

Michigan Journal of International Law

Volume 24 | Issue 1

2002

Nothing is Written: Fundamentalism, Revivalism, Reformism and the Fate of Islamic Law

Hamid M. Khan
University of Michigan Law School

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STUDENT NOTE

NOTHING IS WRITTEN: FUNDAMENTALISM, REVIVALISM, REFORMISM AND THE FATE OF ISLAMIC LAW

*Hamid M. Khan**

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* Associate, Holland & Hart L.L.P., J.D., University of Michigan Law School, 2002; B.S., University of Wyoming, 1998. The author served as Symposium and Article Editor for the *Michigan Journal of International Law* (2001-2002). Thanks to Robert Howse, Dr. Sherman Jackson and to Dr. Khaled Abou el Fadl of the University of California at Los Angeles School of Law. This piece is dedicated to the victims of the tragedy of September 11 and their families.

INTRODUCTION

Islamic law constitutes the bedrock of Muslim belief. Few Muslims over history have challenged it. But in the twentieth century it appears that the bedrock may be shifting, as Muslims have begun a reexamination of their faith. It is hard to gauge how deeply the reexamination has penetrated the great body of believers. At the least, it can be said that this reexamination is having a major impact on the intellectual class, where social change normally begins.¹

Today's Muslims, living in the shadow of the Prophet,^{**} are the heirs to an astounding religious and political legacy; however, they have inherited a world far different from their predecessors. Muslims face a profound question: Do they wish to carry an onerous part of their incredible legacy forward to the present, and, if so, in what form will they carry it—preserved in its pristine state or altered to meet new and unexpected challenges? This legacy is none other than the subject of Islamic law, and the questions that this Note asks have begun to be posed to believers.² The answers that Muslims give will determine the law's fate.

Classical Islamic law has three possible paths. First, it can be regarded as antiquated, and therefore dismissed in favor of more "modern," Western approaches to the law. Second, the classical legal tradition "could be" revived to reap the tenets of a "proven" system and profit from previous religious validity. Third, present laws and institutions can be reformed to achieve religious validity by invigorating not only the basic principles that make up the law, but also by emphasizing tolerance within the law. Anyone with even a semblance of understanding will immediately agree that the first option presents no option for the overwhelming majority of modern-day Muslims, thus, leaving only two options for a them to consider.³

While today's Muslims maintain perhaps an even greater desire for faith to be integrated into their lives, they do not want integration to deprive them of their very humanity. The word that defines this religious desire, fundamentalism, is often a misused and abused term. Religious fundamentalism is essentially an attempt to return to a religious past.

1. MILTON VIORST, *IN THE SHADOW OF THE PROPHET: THE STRUGGLE FOR THE SOUL OF ISLAM* 9 (1998).

** Please note that in every reference regarding the Prophet Muhammad, I ask that God's peace and blessings be upon him.

2. This Note is limited to Sunni Islamic law, although the points articulated could apply to the Shi'a version of Islamic law as well.

3. JOHN L. ESPOSITO, *WOMEN IN MUSLIM FAMILY LAW* 156-63 (2d. ed. 2001).

Part of any Muslim's effort to return to their religious past usually involves an invocation of Islamic law, or what has been termed the *Shari'ah*. This Note intends to cursorily examine Islamic law—where it was, and where it is going. More specifically, this Note will examine a growing fracture within the Islamic community and how a fissure among so-called fundamentalists will ultimately influence an understanding of Islamic law.

In Part I, the Note will briefly examine the need for “law” in the Islamic mindset and how forthright analysis needs to extend beyond past political and religious prejudices. Part II will then review the characteristics of classical Islamic law. Through an examination of both the source-constructs and the source-intonated methodologies, it will dispel the impression that Islamic law is intrinsically static or rigid. Part III will discuss the phenomenon of Islamic fundamentalism and the fissure that is becoming evident between two major groups: Revivalists and Reformists. Part IV will examine a fissure between contemporary Revivalists, whose shortsightedness threatens to empty the Islamic legal tradition of its tolerance and diversity, and contemporary Reformists, whose constructs, although often grounded in Islamic principles, articulate novel, but perhaps less religiously salient, ideas.

Part V then details a Reformist response to the Revivalist challenge. Specifically, this Part will analyze how reform-aimed, classically educated Muslims could religiously account for modernity's more obstinate hurdles. This analysis will focus on those institutions either not found in the classical tradition, or in some ways antithetical to that tradition—the modern nation-state and international law. Part VI will also examine how fundamentalism's insistence on the need for Islamic law must yield to the tenets of international law in the realm of women's rights. This Note observes that there is a possibility for Islamic States to generate religious viewpoints that express the spirit, rather than the letter, of classical Islamic law. Particular attention will be paid to the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), and the Cairo Declaration of Human Rights in Islam, and how, by either reactive or proactive stances, Muslim legal scholars have begun to chart a course allowing them to ease into modernity with their classical legal legacy intact. The Note concludes by urging that ultimate success will only come when those most affected by the law participate to a greater extent than they have in the past.

I. THE PERSISTENCE OF LAW

Islam is part of more than one billion people's lives. Its legacy spans more than fourteen centuries, and today Islam is the fastest growing religion on Earth.⁴ The Islamic faith has contributed to a multiplicity of cultures, languages, and peoples, and has taken part in every major human endeavor, from anatomy to philosophy. For all of its varieties, one characteristic shared by all followers of the Islamic creed is an adherence to a divinely inspired law—an Islamic law, the *Shari'ah*.⁵

Modern-day Muslims can be compared to the Greek god Janis, maneuvering through the present and future by guidance often locked in the past. The common reservoir of such guidance is typically what Muslims considered the Word of God, or the Qur'an, and the example bestowed upon them by God's vicegerent on Earth, the Prophet Muhammad.

The exalted place of law in Islam may be seen to follow from the Islamic conception of God. He is Omnipotent, Transcendent, and Unknowable in his nature; however, He has revealed His will to us. This was nothing He had to do. He could have created us, then left us in the dark, but no, by pure grace and generosity, He let us know how we should behave to please Him.⁶

For centuries, while Islam made its political and religious ascent to become one of the world's greatest empires, scholars debated, struggled and philosophized over what they believed to be God's law. Despite being given both direct, Divine guidance and a divinely inspired exemplar, Muslims soon found that discovering God's precise law was indeed a difficult task.

Of course, before one begins even a rudimentary understanding of Islamic law, one is bound to ask, "What *is* Islamic law?" Thus, it is only appropriate to briefly consider the almost existential nomenclature em-

4. See FREDERICK MATHEWSON DENNY, AN INTRODUCTION TO ISLAM 332 (2d ed. 1994); see also Douglas Jehl, *Moderate Muslims Fear Their Message Is Being Ignored*, N.Y. TIMES, Oct. 21, 2001, at B1.

5. See AHMAD HASAN, THE EARLY DEVELOPMENT OF ISLAMIC JURISPRUDENCE 7 (4th ed. 1988). The word *Shari'ah* and the cautionary principles are derived directly from the Qur'an. "We have set you on the right path [*Shari'ah*]. Follow it and, do not yield to the desires of ignorant men." THE KORAN 45:18 (N.J. Dawood trans., Penguin Books 12th ed. 2000) (1956). The Arabic word *Shari'ah* is a noun derived from the verb "*shari'ah*," which means to set the path or road that provides access to a source. See Abdullahi Ahmed An-Na'im, *Qur'an, Shari'a and Human Rights: Foundations, Deficiencies, Prospects*, in THE ETHICS OF WORLD RELIGIONS AND HUMAN RIGHTS 63 (Koung Moltmann ed., 1990). The term may also be interpreted as "a way of life" or "a method." Over time it has come to mean "divinely ordained way of life." It includes legal and jurisprudential matters, as well as rituals, theology, ethics, personal hygiene and good manners. See *id.*

6. Christopher Melchert, *Islamic Law*, 23 OKLA. CITY U.L. REV. 901, 901-02 (1998).

ployed by the Islamic faith.⁷ The word “Islamic” is an obvious adjective for the religion of the Prophet Muhammad. Even more subtly, it is important to consider how an adjective like “Islamic” has a *transformative* effect on the word law, which is already a subject bound by intrinsic and authoritarian weight. Without having any awareness of its particulars, the combination of both “Islamic” and “law” should invoke both enthusiasm and reluctance, especially when human beings are asked to interpret Divine law. Thus, in the case of those fallible creatures who claim to possess the authority to alter its path, the denomination of a normative subject by a religious distinction should naturally instill caution. In essence, the *Shari’ah* is God’s law to humanity. It is by its very nature purely idealistic, and even though much of the following discussion will use term the term Islamic law as if it were an evident promulgation of rules, no one should believe the following *is*, in fact, the pure *Shari’ah*. Most of the following discussion will focus on the *Shari’ah’s fiqh*, or jurisprudence, that is commonly regarded as a human attempt to grasp at the Divine, but readily termed Islamic law.

At the outset, much like the English Common Law and the Roman Civil Law, Islamic law should be properly regarded as a corpus, or a paradigmatic system of law, rich in history and debate. In contradistinction with its more worldly counterparts, however, Islamic law is grounded in more than a nascent notion of idealism. Through a uniquely religious undertaking, the *Shari’ah* attempts to bring “the Kingdom of God” to Earth.⁸ Islamic law is also unlike more familiar systems of law for the simple fact that its benefits and burdens are not confined to the present world. Rather than regulate present conduct, Islamic law focuses on how conduct in day-to-day activities affects a person’s fate in the afterlife.⁹ Thus, the scope of Islamic law is much wider, as it regulates humanity’s relationship not only with his neighbors and with the State, which is the limit of most other legal systems, but also with its God and its own conscience.¹⁰ Ritual practices, such as the daily prayers, almsgiving,

7. Islamic law has been aptly defined as “the epitome of the Islamic spirit, the most typical manifestation of the Islamic way of life, the kernel of Islam itself.” Joseph Schacht, *Pre-Islamic Background and Early Development of Jurisprudence*, in *LAW IN THE MIDDLE EAST: ORIGIN AND DEVELOPMENT OF ISLAMIC LAW* 28, 28 (Majid Khadduri & Herbert V. Liebesny eds., 1955).

8. See Abdulaziz Sachedina, *The Ideal and the Real in Islamic Law*, in *PERSPECTIVES ON ISLAMIC LAW, JUSTICE, AND SOCIETY* 15, 15–17 (R.S. Khare ed., 1999).

9. It should also be noted that Islamic law can be divided between regulations relating to worship and ritual duties or “acts which honor God” (*ibadaat*), and regulations or “transactions” of a juridical, political, or interpersonal nature (*mu’aamalât*). See *SHORTER ENCYCLOPEDIA OF ISLAM* 143 (H.A.R. Gibb & J.H. Kramers eds., 1953). This Note will only deal with latter category.

10. David A. Westbrook, *Islamic International Law and Public International Law: Separate Expressions of World Order*, 33 VA. J. INT’L L. 819, 825 (1993).

fasting, and pilgrimage, are an integral part of Islamic law. Consequently, Islamic law sees no need to distinguish between the religious and the secular; between legal, ethical, and moral questions; or between the public and private aspects of a Muslim's life.¹¹ Unlike secular legal systems that grow out of society and shift with changing circumstances, Islamic law was imposed from above. Under Islamic law, it is not society that molds the law, but the law that precedes and controls society.¹²

For some of the reasons listed above and for reasons not discussed here, Islamic law has been represented within Western scholarship as an essentially defective legal system.¹³ This critique is not a novel one, but has merely taken on a new form.¹⁴ The argument against the viability of Islamic law has changed from a Western defense of colonialism during the age of imperialism, to a contemporary claim involving human rights, democracy, and pluralism.¹⁵ Even more, the proposition suggests that Islamic law is simply defective, while somehow Western legal traditions are complete. This critique only shortsightedly imitates the present political relationship between the West and the Islamic world, ignoring a legitimate study of Islamic law. Legal critiques, which are based on political relationships rather than a valid inquiry of the law, are necessarily flawed, as they add an obstacle to a meaningful discourse. The West, in particular, needs to take a full account of Islam by attempting to appreciate Islam and its tenets. Western legal students and scholars should not

11. "In Islam, law plays a greater role than it does in Western societies. Islamic law governs the life of every Muslim in every way. Law and religion are one. The Koran serves as the basic constitutional document and regulates all aspects of life, from the proper clothes to be worn and food to be eaten, to specific penalties for certain crimes." Joseph L. Brand, Book Review, 82 AM. J. INT'L. L. 431, 432 (1988) (reviewing MAJID KHADDURI, *THE ISLAMIC CONCEPTION OF JUSTICE* (1984)).

12. See Sachedina, *supra* note 8, at 15–17.

13. "The underlying assumption has always been that Islam—as a culture and not only a religious creed—was primitive, underdeveloped, retrograde, at best stuck in the memory hole of a medieval splendor out of which it could not disentangle itself." Shlomo Avineri, *The Return to Islam*, in *GLOBAL STUDIES: THE MIDDLE EAST 167–70* (1973). However, there is some argument that the English Common Law may have some of its origins in Islamic law. See generally John A. Makdisi, *The Islamic Origins of the Common Law*, 77 N.C. L. REV. 1635 (1999) (arguing that the Islamic legal system was far superior to the primitive legal system of England before the birth of the common law; the action of debt, the assize of novel disseisin, and trial by jury introduced mechanisms for a more rational, sophisticated legal process that existed only in Islamic law at that time).

14. "A continuing problem is that when talking about religion, many people ignore the transcendent and transforming aspects of religion and see religion as an agent that necessarily retards change and development and is more prone to violence." John L. Esposito, *The Future of Islam*, 25 FLETCHER F. WORLD AFF. 19, 24 (Summer 2001).

15. See *infra* Section III.A.

underestimate the role of Islamic law in the world.¹⁶ The events of September 11 and the fallout from those heinous attacks signal a dramatic need for understanding between Islam and the West.

Although it is important to avoid opinions based on political prejudice, and despite the indubitable claim of Islamic law's continued existence, it is equally important that scholars and followers be allowed to critique a law that purports to speak the Divine Will. The need for such critique at this time is especially crucial, as the global fundamentalist movement now underway threatens to undermine the dynamics and diversity of classical Islamic law.¹⁷ In many ways, what is at stake is not only the preservation of Islamic law, but how its future as a legal system will reflect its diverse and complicated past.

We shall soon discover that, although nations and peoples are quick to cite Islamic law as divinely inspired law, a review of its history and the methods used reveal that this contention is far from accurate. Islamic law is not an insular corpus of law, but rather a matrix of legality derived from various sources and bound by religious idealism. In fact, much of what makes up the compendium of Islamic law is varied, and often conflicting. A brief study of both the law's sources and the methods which were instituted by preeminent jurists to proverbially find Divine law, reveals the indelible, intentional impression left by humanity.

II. A REVIEW OF CLASSICAL ISLAMIC LAW

A. *The Foundation of Classical Islamic Law*

Briefly, Islam literally means, "submitting to the will of God."¹⁸ Although Islam is thought to be an eternal religion—the same religion professed by Jesus, Moses, Abraham, and Noah—Muhammad is generally considered to be its founder.¹⁹ Muhammad was born in the year 570 C.E. in the city of Mecca, located in present-day Saudi Arabia.²⁰ The

16. See *infra* Appendix (detailing the legal systems of the various members of the Organization of the Islamic Conference).

17. Countries that have constitutionally incorporated the *Shari'ah* include Pakistan, Qatar, Saudi Arabia, Sudan, Syria, and the United Arab Emirates. Clark Benner Lombardi, *Islamic Law as a Source of Constitutional Law in Egypt: The Constitutionalization of the Sharia in a Modern Arab State*, 37 COLUM. J. TRANSNAT'L L. 81, 82 n.4 (1998). In addition, Iraq, Algeria, Iran, Kuwait, the Sudan, and Tunisia have incorporated Islamic tenets more deeply into the public life of their countries, either voluntarily or involuntarily. ALBERT HOURANI, A HISTORY OF THE ARAB PEOPLES 453 (1992).

18. CAESAR E. FARAH, ISLAM: BELIEFS AND OBSERVANCES 192 (5th ed. 1994).

19. *Id.* For an in-depth biography of the Prophet, which neither includes effusive praise of the Prophet common to most Muslim writers nor the banality of most Western biographers, see generally KAREN ARMSTRONG, MUHAMMAD: A BIOGRAPHY OF THE PROPHET (1993).

20. See CYRIL GLASSÉ, THE CONCISE ENCYCLOPEDIA OF ISLAM 279 (1989).

events of his early life remain a mystery. It is agreed, however, that Muhammad, though born into the powerful Quraysh tribe of Mecca, was orphaned at a young age.²¹ He became a skillful merchant and developed a reputation for honesty that eventually led to his marriage with the widowed noblewoman, Khadija.²²

At the age of forty, while meditating outside Mecca, Muhammad received a revelation from the archangel Gabriel, announcing that he was the successor to previous prophets of God and tasked, once again, with delivering monotheism to humanity.²³ Over the coming decades, these revelations, once compiled, would constitute the Qur'an. The Prophet Muhammad's message was that God would judge all humans at the end of time. Therefore, the faithful should submit themselves to God's will and show their gratitude to God. The Prophet, empowered by the message imparted to him, delivered more than ritual and belief; he delivered a powerful social critique.

Like other prophets before him, Muhammad's message was both feared and shunned by the powerful and entrenched interests of the economic and political elite, who represented the social and economic inequities of society which the Prophet censured. His teachings included outright condemnation of false contracts, usury, the neglect and exploitation of orphans and widows, the suppression of the rights of the poor, and the neglect of the downtrodden by the rich. Muhammad had come to shake up the status quo in his world, and the radical nature of his message was clear.²⁴

Soon after the Prophet began to spread his message, he and his early followers encountered hostility from local, idolatrous tribes.²⁵ Although the Prophet continued his preaching, he dispatched some of his followers to be protected by an empathetic Christian king.²⁶ In time, residents of the neighboring city of Yathrib offered the Prophet sanctuary, protection,

21. See ARMSTRONG, *supra* note 19, at 65–67.

22. See GLASSÉ, *supra* note 20, at 280.

23. See *id.* The message of the Prophet paralleled the message of the Hebrew prophets: God is one. He is all-powerful and created of the universe. There is a judgment day and devoted followers would be rewarded in Paradise and if not, punished in Hell. See generally PAUL HITTI, *THE ARABS: A SHORT HISTORY* (1996). “We have revealed Our will to you, as We revealed it to Noah and the prophets who came after him; as We revealed it to Abraham, Ishmael, Isaac, Jacob and the Tribes, to Jesus, Job, Jonah, Aaron and Solomon, and to David to whom We gave the Psalms. Of some apostles We have already told you, but there are others of whom We have not yet spoken.” *THE KORAN*, *supra* note 5, at 4:163.

24. 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, 315 (1995).

25. See GLASSÉ, *supra* note 20, at 280–82.

26. See *THE KORAN*, *supra* note 5, at xi.

and a ready group of faithful adherents. The Prophet, prompted by increased hostility and a failed assassination attempt, accepted their offer of help.²⁷

The Prophet's migration from Mecca to the City of the Prophet, or Medina, heralded the beginning of a full-fledged Muslim community, or *umma*.²⁸ The migration between Mecca and Medina would be known as the *hijrah*, and mark the beginning of the Islamic calendar. Protected by distance and an increasing number of followers, Islam prospered.²⁹ The Prophet attempted to settle disputes with his idolatrous Meccan neighbors, but often incurred their relentless onslaught. After failed compromises, treaty arrangements, and skirmishes, the Prophet entered Mecca with 10,000 troops to reclaim the *Ka'bah*, the "Temple of Abraham and Ishmael" built for the worship of one God.³⁰ Rather than lay waste his longtime enemies, the Prophet granted them full amnesty. He then cleansed the *Ka'bah* of its idols and rededicated it to the worship of God.³¹ Even in the aftermath of his triumph, the Prophet continued to receive revelations until they were declared complete. The Prophet Muhammad died in Medina in 632 C.E.³²

Although much of the following discussion will expound upon Islamic legal concepts, it is integral to understand that beliefs and ritual practices are at the heart of Islamic law.³³ Muslims must believe in the one God, His absolute supremacy, the angels, the prophets, the holy books—which include the primordial versions of the Torah, Psalms, and Gospel—and the coming Day of Judgment.³⁴ Muslims must manifest their faith through specific conduct in what is known as the Five Pillars of faith.³⁵ First, Muslims are obligated to proclaim at least once during their lifetime the creed (*shahadah*): "There is no deity but God and Muhammad is His Prophet."³⁶ Most Muslims repeat it daily; in order to perform the second pillar, prayer. If possible, a Muslim must pray five times a day (*salat*), while orienting their body toward Mecca.³⁷ Third,

27. See GLASSÉ, *supra* note 20, at 280–81; see also ANTHONY BLACK, THE HISTORY OF ISLAMIC POLITICAL THOUGHT: FROM THE PROPHET TO THE PRESENT 9 (2001).

28. See GLASSÉ, *supra* note 20, at 156–57.

29. See *id.* at 266.

30. See *id.* at 283.

31. See THE KORAN, *supra* note 5, at 5:5 ("This day I have perfected your religion for you. I have chosen Islam to be your faith.")

32. GLASSÉ, *supra* note 20, at 284.

33. SHORTER ENCYCLOPEDIA OF ISLAM, *supra* note 9, at 404.

34. GLASSÉ, *supra* note 20, at 88.

35. *Id.* at 132.

36. *Id.*

37. *Id.*

Muslims must donate regularly to charity (*zakat*).³⁸ Fourth, Muslims must fast during the lunar month of Ramadan, the same month that Muhammad received the first revelation of the Qur'an. Fifth, if economically and physically able, a Muslim must make at least one pilgrimage (*hajj*) to Mecca to visit the *Kab'ah*.³⁹

B. *The Genesis of Islamic Law: The Ascent of the Schools of Law*

After the Prophet's death, a series of rulers, or what were ostensibly political successors to the Prophet, came to power.⁴⁰ In the wake of the Prophet's death and in spite of the end of revelation, these Rightly Guided Caliphs (*al-khulafa ar rashidun*) attempted to maintain order by adhering to religious rules laid down during the Prophet's life.⁴¹ Many of these rules were created on an *ad hoc* basis⁴² and were essentially considered clumsy and unprincipled in light of the idealized rule of the Prophet.⁴³ While the Rightly Guided Caliphs tackled issues about the form of religious conduct, they, like their successors, were also interested in propagating their religion. By the end of this "Golden era," Islam dominated a vast and ever-expanding empire.⁴⁴

In response to the end of revelation, and in an effort to confine the explosion of incongruous rules and religious practices, pious religious scholars, grouped together in loose fraternities formally known as the Schools of Law (*madhab*), emerged. It is important to note that religious leaders (*imams*), not popular movements, inspired greater legal proliferation.⁴⁵ In turn, pious scholars donned the cloak of jurists and began to debate whether the legal practice of the early Islamic empire was properly implementing the religious ethos of Islam. In order to resolve the incongruities which had plagued early approaches to formulating the law, scholars began the task of "finding" a unifying paradigm—a hermeneutic—to guide the Schools of Law so that, despite their differences, the schools would be united in their efforts.⁴⁶ So popular were such religious movements that a second generation of caliphs who came to power in the mid-eighth century pledging to build a

38. This is a 2.5 percent charity tax on the income and property of middle- and upper-class Muslims. Believers are urged to donate to the needy as they feel appropriate. *Id.* at 430–31.

