# WOMEN'S RIGHTS AND SHARI'A LAW: A WORKABLE REALITY? AN EXAMINATION OF POSSIBLE INTERNATIONAL HUMAN RIGHTS APPROACHES THROUGH THE CONTINUING REFORM OF THE PAKISTANI HUDOOD ORDINANCE

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Hudood laws are a tool in the hands of men—with these laws they can rape women and be totally unaccountable... Many religious scholars are producing research which says that these laws are not in accordance with the Holy Koran. They are political tools to control women in our country.<sup>1</sup>

The divides are not Islam and western society, the divide is between people who have different values. We must promote connections between people who want to contribute to human values. People who share that commitment can collaborate across cultural divides.<sup>2</sup>

### INTRODUCTION

There is continued debate over the ability to reconcile Islamic Shari'a<sup>3</sup> law with universal human rights, specifically women's rights.<sup>4</sup>

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- 1. Pakistani Women Speak Up on Rape, BBC NEWS, Sept. 26, 2005, http://news.bbc.co.uk/2/hi/south\_asia/4271504.stm (quoting Uzma Saeed, a legal activist working for the repeal of the Hudood Ordinances in Lahore, Pakistan).
- 2. Religion and Culture: Meeting the Challenge of Pluralism: Abdullahi Ahmed An-Na'im, http://www.religionandpluralism.org/AbdullahiAnNaim.htm (last visited Dec. 17, 2006) (quoting Abdullahi Ahmed An-Na'im, Charles Howard Candler Professor of Law, Emory University).
- 3. Also written as Shari'ah. *See* THOMAS PATRICK HUGHES, A DICTIONARY OF ISLAM 572 (1895), *available at* http://answering-islam.org/Books/Hughes/index.htm.

With the United States' war against terror and the war in Iraq, tensions are mounting and cultural divides between Islamic nations and the western world seem to be widening rather than moving toward consensus. Scholars have argued human rights work in these countries cannot be effective so long as there is a perception of "exclusive Western authorship." This association of the West with human rights has been tied particularly to women's rights, with Islamic traditionalists arguing female liberation would lead to a degeneration of the traditional Islamic family.

This Note challenges the concept of international human rights as separate from the possibility of human rights protection under Shari'a law, using Pakistan's Hudood Ordinance of 1979 (Ordinance) as a case study. The unreformed Ordinance, under Shari'a law, placed rape in the same category as adultery (*zina*). The law has garnered international attention through attempted reforms and compromises that would make the law more equitable to female rape victims; these reforms have been adamantly opposed by Islamic fundamentalist groups in Pakistan but were partially passed in November 2006.

Part I examines Pakistan's emergence as an independent nation, along with its religious identity and the continuing tension between the secular and religious legal systems, including an analysis of the Hudood Ordinance and its evolution. Part II explores why international human rights mechanisms have been unsuccessful in achieving significant reforms and how they could be modified or used in tandem with Islamic conventions to bring about change for women. Part III hypothesizes on workable realities within Pakistan, using both international instruments and working within the current constructs of Shari'a and secular law. Part IV concludes that the international human rights movement must be flexible in its methods, partnerships, and approaches to Shari'a law, particularly within countries, such as Pakistan, which have formed much of their national

<sup>4.</sup> See Jason Morgan-Foster, Third Generation Rights: What Islamic Law Can Teach the International Human Rights Movement, 8 YALE HUM. RTS. & DEV. L.J. 67, 70 (2005) (explaining competing theories on the universality of human rights norms with respect to Islam).

<sup>5.</sup> Id. at 71.

<sup>6.</sup> See Donna Lee Bowen, Islamic Law and the Position of Women, in ISLAM AND SOCIAL POLICY 44, 45-46. (Stephen P. Heyneman ed., 2004).

<sup>7.</sup> The Offense of Zina (Enforcement of Hudood) Ordinance (VII of 1979) § 6 (Pak.).

<sup>8.</sup> Salman Masood, World Briefing Asia: Pakistan: Uproar over Changes to Rape Laws, N.Y. TIMES, Aug. 22, 2006, at A6; Pakistan Votes to Amend Rape Law, BBC NEWS, Nov. 15, 2006, http://news.bbc.co.uk/2/hi/south\_asia/6148590.stm.

identities through their religious beliefs. Shari'a law provides a framework for women's rights, but only through solidified bodies of law and through certain interpretations. Through flexibility and inclusiveness, these constructs can bridge the gap between Shari'a and universal international human rights doctrines.

# I. HISTORY OF PAKISTANI LAW AND RELIGIOUS IDENTITY

# A. Pakistan's Identity

The nation-state of Pakistan was formed with the partition of British India in 1947. The division was along religious lines, creating a Hindu majority in India and a Muslim majority in Pakistan. The formal separation was an attempt to end the violence that had broken out between the two groups. Thus, religion has always been central to the identity of the Pakistani people and the formation of a cohesive nation: "Continuing controversy over the role of Islam in Pakistan's political life and tension among the country's ethnic groups have dominated the process of state-building in Pakistan since independence."

Pakistan's "founding father," Mohammed Ali Jinnah, advocated for a separate nation-state because he feared persecution of the Muslim minority in India; however, he did not intend to form a theocracy within the state of Pakistan.<sup>12</sup> Instead, he desired a more representative government for the people.<sup>13</sup> Jinnah was also an advocate for women's rights.<sup>14</sup>

Jinnah's ideas of government were not entirely accepted; fierce debate over the role of Islam within the formation of legal structures continued in Pakistan for nearly a decade after the country's inception, leading to severe instability and lack of faith in the

<sup>9.</sup> Jeffrey A. Redding, Constitutionalizing Islam: Theory and Pakistan, 44 VA. J. INT'L L. 759, 763 (2004).

<sup>10.</sup> See Double Jeopardy: Police Abuse of Women in Pakistan, HUMAN RIGHTS WATCH (1992), available at http://www.hrw.org/reports/1992/pakistan/.

<sup>11.</sup> *Id.* at 7.

<sup>12.</sup> Id. at 8.

<sup>13.</sup> Id.

<sup>14.</sup> See Mazna Hussain, Note, "Take My Riches, Give Me Justice": A Contextual Analysis of Pakistan's Honor Crimes Legislation, 29 HARV. J.L. & GENDER 223, 238 (2006) (citing Jinnah's criticism of traditional customs that marginalize women).

government.<sup>15</sup> The military coup of 1958 came as little surprise.<sup>16</sup> General Ayub Khan, the coup's leader, attempted to institute secular legal reform, which was particularly advantageous to women as the reforms affected family law ordinances; however, he also detracted from the freedoms of the people by banning all political parties.<sup>17</sup> The Khan years saw increased growth of industry, but also increasing problems with eastern Pakistan, now Bangladesh, which was then advocating for its independence. The country entered a bloody civil war in 1971, its most severe political crisis.<sup>18</sup> India eventually intervened and Bangladesh was declared independent.<sup>19</sup>

Elections were finally held in Pakistan in 1972, ending years of martial law. Zulfikar Ali Bhutto was elected into the office of prime minister.<sup>20</sup> Women participated in large numbers during this political period, which also saw the introduction of a new constitution, passed The Constitution itself demonstrates the continuing compromise between conservative religious authorities and advocates for a modern, secular nation-state that advocated for the equal rights of all its people. Article 2 states, "Islam shall be the state religion of Pakistan;"22 while Article 25 asserts, "(1) All citizens are equal before law and are entitled to equal protection of law; (2) There shall be no discrimination on the basis of sex alone; (3) Nothing in this Article shall prevent the State from making any special provision for the protection of women and children."<sup>23</sup> Bhutto attempted to bridge the interests of the religious and secular leaders with his "Islamic socialist" program, but many religious leaders decried his legal reforms and push for equality as "un-Islamic."<sup>24</sup>

In 1977, Bhutto was reelected despite much opposition and rioting in the streets.<sup>25</sup> Martial law was imposed, but that same year, Bhutto and his progressive regime were overthrown by General Zia ul-Haq during the country's third military coup.<sup>26</sup> Attempts and

<sup>15.</sup> See Double Jeopardy, supra note 10, at 8.

