Taking Islamic Law Seriously: INGOs and the Battle for Muslim Hearts and Minds

Naz K. Modirzadeh*

> In many Middle Eastern countries, poverty is deep and it is spreading, women lack rights and are denied schooling. Whole societies remain stagnant while the world moves ahead. These are not the failures of a culture or a religion. These are the failures of political and economic doctrines.
>
> —George W. Bush[1]

> In effect, the *Hudood* laws have given legal sanction to biased social attitudes towards women, thus not only legitimating the oppression of women in the eyes of the state but also intensifying it: women who seek to deviate from prescribed social norms now may not only be subject to societal censure, but also to criminal penalties. It is this enforcement of religion and its use as a tool to legitimate abusive state power, rather than religion itself, that is at issue here.
>
> —*Double Jeopardy*, Report, Human Rights Watch[2]

Behind the doors of the most influential human rights organizations in the world, a crisis has been forming. It is a crisis that has become more acute

* Assistant Professor and Director, International Human Rights Law Program, American University in Cairo. I am lucky to have my heart and mind occupied by a tribe of brilliant and generous individuals. For their lengthy conversations on this Article, and for lending their ferocious intelligence to my thoughts, I thank Hani Sayed, Hossam Bahgat, and Tom Kellogg. Those more specific encounters were the outcome of a six-year conversation within the "Ambivalent Activism" movement at Harvard Law School's Human Rights Program. I owe a great deal to its unofficial members, among them JJ Rosenbaum, Peter Rosenblum, and Ashwini Sukthankar. I also thank Kaveh Shahrooz, Frank Vogel, Claude Bruderlein, and Khalil Shariff. For her help in Cairo, I thank the director of the Law Library at AUC, Sarah Garner, and also Vivian Campbell. For his limitless and rapid research assistance, I am grateful to Mohamed A. Elmaazi. For sharpening my thoughts on the encounters between Islamic law and rights texts, I thank numerous individuals at Human Rights Watch, the Afghan Independent Human Rights Commission in Kabul, Amnesty International, and the students in my fall 2004 Human Rights in the Middle East and Africa course at AUC. None of these individuals bears any responsibility for this text.

1. George W. Bush, U.S. President, Remarks by the President at the 20th Anniversary of the National Endowment for Democracy (Nov. 6, 2003), http://www.whitehouse.gov/news/releases/2003/11/20031106-2.html.

2. Human Rights Watch, Pakistan: Double Jeopardy, Police Abuse of Women in Pakistan 3 (1992), [hereinafter Double Jeopardy] *available at* http://www.hrw.org/reports/1992/pakistan/.

Electronic copy available at: http://ssrn.com/abstract=1543510

with the increased global media, military, and economic focus on the Middle East/Muslim world since the September 11, 2001, attacks.

The Middle East has long been considered a desert of non-compliance within the human rights community,[3] often depicted as the region of the world least interested in international human rights law.[4] The Middle East is, in fact, seen by some as the most rights-abusing region in the world. The growing sense in the West that *something must be done* about human rights in the Muslim world has pushed the region to the top of the priority list for major human rights organizations. At the same time, there is a sense within many international non-governmental organizations ("INGOs") that the human rights movement's response to recent events in the Middle East has been reactive, responding to an agenda set largely by the Bush administration and subject to the whims of global media attention. For many, it seems that human rights organizations are following the U.S. military into the Muslim world.[5] Many also feel that the human rights movement's rhetoric uncomfortably echoes that of the Bush administration, proclaiming disturbingly similar ends while espousing different means. Aside from making individual human rights professionals uncomfortable, this situation has brought a long-simmering dilemma within the Western-based human rights movement to the surface. This dilemma, yet to be openly addressed, concerns how the human rights movement should deal with Islamic law.

As grandfathers in Iowa and schoolchildren in London become familiar with terms like *hudood*, *jihad*, *fatwa*, and *Shari'a*, there is a dramatically increased demand for human rights groups to comment on issues of Islamic

---

3. One longtime professional in the western human rights movement, who works on Middle East issues and whose comments are representative of the field, frames the crisis this way:

> The crisis of implementation is a global phenomenon . . . [h]owever, contiguous blocks of non-implementation, like the Middle East, present a particular challenge to the ideal of human rights as a universally applicable set of standards. They breed low expectations for human rights progress in the region, which may all too easily fuel negative stereotypes of Muslim societies as being essentially backward and uncivilized.

Neil Hicks, *Does Islamist Human Rights Activism Offer a Remedy to the Crisis of Human Rights Implementation in the Middle East?*, 24 HUM. RTS. Q. 361, 366 (2002). This argument presents the challenge to the universal applicability of international human rights law as purely a problem of implementation. The author later notes, "[f]or human rights activists, the Middle East has often been difficult territory." *Id.* at 380. *See also* MICHAEL IGNATIEFF, HUMAN RIGHTS AS POLITICS AND IDOLATRY 58–63 (2001) (noting the Islamic challenge to human rights).

4. The Middle East has no functioning regional mechanism for human rights, and while efforts have been made to craft a regional human rights document, none are currently in force as binding international human rights rules. *See* Bahey El Din Hassan, *Regional Protection of Human Rights in the Arab States In Statu Nascendi*, *in* HUMAN RIGHTS: INTERNATIONAL PROTECTION, MONITORING, ENFORCEMENT 239 (Janusz Symonides ed., 2003). A broad empirical study on international human rights groups concludes that "[t]he Middle East and Eastern Europe remain the least represented regions among international human rights NGOs." Jackie Smith, Ron Pagnucco & George A. Lopez, *Globalizing Human Rights: The Work of Transnational Human Rights NGOs in the 1990s*, 20 HUM. RTS. Q. 379, 386 (1998).

5. The term "Muslim world" is deeply flawed, its use rendered slightly more acceptable only by the absence of a more appropriate alternative term. In this Article, the phrase refers to those countries in the Middle East and North Africa with a majority Muslim population where at least some portion of the law on the books is explicitly derived from *Shari'a* and is understood as such by the population.

Electronic copy available at: http://ssrn.com/abstract=1543510

law. What was once perceived as an internal weakness, discussed only among the staff of Middle East (and to a certain extent Africa and Asia) divisions within the largest INGOs, is now an unaddressed flaw that threatens to undermine the international human rights project in the region.[6]

Despite the movement's increasing sophistication, human rights NGOs remain unsure of how to address questions of Islamic law when it conflicts with international human rights law. Islamic leaders, on the other hand, are often unequivocal in their belief that specific areas of substantive Islamic law conflict with specific aspects of human rights law, and that *Shari'a* law should govern in such instances. Modern proponents of Islamic law regard their prescriptive rules for society as God-created alternatives to human rights law and as a parallel path to justice and emancipation. Human rights advocates, conversely, appear deeply uncomfortable about acknowledging the apparent contradiction between human rights norms and Islamic law. When they do acknowledge the conflict, human rights proponents seem unable to articulate a coherent response. Although they believe that international human rights law *should* prevail, they worry that this view smacks of cultural imperialism, and, as such, leaves them vulnerable to criticism from Muslims. Behind closed doors, many human rights professionals are deeply worried about how they ought to address Islamic law. The constant need to publicly deny any crack in the edifice of the universalism of human rights has adversely affected the work of the movement.

I should note at the outset that this Article assumes the existence of major substantive and procedural conflicts between currently applied *Shari'a*[7] and

---

6. *See, e.g.*, Jean-Paul Marthoz & Joseph Saunders, *Religion and the Human Rights Movement*, *in* HUMAN RIGHTS WATCH, WORLD REPORT (2005). In this recent essay, Human Rights Watch ("HRW") attempts, for the first time, to articulate the position of the organization (and that of the broader movement) on religion and human rights. The essay hints at the confusion, both in substantive terms and in advocacy strategies, caused by world attention on issues of religious law.

7. There are many possible ways to define *Shari'a*, and this Article does not provide an analysis of *fiqh* ("Islamic Jurisprudence") theories or of the positions of various jurists. My working definition of *Shari'a* here is limited to laws that are actually applied (or laws that governments seek to draft and apply in the future). Central to my definition is the belief held by the general population of a given country that the laws which govern are based on the Qur'an and *Sunna* ("tradition"), and are thus either the word of God or the practices of the Prophet Muhammad. *Shari'a* is, for my purposes here, whatever people in a particular place at a particular time believe *Shari'a* to be. The general understanding of *Shari'a* that I employ here exists irrespective of the multiple possible alternate readings of *Shari'a*, and myriad possible reform projects. *See, e.g.*, Abdullahi Ahmed An-Nai'm, *Human Rights in the Muslim World: Socio-Political Conditions and Scriptural Imperatives*, 3 HARV. HUM. RTS. J. 13, 40 (1990) (arguing that "we must be clear on what Shari'a *is* rather than what it can or ought to be"). My definition does not assume that the law is uncontested or that other versions of such a law in an Islamic context are unavailable. My use of *Shari'a* simply implies that the language and vocabulary surrounding the law in a state makes use of Islamic legal tools, jurisprudential methodologies, legal maxims, and interpretive canons. For a background on classical Islamic law, see NOEL COULSON, HISTORY OF ISLAMIC LAW (1964); JOSEPH SCHACHT, AN INTRODUCTION TO ISLAMIC LAW (1964). For a background on *Shi'a* law, see MOOJAN MOMEN, INTRODUCTION TO SHI`I ISLAM: THE HISTORY AND DOCTRINES OF TWELVER SHI`ISM (1985); MUAHAMMAD HUSAYN TABATABA'I, SHI'ITE ISLAM (Seyyed Hossein Nasr trans., St. U. N.Y. Press 2d ed. 1977) (1975), *Shari'a*, *in* 9 ENCYCLOPEDIA OF ISLAM 321 (E. J. Brill 1996). For key texts discussing reform or reinterpretation of Islamic law, see FATIMA MERNISSI, THE VEIL AND THE MALE ELITE (Mary Jo Lakeland trans., Addison-Wesley ed., 1991) (1987); ABDOLKARIM SOROUSH, REASON, FREEDOM, AND DEMOC-

international human rights law.[8] I adopt, as a first premise, the position that Islamic law, as currently applied in many countries, violates international human rights law. The second assumption I make is that the existence of this conflict is widely known. The question of "Islam and human rights" is not, in fact, *whether* there is a conflict, but how such a conflict is to be addressed. The central issues concern who wins and who loses, how we understand the stakes, and what professional performances are presented in the process. The hand-wringing by Muslim scholars about *whether* a conflict exists is largely for the benefit of a Western audience. The average Muslim acknowledges that, in application, there are significant differences between the two legal regimes.

The question whether there is a larger philosophical or cultural conflict between Islam (as opposed to Islamic law) and human rights, is distinct from the argument herein. The two areas are often confused, to the detriment of human rights projects in the region. Although this Article does not comment on whether there is a "fundamental" conflict between Islam and human rights, it would seem that any religion committed to divine justice, mercy, charity, and goodwill toward others may be broadly consistent with human rights principles.[9]

Work on human rights violations that arise from the application of *Shari'a* is merely a subset of the areas of the broader work carried out by Western human rights groups in the Muslim world. Human rights groups can investigate violations in Muslim countries without touching on Islamic law at all. For example, reporting on the limits placed on political expression that do not relate to blasphemy, or the torture of political dissidents, or violations of

---

RACY IN ISLAM (Mahmoud Sadri, Ahmad Sadri, trans., Oxford U. Press 2000); FAZLUR RAHMAN, ISLAM (1979); Amina Wadud-Muhsin, *Qur'an and Woman*, *in* LIBERAL ISLAM: A SOURCEBOOK 127 (Charles Kurzman ed., 1998).

8. There is a vast, though substantively and methodologically undernourishing, field of literature on this subject generally found under the heading of "Islam and Human Rights." *See, e.g.*, KATERIA DALACOURA, ISLAM, LIBERALISM AND HUMAN RIGHTS (2d ed. 2003); Sami A. Abu-Sahlieh, *Human Rights Conflicts Between Islam and the West*, 1990 THIRD WORLD LEGAL STUD. 257 (1990); M. A. Baderin, *Establishing Areas of Common Ground Between Islamic Law and International Human Rights Law*, 5 INT'L J. HUM. RTS. 72 (2001); Heiner Bielefeldt, *"Western" Versus "Islamic" Human Rights Conceptions?: A Critique of Cultural Essentialism in the Discussion on Human Rights*, 28 POL. THEORY 90 (2000); Joelle Entelis, *International Human Rights: Islam's Friend or Foe—Algeria as an Example of the Compatibility of International Human Rights Regarding Women's Equality and Islamic Law*, 20 FORDHAM INT'L L.J. 1251 (1997); Marjon E. Ghasemi, *Islam, International Human Rights and Women's Equality: Afghan Women Under Taliban Rule*, 8 S. CAL. REV. L. & WOMEN'S STUD. 445 (1999). The exception is the work of Abdullahi Ahmed An-Nai'm, who has stood out for the past twenty years as a critical voice for reinterpretation and bold honesty in the field of *Shari'a*. I reference his work regularly throughout this Article but key pieces include: ABDULLAHI AHMED AN-NA'IM, TOWARD AN ISLAMIC REFORMATION (1996); Abdullahi A. An-Na'im, *Human Rights in the Arab World: A Regional Perspective*, 23 HUM. RTS. Q. 701 (2001); Abdullahi Ahmed An-Nai'im, *Human Rights in the Muslim World: Socio-Political Conditions and Scriptural Imperatives*; 3 HARV. HUM. RTS. J. 13 (1990); Abdullahi A. An-Na'im, *Islamic Law, International Relations, and Human Rights: Challenge and Response*, 20 CORNELL INT'L L.J. 318 (1987).