39. *Id.* at 132.

40. See BLACK, *supra* note 27, at 14–16.

41. See 1 MOHAMMAD HASHIM KAMALI, *PRINCIPLES OF ISLAMIC JURISPRUDENCE* 147–48 (1997).

42. See WAEL B. HALLAQ, *A HISTORY OF ISLAMIC LEGAL THEORIES* 7 (1999).

43. See HAMID ENAYAT, *MODERN ISLAMIC POLITICAL THOUGHT* 13 (1982).

44. See MALISE RUTHVEN, *ISLAM IN THE WORLD* 11, 37–38 (1984).

45. See VIORST, *supra* note 1, at 162–67.

46. See *id.*

proper Islamic society, enthusiastically sponsored jurists and promoted the validity of the Schools of Law.⁴⁷ Additionally, and quite literally decades after the Prophet's death, an unmatched Islamic legal theorist, Muhammad ibn Idris al-Shafi'i emerged to take on the Herculean task of mapping out an approach to "find" the law.⁴⁸

Shafi'i aimed to eliminate legal and religious schisms by producing a uniform theory (*fiqh*) of how to derive principles from the prolixity of sacred guidance.⁴⁹ Shafi'i's fundamental teaching was that true knowledge of Islamic law could only be attained through a derivation of divine revelation, found in the Qur'an and/or in the divinely inspired traditions of the Prophet Muhammad (*hadith*).⁵⁰ Shafi'i's doctrines are the principal focus of this study, as they possess what many scholars argue is the mean of Islam's theological and legal underpinnings. Shafi'i's major contribution to Islamic law and to Islam was an exacting emphasis on the Prophet Muhammad as a *source* of law. In fact, Shafi'i perpetuated the proposition that, since the Prophet Muhammad could be viewed as God's ultimate delegate to humanity, it only stood to reason, and to some degree was mandated by faith, that the Prophet's traditions should guide proper Muslim behavior.⁵¹ These propositions, both pious and rational, became the foundation by which the rest of classical Islamic law stood.⁵² It should be noted, however, although Shafi'i's hermeneutic eventually became paradigmatic of classical Islamic law, it did not go unchallenged by self-purported rationalists or strict-constructionist conservatives.⁵³

In particular, a group of rationalists known as the Mu'tazilites, reputed for their "extreme" dependence on human thought, argued that legal principles should be grounded in cogent rationality.⁵⁴ They argued that believers, guided by a philosophical and religious study of the Qur'an would rationalize a proper course of action.⁵⁵ Orthodox adherents, however, rejected this doctrine, arguing that the approach took

47. See *id.* at 160–73.

48. See HALLAQ, *supra* note 42, at 18.

49. See *id.* at 21–35.

50. See VIORST, *supra* note 1, at 162–67.

51. See THE KORAN, *supra* note 5, at 4:59, 33:53.

52. Historically speaking, it should be noted that traditionalists' and quasi-rationalist Mu'tazilites' use of the Prophet's traditions to gauge proper Muslim conduct had far-reaching political implications on the ruling dynasties at the time. See VIORST, *supra* note 1, at 160–62.

53. See *id.* at 162–73.

54. As the Mu'tazilites' theological stance invited troubling questions about the wisdom of Islamic doctrine, the sect sought to avoid everything that might compromise or encroach upon the oneness of God. Accordingly, the Mu'tazilites rejected the doctrine that the Qur'an was uncreated and eternal, as this doctrine implied that something other than God existed eternally, thus creating an eternal and irreconcilable "dualism." See *id.* at 160–62.

55. *Id.*

little account of both the Prophet and the Qur'an and instead maximized human interests at the expense of the Deity's. Although orthodox adherents were likely consoled at their rejection of the Mu'tazilite ideology, they would soon find themselves adopting essentially human constructs as the Divine law.⁵⁶ One effect of excluding the Mu'tazilite position was that the law became confined not only to the literate, but also to a cadre of male religious scholars. As will be shown, although the consequence of this reality was not altogether negative, contemporaries utilize the Mu'tazilite rejection as pretext for their own hostility to democratically elected legislatures or any other accompanying political concept that humanity, rather than God, could decide the proper course of action.⁵⁷

The combination of both pious scholarship and an accepted structure of interpretation produced the formal Schools of Law. An important point for understanding classical Islamic law is the predominance of skilled and educated jurists.⁵⁸ The jurists' ultimate goal was to develop the law by discovering the divine intent embodied in the sacred texts—the Qur'an and the Prophet's tradition, or Sunnah.⁵⁹ Classical era jurists were essentially guardians of the original Shafi'i hermeneutic, and their legitimacy rested largely on their quasi-independent status from the surrounding political system.⁶⁰ It was often assumed that a jurist's interests were not confined to the State and its accompanying power structure. Rather, their interests lay in the exigencies of life and the complexities of faith. In order to best grapple with the complexities of faith, jurists often armed themselves with an intense education, allowing them to fully understand competing legal concepts from the various Schools of Law. In addition, it is important to note that, while jurists played a powerful role in the development of Islamic law, they did not exclusively shape the law. The law was often the product of a complex interplay between

56. See HALLAQ, *supra* note 42, at 32.

57. See, e.g., VIORST, *supra* note 1, at 230, 261.

58. Joseph Schacht observed that jurists often went to the extreme in the formulation of Islamic law. JOSEPH SCHACHT, AN INTRODUCTION TO ISLAMIC LAW 5, 209 (1982). *But see* Wael Hallaq, *The Logic of Legal Reasoning in Religious and Non-Religious Cultures: The Case of Islamic Law and the Common Law*, 34 CLEV. ST. L. REV. 79 (1985–86); Wael Hallaq, *Was the Gate of Ijtihad Closed?*, 16 INT'L J. MIDDLE E. STUD. 3 (1984). *See also* Khaled Abou El Fadl, *Islamic Law and Muslim Minorities: The Juristic Discourse on Muslim Minorities from the Second/Eighth to the Eleventh/Seventeenth Centuries*, 1 ISLAMIC L. & SOC'Y 141 (1994).

59. "If one speaks about the Sunnah or the *hadith* in the contemporary era, one is necessarily speaking about a symbolic construct that obtains its meaning and normative power from the juristic culture." KHALED ABOU EL FADL, *SPEAKING IN GOD'S NAME: ISLAMIC LAW, AUTHORITY AND WOMEN* 97 (2001).

60. See Khaled Abou El Fadl, *The Place of Tolerance in Islam: On Reading the Qur'an—and Misreading It*, BOSTON REV. Dec.–Jan. 2001–2002, at 34.

judges (*qadis*),⁶¹ juris-consults (*muftis*), and the State authority in general.⁶² The reasoning for this approach was that jurists were sometimes notorious for their inability to relate to the exigencies of life that followers faced.⁶³

The genesis of what was to become classical Islamic law is encapsulated into two historical stages—the Formative Era and the Post-Formative era. The Formative era was marked by the emergence of “master” jurists (*mujtahids*), or what shall be called the “Principal Thinkers,” such as Abu Hanifa, Shafi’i, Malik, and Hanbal. These Principle Thinkers derived the law directly from the sacred texts.⁶⁴ The Post-Formative Era was marked by the firm implantation of the Schools of Law that were named after the Imams who founded them—the Shafi’i, Hanafi, Maliki, and Hanbali.⁶⁵ These second generation jurists studied the Principal Thinkers, while simultaneously organizing, preserving, and communicating the law to members of the communities in which they lived.

Despite some accord among the Schools of Law, there was endless disagreement. Jurists disagreed about the appropriate way to analyze the main sources of the law and, in turn, competed against one another by defining their differences and championing their own rules to get at the Truth.⁶⁶ Rather than devote unnecessary time to examining the differences between the Schools of Law, it is more helpful to understand the tools they used in formulating the classical approach. Through in-depth analysis of the pillars of classical Islamic law, we discover the

61. For a fascinating discussion about how judicial decision making is a cultural phenomenon and how the nature of judicial discretion is shaped by its surrounding cultural context, see LAWRENCE ROSEN, *THE ANTHROPOLOGY OF JUSTICE: LAW AS CULTURE IN ISLAMIC SOCIETY* (1990) (arguing that judicial discretion, even within the Islamic legal context, should be understood neither as arbitrary and unknowable, nor as a threat to the rule of law; instead, it should be viewed as an expression of the cultural principles and categories of the larger society within which the judge works).

62. See MOHAMMED KHALID MASUD ET AL., *ISLAMIC LEGAL INTERPRETATION* 3 (1996).

63. “It is as if one joins a debate between mathematicians who speak in an inaccessible language and who are not interested in explaining the relevance of their discussions to outsiders.” Alan Watson & Khaled Abou el Fadl, *Fox Hunting, Pheasant Shooting, and Comparative Law*, 48 *AM. J. COMP. L.* 1, 30 (2000).

64. See GLASSÉ, *supra* note 20, at 286.

65. The Hanafi school is prevalent in Egypt, Syria, Lebanon, Libya, and Turkey and includes more than one-third of all Muslims. The Maliki school is prevalent in Morocco, Algeria, Tunisia, the Sudan, Kuwait, and Bahrain. The Shafi’i school is prevalent in Southern Egypt, Syria, Lebanon, Palestine, Jordan, Pakistan, and Indonesia. The Hanbali school is the official School of Law in Saudi Arabia and is influential in Pakistan, Syria, and Iraq. See SUBHI RAJAB MAHMASSANI, *FALSAFAT AL-TAHRIR FI AL-ISLAM [THE PHILOSOPHY OF JURISPRUDENCE IN ISLAM]* 19–39 (F. J. Ziadeh trans., 1961). For a discussion of the major differences among the Islamic Schools of Law, see generally MOHAMMAD HAMEEDULLAH KHAN, *THE SCHOOLS OF ISLAMIC JURISPRUDENCE: A COMPARATIVE STUDY* (1991).

66. See SHORTER ENCYCLOPEDIA OF ISLAM, *supra* note 9, at 611–15. See generally WAEL B. HALLAQ, *LAW AND LEGAL THEORY IN CLASSICAL AND MEDIEVAL ISLAM* (1995).

lengths to which classical jurists went in trying to discover the law, and how, through their process of discovery, they imposed the need to maintain legal tolerance—a matter often forgotten in contemporary discussions about Islam and Islamic law.

C. *The Pillars of Classical Islamic Law*

To repeat, Shafi'i's hermeneutic formed the basis of the classical theory, the science of jurisprudence (*usul al fiqh*). By the early tenth century, this science of jurisprudence, or *fiqh*, became crystallized.⁶⁷ According to the accepted *fiqh*, there are four main sources to Islamic law: the Qur'an, Sunnah, *qiyas*, and *ijma*. Islamic law's primary precepts came from the Qur'an and from the Sunnah. The two remaining sources, *ijma* (consensus of the community of jurists) and *qiyas* (reasoning by analogy), are not expressly sanctioned sources of law, but rather rationalized methodologies that require both intense deliberation and religious temperance. Consequently, this Note has deliberately categorized the Qur'an and the Sunna as source-based constructs⁶⁸ and *qiyas* and *ijma* as source-intonated methodologies.⁶⁹

1. The Ultimate Source: The Qur'an

The Qur'an is the primary source of Islamic law.⁷⁰ It is considered God's ultimate revelation to humanity;⁷¹ or what one author deemed, "the central *fact* of the Islamic religious experience."⁷² Muslims and non-

67. See Frank E. Vogel, *Islamic Law and Legal System: Studies of Saudi Arabia 75–76* (1993) (unpublished Ph.D. dissertation, Harvard University); see also NORMAN CALDER, *STUDIES IN EARLY MUSLIM JURISPRUDENCE* 58 (1993).

68. This terminology is not intended to undermine the religious validity of these sources, only to demonstrate the interrelatedness of the various sources, as they are best understood in the larger framework of Islamic law generally. Such delineation is supported by the Prophet's statement: "I leave behind me two things, the Qur'an and my example, the SUNNAH and if you follow these you will never go astray." Bismillah, *The Prophet's Last Sermon*, <http://www.fordham.edu/halsall/source/muhm-sermon.html>. It should be noted that, in the Qur'an, compilations of the *hadith* are known collectively as *ilm*. See HALLAQ, *supra* note 42, at 22.

69. See I KAMALI, *supra* note 41, at 168, 197.

70. The Qur'an ("The Recital") is about the same length as the New Testament. In contrast to the Hebrew Bible and the New Testament, the Qur'an issued from the Prophet Muhammad, who recited what he heard from the Archangel Gabriel. Both the Jewish and the Christian scriptures are collections of many books that were written down by a large number of humans, and opinions differ as to their status as revelation. Even if one claims that the books of the Bible were all revelations of God, they were revealed to different people who did not live at the same time or in the same place. The Qur'an is divided into chapters of unequal length, each of which is called a *sura*, a word that literally means "a fence, enclosure, or any part of a structure." The shortest of the *suras* has ten words. The longest *sura*, which is placed second in the text, has 6,100 words. See GLASSÉ, *supra* note 20, at 228–32.

71. See I KAMALI, *supra* note 41, at 15.

72. ESPOSITO, *supra* note 3, at 3.

Muslims alike appreciate the Qur'an's distinct style. "The style of expression underlying the Qur'an is a curious blend of poetic rhymed prose and a lyrical flow."⁷³ For most Muslims, however, the Qur'an is dedicated to reminding them of the theological absolutes in place for both believers and non-believers:

The Koran contains laws for society and warnings of the end of the world, descriptions of judgment, of Heaven and Hell. There are stories of Biblical figures, but often in a form surprisingly different from that of the Hebrew Scriptures, as if the same events were being witnessed from a different point of view. It also contains stories of figures unknown to the Bible as passages metaphysical and non-historic and non-descriptive, Sacred history is a secondary preoccupation; the subject of the Koran is above all the Divine Nature and the means of salvation.⁷⁴

What no perusal of the Qur'an fails to yield, however, is that divine morality is heavily intertwined with legality. Clearly any verse of the Qur'an, no matter its designation, earns an autonomic reverence bordering on idolatry. The Qur'an's ambition for salvation and its reverence as the very word of God animate the very concept of an *Islamic* law. Consequently, a more detailed analysis of the Qur'an is a prerequisite for further appraisal.

According to tradition and contemporary understanding, parts of the Qur'an were revealed to reflect a situation or occasion during the Prophet's life.⁷⁵ The chapters, or *suras*, are classified by whether the revelations occurred in Mecca or Medina.⁷⁶ When the Prophet died in 632 C.E., the whole of the Qur'an was committed to memory by devoted followers,⁷⁷ while smaller parts and pieces were written on skins, bones and stones.⁷⁸ After a series of battles in which many of these followers were killed, there was growing concern that the Qur'an's contents would be lost. Abu Bakr, then caliph, ordered the Prophet's secretary, Zayd, to construct the canonically written Qur'an.⁷⁹ Some eighteen years later, the

73. FARAH, *supra* note 18, at 82.

74. GLASSÉ, *supra* note 20, at 229.

75. See the discussion in 1 KAMALI, *supra* note 41, at 39–40.

76. See GLASSÉ, *supra* note 20, at 229.

77. Although this might appear astonishing to a contemporary audience, it should not be forgotten that during this time there was a great deal of emphasis placed on oral tradition. See 1 KAMALI, *supra* note 41, at 17–18.

78. See *id.*

79. See GLASSÉ, *supra* note 20, at 230.

text was certified as faithful Scripture and true to the revelation of the Prophet.⁸⁰

Admittedly, during the era of revelation, there was no science of ordering Qur'anic verses in terms of their chronology, nor has it been made apparent that verses always possess a link to the Prophet's life. Thus, the codified text, the "Uthmanic text," has no system of order aside from putting the longest *suras* before the shortest.⁸¹ Even scholars readily acknowledge that the Qur'an is not chronologically ordered or annotated by those who compiled it. Some scholars attribute the erratic shifts in the present text to a lack of a scientific or sufficiently careful organization.⁸² Since there are no authoritative or even sufficiently credible alternatives to organizing the Qur'an, both scholar and jurist are left contemplating the exact meaning of each verse.⁸³

Although dismissed by traditionalists as relatively insignificant, without a precise chronology of revelation, classical jurists were often left speculating on the precise meaning of a particular verse. The problem of chronology was especially great when jurists had to decide whether a verse carried an imperative, whether that same verse abrogated a verse that preceded it, or simply whether a verse dealt with allegorical or mysterious allusion. Thus, without a composite science to order revelation, classical scholars were left with an immense struggle to reinstitute order in an otherwise faithful text. They tackled the task by resorting to other sources that could give the Qur'an an even fuller meaning. Consequently, Muslim jurists of the Formative era relied both on their personal insights as well as their intrepidity to construct legal arguments that supported their understanding of the text.

Despite the legalistic spirit of the Qur'an, it is not itself a legal text.⁸⁴ No more than eighty verses deal with strictly legal matters. While these verses cover a wide variety of topics and introduce novel rules, their

80. See Alford T. Welch, *Kuran*, in *ENCYCLOPEDIA OF ISLAM* 404 (H.A.R. Gibb et al. eds., 2d ed. 1960).

81. See I KAMALI, *supra* note 41, at 343, 353.

82. See REUVEN FIRESTONE, *JIHAD: THE ORIGIN OF HOLY WAR IN ISLAM* 43 (1999).

83. There is new scholarship suggesting that claims that Uthmanic codification of the Qur'an is the only available version may not be entirely true, and there may be other variants of the Qur'an still in existence. See Toby Lester, *What is the Koran?*, *ATLANTIC MONTHLY*, Jan. 1999, at 43-56; see also *THE ORIGINS OF THE KORAN: CLASSIC ESSAYS ON ISLAM'S HOLY BOOK* (Ibn Warraq ed., 1998). The implications of these findings, whether conclusive or not, could suggest that there is a remote chance for fundamental alterations of the fabric of Islamic law. It seems likely that many faithful believers will ignore these archaeological developments as either fabrications, or simply assert that, as the sources are already settled, there exists no reason for new legal interpretation. *Id.*

84. If one could superficially compare the Qur'an with the Book of Leviticus, one would be impressed with how little the Qur'an speaks about the absolute legality.

general effect was to modify particular Arabian customary law.⁸⁵ Most of the early jurisprudence contained in the Qur'an centered on easily referenced positions and included matters like taxes, property, and inheritance.⁸⁶ Despite the legal conclusions one might draw from the Qur'an, its silence, ambiguity, or even clarity was only the beginning of the law. What remains for the legal mind is the fact that the Qur'an is distinct among legal and religious texts in that it integrates legality with the infallible word of God. Consequently, any legal progeny even remotely outside the Qur'an's direct ambit may also have to be tested by another legal source.

2. The Sunnah of the Prophet

The Sunnah is the spoken and acted example of the Prophet Muhammad.⁸⁷ This devotion to the Prophet is not difficult to understand given his role as the human medium of the Word of God. For Muslims, although the Prophet Muhammad did not ascribe to himself any attributes of the Deity, he was renowned not only as God's final messenger, but he was also considered the vicegerent of God—a father, a husband, and a human *par excellence*.⁸⁸ To obey the Prophet Muhammad was, by its very definition, to obey God.⁸⁹ Thus, the Sunnah is in many ways the necessary compliment to the Qur'an. While the Qur'an essentially lays down the broad outlines of Islam, it is not entirely prescriptive. Instead, the Sunnah does much of the heavy lifting with regard to Islamic dogma and ritual practice.⁹⁰ Readers might be struck by the fact that, although Islam maintains a strict adherence to monotheism, the Prophet's practices are essential to practicing Islam in a more ritualized sense.

Despite what appeared to be axiomatic sentiments for contemporary Muslims, a full-scale search for what constituted the life and practices of the Prophet did not begin in earnest until Shafi'i gave the search an imprimatur of religious fidelity.⁹¹ Thus, for centuries, Muslims throughout the growing empire collected and recorded the Prophet's traditions

85. See HALLAQ, *supra* note 42, at 10–11.

86. See Westbrook, *supra* note 10, at 827.

87. The Sunnah is divided into three parts: (1) *al-sunnah al-gawliyah*, the sayings and statements of the Prophet; (2) *al-sunnah al-filiyah*, the deeds of the Prophet; and (3) *al-sunnah al-taqriyah*, the Prophet's silence or tacit approval regarding deeds which had occurred with his knowledge. GLASSÉ, *supra* note 20, at 381.

88. For Qur'anic validation of this point, see THE KORAN, *supra* note 5, at 62:2.

89. Cf. HALLAQ, *supra* note 42, at 3. There is no agreement on the number of verses that constitute a legal principle or rule. Hallaq argues that there are over one hundred such verses, but some scholars put the number at nearly five hundred. *Id.*

90. See I KAMALI, *supra* note 41, at 53, 62.

91. See VIORST, *supra* note 1, 163–65.

(*hadith*).⁹² “Hadith may enunciate doctrine or provide a commentary to it. They deal with the contents of the Koran, social and religious life, and everyday conduct down to tying of sandals.”⁹³ In spite of pious attempts at trying to gauge the precise life of the Prophet, both Western scholars and Muslim jurists have rejected many *hadith* as fabrications.⁹⁴ Some *hadith* were fabricated to validate otherwise well intentioned, pious intentions about the Prophet;⁹⁵ while others were created to religiously legitimize political antics by Muslim rulers.⁹⁶ Literally more than half a million *hadith* were recorded, but there was no agreed-upon litmus test, *ex ante*, to determine the validity of a particular *hadith*. As such, scholars were forced to verify a chain of transmission (*isnad*) *ex post*.⁹⁷ The process of authenticating *hadith* involved examining the narrators who propagated a particular version of a tradition and scrutinizing the subject matter in order to determine whether it was in conflict with the Qur’an.⁹⁸

To complicate matters, even if Muslims implicitly assented to the notion that the Prophet manifested the quintessential believer in God, and if they agreed that a particular *hadith* was authentic, it did not resolve the question of whether the practice should be emulated. For example, if the Prophet consumed a particular fruit on a particular day, it was not always clear whether that action constituted an imperative for his followers, or even a recommendation. Plausibly, a tradition could simply reflect the conduct of a person who normally enjoyed a particular fruit on a given day in a given place.⁹⁹ Consequently, since the *hadith* constantly suffered from questions about authenticity or even proper use, jurists soon came to the conclusion that the Sunnah alone gave an incomplete picture of the law.