<sup>16.</sup> See id. at 8-9.

<sup>17.</sup> *Id*. at 9.

<sup>18.</sup> *Id*.

<sup>19.</sup> *Id*.

<sup>20.</sup> Id.

<sup>21.</sup> *Id*.

<sup>22.</sup> PAK. CONST. art. 2.

<sup>23.</sup> Id. art 25.

<sup>24.</sup> Double Jeopardy, supra note 10, at 9-10.

<sup>25.</sup> Id. at 10

<sup>26.</sup> Id.

arguments to make Pakistan more "Islamic" had been a continuous part of the country's history; "each time Pakistan faced hard times, the leader most able to promise a stronger future of Islam prevailed." Zia depended on Islamic values and rhetoric to legitimize his regime and consolidate his power. Claiming to work within the constructs of the existing constitution, Zia instituted multiple changes according to the desires of the religious conservatives.<sup>29</sup>

The "Islamization of Pakistan's constitution" began in 1962, when Bhutto tried to appeal to religious fundamentalists by instituting the repugnancy clause, which stated, "No law shall be repugnant to the teachings and requirements of Islam as set out in the Qur'an and Sunnnah and all existing law shall be brought into conformity therewith." Zia continued this trend, becoming much more extreme in his changes, most importantly setting up the Shariat courts as a "parallel" to the "mainstream" judicial system. The Hudood Ordinances were placed under the jurisdiction of the Shariat judicial system. 22

# B. Shari'a Law, the Hudood Ordinance, and "Islamization"

The Hudood Ordinances and the Shariat courts in Pakistan claim to be based upon the true Shari'a law.<sup>33</sup> The Shari'a "covers all aspects of human existence, including life after death. It does not represent a set of theories and rules to be utilized within the limits of social government, but signifies a comprehensive way of life."<sup>34</sup> This way of life is governed under the *fiqh*, Islamic jurisprudence, on the basis of Shari'a.<sup>35</sup> Shari'a law begins with the textual reference point

<sup>27.</sup> Julie Dror Chadbourne, Never Wear Your Shoes After Midnight: Legal Trends Under the Pakistan Zina Ordinance, 17 Wis. INT'L L.J. 179, 182 (1999).

<sup>28.</sup> See id. at 183.

<sup>29.</sup> See Redding, supra note 9, at 765-71.

<sup>30.</sup> See Amjad Mahmood Khan, Note, Persecution of the Ahmadiyya Community in Pakistan: An Analysis Under International Law and International Relations, 16 HARV. HUM. RTS. J. 217, 224 (2003).

<sup>31.</sup> See PAK. CONST. art. 203; see also Redding, supra note 9, at 770-71 (discussing the parallel tracks along which the courts were supposed to function).

<sup>32.</sup> See Redding, supra note 9, at 771-72.

<sup>33.</sup> See id. at 760-62.

<sup>34.</sup> See Mawil Izzi Dien, Islamic Law: From Historical Foundations to Contemporary Practice 35 (2004).

<sup>35.</sup> See Bowen, supra note 6, 47-48.

of the Qur'an, 36 which was the book of revelations of the Prophet Muhammad.<sup>37</sup> The words and actions of the Prophet formulated the Sunna<sup>38</sup>: "the Shari'a has, apart from others, two important sources of formulation: the Qur'an and the Sunna, and both ... have two important ingredients: the normative and the contextual."<sup>39</sup> The Qur'an is to trump the Sunna if there are contradictory passages or wisdoms set out, particularly when dealing with the contextual passages.<sup>40</sup> The goal is to separate out the normative principles from the context in which the Prophet lived, much of which does not apply today; however, "sometimes the normative in the Qur'an, which imbibed principles, did not appeal to [Islamic jurists] as much as certain traditions which were closer to their 'adat (practices) and hence they even went to the extent of giving precedence to the Sunna over the Qur'an." Formally, the Sunna is considered a necessary source of Islamic jurisprudence, where "all the principles of Islam were revealed in a general form," but submissive to the Qur'an. 42 Functionally, the Sunna has been used as an interpretive tool, often to maintain practices over principles.<sup>43</sup>

Additionally, the *ijmā*', or consensus of scholars, provides a secondary (but still divine) source for interpretation of the law.<sup>44</sup> Traditionally, *ijmā*' had to be a consensus of all scholars, but today, without an overarching Islamic body and belief system, this requirement has been lessened. With the political, social, and religious consequences that scholars can face through their interpretations of Islam, some have advocated for the entire concept of *ijmā*' to be reformed or lessened to a "human," as opposed to a divine, source of law along with individual reasoning.<sup>45</sup> *Ijtihād*, or

<sup>36.</sup> Also transliterated as Quran, Koran, or Al-Quran. *See, e.g., Qur'an*, WIKIPEDIA, http://en.wikipedia.org/wiki/Quran (last visited Apr. 19, 2007).

<sup>37.</sup> Bowen, supra note 6, at 48.

<sup>38.</sup> See HUGHES, supra note 3, at 622.

<sup>39.</sup> ASGHAR ALI ENGINEER, THE RIGHTS OF WOMEN IN ISLAM 14 (2d ed. 2004).

<sup>40.</sup> Id. at 15.

<sup>41.</sup> *Id.* at 14-15.

<sup>42.</sup> DIEN, *supra* note 34, at 38.

<sup>43.</sup> See ENGINEER, supra note 39, at 13-18. The hadith, or Prophetic tradition, is another mechanism that has been used to maintain context over religious principle and hence formulate many of the discriminatory laws against women: "suffice it to say that many a hadith (tradition) came into being later in keeping with the cultural and socio-religious prejudices of the 1st and 2nd centuries of the Islamic calendar. These traditions must be treated with great caution and one should not rush to draw conclusions from them." *Id.* at 16.

<sup>44.</sup> See DIEN, supra note 34, at 40.

<sup>45.</sup> See id. at 47-48.

individual reasoning, was developed to allow the Shari'a to be adaptable to new and changing circumstances; though it is less persuasive authority than the texts, it is recognized as a legitimate source of lawmaking. In addition to the variety of legal sources making up Shari'a, there are distinct schools of thought, each with different legal interpretations: Maliki, Hanafi, Shari'i, and Hanbali. Pakistan adheres to the Hanafi school, though there are no strict lines of demarcation between the schools and their jurisprudence.

The Pakistani Shariat courts were set up in 1979 under the new Zia government with the promise to bring Pakistan back to its Islamic core of values. While the intact civil system was supposed to have jurisdiction over the "fundamental rights" violations, the Shariat courts assumed jurisdiction for family law matters and criminal law falling under the Hudood Ordinances.<sup>49</sup> The court was composed of two levels.<sup>50</sup> The lower level included eight judges, each appointed by the President.<sup>51</sup> There was a stipulation that the Chief Justice must be qualified to serve in the secular court system.<sup>52</sup> There were three *ulema*, Islamic legal scholars and clergymen, who could take part in the court.<sup>53</sup> Appeals from the Federal Shariat Courts go to the special Shari'a law branch of the Federal Supreme Court.<sup>54</sup>

The Hudood Ordinances were codified in 1979 to bring Pakistan into "conformity with the injunctions of Islam." The Hudood Ordinances set out the definitions and punishments for sexual relations outside of marriage. Prior to the passage of the Hudood Ordinances, the Pakistani Penal Code of 1898, promulgated under

<sup>46.</sup> See id. at 51.

<sup>47.</sup> Bowen, supra note 6, at 49.

<sup>48.</sup> Emory School of Law Islamic Family Law Center, Islamic Republic of Pakistan, http://www.law.emory.edu/IFL/legal/pakistan.htm (last visited Nov. 20, 2006) [hereinafter Islamic Republic of Pakistan]. The four schools of Islamic jurisprudence are from the Sunni tradition. The Shi'a tradition will not be discussed in this note and is a minority population of the overall makeup of Islam.

<sup>49.</sup> Redding, supra note 9, at 770-71.

<sup>50.</sup> Id.

<sup>51.</sup> Id.

<sup>52.</sup> *Id*.

<sup>53.</sup> Id. at 771-72.