9. For examples of scholarship that flattens the differences between legal and philosophical conflicts, see generally JACK DONNELLY, UNIVERSAL HUMAN RIGHTS: IN THEORY AND PRACTICE 72 (2d ed. 2003); ANN ELIZABETH MAYER, ISLAM AND HUMAN RIGHTS (2d ed. 1995).

international humanitarian law during conflict have little or nothing to do with Islamic law.[10] The conflict between legal regimes discussed in this Article focuses only on those violations of international human rights law that can be directly linked to the application of *Shari'a*.

One response to this conflict may be to stress that certain practices within the Islamic world can be reformed because they are contested, or because the laws giving rise to them are not "real" Islamic laws. There is, indeed, a vigorous debate within many Muslim societies about the validity of these norms. The participants in this discussion range from scholars who argue that modern Muslims should historicize revealed texts,[11] to those who believe that feminist readings of the *Qur'an* and *Sunna* result in markedly different legal outcomes,[12] to thinkers who claim that the role of human agency (and thus fallibility) in Quranic exegesis and *Shari'a* interpretation means that many of the laws considered divine can be reformed in light of today's standards. But these approaches currently hold almost no legal or political influence in states that apply *Shari'a*. Therefore, I take Islamic law as it is enforced today.

This Article focuses almost exclusively on Amnesty International ("AI") and Human Rights Watch ("HRW"), the two most influential players in the human rights movement. I argue that, perhaps more than in many other fields of law, it is the professionals who work for such INGOs, and their published output, that frames which issues we think of as most important under the category "human rights," how we think about the law, and how the law is applied.

Part I very briefly discusses why I think we ought to be most interested in the work of these INGOs when appraising the effect and the effectiveness of the international human rights movement. I argue that in planning and executing their interventions, AI and HRW are, today, highly strategic pragmatists.

Part II presents a typology of methods currently used by INGOs when they encounter *Shari'a,* and describes the four moves employed by INGOs to manage their untheorized position on Islamic law. In this Part, I provide a close reading of some reports, press releases, letters to governments, urgent action calls, and op-eds published by AI and HRW over the past fifteen years. I demonstrate that these texts do something very different than what they claim. INGOs almost always make an initial move I call *caveat fidelis*, providing a first line of defense to charges of anti-Muslim bias, neo-imperialism, and insensitivity toward Muslim culture. The *caveat fidelis* statement allows INGOs to

---

10. *See, e.g.*, Press Release, Human Rights Watch, Iran Trial of Political Prisoners Activists Begins (Jan. 8, 2002), http://hrw.org/english/docs/2002/01/08/iran3453.htm; Press Release, Human Rights Watch, Egypt Government Uses National Security to Stifle Dissent (June 22, 2005), http://hrw.org/english/docs/2005/06/21/egypt11185.htm.

11. *See, e.g.*, NASR ABU-ZAYD, RETHINKING THE QUR'AN (2004); Nasr Abu-Zayd, *The Qur'anic Foundation for Human Rights*, http://www.stichtingisbi.nl/folders/The_Qur_anic_foundation_for_Human_Rights.pdf (last visited Dec. 4, 2005).

12. *See, e.g.*, MERNISSI, *supra* note 7; Wadud-Muhsin, *supra* note 7.

argue that they are not engaging Islamic law, not taking a stand in the battles within Islamic legal interpretation, and certainly not taking a position on any conflict between *Shari'a* as applied and international human rights law.

Part III points to the costs of the current approaches and to those who bear them. I argue that the costs of the human rights movement's professional performances in this finite arena can be identified and weighed against the benefits of international intervention as currently practiced. These costs are not imagined. They are the real and ongoing effects of the failure to engage, in some way, with Islamic law. Some costs occur now, some have been paid in the past, and some are future possibilities. Beyond demonstrating a fumbling incoherence on a crucial issue, the current work of the human rights movement is bad for activists, bad for Islamic law, and bad for human rights.

Part IV suggests possible ways out of the current confusion. It calls on INGOs to acknowledge the uncomfortable realities of their current position, and, assuming that INGOs will continue to take a pragmatic line in determining when and how to act, suggests that they consider new ways of engaging with Islamic law. Although I take no position on which strategy has the most potential, I provide three alternative paths forward for the movement, depending on how they choose to evaluate the costs and risks before them.

Human rights discourse and Islamic legal discourse are powerful forces in the Muslim world today. These discourses are fighting for hearts and minds and are both key intellectual sources of the rules and regulations that govern the lives of millions of women and men across the region. Importantly, both discourses are often employed by imperialist and militant forces. In order to act as an agent for human rights in the region, the international human rights movement must develop a new theory of engagement with Islamic law. It must undertake more intellectually responsible professional performances, and, in so doing, begin to heal the rupture between its rhetoric and what it is actually doing in its work on the Islamic World.

I. The Human Rights Movement and Its Texts[13]

Informed by various critical approaches, my purpose here is to understand where to locate the agenda-setting power and the political force of the human rights movement. From a purely pragmatic position, it is this site that shapes the perspective on Islamic law adopted by the rest of the human rights machinery. We must, therefore, assess the approach and impact of this site. With international law, advocacy documents, and press coverage of human rights issues all falling within the umbrella of the "human rights discourse,"

13. The comments in this Part are based largely on my personal experience working as a consultant researcher in the Middle East and North Africa ("MENA") division of Human Rights Watch from September 2003 to August 2004, as well as numerous discussions with human rights professionals who are now, or were in the past, employed by HRW or AI, and local human rights organizations in the Muslim world.

it is often difficult to accurately depict the human rights movement. The movement is so large, so diverse, and so complex that a critique of the discourse as a whole is almost impossible. These broad phrases often have little content, obfuscating more than they reveal. As one ambivalent activist cautions, "critics often refer to *the* discourse, or the *corpus*, or human rights *talk*."[14] He further notes that critics tend to "represent human rights as a single discourse and a two dimensional movement."[15] In order to avoid this pitfall, I will target that aspect of the human rights movement that holds the most power, both in the eyes of the movement itself as well as in the eyes of those for whom the movement advocates. Because of their immense influence on intergovernmental bodies, the media, and the public, I focus on Human Rights Watch and Amnesty International.[16]

INGOs' human rights professionals have, in recent times, joined the ranks of the international elite, shaping governance and giving meaning to a body of law that seeks to define universal standards for human freedom from want and abuse. Thus, if we want to assess the human rights movement, we should begin by understanding it as it presents itself: both through its primary strategy of "naming and shaming," and through the human rights reports and advocacy documents it produces. In analyzing these strategies and texts, I am concerned here with the areas of contact between this movement and Islamic law.

Critiques of the human rights movement too often focus on the devotional and earnest tenor of "speaking truth to power," without recognizing that the modern movement is less about devotion to human rights ideals than about pragmatic strategies devised to accomplish maximum impact. Activists can often readily dismiss these critiques, pointing out that such attacks maintain a dated and caricatured image of the now-cosmopolitan human rights movement. In other words, the published works of international human rights groups in general, and those of Human Rights Watch and Amnesty International in particular, have as their primary goal the resolution of human rights problems rather than the enunciation of emancipatory rhetoric. As such, the INGOs have impact squarely in mind as they select the problems on which to focus their significant resources. While philosophical

---

14. Peter Rosenblum, *Teaching Human Rights: Ambivalent Activism, Multiple Discourses, and Lingering Dilemmas*, 15 Harv. Hum. Rts. J. 301, 305 (2002) (emphasis in original).

15. *Id.* at 302.

16. Amnesty International, founded by British lawyer Peter Berenson in 1961, and Human Rights Watch (initially Helsinki Watch), founded by Bob Bernstein, Aryeh Neier and Jeri Laber in 1978, are today the most powerful human rights organizations in the world. The operating budget of each organization has mushroomed rapidly to over $23,000,000. Human Rights Watch Financial Statements, Statement of Activities, http://www.hrw.org/donations/finance.htm (last visited Mar. 8, 2006); Amnesty Int'l, Facts and Figures: The Work of Amnesty International, http://web.amnesty.org/pages/aboutai-facts-eng (last visited Mar. 6, 2006). With large offices in London and New York, both organizations are often approached by press, politicians, United Nations' officials, and large foundations for their views on a given human rights situation, or on the human rights conditions in a particular country. *See generally* Kerstin Martens, *An Appraisal of Amnesty International's Work at the United Nations: Established Areas of Activities and Shifting Priorities Since the 1990s*, 26 Hum. Rts. Q. 1050 (2004).

adherence to the emancipatory phraseology of the post–World War II international human rights instruments is important, articulation of a consistent philosophy of human rights takes a backseat to the search for pragmatic solutions.

Reading human rights reports is crucial to understanding the new pragmatism of human rights INGOs. Only by understanding the construction and mechanics of the movement's texts, and by identifying the goals that such texts are intended to achieve can we assess the effectiveness of the human rights movement. Nowhere in the work of international human rights organizations is the pragmatic thrust more apparent than in the detailed recommendations that are now included in virtually all reports. These recommendations sections are increasingly lengthy, and are often addressed to all of the relevant parties, including the violator state government, the governments of neighboring countries, the United States, and applicable United Nations treaty bodies and special rapporteurs. It is true that most recommendations sections include a *pro forma* statement that a violator country should immediately sign and ratify a series of major international human rights instruments. However, after several aspirational recommendations, the reports generally switch to highly focused, and sometimes extremely technical, suggestions for ending the abuse.[17]

The movement today engages in sophisticated calculations when deciding how to choose a topic for research, which country to investigate, and which victims to highlight. The buzzword in many conference rooms today is "impact," with result-driven decision-making influencing how organizations plan their work. Potential for impact might include considerations such as whether there are local groups present that can follow up on a report and advocacy campaign after it is launched by an INGO and whether a Western government has enough leverage over the government of the violator state such that the INGO can engage in effective lobbying. Responding to a critic within the movement who urged HRW to do more work on economic, social, and cultural rights and to drastically alter its methodology in order to better do this, Kenneth Roth, the Executive Director of Human Rights Watch, wrote of the organization's very pragmatic decision-making:

> In addition to our investigation, analysis, reporting, and advocacy, Human Rights Watch tries to shape public opinion through the press and the Internet. That is concededly different from direct commu-

17. For example, one recent report on abuses against underage detainees in Egypt suggests, *inter alia*, the creation of a new position within the government bureaucracy to monitor the treatment of children in detention; the modification or abolition of several specific provisions of Egyptian law; the annual publication of nationwide statistics on the arrest and detention of children, including tallies of reports of abuse; the improvement of detention centers where children are held so that they conform with international standards; and the provision of school fees, books, uniforms, and government health insurance for children who are at risk of leaving school early. HUMAN RIGHTS WATCH, CHARGED WITH BEING CHILDREN: EGYPTIAN POLICE ABUSE OF CHILDREN IN NEED OF PROTECTION 58–61 (2003), *available at* http://hrw.org/reports/2003/egypt0203/egypt0203.pdf.

> nications with the public. But reasons of efficiency and available resources lead us to rely on it. We have found that the combination of press work and direct advocacy with policymakers can be a highly efficient way to secure human rights policy changes. Those who advocate diminishing these efforts in favor of attempts to mobilize large numbers of public constituents more directly must make the case that the tradeoff is worth it in terms of impact.[18]

"Naming and shaming," a methodology developed in the absence of any real enforcement mechanism for international human rights law, involves the accurate documentation of a particular set of human rights violations and, then, leveraging public opinion and media attention in order to embarrass violator states. While there has been much debate and intense internal discussion within INGOs about moving beyond "naming and shaming," or finding alternative methods for human rights work, this practice continues to characterize the tone and practice of international human rights reporting. Roth, once again, provides the clearest articulation of current practices:

> [T]he core of our methodology is our ability to investigate, expose, and shame. We are at our most effective when we can hold governmental (or, in some cases, nongovernmental) conduct up to a disapproving public.
>
> . . . .
>
> Although there are various forms of public outrage, only certain types are sufficiently targeted to shame officials into action. That is, the public might be outraged about a state of affairs—for example, poverty in a region—but have no idea whom to blame. Or it might feel that blame is dispersed among a wide variety of actors. In such cases of diffuse responsibility, the stigma attached to any person, government or institution is lessened, and with it the power of international human rights organizations to effect change. Similarly, the stigma weakens even in the case of a single violator if the remedy to a violation—what the government should do to correct it—is unclear.[19]

This approach to research, report-writing, and advocacy is the central contribution of INGOs to the larger human rights movement. To a large extent,

---

18. Kenneth Roth, *Response to Leonard S. Rubenstein*, 26 HUM. RTS. Q. 873, 876 (2004). This essay is part of an extraordinary group of responses to Roth's landmark article in the Human Rights Quarterly addressing the practical difficulties caused by HRW's expanded mandate to address economic, social, and cultural rights. While that issue is well outside the scope of this Article, Roth's piece is one of the more honest and cogent presentations of the work by anyone within the movement, devoid of cultural defensiveness, and brusquely pragmatic in tone. He notes that in selecting which aspects of economic, social and cultural rights to work on, HRW should "select from among them those that are well suited to being addressed by a methodology of public shaming." *Id.* at 877.