92. Interestingly *hadith* are divided into two general categories: *hadith qudsi* and *hadith sharif*. *Hadith qudsi* are those traditions where God is the speaker, while *hadith sharif* stand to relate some method or archetypal position of the Prophet. GLASSÉ, *supra* note 20, at 141; see also 1 KAMALI, *supra* note 41, at 46–47.

93. GLASSÉ, *supra* note 20, at 141.

94. See 1 KAMALI, *supra* note 41, at 65–68. In addition, it should be noted that even among the pious followers, the different versions of the *hadith* were not compiled until approximately the ninth century, when it was discovered that *hadith* works differed and that many of the *hadith* collections were fabricated.

95. Believers are often tempted to attribute the fanciful to the Prophet. As Ignaz Goldziher noted, “I have come to the conclusion that a true believer is never so ready to lie as in matters of the hadith.” IGNAZ GOLDZIHHER, *On the Development of the Hadith*, in 2 MUSLIM STUD. 17, 55 (1971).

96. In particular, forgeries were often attributed to deepening schisms between political elites. See 1 KAMALI, *supra* note 41, at 65–66.

97. See *id.*

98. For a more illuminating discussion on the topic of validation and rigors by which *isnad* are achieved, see *id.* at 68–82.

99. See *id.* at 51–57.

Jurists, well aware of the difficulties that came with creating the Sunnah, had before them a daunting challenge. Even if they could accept a common biography of the Prophet, and they often did not, they also had the equally daunting task of extending the traditions of Muhammad, a person who lived an extraordinary life in secluded Arabia, to the everyday lives of Muslims, whether they lived in Damascus, Darussalam, or Cordoba, while at the same time insisting that what they propounded, as ordinary humans, was in fact the Divine law. The constant question posed by any jurist was, “[H]ow can one know that a particular decision in a world of confusion is right, is what God wills?”¹⁰⁰

3. *Qiyas* and *Ijma* as Methodologies

Since questions of morality and conduct confront a Muslim anywhere he or she lives, and as there are often endless challenges to preconceived notions about the law, there is an implicit need to extend the law to divergent experiences. In an effort to ground Muslims in an appropriate religious orientation, scholars created the concepts of *qiyas* and *ijma*. *Qiyas* is defined as reasoning based on analogy,¹⁰¹ while *ijma* is defined as the consensus of qualified legal scholars of a given generation.¹⁰² Both methodologies were presumably derived from the reliable and guided action of the individual persons and the community that has lived in accordance with that revelation and tradition.

Qiyas was essentially a process of analogical deduction based on the provisions laid down by the appropriate verse(s) in the Qur’an and/or a corresponding matter within the Sunnah. *Qiyas* was created in response to a growing need to resolve problems which were not explicitly addressed in the Qur’an or the Sunnah.¹⁰³ However, because jurists faced a multitude of questions about proper conduct and because they had to deal with the practical limitations associated with both sources as essentially “closed” canons,¹⁰⁴ multiplied by the constraints of literary formalism, they were essentially compelled to become linguistic

100. Westbrook, *supra* note 10, at 827.

101. See I KAMALI, *supra* note 41, at 197–99.

102. See *id.* at 169.

103. Mohammad Hashim Kamali, *Methodological Issues in Islamic Jurisprudence*, 11 ARAB L.Q. 3, 29 (1996) (“[*Ijma*]” represents the single most important concept in the legal theory of *usul* which offers the potential of making the whole of the legal theory pragmatic and viable.”)

104. Until codified, the Qur’an was part of an oral tradition, which essentially meant that those reading from it could ostensibly shift its meaning through both tone and inflection. It was the necessity of maintaining the text itself that overcame any desire to uphold the oral tradition. See VIORST, *supra* note 1, at 84.

scholars in order to appropriately scrutinize the very language that constituted the Qur'an and the Sunnah.¹⁰⁵

Since Divine and prophetic commands were expressed in language, an appropriate, or even a valid, understanding of the sources required an expert knowledge of the function of language as a lexical code and as a system of signs.¹⁰⁶ Jurists sought to master this code in order to discover the meaning of the sacred texts, which they regarded as being identical with the intention of the Divine Author.¹⁰⁷ Jurists soon realized that language is intrinsically oblique. Even the seemingly clear commands of the Qur'an may be subject to multiple, but faithful interpretations. Sunnaic texts were equally ambiguous, not merely for the fact that they were texts of language, but because it was often difficult to determine whether the anecdotes recorded about the Prophet were to be emulated as a matter of law.

Thus, if one begins to contemplate the enormous lingual task before jurists in simply discerning a proper textual account, the idea of analogizing would seem almost impossible. To extend an understanding of the texts beyond their historical significance required recognition, perception, and insight, as well as the formidable responsibility of professing one's belief as essentially speaking in God's name. The emphasis of *qiyas* is the identification of a common, Divine cause between an original and a new case. Jurists did not consider law derived through *qiyas* as new law. For all intents and purposes, analogy was, in fact, the product of human rationality used to rule on novel matters.¹⁰⁸ While critics absently charge that Islamic law lacks an appropriate amount of rationality, they would likely be struck by the fact that, even in cases where Islamic jurists engaged in rationalization, they were tempered by the recurring presence of religion, and therefore prohibited from drawing wild and unsupported conclusions.

When the texts explicitly state the ruling of a case, then there should be no room for doubt whether or not it is God's intention.

However, when the texts provide only indications and signs, the jurist then must attempt to find out the divine intention, although

105. See generally BERNARD G. WEISS, *THE SPIRIT OF ISLAMIC LAW* (2001).

106. See *id.* at 151–58.

107. See *id.* at 329–501 (discussing topics like commands, implications, ambiguities, and unqualified expression, one cannot help but be nearly overwhelmed at the complexity involved).

108. For a broader discussion of ratiocination of *qiyas*, see I KAMALI, *supra* note 41, at 34–37.

*there is no guarantee that the ruling he reaches will be identical with that which is lodged in God's mind.*¹⁰⁹

Cognizant of the challenge that *qiyas* presented—an allocation for jurists essentially to “create” the law—jurists were quick to subordinate this source of law, but not to eliminate it. To conclude, not only did the creation of the *qiyas* allow for religious recognition for rationality, it became *qiyas*'s hallmark.¹¹⁰

The Prophet once said, “My community will never agree on an error.”¹¹¹ In response to this highly-esteemed and ingenious sentiment, jurists created the last well-regarded source of law: *ijma*. *Ijma* is a rationally derived, but *permanent* certification of religious authenticity conducted by jurists within a given generation.¹¹² One might superficially conclude that the proposition presented here suggests that the law can, at some point, reach a vanishing point, an essential permanence. While this conclusion is implicitly valid, it is also integral to note just how difficult achieving such permanence really was.

Two major effects flow from the *ijma* doctrine. First, because the rigors of religious certification are so difficult, they serve as permissive principles by allowing varying opinions to be considered valid attempts to define Islamic law. Second, by virtue of these certification problems, *ijma* excludes propositions which have not been tested throughout the community of believers. Put differently, the religious heights to which one had to climb in order to reach a unanimous conclusion were so difficult that the process actually invited dissent. Thus, time, experience, and the role of religion reveal to us the insight of the Prophet's declaration that humans are not inclined to agree on matters of faith, and that the only way to deem matters as actual law is to require full and unequivocal agreement. So long as one thoughtful dissent appeared, the law could not achieve permanence.¹¹³ *Ijma*'s significance lies not in the proposition it presents—that if a community of believers within a given generation can achieve assent on a religio-legal principle, then that principle becomes infallible—but in the variety it allows. Thus, *ijma* should not be seen as merely a seal to authenticity, but as a bulwark against discrete legal sentiments. Variance of opinion was not only present in the law; it was, in fact, encouraged.¹¹⁴

109. HALLAQ, *supra* note 42, at 28 (emphasis added).

110. See 1 KAMALI, *supra* note 41, at 197–99.

111. GLASSÉ, *supra* note 20, at 182.

112. HALLAQ, *supra* note 42, at 20, 27–28.

113. See *id.* at 75–78.

114. See Abdullahi Ahmed An-Nai'im, *Human Rights in the Muslim World: Socio-Political Conditions and Scriptural Imperatives*, 3 HARV. HUM. RTS. J. 13, 19–20 (1990).

4. The Effect of Legality

After a process of filtration through the sources, the Schools of Law categorized various actions into what were essentially verdicts on how they believed Muslims should deal with particular conduct. These five categories are defined as whether one must, should, is permitted to, should not, or must not do a particular act:

[A]ll human actions are subsumed, according to a widely accepted classification, under five categories: as commanded, recommended, left legally indifferent, reprehended, or else prohibited by God. And it is only in regard to the middle category (i.e., those things which are left legally indifferent) that there is in theory any scope for human legislation.¹¹⁵

Some Schools placed more emphasis on a particular source or methodology than another, resulting in wide-ranging verdicts. On one hand, since few matters were conclusive or reached the level of *ijma*, a plethora of conduct was subject to different interpretations based on which School of Law dominated a particular geographic region. On the other hand, because few matters reached the level of *ijma*, there was liberty in interpreting various matters to suit the needs of one's faith. Some schools believed one matter was forbidden, while another believed that it was permissible, but not recommended. Nearly all of these categories remained in constant flux.¹¹⁶ "Islamic law consisted of a set of methodological approaches, normative principles and positive commandments that were in a constant state of evolution."¹¹⁷ Even though there are differences in interpretation among the Schools of Law, diversity of opinion was cultivated. In Islam, believers were not merely judged according to their acts, but their intentions. Consequently, when a Muslim follows a verdict that meets the requisite level of religious contemplation, then that believer is essentially performing a religiously valid act. Thus by implication, all religio-legal dictates were recognized as religiously valid.¹¹⁸

The Schools of Law had, however, certain ground rules for legal change. They maintained that change was permissible in the following instances: when there was a passage of time with a change of place or circumstance; when changes in the law were required to avoid ultimate harm to human interests; when previous principles were based on a

115. GLASSÉ, *supra* note 20, at 381.

116. See I KAMALI, *supra* note 41, at 33-34.

117. EL FADL, *supra* note 59, at 170.

118. See Kimberly Schooley, *Cultural Sovereignty, Islam and Human Rights: Toward a Communitarian Revision*, 25 CUMB. L. REV. 651, 660 (1994).

cause which itself has disappeared; and when change or alteration served the common interest of the community.¹¹⁹ As a consequence of broad-based tolerance in the law, early Muslims lived in “an intellectually dynamic milieu, characterized by a multiplicity of communities, schools of thought and stances on major religio-political issues of the time.”¹²⁰ In the fluid and intellectually effervescent atmosphere in which ordinary individuals, as well as scholars and theorists, often moved freely among different communities, Muslims engaged in lively discourse revolving around a host of issues that were of vital significance to the emerging Muslim *umma*. Muslims could not have lived such vigorous intellectual lives and still formed what one author called “communities of interpretation” had they been a mass of unquestioning people. Consequently, Islam could not have expanded religiously or politically had it not permitted differences of opinion and interpretation within faith’s fundamental confines.

5. The End of the Classical Era and a Note About *Ijtihad*

The end of the classical era of Islamic law followed the political and military decline of Islamic Imperial States. Concomitantly, many jurists called for an end to independent interpretation (*ijtihad*) of the Qur’an and the Sunnah, which left jurists with methodologies of interpretation, rather than interpretation of the sources independently. This approach effectively closed the doors to *ijtihad*.¹²¹ Once these doors were proverbially shut, jurists were functionally demoted to the rank of imitators (*muqallids*), and they became bound by the doctrine of *taqlid* which is loosely translated as an implicit acceptance. Thus, jurists were bound to follow the doctrine as it was recorded in the authoritative legal manuals generated by a particular School of Law.¹²² This withholding of the right of independent interpretation of the two primary sources was marked by the phrase, “the closing of the door of *ijtihad*.”¹²³

Some scholars argued that adherence to *taqlid* ignored changing conditions of society. Thus, the notion of an end to *ijtihad* is looked upon

119. Azizah al-Hibri, *Islam, Law and Custom: Redefining Muslim Women’s Rights*, 12 AM. U.J. INT’L L. & POL’Y 1, 7–8 (1997).

120. Asad Latif, *Islam Has a Scope for Diversity*, STRAITS TIMES INTERACTIVE (Singapore), Oct. 16, 2001, at 18 (quoting an unknown Muslim Almanac).

121. SCHACHT, *supra* note 58, at 70–71. Professor Wael B. Hallaq argues that the “gate of *ijtihad*” was never closed. Wael B. Hallaq, *Was the Gate of Ijtihad Closed?*, 16 INT’L J. MIDDLE E. STUD. 3, 15–22 (1984). He refutes this contention by showing that a number of jurists, most notably Ibn ‘Abd al-Wahhab, continued the *ijtihad* of their predecessors by discussing their works and introducing new ideas well into the nineteenth century. *Id.* at 32.

122. See ALI ASGHAR, *THE RIGHTS OF WOMEN IN ISLAM* 49 (1996).

123. SCHACHT, *supra* note 58, at 71.

with suspicion and distrust.¹²⁴ Although many scholars have simplified this debate in terms of intellectual and interpretative freedom, as if the contrasts were black and white, this sentiment oversimplifies the subject.

The premise behind such conclusory sentiments like closing the doors to *ijtihad* is based on the idea that a reopening of interpretation still would require a fidelity to the whole of the Islamic legal tradition, which means that in order to reinterpret the primary sources, one had to be qualified in some sense. Reinstitution of *ijtihad* requires a rationale for why this right was qualified in the first place.¹²⁵ Arguably, the right to conduct *ijtihad* was limited for functional reasons: if everyone possessed such a right for any enduring length of time, especially in light of trying to formulate working precedents, nothing would remain of Islamic law.

Ijtihad requires competence and expert technical knowledge in the sources and methodologies of Islamic law.¹²⁶ This proposition is not difficult to conclude since espousing the law required that a person possess an innate knowledge of the principal sources and methodologies and the ability to analogize.¹²⁷ In essence, a *mujtahid* (one capable of conducting *ijtihad*) is a technician skilled with sufficient knowledge to exercise competence, authority, and technical expertise. In other words, the practice of *ijtihad* requires a Muslim be more than an adherent to Islam, and be more than merely familiar with the *fiqh*, it required the requisite level of competence and caution to authoritatively espouse law on behalf of the Divine. Thus, in a way, one could view the closing of the doors to *ijtihad*, as a way to codify tolerance by preserving both the role of prominent and well-educated jurists, while at the same preserving a *fiqh* that implicitly possessed a penchant for a diversity of opinion. Consequently, while the classical legal tradition remains one of the hallmarks of *pax islamica*, today it is often treated as an archaic aberration of insight.

Of course, the classical era has faded into history, but the existential question of what Islamic law is has not. This brief discussion is intended to demonstrate the complexity and the brilliance of the legal tradition, as well as the lengths to which scholars of law went in creating and delivering it. However, this analysis should not suggest that classical Islamic law was perfect. The experience of history and the light of modernity have either exposed or exacerbated the pitfalls of the classical legacy. For example, while Muslims proffer Islam as a rational faith, rationalist-based Schools of Law, like the Mu'tazilites, were condemned and erased

124. See *id.*

125. See 1 KAMALI, *supra* note 41, at 2.

126. See *id.* at 386–91.

127. See *id.* at 377–79.

from the Islamic orthodoxy.¹²⁸ While Islam is thought to be a religion based on human intuition, it often takes a hostile position to intuitive notions like human rights.¹²⁹ While Islamic law is proffered to respond to future human exigencies, often exigencies forced litigants to respond to Islamic law. Finally, while it is contended that Islamic law is as sophisticated and as rich as any other legal system of the world, there is an unmistakable tendency to drain this system of doctrinal richness and sophistication.¹³⁰

The point of a full-fledged discussion of classical Islamic law is two-fold. First, it grounds the discussion about where Islamic law stood, and gives a sense of demands for its complete reinstitution that are unworkable at best. Second, and more importantly, the point of emphasizing early Islamic law is that all of those who desire a return to religiosity will find that Islamic law is idealistic. Except for what has reached the status of *ijma*—although one could imagine a variety of arguments which suggest that very little has ever attained this status in the first place—there are no legitimately codified precepts. Even if we were to accept the benefits and burdens of either *ijtihad* and *taqlid* and the role that jurists would play, one cannot conclude that Islamic law should go about without *some* codification. Thus, the picture of Islamic law we get today is far different from the intellectual tradition from which it sprung. Like the ninth century jurist who reflectively posed the question of what Islamic law was, today we encounter the same question, but under radically different circumstances. Islamic law today is in many ways suffering an identity crisis. It “is neither a holdover from the past nor a return to ancient roots but rather a complex, multistranded set of ideas and practices . . . likely to be determined by which ideology wins over the Muslim mind,” the Reformist or the Revivalist.¹³¹

III. EXAMINING ISLAMIC FUNDAMENTALISM

At the outset, some might be perplexed by the presence of Islamic fundamentalism in a discussion about the law. It is crucial, however, to understand what is meant when discussing fundamentalism generally. Fundamentalism is a concept used to define a reinvigoration of

128. See VORST, *supra* note 1, at 157–62.

129. “Human rights law is based on an ill-defined philosophy combining natural law impulses with positive law enactments which seek, for their part, to check arbitrary power.” Anthony Chase, *Legal Guardians: Islamic Law, International Law, Human Rights Law and the Salman Rushdie Affair*, 11 AM. U.J. INT’L L. & POL’Y 375, 382 (1996).

130. See EL FADL, *supra* note 59, at 175–76.

131. Jane F. Collier, *Intertwined Histories: Islamic Law and Western Imperialism*, 5 STAN. HUMAN. REV. 152, 153 (1996) (book review).

religiosity.¹³² Use of the word fundamentalism is not intended to draw upon contemporarily pejorative connotations; rather it is an effort to harmonize the use of this term as it was recognized in Protestant Christianity.¹³³ Religiosity means more than passionate displays of religious devotion. Fundamentalists in various religious traditions teach that there was a perfect moment and they endeavor to recover that moment. This often involves reacting to that which is seen as a threat to realizing the ideal—even if the ideal never actually existed. Given a proper understanding of both Islam’s emphasis on history, and the implicit religiosity that surrounds a study of Islamic law,¹³⁴ it should not seem surprising to find that Islam and its history are replete with episodes of fundamentalism.¹³⁵

Although the causes of fundamentalism are many, and differ from country to country, there are common catalysts and identifiable concerns. Every evangelical religion has sought to renew adherence and reinstitute them in truth faith.¹³⁶ Islam is no different—a Muslim polity requires Islamic validity.

132. See Courtney W. Howland, *The Challenge of Religious Fundamentalism to the Liberty and Equality Rights of Women: An Analysis Under the United Nations Charter*, 35 COLUM. J. TRANSNAT’L L. 271, 275–78 (1997); see also John S. Hawley & Wayne Proudfoot, *Introduction*, in FUNDAMENTALISM AND GENDER 1, 16–19 (John S. Hawley ed., 1994). But see Gita Sahgal & Nira Yuval-Davis, *Introduction: Fundamentalism, Multiculturalism and Women in Britain*, in REFUSING HOLY ORDERS 1, 3–4 (Gita Sahgal & Nira Yuval-Davis eds., 1992) (using fundamentalism to fuel anti-Muslim sentiments).

133. See JOHN ESPOSITO, *THE ISLAMIC THREAT: MYTH OR REALITY* 5 (3d ed. 1999) [hereinafter ESPOSITO, *THE ISLAMIC THREAT*]; see also KAREN ARMSTRONG, *THE BATTLE FOR GOD* xi (2000); Khurshid Ahmad, *The Nature of the Islamic Resurgence*, in VOICES OF RESURGENT ISLAM 218, 225–26 (John Esposito ed., 1983).

134. See VIORST, *supra* note 1, at 141–45.

135. A group of dedicated Muslims called the Kharijites emerged twenty years after Muhammad’s death and marked the first instance of Islamic fundamentalism. Through the centuries, the phenomenon of fundamentalism continued, taking on various forms. In the twentieth century, it was revived by several figures, including Hasan El Banna of Egypt, founder of the Muslim Brotherhood. Fundamentalism is the term chosen by deeply committed Muslims to describe themselves. These groups believe that Muslims all over the world should return to the “fundamentals of the faith” and establish God’s law on Earth as it is taught in the Qur’an and through their traditions. See generally VOICES OF RESURGENT ISLAM, *supra* note 133.

136. An example of a fundamentalist group can be found in Jerry Falwell’s ministry and Moral Majority, Inc. See JERRY FALWELL, *LISTEN AMERICA!* 258 (1980) (detailing Christian fundamentalism); Diane J. Austin-Broos, *Pentecostals and Rastafarians: Cultural, Political, and Gender Relations of Two Religious Movements*, 36 SOC. & ECON. STUD. 1 (1987) (discussing Pentecostal and Rastafarian fundamentalism); D. Michael Quinn, *Plural Marriage and Mormon Fundamentalism*, in 2 THE FUNDAMENTALISM PROJECT: FUNDAMENTALISMS AND SOCIETY 240 (Martin E. Marty & R. Scott Appleby eds., 1993) (describing Mormon fundamentalism); Samuel C. Heilman & Menachem Friedman, *Religious Fundamentalism and Religious Jews: The Case of the Haredim*, in 1 THE FUNDAMENTALISM PROJECT: FUNDAMENTALISMS OBSERVED 197 (Martin E. Marty & R. Scott Appleby eds., 1991) (detailing Jewish haredim fundamentalists); DIANE Y. PAUL, *WOMEN IN BUDDHISM: IMAGES OF THE*

For the vast majority of Muslims, the resurgence of Islam is a reassertion of cultural identity, formal religious observance, family values, and morality. The establishment of an Islamic society is seen as requiring a personal and social transformation that is a prerequisite for true Islamic government. Effective change is to come from below through a gradual social transformation brought about by implementation of Islamic law.¹³⁷

Abdullahi Ahmed An-Na'im, a renowned Islamic scholar, points out a theme recurrent in the discussion of law, "[i]f we are to understand anything at all about what has happened in the past and is happening today in the Muslim world, we must appreciate the universality and centrality of religion as a factor in the lives of the Muslim peoples."¹³⁸ The consequence of such a truism is a requirement that modern States possessing Islamic majorities either adopt Islamic law or in some way seek stricter adherence to Islamic law.

Consequently, most of Islamic history can be seen as a record of aspirations to an ideal State that would faithfully and impartially implement Islamic law as a total way of life. These aspirations were frustrated by the realities of political expediency and security concerns.¹³⁹ When the balance would tilt too much in favor of the latter considerations, however, the intensity of demands for the application of Islamic law would rise, usually in the form of local or regional fundamentalist movements. The common denominator to most of these movements, much like the one advocated presently, is a reinvigoration of classical Islamic law.¹⁴⁰ However, unlike other episodes of fundamentalism, this period in history is unique and poses unprecedented challenges for those who believe that a simple reinstitutionalization of Islamic law can be accomplished within modernity's constraints. As a result of both novel political and social concepts, as well as a burgeoning movement aimed at

FEMININE IN MAHAYANA TRADITION 3-5, 51 n.8, 52 (2d ed. 1985) (discussing Mahayana Buddhist fundamentalism); Ainslie T. Embree, *The Function of the Rashtriya Swayamsevak Sangh: To Define the Hindu Nation*, in 4 THE FUNDAMENTALISM PROJECT: ACCOUNTING FOR FUNDAMENTALISMS 617 (Martin E. Marty & R. Scott Appleby eds., 1994) (describing Hindu fundamentalism).