<sup>54.</sup> Islamic Republic of Pakistan, supra note 48.

<sup>55.</sup> Asifa Quraishi, Her Honor: An Islamic Critique of the Rape Laws of Pakistan from a Woman-Sensitive Perspective, 18 MICH. J. INT'L L. 287, 288 (1997).

<sup>56.</sup> The Hudood Ordinances also deal with offenses beyond sexual relations, including alcohol and property violations, but those will not be discussed here. *See id.* 

British rule, was the governing criminal law.<sup>57</sup> There were several important differences in the definition of sexual crimes, besides the jurisdiction of the court and the Islamic evidentiary requirements, discussed below, which differentiated the Code from the Hudood Ordinances. Under the criminal code, women could not be charged with adultery.<sup>58</sup> The public policy consensus at the time was that under the male-dominated culture, women would be unable to protect themselves from adultery charges, whether true or false.<sup>59</sup> Additionally, the Code included marital rape as a crime, whereas the Ordinances did not. The Ordinances also have no place for statutory rape, which was a traditionally criminal offense.<sup>60</sup> The Ordinances have been under intense international and national scrutiny that has brought some reform, but the traditional text is first discussed below.

The Hudood Ordinances define "zina" in Article 4: "A man and a woman are said to commit zina if they wilfully have sexual intercourse without being validly married to each other." Article 5 sets out the types of zina that are subject to hadd, the highest punishment (which includes flogging or stoning): <sup>62</sup>

- 5. Zina liable to hadd.
  - (1) Zina is zina liable to hadd if-
    - (a) it is committed by a man who is an adult and is not insane with a woman to whom he is not, and does not suspect himself to be married; or
    - (b) it is committed by a woman who is an adult and is not insane with a man to whom she is not, and does not suspect herself to be, married.
  - (2) Whoever is guilty of Zina liable to hadd shall, subject to the provisions of this Ordinance, -
    - (a) if he or she is a *muhsan*, 63 be stoned to death at a public place; or

- 59. Id.
- 60. Id.
- 61. Hudood Ordinance, supra note 7, art. 4.

<sup>57.</sup> Chadbourne, *supra* note 27, at 189-90. Those parts of the Code not superseded by the Hudood Ordinances remain in effect. *Id.* 

<sup>58.</sup> *Id.* Women were also not able to be charged with rape (*zina-bil-jabr*) under the Pakistani Criminal Code, whereas both men and women can be charged with rape under the Hudood Ordinances. While some may argue that allowing women to be charged with rape is more equitable, this provision has not been used to protect male rape victims in Pakistan.

<sup>62.</sup> See Quraishi, supra note 55, at 310. Hudood crimes (the plural of hadd) are said to be set out specifically in the Qur'an. Ta'zir crimes are socially legislated crimes, which come with lesser punishments. See id. at 310-11.

<sup>63.</sup> A sane, adult Muslim man or woman. See Hudood Ordinance, supra note 7, art. 2.

- (b) if he or she is not *muhsan*, be punished, at a public place; with whipping numbering one hundred stripes.
- (3) No punishment under sub-section (2) shall be executed until it has been confirmed by the Court to which an appeal from the order of conviction lies; and if the punishment be of whipping; until it is confirmed and executed, the convict shall be dealt with in the same manner as if sentenced to simple imprisonment.<sup>64</sup>

Article 6 further specifies the parameters and punishments for rape, *zina-bil-jabr*:

- 6. Zina bil Jabr
  - (1) A person is said to commit *zina-bil-jabr* if he or she has sexual inter-course with a woman or man, as the case may be, to whom he or she is not validly married, in any of the following circumstances, namely:
    - (a) against the will of the victim;
    - (b) without the consent of the victim;
    - (c) with the consent of the victim, when the consent has been obtained by putting the victim in fear of death or of hurt: or
    - (d) with the consent of the victim, when the offender knows that the offender is not validly married to the victim and that the consent is given because the victim believes that the offender is another person to who the victim is or believes herself or himself to be validly married.

**Explanation:** Penetration is sufficient to constitute the sexual inter-course necessary to the offence of *zina-bil-jabr*.

- (2) Zina-bil-jabr is liable to hadd if it is committed in the committed in the circumstances specified in sub-section (1) of section 5.
- (3) Whoever is guilty of *zina-bil-jabr* liable to *hadd* shall subject to the provisions of this Ordinance,
  - (a) if he or she is a muhsan, be stoned to death at a public place; or
  - (b) if he or she is not muhsan, be punished with whipping numbering one hundred stripes, at a public place, and with such other punishment, including the sentence of death, as the Court may deem fit having regard to the circumstances of the case.<sup>65</sup>

<sup>64.</sup> Id. art 5.

<sup>65.</sup> Id. art. 6.

The necessary evidentiary elements for *zina* and *zina-bil-jabr* were laid out in Article 8, a major point of reform<sup>66</sup>:

- 8. Proof of zina or zina-bil-jabr liable to hadd. Proof of *zina-bil-jabr* liable to *hadd* shall be in one of the following forms, namely:
  - (a) the accused makes before a Court of competent jurisdiction a confession of the commission of the offence; or
  - (b) at least four Muslim adult male witnesses, about whom the Court is satisfied, having regard to the requirements of tazkiyah al-shuhood, that they are truthful persons and abstain from major sins (*kabair*), give evidence as eye-witnesses of the act of penetration necessary to the offence:

**Provided** that, if the accused is a non-Muslim, the eyewitnesses may be non-Muslims. <sup>67</sup>

When the requirements of the hadd punishments cannot be met (either through a confession or four male witnesses), the action is punished through Article 10 under *ta'zir*, a lesser punishment.<sup>68</sup>

- 10. Zina or zina-bil-jabr liable to tazir.
  - (1) Subject to the provisions of section 7, whoever commits zina or *zina-bil-jabr* which is not liable to *hadd*, or for which proof in either of the forms mentioned in section 8 is not available and the punishment of *qazf liable to hadd* has not been awarded to the complainant, or for which *hadd* may not be enforced under this Ordinance, shall be liable to tazir.<sup>69</sup>

Under the traditional Hudood Ordinances, if there was not enough evidence to convict the perpetrator of rape (usually lacking four witnesses), the victim could be brought up on charges of *zina*, or consensual sex. Rapes went unreported because of fear of the retribution possible if one's charges were not sustained, particularly because police and officials were often the alleged perpetrators of rapes. There existed severe biases against women bringing these charges within the court systems. As one judge on the Federal Shariat Court stated, "wherever resort to courts is unavoidable for any reason, a general possibility that even though the girl was a willing party to the occurrence, it would hardly be admitted or

<sup>66.</sup> Id. art. 8; see Salman Masood, Pakistan Moves toward Amending Rape Law, N.Y. TIMES, Nov. 16, 2006, at A3. Medical and DNA evidence will be used in rape cases under the criminal code.

<sup>67.</sup> Hudood Ordinance, supra note 7, art. 8.

<sup>68.</sup> See Quraishi supra note 55, at 311.

<sup>69.</sup> Hudood Ordinance, supra note 7, art. 10.

<sup>70.</sup> Quraishi, supra note 55, at 290.

<sup>71.</sup> See id. at 291-92; see also Double Jeopardy, supra note 10.

conceded. In fact it is not uncommon that a woman, who was a willing party, acts as a ravished woman . . . . "<sup>72</sup>

There were several major legal trends of concern within the enforcement of the Hudood Ordinances in Shariat courts. First was the issue of consent and what evidence could be presented to use consent as a defense to a rape allegation.<sup>73</sup> Evidence of consent included delay in reporting, lack of physical evidence, testimony about the victim's "poor moral character,"<sup>74</sup> animosity between the parties, a valid marriage contract between the parties, or insufficient physical resistance.<sup>75</sup>

The second concern was the use of pregnancy as proof of *zina* under *hadd*, triggering the highest of penalties because pregnancy was considered a confession, which implicates *hadd* punishments without four witnesses. For instance, in the *Jehan Mina* case, a fifteen-year-old girl was raped by her uncle and became pregnant. Her rapists were acquitted for lack of evidence, but she was convicted in the lower court because of her "unexplained" state of pregnancy, which was considered to be a confession to *zina*. Though her punishment was eventually lessened to *ta'zir* levels, the case demonstrated in stark contrast the dilemma of pregnant victims who bore the burden of proving rape, rather than the state or the perpetrator bearing the burden. The state of the perpetrator bearing the burden.