19. Kenneth Roth, *Defending Economic, Social and Cultural Rights: Practical Issues Faced by an International Human Rights Organization*, 26 HUM. RTS. Q. 63, 67 (2004).

the "naming and shaming" approach also dictates the style and content of most of the documents discussed in this Article.

II. Who's Afraid of Islamic Law?

Kenneth Roth has usefully articulated the criteria for INGO impact and has explained the "naming and shaming" methodology, which is, by far, the most dominant in the work of Western human rights professionals. Roth states: "The principal power of groups like Human Rights Watch is our ability to hold official conduct up to scrutiny and to generate public outrage. The relevant public is best when it is a local one—that is, the public of the country in question."[20] Roth notes that INGO professionals can identify clear criteria for determining which violations can be affected by their approach and which violations, while unfortunate, cannot:

> In my view, to shame a government effectively—to maximize the power of international human rights organizations like Human Rights Watch—clarity is needed around three issues: violation, violator, and remedy. We must be able to show persuasively that a particular state of affairs amounts to a violation of human rights standards, that a particular violator is principally or significantly responsible, and that a widely accepted remedy for the violation exists. If any of these three elements is missing, our capacity to shame is greatly diminished.[21]

I argue here that complex human rights violations arising from the application of *Shari'a* do not meet the above criteria. The local "outrage" the movement seeks to harness would need to be directed at Islamic law. In many cases, the violator is not the state, and the remedy is not necessarily state-controlled. Most professionals within the human rights movement are increasingly aware of this though they engage in a series of ever-more awkward moves to pretend that they are not.

As noted above, this Article assumes that there is a real and serious conflict between international human rights law and *Shari'a*, and that current human rights methodology can never properly address this conflict in a way that is

---

20. *Id*. It should be noted that representatives of AI have disagreed that "shaming" is the only function of INGOs and their only means of impact. They have expressed concern about "the implications of Roth's approach for relationships between international human rights organizations based in the North and local and national NGOs based in the South," noting that "a substantial portion of our work is documenting abuses and campaigning to stop them, and that [while] public exposure plays an important role in such situations . . . AI is more than that." Daniel A. Bell & Joseph H. Carens, *The Ethical Dilemmas of International Human Rights and Humanitarian NGOs: Reflections on a Dialogue Between Practitioners and Theorists*, 26 Hum. Rts. Q. 300, 314 (2004) (quoting from an adaptation of remarks by Curt Goering, Deputy Executive Director, Amnesty International USA). Roth's statements strike me as some of the clearest and most direct from within the movement, pointing to the dominant methodology and its rationale as applied by most human rights professionals.

21. Roth, *supra* note 19, at 67–68.

not damaging to human rights. While *Shari'a* is said to provide for every aspect of Muslim life, for most Muslims, Islamic law, as applied by states, is a set of codified substantive and procedural rules that can be easily identified. It is that *legal content* that concerns me here. In particular, I am interested in aspects of that legal content with which the international human rights movement repeatedly comes into contact.[22]

The conflict between aspects of that legal content, which comes into conflict with international human rights law norms, can be understood as a substantive conflict between formal legal rules generated by competing legal regimes. Much of substantive Islamic law is either consonant with human rights (rules relating to economic, social, and cultural rights, for example), or have no obvious bearing on human rights (rules governing religious rituals, among others). The human rights movement has a problem only with a small bundle of Islamic legal rules, specifically those relating to women's legal status, criminal/penal laws and procedures relating to a select number of crimes, and legal rules related to freedom of religion and religious minorities.

In and of itself, this conflict is not a major problem. After all, many states' laws and practices conflict with human rights law. Here, though, the conflict is with a parallel and alternative legal order, whose legitimacy is founded on the word of God as revealed to the Prophet Muhammad. The rules that God set out for Muslims, from personal hygiene and private relations in the home, to business transactions, criminal sanctions, and the laws of armed conflict, are taken very seriously by many Muslims.

Herein lies the central dilemma faced by international human rights organizations. Many of the egregious violations of international human rights law they document and advocate against in the Muslim world stem from the application of these very rules. Violations arising from Islamic law, as opposed to those related to emergency laws or secret prisons, cannot be attributed merely to a violator state. Indeed, many of the very people suffering from the violations so impressively documented by Western INGOs may believe that it is their duty as Muslims to live, marry, divorce, go to court, and even go to prison according to the rules of *Shari'a*. In some cases, individual Muslims even pressure their governments to adopt *more* rules based on Islamic law.[23]

---

22. This can be distinguished from human rights work that focuses on abuses unrelated to Islamic law, occurring in states that incidentally apply such law. *See, e.g.*, HUMAN RIGHTS WATCH, IN A TIME OF TORTURE: ASSAULT ON JUSTICE IN EGYPT'S CRACKDOWN ON HOMOSEXUAL CONDUCT (2004), *available at* http://hrw.org/reports/2004/egypt0304/egypt0304.pdf.

23. *See, e.g.*, Abdullahi Ahmed An-Na'im, *Human Rights in the Muslim World: Socio-Political Conditions and Scriptural Imperatives*, 3 HARV. HUM. RTS. J. 13, 20 (1990) [hereinafter *Human Rights in the Muslim World*] (noting that in 1990, before the most recent wave of Islamization efforts, "many Muslims . . . challenged the gradual weakening of Shari'a as the basis for their formal legal systems . . . [making] mounting demands for the immediate application of Shari'a as the sole, or at least primary, legal system of the land"); *see also* GENEVIEVE ABDO, NO GOD BUT GOD (2000) (analyzing the "bottom-up" revival of Islam in Egypt). Most recently, the officially banned Muslim Brotherhood party of Egypt (whose campaign slogan is "Islam is the Solution") has made dramatic gains in the country's parliamentary elections. *See* Neil MacFarquhar, *Will Politics and Success at the Polls Tame Egypt's Muslim Brotherhood?*, N.Y. TIMES, Dec. 8, 2005 at A1 (quoting one Egyptian as stating, "If Islam were applied, Iraq could not have been

Even if a state wants nothing more than to liberalize its laws, it may be constrained by a population that is prepared to engage in violence in order to keep certain laws authentically "Islamic."[24]

State action is further complicated in the interpretation of Islamic law. While the modern state technically promulgates laws based in Islam, a transnational and trans-temporal structure of legal authority underpins the application and interpretation of that law. Although his job is to apply the laws of Pakistan, a Pakistani judge may have attended seminary in Cairo, and he may rely on jurisprudential texts written in 765 C.E. in what is now Iraq. In many ways, Islamic law blurs the lines between victim and violator, between state and subject.

When they talk about victims and violations that relate to Islamic law, INGOs are, I believe, painfully aware of this uncomfortable political reality. They know that the state is often *not* the primary source of the violation, that violations may actually increase in the absence of an authoritarian secular state, and that many of the same people who are normally considered ideal victims for the purpose of human rights advocacy (the poor, the uneducated, the repressed, those imprisoned or tortured by the state) are often the most fervent supporters of a system of rules that substantively contradicts key tenets of international human rights law. Internally, INGO professionals know that most Muslims think of Islamic law as God's law and not simply the law of a state. Yet these INGOs are afraid to acknowledge the difficulties created by this fact. They are afraid of admitting that victims' desires about law might be ambiguous and complicated. They are also afraid to admit the difficulty in convincingly documenting a conflict between God's law and international law. In fact, they go to great lengths to avoid giving the impression that they are engaged in just that task. They must find victims, convey their stories, and engage in the fiction that the violations are simply a problem of states' failure to abide by their obligations under international human rights law. Moreover, they must pretend that their work has nothing to do with the substance of *Shari'a*.

The awareness of this fiction among INGO professionals, together with the determination to continue with the use of traditional tools of human rights advocacy, creates a deep dissonance between what INGO texts claim to do and what they do in fact. Because the current limited calculus of human rights advocacy techniques requires INGO texts to identify abuses, give voice to the victims through recorded testimony, and blame the state for the

---

invaded, Israel could not occupy Jerusalem, and aggression could not have been used to humiliate Muslims everywhere").

24. *See Human Rights in the Muslim World*, *supra* note 23, at 21 (stating that "to the overwhelming majority of Muslims today, Shari'a is the sole valid interpretation of Islam, and as such *ought* to prevail over any human law or policy"). Of course, we have no idea what Muslims really want. The region has few reliable empirical indicators (very few elections, no reliable polling data or independent polling mechanisms) of individual political opinions.

violation,[25] the only possible position is to offer international law as the solution to every violation. But it is not difficult to see the error of this logic. If, as I have asserted here, the state law is based on Islamic law, and state law is blamed for giving rise to a violation (such that it requires remedy by compliance with international instruments), the necessary conclusion is that Islamic law is at the root of the human rights violation. Denying the obvious conclusion of this simple syllogism necessitates a series of awkward intellectual moves to cover up the discomfort with, and lack of an adequate response to, an increasingly complex state of affairs.

Western INGOs do not feel as though they can avoid reporting on abuses related to Islamic law, especially given the growing appetite of Western audiences for stories about the suffering of Muslims under "medieval" Islamic law, and the explosion of media attention on the region. Yet their current posture leaves these INGOs consistently on the defensive. They appear unclear about whom they are addressing and who the real victims are, unsure of how to talk about the violators without sounding offensive, culturally imperialistic,[26] and under-informed about the rules, procedure, and jurisprudence of Islamic law. In the Parts that follow, I locate the points where the discomfort is most acute, and the ways in which INGOs reveal their anxiety about their position vis-à-vis Muslim "victims" through their texts.[27]

A. Caveat Fidelis[28]

In every INGO report that engages Islamic law that I have been able to find, a statement appears in the early sections of the report that claims to articulate the posture of the organization toward *Shari'a.* This statement, what I call *caveat fidelis*, is meant to convey to the reader that the organization is

---

25. For a leading critique of the dominant human rights methodology, see Makau Mutua, *Savages, Victims, and Saviors: The Metaphor of Human Rights*, 42 Harv. Int'l L.J. 201 (2001); Makau Mutua, Human Rights: A Political & Cultural Critique (2002). *See also* David Kennedy, *The International Human Rights Movement: Part of the Problem?*, 15 Harv. Hum Rts. J. 101 (2002).

26. *See* Edward W. Said, Covering Islam 29–30 (1997).

27. A note on methodology: Where relevant, I have read and included every publicly available document published by Amnesty International and Human Rights Watch on countries that apply, or have considered applying, any aspect of substantive Islamic law. Using the excellent online databases of both organizations, it is possible to search the entire work of HRW's (formerly Middle East Watch) MENA division. Early efforts by AI in the Muslim world are also available. Search methods included both country-specific searches, as well as searching for terms such as *Shari'a*, *hudood*, and *zina*. I have excluded texts that address broad ranges of human rights violations in a context where there was no possibility for internal debate, dialogue, reform, or change and thus where it seems unfair to criticize the position of the organization on law (such as the civil war in Afghanistan, the military government of Sudan during the Sudanese civil war, the application of international humanitarian law in the Occupied Palestinian Territories, and violations that occur during active armed conflict). My focus is on those areas where the human rights movement encounters Islamic law *as* (state-enforced) *law*, which I consider to be separate from, for example, Muslim social mores, or the personal application of *Shari'a* by Muslims in their private lives. I exclude texts that address violations that are justified by states on the basis of "Islam," or "Muslim culture" but with no actual basis in Islamic law. *See, e.g.*, Middle East Watch, Court Upholds Closure of Women's Organization (1992), *available at* http://www.hrw.org/reports/1992/egypt/.

28. "Believer Beware." My thanks to David Winickoff and David Ratzan for assistance with Latin.

claiming a non-choice or a non-intervention. The organizations repeat that they *do not* take a position on *Shari'a*. I argue that the statement is an unsuccessful attempt to hide or occlude actual positions and interventions on Islamic law. The *caveat fidelis* statement, and the methodology and language it brings, are, in fact, an intervention into Islamic legal discourse at particular sites of application, and INGOs must be responsible for the costs (and benefits) of this intervention. Most importantly, they must recognize the intervention, and see it as a choice, among a variety of options, about how best to engage with Islamic law. One can identify a pattern in the use of the *caveat fidelis* statement in the map of the reports. The cautionary phrase tends to appear once in the introduction to the report (usually within the first five pages), and then again every time the language of the report approaches commentary on Islamic law. *Caveat fidelis* often appears at the very suggestion that Islamic law might be involved.