137. John L. Esposito, *Political Islam and U.S. Foreign Policy*, 20 FLETCHER F. WORLD AFF. 119 (Spring 1996).

138. ABDULLAHI AN-NA'IM, TOWARD AN ISLAMIC REFORMATION: CIVIL LIBERTIES, HUMAN RIGHTS, AND INTERNATIONAL LAW (CONTEMPORARY ISSUES IN THE MIDDLE EAST) 3 (1996). For an account of the growing need to return to an Islamic identity in Turkey, see generally JUNE STARR, *LAW AS METAPHOR: FROM ISLAMIC COURTS TO THE PALACE OF JUSTICE* (1992).

139. See Ahmad, *supra* note 133, at 222-24.

140. See ESPOSITO, *THE ISLAMIC THREAT*, *supra* note 133, at 119-20; see also M. H. A. Reisman, *Some Reflections on Human Rights and Clerical Claims to Political Power*, 19 YALE J. INT'L L. 509, 512-13 (1994).

bolstering Islamic religiosity, there have emerged two ideologies claiming to wear Islam's mantle—the Revivalists and the Reformists.¹⁴¹

The dividing line between Reformist and Revivalist is not clearly inscribed. Distinctions between the two, however, are becoming more apparent as the ascent of contemporary Revivalism continues.¹⁴² Although sometimes difficult to distinguish because of the way it narrows the word fundamentalism,¹⁴³ one scholar has identified this to be a debate between religious conservatives and religious fundamentalists.

Scholars generally rely on the militant activism of fundamentalism to distinguish it from “conservative” or “traditional” religion. Fundamentalists fight in and against society for political, social, and legal changes, through the legal and political system or by means of violence, whereas traditional conservative groups appear more passive in accepting the political and legal structures of society. Indeed fundamentalists have often critiqued the traditional conservatives of their respective religions for not being sufficiently involved in activist political ideology and militant action.¹⁴⁴

The dividing line, however, between Reformist and Revivalist is especially important for a contemporary understanding of what Islamic law is. At the outset, these terms are a bit ambiguous because the distinctions, as ideologies, are sometimes difficult to distinguish for the basic fact that both groups seek a return to religious values. Revivalism is a uniquely contemporary phenomenon that seeks not only to institute classical Islamic law, but in doing so, demolish or undercut some of modernity's existing political and social structures—in particular, the

141. Although these terms deal with fundamentalists, they are used to identify what can be seen as a split in the Islamic community. The terms have been borrowed from John Esposito and others who adroitly point out that the term fundamentalists is disingenuous. This group of academics prefer the term Revivalists for what are today known as “Islamists” or “radical Islamic fundamentalists.” This Note deliberately uses the term Revivalists, as this ideological movement subjects the world to over simplistic representations about religion that are more emotive than substantive. See Howland, *supra* note 132, at 276 n.7. See generally ESPOSITO, *THE ISLAMIC THREAT*, *supra* note 133. The term Reformists emerges from an analysis of the writings of the late, renowned scholar Fulzar Rahman. See generally FULZAR RAHMAN, *REVIVAL AND REFORM IN ISLAM* (Ebrahim Moosa ed., 2000).

142. “The movement nowadays called fundamentalism is not the only Islamic tradition. There are others, more tolerant, more open, that helped to inspire the great achievements of Islamic civilization in the past, and we may hope that these other traditions will in time prevail.” Bernard Lewis, *The Roots of Muslim Rage*, *ATLANTIC MONTHLY*, Sept. 1990, at 47, 60.

143. See Ahmad, *supra* note 133, at 225; see also ESPOSITO, *THE ISLAMIC THREAT*, *supra* note 133, at 7–8; BASSAM TIBI, *THE CHALLENGE OF FUNDAMENTALISM: POLITICAL ISLAM AND THE NEW WORLD DISORDER* 5 (1998); John O. Voll, *Renewal and Reform in Islamic History: Tajdid and Islah*, in *VOICES OF RESURGENT ISLAM*, *supra* note 133, at 32, 32–35, 43.

144. Howland, *supra* note 132, at 281.

nation-state and the modern notion of international law. On the other hand, Reformism is in some ways also a unique contemporary creation. While Reformists have opted not only to accept modernity's continued existence, they also endeavor to make such concepts religiously acceptable within the traditional constraints of Islamic law. In so doing, rather than follow in what they consider the Revivalists' retail adherence to Islamic law, they instead argue for a wholesale acceptance of Islamic law. The following Part examines the Revivalists' complaint about modernity, and briefly considers two well-accepted articulations of a Revivalist institution of Islamic law. Following the discussion of Revivalism, the next Part looks at the Reformist's response to two of the more significant and enduring modern legal institutions—the nation-state and international law.

IV. THE REVIVALIST COMPLAINT

There are numerous, multifaceted reasons for the emergence of Revivalism. For some, Revivalism is a religious renewal in the wake of modernity and globalization.¹⁴⁵ For others, Revivalism is a move toward political and economic segregation with a religious pretext fed by feelings of defeat and disempowerment.¹⁴⁶ In their attempt to realize the ideal religious moment, Revivalists would necessarily either ignore, or worse, annihilate some of modernity's more salient political and social concepts, such as the nation-state.

In general, the Revivalist movement is urban-based, drawing heavily from the lower-middle and middle classes.¹⁴⁷ Of particular import is the growing participation of university graduates and young professionals, both male and female.¹⁴⁸ The movements recruit from the mosques and on campuses where, contrary to popular assumptions, their strength is not so much in the religious faculties and the humanities, but in science, engineering, education, law, and medicine.¹⁴⁹ Their basic argument is fairly simple, and, for the most part, an accepted ideology. Islam is not

145. ROXANNE EUBEN, *ENEMY IN THE MIRROR: ISLAMIC FUNDAMENTALISM AND THE LIMITS OF MODERN RATIONALISM* 20 (1999).

146. See JUDITH MILLER, *GOD HAS NINETY-NINE NAMES* 17 (1996).

147. See *id.*; see also ALI RAHNEMA, *PIONEERS OF THE ISLAMIC REVIVAL* 111 (1994).

148. See ARMSTRONG, *supra* note 133, at 293–99; see also Ibrahim Ahmad Omar, *Contextualization . . . Whence, and How Far Have We Come?*, in *PROCEEDINGS OF THE 21ST ANNUAL CONFERENCE OF THE ASSOCIATION OF MUSLIM SOCIAL SCIENTISTS* 108, 108–09 (Mona M. Abul-Fadl ed., 1993) (describing the International Institute of Islamic Thought's efforts in placing professors in universities around the world, sponsoring conferences, and fostering discourse among scholars).

149. See ESPOSITO, *THE ISLAMIC THREAT*, *supra* note 133, at 137–39.

just a collection of beliefs and ritual actions, but a comprehensive ideology embracing public as well as personal life.¹⁵⁰

Although this vastly oversimplifies history, two major events have heralded the rise of the Revivalist movement. Specifically, the first herald of contemporary Revivalism was the era of European colonialism and the succeeding, but badly maligned era when Islam became part of the province of modern nation-states, rather than the preeminent social order of all Muslims.

For nearly all of its history, some thirteen centuries, Islam has thrived under empires or imperial States in which both religion and politics were united.¹⁵¹ However, for more than two hundred years, the Islamic world was carved up among dominating European powers. This era ended slowly, as the last of the Islamic empires, the Ottoman Empire, disintegrated at the beginning of the twentieth century.¹⁵² The rest of what would become the modern Islamic world waited until the end of colonization and World War II to become recognized nation-states. Rather than have any opportunity create their own identity as nation-states, many of these newly born Islamic States' needs were eclipsed by the constant threat of nuclear annihilation between the United States and the Soviet Union. The Cold War gave license to many of these newly formulated nations to subdue religious fundamentalism. Dueling superpowers, in their attempt to control their respective spheres of influence, antagonized those who sought to establish their own distinct Islamic identity. For as many as fifty years, many Islamic States' political systems froze, as underlying resentment grew.¹⁵³

In the midst of the Cold War, came the second major signpost to Revivalism—the Israeli invasion and occupation of Arab held territories. In 1967, Israel defeated six Arab armies and took control of the West Bank and the Gaza Strip, including the city of Jerusalem, site of Islam's third holiest site (behind Mecca and Medina).¹⁵⁴ The takeover of Jerusalem from Islamic control signaled the ultimate failure of Muslims to take account of their faith.¹⁵⁵ For thousands of years, Islam flourished under vast empires and added novel dimensions to every major human

150. See *id.* at 122–23; see also HALLAQ, *supra* note 42, at 11; Hassan al-Banna, *The New Renaissance*, in ISLAM IN TRANSITION: MUSLIM PERSPECTIVES 78 (John J. Donohue & John L. Esposito eds., 1982); Abul Ala Mawdudi, *Political Theory of Islam*, in ISLAM IN TRANSITION: MUSLIM PERSPECTIVES, *supra*, at 252.

151. See TIBI, *supra* note 143, at 5–8.

152. See generally RUTHVEN, *supra* note 44.

153. See ESPOSITO, THE ISLAMIC THREAT, *supra* note 133, at 75, 193; see also BLACK, *supra* note 27, at 308.

154. Deemed the “Year of Catastrophe.” See ESPOSITO, THE ISLAMIC THREAT, *supra* note 133, at 12–13.

155. See JOHN ESPOSITO, ISLAM AND POLITICS 11–12 (1998).

endeavor. Arguably, up until 1967, most Muslims maintained both a religiously supremacist view of the world, as well as a mentality which essentially longed for an empire.¹⁵⁶ The loss of Jerusalem signaled a need for Muslims to once again assert themselves against those who controlled them.¹⁵⁷

In sum, modernity, for the Revivalist, represents more than the Enlightenment, the proliferation of democracy, and the birth of modern economics. Instead, modernity represents the continued defeat of Islam, first in a territorial sense with the collapse of Islamic empires, but more so in a religious sense with the capture of some of Islam's most venerated sites, and, more latently, the denigration of religious ideas. Formally, Islamic legal systems were uprooted and replaced by the English common law or by the French civil codes. The quiet but dramatic end of the Cold War further unveiled the fragility of Islamic political systems, as well as the wholesale failure of their economies and social systems.¹⁵⁸ Consequently, many Muslims turned from failed attempts at nationalism, instead focusing their efforts on Revivalism.¹⁵⁹ Revivalists believed that secular nationalism—whether in the form of liberal nationalism, Arab nationalism, or socialism—did not provide a sufficient sense of identity for Muslims. Thus, it is important to acknowledge that Revivalism is not created by, and is not the same as Saddam Hussein's rule in Iraq or even the emergence of the Ayatollah Khomeini's Islamic revolution in Iran. The governments in Muslim countries, mostly non-elected, authoritarian, and dependent on brutal force, have been unable to establish their political legitimacy without taking cues from the Revivalist movements which have grown within them.¹⁶⁰ Consequently, Revivalism can be viewed as a construction of non-State actors who have emerged in the context of modernity, but do not accept its constraints.¹⁶¹

Today, in the post-1967/post-Cold War era, a thorough self-evaluation has confirmed Revivalist suspicions that all is not well within Islam.

Indeed, what Arabs find at home is economic lethargy and social stagnation. The energy, the daring entrepreneurial experience

156. See RUTHVEN, *supra* note 44, at 101–40.

157. See *id.*

158. See VIORST, *supra* note 1, at 5–7.

159. The founders of many Islamic movements were often formerly participants in nationalist movements. Examples include Hasan al-Banna of the Muslim Brotherhood in Egypt, Rashid Ghannouchi of Tunisia's Renaissance party and Abbasi Madani of the Islamic Salvation Front in Algeria. See Ahmad, *supra* note 133, at 222–23.

160. See EUBEN, *supra* note 145, at 29.

161. See Bassam Tibi, *The Fundamentalist Challenge to the Secular Order in the Middle East*, 23 FLETCHER F. WORLD AFF. 191, 194 (Spring 1999).

that suddenly appeared in the Pacific societies remains long absent in the Middle East. The Arab world seems weighed down by the pessimism over its future, if not outright despair. Unfortunately, the rest of the world seems indifferent to this condition. The headlines in the international press that deal with the Middle East point instead to the violence and terrorism that are made out to be that region's product.¹⁶²

In addition, it would seem that nearly every part of the Islamic world has been affected: the Armenian-Azerbaijani conflict;¹⁶³ the Israeli-Palestinian conflict involving Syria, Lebanon, and Israel;¹⁶⁴ constant rumblings between the now-nuclear power of India and Pakistan;¹⁶⁵ conflict between Chechnya/Dagestan and Russia;¹⁶⁶ civil war in Algeria;¹⁶⁷ Muslim-Christian violence in Nigeria and the Sudan;¹⁶⁸ Sunni-Shi'a conflicts in Pakistan,¹⁶⁹ Bosnia, Kosovo, and Serbia;¹⁷⁰ Iraqi, Turkish, and Iranian persecution of the Kurds;¹⁷¹ violence in the Xinjiang province of China;¹⁷² and, of course, the attacks by Osama bin Laden on the World Trade Center, the Pentagon, the U.S.S. Cole, and the U.S. Embassies in Kenya and Tanzania,¹⁷³ to name a few, illustrate Islam's many problems.

In addition, Islamic States have been blamed for their failure to achieve economic self-sufficiency, to stem the widening gap between rich and poor, to halt widespread corruption, to liberate Palestine and, most of all, to resist Western political and cultural hegemony. Both the political and the religious establishments have come under criticism, the

162. See Viorst, *supra* note 1, at 6.

163. See Thom Shanker, *A Nation Challenged: The Allies; Rumsfeld to Visit Troops Stationed in Afghanistan*, N.Y. TIMES, Dec. 16, 2001, at B4.

164. See James Bennet, *The World: About Face; What Does He Want? The Enigma That Is Sharon*, N.Y. TIMES, Mar. 17, 2002, Sec. 4, at 1, 6.

165. See David Sanger, *A Nation Challenged: Diplomacy; Bush Hails Musharraf, and Warns Iraq*, N.Y. TIMES, Feb. 14, 2002, at A16.

166. See, e.g., Patrick Tyler, *Russian Defector Says Army Killed Civilians in Chechnya*, N.Y. TIMES, Mar. 17, 2002, Sec. 1, at 8.

167. See, e.g., Agence France-Presse, *World Briefing Africa: Algeria: Elections Set for May*, N.Y. TIMES, Feb. 26, 2002, at A14.

168. See, e.g., Norimitsu Onishi, *World Briefing Africa: Nigeria: Soldiers On Patrol As Tensions Rise*, N.Y. TIMES, Feb. 14, 2002, at A18.

169. See, e.g., Raymond Bonner, *Pakistan Seethes as the Militants Lash Out*, N.Y. TIMES, Mar. 17, 2002, at A22.

170. See, e.g., Thomas Friedman, *Wall Of Ideas*, N.Y. TIMES, Mar. 3, 2002, at Sec. 4, at 5.

171. See, e.g., Somini Sengupta, *Turkish Company and Iraqi Kurds Plan Project*, N.Y. TIMES, Dec. 14, 2001, at A11.

172. See, e.g., Elisabeth Rosenthal, *Asian Terror; Beijing Says Chinese Muslims Were Trained as Terrorists with Money from Bin Laden*, N.Y. TIMES, Jan. 22, 2002, at A11.

173. See, e.g., John F. Burns, *Day of Terror: The Militant; America the Vulnerable Meets a Ruthless Enemy*, N.Y. TIMES, Sept. 12, 2001, at A23.

former as a Westernized, secular elite overly concerned with power and privilege, and the latter as corrupted by leaders appointed by the very governments who control mosques, religious universities, and other institutions.¹⁷⁴ As a consequence, Revivalists have fired the first salvo at their own governments:

[A] significant minority views the societies and governments in Muslim countries as hopelessly corrupt. They believe that un-Islamic societies and their leaders are no better than infidels and that the religious establishment has been co-opted by the government. Such critics believe that both established political and religious elites must be overthrown and a new Islamically committed leadership chosen and Islamic law imposed. These radical revolutionary groups, though relatively small in membership, have proved effective in political agitation, disruption, and assassination.¹⁷⁵

Nevertheless, the Revivalist complaint is most vehemently directed at all things that are non-Islamic. Revivalists need only remind their followers of the picture previously painted to justify the West's (un)Islamic practices. By fanning the flames of religious fervor, fanatics justify their attacks in religious terms, explaining that the West *created* secularism, an idea without historical or religious precedent.¹⁷⁶ In addition, they claim that foolhardy dependence on Western political and economic models of development has produced the politically stagnant and socially corrosive systems seen today. In essence, they claim that the West undermined the identity and moral fabric of Muslim societies.¹⁷⁷ Revivalists even renounce whatever present economic bounty that exists in some parts of the Islamic world. They often dismiss the mighty petrodollar as a constant reminder of the continued capitulation of Islamic States to the influences of Western nations.¹⁷⁸ Of course, while there are patent absurdities in the dilemmas they pose, their implicit attempt to obtain Islamic validity for political solutions remains powerfully salient.¹⁷⁹

174. See El Fadl, *supra* note 60, at 34.

175. Esposito, *supra* note 14, at 133.

176. See BERNARD LEWIS, ISLAM AND THE WEST 180–84 (1994).

177. ESPOSITO, THE ISLAMIC THREAT, *supra* note 133, at 53–62.

178. See *id.* 225–26.

179. Thus, Revivalists utilize the instruments of modernity, but believe that one can carve out pieces of liberated territories to be freed from modernity. They often demonstrate their indifference to the attempts of numerous other entities throughout the world that share their concern and disdain for globalization. Although Revivalists are venomous in their attacks on United States foreign policy, they lack a willingness to institute political freedom, thereby accepting the abundance of repression in their own societies.

Revivalists see the present discontent within the constraints of modernity as a choice: Muslims will either have to fully engage in their societies or fully dismiss their religious roots, since the second choice poses no choice at all, they must accept the first solution. Revivalists are guided principally by the mindset of the empire. They are essentially attempting to recapture the Islamic *umma* of the Prophet Muhammad.¹⁸⁰ They contend that true Islamic revitalization will only be accomplished through the reinstatement of Islamic law. For Revivalists, Islamic law is a proven system, ready with implicit religious legitimacy and possessing the authority to reestablish the link enjoyed by the Prophet and his earliest followers. In general, the Revivalist considers solely political solutions as inept, and demands that they be replaced with *Islamic* solutions. For example, many Revivalists argue that Muslim nation-states should have no role in the development of the judiciary.¹⁸¹ Instead, Revivalists argue that judicial matters should be left solely to religion. Even today, calls for a renewed Islamic legal system continue to gain resonance in many States where Western and Soviet legal systems once reigned.¹⁸²

Now, having a sense of the Revivalist motives for the reinstatement of Islamic law, it is important to examine how, in fact, a Revivalist conception of Islamic law would appear. In order to gain a fuller sense for the precise mechanics of the Revivalist ideological mindset, two, of many, personas who have envisioned the reinstatement of Islamic law will be examined.

A. Wahhab & Qutb: Revivalism's Ideological Leaders

Although it would be historically inaccurate to reduce Revivalist movements into an entirely cohesive sentiment, both the Wahhabist movement of modern-day Saudi Arabia,¹⁸³ and the writings of Sayyid

180. See RUTHVEN, *supra* note 44, at 182–98.

181. See, e.g., Lino J. Lauro & Peter A. Samuelson, *Toward Pluralism in Sudan: A Traditionalist Approach*, 37 HARV. INT'L L.J. 65, 79 (1996).

182. See *infra* Appendix (detailing the legal systems of the various members of the Organization of the Islamic Conference). See, e.g., Evan Gottesman, *The Reemergence of the Qisas and the Diyat in Pakistan*, 23 COLUM. HUM. RTS. L. REV. 433 (1996) (describing the reinstatement of Islamic law from the former common law system in Pakistan).

183. In the late eighteenth century, the Al Sa'ud family, under the leadership of 'Abd al-'Aziz ibn Sa'ud, united with the Wahhabi movement and rebelled against Ottoman rule in Arabia. Wahhabism, however, did not propagate itself as one school of thought or as a particular orientation within Islam. Rather, it asserted itself as the orthodox, "straight path" of Islam. By claiming literal fidelity to the Islamic text, Wahhabism was able to make a credible claim to authenticity at a time when Islamic identity was contested. Wahhabism is the dominant Islamic tradition on the Arabian Peninsula, though its influence is greatly reduced in the rest of the Middle East. See EL FADL, *supra* note 59, at 73 n.43. As Osama bin Laden comes from

Qutb illustrate the Revivalist approach to Islamic law. Although Wahhabism is considered a “minority” position, it has been influential for the Revivalist movement *in toto*:

Wahhabism and its militant offshoots share both attitudinal and ideological orientations. Both insist on a normative particularism that is fundamentally text-centered; both reject the notion of universal human values; and both deal with the other, however defined, in a functionalist and even opportunistic fashion.¹⁸⁴

Muhammad ibn Abd al-Wahhab could be considered the first Revivalist. In essence, he advocated following a history that ended in the ninth century. He likened much of the post-ninth century Islamic world to a retrogression to pre-Islamic Arabia.¹⁸⁵ Wahhab was particularly dismayed at the widespread laxity in adhering to traditional Islamic laws involving religious devotions. He cast himself as acting in accordance with the example set by the Prophet himself, and claimed that contemporary Muslims should not hesitate to oust the kinds of politically repressive and irreligious governments that the Prophet Muhammad worked to overthrow.¹⁸⁶ He was convinced that because so many Muslims tolerated their precarious existence, they were in fact not really Muslims after all. Wahhabism “reformed” and “revived” Islam, not by opening it up to the world, but by turning deeply inward and becoming narrow, intolerant, rigid, literalistic, and puritanical.¹⁸⁷ In particular, Wahhab advocated strict literalism in which the text of the Qur’an became the *sole* source of authority, thereby expressing an extreme hostility toward intellectualism, mysticism, and any sectarian divisions within Islam. Consequently, Wahhabi religious leaders rejected *any* reinterpretation of the Qur’an when it came to issues settled by the earliest Muslims.

Perhaps the most influential figure of Islamic Revivalism is Sayyid Qutb of the Muslim Brotherhood in Egypt.¹⁸⁸ A terse analysis of Sayyid Qutb’s popular Revivalist writings reveals a doctrinal resonance with the

Saudi Arabia and is Wahhabi himself, Wahhabi extremism and radical ideas of purity have obviously influenced him considerably.