Third, rape victims feared coming forward to report their perpetrators because of judicial conversion of rape, *zina-al-jabr*, to consensual *zina* if insufficient proof was presented to sustain a rape conviction.<sup>79</sup> Women faced not only the fear of coming before a court

<sup>72.</sup> Quraishi, *supra* note 55, at 304.

<sup>73.</sup> Chadbourne, supra note 27, at 194.

<sup>74.</sup> Id. at 197.

<sup>75.</sup> *Id.* at 195, 199-202; *see also* Ubaidullah v. State, PLD 1983 FSC 117 (holding that since the woman did not adequately resist, as evidenced by negligible physical harm to her, she must have consented to the sexual intercourse).

<sup>76.</sup> See Chadbourne, supra note 27, at 205-07. Though some hadd punishments were handed down, none to date have actually been carried out in Pakistan. See Asma Jahangir, Op-Ed., Women's Commission and Hudood Ordinances, DAILY TIMES (Pak.), Sept. 12, 2003, available at http://www.peacewomen.org/news/Pakistan/newsarchive03/Zina.html. Ms. Jahangir is the former chairperson of the Human Rights Commission in Pakistan. See also Double Jeopardy, supra note 10.

<sup>77.</sup> Chadbourne, supra note 27, at 206-07.

<sup>78.</sup> See id.

<sup>79.</sup> *Id.*; Jahangir, *supra* note 76 (stating "[i]n many cases, women alleging rape have been arrested and convicted of Zina. The accused men are given benefit of the doubt and acquitted by the Federal Shariat Court.").

to face their attacker, but also the potential shame of being accused of extramarital sex.<sup>80</sup> In the Pakistani culture, and often Islamic culture generally, the honor and reputation of a family is dependent on the honor and chastity of its women.<sup>81</sup> A conviction of *zina* brought immense shame to a woman and her family.

Lastly, *zina* punishments have been used as harassment against women. Most of the charges filed against women have been by their fathers or their husbands (particularly during times of divorce) in order to distance the family from the supposed dishonor or to punish the woman. This punishment can arise because the woman has tried to run away from her family or because her husband wishes to divorce the victim and remarry. The poor and illiterate have borne the brunt of these laws. The poor and illiterate have borne the brunt of these laws.

### C. Current Reforms—The Women's Protection Bill

Until 2001 and the War on Terror, Pakistan did not receive federal funding from the United States because of its troubling human rights record, particularly the Hudood Ordinances' discrimination against women and allowance of death by stoning. The War on Terror, led by the United States, has given Pakistan greater acceptance at the international level than it had previously experienced, as well as a decrease in pressure to change its human

<sup>80.</sup> See Chadbourne, supra note 27, at 211 (explaining the practice of judicial conversion of failed rape cases to zina charges).

<sup>81.</sup> See THE WORLD BANK, MENA DEVELOPMENT REPORT, GENDER AND DEVELOPMENT IN THE MIDDLE EAST AND NORTH AFRICA: WOMEN IN THE PUBLIC SPHERE (2004), available at http://www.medea.be/files/WB\_Gender\_EN.pdf#search=%22mena%20 development%20report%22 [hereinafter MENA REPORT].

<sup>82.</sup> See id.; see also Chadbourne, supra note 27, at 217-19. There have also been significant problems with female prisoners, often those charged with zina, who have been severely abused or raped by police officers. For a more detailed analysis, see Jahangir supra note 76 ("A very large number of women have been tortured, molested and raped by the police with impunity. From 1980 to 1987 the Federal Shariat Court alone heard 3,399 appeals of Zina involving female prisoners. This is only the tip of the iceberg, given the number of women arrested and released before reaching the appeal stage. Once a woman is accused of Zina she stands stigmatized regardless of subsequent acquittals."). See also Double Jeopardy, supra note 10, at 32.

<sup>83.</sup> See Pakistani Women Speak Up on Rape, supra note 1 (quoting a legal aid worker regarding women in a local prison accused of zina, "[t]hese women are totally illiterate, hardly aware of their rights . . . ").

<sup>84.</sup> See Josh Kruskol, Legislative Watch/Legislative Focus, 11 HUM. RTS. BRIEF 63, 63-64 (2004) (Kruskol discusses the Foreign Operations Appropriations and Defense Department Appropriations Bills' Amendments, the Leahy Law, which was consistently passed from 1997 on. The bill prevented US funds from supporting any army or force in a nation where "gross violations of human rights were being committed." Pakistan was ineligible for all aid until 2001, but now receives in excess of \$395 million because of its support in the War on Terror).

rights norms. Despite the drop in attention to the country's human rights violations, General Musharraf, the current Pakistani President who took over through a military coup in 1999, has pledged to fight discrimination against women. Women's and human rights groups had been advocating for years for a repeal of the onerous Hudood Ordinances, emphasizing that the law made it impossible to charge and convict rapists. Additionally, the threat of female rape victims having the law turned on them for a conviction of *zina* if rape could not be proved severely discouraged women from coming forward to report such crimes. The Ordinances were particularly troubling because of the statistics coming out of the country's major human rights organizations: on average, a woman was raped every two hours and gang raped every four hours in Pakistan.

At the International Women's Day in 2002, Musharraf pledged that to women's "empowerment, protection and security, I stand totally committed." This pledge proved difficult to keep. When the Women's Protection Bill first appeared on the Pakistani political stage in September 2006, it was met with ardent resistance from "hard line" Islamic groups. The bill eventually was pulled from parliamentary consideration. Despite the rhetorical assurances, Musharraf seemed "[a]ssailed on all sides, [his] only certain support is the military—and the Pakistani army is not prepared to take on the Islamists over women's rights." Surprisingly, after renegotiation with human rights groups and religious officials, a reformulation of the bill was released and passed in both the Pakistani House and the Senate in late November 2006. Though conservative religious

<sup>85.</sup> See id. (explaining that continued funding despite human rights violations decreases the effectiveness of the Leahy Law); see also Khan, supra note 30, at 217-18.

<sup>86.</sup> See Perry S. Smith, Silent Witness: Discrimination Against Women in the Pakistani Law of Evidence, 11 Tul. J. INT'L & COMP. L. 21, 24 (2003).

<sup>87.</sup> See id. at 55-56.

<sup>88.</sup> See Barbara Plett, How Pakistan's Rape Reform Ran Aground, BBC NEWS, Sept. 15, 2006, http://news.bbc.co.uk/2/hi/south\_asia/5346968.stm; Jahangir, supra note 76.

<sup>89.</sup> See Jahangir, supra note 76.

<sup>90.</sup> These numbers are thought to be a low estimate because of the vast number of rapes that go unreported each year. *Pakistani Senate Backs Rape Bill*, BBC NEWS, Nov. 23, 2006, http://news.bbc.co.uk/2/hi/south\_asia/6178214.stm.

<sup>91.</sup> Smith, supra note 86, at 55.

<sup>92.</sup> Salman Masood, World Briefing Asia: Pakistan: Rape Reform Law Delayed, N.Y. TIMES, Sept. 19, 2006, at A8.

<sup>93.</sup> *Id*.

<sup>94.</sup> Plett, supra note 88.