Two typical *caveat fidelis* statements merit close reading. The first is found in an older HRW report, and typical of the longer version of the statement that appears in the introduction section of most reports that touch on Islamic law: "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."[29]

Let us tease out the powerful phrases in this first statement. "Per se" seems to suggest that while HRW does not oppose the application and enforcement of Islamic law as such, the organization may oppose it in other circumstances if the law does not, for example, respect the principle of equality. So, we might take from this statement that HRW would not oppose the creation of a state founded entirely or even partially on Islamic law at the outset; it would only be concerned with the fair application of the laws (assuming that they guarantee *prima facie* equality before the law). This has not been HRW's actual position.

The second statement ostensibly indicates a more sophisticated and pragmatic human rights movement. It has a more legalistic tone, giving the impression of humble objectivity that may lead the reader to believe that HRW advocates *for Shari'a*. This second statement, from a more recent report, reads as follows:

> Human Rights Watch does not advocate for or against Shari'a per se, or any other system of religious belief or ideology; nor do we seek to judge or interpret the principles of any religion or faith. We are simply concerned about human rights violations resulting from the implementation of any legal system, in any country.[30]

---

29. Double Jeopardy, *supra* note 2.

30. Human Rights Watch, Divorced from Justice: Women's Unequal Access to Divorce in Egypt (2004), *available at* http://hrw.org/reports/2004/egypt1204/egypt1204.pdf [hereinafter Divorced from Justice]. AI's statements serve an almost identical function, and tend to utilize the *caveat*

The statement, emphasizing that HRW will not sit in judgment of the principles of any religion, appears to be an articulation of HRW's official position. If this was, in fact, the case, we would expect no statement judging the principles of Islam to appear in the body of the report. The next sentence in the above-quoted passage, claiming to describe the motivations behind the report, takes the rare step of speaking in the first person.[31] Note also the curious addition of an adverb: "We are *simply* concerned about human rights violations."[32] This is intended to announce to the reader that violations of human rights can be clearly and simply identified without any evaluation of, or opinion on, Islamic law. The report seemingly does not court conflict, nor does it pit Western ideas of justice against competing Muslim conceptions. Instead, it purports to be an evaluation of violations of international human rights law without taking a position on Islamic law.

---

fidelis at similar moments of possible contact with Islamic law, using slightly different language. One AI report states,

> The fact that penal legislation is associated with a religion has no relevance for Amnesty International,[sic] instead, our analysis focuses solely on how it affects human rights in Nigeria. Amnesty International is an independent and impartial human rights organization, which neither supports nor opposes any religion or belief. Amnesty International bases its research analysis on international human rights law and standards, and neither supports nor opposes *Sharia* law nor any other system of law *per se*.

AMNESTY INT'L, NIGERIA: THE DEATH PENALTY AND WOMEN UNDER THE NIGERIA PENAL SYSTEMS 3 (2004), *available at* http://web.amnesty.org/library/Index/ENGAFR440012004?open&of=ENG-NGA. A more culturally sensitive version reads,

> Amnesty International takes no position on religions, customs or specific legal regimes; it welcomes the rich variety of cultures and believes that the universality of all human rights, far from denying diversity, can only benefit from it. The organization recognizes that the contribution of different cultures, at the local and the global level, enrich the understanding of human rights giving them their local form and language.
>
> . . . .
>
> While recognizing the importance of cultural diversity, Amnesty International stands resolutely in defence of the universality of human rights, particularly the most fundamental rights to life and freedom from torture and ill-treatment.

AMNESTY INT'L, PAKISTAN: VIOLENCE AGAINST WOMEN IN THE NAME OF HONOUR 4 (1999), *available at* http://web.amnesty.org/library/index/engasa330171999; *see also* Amnesty Int'l, Afghanistan: New Forms of Cruel, Inhuman or Degrading Punishment 6 (1992), *available at* http://web.amnesty.org/library/pdf/ASA330171999ENGLISH/$File/ASA3301799.pdf.

31. Human Rights Watch almost universally uses the third person when referencing the individuals involved in researching reports, carrying out interviews, writing the text, as well as the organizational entity making recommendations in its reports. Its typical phrases include "researchers found," "Human Rights Watch said," or "[i]nterviewees told Human Rights Watch." While the present Article is not a comparative analysis of INGO reports on other areas of the world, it is worth noting that a recent, highly anticipated, and groundbreaking HRW report on access to abortion in Argentina, although acknowledging the power of the Catholic Church and its teachings in influencing both law and societal norms, includes no *caveat fidelis* statement about the organization's position regarding religion, despite the fact that the many Catholics believe that their religion requires that they take a position against abortion. *See generally* HUMAN RIGHTS WATCH, DECISIONS DENIED: WOMEN'S ACCESS TO CONTRACEPTIVES AND ABORTION IN ARGENTINA (2005) *available at* http://hrw.org/reports/2005/argentina0605/argentina0605.pdf [hereinafter DECISIONS DENIED].

32. Emphasis added.

But can this really be all that the report does? It seems impossible to be "concerned" about, and take a strong prescriptive position against, unequal divorce laws in a Muslim country that applies *Shari'a*-based personal status law and not "judge" Islamic law itself. The human rights violation is *inseparable* from the divorce law. The divorce law is Islamic law. This is not a case of disparate impact from a facially neutral law, but rather of a law that is discriminatory on its face. The root of the discriminatory law is revealed text. The human rights violation in the earlier report *is* the *hudood* criminal punishment. The *hudood* criminal punishment is Islamic law.[33] The language of human rights reports, almost by necessity of the genre, is strongly judgmental. One report, for example, excoriates "Egypt's profoundly discriminatory divorce system."[34]

This statement of neutrality creates an impossible task for the rest of the report and for the human rights professional who will conduct press advocacy for the report in the Muslim world. The statement claims that the report will only discuss human rights violations without making any judgments about, or articulating any opinions regarding, Islamic law. This approach gives the impression that the INGO considers the law's basis in *Shari'a* to be as irrelevant as, say, the language in which a law was drafted. (The INGO may as well say: "We take no position on whether this law was originally written in German.") This strained neutrality gives the reader the false sense that Islamic law actually has very little to do with the human rights violations documented in the report itself.

B. Islamic Law? What Islamic Law?

After the *caveat fidelis* move, the statements in the text diverge even more significantly from what the text does. As the reports present their case by providing testimony from interviewees, describing the relevant laws, and analyzing how such laws and their application violate international human rights law, the conflict between Islamic law *per se* and international human rights law

---

33. The extended version of the above quoted *caveat fidelis* statement reads,

> The *Hudood* Ordinances criminalize, among other things, adultery, fornication and rape, and prescribe punishments for these offenses that include stoning to death, public flogging and amputation. 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. However, the *Hudood* laws, as written and applied, clearly conflict with these rights principles. Not only do they prescribe punishments that are cruel and inhuman under international law, but they clearly discriminate on the basis of gender.

DOUBLE JEOPARDY, *supra* note 2. The flawed reasoning in the passage undermines HRW's supposed neutrality. It is *religious law itself* that is at issue here, and *religious law itself* is in direct conflict with HRW's conception of international human rights standards. Stating the opposite does not make that uncomfortable fact go away, nor does it sound very convincing to a Muslim audience. The *Hudood* Ordinance punishments may well serve to legitimize abusive state power as a matter of fact, but they are not the invention of a state seeking to justify cruel and inhuman punishments. The punishments have a much more complex and firmly rooted history in a fourteen hundred year criminal legal tradition.

34. DIVORCED FROM JUSTICE, *supra* note 30, at 34.

is revealed more clearly.[35] The absolute belief of the INGO in the superiority of international human rights law over Islamic law also becomes apparent, though it remains unstated. The primary function of reports that discuss Islamic law appear to be to describe the conflict, to highlight its detailed contours, and to point to the corpus of international human rights law that they believe should govern. Because the conflict cannot be explicitly stated, the INGOs either must pretend that the violations they are illustrating have nothing to do with Islamic law, or they must claim that Islamic law is *not* law, but simply the manifestation of an abusive state.

In order to maintain the fiction that Islamic law is not the issue, many reports implicitly claim that Islamic law is not a necessary element in understanding the documented violations. Even when it is clear that the abuses highlighted in the reports are the result of the application of *Shari'a*, the reports will still go to great lengths to avoid stating the obvious conflict.

This strategy manifests itself in multiple ways. Human rights reports often discuss a violation without acknowledging that it is rooted in an alternative legal system, repeatedly mention specific rules of Islamic law (such as *hudood* punishments or *zina* regulations) without providing any legal context or analysis of such laws, or describe a series of violations stemming from the application of Islamic law without actually locating the specific legal conflict in play (between *Shari'a* and international human rights law). These techniques often lead to basic factual or analytical errors in the presentation of *Shari'a*. Yet any attempt to live up to the *caveat fidelis* expectation necessitates their use, because if human rights violations are explicitly linked with Islamic legal rules, then the conflict would be acknowledged, and a normative judgment would be difficult to avoid. The more that Islamic law is acknowledged to be legitimate and autonomous, the more entrenched the conflict between the legal systems will appear, and the more the organization will seem to be assessing a particularly Muslim legal system as different from that of the international human rights order. Given the lack of other options, it is easier to pretend that the report does not at all address "real" law.

As noted above, Islamic personal status law as applied in every state today, and according to all mainstream juridical schools, is overtly discriminatory. Simply put, within a *Shari'a* personal status system, men and women do not share equal legal status. Arguments can be made to favor such a facially discriminatory system. A devout believer may claim: "It is more important to me that I follow what I believe are God's specific laws regarding marriage of Muslims, than to know that my legal system is characterized by formal equality." She may also state: "I know that Muslim personal status law grants me the right to maintain my own property and to negotiate a series of advanta-

35. The vast majority of INGOs' texts that encounter Islamic law address issues relating to the rights of women, criminal punishment (application of *hudood* laws and corporal punishment), criminal procedure, apostasy, and blasphemy.

geous conditions into my marriage contract, and this is a predictable system that I prefer over the tribal norms in my village."

Whether women think this, or whether the law is always bad for women, is not at issue here. There are, in fact, many justifications offered for the discriminatory nature of Islamic personal status law. Such justifications include the claim that *Shari'a* personal status is more protective of women, or the belief that Islam radically transformed the position of tribal women at the time of the Prophet into rights-holders who were subject to law.[36] There are, in turn, arguments attempting to re-imagine and transform Islamic personal status law such that it grants full equality to women while preserving a Muslim character.[37] There is a growing literature on the internal debate, much of it initiated by Muslim women's rights activist within Muslim communities, about the future of personal status law.[38]

Of all the areas of substantive Islamic law that conflict with international human rights norms, personal status law is the most regularly applied by modern states across the Muslim world today. One scholar notes that personal status law (unlike civil codes, for example) remains "*fiqh* in content"[39] across the Middle East. Many scholars have addressed the reasons why personal status law remains the stronghold of *Shari'a* in the region,[40] but one aspect of the debate is central to understanding why the human rights move demonstrated here is so problematic. As one scholar notes:

> [This debate] is conducted almost entirely within the Islamic framework, indicative of the fact that the concept of an Islamic law is accepted as given. What the modernist movement objects to is not

---

36. For the most infamous apologist text in this field, see Sultanhussein Tabandeh, A Muslim Commentary on the Universal Declaration of Human Rights (F. J. Goulding trans., 1970); *see also* Amira Mashhour, *Islamic Law and Gender Equality—Could There be a Common Ground?: A Study of Divorce and Polygamy in Sharia Law and Contemporary Legislation in Tunisia and Egypt*, 27 Hum. Rts. Q. 563 (2005). Mashhour states: "[T]he deterioration of women's rights in many Islamic countries has nothing to do with their Islamic nature and . . . most of the gender inequalities are not based on Islam but are mainly the result of traditional, patriarchal, and male-dominated societies' practices that aim to dominate women and to find any pretext to suppress them." *Id.* at 564.

37. *See, e.g.*, Mernissi, *supra* note 7 (developing a seminal argument for historicizing revealed texts and reconsidering key Islamic texts from a feminist perspective).

38. There is a broad range of scholarship analyzing the internal human rights discourse in particular Muslim contexts, exploring paths to human rights from within Islamic law, or articulating "local" agendas for reform. This literature ranges from illuminating and vital to poor scholarship that perpetuates the weak analysis found in human rights reports. In the former category, see, for example, Khaled Abou El Fadl, Speaking in God's Name: Islamic Law, Authority, and Women (2001); Riffat Hassan, *Religious Human Rights and the Qur'an*, 10 Emory Int'l L. Rev. 85 (1996); Shadi Mokhtari, *The Search for Human Rights Within an Islamic Framework in Iran*, 94 The Muslim World 469 (2004). In the latter category, see Janet Afary, *The Human Rights of Middle Eastern & Muslim Women: A Project for the 21st Century*, 26 Hum. Rts. Q. 106 (2004).

39. Frank Vogel, Islamic Law and Legal Systems: Studies of Saudi Arabia 214 (E. J. Brill 2000).

40. Abdullahi A. An-Na'Im, Islamic Family Law in a Changing World: A Global Resource Book 18 (2002); Kristen A. Stilt, *Islamic Law and the Making and Remaking of the Iraqi Legal System*, 36 Geo. Wash. Int'l L. Rev. 695 (2004); Lama Abou Odeh, *Modernizing Muslim Family Law: The Case of Egypt*, 37 Vand. J. Transnat'l L. 1043 (2004).