184. El Fadl, *supra* note 60, at 35.

185. See GLASSÉ, *supra* note 20, at 414–16.

186. See Khaled Abou El Fadl, *Islam and the Theology of Power*, in MIDDLE E. REP., Winter 2001, at 221, available at http://www.merip.org/mer/mer221/221_abu_el_fadl.html

187. The Wahhabist approach is premised on the arrogant belief that, since the end of the Rightly Guided Caliphs, Muslims have failed to fulfill God’s will. Instead, they propose that, if Islam were to return to its authentic form, the entire community would be better off. This insipid approach is hopelessly simplistic and naïve. See EL FADL, *supra* note 59, at 73.

188. Among his popular writings is a thirty-volume translation and commentary of the Qur’an. Additionally, Qutb’s teachings were instrumental in the Iranian revolution. See Yvonne Haddad, *Sayyid Qutb: Ideologue of Islamic Revival*, in VOICES OF RESURGENT ISLAM, *supra* note 133, at 68.

Wahhabist movement. He inspired many of the radical Islamic movements of the 1970s and 1980s in the Middle East and Northern Africa, and his ideas of an Islamic society have been used repeatedly. Qutb has also influenced numerous generations of Egyptian and Arab intellectuals who seek to understand Islam as an ideology that leads to changes in the social order.¹⁸⁹ His prolific teachings are known the world over and, more importantly, much of his writing serves as comprehensive doctrine for how Islam actually *condones* terrorism and fosters a mindset of extreme exclusivity.¹⁹⁰

Qutb considered Islam—political Islam, especially—to be the only alternative to the ills of contemporary Muslim society.¹⁹¹ Although Qutb's writings incorporate many topics, his most notable writings were those about religious ignorance and his fear that modern Egypt was falling into the grips of a Western spirituality.¹⁹² Qutb felt that Islam was in danger of spiritual imperialism from the West and sought primarily to protect Islam from this interference. Qutb believed wholeheartedly in the supreme nature of Islam, and he felt that he needed to use radical political tactics to achieve his ends. His widely read book, *Milestones*, made the case that current Islamic social systems never achieved a truly Islamic society.¹⁹³ His impressions colored the world in stark terms of black and white. According to Qutb, a society whose legislation does not rest on divine law is not Muslim, no matter how ardently its individuals may proclaim themselves Muslim, even if they pray, fast, and make the pilgrimage.¹⁹⁴ In addition, the ruler of a Muslim nation who does not implement Islamic law is not really a Muslim. That being the case, they are not really a Muslim ruler any more, but rather an infidel. This means that they can be killed with impunity. The only solution for the ills of such a

189. See MILLER, *supra* note 146, at 59.

190. See Haddad, *supra* note 188, at 68. Qutb's brand of militancy, and his justification for fanaticism, however, is not novel. Rather, it is a new spin on the old idea of hatred itself.

We are not deceived by their pretenses to piety. We have seen their kind before. They are the heirs of all the murderous ideologies of the 20th century. By sacrificing human life to serve their radical visions—by abandoning every value except the will to power—they follow in the path of fascism, nazism, and totalitarianism. And they will follow that path all the way, to where it ends: in history's unmarked grave of discarded lies.

President George W. Bush, Address to a Joint Session of Congress and the American People (Sept 20, 2001), available at <http://www.whitehouse.gov/news/releases/2001/09/20010920-8.html>.

191. See Ibrahim Abu Rabi, *Sayyid Qutb: From Religious Realism to Radical Social Criticism*, 28 ISLAMIC Q. 103, 104 (1984).

192. See Haddad, *supra* note 188, at 68–72.

193. See generally SAYYID QUTB, MILESTONES (rev. ed. 1991).

194. See JOHANNES J.G. JANSEN, THE DUAL NATURE OF ISLAMIC FUNDAMENTALISM 10 (1997).

society is, again, a wholesale adoption of Islamic law.¹⁹⁵ It is important to note, however, that Qutb, for all of his judicial sentiments about Islam and Islamic law, was not trained as a jurist.¹⁹⁶

The justification for an implicitly rigid approach to Islamic society and political philosophy is the Islamic concept of *jahiliyya*.¹⁹⁷ *Jahiliyya* primarily means “ignorance,” but it is also a term used to characterize the time before the Prophet’s message. More specifically, *jahiliyya* is characterized by a way of life without regard to what God has prescribed. Invoking *jahiliyya* allows one the right to create values and to legislate rules of collective behavior. Revivalists have used this powerful tool to justify overthrowing what are ostensibly Islamic States by denying that they are truly Islamic at all. Of course, the term can be easily manipulated to extend to Western societies as well. According to Qutb, any non-Muslim society implicitly qualifies as *jahiliyya* because, according to their systems of governance, God is not sovereign—instead, men and their laws are sovereign, replacing God in his rightful place. By expanding the use of *jahiliyya* to include contemporary society, he articulated an Islamic justification for revolution and sedition.

From an analysis of their works, both Qutb and Wahhab essentially refused to interpret Islamic law historically or contextually, with any attendant possibilities of reinterpretation under changed circumstances. Both treat the vast majority of Islamic history simplistically and as a corruption of the true and authentic Islam. Their adherence to a doctrine of ossified history suggests a broader opposition to any reinterpretation of classical Islamic law, especially in the realm of modern notions such as gender, family, and religious rights. Although no one would argue against a return to fundamentals as a matter of religiosity, the Revivalist approach would reduce the value of both the Qur’an and the Sunnah by erasing their historical context and disregarding the essential fact that Islamic law has never existed without tolerance and historical variance.

B. *The Pitfalls of Revivalism*

By adhering to a Revivalist approach to Islamic law, little remains of the tolerant, classical approach. While the classical jurist and the contemporary Reformist would likely analyze a factual scenario in light of the overall moral thrust of the Qur’anic message, the Revivalist essentially reads Qur’anic verses in isolation, with the insipid assumption that such verses are transparent and that their historical

195. See *id.*

196. See Rabi, *supra* note 191, at 106 (stating that Qutb, at best, received a traditional religious education along with a general college education).

197. See Haddad, *supra* note 188, at 85–87.

context was irrelevant.¹⁹⁸ Many of the institutions referenced in the Qur'an can be understood only if the reader is aware of the historical practices surrounding the revelation of the text. The Revivalist's attempt at interpretation is, of course, baffling to anyone familiar with the classical heritage or even vaguely aware of the roles the Sunnah, *qiyas*, or *ijma* play in the development of Islamic law. Simply stated, the untrained Revivalist would be inclined, out of ease, and frankly, out of ignorance, to examine Qur'anic matters in isolation. However, as the above discussion indicates, the role of history is not merely presented for purposes of discussion, but is at the heart of a true understanding of the Islamic religion itself.¹⁹⁹ By draining the Qur'an both of its historical and moral context, the Revivalist transforms the text into a long list of morally non-committal legal commands. In essence, internalizing history with revelation is the point of a jurist's job.

The legal salience of many Revivalist claims rests on religious pretenses so that they ostensibly create an Islamic mythology that extends far beyond the *mythos* of early classical Islam. The predominance of legally untrained religious leaders has led to a misunderstanding of the classical Islamic legal tradition.

It is an irony of history that, while rejecting the institution of organized priesthood, Islam has often fallen into the hands of priests. . . . For centuries, ill-educated Mullahs [religious scholars] have often monopolized the pulpit. On the one hand, the Mullah has woven into Islam a crazy network of fantasy and fanaticism. On the other, he has often tried to use it as an elastic cloak for political power and expediencies. The result in both cases is chaotic. Inside the mosque, the Mullah has made Islam into a fairy tale immersed in strange superstitions [sic] and opposed to all forces of progress. Outside the mosque, he has often made it a pliant handmaid of power politics.²⁰⁰

198. See El Fadl, *supra* note 60, at 35. Consider the following:

The application of shari'ah law exclusively and its totality is not possible today without compromising admixtures of modern ideas (as exemplified by the reformers who adopt modern rationalism as axiomatic), or through stultifying simplification; it cannot be unless the world itself were to return to another age. And this is not feasible for whole societies without changes of cosmic proportions which are out of human hands, whatever may be possible for individuals. This was foreseen by prophecy, for there was a saying attributed to the Prophet that "In the beginning if one omits a tenth of the law, one will be punished, but at the end of time, if one accomplishes the law, one will be saved."

GLASSÉ, *supra* note 20, at 362.

199. See VORST, *supra* note 1, at 141.

200. FAROOQ HASSAN, *THE CONCEPT OF STATE AND LAW IN ISLAM* 4 (1981).

Revivalists' cursory view of the law and shortsighted evaluation of the sacred texts stands in sharp contrast to the classical approach to the law. The Revivalists' methodology, which includes renewed calls for *ijtihād*, denies Islamic law of any sense of integrity, seriousness, or viability in the modern age. "[I]n many ways, Islamic law became the playing field for shabby scholarship, political sloganism, and ideological demagogues."²⁰¹ Revivalists are often "political and social Islamic activists who [have] enjoyed a minimal degree of training in the Islamic scholastic tradition and reconstructed Islamic law into a set of highly simplified and dogmatic commands. [Revivalist] formulations . . . became poorly justified and a non-persuasive set of rules and not a methodology for an open process of discourse and determination."²⁰²

The key to understanding Revivalism is not in its advocacy of Islamic solutions, but rather in the fact that the Revivalists' position could only achieve salience in an era of legal ignorance. Although one can concede that every faith believes its opinions are paramount when compared to others, it seems illogical that, in the process of returning to fundamentals, an entire ideology could ignore the very premises which made an adherence to Islamic law great—implicit tolerance of divergent viewpoints. The contemporary Revivalist reaches not for Islamic law, but for the *fiqh*. Even in their attempt to grapple with Shafi'i's *fiqh*, they should not, as a matter of principle or as a matter of logic, conclude that the *fiqh* declares complete certainty. In light of the Prophet's death and the absence of God's revelation, it is imperative that tolerance be seen as the touchstone for both the *fiqh* and Islamic law as a whole.

What seem to fill the Revivalists' logical vacuum are implicit nationalist components oriented toward cultural and political dominance.²⁰³ For all their distaste of modernity, Revivalist positions could only gain recognition through the prolonged absence of Islamic institutions witnessed in the modern era. Revivalists are not satisfied with living according to their own personal preferences. Instead they attempt, sometimes violently, to crush any deviation from their views of what life should be.²⁰⁴ Returning to a point made earlier, one of the advantages of the classical legal system was its tendency to jealously guard those who could engage in the interpretation of the original sources. That jealousy was not entirely misguided, for as we have seen, in the modern era many Muslims, unaided by the dictates of history as well as the pitfalls of the sources, often take the burdens of interpretation

201. EL FADL, *supra* note 59, at 172.

202. *Id.*

203. See ESPOSITO, *THE ISLAMIC THREAT*, *supra* note 133, at 62–64.

204. See Khaled Abou el Fadl, *What Became of Tolerance in Islam?*, L.A. TIMES, Sept. 14, 2001, at B11.

too lightly. This, combined with the kind of intolerance imbued by notions of *jahiliyya*, allows them to deceive and misguide under the banner of Islamic law. Essentially, Revivalists have attempted to turn an incredible tradition of legal scholarship into a residue of mechanics and technicalities sufficient to appease the masses.²⁰⁵

V. THE REFORMIST RESPONSE

The growing devotion to contemporary Revivalism coupled with a strict adherence to its propositions would destroy the essential reasons classical Islamic law was regarded as a credible legal tradition in the first place. It calls for a resolute *response* by the silent majority of Muslim scholars. This Note has deliberately termed this group of contemporarily existing, but classically minded, group of scholars Reformists. Although at some level Reformists believe in the baseline proposition of fundamentalism—a return to religiosity—they are intent upon reforming the larger fundamentalist movement by making certain that there is an adequate fidelity to the classical legal tradition.

The traditional and protective institutions in place during the classical era have fundamentally changed under the innovations of modernity. In the past, the jurist was the natural defender of classical Islamic law and could wield a powerful sword against either the unprincipled scholar or the recalcitrant ruler.²⁰⁶ Traditionally, the tension between Islamic legitimacy and political expediency was mediated by rulers and jurists, whereby the former acknowledged the religious supremacy of Islamic law and the latter conceded the practical political authority of the rulers.²⁰⁷ Traditionally, jurists were highly regarded and well favored for their ability to avoid collusive tactics with the governing authority and safeguard the independence of religious law. Today, the State now controls the private endowments that sustain the juristic class. Thus, by intertwining the authority of the State with the jurist, it is unclear which voice speaks on matters of religion, especially with a religion that remains central to the dynamics of public legitimacy and cultural meaning.²⁰⁸

Reformists are essentially the mainstream of Islam, whose true adherence is not merely an invocation of fundamentals, but rather an adherence to the whole of the Islamic tradition. Unlike Revivalists like Qutb and Wahhab, it is often difficult to parse out well-named

205. *See id.*

206. *See* El Fadl, *supra* note 60, at 34; *see also* EL FADL, *supra* 59, at 15.

207. *See* EL FADL, *supra* note 59, at 15.

208. *See* El Fadl, *supra* note 60, at 34.

Reformists for two simple reasons. First, many do not wish to speak against the more politically powerful Revivalists. Second, for those who are courageous enough to share their message of tolerance, deliberation, and devotion, they do not often receive the same kinds of notorious acclaim as those Revivalists who espouse emotionally satisfying messages aimed at ameliorating a Muslim's basic concerns.²⁰⁹ Despite the lack of popularity that Reformists are likely to attain, there is a growing need to respond to the impending tide of Revivalism.

The intellectuals, the liberal-minded [of] the Islamic world are so apologetic and defensive; they concede to the fundamentalists more than what the fundamentalists are asking for themselves. Most of all, they concede to the fundamentalists the legitimacy and the right and the ability to define the issues and to define the space of discourse. That is something that we have to question among ourselves. We are not simply dealing with someone who holds a counterview, but we are dealing with our own internal defeat, which gives that counterview more weight than it deserves. One of the issues that one finds in discussing questions of cultural specificity or relativism and religious fundamentalism is the fear that by engaging in a cultural or religious discourse you are conceding the platform, you are conceding the terms of reference to the other side.²¹⁰

Consequently, if all Muslims were to submit to the Revivalist position of maintaining a corpus of law which is deprived of its innate vitality, one would find it to be much like how Dr. Abou El Fadl describes it. If Islamic law were nothing more than a set of positive commandments, i.e., a set of rules, then Islamic law is thriving. In fact,

Islamic law has staunchly resisted codifications or uniformity, at least until the contemporary age. The earmark of traditional Islamic methodology has been its open-ended and antiauthoritarian character. Fundamental to this character was an evolutionary process of exploration, investigation, and adjudication that, according to its own inner logic resisted settlement or inertia.²¹¹

209. Some prominent Reformists include Mahmoud Mohamed Taha, Khaled Abou El Fadl, and Abdullahi An-Na'im. See generally MAHMOUD MOHAMED TAHA, *THE SECOND MESSAGE OF ISLAM* (Abdullahi Ahmed An-Na'im trans., 1987).

210. Abdullahi An-Na'im, *Remarks of Abdullahi An-Na'im*, 44 AM. U. L. REV. 1383, 1384 (1995).

211. EL FADL, *supra* note 59, at 171.

If Islamic law means more than the sum of its rule, i.e., inclusive of *fiqh*, or the intellectual synthesis, then “Islamic law, for the most part, is dead.”²¹²

The major problem a Reformist faces in defending modernity’s institutions is that any implicit acceptance of modernity effectively erases the possibility of an independent religious evaluation of modernity’s institutions. As modernity itself has removed the independence of religious scholars to some extent, any views that in some way support an institution will always seem suspect.²¹³ In addition, because there is a lack of clear, representative authority to defend that paradigm of Islamic law, the responsibility of defending the classical paradigm actually falls on the shoulders of a broader group of quasi jurists who would inevitably partake in the same kinds of “independent” interpretation as their Revivalist counterparts. Both an emphasis on training and a fundamental adherence to the broad-based acceptance of tolerant positions evident in the classical era, however, can mitigate concerns that Reformists may become as unprincipled as Revivalists in their espousals of the law.

For all of the concerns voiced about qualifications, and about *ijtihad* more particularly, any observer of Islamic law has to take into account the fact that jurists, for all of their greatness, were still human. One need not probe too deeply to note the heavy role that scholars such as Malik, Ibn Hanbal, Hanafi and Shafi’i have played in the formulation of the law itself. Admittedly, classical Islamic law is built on the work of jurists, not merely the Divine. However, it is the repeated insistence for jurists that in some ways undermine attempts at tolerance.²¹⁴ Consequently, the insistence that caution be employed in formulating the law should also be extended with regard to jurists. From an unqualified dependence on jurists, to accepting opinions without juridical training at all, any authority that dislodges the role of the Deity should be regarded as suspect. So long as the gulf remains between humanity and the ultimate source of the Divine law, humanity, whether in the classical or the contemporary era, should not shy away from tackling the issues that surround the law.²¹⁵ In addition, throughout the course of Islamic history, one notes the disappearance of several Schools of Law, the departure of quasi rationalism and the emphasis placed on scholars rather than the authority of the jurists. This authoritarian persuasion within Islamic law, however, cannot be seen as a purely positive development. Often those willing to defend the classical era are motivated by a desire to respond to the Revivalists, but are muted

212. *Id.*; see also WAEL HALLAQ, *AUTHORITY, CONTINUITY AND CHANGE IN ISLAMIC LAW* 126 (2001).

213. See El Fadl, *supra* note 60, at 34–35.

214. See EL FADL, *supra* note 59, at 62–63.

215. See THE KORAN, *supra* note 5, at 6:57 (“Judgment is for God only”).

by their personal fidelity to the classical regard for jurists. It seems, however, that rather than placing a premium on juristic status alone, Reformists would likely profit more by tempering their opinions and by placing a premium on tolerance.

Although their legal assertions may be different, and their interpretive paradigms distinct, the Reformist position should *not* be viewed as a mutually exclusive paradigm. Rather it should be seen as encompassing the Revivalist model. Undoubtedly, Revivalists have made valid points and spurred a Reformist response. In fact, one could posit that it was the intellectual laziness of the Reformist position that gave rise to a more undisciplined and illogical Revivalist approach. The Revivalist position should not be underestimated, but engaged. Religious validity is integral, but validity must have more than political assent; it must have a religious basis.²¹⁶ The repressive modern regimes of the present have often been to blame for the extreme acts of the Revivalist movement.²¹⁷ To suppress the Revivalist position with greater ferocity will inevitably lead to an even greater, more venomous, and, arguably, more stubborn legal and political backlash.²¹⁸

To conclude, the Revivalist interpretation of Islamic law is intentionally simplistic. The only way for the Reformist to succeed in persuading contemporary Muslims of the religious validity of their positions is to establish comprehensive arguments that are religiously salient.²¹⁹

To fully comprehend the debate between Revivalist and Reformist, it is important to keep in mind the legal and social hurdles that classical Islamic law must overcome. These hurdles are not merely replicated legal notions that have reemerged from the past. Rather they are entirely novel legal concepts: the nation-state²²⁰ and modern public international law.²²¹ On the one hand, although the modern nation-state stands in stark contrast to the Islamic concept of a State, Muslim scholars have, in some ways, been able to rectify religious disparities by focusing their attention on Islamic law's most salient features including family law. On the other hand, the concept of international law poses an even greater religious difficulty. The following discussion attempts to address some of the

216. See AN-NA'IM, *supra* note 138, at 3.

217. See ESPOSITO, *THE ISLAMIC THREAT*, *supra* note 133, at 212–21.

218. See *id.* at 214–21.

219. See AN-NA'IM, *supra* note 138, at 3.

220. The next two Sections discuss two of the more obstinate hurdles to the Reformists' success and offer responses that are based on an understanding of classical Islamic law. Know, however, that these propositions are offered with the full cognizance that I am not a certified legal jurist. I operate on the compulsion that for whatever legal training I possess, it can be no less principled or less intellectual than the proffered and unprincipled arguments often foisted by my Revivalist counterparts.

221. See generally Westbrook, *supra* note 10.

more obvious misconceptions and demonstrate that, in the case of both the nation-state as well as international law generally, Islamic law's tenets remains a valid and resonating legal tradition.

A. *The Contemporary Nation-State and Islam*

Political scientists could justifiably argue that the religious acceptance of the conceptual nation-state would be redundant, as nearly the entire globe, including the Islamic world, is composed of nation-states.²²² Although empirically justifiable, this position misses the basic point that even political establishments must carry some notion of religious validity in order to gain widespread acceptance. Concomitantly, recent Revivalist movements, designed to justify Islam as the basis for their authority, typically make implementation of Islamic law a primary element of their reforms.²²³ In emphasizing exclusive divine sovereignty, however, Reformists often miss the more important point that, by confining rule to the Divine, they exclude their own political position.

One of the major hurdles for either Reformists or Revivalists to overcome is a religious acceptance of the modern nation-state.²²⁴ The nation-state itself is the embodiment of a popular sovereignty confined by restrictive borders and guided by the collective principle that it possesses the ability to determine its own destiny.²²⁵ A nation is thought to encapsulate a group of people who share certain characteristics.²²⁶ There is generally no need for a nation to possess an actual physical boundary, only a consciousness of shared identity.²²⁷ On the other hand, at its most basic level, a State could be thought of as a demarcation of territory. A State's physical territory is generally thought to be the limit of its authority and the boundary of its law.²²⁸ As axiomatic as these concepts might sound to a contemporary-minded person in the modern era, such notions are in stark contrast to the approach adopted by the Islamic classical legal tradition.

222. See HASAN MOINUDDUN, *THE CHARTER OF THE ISLAMIC CONFERENCE AND LEGAL FRAMEWORK OF ECONOMIC CO-OPERATION AMONG ITS MEMBER STATES* 18 (1987).

223. See, e.g., TIBI, *supra* note 143, at 104.

224. See, e.g., HAMID ENAYAT, *MODERN ISLAMIC POLITICAL THOUGHT* (1982); JAMES P. PISCATORI, *ISLAM IN A WORLD OF NATION-STATES* (1986); Ann E. Mayer, *Religious Law and Legal Pluralism*, 12 *CARDOZO L. REV.* 1015 (1991).

225. See Michael J. Kelly, *Political Downsizing: The Re-Emergence of Self-Determination, and the Movement Toward Smaller, Ethnically Homogenous States*, 47 *DRAKE L. REV.* 209, 211 (1999); see also Lloyd N. Cutler, *Foreword* to MORTON H. HALPERIN ET AL., *SELF-DETERMINATION IN THE NEW WORLD ORDER*, at xi (Carnegie Endowment for International Peace 1992).