<sup>95.</sup> See Pakistani Senate Backs Rape Bill, supra note 90.

groups voiced opposition and boycotted the vote, the compromise moved all rape cases from the Shariat courts back to the Pakistani penal code and civil courts.<sup>96</sup> A rape case cannot be converted to Shariat courts, and thus to any form of *zina* or fornication, after it is reported to civil authorities.<sup>97</sup> In the civil courts, the Shariat requirement of four male witnesses is supplanted by civil evidentiary procedures, including the admission of DNA and medical evidence. As a concession to some of the more hard-line religious groups, "fornication," defined as consensual sex between unmarried persons, was made a criminal offense.<sup>99</sup> Thus, it is possible that the discriminatory practice of accusing women of zina as punishment for "dishonoring" the family, 100 or as a mechanism for husbands trying to rid themselves of their wives could be translated into accusations of fornication. Though hailed as a great step forward for the women of Pakistan, it is likely that until the Hudood Ordinances are completely reformed, women will not be fully protected. 101 Additionally, though the new bill is hopeful, no actual process of implementation has vet been revealed. As one commentator described it:

The bill is a modest first step towards a more rational policy on sexual assault and rape . . . . Its passage should be welcomed by all right-thinking persons . . . . Whether the bill reshapes the entire political landscape once and for all will now depend on how the government reacts to the changed ground realities and on the quantum of bitterness that remains within the ranks of the opposition. <sup>102</sup>

Implementation of the current reforms and movement toward increased equality, particularly the repeal of the entire Hudood Ordinance, require an understanding of how and why these reforms were eventually successful, though extremely controversial and divisive. The international human rights mechanisms were not a large

<sup>96.</sup> NA Passes Women's Protection Bill, HUM. RIGHTS COMM'N OF PAK., Nov. 16, 2006, http://www.hrcp-web.org/archive\_news\_list.cfm. See David Montero, Rape Law Reform Angers Pakistani Islamists, CBS NEWS, Nov. 17, 2006, http://www.cbsnews.com/stories/2006/11/17/world/main2192884.shtml (discussing the ardent protests of the Islamists groups who claimed that changes to the Hudood Ordinance would make Pakistan a "free-sex society").

<sup>97.</sup> NA Passes Women's Protection Bill, supra note 96.

<sup>98.</sup> Montero, supra note 96.

<sup>99.</sup> Id.; NA Passes Women's Protection Bill, supra note 96.

<sup>100.</sup> See MENA REPORT, supra note 81, at 7.

<sup>101.</sup> See, e.g., Pakistan Votes to Amend Rape Law, supra note 8; Press Hails New Rape Law, BBC NEWS, Nov. 17, 2006, http://news.bbc.co.uk/1/hi/world/south\_asia/6157922.stm.

<sup>102.</sup> See Press Hails New Rape Law, supra note 101.

part of making these reforms work, and cannot be a large part of future reforms unless their tactics and methodologies are changed.

### II. INTERNATIONAL HUMAN RIGHTS NORMS

Locals also have a very negative view of NGOs. Firstly, they think they are all funded by Americans or foreigners. They reason that we belong to an Islamic society and that western-funded NGOs work against Islamic traditions and values. But we have slowly won their confidence and trust. We have told them that this crisis centre is their organisation and we are here to solve their problems. <sup>103</sup>

There are three main schools of thought regarding human rights: "universalism," which argues that all human rights must be applied to all cultures and thus Shari'a law and religious authorities should not be allowed to dictate and subsequently curtail human rights; "strict cultural relativism," which advocates that cultures are so vastly different and beliefs so irreconcilable that there can be no set of values universally applied; therefore, countries should be at liberty to set their own standards (religious or otherwise); and "moderate cultural relativism," which accepts a core set of universal rights that are necessarily valid for all cultures, but disagrees that all rights apply to all cultures. None of these categories can adequately capture the dilemma the international community faces when dealing with Islam, Shari'a, and human (particularly women's) rights.

Some scholars, such as Samuel Huntington, have argued that there is an ongoing and worsening clash of cultures that prohibits the international community from intervening and implementing its concept of human rights. They contend Islam requires a distinctive approach to rights, applying a specific cultural relativist argument. This argument has been used consistently throughout certain Islamic nations and conventions. Human rights necessarily implicate religious views, gender roles, governmental actions, and notions of

<sup>103.</sup> Pakistani Women Speak Up on Rape, supra note 1 (quoting Mussarat Shefi, an aid worker in rural Pakistan who is employed by a non-governmental organization (NGO) that runs a women's crisis center).

<sup>104.</sup> Morgan-Foster, *supra* note 4, at 70.

<sup>105.</sup> See generally Samuel P. Huntington, The Clash of Civilizations and the Remaking of World Order (1998). See 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, 310-12 (1994).

<sup>106.</sup> See Mayer, supra note 105, at 309.

<sup>107.</sup> See Org. of the Islamic Conference, Cairo Declaration on Human Rights in Islam, Res. 49/10-P Annex 1 (Aug. 5, 1990), available at http://www.oic-oci.org/english/conf/fm/19/19%20 icfm-political-en.htm [hereinafter Cairo Declaration].

freedom. Rhetoric implying that Islamic values are being attacked by those outside the Islamic world has proven powerful: the imperialism of reformers and the preservation of Islamic culture have been ready defenses when governments, groups, or patriarchal systems have been unwilling or unable to change their discriminatory provisions. Perhaps this fear is not entirely unfounded. There is a real sense in the Middle East that international NGOs are following the American military into the region. There is also the argument that the traditional "West" focuses on rights violations outside its geographic sphere, while committing many of the same human rights violations within its own boundaries, as well as selectively ignoring human rights violations by those countries who provide military, economic, or political support to Western causes. 110

While the assertion that human rights are Western rights is not necessarily true, until that stereotype is broken, little progress can be made. The changes in rhetoric and methodology that can make human rights truly universal must come from both sides of the argument: from the religious groups who advocate that so-called Western human rights have no place in Islamic societies, and from the international human rights groups, which have not developed programming for Islamic nations to use their own legal structures to effect sustainable human rights changes. While human rights work cannot be effective when there is a perception of "exclusive Western authorship," there are "differences between cultural sensitivity and cultural stagnation attributable to power imbalances within society."

### A. United Nations

Countries with predominately Islamic populations were key founding members of the United Nations and all signed the Universal Declaration of Human Rights (UDHR), which established a basic

<sup>108.</sup> See id.; see also Montero, supra note 96.

<sup>109.</sup> Naz K. Modirzadeh, *Taking Islamic Law Seriously: INGOs and the Battle for Muslim Hearts and Minds*, 19 HARV. HUM. RTS. J. 191, 192 (2006).

<sup>110.</sup> See Mayer, supra note 105, at 313; see also Kruskol, supra note 84, at 64. For instance, the United States has refused to ratify the Convention to Eliminate Discrimination Against Women (CEDAW), among other international rights treaties.

<sup>111.</sup> Morgan-Foster, supra note 4, at 71.

<sup>112.</sup> Nancy Kim, Toward a Feminist Theory of Human Rights: Straddling the Fence between Western Imperialism and Uncritical Absolutism, 25 COLUM. HUM. RTS. L. REV. 49, 104 (1993).

common standard for international human rights. 113 Ann Elizabeth Mayer, a prominent scholar on human rights and Islam, argues that "Muslim particularism" with regard to human rights was not advocated until the 1979 Islamic Revolution in Iran. Pakistan played an important early role in the discussions and passage of the UDHR, particularly the provision on freedom of religion and expression. 115 Article 18 states, "Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance."116 Article 19 asserts, "Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers."<sup>117</sup> vehemently argued against Saudi Arabia to successfully maintained that these provisions on freedom of religion and freedom of conscience were not only compliant, but required under the laws of Pakistan argued that Islam was against compulsion, demonstrating that the laws of Shari'a can be compliant with human rights and that such compliance might depend more on the political situation of a nation than on its religious foundations.

As a proponent of and signatory to the UDHR, Pakistan assured the world that human rights and equality<sup>119</sup> would be upheld within its borders because of its adherence to Islamic law and principles. In addition to its participation in the UDHR, Pakistan is also a signatory to the Convention to Eliminate Discrimination Against Women (CEDAW), which was passed by the United Nations General

<sup>113.</sup> Mayer, *supra* note 105, at 321-22.

<sup>114.</sup> *Id*.

<sup>115.</sup> Khan, *supra* note 30, at 220-22.

<sup>116.</sup> Universal Declaration of Human Rights, G.A. Res. 217A (III), art. 18, U.N. Doc. A/810 (Dec. 10, 1948), [hereinafter Declaration].

<sup>117.</sup> Id. art. 19.