> the postulate that Islam as a religion ought to regulate the sphere of law as well, but that traditional form of Islamic jurisprudence and the way in which the message of Islam has been interpreted by Muslim scholars.[41]

Regardless of whether one accepts this argument as relevant to the whole of Islamic legal reform today, it is surely true in the arena of family law reform. Even secular feminists in Muslim countries often articulate their reform projects in the language of Islamic law, and seek to find new *Shari'a* jurisprudential methodologies to challenge traditionalist versions of the law.[42] Islamic law is taken seriously by the states that promulgate the law, the judges who enforce it, and the reformers and activists who advocate for change. The battle occurs largely within the legal discourse of Islam, and centers on the key Islamic legal texts.

In this context, a close reading of INGO texts provides us with the contours of the human rights movement's awkward intellectual position. A 1995 review of women's rights developments around the world published by Human Rights Watch discusses the inequality of personal status law in Morocco (the Moroccan code, since significantly reformed, is called the *Moudawana*). The review explains that the "Women's Rights Project spent two months investigating the effects of Morocco's discriminatory family code" and that the code "regulates . . . legal capacity, marriage, divorce, and inheritance. In each of these areas, the *Moudawana* grants different rights to women and men and consistently renders women's autonomy subject to male guardianship and authority."[43] The report also states that the "law compounds the unequal status of women in the marital relationship by allowing men up to four wives simultaneously."[44] These are central aspects of Islamic personal status law. Muslim audiences would not be surprised by this information; they are considered some of the most central rules of substantive *Shari'a*.[45] The document gives the impression that these conclusions about the law, and its discriminatory nature, were uncovered by the organization and that they represent the fruits of a two-month investigation. Because there is no further analysis of the context of the long legal and jurisprudential tradition upholding polygamy and guardianship, it is difficult to understand the purpose of this update on

---

41. Ziba Mir-Hosseini, Marriage on Trial: A Study of Islamic Family Law 13 (2000).

42. *See generally* Abou Odeh, *supra* note 40; *see also* Madhavi Sunder, *Piercing the Veil*, 112 Yale L.J. 1399 (2003).

43. Human Rights Watch, Women's Human Rights Developments (1995), *available at* http://www.hrw.org/reports/1997/WR97/BACK-04.htm.

44. *Id.*

45. Despite marked differences in doctrine and practice between the four *Sunni* schools (as well as in *Shi'a* jurisprudence), the central concept of gender inequality in personal status and other law enjoys consensus across the board. For example, women are not equal witnesses in court, they have an unequal right to initiate divorce, a one-way duty of obedience to husbands who have the right to "discipline" them, and unequal rights to inheritance. On the difference between schools, see Noel J. Coulson, A History of Islamic Law 86–119 (1964). On Islamic personal status law, see generally Jamal J. Nasir, The Islamic Law of Personal Status (2002).

Moudawana. One cannot help but conclude that the organization was uninterested in the legal discourse shaping personal status law for Moroccans seeking to change the nature of guardianship or the rules governing marriage. While the information about the discriminatory aspects of *Moudawana* is neither surprising nor shocking to Muslims, it resonates strongly with a Western audience, which is used to viewing legal reform as a process of eliminating such discrimination.

Another recent HRW report looks at the significant battles over personal status law reform in Egypt, ultimately resulting in the passage of *khul'* laws which allow women to initiate divorce proceedings under certain (discriminatory) conditions.[46] The reforms are generally thought to be relatively progressive within the Muslim world, and the strategic work of activists struggling for these reforms are considered by many to be a model for the region. Even with the reforms, however, the law is still well below the standards of international human rights law in general, and the requirements of the Convention on the Elimination of All Forms of Discrimination Against Women ("CEDAW") in particular.[47]

The report, *Divorced from Justice*, enters the debate in order to assess the human rights of women under the newly reformed family law system, and, ostensibly, to contribute to the local activism around the issue. It includes a number of testimonies from women of different classes who have suffered at the hands of their husbands and the legal system.[48] The introductory section of the report, aside from the *caveat fidelis* statement, notes that "[t]he Egyptian government has created two widely disparate systems for divorce, one for men and one for women."[49] Although it is true that the Egyptian State has promulgated the family law system, the conflict with human rights law in this case is not merely the result of an autocratic state behaving badly. There are other factors that contribute to the preservation of the *Shari'a*-based system, some of them more important than the Egyptian government. This important fact is lost in the presentation of the human rights report, which by necessity requires that a *state* be blamed for the violation.

Without engaging any of the complex Islamic legal issues involved in the battle over family law in Egypt, or the doctrinal complexities of *khul',* the report acknowledges the efforts of domestic activists:

---

46. Divorced from Justice, *supra* note 30, at 34 (2004).

47. On the personal status law debates in Egypt, see Jasmine Moussa, *The Reform of Shari'a-Derived Divorce Legislation in Egypt: International Standards and the Cultural Debate*, 1 Hum. RTS. L. Comment. 1 (2005); Diane Singerman, *Women and Strategies for Change: An Egyptian Model*, Daily Star (Leb.), July 28, 2004, *available at* http://dailystar.com.lb/article.asp?edition_id=10&categ_id=5&article_id=6681 (noting that activists "muted the liberal rights discourse favored by many women's rights activists and instead emphasized religion as an asset"); Mariz Tadros, *Khul' Law Passes Major Test*, Al Ahram Weekly On-Line, 19–25, Dec. 2002, http://weekly.ahram.org.eg/2002/617/eg11.htm.

48. The report is based on 112 interviews conducted in Egypt, an impressive number for a human rights report. Divorced from Justice, *supra* note 30, at 4.

49. *Id.*

> The success of the legislative initiative has also been attributed to the fact that the basis of the law is found in the Qur'an. Given the constrained environment in which advocates for changing discriminatory elements of the personal status law (derived from interpretations of Shari'a deemed untouchable by some) operate, the coalition made the strategic decisions to use religion as a basis for these reforms.[50]

This comment is fascinating. It acknowledges that *Shari'a* is at the root of the law, that Islamic law can be deployed strategically, and that it was the only viable vocabulary of change for the coalition of Egyptian reformers. This is important because we might expect that this acknowledgement would be taken into consideration in the recommendations section, or in the advocacy strategy that HRW designed for the report.

But, in the end, the statement turns out to be an anomaly. Once presented, it is then ignored. The report does not build on this key point, nor does it analyze or further develop the Islamic arguments of local activists. Yet, it assumes that a feminist/reformist Islamic legal argument could *only* have been instrumental, rather than based on a genuine desire to harmonize women's rights and the requirements of *Shari'a*. In other words, because an unidentified "some," presumably those who are against women's rights, believe that certain aspects of personal status law derive from an unalterable *Shari'a* code, those who fight for women's rights are forced to use Islamic law strategically to achieve their desired end. Admittedly, the report presents a fuller picture than others in its acknowledgement that the domestic debate centered almost exclusively on Islamic law. However, it conveniently forgets this fact immediately after stating it, resorting back to the traditional INGO approach.

While a discussion of international human rights law is certainly relevant, an attempt at harmonizing the two bodies of law would be welcome. At the very least, the report should contextualize its discussion of international human rights law with a similarly detailed discussion of *Shari'a*. It is in the section of legal analysis that we might find the despair of the testimony section matched by the hope of law and the promise of international human rights. This section, entitled "Egypt's obligations under international law," begins as follows: "Egyptian personal status laws advance a model of the family based on the superiority of men over women."[51] But we already know the story to be much more nuanced. Egyptian personal status law actually advances a *Muslim* model of the family based *explicitly* on *Shari'a*. In other words, the report presents the opportunity to take a number of important steps. First, the report could articulate the obvious: that there is a serious *legal* conflict between *Shari'a*-based personal status law and international human rights law, a clear (but unstated) assumption throughout the report. Second, the report

50. *Id.* at 23–24.
51. *Id.* at 55.

could take bold and innovative steps to address this conflict. Unfortunately, the report does neither, which prevents it from advancing the debate. Instead, *Divorced from Justice* is a catalogue of horrors, appended with a rote recitation of women's rights under international law.

I should note that of all the reports, press releases, and world report chapters that deal with subjects that make contact with Islamic law,[52] *Divorced from Justice* is among the very few that at least acknowledges that Islamic law and reform of legislation operates in a unique discourse within Egypt, and that this necessitates various strategies by activists. While the report does not address the tension experienced by many Muslims in understanding how to live by God's law while also seeking emancipation and equality, it does attempt to address an issue more complex than "women suffering under *Shari'a*."

Not all human rights texts avoid explicit criticism of Islam, however. Explicit critical engagement with Islam, if done improperly, can be even worse than the more common avoidance techniques discussed above. A 2002 op-ed piece entitled *The War on Women*[53] is different than the reports discussed in this section in that it names *Shari'a* as the problem. But the article grossly oversimplifies and flattens distinctions between Islamic legal orders in different countries, misinforms readers about the nature of human rights concerns stemming from the application of *Shari'a*, and fails to treat Islamic law as law. Despite the human rights abuses that have resulted from it, the piece seems to uncritically approve of the U.S. approach to "combating terrorism emerging from militants in the Islamic world,"[54] and urges the United States government to put similar energy into combating the treatment of women under *Shari'a*.

Urging the United States government to pay more attention to women's rights in the Middle East is not inherently problematic. However, *The War on Women* engages in repeated hyperbole, inciting panic by repeatedly stating

---

52. *See, e.g.*, Amnesty Int'l, *United Arab Emirates: Flogging*, *Urgent Action Appeal* AI Index: MDE 25/003/2004, Dec. 23, 2004. This urgent action, calling on Amnesty's constituency to flood the government of the United Arab Emirates with letters, states that two women sentenced to flogging "reportedly confessed to having a sexual relationship outside wedlock," and recommends that individuals "send appeals to arrive as quickly as possible" to the government of the United Arab Emirates "expressing concern" that neither of the women "has been convicted of a recognizably criminal offense." *Id.* While AI, and many of the individuals drafting letters may not consider this a recognizable criminal offense, having a sexual relationship outside wedlock is a very clear criminal offense under *Shari'a*. The complete avoidance of Islamic law renders the action irrelevant and off-key in a country where many people (not just the state) believe that extra-marital sexual conduct must be criminalized in accordance with divine law. In a different newsletter to its members, AI states: "In many parts of Afghanistan, girls and women are prosecuted for adultery, 'running away from home,' and for engaging in consensual sex before marriage, all of which are known as *Zina* crimes . . . . This is justice turned upside down." This view of justice may or may not be an accurate moral assessment, but it is most certainly an unacknowledged judgment about Islamic law. Amnesty Int'l, *Justice Turned Upside Down in Afghanistan*, WIRE, Oct. 2003. *See also* HUMAN RIGHTS WATCH, KUWAIT: PROMISES BETRAYED (2000) 21–28.

53. LaShawn R. Jefferson, *The War on Women*, WALL ST. J., Aug. 22, 2002, *available at* http://hrw.org/editorials/2002/women0822.htm.

54. *Id.*

that *Shari'a* is a physical "threat to women's very existence."[55] The author addresses her audience as though it has never heard of Islamic law, which she describes as a strange, archaic, and radical force that seeks to "brutalize and subordinate women."[56] In an act of grossly oversimplified selection, she presents a parade of Islamic law horribles, including stoning, the death of Saudi girls due to the fact that they were not wearing headcovering, grossly unfair rules on women witnesses, polygamy, and discriminatory personal status law in general. In the space of a few short paragraphs, the author engages in commentary on five separate countries, while neglecting to mention all of the significant differences in terms of the level of protection each country affords to women.

The War on Women fails to take Islamic law seriously as law, and, in so doing, also neglects to acknowledge the Herculean task faced by legal reformers attempting to develop new interpretations within an Islamic jurisprudential framework. It states several times that the abuses included in the column are the result of "radical interpretations" of *Shari'a* and suggests that any debate over these issues is the equivalent of doing nothing while "millions of women living under Shariah contend with laws and practice that make a mockery of international human rights protections and endanger their lives."[57] Indeed, most of the laws described in *The War on Women*, including personal status laws and criminal procedure rules, are not only common in the region, but are also very mainstream interpretations of Islamic law. Many of these rules are not the result of radical interpretations of *Shari'a*,[58] but, rather, form the widely agreed-upon doctrinal basics.[59]

Without a doubt, serious human rights violations occur as a result of many of these rules. Solutions that will minimize the negative impact of such rules need to be found. But to suggest that the solution to every violation is merely more "pressure" from the United States government seriously underestimates the extent to which Islamic law is deeply ingrained in the legal, political, and social frameworks of many Muslim countries. Binding rules that have been in effect for centuries cannot easily be done away with through the application of outside pressure. And many who live under these rules, male and female, do not wish for these rules to be simply done away with. An advocacy strat-

---

55. *Id*.