226. See Kelly, *supra* note 225, at 213.

227. See *id.*

228. See *id.* at 212.

At its purest conceptual level, Islamic political science views the nation-state very differently from its Western counterpart. Islamic political science removes the notion of an active polity to decide the laws, where instead God alone has law-making authority.²²⁹ While a nation-state sees all law as originating in the law-making organs of the State, in Islam the law derives its status as such from being traced to God's command. Consequently, the impression with which classical Islamic law leaves us is that the law places severe limits on the power of the State. Rights pertain either to individuals or to God, but not to the State. Thus, the State may never be a party to a dispute or assert any claim of its own. When a Muslim pays taxes or serves in the military, this legal orientation suggests that he is fulfilling an obligation to God, not to the State.²³⁰ An Islamic State is only needed to secure the Islamic social order. A government that knows the limits of its authority can best realize this goal.

Of course, like in all realms of law, the fact that Islam and the nation state embrace contradictory theories of popular or legal sovereignty does not mean that the two systems must inevitably come into conflict, but often in seeking to live in compliance with the law, there remain difficult legal obstacles.²³¹

While Islam and the conceptual nation-state both emphasize the importance of the law, it is precisely this commonality that serves to undermine their relationship. Islamic legal scholars and contemporary political leaders, cognizant of the question of religious legitimacy, have to come up with a formula to avoid a religio-political clash while simultaneously working within the newly devised legal concept that is the nation-state. One way of accomplishing this has been to reconfigure classical Islamic law with modern political science concepts. For example, Fazlur Rahman, argued that the modern function of legislating could be soundly linked to the classical construct of *ijma*.²³² According to

229. Abul 'Ala Mawdudi, a Pakistani scholar whose works are read throughout the Muslim world, argues that the political philosophy of Islam is the "very antithesis of secular Western democracy . . . [and] the philosophical foundation of Western democracy is the sovereignty of the people." In Islam, however, the polity is founded on the sovereignty of God. SAYYID ABUL 'ALA MAWDUDI, *ISLAMIC LAW AND THE CONSTITUTION* 136–37 (Khurshid Ahmad trans. & ed., 2d ed. 1960). For a brief summary of Mawdudi's life and views, see Charles J. Adams, *Mawdudi and the Islamic State*, in *VOICES OF RESURGENT ISLAM*, *supra* note 133, at 99, 99–133.

230. See Adams, *supra* note 229, at 115–17.

231. At a theoretical level, the Islamic concept of the doctrine of *ikhtilaf* (or diversity of doctrine) provides a basis for law to accept other legal doctrine. See N.J. COULSON, *A HISTORY OF ISLAMIC LAW* 86–89, 102 (Edinburgh Univ. Press 1964).

232. See Fazlur Rahman, *The Islamic Concept of State*, in *ISLAM IN TRANSITION: MUSLIMS PERSPECTIVES*, *supra* note 150, at 261, 262–63.

Rahman, the concept of consensus would allow legislative variety. He claimed that changing the law was no more novel than changing the direction of consensus generally.²³³ Despite creative attempts to inculcate modern concepts with, arguably, their Islamic law-based analogues, more success has been found in bifurcating authority and wresting away authority in matters deemed to be the concern of family.

Another way in which many political theorists and legal scholars have attempted to reconcile these difficult theoretical problems of religion and the emergence of the nation-state is to confine Islamic law to issues relating to family law. Family law is thought to encompass the laws of domestic relations.²³⁴ In fact, many aspects of Muslims' life, including their views on the education of women, are found in family law.

Family law, which includes such important areas as marriage, divorce, and succession has enjoyed a pride of place within the *Shariah*, a prominence which reflects the *Quranic* concern for the rights of women and the family. Thus, the traditional family social structure as well as the roles and responsibilities of its members and family values may be identified in the law.²³⁵

One might come away concluding that Islamic family law properly entertains fidelity to its classical antecedents. However, this is not always the case. While some of the more superficial legal aspects touch on classical legal creations, laden throughout most of Islamic family "law" is the sporadic role of cultural practices. In fact, it has been properly noted that for many Muslims the distinction between a creature of culture and a construct based on Islamic law may not be evident. Thus, in examining much of the family relationships that predominate the Islamic world, one finds effusive examples of male-based authoritarianism.²³⁶ Even more troubling is the wholesale exclusion of women from education and, more specifically, education about the general fundamentals of the law.²³⁷ The

233. *Id.* at 262–63.

234. For a sense of how this area of law might be described as diffuse, see Carl E. Schneider, *The Next Step: Definition, Generalization and Theory in American Family Law*, 18 U. MICH. J.L. REFORM 1039, 1041 (1985).

235. ESPOSITO, *supra* note 3, at 12.

236. See Al-Hibri, *supra* note 119, at 5.

237. See *infra* Section VI.B.

To critically examine patriarchal Islamic jurisprudence from within the tradition, a woman must be familiar with the logic of *usul al-fiqh* (Islamic jurisprudence and its basic principles of reasoning). This requirement is difficult to satisfy because over the centuries patriarchy has drastically reduced women's access to the arena of Islamic jurisprudence despite the women's early involvement and contribution to it. Consequently, the demand for the education of women, particularly in the area of religious studies, is critical.

discussion about whether today's Islamic law is actually loyal to the classical tradition in this regard, as well as the participation of women in the formulation of the law, will resurface in Part VI.

In order to avoid upsetting the delicate balance between a politically viable nation-state and an arguably antithetical political philosophy, Islamic States have had to carve out areas of influence between religious authority and State-based authority. If this were the end of discussion, perhaps little more would need to be said about the State. However, assertions of exclusive authority have not only been challenged by State-based authorities, but also by an authority that extends beyond State boundaries—international law. Consequently, it soon became evident that even if States were willing to delegate authority over areas traditionally thought best to fit within the realm of religious law, international actors would continuously exert influence. Once in this position, Islamic States would not only need to account for their legal positions, but also defend such positions to a non-Muslim audience.²³⁸ Islamic law would have to contend not only with the notion of the secular nation-state, but also deal with how that nation-state conception could conform to an even broader framework of nations, most of which were not Islamic and many of which were not entirely empathetic to Islamic notions of legal and social relativism. Thus, it is the discussion of an Islamic international law that presents the next major contemporary challenge to classical Islamic law.

B. *Islam and International Law*

After carefully evaluating both the Reformist and Revivalist paradigms of Islamic law and how they can often lead to diametrical results, it becomes equally necessary to explore each paradigm's practical effects. Undoubtedly, there are many areas of substantive law that could be analyzed in order to examine the manifestations of either paradigm. Yet, international law poses a unique field of study. The selection of international law for this study is motivated in part by the fact that the realm of public international law itself is a novel legal establishment created without taking into account Islamic States generally, and in part because modern international law is the most likely arena where religio-legal justifications are likely to be tested. Thus, it is crucial for Islamic legal scholars to implicitly find some level of compatibility in their positions.²³⁹

Al-Hibri, *supra* note 119, at 5–6.

238. See Westbrook, *supra* note 10, at 832–33.

239. See generally Ann Elizabeth Mayer, *Universal Versus Islamic Human Rights: A Clash of Cultures or a Clash With a Construct?*, 15 MICH. J. INT'L L. 307 (1994).

At the outset it is important to note that there is an active political resistance to modern public international law for reasons that have little to do with religion *per se*.²⁴⁰ During the nineteenth century, Europe embarked on a mission to “civilize” the Islamic world. Within one hundred years, through the “triumph” of colonialism, all of Muslim Africa and most of the Islamic lands of Central and South Asia were under European control. With the dawn of the twentieth century, some 1,300 years after the Prophet’s death, Islam existed under the aegis of nation-states rather than empires.²⁴¹ After World War I, the Muslim States of Turkey, Iraq, Jordan, and Saudi Arabia were created by the intentional breakup of the Ottoman Empire. European powers, through the process of decolonization, gave birth to numerous other Islamic nation-states as well.²⁴² For all of the faith placed in the concept of nation-states, however, the European system committed two blunders. First, little attention was paid to the different peoples who would have to live together in these new political entities. Second, the basic concept of a Western nation-state flew in the face of Islamic tradition, which stressed a collective identity based on Islam.²⁴³ Consequently, every Islamic State not only had to contend with the conception of Statehood itself, but also deal with a system of rules and obligations created by the dominant European powers.²⁴⁴

As shall be seen, modern international law and the Islamic conception of international law are facially incompatible. Nevertheless, greater

240. See Esposito, *supra* note 14, at 26. Esposito explains:

Few took seriously or resolved the relationship of religious culture and [S]tate ideology. Somehow it was hoped that religion would just recede into private life. Neither rulers nor Western-oriented elites faced those issues. The fact is that the modern nation state has failed in many ways. The crises that generated contemporary Islamic revivalism in newly modernizing [S]tates occurred because after several decades, Western models of development were not working. Many concluded “the [S]tate isn’t turning out to be what we thought it would be, we’re not getting the benefits that we thought we would get.”

Id.

241. See RUTHVEN, *supra* note 44, at 289–92, 298.

242. See ESPOSITO, *THE ISLAMIC THREAT*, *supra* note 133, at 75, 193.

243. See LAWRENCE DAVIDSON, *ISLAMIC FUNDAMENTALISM* 12 (1998).

244. Consider the following:

If you remember nothing else, remember the following: [W]hile most Muslim countries gained their political independence a short time ago, today they are engaged in struggles or wars of cultural identity; they did not face the issue of cultural identity when they gained independence. When we talk about the future of Islam, we have to see it within that sense that we are talking about a 40- or 50-year period, which has had a tremendous impact in terms of today.

Esposito, *supra* note 14, at 25.

compatibility can be found once one removes the historically based animus that exists in many of the constructs of the law.

1. The Unfortunate Effect of Militancy and Its Contemporary Rejection

When a Muslim writes of international law, they write in response to established Western norms. Often the West is disinterested in the Islamic response.²⁴⁵ David Westbrook, one of the few scholars who have put forth a study of Islamic international law (*al-siyar*), concluded that international law is a concept that “Islam needs to account for, respond to, explain, or make useless.”²⁴⁶ For the classical Islamic scholar, modern public international law is foreign. “The *siyar* cannot be said to be compatible with the modern international jurisprudence with respect to treaty principles, customary law, precedent or even the teachings of eminent publicists.”²⁴⁷ “As a consequence, the authority of public (modern) international law over Muslims, its legal quality, is inherently problematic.”²⁴⁸ These problems, however, do not necessarily stem from a broad examination of religious belief. Rather, they are the consequence of a narrow view of history. It is through an examination of the concert of religion, religious society, and contemporary political institutions that we can argue for the demise of *al-siyar* doctrine.

Islam, as a religion, prevailed not only through the dissemination of a message ending polytheism. Its success was made resolute through vigorous military opposition.²⁴⁹ Despite a religious resistance to war generally, Islam was born in the midst of war and much of the bellicosity surrounding the birth of Islam permeated its religious world view. Islam was born during the decline of Byzantium and Persia, each of which spent much of their precious resources at war with one another.²⁵⁰ On a microcosmic level, the ascent of both the Prophet Muhammad and Islam was met with hostile tribal warfare. Rather than becoming involved in an ideological contest, the Prophet’s opponents opted for militant extermination in an attempt to silence the message.²⁵¹ The *hijira*, the monumental event which begins the Islamic calendar, is not merely the

245. In matters of international law, Muslims often take a defensive or almost regressive stance; an “apologetic preoccupation” rather than a proactive position. Westbrook, *supra* note 10, at 833. See generally ERVIN I.J. ROSENTHAL, *ISLAM IN THE MODERN NATIONAL STATE* (1965).

246. Westbrook, *supra* note 10, at 834.

247. Christopher A. Ford, *Siyar-ization and its Discontents: International Law and Islam’s Constitutional Crisis*, 30 TEX. INT’L L.J. 499, 500 (1995).

248. Westbrook, *supra* note 10, at 834.

249. See AN-NA’IM, *supra* note 138, at 142.

250. See *id.*

251. See *id.*; see also GLASSÉ, *supra* note 20, at 280–81; MILLER, *supra* note 146, at 90.

date which marks the Prophet's departure from Mecca, but, more important, the military expulsion of early Islam.²⁵² It was only through a bloodless invasion of Mecca that the Prophet could assure a halt to hostility against the Faith. The Prophet's migration marked a turning point in Islam's dealings with other religions.²⁵³ After the Prophet's death, both the message and militancy continued. Many Islamic conquests were admittedly aggressive and expanded the reach of the empire. Soon Islam encountered, and in some cases dominated other faiths.²⁵⁴ The Islamic realm expanded against a multiplicity of foes and the need for unity within the growing empire was essential. Thus, the import of Islam was often viewed through the lens of militancy rather than religiosity. However fortunate this formula might have been for the preservation of Islam, it is this early reliance on militancy that predominates and infects classical Islamic law's view of international law.²⁵⁵ The need for an Islamic international law did not become readily apparent for a century after the Prophet's death.²⁵⁶ The emphasis on militancy and the desire for unity within the Islamic empire was not lost on the *mujithads* who formulated the Schools of Law. Accordingly, a paradigm of militancy predominated classical Islamic law, despite a textual ambivalence to the idea of constant war.²⁵⁷

252. See ESPOSITO, *THE ISLAMIC THREAT*, *supra* note 133, at 29.

253. In particular, the Prophet had to deal with early Muslims as well as native Jewish tribes. See AN-NAI'AM, *supra* note 138, at 141–49; see also MONTGOMERY WATT, *MUHAMMAD AT MEDINA* 221–25 (1956).

254. In one hundred short years, Islam had built a magnificent, but deeply divided empire. By the time of the Prophet's death in 632 C.E., all of Arabia was under the control of Islam. In 637 C.E., Islam expanded and Muslims took over the Persian capital of Ctesiphon. In 638 C.E., parts of Byzantium collapsed following the Battle of Yarmouk and the Muslims entered Palestine. The Muslims continued their conquest of Syria, Lebanon, and Iraq until it was completed in 641 C.E. Additionally, Islam spread into Egypt. The Catholic Archbishop invited the Muslims to help free Egypt from Roman oppressors. This exemplified the alliances formed between Muslims, Christians, and Jews. Egypt, Persia and the Fertile Crescent were ruled by the four Rightly Guided Caliphs until 662 C.E.; later these regions were ruled by the Umayyad dynasty. By 651 C.E., the entire Persian realm came under the rule of Islam as it continued its westward expansion. At the same time, the Muslim conquest reached Morocco in North Africa. By 711 C.E., Muslims began the conquest of Sindh in Afghanistan. By 718 C.E., almost the entire Iberian Peninsula was under Islamic control. In 732 C.E., at the Battle of Poitiers, Islamic expansion was halted in France, but continued into parts of Asia and Africa. See generally *THE OXFORD HISTORY OF ISLAM* (John Esposito ed., 2000).

255. Empirical evidence of this pervasive militant mindset can be found in early *mujithads'* classification of the entire realm of foreign affairs under the rubric of *jihād*. GLASSÉ, *supra* note 20, at 209–10.

256. See William Samuel Dickson Cravens, Note, *The Future of Islamic Legal Arguments in International Boundary Disputes Between Islamic States*, 55 WASH. & LEE L. REV. 529, 536–39 (1998).

257. See, e.g., *THE KORAN*, *supra* note 5, at 2:190, 9:5, 9:12–13, 9:29, 9:36, and 9:73.

Classical era jurists created what would best be termed an “enabling doctrine” to permit a continued conflict with non-believers. This doctrine is known as the doctrine of *dar al-islam/dar al-harb*.²⁵⁸ According to this doctrine, the world is divided into two spheres: the *dar al-islam* (abode of peace)²⁵⁹ and the *dar al-harb* (abode of war).²⁶⁰ The latter was thought to be territory dominated by unbelievers²⁶¹ and the former included areas where Islam ruled. This construct then led to the creation of a corpus of law dedicated to *jihad*. The fiction of *dar al-islam/dar al-harb*, alongside the legal mechanics of *jihad*, is the animating force behind the classical Islamic concept of international law, known as *al-siyar*. Since classical Islamic law professed the true definition of internationalism as confined to the operation of war and peace, classical Islamic international law operated on a *jus ad bellum* standard.²⁶²

Today, every Islamic society belongs to nation-states that are part of a global political and economic system. They are members of the United Nations and subject to modern international law.²⁶³ None of these nation-states is religiously homogeneous, politically insulated, or economically independent from the non-Muslim world. Ostensibly, wealthy, purely Islamic countries like Saudi Arabia are, in fact, vulnerable to economic, security, technological, or other forms of dependency on non-Muslim parts of the world. The question then arises, whether, in the postcolonial era, the doctrine of *al-siyar* still possesses any of its religious or political salience. However, rather than concede that history has already answered this question, it is important as a matter of law to deconstruct classical

258. See LOUIS HENKIN ET AL., *INTERNATIONAL LAW: CASES AND MATERIALS* XXI (1993).

259. See GLASSÉ, *supra* note 20, at 93.

260. It should be noted that the geographic and religious distinctions of the *dar al-islam/dar al-harb* have been slightly modified over time. Some have defined these terms so as to allow Muslims governed by Islamic law, even if they reside under the political dominance of non-Muslims, to remain in the realm of the *dar al-islam*. One particularly salient example of this was the British control of India. However, the premise of an inviolable distinction between believers and non-believers remains. See MAJID KHADDURI, *WAR AND PEACE IN THE LAW OF ISLAM* 156–57 (1979).

261. The bifurcation of the world on religious terms is not a novel concept, nor is it confined to Islam. See generally JAMES TURNER JOHNSON, *THE HOLY WAR IDEA IN WESTERN AND ISLAMIC TRADITIONS* (1997) (discussing how the Augustinian division between *civitas terrena* (earthly city) and *civitas dei* (city of God) compares with the Islamic concept of *dar al-harb* and *dar al-islam*).

262. Ann E. Mayer, *War and Peace in the Islamic Tradition of International Law*, in *JUST WAR AND JIHAD* 195, 197 (John Kelsay & James Turner Johnson eds., 1991). But see MOINUDDUN, *supra* note 222 (discussing an emphatic rejection of the *jus ad bellum* stance of Islamic law).

263. It should be noted that, recently, Asian countries have been the strongest advocates of the position that human rights are not universal. Christina M. Cerna, *Universality of Human Rights and Cultural Diversity: Implementation of Human Rights in Different Socio-Cultural Contexts*, 16 *HUM. RTS. Q.* 740, 743 (1994).

Islamic international law in order to ferret out both the doctrine's limits and strengths, especially in light of the repeated calls by Revivalists for a strict adherence to Islamic law.

To recall, under the classical doctrine of *al-siyar*, the world is neatly bifurcated between realms of belief and non-belief. The rationale for such a distinction is that those living within the realm of believers exist on a significantly advantageous religious plane compared to those who do not. Consequently, there is a constant political and religious preoccupation with trying to make the world more advantageous for Muslims. As a matter of religion, the animating feature behind the *dar al-islam/dar al-harb* distinction rests with the empirical notion that a *dar al-islam* exists, or at one time existed. In response, first, one could dismiss the animating features of *al-siyar*, the *dar al-harb/dar al-islam* distinction, by pointing out that the Qur'an itself does not mandate this division of the world.²⁶⁴ Second, in response to claims that the *al-siyar* doctrine is the natural consequence of religion and religious history, one would likely find the legitimacy of the doctrine of *al-siyar* largely undermined by the very same concert of religious belief and religious history.

Islam, unlike other universalistic faiths such as Christianity, actually codified the idea of religious and social coexistence.²⁶⁵ Although Islam maintained an ideological leadership role for itself, it was not intended as means of social or military repression. Instead, this assertion of leadership was maintained as a default position, as faiths like Christianity made no mention of peaceful religious coexistence. In fact, the Qur'an actually discourages Muslims from declaring a self-righteous preeminence over others, especially in matters of religion. Thus, there is no reason to suppose that Qur'anic reprimands to other religious communities would, or should not be applied to the Islamic community. "That is a community that is bygone; to them belongs what they earned and to you belongs what you earn, and you will not be asked about what they had done."²⁶⁶ In fact, Islamic law recognizes the sovereign equality of Muslim and non-Muslim States.²⁶⁷ Specifically, within Islamic law, sovereign

264. See HALLAQ, *supra* note 42, at 236; see also THE KORAN, *supra* note 5, at 11:120 ("Had your Lord pleased, He would have united all mankind. They are still at odds, except for those to whom your Lord has shown mercy."). But see THE KORAN, *supra* note 5, at 2:62; 3:28, 85, 91, 118, 188; 4:56, 74, 76, 89, 140, 144, 150-151; 5:10, 51, 69, 82, 86; 7:36; 8:12, 28, 39-42; 9:5-6, 23, 29, 38-39; 10:4; 17:10; 22:19-22; 44:43-58; 46:4; 72:23; 48:16; and 98:6.

265. See, e.g., THE KORAN, *supra* note 5, at 2:62; 29:46.

266. *Id.* at 2:134.

267. See Sarvenoz Bahar, *Khomeinism, The Islamic Republic of Iran, and International Law: The Relevance of Islamic Political Ideology*, 33 HARV. INT'L L.J. 145, 190 (1992).

equality has been described as “no [external] power . . . enforce[ing] its will upon an independent sovereign.”²⁶⁸

In addition, religious history and human experience reveal that the separate realms of war and peace have never existed since the time of the Prophet. Recall that the Prophet made Medina the capital of the Islamic community and, in due course, that the city began to acquire the characteristics of a State. As time went on, the tiny city-state burgeoned into a well-organized government with its own sources of revenue, its own treasury, its own army, its own system of justice, and its own administrative and diplomatic apparatus.²⁶⁹ After the death of the Prophet, the infighting began. Three of the four Rightly Guided Caliphs were murdered. Soon thereafter, the religious split between the Sunnis and Shiites occurred.²⁷⁰ Within Islam came the wholesale rejection of the Mu'tazilite insistence on quasi rationalism, which rose to the domination of an insular form of Islamic law, making religious dissent more difficult.²⁷¹ Even under the Rightly Guided Caliphs, the political dimensions of the *umma* changed. The subsequent Umayyad and Abbasid dynasties were actual contenders, not allies.²⁷² In essence, the People of the Faith could no more reconcile Islam with themselves, let alone act as a unified force against other faiths.

Consequently, when the Prophet Muhammad died in 632 C.E., the collective religio-political *umma* for which the Revivalists clamored in their insistence that Islamic law be fully adopted actually *died* with the Prophet. Thus, when evaluated in light of history, the idea of the *dar al-islam* reveals little empirical advantage for Muslims, at least in a political sense. The shortcomings of the *dar al-islam* call into question whether the *dar al-harb* is truly an abode of war. Thus, the totality of circumstances regarding this doctrine actually undermines the justification that the *al-siyar* should take a *jus ad bellum* approach.

268. MUHAMMAD HAMIDULLAH, *MUSLIM CONDUCT OF THE STATE* 126 (1977). Hamidullah clarifies that “. . . it is the right of a State to administer all of its internal and external affairs in such a way that it is neither controlled nor interfered with by a foreign power.” *Id.*; see also THE KORAN, *supra* note 5, at 3:26 (“Lord, Sovereign of all sovereignty, You bestow sovereignty on whom You will and take it away from whom You please! You exalt whomever You will and abase whomever You please.”).