<sup>118.</sup> See Khan, supra note 30, at 221-22.

<sup>119.</sup> Article 2 of the Declaration assures that "[e]veryone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status." Declaration, *supra* note 116, art. 2. Article 29 notes that no rights will be curtailed (such as the freedom of religion) *unless* they interfere with another's rights. *Id.* art. 29 (emphasis added).

Assembly in 1979. CEDAW includes provisions on freedom of religion, but stipulates a hierarchy of values and rights in which the freedom of religion is limited when and if it inhibits the rights of others. 121

Despite commitments stemming from international conventions, the rights of women in Pakistan have not been stable since the conventions' passings, and have actually decreased with the subsequent "Islamization" of the constitution and laws such as the Hudood Ordinance. Human Rights Watch explains:

[W]omen were at the center of a fundamental paradox that was to affect their status in Pakistani society... on the one hand, their increasing freedom was intricately linked with a political movement to create an independent Muslim state; on the other, conservative interpretations of the identity of that same state—depending on social, political and economic conditions—was turned against women as a means of consolidating state power in times of instability.<sup>122</sup>

The religious identity of Pakistan has allowed increasingly conservative and hard-line versions of Islam to dictate its human rights, particularly in times of struggle. Despite the lip service given to international human rights mechanisms, the mechanisms have not been successful advocates for the women of Pakistan. Rights and powers of Shariat courts and the enforcement of the Hudood Ordinances have not been curtailed because they infringe on women's rights. Instead of protecting rape victims, the Ordinances were used to punish perceived dishonor or to inflict punishment on victims of violent crimes. The international documents to which Pakistan was a signatory seemed unable to help, usually because the country insisted that Islam and Shari'a law prevented it from truly implementing real change. The reservations and declarations

<sup>120.</sup> See Frances Raday, Culture, Religion and Gender, 1 INT'L J. CONST. L. 663, 664 (2003); Hussain, supra note 14, at 241. Pakistan's courts have, at times, recognized their obligations under CEDAW, but often cite Pakistan's reservations to the Convention as justification to refrain from truly enforcing the rights that CEDAW protects. See Smith, supra note 86, at 29.

<sup>121.</sup> Raday, *supra* note 120, at 668-69. Pakistan has yet to ratify the International Covenant on Civil and Political Rights, which also includes a hierarchy of rights with religion limited by the rights of others. *See id.*; *see also Amnesty International's Guide to UN Human Rights Council Candidates: Pakistan*, AMNESTY INT'L, May 5, 2006, http://www.amnesty.org/un\_hrc/pakistan.html.

<sup>122.</sup> See generally Double Jeopardy, supra note 10, at 29.

<sup>123.</sup> See id. at 60.

<sup>124.</sup> U.N. Convention on the Elimination of All Forms of Discrimination against Women, Declarations, Reservations, Objections and Notifications of Withdrawal of Reservations Relating to the Convention on the Elimination of All Forms of Discrimination against Women, at 26, U.N.

stipulated that any right was subject to Pakistan's constitution, which, as discussed above, underwent continued "Islamization," beginning with the repugnancy clause. 125 The international rights movement has been unable or unwilling to use any real enforcement mechanisms to bring these rights covenants into realistic practice. 126

Some authors have compared this religious discrimination to the discrimination practiced during apartheid in South Africa. As Professor Mayer explains, the international community came together in combating apartheid, harshly stigmatizing South Africa's racial separation and discrimination:

The heinous nature of its treatment of non-Whites prompted sanctions and boycotts in the 1980s both at the national and international level. South Africa wound up a pariah state, excluded from international sports and ostracized by other members of the international community, leading to the crippling of its economy. Unable to withstand the sanctions, South Africa ended its apartheid policy in 1991. 128

Unlike CEDAW, the Declaration on the Elimination of All Forms of Racial Discrimination, the International Convention on the Elimination of All Forms of Racial Discrimination, and the International Convention on the Suppression and Punishment of the Crime of Apartheid, all of which combated apartheid, included provisions for serious economic and social sanctions against the perpetrating countries, forcing South Africa to embrace the human rights norms of the international community and end the abhorrent treatment of black South Africans.<sup>129</sup>

The international community has been unwilling or unable to provide the same sort of enforcement to protect the women of the world. Although racial and gender discrimination are equally

Doc. CEDAW/SP/2006/2 (Apr. 10, 2006) (noting Pakistan's official reservation: "The accession by the Government of the Islamic Republic of Pakistan to the [said convention] is subject to the provisions of the Constitution of the Islamic Republic of Pakistan.").

<sup>125.</sup> See supra Part I.A.

<sup>126.</sup> See Darren C. Zook, Decolonizing Law: Identity Politics, Human Rights and the United Nations, 19 HARV. HUM. RTS. J. 95, 96 (2006) (discussing the centrality of the United Nations in terms of human rights discussions and its need for reform to more ably enforce and encourage the international human rights movement as one that applies to all).

<sup>127.</sup> See generally Ann Elizabeth Mayer, A "Benign Apartheid": How Gender Apartheid Has Been Rationalized, 5 UCLA J. INT'L L. & FOREIGN AFF. 237 (2000-2001) [hereinafter Benign Apartheid].

<sup>128.</sup> Id. at 241.

<sup>129.</sup> See id. (implying that sanctions were crucial to breaking down apartheid in South Africa).

prohibited by Article 2 of the UDHR, thus far only racial discrimination has been successfully curbed by enforcement mechanisms. Also, the international community has accepted religious and cultural rationalizations for discrimination against women, whereas such rationalizations were uniformly rejected during the apartheid debate. Attempts to effectively enforce CEDAW have been met with adamant opposition, in particular from Islamic countries that declared reservations to the Convention. This resistance led one scholar to conclude:

CEDAW effectively seems to have a lesser status than other human rights conventions, being treated more as a statement of intent than as a set of internationally binding obligations, and that the culturally-sensitive nature of the content is a factor influencing countries to see CEDAW more as rhetoric than as international law.<sup>133</sup>

CEDAW is portrayed as a religious and cultural battle, one which the international community has refused to fight.

Pakistan is a country built on a religious identity. From its inception, it has defined itself according to Islam, and that Islam has become increasingly radicalized during the country's difficult times. Rightly or wrongly, segments of the governmental and political establishment have convinced portions of the populace that debating human rights is a form of Western imperialism, particularly in the arena of women's rights. Perceptions shape policy. In light of Pakistan's recent cooperation with the United States, accusations and fears of Western imperialism may resonate strongly. There is a risk of creating situations where Muslims feel they must choose between human rights and Shari'a law, which many believe come directly from God: "In a [z]ero [s]um [c]alculus, God [a]lways [w]ins." The

<sup>130.</sup> See id. at 245-46. Article 2 states, "Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as *race*, colour, *sex*, language, religion, political or other opinion, national or social origin, property, birth or other status." Declaration, *supra* note 116 (emphasis added).

<sup>131.</sup> See Benign Apartheid, supra note 127, at 266.

<sup>132.</sup> *Id.* A study commissioned in 1987 to examine the workings of CEDAW in relation to reservations made by Islamic nations was adamantly opposed by those reserving nations. Instead of defending the Convention and using this as an opportunity for discussion, the study was abandoned, demonstrating that the international community would back down on this Convention in the face of opposition. *Id.* at 271-72.

<sup>133.</sup> Id.

<sup>134.</sup> See supra Part I.

<sup>135.</sup> See Morgan-Foster, supra note 4, at 70.

<sup>136.</sup> Modirzadeh, supra note 109, at 230.

question then becomes how to bridge the gap between the two arguably complementary components, human rights and religion, particularly when existing international conventions have been portrayed (and proven) to be weak mechanisms for promoting change. One suggestion from the Islamic community is the Cairo Declaration on Human Rights in Islam.