56. *Id.*

57. *Id.*

58. This should be compared to radical interpretations of *Shari'a*-based international law and law regarding just war, as developed by, for example, Osama bin Laden and Ayman al Zawahiri. On this issue, see MOHAMMAD-MAHMOUD OULD MOHAMEDOU, NON-LINEARITY OF ENGAGEMENT (2005), *available at* http://www.hpcr.org/pdfs/Non-Linearity_of_Engagement.pdf.

59. Again, this is not to say that such doctrines are not contested, that they do not vary within and across countries, that they are fixed or static for all time, or that they cannot or should not be changed. My argument is simply that pretending that the personal status code of Morocco, or the criminal procedure rules of Pakistan, are the results of current radical or "fringe" interpretations of Islamic law conveniently avoids charges of anti-Muslim sentiment, but it is factually incorrect and intellectually incoherent.

egy that is based on the generation of international pressure is likely to have extremely limited impact.

While *The War on Women* is an extreme example of the oversimplification of Islamic law, other documents contain similarly broad generalizations. *State Injustice*, a 1998 report by Amnesty International on unfair trials in the Middle East, repeatedly lumps together several countries into an undifferentiated whole. In doing so, the report not only avoids a serious discussion of the relevant Islamic legal provisions, but it also neglects significant historical and cultural differences that are relevant to the current state of the legal system in the countries discussed.[60]

State Injustice takes a region-wide look at the state of the protection of the right to fair trial, conflating a number of countries, political contexts, and legal regimes. The report is divided by type of violation rather than by country or by Middle East region. States applying *Shari'a*-based criminal procedure[61] are discussed side-by-side with brutally repressive secular regimes.[62] The situation in countries engaged in civil war is analyzed next to that of areas under belligerent occupation.[63] The INGO never states why it has decided to present the entire region in this manner. In the absence of a section that explains the methodology, it is unclear why certain individual cases were selected.

As a result, the report induces a dizzying feeling of flying over the Middle East, abruptly pointing to the evils perpetrated by each state. From Israeli torture cells[64] to a naked Egyptian man subjected to electroshock in Lazoghly Square,[65] Amnesty International lists violations without any significant attempt at connecting the pieces or contextualizing the violations it describes. In the section on "corporal punishments,"[66] the report quotes the testimony of an Iraqi prisoner who describes, in graphic detail, how his ear was cut off while he was in detention in 1996. But with the political situation in Iraq at that time, that violation is unlikely to be connected to Islamic law. Yet, in its *caveat fidelis* paragraph, the report states that "Amnesty International takes no position on the religious or legal systems under which corporal punishments are inflicted."[67] Strangely, the rest of the page describes punishments in Yemen that clearly fall within the rubric of Islamic law, but fails to include the phrase "Islamic law" or "*Shari'a*."

---

60. Amnesty Int'l, State Injustice: Unfair Trials in the Middle East and North Africa (1998), *available at* http://www.unhcr.org/cgi-bin/texis/vtx/home/opendoc.htm?tbl=RSDCOI&page=research&id=3ae6a5b40.

61. Iran and Saudi Arabia, for example, maintain discriminatory rules on the standing of female witnesses. *Id.* at 17.

62. *Id.* at 22 ("In Iraq, arbitrary arrests of suspected government opponents continue unabated.").

63. The thousands of disappearances in Algeria are noted directly before a paragraph on the Palestinian Authority's political detention of numerous individuals without charge. The situations are similar only in that international humanitarian law would be part of the legal regime determining rights and violations. *Id.* at 26.

64. *See id.* at 33.

65. *See id.* at 35.

66. *Id.* at 44.

67. *Id.*

It is, in fact, unclear what the *caveat fidelis* statement in the report is intended to achieve. The disclaimer may exist so as to implictly signal to readers that the punishments documented are based on religious law. It is equally probable that the statement is intended as a preemptive indication that despite the connections between Islam and the punishments discussed, Amnesty International refuses to make any statement on, or take any position against, Islam. The section on corporal punishment ends by asserting that "it is a legal absurdity for a legal procedure—a trial—to result in an internationally unlawful penalty."[68] Perhaps that is so. But as long as such punishments are thought to be derived from God-mandated law, Amnesty International will likely need a more sophisticated analysis to persuade its audience, which presumably includes practicing Muslims, of the truth of that statement. By the end of the chapter on corporal punishment, the reader is left surrounded by images of gouged eyes, chopped-off limbs, an amputated ear, bleeding buttocks,[69] a back covered with welts from the lash, but without a framework for how to understand these outrages.[70] The reader is not told what factor binds together such acts of state-perpetrated violence. Is it a single criminal code? A fear of political opponents? Is it *Shari'a*? A lack of properly functioning local human rights NGOs? Though there is no actual reference to religion, all that guides us is the *caveat fidelis* paragraph, awkwardly placed in the middle of a parade of genuine horrors.

The report closes with the statement that the "previous chapters illustrate clearly how the right to fair trial is grossly violated throughout the Middle East and North Africa" and that "unfair trial practices have been a key factor behind the gross human rights violations prevailing in the region."[71] The material, then, is bound together only by the connection to the right, protected under international law, to a fair trial. The reader is told at the end that "states in the Middle East and North Africa, despite the difference between their judicial systems and stances on international human rights law, all violate the right to fair trial . . . [t]he lack of adequate defense and appeal in many countries have made . . . amputations and flogging an easy exercise."[72]

Some of these states carry out the documented punishments extra-judicially, while others do not. For those that have clearly written these punishments into their criminal and penal codes, such sanctions are deeply rooted in a sophisticated legal system with its own fair trial standards, believed to be ordained by God. The failure to mention even once the legal system at the core of many of the catalogued violations, as well as the failure to differentiate between religious punishments and those carried out under secular systems (and which are likely motivated by an entirely different set of reasons) appears

68. *Id.* at 47.
69. *See id.* at 46.
70. In only four pages, this report covers Iraq, Iran, Libya, Saudi Arabia, the United Arab Emirates, and Yemen. *See id.* at 44–47.
71. *Id.* at 71.
72. *Id.*

counter-productive. In the end, the violation may be equally egregious regardless of where it takes place, but the search for ways to end the abuse must begin with a deeper understanding of the specific causes of that abuse.

In the absence of any overarching theoretical framework, the report provides little beyond the simple argument that the various catalogued human rights abuses are bad, and that they should cease. But given the broad range of countries, abuses, and legal frameworks discussed, it is hard to imagine a specific set of steps applicable across the board. The mere observation that human rights abuses are bad does not, in most cases, advance the debate on how to end them.

C. Get Rid of Islamic Law! But We Take No Position on Islamic Law

As explained above, human rights reports declare their distance from *Shari'a* in the opening pages of almost every report touching on Islamic law. They maintain that distance throughout the body of the report, engaging in an extensive fiction that Islamic law is not part of the human rights abuse being documented.

The recommendations sections, usually placed at the end of a report, also reflect an inability to engage Islamic law as law. Recommendations are intended to explain in detail how the violations and abuses so graphically portrayed in the body of the report can be stopped. As human rights organizations have grown in global influence, recommendations have become a key element of their writing and advocacy and a distillation of their hands-on, pragmatic, and policy-driven approach.

Moving from the victim testimonies, and faced with the (implicit) conflict between Islamic law and human rights law addressed in earlier sections of their report, INGOs believe that the solution to the violations is that international human rights law should govern. Since saying so explicitly would undermine the carefully crafted tone of the report, INGOs make recommendations that would have the effect of removing virtually all Islamic law currently applied in a given state without acknowledging that they are doing so. In other words, if all of the recommendations of a typical human rights report that deals with Islamic law were actually implemented, the effect would be to thoroughly secularize the law. There would be no *Shari'a* as currently understood by mainstream Islamic jurisprudence. If we take Islamic law seriously as a force in the region, both as domestic law and as a central part of the lives of millions of Muslims (as something they alternately organize against, embrace wholeheartedly, seek to change, and, in some cases, want more of), then attempting to engage in a sleight of hand such that the reader does not notice that international human rights law trumps *Shari'a* is intellectually weak at best and harmful at worst. Taking Islamic law seriously does not mean assuming the law is monolithic, nor does it assume that Islamic law should in fact govern. In addition, engaging with Islamic law does not presuppose that all

Muslims at all times want Islamic law applied to them.[73] Taking Islamic law seriously merely means recognizing the reality and diversity of the intellectual, spiritual, and physical lives of millions of Muslims in the region. Without a more sophisticated discussion of *Shari'a*, a report's recommendations generally suggest that Muslims step completely outside of their own understanding of their religious obligations.[74]

An example of this approach can be found in both HRW and AI reports. Over the years, both organizations have made an apparent policy shift on the issue of regulations on sexual conduct. There has been a shift from HRW's early assertion that it "take[s] no position . . . on a government's decision to criminalize adultery and fornication *per se*"[75] to AI's recent statement that it also "opposes the criminalization of consensual sexual relations between people over the age of consent."[76] While this significant shift in the position of the organizations vis-à-vis Islamic laws criminalizing adultery and fornication has manifested itself in the reports, the *caveat fidelis* statement has remained consistent throughout. Although the position of the organizations has changed, the reasoning behind the position has not. The preservation of the *caveat fidelis* statement, even while advocating a position that directly contradicts Islamic law as currently understood, indicates an attempt to evade the criticism that requiring legalization of consensual sexual activity outside of marriage necessitates the abrogation of *Shari'a* as currently applied in many Islamic countries. This approach may also be an attempt to avoid the charge that the organization is itself anti-*Shari'a*.

Some states that apply some aspects of substantive Islamic law do not criminalize sexual activity outside of marriage. But for those that do, adopting the report's recommendations as they are stated would require secularization of a highly developed substantive area of Islamic law. Regardless of how one feels about such secularization, it is important to acknowledge the complexity of the issue. It must also be recognized that the secularization project results from the "judgment" that Islamic law must be excised in order to achieve compliance with universal rights. For those engaged in the protracted and legally

---

73. It might, of course, mean all of those things in a particular context.

74. One author argues that this is a symptom of the broader conflict between international law discourse and religion, noting that "[c]hoosing rights over religion generally entails either leaving one's community—literally seeking asylum elsewhere—or else praying that one's culture becomes 'extinct.'" Sunder, *supra* note 42, at 1410–11.

75. Double Jeopardy, *supra* note 2, at 23.

76. Amnesty Int'l, Nigeria: The Death Penalty and Women Under the Nigeria Penal Systems 4 (2004). Another report, in proffering recommendations to the government of Pakistan states: "Article 17 of the Qanun-e-Shahadat Order of 1984 should be amended to explicitly guarantee the right of women to have their testimony given equal weight to that of men in all cases."

Human Rights Watch, Crime or Custom? 3, 4 (1999) [hereinafter Crime or Custom?]. *See also* Press Release, Amnesty Int'l, Nigeria: The Death Penalty and Women Under the Nigerian Penal Systems (Feb. 10, 2004) http://news.amnesty.org/index/ENGAFR440072004 (stating that "[n]obody over the age of consent should be charged or convicted for having consensual sex"); Amnesty Int'l, The Death Penalty in Nigeria (2004). For an example of this approach involving Islamic criminal law, see Amnesty Int'l, Women In Pakistan: Disadvantaged and Denied Their Rights 17 (1995).

dense struggle to reform such laws in their particular states, it must be strange to read the casual suggestion of organizations with much greater resources than their own, who have traveled for mere weeks to do research in their country, that the law should simply be erased from the books.

More importantly, this approach leaves the impression that the INGO knows so little about Islamic law that it assumes that "offending" portions of divine law can be repealed by state fiat. Alternatively, it is possible that the INGO is aware of the impracticability of its proposed solution, but offers it simply because it cannot develop another approach without delving into the Islamic legal discourse. Regardless of the rationale, the result is a recommendations section that is neither pragmatic nor useful. Because of the *caveat fidelis* policy, the INGO cannot acknowledge that urging the state to repeal divine law is qualitatively different than urging the state to stop torture of political detainees. But INGOs will not recognize that for many Muslims in the state under investigation, the fact that the criminalization of sexual conduct outside of marriage contravenes international law is an insufficiently compelling rationale for its repeal. Because the INGO cannot actually engage in any Islamic discourse throughout the report, or point to reform methodologies, the recommendations become formulaic and lack direct relevance.

D. Reform Islamic Law, Just Don't Ask Us How

The final strategy that INGOs employ in their encounter with Islamic law is exceedingly rare. Rather than recommending outright repeal of *Shari'a* law, INGOs have occasionally suggested that the state reform areas of the law that conflict with international human rights. This approach seems to suggest either that Islamic law need not necessarily violate international human rights obligations, or that the INGO has some constructive thoughts on internal reform of Islamic law. The problem with this approach is that the internal reform of Islamic law, utilizing tools and methodologies from within Islamic discourse, requires an explicit theoretical framework. It requires a methodology of reform, a set of actors, and a strategy for challenging the orthodoxy. "Urging" a state to reform an area of substantive law that has resisted major change for centuries is not in itself a pragmatic or useful recommendation.[77] As noted earlier, it may not be within the state's power alone to implement such reform, or it may be that the local human rights community has already been engaging in a series of internal reform projects. Nonetheless, this approach is an improvement as it presents the possibility for a new articulation of the conflict between the two legal regimes.