269. See M. Cherif Bassiouni, *Protection of Diplomats Under Islamic Law*, 74 AM. J. INT'L L. 609, 610 (1980).

270. See VORST, *supra* note 1, at 147.

271. See *id.* at 151–57.

272. See *id.*

2. Renewing Islamic Law's Resonance with International Law

As a matter of religion, society, and nationhood itself, the *dar al-islam* and *dar al-harb* have little credibility in the modern context. There are, in fact, ways in which classical concepts may find resonance in modern international law.²⁷³ While Islamic States have made strides in accepting international law, they have not given their full assent on a religio-philosophical-legal level.

Muslim [S]tates have accommodated themselves to the prevailing international norms while stopping short of assimilating them into Islamic political or legal theory. In other words, although they have committed themselves to the principles of international law, there has yet to occur a theoretical incorporation of these principles into a coherent and modern elaboration of Islamic international law.²⁷⁴

Thus, armed with religiously plausible arguments that defeat notions of fearing “the other”—a notion that predominated most of Islamic history—Islamic States can reap the advantages of both advancing the social and political progress of humanity as well as advancing their own political self-interests. Islamic States should be motivated to religiously accept modern public international law by removing religious and doctrinal hindrances that usually stand between them and other States. Islamic States are best suited to meet the challenges posed by their own political and social considerations, especially in the wake of modernity. In addition, through the acceptance of international law, Islamic States can advance the entire field for the benefit of humanity, while at the same time implanting the distinctive qualities of Islamic States. The fundamental purpose and function of modern international law is the regulation of the relationship between all of the members of the international community according to the principles of equality and justice, and the promotion of peace among those States and their respective subjects.²⁷⁵

Although scholars such as Westbrook point to a lack of established international law, these scholars fail to recognize that Islamic law is inherently international.²⁷⁶ Hasan Moinuddun, conducting a study of international Islamic organizations, concluded that Islamic international law

273. See Chase, *supra* note 129, at 385 (arguing that, broadly speaking, Islamic law and modern public international law are compatible).

274. Sohail H. Hashmi, *The Power of Religion in International Society and its Islamic Malcontents*, 20 FLETCHER F. WORLD AFF. 13, 18 (Spring 1996).

275. See AN-NA'IM, *supra* note 138, at 3.

276. See Cravens, *supra* note 256, at 542–44.

has a common juridical background.²⁷⁷ In addition, one must be cognizant of the fact that, even at a superficial level, Islamic law occupies a superlative position in the legal arena of many States and functions much like a modern international framework.²⁷⁸ Within this larger framework, one finds resonant concepts of *jus cogens* and preemptory norms derived from the Qur'an and Islamic law. Thus, despite present definitional shortcomings, it is difficult to call Islamic law anything but compatible with international law.

After examining the tenets which make up the classical Islamic legal tradition, one finds that "Islamic" concepts and "international" concepts have much in common. Overarching much of this discussion is a basic tenet that Islamic States follow in the Christian conviction of Grotius. That is, their authority is in some ways derived from God and, therefore, Islamic States should implicitly be cognizant of their religious obligations when they attach their signatures to international agreements.²⁷⁹ On a more human level, one litmus test of international legal compatibility is found in article 38 of the Statute of the International Court of Justice (ICJ Statute). Article 38 argues that the sources of law for international legal considerations shall apply in the following situations:

- (a) International conventions whether general or particular, establishing rules expressly recognized by the contesting states;
- (b) International custom, as evidence if a general practice accepted as law;
- (c) The general principles of law recognized by civilized nations;
- (d) Subject to provisions of Article 59, judicial provisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of the rules of law.²⁸⁰

One constant in the international legal process is the concept of *pacta sunt servanda*—the obligation that treaties be fulfilled. The Islamic response is that "[t]he principle of *pacta sunt servanda* is recognized by all Muslim jurist-theologians."²⁸¹ In fact, according to the

277. See MOINUDDUN, *supra* note 222, at 18.

278. See *infra* Appendix (detailing the legal systems of the various members of the Organization of the Islamic Conference).

279. See generally Mark Janis, *American Versions of the International Law of Christendom: Kent, Wheaton and the Grotian Tradition*, 39 NETH. INT'L L. REV. 37 (1992).

280. Statute of the International Court of Justice, June 26, 1945, art. 38, 59 Stat. 1055, T.S. No. 993.

281. MAJID KHADDURI, *WAR AND PEACE IN THE LAW OF ISLAM* 204 (AMS Press 1979) (1955).

Qur'an, treaty obligations are a part of the Divine mandate, and may even be used to supercede agreements with fellow Muslim communities. "But if they seek your help in the cause of the true Faith, it is your duty to assist them, except against a people with whom you have a treaty."²⁸² Religious compliance with a treaty eclipses temporary "State" arrangements of mutual convenience. Consequently, there is a stronger moral force for self-proclaimed Islamic States to adhere to treaty obligations, even if the underlying substantive law proves less than Divine.²⁸³ More importantly, proof of *bona fide* and purely Islamic efforts to uphold an international treaty is found in the standard set forth by the Treaty of Hdaybiya.²⁸⁴ This treaty between the Prophet Muhammad and the idolatrous tribes of Mecca was aimed at achieving a truce between the warring sides.²⁸⁵ Even after repeated breaches by the Meccans, Muhammad's entry into Mecca came without incident. The Treaty of Hdaybiya offers two important points of consideration. First, the treaty, at that time, was in fact an international treaty of peace between Muslims and some of the more aggressive tribes of Arabia. Second, although a military reprisal was justified under the terms set forth in the treaty, an extreme counterresponse never materialized.²⁸⁶

Additionally, Islamic law has implicitly accepted the powerful role of custom in framing legal standards. Both the international necessity of using custom to expound upon treaty obligations, as well as the Islamic necessity of using the Prophet's custom to expound upon Islamic legal principles, signals, at some basic level, a common appreciation for the implicit legal authority not found in either a particular treaty or in the Qur'an. Such a common reliance on agreed-upon reference points suggests an implicit willingness by both international law and classical Islamic law to use sources and methodologies that expand the rubric of the law. One perhaps simplistic example in international law is the reliance on the Vienna Convention on Treaties to expound upon the meaning of article 38 of the ICJ Statute. In Islamic law, one finds an analogous concept in the Treaty of Hdaybiya, where the Qur'an serves to explicate the meaning of that treaty's text. Even the distinction between *jus cogens*, a more historical and natural law, and customary law, a common conventional law, finds a mirror image of the history replicated in the Sunnah and the conventions endorsed by the Qur'an. In addition, there has been an increasing international legal consciousness among Islamic

282. THE KORAN, *supra* note 5, at 8:72.

283. See, e.g., MOINUDDUN, *supra* note 222, at 48.

284. See *id.* at 49. The caliph has always retained the authority to enter into treaty arrangements for the Islamic State. See Bassiouni, *supra* note 269, at 610.

285. See Bassiouni, *supra* note 269, at 611-12; see also WATT, *supra* note 253.

286. See Ford, *supra* note 247, at 519.

States. Specifically, the formulation of the Organization of the Islamic Conference (OIC), as well as the concomitant formulation of the Islamic International Law Commission (IILC) resonates with the notion of a growing international consciousness.

The OIC Charter contains two important international concepts.²⁸⁷ First, the parties to the Charter recognize the legitimacy of international boundaries, and more importantly, through their implicit recognition of nation-states as legitimate legal actors in the international arena, the Charter acts as an empirical rejection of the classical doctrine of the *dar al-harb/dar al-islam* within the *al-siyar*. Second, the Charter's language closely resembles a Western notion of the nation-state and, as such, can be seen as persuasive indication of an Islamic willingness and capability to participate in the wider scope of international affairs.

To conclude, a new era of international law will follow when Islamic States can fully reject, at a religious level, the *dar al-islam/dar al-harb* distinction. For Islamic international law to continue its move toward full compatibility with modern international law, however, Reformists must defeat Revivalist attempts to masquerade social reforms that are essentially inconsistent with the classical tradition for tolerance within Islam. Reforms of the domestic Islamic law require that Islamic international law must take aim at larger considerations. In order to be faithful to the spirit, rather than the letter of classical Islamic law, novel Islamic international paradigms must be expansionary and malleable in order to allow new legal doctrines to reflect future exigencies. These exigencies require Islam-derived international decrees to take into account all relevant socio-economic conditions before consenting to any general, binding principles.²⁸⁸

287. See CHARTER OF THE ORGANIZATION OF THE ISLAMIC CONFERENCE, at <http://www.oic-un.org/about/Charter.htm> (last visited Oct. 20, 2002).

288. Although the process set forth is admittedly vague, there is a further catalyst: the full-fledged institution of democracy. By accepting the premise that Islamic law is defined heavily by juridical constructs, a true revolution must consider popular demands and assent to all-encompassing restrictions. As a result, Reformists must place a premium on educational reform so that legitimate democracy can take over the process. Until there is self-sufficient democracy, international law can play an important role in *forcing* the continued evolution of Islamic law. One could argue that any articulation of the Qur'an must stand firm and not be compromised by either the Sunnah or an obscure lingual context requiring that principles be drawn from purely Qur'anic textual references. Additionally, the application of religious law must look at the progression of the Qur'an in its entirety. Although, at first glance, this contention seems identical to the previous principle, it actually forces scholars to square the development of concepts in the entire legal corpus, not just the rigidity of choice phrases.

VI. WOMEN'S RIGHTS AND THE CLASH OF IDEOLOGIES

The fate of Islamic law will largely be determined by how it is characterized. Accordingly, whether this characterization is made by Reformists or Revivalists is extremely important. Both contemporary ideologies have become particularly interested in the rights of women and the way in which the classical Islamic legal tradition has dealt with those rights as compared to the treatment accorded to women by modern international law.

In a study of Islamic law's struggle with women's rights, one must consider three areas of discussion. First, in the formation of classical Islamic law, there appears to be a vast divide between the Qur'anic spirit and the actual form of the law. Second, it is important to examine how the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) resolutely articulated international legal standards for the rights of women. Third, one must understand how Islamic States have "Islamically" reconfigured their domestic legal structures specifically to comply with international legal standards and how they have articulated their version of human rights more generally. While Reformists have had some success in religiously reconfiguring Islamic law through the external dialectic of international law, real success in overhauling women's status under Islamic law can only be realized when women themselves are thoroughly involved in shaping the legal and ethical considerations which affect them the most.

Both because of the contemporary criticism of Islam's treatment of women, and a general portrayal of Islamic law as debasing the rights of women, it is important to take into account the role that Islam played in revolutionizing the status of women.²⁸⁹ Islam was the most progressive religion in the Near East. The Qur'an banned female infanticide; granted women the right to inherit,²⁹⁰ to divorce and to maintain their dowries; and slowed polygamy in the Arabian Peninsula. In Islam, women and men are subject to the same religious obligations such as prayer, fasting, and a pilgrimage to Mecca. In addition, under Islamic law, a woman's right to own property is just as absolute as a man's.²⁹¹ Male kin cannot

289. "Islam was the first religion to honor the woman and the first religion to outline legislation to stipulate that women should be treated as an independent human entity." *Report of the Round Table Workshop: CEDAW and Islam and the Human Rights of Women*, UNITED NATIONS DEVELOPMENT FUND FOR WOMEN, Oct. 1999, at www.arabwomenconnect.org/english/western_asia/round_report.html.

290. See, e.g., Zainab Chaudhry, Comment, *The Myth of Misogyny: A Reanalysis of Women's Inheritance in Islamic Law*, 61 ALB. L. REV. 511, 516 (1997) (giving women the right to inherit is well recognized "as one of the most significant aspects of the Islamic law . . .").

291. See Sayeh & Morse, *supra* note 24, at 327.

handle a woman's financial interests without her permission.²⁹² A woman must specifically consent to marriage and cannot be forced to accept a husband she does not want.²⁹³ In cases of divorce, women have exclusive guardianship rights over children until they reach puberty, an important departure from past practice. Most importantly, Islam overturned tradition by according women equal religious status before God. No longer were women denied their humanity. Their souls, like the souls of men, were precious to God. In addition, women, like men, were deemed worthy of dignity and respect.²⁹⁴ As a result of this new status and the revolution it worked on Arab communities, women became pillars of early Muslim society. Accordingly, it was not the spirit of the Qur'an that subjugated women to men, but the will of society.

With regard to the Sunnah and subsequent history, the Prophet's treatment of women in marriage, specifically his relationship with his first wife, Khadijah, has been glorified as the ideal marriage. Contrary to the tradition of polygamy that prevailed at the time in Arabia, the Prophet Muhammad remained a faithful and devoted husband. Khadijah was, in fact, Muhammad's first convert to Islam and his strongest supporter in the struggle to establish the new faith. Several women, notably Fatima—daughter of the Prophet Muhammad and wife of Ali, the fourth of the Rightly Guided Caliphs—played important roles in the propagation of the faith.²⁹⁵ Additionally, A'isha, a later wife of the Prophet, was noted for her education and intelligence, and she was often consulted about the teachings of the Prophet after his death.²⁹⁶ A'isha also became the modern-day equivalent of a military general, and actively opposed the succession of Ali as caliph upon the death of Caliph Uthman. As one author put it, "[t]here is no greater scholar than A'isha in the learning of the Koran, obligatory duties, lawful and unlawful matters, poetry and literature, Arab history and genealogy."²⁹⁷

In spite of the above-described historical tradition, the spirit of equity never fully crystallized under Islamic law. Much of the progressive momentum of Islam died with the Prophet. For the vast majority of religious scholars, where the Qur'an gave no more, they gave no further. This relationship of inequity remains to the present day.

292. JOHN L. ESPOSITO, *ISLAM: THE STRAIGHT PATH* 79 (1991).

293. See Sayeh & Morse, *supra* note 24, at 326–27.

294. See *id.* at 321.

295. To Shi'a Muslims, Fatima is actually revered as an authoritative source of the Prophet's sayings and deeds.

296. A'isha was so well regarded in matters of faith that the Prophet told Muslims to "take half [their] religion from this woman." GERALDINE BROOKS, *NINE PARTS OF DESIRE: THE HIDDEN WORLD OF ISLAMIC WOMEN* 85 (1995).

297. JAN GOODWIN, *PRICE OF HONOR: MUSLIM WOMEN LIFT THE VEIL OF SILENCE ON THE ISLAMIC WORLD* 42 (1994).

The Islamic woman appears to be the very object now that she was hundreds of years ago, with little personal power independent of the men in her life. Men and women in Islamic society are not treated as equals; rather women are persons whose status is derived from the men in her life. Those male figures include, but are not limited to, her father and her husband. An Islamic marriage follows the traditional contract theory of marriage: an offer, an acceptance, and consideration (dower). There must also be marital equality, and no impediments to the marriage. Most Islamic sects perceive marital equality to be through lineage, freedom from defects, religious piety, and property.²⁹⁸

Despite the Qur'anic impetus and subsequent history offered above, women's rights under Islam have essentially been shackled by the confines of culture and made so intertwined in the mind of classical jurists that, suddenly, cultural practices possessed the seal of religious law. One reason for the continued codification of such cultural practices was the near absence of women jurists.²⁹⁹ Unlike the earlier discussion about Islamic international law, where one could utilize changing legal and social apparatus to alter its *present* religious validity, one finds that women's rights under Islam have suffered so greatly from the heavy hand of culture that it is extremely difficult for Reformists to find valid alternative religious constructs without causing great internal strife. Additionally, one could conclude that, as a matter of Islamic law, the subject of women's rights will likely be the most difficult challenge for Reformists, and the arena in which Revivalists are likely to be the most adamant. Although far from an impossible task, Reformists may need the aid of international institutions, as well as the help of women themselves to force Islamic States to reconsider their Islamic legal positions.

A. *The External Dialectic: International Law and the Rights of Women*

International law and the persistence of many of its actors has helped persuade, and, at times, perhaps force Islamic States to reexamine their laws related to women. In 1967, the United Nations promulgated the Declaration on Women (the Women's Declaration), which essentially offered the world the "definitive international legal instrument requiring

298. JAMAL J. NASIR, *THE STATUS OF WOMEN UNDER ISLAMIC LAW AND UNDER MODERN ISLAMIC LEGISLATION* (2d ed. 1994).

299. See al-Hibri, *supra* note 119, at 6-7.

respect for the observance of the human rights of women.”³⁰⁰ However, it was the United Nations Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) that sought to eradicate harassment against women and to promote equality among the sexes in their social and legal rights:

The Convention provides the basis for realizing equality between women and men through ensuring women’s equal access to, and equal opportunities in, political and public life—including the right to vote and to stand for election—as well as education, health and employment. In turn, [S]tates [P]arties agreed to take all appropriate measures, including legislation and temporary special measures, so that women can enjoy all their human rights and fundamental freedoms.³⁰¹

The Convention’s ambitious agenda gained widespread popularity, and, unlike past considerations which dealt with the legal status of women in international agreements, Muslim States were very attentive to the Convention’s details. This enhanced attention is attributable to both the language utilized in the Convention and concerns about the Convention’s enforcement. In particular, Islamic States voiced their hostility toward article 16 of the Treaty, which requires States to end prejudicial and customary forms of discrimination related to marriage and domestic relations.³⁰² Despite a wide disparity of religious opinions, some Islamic countries, such as Egypt, Tunisia, and Morocco, registered reservations to article 16 predicated on Islamic law.³⁰³ These Islamic States’ thinly veiled attempts to block international criticism was met by a surprisingly intense amount of scrutiny. Many States charged that reservations based on Islamic law were so broad in their scope that they contradicted the object and purpose of the Convention, thus violating of the Vienna Convention on Treaties.³⁰⁴

300. Rebecca Cook, *Reservations to the Convention on the Elimination of All Forms of Discrimination Against Women*, 30 VA. J. INT’L L. 643, 643 (1990).

301. G.A. Res. 2263, U.N. GAOR, 22d Sess., U.N. Doc. A/6880 (1967), reprinted in 1 UNITED NATIONS, HUMAN RIGHTS: A COMPILATION OF INTERNATIONAL INSTRUMENTS 145 (1993).

302. *Id.* art. 16, 1249 U.N.T.S. at 20.

303. See Bharathi Anandhi Venkatraman, *Islamic States and the United Nations Convention on the Elimination of All Forms of Discrimination: Are the Shari’a and the Convention Compatible?*, 44 AM. U. L. REV. 1949, 1960 (1995).

304. Under article 19(a) and (b) of the Vienna Convention, a country can make reservations to a treaty at the time of signing or ratifying so long as the treaty does not prohibit formulation of reservations or limit the types of reservations that may be made. Vienna Convention on the Law of Treaties, May 23, 1969, art. 1, 1155 U.N.T.S. 331, 333–36 [hereinafter Vienna Convention]. Mere compliance with these two subsections, however, does not auto-

A community of nations summarily refused to accept the reservations as a matter of internal social concerns of Islamic States.³⁰⁵ The same multitude of nations also adroitly addressed concerns about the unfair intrusiveness of the international community arguing that upholding international standards was not a question of cultural relativism—international agreements aim for higher standards.³⁰⁶ For most of the global community, it was difficult to accept a reservation like Islamic law as an excuse to internal reforms. Today, with the fiftieth anniversary of the Universal Declaration of Human Rights passed and the end of the Cold War, simple acquiescence to reservations is no longer an acceptable practice.³⁰⁷ The international debate required that Islamic States provide a clear and legitimate response to the challenges posed by the Convention.

As a consequence of Islamic States' early intransigence and the fierce criticism of the world community, many Islamic States re-evaluated the extensiveness of their Islamic law reservation. Because of early intransigence, at the outset, only five Islamic States had adopted the treaty by 1981.³⁰⁸ By 1994, however, twelve Islamic States had ratified the treaty. Importantly, no Islamic State filed a reservation to article 7 and article 8 dealing with political equality among the sexes.³⁰⁹ Even more remarkable, Tunisia, Pakistan, and Bangladesh have implemented laws following in the Convention's path. Although by no means a complete success,³¹⁰ buoyed by treaty and popular support, some nations did alter their domestic laws. For example, Tunisia began to implement a series of women's rights modifications cleverly using

matically render a reservation valid. Article 19(c) of the Vienna Convention prohibits reservations incompatible with a treaty's object and purpose. *Id.*

305. See generally Venkatraman, *supra* note 303.

306. *Id.*

307. Despite thoughtful argument, the notion that cultural relativism should pervade is not a persuasive argument:

With a coherent philosophy of human rights yet to emerge, the universality of human rights appears to be the rhetoric of a political project, rather than the expression of an established fact. This incoherence, however, should not mask the fact that what might be called a "shifting universality" has, in fact, solidified itself as people from various perspectives have come to see human rights as the common language by which their political and social ideals can gain force with general consensus on a number of rights.

Chase, *supra* note 129, at 383.

308. *Id.*

309. See Cook, *supra* note 300.

310. See, e.g., Kathryn Christine Arnold, *Are the Perpetrators of Honor Killings Getting Away with Murder? Article 340 of the Jordanian Penal Code Analyzed Under the Convention on the Elimination of All Forms of Discrimination Against Women*, 16 AM. U. INT'L L. REV. 1343, 1397 (2001) (asserting that Jordan has failed to take affirmative steps to eradicate discrimination against women who are victims of honor killings in violation of CEDAW).

previously dismissed religious doctrine to justify domestic legal changes. In particular, Tunisian officials produced redefined Qur'anic principles in order to adhere to broader Convention provisions. By 1981, Tunisia gave divorced women the right to a level of maintenance to which they were accustomed while married, a debt that continues until the husband's death or until the former wife's economic condition improves.³¹¹ In 1992, stepping away from the harsh and intransigent policy that women could not divorce men despite abuse or deprivation, Tunisia modified divorce so that it cannot be pronounced until after a family magistrate has attempted to reconcile the spouses. If there are minor children, at least three reconciliation hearings must be held, no less than thirty days between each. During divorce proceedings, family magistrates are empowered to issue orders, when urgent, regarding spousal residences, alimony, custody of children and visitation rights.³¹² In addition, Tunisia has already legalized abortion and provides free abortions when performed in public facilities for those not covered by medical insurance.³¹³ Tunisia's reinterpretation of Islamic law according to the Hanafi view permitted abortions before the soul was formed, which is deemed to be up to four months after conception.³¹⁴ By 1993, the Tunisian government vowed to endow women with new rights, including the suppression of domestic violence.³¹⁵

Some States, likely taking their cue from the treaty language, not only controverted basic Islamic law, but also controverted well-established legal principles. For example, CEDAW furthered women's political rights in articles 7 and 8 by laying down provisions ensuring

311. See Michele Brandt & Jeffrey Kaplan, *The Tension Between Women's Rights and Religious Rights: Reservations to CEDAW, by Egypt, Bangladesh and Tunisia*, 12 J.L. & RELIGION 105, 110–13 (1995–96) (construing the Personal Status Code of Egypt, 1976). The reformed divorce laws of Tunisia, Iran, Iraq, and South Yemen are more progressive in that they require the pronouncements of divorce to be made in a court of law. See Noel Coulson & Doreen Hinchcliffe, *Women and Law Reform in Contemporary Islam*, in *WOMEN IN THE MUSLIM WORLD* 44 (Lois Beck & Nikki Keddie eds., 1978).