# B. Cairo Declaration on Human Rights in Islam

The Cairo Declaration was written and endorsed by the foreign ministers of the Organization of the Islamic Conference (OIC), an international organization founded in 1973 to which most predominately Muslim countries belong, including Pakistan.<sup>137</sup> The OIC came together in 1990 to produce a document that was a hybrid of international and Islamic elements, proclaiming the existence of an "Islamic counter-model of human rights."<sup>138</sup> Although the preamble of the OIC Charter states members are "reaffirming their commitment to the UN Charter and fundamental Human Rights, the purposes and principles of which provide the basis for fruitful cooperation amongst all people,"<sup>139</sup> Articles 24 and 25 of the Cairo Declaration proclaim that anything within the document is subject to the Islamic Shari'a. Despite such provisions defining the entire agreement and limiting the rights thereof, no attempt is made to define the parameters of Islamic Shari'a.<sup>141</sup>

Because of the undefined limits of the Islamic Shari'a, it is very difficult to grasp the consequences or reaches of the rights within the Declaration. For instance, Article 1 proclaims that human beings "are equal in terms of basic human dignity and basic obligations and responsibilities, without any discrimination on the grounds of race, colour, language, sex, religious belief, political affirmation, social status or other considerations." Article 6 specifically addresses women's rights, stating, "woman is equal to man in human dignity"

<sup>137.</sup> Mayer, *supra* note 105, at 327; Organization of the Islamic Conference, http://www.oicoci.org/ (last visited Mar. 28, 2007).

<sup>138.</sup> Mayer, supra note 105, at 327.

<sup>139.</sup> Id.

<sup>140.</sup> Article 24 states, "All the rights and freedoms stipulated in this Declaration are subject to the Islamic Shari'ah" while Article 25 proclaims: "The Islamic Shari'ah is the only source of reference for the explanation or clarification of any of the articles of this Declaration." Cairo Declaration, *supra* note 107.

<sup>141.</sup> Mayer, *supra* note 105, at 328-29.

<sup>142.</sup> Cairo Declaration, *supra* note 107, art. 1.

and has "rights to enjoy as well as duties to perform." Article 12 promises the right to free movement, within the "framework" of the Shari'a. Though many of these rights sound similar to those within the United Nations' documents, all are subject to Article 24 and 25—the Shari'a. Since there is no definition of the Shari'a, countries are left to formulate their own definitions. "There is precious little consensus on what shari'a means and how it should be applied today."

Until there is any consensus, the Cairo Declaration remains more of a shield from critiques of human rights abuses than a sword able to fight those abuses. Signatories to the Declaration claim they adhere to the Declaration through their own interpretation of the Shari'a. 146 As Pakistan has demonstrated with the Hudood Ordinances, those interpretations may be used to serve the patriarchal goals of society, forcing women into more subservient and fear-dominated positions. Until there is more of a consensus as to how Shari'a is applied in the human rights context, the Declaration harms women's rights. It could be a useful tool for Muslim human rights activists and international human rights groups if some sort of consensus could be reached, because it would help dispel the stereotype of Western authorship of human rights; however, as the restrictions on the ijmā' or consensus of scholars have demonstrated, there is little chance for a consensus anytime soon. 147 Arguably, attempting to force a consensus on religious beliefs could be just as harmful, if not more so, than trying to push for a consensus on international human rights. As of now, a country-specific focus is necessary to implement changes within the existing international framework where the international mechanisms, particularly CEDAW, have been enforced ineffectively and where Islam-specific mechanisms have been used as shield against critique.

# C. Country Reforms through Islamic Law

Some Islamic countries have used Shari'a law to vastly improve the rights of their women. For instance, Morocco has undergone

<sup>143.</sup> Id. art. 6.

<sup>144.</sup> Id. art 12.

<sup>145.</sup> Ehsan Masood, Thinkers Seek Middle Path, THE AUSTRALIAN, Aug. 19, 2006, at 29.

<sup>146.</sup> See Mayer, supra note 105, at 327-30.

<sup>147.</sup> See supra Part I.

major reforms to their Mudawana, or code of personal status. The "newly reformed Mudawana is an example of . . . public policy goals rendered in conjunction with the precepts of traditional Islamic law." Using the legal interpretive structures already in place, the country successfully defined its Shari'a law as a protective device for its women rather than a persecutory one. In actuality, the Prophet Muhammad enhanced the rights of Islamic women during his time. Before the spread of Islam across the Arabian peninsula, women had no legal status and could be sold into marriage at any time against their will. The Prophet implemented what were, at the time, revolutionary reforms to protect women's status and inheritance rights.

The Moroccan government knew that the reforms could be divisive but wisely used Islamic law, not international human rights rhetoric, to shape and reinforce the reforms. There was a "deeply rooted and lasting desire on the part of the Moroccan people to maintain a distinctly Muslim identity—an identity that at once meshes with notions of democracy, plurality, secure political and legal rights and privileges." There are conflicting verses within the Qur'an and the *Sunna* on the rights and equalities of women. The two verses quoted with frequency to justify the submissive status of women are: "women have such honorable rights as obligations, but their men have a degree above them" and "men are in charge of women, because God has made the one of them to excel the other, and because they spend of their property [for the support of women]." Conversely, there are a plethora of verses on the equality of men and women in status, labor, property, and standing before the law.

Morocco managed to use these equality verses to trump the conflicting ones; the legal system was able to pull the "normative" principles that Shari'a entailed and leave behind the contextually and

<sup>148.</sup> Laura A. Weingartner, Comment, Family Law and Reform in Morocco—The Mudawana: Modernist Islam and Women's Rights in the Code of Personal Status, 82 U. Det. Mercy L. Rev. 687, 687-88 (2005).

<sup>149.</sup> Id. at 692.

<sup>150.</sup> Bowen, supra note 6, at 56.

<sup>151.</sup> Weingartner, supra note 148, at 692-93.

<sup>152.</sup> Id.

<sup>153.</sup> Id. at 707-08.

<sup>154.</sup> Qur'an 2:228.

<sup>155.</sup> *Id.* 4:34; *see also* Bowen, *supra* note 6, at 57.

<sup>156.</sup> See Bowen, supra note 6, at 54-55.

culturally sanctioned discrimination.<sup>157</sup> The country reformed its Shari'a system while still leaving it intact: marriage, polygamy, divorce, child custody, and inheritance are all still under the Mudawana, but all have been changed to better protect women's rights and equality.<sup>158</sup> The leaders of the Moroccan reforms knew they would need the support of the religious leaders to pass the legislation and effectively implement the changes. <sup>159</sup> Focusing on the teachings of Mohammed proclaiming that the Creator "shall not lose sight of the labor of any of you who labors in My way, be it man or woman; each of you is equal to the other,"160 the government managed to retain its religious identity while legitimately overhauling the assumptions underpinning the Shari'a legal system. There was still an outcry against the king and the reforms from conservative groups. The Justice and Charity Islamist Movement proclaimed that the "reforms have been elaborated in response to the desires of foreigners and the feminist movement." This outcry was lessened and somewhat quelled because of the reliance on religious law to change religious understandings. Instead of introducing the reforms as an attempt at compliance with international human rights norms, the changes were seen as Islamic reforms. 162

Muslim feminists have consistently argued that Islam is not antithetical to gender equality. For instance, the Muslim Women's League is an American nonprofit organization working to "implement the values of Islam and thereby reclaim the status of women as free, equal and vital contributors to society." Like many other religious texts, the Qur'an can be used as a document of equality or a document of repression. Morocco gives an apt example of how the religious text can be formulated into a human rights document. During the second conference on human rights in Islam in

<sup>157.</sup> See Engineer, supra note 39, at 14-15; see also supra Part I.

<sup>158.</sup> Weingartner, *supra* note 148, at 697-706. Marriage now is recognized as being under the direction of both spouses and the age of consent for both males and females is now eighteen. Women are no longer required to select a male guardian to approve the marriage. Polygamy is only allowed at the discretion of a judge after draconian legal provisions are applied and it can be forbidden in the marriage contract. Unilateral divorce on the part of the husband is no longer valid; a slow process involving mediation is now required. The mother is now the preferred guardian in child custody cases. For inheritance cases, children born out of wedlock are now legally recognized and entitled to inheritance. *Id*.

<sup>159.</sup> Id.

<sup>160.</sup> Qur'an 3:195.

<sup>161.</sup> Weingartner, supra note 148, at 709-10.