One recent report, *Political Shari'a*, captures this possibility, and sets out a new paradigm for engagement with Islamic law.[78] This report seems to ac-

---

77. *See, e.g.*, Divorced from Justice, *supra* note 30; Double Jeopardy, *supra* note 2; Human Rights Watch, Empty Reforms: Saudi Arabia's New Basic Laws (1992).

78. Human Rights Watch, "Political Shari'a"? Human Rights and Islamic Law in Northern Nigeria (2004), *available at* http://www.hrw.org/reports/2004/nigeria0904/.

knowledge the pragmatic impossibility and basic impropriety of recommending a total repeal of *Shari'a*-based laws while pretending not to engage with Islamic law, and instead takes the conversation in an entirely different direction. Unlike many reports, which reflect little understanding of the depth of influence of *Shari'a* on every aspect of Muslim society in many countries, *Political Shari'a* appreciates the challenge posed to many Muslims in shaping their lives and their legal relationship with the state. For these reasons, *Political Shari'a* represents an important shift in approach. *Caveat fidelis* is announced, but it is couched in much more subtle language. The second paragraph of the report states:

> Shari'a is seen by many Muslims as an entire system of guidelines and rules which encompass criminal law, personal status law, and many other aspects of religious, cultural and social life. There are several different schools of thought and within each of these, different interpretations of the provisions of Shari'a.[79]

Only then does the report provide the standard disclaimer: "Human Rights Watch does not advocate for or against Shari'a per se . . . nor do we seek to judge or interpret the principles of any religion or faith."[80]

Political Shari'a acknowledges the complex realities at play in northern Nigeria, including the ambivalence of a community which democratically voted to welcome more state-enforced *Shari'a*, but which later came to see some aspects of its application as abusive. In addressing the increasing role of morality "police" in monitoring women's dress, the report concedes that "most Muslim women in northern Nigeria traditionally covered their heads, even before Shari'a was extended in 2000, so many of them have not experienced a significant difference in this respect."[81] Later, the report recognizes the role of Islamic law in northern Nigeria as a seamless set of ordering guidelines for Muslim society, without a clear distinction between state and mosque, public and private:

> The concept of *hisbah* in Islam originates from a set of Qur'anic verses and Hadith. It is an obligation placed on every Muslim to call for what is good or right and to prevent or denounce what is bad or wrong. The Qur'an states: "Let there arise from among you a group calling to all that is good, enjoining what is right and forbidding what is wrong. It is these who are successful." . . . Scholars have generally interpreted these verses and traditions as placing

79. *Id*. at 1. The report later discusses Nigerian authorities' selective application of certain doctrines within the Maliki school of Islamic law, providing a more complex presentation of the interpretation of *zina* rules than any other report the Author was able to locate. *Id.* at 64.

80. *Id.*

81. *Id*. at 66.

> duties upon Muslims at both the institutional level and the personal level.[82]

Aside from a more informed understanding of Islamic law, the organization sets up the legal analysis portion of the report with two sections previously unseen in INGO reports. The first such section, entitled "The politicization of religion: reactions to the implementation of Shari'a," includes frank testimony from Muslims not about specific instances of victimization or accounts of horrific, violent state abuse, but about their views on the extension of *Shari'a* and their disappointment with the experience of divine law as expressed through new criminal and penal rules:

> Many Muslims told Human Rights Watch that according to their understanding, punishment was the least important aspect of Shari'a, that the first priority should be for the state to provide for the people and that it should fulfill its responsibilities in that respect—by ensuring that everyone had a reasonable standard of living, access to housing, health, and education—before turning to the system of punishment.[83]

The second section, entitled "International reactions to Shari'a in Nigeria," takes the controversial step of assessing and critiquing international reactions to the expansion of *Shari'a* in Nigeria. The report is refreshingly honest about the hysteria in the West regarding the stoning sentences of two young women, and its negative effect on the situation on the ground. It states: "The unfortunate, if unintended, effect of some of this coverage was the perception within northern Nigeria that these criticisms were motivated by stereotypical, anti-Islamic feelings, which took no account of the reality in the country."[84]

Political Shari'a also points out that post–September 11 politics also played a significant role:

> In the climate of fear which spread throughout the West following the attacks of September 11, 2001 in the U.S., there was a readiness to interpret the introduction of Shari'a in Nigeria as a further strengthening of resolve on the part of Islamic militants and the introduction of Shari'a as a gesture of defiance on the part of Muslim "extremists."[85]

These statements demonstrate that human rights groups can engage in a more complex analysis of the conflict between *Shari'a* and human rights law as specifically located in the contact between two legal systems. The report fur-

82. *Id.* at 73–74.
83. *Id.* at 91.
84. *Id.* at 95.
85. *Id.* Internal citations omitted.

ther takes the law, and the sincere belief of many Muslims that God requires adherence to *Shari'a*,[86] as a serious challenge to Nigerian compliance with international law that must be discussed rather than ignored. Finally, and most refreshingly, the report coherently presents the political context within which Muslims hear international human rights critiques of Islamic law.[87]

At one point, the report even discusses what has been a key unacknowledged paradox for international human rights groups for some time. HRW documents how "victims" of abuse under the *Shari'*a law sometimes take drastic steps to ensure that the law is enforced in their individual case. In discussing amputation sentences in Zamfara state in Nigeria, the report notes that the governor of that state felt politically compelled to apply *Shari'a* sentences in order to demonstrate to the population that the criminal law had been properly Islamized. He notes one case where an individual was sentenced to amputation:

> He [state governor Ahmad Sani] claimed that despite the judge's wish to impose a more lenient sentence, Jangebe [the individual sentenced to amputation] confessed and "insisted." . . . "I personally sent several messengers to [him] asking him to appeal.[. . .] This was a test case for me. I wanted to exhaust all options. But the man said no, I don't want to be a bad Muslim. I sent a lawyer to him for free. The man refused. After thirty days, people were counting the days and saying 'let's see if the governor is serious.' The judges had to implement it."
>
> Referring to the case of Lawal Inchi Tara, Ahmad Sani claimed that while in prison, "he [Lawal Inchi Tara] started cutting off his own hand. He said it's in God law [sic] and he believes in it."[88]

Regardless of whether the Governor's account is an accurate portrayal of the actions of either Jangebe or Lawal Inchi Tara, or whether, as the report claims, the individuals whose hands were amputated were financially and politically rewarded for their public statements, this moment—the state official trying to balance his desire to moderate punishment with his sense that the public wants to see justice done under *Shari'a*—captures the inadequacy of the traditional human rights methodology in addressing the complexities of Islamic law's application by states in the Muslim world.[89]

Despite these significant innovations, the report as a whole does not live up to the glimpses it offers of a new theory of engagement. Ultimately, *Political Shari'a* seems hobbled by institutional identity and the organizational incen-

---

86. *Id.* at 32–33.

87. One cannot help but conclude that this particular report's drastic shift in tone must partly be the result of the rare decision to bring in an Islamic legal expert to advise on the text. The "Acknowledgments" portion of the report states: "We are especially grateful to Albaqir Mukhtar for his contribution to the research and the report and for his advice on issues of Islamic law and human rights." *Id.* at 111.

88. *Id.* at 38, 39.

89. *Id.*

tive to make the report's tone and structure consistent with the organization's overall position on *Shari'a*. The author seems to want to go beyond the restriction of *caveat fidelis*. But in the end, the report is unable to do so. In its recommendations, the report fails to offer any coherent path to achieving the kind of reform it urges. It is a positive step that *Political Shari'a* seems comfortable with the ambivalence of many of its interviewees, and the confusion, as expressed by many of the "victims," about a law that they still want with an application that is blatantly unjust. However, the report's incitement to reform does not take us forward,[90] as the organization will not allow itself to enter into Islamic discourse long enough to suggest strategies for accomplishing what HRW asks of Nigeria and Nigerians. The report holds some promise for the future, but it does not go far enough. In the end, *Political Shari'a* does not appear to have been adopted as a methodological alternative by the Middle East divisions at either AI or HRW.

III. Some Costs of the Current Approach[91]

In this Part, I argue that the INGOs' current approaches create real costs for human rights activists in the Middle East and for human rights across the Muslim world. I assume for the purposes of this list that if, after engaging in a detailed cost-benefit analysis, it is determined that the current approach—focusing entirely on Western readers, catering to a Western audience, and lobbying Western governments to pressure Muslim leaders—is better for human rights, then despite political or aesthetic objections we should support INGOs in their strategy.[92] I further take INGOs at their word: that the primary public they seek to address is the local one and that the most important audience for their texts and their performances is the public of the country guilty of human rights violations.[93] If this is true, then local activ-

---

90. *Id.* at 8 ("More generally, state governments should encourage public reflection and debate on the compatibility of human rights and Islamic law, as well as other systems of law, and highlight the notions of justice, compassion and fundamental rights which are integral to Shari'a.").

91. This list owes a great deal to David Kennedy, *supra* note 25, at 101.

92. As one Palestinian human rights activist asks,

> [W]ho is the audience of the human rights organizations and is this audience the same for the various international, American and local organizations? It may be that the specificity of the American audience imposes on American-based organizations a certain direction or mode of dealing with human rights issues so as to influence the American decision-maker from this point of view. However, does this direction, which may be necessary to be effective inside the US, take into sufficient consideration the diverse national governmental and popular audiences in other countries, which are affected by the American organizations' decisions and calls for penalties against the violators of human rights in other countries?

Fatih Azzam, *Transformations in the Relationship Between International and Domestic Human Rights Organizations*, Rowaq Arabi 82, 86 (1997).

93. Roth, *supra* note 19, at 67 (noting that if a local public cannot be called to outrage, "surrogate publics can also be used if they have the power to shape the politics of a government or institution with influence over the officials in question, such as by conditioning international assistance or trade benefits, imposing sanctions, or pursuing prosecution").

ists are a key audience, the primary vessels for mobilizing human rights claims and making them meaningful in particular contexts.[94]

If, as I have argued, human rights professionals are strategic pragmatists, then this list should matter. If, when properly taken into account, the costs presented here outweigh the benefits of current approaches in reporting on Islamic law, then something should change. If the present engagement with Islamic law is bad for local activists, and bad for the enjoyment of human rights in the region, then it should be reassessed.

Human rights professionals take many costs into account when they prepare their reports. They constantly consider the impact that their reports will have. They are aware that there are horrific tragedies in the world that cannot be addressed by INGO reports because there is virtually no possibility for credible research or impact.[95] Because of the overwhelming anxiety about how to approach Islam and Muslims, the failure to engage with Islamic law has been shielded from this analysis. Costs are not being properly weighed. Below, I set out some costs that may be relevant in certain circumstances.

A. The Conflict Is Inherent and It Is Cultural

The strategies discussed above are not just intellectually unsatisfying. They also make the conflict with Islamic law seem far more entrenched and timeless than it may be in any given case. The current approach gives Islamic law both too much and too little power.

When INGOs fail to consider Islamic law as "real" law—complete with internal reform mechanisms, constitutive narratives, key scholars, schools of thought, and thus, major schisms—the result can be that the perceived conflict spreads out to the entire culture, mindset, and way of life of Muslims. Because *caveat fidelis* statements, and recommendations urging secularization without addressing these costs, prevent INGOs from specifically and accurately locating the conflict, the conflict appears to be inherent to Islam. Since the INGOs do not talk about the specific location of the conflict, we begin to see it everywhere, overwhelming Muslim culture and society.

The notion of a *general* conflict, from which the reader infers a sense of static and constant Muslim antipathy to international human rights law, is created

---

94. I do not privilege the "voice" or experience of domestic human rights activists as reflecting the authentic or real Muslim approach to human rights in a given country. There are several powerful and convincing critiques portraying elite human rights organizations in the global South as equally distanced from the public they "serve" as INGOs thousands of miles away. *See, e.g.*, Hanny Megally, *The Crisis of Identity: Has the Human Rights Movement Come of Age?*, *in* ROWAQ ARABI 67, 71 (1997); Chidi Anselm Odinkalu, *Why More Africans Don't Use Human Rights Language*, 2.1 HUM. RTS. DIALOGUE (2000), *available at* http://www.carnegiecouncil.org/viewMedia.php/prmTemplateID/8/prmID/ 602. However, my assumption is that local human rights activists are the ideal type of audience imagined by INGOs, especially when they seek to convince themselves or the world that they are not only catering to a Western public. As such, local activists are seen by INGOs as ideal conduits, helping their reports reach a broader public in Muslim countries.

95. The paucity of INGO reports on North Korea or Somalia is an excellent illustration of the pragmatism and the "impact first" approach adopted by human rights INGOs.

because the very specific textual conflict (the implementation of a particular school of law, or a specific method of *Shari'a* codification conflicting with a specific provision of human rights law) is not fully explained. The effect of this is to bypass a critical moment for impact and change. Further, the current timid, tepid, and untheorized approach to *Shari'a* serves to mystify Islamic law, leaving it to be defined by others, as discussed below.