312. See Amending Certain Articles of the Personal Status Code, Act No. 93-74, July 12, 1992, art. 67, construed in Brandt & Kaplan, *supra* note 311, at 129–31.

313. See Consideration of Reports Submitted by States Parties Under Article 18 of the Convention: Combined Initial and Second Reports of State Parties—Tunisia, Apr. 12, 1994, CEDAW/C/TUN/1–2, at 19, construed in Brandt & Kaplan, *supra* note 311, at 128 n.110 [hereinafter Tunisia Report].

314. See Azizah al-Hibri, *Marriage Laws in Muslim Countries: A Comparative Study of Certain Egyptian, Syrian, Moroccan, and Tunisian Marriage Laws*, 4 INT'L REV. COMP. PUB. POL'Y 227, 240 (1992); see also Azizah Y. al-Hibri, *Family Planning and Islamic Jurisprudence*, Address as Part of the Panel on Religious and Ethical Perspectives on Population Issues Convened by the NGO Steering Committee at Prepcom II of the International Conference on Population and Development at the United Nations, May 19, 1993, available at www.religiousconsultation.org/family_planning_&_Islamic_jurisprudence_by_al_Hibri.htm.

315. See Tunisia Report, *supra* note 313, at 32.

that women not only have the right to vote, but also the right to stand for election in all publicly elected bodies and to hold public office. Additionally, the right to represent government in the international sphere is specifically provided for in article 8.³¹⁶ Although no Islamic States entered a reservation, there was the possibility of conflict between classical Islamic law and the Convention's provisions. The main source of prejudice against women in Islamic law entering the political sphere emanates from a *hadith* related by Abu Bakr—the Prophet's closest friend and first caliph. He claimed that when the Prophet Muhammad was told that a woman leader had been appointed in Persia, he commented, "A nation will never prosper if it is led by a woman."³¹⁷ Islamic States summarily rejected that inequitable interpretation of Islamic law, by essentially denying that the *hadith* constituted Sunnah. Specifically, Egypt, Bangladesh, and Pakistan have guaranteed the franchise to women in politics, with Bangladesh having women retain a certain number of seats in its parliament. In particular, Bangladesh and Pakistan have had women at the highest levels of political leadership.³¹⁸

Although CEDAW represents a powerful example of how international influence could force Islamic States to reevaluate their legal principles, and also their domestic laws, it seems only likely that the most effective way in which to change Islam-based laws is through Islam-based standards. There is already an implicit Islamic duty under current international treaties and conventions recognized in religion and in law to protect women from persecution.³¹⁹ For most of the debate, Revivalists have readily challenged the existence and validity of universal human rights standards.³²⁰ These challenges, however, are not

316. See CEDAW, *supra* note 301, arts. 7, 8.

317. Fatima Mernissi, *A Feminist Interpretation of Women's Rights in Islam*, in LIBERAL ISLAM 112, 113–114 (Charles Kurzman ed., 1998).

318. Prime Minister Sheikh Hasina of Bangladesh and former Prime Minister Benazir Bhutto of Pakistan. See Urfan Khaliq, *Beyond the Veil?: An Analysis of the Provisions of the Women's Convention as Stipulated in the Shari'ah*, 2 BUFF. J. INT'L L. 1, 22 (1995).

319. See generally Abdullahi An-Na'im, *The Rights of Women and International Law in the Muslim Context*, 9 WHITTIER L. REV. 491 (1987).

320. Many Muslims use the concept of cultural relativism to legitimize their adherence to Islamic law. They contend that it is difficult, if not entirely impossible, to create universal human rights standards that will apply equally to all members of the global community. Their position generally suggests that—given the diversity of cultural traditions, political structures, and levels of development in the world—it is virtually impossible to define a single distinctive and coherent human rights regime. See Bilhari Kausikan, *Asia's Different Standard*, 92 FOREIGN POL'Y J. 224, 227 (1993). But see An-Na'im, *supra* note 114, at 46–48 (arguing that Islamic law, in its true form, addresses the fundamentals of human rights, An-Na'im identifies the most important human rights principles in Islam to be dignity and brotherhood; equality among members of the community without regard to race, color, or class; respect for the honor, reputation, and family of each individual; the right of each individual to be presumed innocent until proven guilty; and individual freedom). For a tentative exploration into a legiti-

entirely legal. Instead they largely focus on issues of cultural relativism and rely largely on the political divide between the Islamic and Western worlds. Rather than engage human rights on a legal level, Islamic States, until recently, relied on their jaded political views. Consequently, in a move that corresponded with the fiftieth anniversary of the Universal Declaration of Human Rights, the Islamic world actually began to articulate Islamic law's stance on human rights generally. In 1990, all of the nations of the Organization of the Islamic Conference produced the Cairo Declaration on Human Rights in Islam.³²¹ The Declaration is perhaps one of the most unequivocal examples of Islamic international collectivism, as it is uniquely Islamic and was formulated by every State within the Organization of the Islamic Conference. "The Cairo Declaration assumes more general significance than the previous Islamic human rights schemes because it embodies an approach to rights that has been endorsed by the foreign ministers of the Organization of the Islamic Conference."³²²

Additionally, the Declaration exemplifies an important aspect of classical Islamic law—an implicit rejection of the classical antagonism toward the concept of a nation-state and the acceptance of internationalism. A review of the Declaration's contents reveals that, facially, it contains both international and religious aspects. Consequently, the Declaration's hybridization of Islamic and international standards should be seen as a positive indication of an Islamic willingness to incorporate contemporary political concepts into their own legal legacy. At the outset of the Declaration, international standards are invoked: "[R]eaffirming their commitment to the [U.N.] Charter and fundamental Human Rights, the purposes and principles of which provide the basis for fruitful cooperation amongst all people."³²³

In addition, one of the Declaration's critics, Ann Elizabeth Mayer, conceded the significance of that document in its blending of Islamic and modern international principles, and as representing a departure from the recognized canons of Islamic law:

Like other Islamic human rights schemes, the Cairo Declaration is actually a hybrid of international and Islamic elements. *It does not have an exact counterpart in the Islamic legal legacy.* Like

mate "universalization" of universal human rights, see HUMAN RIGHTS IN CROSS-CULTURAL PERSPECTIVES: A QUEST FOR CONSENSUS (Abdullahi Ahmed An-Nai'im ed., 1992).

321. Cairo Declaration on Human Rights in Islam, Aug. 5, 1990, *reprinted in TWENTY-FIVE HUMAN RIGHTS INSTRUMENTS* (Columbia Univ. Center for the Study of Human Rights ed., 1994) [hereinafter Cairo Declaration]; U.N. GAOR, World Conf. on Hum. Rts., 4th Sess., Agenda Item 5, U.N. Doc. A/CONF.157/PC/62/Add.18 (1993) (English translation).

322. Mayer, *supra* note 239, at 327.

323. MOINUDDUN, *supra* note 222, at 186.

the preceding Islamic human rights schemes, the Cairo Declaration, in formulating its civil and political rights, borrows extensively from terms and concepts taken from the International Bill of Human Rights and combines them with elements inspired by Islamic law or the authors' conceptions of Islamic values.³²⁴

Moreover, the Declaration explicitly affirms sex equality in areas where Muslim women are often thought to suffer discrimination. In particular, the Declaration expressly guarantees equality in the workplace. One "shall be entitled—without any discrimination between males and females—to fair wages for his work without delay, as well as to holiday allowances and promotions which he deserves."³²⁵ The "right to marriage" is guaranteed to both men and women without restrictions.³²⁶ The Declaration also provides protection to children without distinction between girls and boys. Although the Declaration provides the best yardstick by which to measure Islamic legal standards when dealing with human rights, there are significant questions that remain. Specifically, article 6 enunciates a number of duties which are imposed upon women: "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 rights to retain her name and lineage."³²⁷

Although the arguments proffered against the Declaration do serve as a basis for future criticism and discussion, there is also an implicit legal value in possessing such a Declaration. For one, the Declaration moves beyond the mere invocations of Islamic law, and purports to articulate what in fact *is* Islamic law.³²⁸ From this point of view, the Declaration becomes a means for Western critics to continue charging that Islamic States simply are not complying with international treaties in their own right. More importantly, however, it also gives Islamic legal scholars an opportunity to either challenge, or in some way circumvent, the religious propositions set forth in the Declaration. The Declaration could be seen as a sort of modern-day *ijma*, or at least modernity's most likely analogue. That being said, the Declaration may offer Islamic

324. Mayer, *supra* note 239, at 328 (emphasis added).

325. Cairo Declaration, *supra* note 321, art. 13, at 192.

326. *Id.* art. 5, at 191. *But see* ANN E. MAYER, ISLAM AND HUMAN RIGHTS: TRADITION AND POLITICS 120 (1991) [hereinafter MAYER, ISLAM AND HUMAN RIGHTS]; Mayer, *supra* note 239, at 333 (noting that the freedom does not extend to the husband's religious affiliation).

327. Cairo Declaration, *supra* note 321, art. 6, at 191.

328. The most pervasive qualification to the Declaration is that Islamic law governs all rights and freedoms stipulated. Some have viewed this negatively. Although The Cairo Declaration is a not the definitive document on human rights and Islam, it moves the religion in the right direction. *See* MAYER, ISLAM AND HUMAN RIGHTS, *supra* note 326, at 76–78.

States a religious cover from Revivalists' continued criticism that State compliance with international treaty obligations is contrary to Islamic law. Thus, like the enabling doctrine that characterized the *dar al-islam/dar al-harb* distinction, the Declaration's insistence that human rights are Islamic in character may further enable more complete compliance with treaty bodies such as CEDAW. In fact, Islamic States, taking their cue from the Qur'anic example, may be encouraged to become religiously expansive in the fulfillment of their obligations.³²⁹

Ten years after the Declaration, there came a vaguely affirming set of principles. The Islamic Educational, Scientific, and Cultural Organization (ISESCO), a unit of the OIC, delivered the Rome Declaration on Human Rights in Islam, which was ostensibly more of a Statement of Principles³³⁰ regarding human rights, rather than an entirely separate approach to the Declaration. The Statement of Principles, however, did not directly endorse the Declaration. In some ways, the Statement of Principles could be seen as a disembodied affirmation of the Declaration, or even a retreat from the more absolutist language in the Declaration.³³¹ It urged governments to examine "international conventions relating to [man's] rights, compared their contents and efficiency in dealing with human rights, and has noticed their shortcomings in terms of meeting his growing and advanced needs . . . [and encouraged] all governments of the world and all international bodies, organizations and institutions concerned with human rights, to revise the international declarations and conventions on human rights in an objective manner in order to fill the gaps therein."³³² Although it is not entirely clear which document the Statement of Principles was directed to inform, it reaffirmed the continued religious ratification of human rights generally, and perhaps just as importantly, it religiously endorsed

329. One example of novel approaches to reinterpreting women's rights is the gradualist hermeneutic in the Qur'an. "Women have fundamental freedoms within Islam, and all the goals of equality espoused by the West can be achieved by applying the notion of gradualism inherent in the religion. Thus, the best way to solve this problem may not lie in dictating from the outside what standards must be met by the culture, but rather in encouraging a liberalization of the interpretation of the religion by Islamic scholars themselves." Sayeh & Morse, *supra* note 24, at 332.

330. Rome Declaration on Human Rights in Islam, in *Human Rights in Islamic Teachings*, Annex 2, at <http://www.isesco.org.ma/> (last visited Feb. 7, 2003) (report of World Symposium on Human Rights in Islam in Rome, Feb. 27, 2000).

331. This conclusion is premised on two points. First, there was no specific mention of the Cairo Declaration, though the Cairo Declaration itself affirmed the Universal Declaration of Human Rights. Second, the specific values mentioned in the Statement of Principles, although they do not retract from the Cairo Declaration, do suggest that uniformity be attempted with regard to the panoply of human rights treaties and, at the same time, they promote reconciliation among the civilizations of the world. *Id.*

332. *Id.* (emphasis added).

the notion of a unified, rather than relative, set of human rights. The report of the symposium, however, proffered a final and troubling comment. “[W]e cannot, in all objectivity, set the Universal [D]eclaration [of] Human Rights, a man-made product, to judge Islam, which is a divine revelation.”³³³ This statement suggests a continued need to further articulate religiously valid principles, and implies that the debate between Islamic States and international law will continue. While the international legal arena offers broad-based hope for forcing Islamic States to reevaluate their legal stance, the direct participation of women will likely produce the most tangible, as well the most beneficial results in making the standards of CEDAW a reality.

B. *The Internal Dialectic: The Need for Women’s Participation in the Law*

Previously, there was a heavy emphasis on the role that international law could play in instigating changes to State practice with regard to women’s status. Prompted by the international community, many Islamic States engaged in reforms which attempted to meet the Revivalist expectations that Islamic law be implemented, while at the same time importing the proper amount of history and circumstance to sufficiently support a Reformist point of view. Over time, Islamic States have begun their own, home-grown articulations of the law. However, the more difficult question is not merely how to instigate reform, but how to *perfect* reform so that it will establish a semblance of permanence. The answer to this question lies in the participation of women to best articulate their own respective legal positions:

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.³³⁴

To repeat a maxim, there is always an implicit need to ground one’s opinions in religious belief when changing and reforming Islamic law.

A more effective strategy for establishing women’s . . . rights would ground such rights within an appropriate framework that

333. *Conclusion, in Human Rights in Islamic Teachings, supra* note 330, at 6.

334. *Al-Hibri, supra* note 119, at 3.

takes into account, not only Islam and Muslim laws, and their varying interpretations, but also the specific cultural and political context of any society, and is based on a bedrock of universal human rights standards.³³⁵

As a matter of history, male jurists monopolized classical Islamic law. Many of its principal leaders, although speaking on issues regarding women generally, spoke only in a representational capacity and imported their own patriarchal conditions. However, it should be noted that these kinds of patriarchal impulses were not evident during the genesis of Islamic law, especially with regard to the Sunnah. While most of the Sunnah is obviously male centered, it did not exclude the powerful role that early women played in the development of Islam. In dealing with women's roles in society, often the proper course of action was found not in the Prophet himself, who did not always deal directly in such matters, but rather through the women closest to him, such as his wives and daughters. The conclusion that one should come away with is that women, in a deeply historical sense, are often in the best position to articulate their own rights, as well as their own representational capacity.

For literally centuries, the patriarchal dominance of law not only depended on male jurists to represent women's legal positions, but with this representation also brought the likely unintended effects of imposing one's culture. It is also likely that an abundance of time has only helped add to the codification of these principles. Instead, Reformism of women's status under Islam can only fully succeed if the "representative" discourse that has dominated classical Islamic law can be overturned through an active participation of women themselves.

CONCLUSION

Islamic law is undergoing a process of reevaluation. In an era of renewed religiosity, and in the face of modernity's perils, two factions have emerged—the Revivalists and the Reformists. Both claim to be faithful adherents to Islamic law; both are situated to determine the path the law will take. The challenge to either ideology is not a simple one. They must address modernity's political and social ills, while at the same time justifying their particular paradigm as religiously valid. In order to succeed in making the transition from the past to the present, Islamic law and its followers must overcome modernity's most obstinate hurdles—the

³³⁵ Sajeda Amin & Sara Hossain, *Religious and Cultural Rights: Women's Reproductive Rights and the Politics of Fundamentalism: A View from Bangladesh*, 44 AM. U. L. REV. 1319, 1336 (1995).

changes associated with the evolution of the nation-state and the changes associated with the growth of an international legal regime. Perhaps the greatest challenge to those advocating change is how to deal with the religiously sensitive subject of women's rights under Islamic law, while working within the given framework provided by international law and, at the same time, working through the changing membrane of both contemporary notions of the nation-state and international law.

This Note concludes where it began, asking, "What is Islamic law?" Although I possess no definitive answers, I, like other Muslims, believe success is often found in the struggle.

Islamic law is founded on the logic of a Principal Who guides through instructions. Those instructions are issued to the agents who have inherited the earth and who are bound to the Principal by a covenant. . . . [T]he point of the covenant is not to live according to the instructions, but to attempt to do so. Searching the instructions is core value in itself—regardless of the results, searching the instruction is a moral virtue. This is not because the instructions are pointless, but because the instructions must remain vibrant, dynamic, open, and relevant. . . . [I]t is impossible for a human being to represent God's Truth—a human being can only represent his or her own efforts in search of this truth. The ultimate and unwavering value in the relationship between human beings and God is summarized in the Islamic statement, "And, God knows best."³³⁶

336. EL FADL, *supra* note 59, at 265.

APPENDIX
MEMBERS OF THE ORGANIZATION OF THE ISLAMIC CONFERENCE
AND THEIR RESPECTIVE LEGAL SYSTEMS³³⁷

AFGHANISTAN: Information not available

ALBANIA: Supreme Court, chairman of the Supreme Court is elected by the People's Assembly for a four-year term, does not accept compulsory ICJ jurisdiction

ALGERIA: Socialist, based on the civil law system and Islamic law; judicial review of legislative acts in *ad hoc* Constitutional Council composed of various public officials, including several Supreme Court justices; does not accept compulsory ICJ jurisdiction

AZERBAIJAN: Based on the civil law system

BAHRAIN: Based on the common law and Islamic law

BANGLADESH: Based on the common law and Islamic law

BENIN: Based on the civil law system and customary (Islamic law) law; does not accept compulsory ICJ jurisdiction

BOSNIA HERZEGOVINA: Constitutional Court, consists of nine members: four members are selected by the Muslim/Croat Federation's House of Representatives, two members by the Republika Srpska National Assembly, and three non-Bosnian members by the President of the European Court of Human Rights

BRUNEI: Based on the common law; Islamic law supersedes certain areas of law in a number of areas

BURKINA FASO: Based on the civil law system and Islamic law

CAMEROON: Based on the civil law system, with common law influence; does not accept compulsory ICJ jurisdiction

CHAD: Based on the civil law system and Chadian customary law; does not accept compulsory ICJ jurisdiction

COMOROS: Based on the civil law system and Islamic law in a new consolidated code

DJIBOUTI: Based on the civil law system, traditional practices, as well as Islamic law

EGYPT: Based on the common law, Islamic law, and Napoleonic codes; judicial review by Supreme Court and Council of State (oversees validity of administrative decisions); accepts compulsory ICJ jurisdiction, with reservations

GABON: Based on the civil law system and customary law; judicial review of legislative acts in Constitutional Chamber of the Supreme Court; does not accept compulsory ICJ jurisdiction

337. See CENTRAL INTELLIGENCE AGENCY, WORLD FACTBOOK (2001), at <http://www.cia.gov/cia/publications/factbook/index.html>.

GAMBIA: Based on a composite of the common law, Islamic law, and customary law; accepts compulsory ICJ jurisdiction, with reservations

GUINEA: Based on the civil law system, customary law, and decree; legal codes currently being revised; does not accept compulsory ICJ jurisdiction

GUINEA-BISSAU: Information not available

INDONESIA: Based on Dutch-based civil law, substantially modified by indigenous concepts and by new criminal procedures code; does not accept compulsory ICJ jurisdiction

IRAN: The Constitution codifies Shi'a version of Islamic law as the law

IRAQ: Based on Islamic law in special religious courts, the civil law system elsewhere; does not accept compulsory ICJ jurisdiction

JORDAN: Based on the civil law system and Islamic law; judicial review of legislative acts in a specially provided High Tribunal; does not accept compulsory ICJ jurisdiction

KAZAKHSTAN: Based on the civil law system

KUWAIT: Civil law system with Islamic law significant in personal matters; does not accept compulsory ICJ jurisdiction

KYRGYZSTAN: Based on the civil law system

LEBANON: Mixture of Islamic law, canon law, Napoleonic code, and civil law; no judicial review of legislative acts; does not accept compulsory ICJ jurisdiction

LIBYA: Based on Italian-based civil law system and Islamic law; separate religious courts; no constitutional provision for judicial review of legislative acts; does not accept compulsory ICJ jurisdiction

MALAYSIA: Based on the common law; judicial review of legislative acts in the Supreme Court at request of supreme head of the federation; does not accept compulsory ICJ jurisdiction

MALDIVES: Based on Islamic law with a mixture of common law, primarily in commercial matters; does not accept compulsory ICJ jurisdiction

MALI: Based on the civil law system and customary law; judicial review of legislative acts in Constitutional Court (formally established March 9, 1994); does not accept compulsory ICJ jurisdiction

MAURITANIA: A combination of Islamic law and modern law

MOROCCO: Based on Spanish-based civil law system and Islamic law.

MOZAMBIQUE: Based on Portuguese-based civil law system and customary law

NIGER: Based on French civil law system and customary law; does not accept compulsory ICJ jurisdiction

NIGERIA: Based on the common law, Islamic law and tribal law, presently attempting to universalize Islamic law

OMAN: Based on the common law and Islamic law with ultimate appeal to the monarch; does not accept compulsory ICJ jurisdiction

PAKISTAN: Based on the common law, attempt to fully codify Islamic law has also begun; accepts compulsory ICJ jurisdiction, with reservations

QATAR: Discretionary system of law controlled by the emir, although civil codes are being implemented; Islamic law is significant in personal matters

SAUDI ARABIA: Based on Islamic law; commercial disputes handled by special committees; does not accept compulsory ICJ jurisdiction

SENEGAL: Based on the civil law system; judicial review of legislative acts in Constitutional Court; the Council of State audits the government's accounting office; does not accept compulsory ICJ jurisdiction

SIERRA LEONE: Based on the common law and customary laws indigenous to local tribes; does not accept compulsory ICJ jurisdiction

SOMALIA: Most regions have reverted to Islamic law with a provision for appeal of all sentences

SUDAN: Based on the common law and Islamic law; as of January 20, 1991, the now defunct Revolutionary Command Council imposed Islamic law in the northern states; Islamic law applies to all residents of the northern states regardless of their religion; some separate religious courts; accepts compulsory ICJ jurisdiction, with reservations

SURINAME: Based on Dutch legal system incorporating French penal theory

SYRIA: Based on the civil law system and Islamic law; special religious courts; does not accept compulsory ICJ jurisdiction

TAJIKISTAN: Based on the civil law system; no judicial review of legislative acts

TURKEY: Derived from various European continental legal systems; accepts compulsory ICJ jurisdiction, with reservations

TURKMENISTAN: Based on the civil law system

TUNISIA: Based on the civil law system and Islamic law.

UGANDA: In 1995, the government restored the legal system to one based on the common law and customary law; accepts compulsory ICJ jurisdiction, with reservations

UNITED ARAB EMIRATES: All emirates have secular and Islamic law for civil, criminal matters.

UZBEKISTAN: Evolution of Soviet civil law; still lacks independent judicial system

YEMEN: Based on Islamic law, Turkish law, the common law, and local tribal customary law; does not accept compulsory ICJ jurisdiction