<sup>162.</sup> See id

<sup>163.</sup> Muslim Women's League, http://www.mwlusa.org/ (last visited March 28, 2007).

1993, the Saudi Arabian foreign minister claimed Islam gave "a comprehensive system for universal human rights" and had at its core "all the legal texts necessary for ensuring their implementation and enforcement." 164 While Saudi Arabia has used the Qur'an to curtail the rights of its women, the statement was nonetheless truthful. 165 The Qur'an and Shari'a law can provide universal human rights and equality if interpreted to do so. Shari'a legal systems are legal principles built on religious beliefs. As one commentator notes, Islamic law "blurs the line between victim and violator, between state and subject." In order for reforms to be made within a sovereign legal system, they must be accepted as legitimate. In Islamic states with Shari'a law systems, including Pakistan, these reforms must be legitimate within both legal and religious interpretation. question, then, is not whether there are abuses of universal human rights in the Shari'a law systems, but how to find common ground between human rights law and Shari'a law.<sup>167</sup>

# III. WORKABLE REALITIES WITHIN PAKISTAN

Pakistan's emergence as an independent nation owed much to its women, who fought side by side with other political leaders to forge a new nation. Pakistan's emergence as an independent nation was also built solidly upon its religious identity. The Shari'a law system will not be dismantled anytime soon within Pakistan. The reforms of the Hudood Ordinance, though hopeful, have not been demonstrated in practice. There is still the possibility that innocent women may be prosecuted under the fornication provision of the amended ordinance. The vehement protests against the Women's Protection Bill demonstrate the continued divisions between those arguing for a reformed state and those advocating for what they view as a traditionally Islamic governance structure. Pakistan displays a history

<sup>164.</sup> HRH Prince Saud Al-Faisal, Minister of Foreign Affairs of Saudi Arabia, Address at the World Conference on Human Rights (June 15, 1993), (transcript at http://www.saudiembassy.net/Issues/HRights/hr-Vienna-93.html).

<sup>165.</sup> See Saudi Arabia: Country Reports on Human Rights Practices, U.S. DEP'T OF STATE, Feb. 25, 2004, http://www.state.gov/g/drl/rls/hrrpt/2003/27937.htm.

<sup>166.</sup> Modirzadeh, supra note 109, at 202.

<sup>167.</sup> See id. at 194.

<sup>168.</sup> See Double Jeopardy, supra note 10 (discussing the importance of religious identity and the combination of religious and legal ideas within the governance model of the country).

<sup>169.</sup> See Montero, supra note 96.

of governmental instability and a return to more conservative Islamic tenants whenever political strife develops.<sup>170</sup>

In order to successfully promote human rights in Pakistan, it is necessary to bridge the gap between human rights and Islamic law instead of claiming that the former is inherently incompatible with the latter. Pakistan's religious identity has shaped its history and it must be a part of the process of promoting equality. Researchers who have studied international human rights groups and their work in Islamic countries have found that the typical method has been one of "naming and shaming" the offending country in an attempt to force compliance.<sup>171</sup> While this may have worked with South Africa, the enforcement mechanisms for CEDAW and other rights conventions have been minimally successful and countries have felt little pressure to comply. 172 Additionally, the international community's focus on Pakistan has changed after September 11, from its instability and human rights abuses to its potential as a security ally.<sup>173</sup> international pressure on Pakistan to change its human rights abuses has thereby lessened. If the international community is not willing to force change through enforcement and sanctions as it did in South Africa, rights groups must find alternative methods toward reform.

Professor Modirzadeh explains that "Islamic personal status law as applied in every state today, and according to all mainstream juridical schools, is overly discriminatory. Simply put, within a Shari'a personal status system, men and women do not share equal legal status." The Hudood Ordinances represent this lack of equality, and their continued existence, even though reformed, may well still haunt the lives and destroy the legal status of women. As an overpowering defeat of a study on Muslim reservations to CEDAW and the resulting lack of CEDAW enforcement have demonstrated, the international protocols in place can cause more division than consensus. A study on international NGOs' reports on Shari'a law found that the organizations' findings consistently refused to state there was a serious legal conflict between the way Shari'a was applied

<sup>170.</sup> See Chadbourne, supra note 27, at 182.

<sup>171.</sup> See Modirzadeh, supra note 109, at 198.

<sup>172.</sup> See id. at 199.

<sup>173.</sup> See Khan, supra note 30, at 217-18.

<sup>174.</sup> Modirzadeh, *supra* note 109, at 207.

<sup>175.</sup> See supra note 132 and accompanying text.

and international law.<sup>176</sup> The reports to the international community separated the Shari'a system from the perpetuation of abuse. For instance, a Human Rights Watch report on the Ordinances states, "Human Rights Watch has no opposition to Islamic law per se and does not object to laws founded on religion, provided that human rights are respected and the principle of equality before the law is upheld."<sup>177</sup> While in some respects this is an appropriate separation because Shari'a is not necessarily a tool of repression, depending on its interpretation, there must be an acceptance that Shari'a is both the legitimate legal system within which these reforms must occur and the system that is currently used to perpetrate the abuses in Pakistan and elsewhere. The study, which primarily examined reports from Human Rights Watch and Amnesty International, claimed the international NGOs failed to see Islamic and Shari'a law as "real law." By ignoring the reality that Shari'a was both the legitimate legal system and the perpetrator of abuses, the groups were unable to address the problem of reforming the Shari'a itself.

Making lasting changes in Pakistan is going to require an understanding and acceptance of its reliance on religious laws. Its religious identity has been the touchstone of legitimacy throughout Pakistan's history. An acceptance of sustainable human rights norms is going to have to speak through this religious identity. Instead of identifying human rights as international and universal, perhaps at this stage they need to be discussed as Islamic reforms, through international organizations on the ground using local workers and Shari'a experts. 180

### **CONCLUSION**

As scholar Randall Peerenboom notes, there is not an "accepted understanding of what a right is—whether collective or group rights and nonjusticiable social, economic and cultural rights are really

<sup>176.</sup> Modirzadeh, *supra* note 109, at 211. Ms. Modirzadeh is a senior associate with the Program on Humanitarian Policy and Conflict Research associated with the Harvard School of Public Health and a former assistant professor of international human rights law at the American University of Cairo.

<sup>177.</sup> Double Jeopardy, supra note 10, at 147.

<sup>178.</sup> See supra Part II.B (discussing that there is no consensus on Shari'a law and on how it should be applied, which is why the Cairo Declaration on Human Rights in Islam has failed to bring about any real reforms in countries' law).

<sup>179.</sup> See Double Jeopardy, supra note 10.

<sup>180.</sup> See id. at 229-33.

rights; or how rights relate to duties; or whether a discourse of rights is complementary or antithetical to, or better or worse than, a discourse of needs or capabilities." The debate over whether human rights are universal or cultural seems circular and unceasing, and while the debate continues, the rights violations continue. Pakistan is a nation desperately in need of the underlying values of international human rights, particularly for female equality. It is also a nation built on a religious identity that has been used to shield against any human rights reform. The partial reform of the Hudood Ordinances demonstrates a way of the future and an alternate path toward underlying universal human rights. Human rights can be universal even if they are reached through different methods. If the language and terminology is changed to make the reforms through the Qur'an instead of through international human rights documents, their impact is still equally felt and probably more sustaining. Human rights have been preached in terms of an "us versus them" argument. When conflicts arise, any terminology or stereotype associated with the other side becomes a target for attack. The path for continued reform and protection of Pakistan's women is still unclear. pertinent United Nations documents such as CEDAW have not been enforced. Islamic-specific human rights documents have been used to allow abuses rather than prevent them. Perhaps the solution is a compromise between the two: a use of Islamic legal structures and sources (the Qur'an and Sunna), using specific interpretations of the texts that bring about the same result of universal human rights as the international documents. The goal is universal rights, which are not Western-authored or Islamic-authored, but a blend of the two using different terminologies and mechanisms that end with the same underlying equality.

<sup>181.</sup> Randall Peerenboom, *Human rights and Rule of Law: What's the Relationship?*, 36 GEO. J. INT'L L. 809, 816 (2005).