B. Islamic Law Can Only Be Defined and Interpreted by Authentic Authorities

Because INGOs refuse to enter explicitly into Islamic legal discourse (while implicitly adopting, as I have shown, positions on Islamic legal outcomes), the interpretation of *Shari'a* remains exclusively the province of traditional Islamic legal authorities. For local activists, the function of INGO texts may be to limit human rights debates to an ongoing (and relatively useless) discussion of whether human rights are Western, whether local human rights organizations are tied to the West because of their cooperation with INGOs, and whether a specific report is part of the Western mission to "secularize" the Muslim world. All the while, the actual content of INGO reports is left untouched and is beyond the reach of most local human rights actors, who lack traditional legitimacy to interpret or expound on Islamic rules. By not owning up to the implications of their texts for Islamic law, and by failing to theorize their engagement with Islamic law more coherently, INGOs implicitly leave the "judging" and "interpreting" of Islamic law to the people who have always done it.[96]

C. Shifts the Hard Work to the Locals

It is exceptionally difficult to carry out meaningful and lasting Islamic legal reform.[97] Many of the substantive law areas discussed herein have been bitterly contested, repealed, reenacted, and debated for centuries. In some countries, certain *Shari'a* provisions may have taken on extra significance as symbols of resistance to the West, or as confirmation of an alternative Muslim identity, or as a source of power and legitimacy for autocratic rulers. Regardless of the reasons, many Muslims are today engaged in various transformative legal projects in states that apply *Shari'a*. Some might be working to increase the application of *Shari'a* in the belief that this will lead to more justice while others work to reinterpret revealed texts. Some are applying de-

---

96. On this point, see Madhavi Sunder's much broader critique of law's encounter with religion. I disagree with Sunder about the "growing disconnect between human rights law and human rights practice." Sunder, *supra* note 42, at 1409. Whereas she locates the problem with law, I locate it in practice. Still, she moves the field forward by drawing attention to the strategies of women's rights activists working within Islamic law. On the point I make here, Sunder notes: "Failing to recognize cultural and religious communities as contested and subject to change, legal norms such as "freedom of religion," the "right to culture," and the guarantee of "self determination" defer to the claims of patriarchal, religious elites, buttressing their power over the claims of modernizers." *Id*.

97. For a cogent estimate of significant efforts by Islamic intellectuals to effectuate reform in various arenas of Islamic law, see WAEL HALLAQ, A HISTORY OF ISLAMIC LEGAL THEORIES 207–54 (1999).

mocratic consent ideals from revealed texts to reshape how Muslims govern themselves, while others seek to identify substantive rules and interpretive methods from multiple *madhahab* ("schools") in order to shape a more modern body of Islamic rules. These individuals often face great personal risk, and attempt to hold together tenuous alliances of groups with different political outlooks and different approaches to Islamic law.

The report *Double Jeopardy*, discussing the work of groundbreaking Pakistani women's rights activists, states:

> [The work] raised the questions of what is meant by "Islamic" and whether, in an Islamic country, women's rights should be founded in religion or secular law.
>
> From the standpoint of an international human rights organization, the provenance of women's rights in a given state is not of paramount concern—so long as those rights comport with accepted international principles of equality before the law and equal protection of the law.[98]

What does it mean to write reports that often serve as the primary vehicle through which a Western audience comes to understand a given human rights issue, and claim that the provenance of religious laws means nothing—when, in fact, for the people in the country, the provenance of religious laws means everything? I do not mean here that for people in a Muslim country, the fact that laws are religious means they are not open to critique. It may not mean anything from an emotional or spiritual point of view (though for the vast majority of Muslims, it does). But for those who campaign for the liberalization of religious laws within Muslim countries, it is not a tenable position to assert that the source of the laws is meaningless. The avoidance statement—that the organization only comments on international human rights law and compliance with such law—is not value-neutral. It represents a choice. And this choice comes with certain costs.

International human rights law is famously devoid of enforcement mechanisms, open to multiple readings, interpreted by various quasi-judicial mechanisms. Thus, to say that the INGOs' only concern is the international compliance with given laws or practices is an inadequate explanation of the choice made by the organizations.[99] HRW's report on divorce in Pakistan, *Double Jeopardy*, notes that the *Shari'a*-based status of the law may matter to the local population,[100] suggesting an utter lack of concern for the costs distributed to local activists by the choices made in INGO texts. The international, according to this report, is neutral, unperturbed by religion, and unsullied by the local

98. DOUBLE JEOPARDY, *supra* note 2, at 38.

99. *Id*. at 38–39 ("It is abuses of women's rights by the states, no matter what the justification (religious, secular or otherwise) that warrant international condemnation.").

100. *Id.* at 39 ("For women trying to obtain rights denied them by a particular state, the source of rights is often an important strategic issue.").

battle. The local, on the other hand, might have to deal with religion as a strategic tool. Because INGOs are so busy pretending not to make an Islamic legal intervention, and because this pretense keeps them from theorizing their encounter, the human rights movement falters in providing real strategies and tools for the region.

D. Displaces and Externalizes Reactionary Responses

Many commentators have noted that the work of INGOs can sometimes incite a reactionary response from local authorities, placing local cooperative human rights activists at risk or limiting the opportunities for local organizations to investigate particular issues.[101] INGOs currently assess such risks more actively than is generally realized. They weight heavily the security of interviewees, victims, and local activists who may be harmed if a particular report is released, and do all that they can to minimize such risks. This is part of the calculus that goes into the pragmatic report planning process. In my view, one set of specific costs and risks is left out: those costs that come with the current approaches to Islamic law. Because INGOs refuse to acknowledge that they are often, in effect, recommending the total repeal of Islamic law, they fail to anticipate the type of reactionary responses that may come from Islamic leaders, clerics, politicians, and others who both understand the true implications of INGO recommendations and openly challenge them, often times in pursuit of domestic political gain.

This cost is very specific, and very important. INGOs leave local activists to clean up the mess they have created when they recommend, for example, that all aspects of Islamic criminal law be repealed in order to comply with international human rights law. Such a boldly secularizing recommendation, without a stated methodology or an eye to reform, implicates human rights language in an arrogant anti-*Shari'a* agenda. Local actors who use human rights language are then, in turn, painted with a similar brush. Therefore, local activists and reformers may spend much of their time responding to the charge that they oppose Islamic law or that they wish for the repeal of all Islamic

---

101. In a widely circulated letter asking the human rights community in general, and Amnesty International in particular, to cease a campaign on behalf of female "victims" of Islamic law, the Nigerian BAOBAB for Women's Rights explains that a massive letter-writing campaign led by an Amnesty International chapter resulted in reactionary responses in a number of sensitive cases:

> [T]he Governor of Zamfara State [who had overseen the extra-legal application of a flogging sentence on a woman accused of fornication] boasted of his resistance to "these letters from infidels"—even to sniggering over how many letters he had received. Thus, we would like you to recognise that an international protest letter campaign is not necessarily the most productive way to act in every situation. On the contrary, women's rights defenders should assess potential backlash effects before devising strategies.

BAOBAB for Women's Rights, *A Letter From BAOBAB for Women's Human Rights, Lagos, Nigeria Regarding the Case of Amina Lawal*, May 2003, http://www.wluml.org/english/newsfulltxt.shtml?cmd%5B157%5D=x-157-18546. The organization further cautions: "[S]uch letters can put in further danger both the victims who are easily reachable in their home communities, and, the activists and lawyers supporting them (who are particularly vulnerable when they have to walk through hostile crowds on their way to court, for instance)." *Id*.

personal status laws. It might be the case, in particular circumstances, that local activists would be content to have INGOs take such positions for strategic reasons. However, the current approach closes out opportunities for strategic coordination and labor-sharing between local and international groups.

E. Dominates (Limited) Space for Debate[102]

Virtually all countries in the Muslim world lack fully open space for political and legal debate. Restrictions on free expression throughout the region limit the extent to which human rights issues, which often cut to the heart of political, religious, and power struggles, can be discussed in newspapers, on television programs, and on the Internet. Let us imagine that in a given Muslim country, where speech is widely repressed, the state is willing to grant twenty hours of "speech" on an issue central to Islamic legal interpretation and human rights law before the issue is closed off from public discussion. We might imagine that these twenty hours can be divided between a televised debate on a state-run news program, a number of editorials in state-controlled or state-censored newspapers, and an independent radio program. Let us further imagine that an INGO investigates and publishes a report on this country's *Shari'a*-based criminal law system and holds a major press conference to launch the report both in the capital city as well as in London. The launch is successful, and major Western news outlets—CNN, BBC, *The New York Times*, and *The Washington Post*—all carry stories on the issue covered in the report, highlighting testimony about brutal floggings, recounting eyewitness testimony of a stoning, and enumerating INGO allegations against the state. Further, suppose that the report is strategically launched so that its release coincides with a visit between the state's leader and the U.S. Secretary of State. The report is immaculately researched, includes an impressive array of victim testimony as well as supplementary documentary research, and provides a legal section that articulates multiple violations of international human rights law ongoing in the state. The recommendations call for a repeal of all laws that violate international human rights law.

---

102. While many activists have rejected David Kennedy's critique that human rights occupies "the field of emancipatory possibility," either on the ground that human rights really is not as powerful as Kennedy imagines, or because his critique is outdated, it is in the cost articulated here that I see Kennedy's critique coming to life, playing out in specific terms. Kennedy, *supra* note 25, at 101. For a critique of Kennedy's position, see Hilary Charlesworth, *Author! Author!: A Response to David Kennedy*, 15 HARV. HUM. RTS. J. 127 (2002); Rosenblum, *supra* note 14, at 15. My sense of where the critique touches ground is not that the human rights *discourse* closes out the possibility of ever engaging in any other emancipatory projects. My argument is that in the contemporary politics of human rights, human rights *law* and *discourse* have little actual meaning and consequence for individuals trying to live better and more meaningful lives. Rather, in particular contexts and with regard to discrete issues, the primary and most powerful way in which human rights law is expressed and enforced today—through the texts and performances of the largest INGOs—can drown out any alternative approaches. The INGOs' performance is so much bolder, brighter, and louder (by design) than anything that competing projects might muster that it functions in particular contexts to take up the emancipatory stage. My argument here is that more than other region in the world, the stage in the Middle East is already very small.

This report, the attention from global media, and the significance of the attention drawn to Islamic criminal punishments during a key moment in diplomatic relations with the U.S. may well consume the twenty hours of speech available to activists in that year. The attention afforded to how the report is being read by a Western audience, the concern among many in the state that the report gives a poor impression of Islam, the government's vitriolic responses to the INGO, and debate over how the state should respond to the report and how the report might affect aid from the West will almost entirely command the discursive stage. These topics all *seem* like they are about human rights. But, in fact, they are about how to negotiate the INGO text. It is unlikely that a brief policy paper written by a local coalition of activists suggesting progressive reform of *Shari'a* criminal penalties will garner attention in this context. The INGO report, and the advocacy performance surrounding it, becomes the central human rights story of the year. In a closed country, controlled by a repressive government with limited tolerance for public dissent, the INGO has come and gone, and has used up all the space for public debate.

F. The Window for Debate on Human Rights Issues Is Closed to Imagining Islamic Reform

When INGOs choose not to expressly address Islamic law, or when they make basic errors in their articulation of Islamic legal rules, they close out the possibility of making pragmatic recommendations about bad applications,[103] or for distinguishing between Islamic principles and modern state practice.

---

103. This touches on one of the basic fears among INGOs of entering Islamic legal discourse. The concern is that if an INGO objects, for example, to a stoning sentence on the grounds that the decision falls short of minimum *Shari'a* standards, or if the organization argues that the judge did not properly apply *Shari'a*-based procedural guidelines, it is implicitly approving of the punishment of stoning in instances where the procedural requirements are met. It is generally agreed by Islamic legal scholars that the proper evidentiary and fair trial threshold required for a stoning is virtually impossible to meet, and that most executions that are carried out under *hudood* laws are flawed on procedural grounds. While an INGO's concern may be a difficult moral issue for human rights professionals to grapple with, it is worth considering that both AI and HRW research and comment on trial procedures and the discriminatory application of the death penalty despite their stated opposition to all forms of capital punishment. INGOs often include recommendations for improving death penalty practice, while also noting their desire for abolition of the practice. Unless the organization considers stoning to death to be a different *type* of legal violation from death by lethal injection or the electric chair, this is a difficult argument to sustain. As BAOBAB for Women's Human Rights argues, letter campaigns urging the executive branch in Nigeria to pardon women sentenced to stoning and flogging in fact subvert systematic change in Northern states:

> Winning appeals in the Sharia courts, as we and others have done, establishes that convictions should not have been made. A pardon means that people are guilty but the state is forgiving them for it. It does not have the same moral and political resonance. A pardon that is perceived as occurring as a result of outside pressure is even less likely to convince the community of its rightness. If we don't want such abuses to go on and on, then we have to convince the community not to accept injustices even when perpetrated in the name of strongly held beliefs.

BAOBAB for Women's Human Rights, *supra* note 101.

More importantly, perhaps, INGOs preemptively preclude the possibility of creating alliances with Islamic reformists, transformative Islamic thinkers, and innovative jurists and scholars. As long as INGO reports betray a dismissive lack of respect for Islamic law, as long as they make basic errors in their depiction of this legal system, and as long as they treat *Shari'a* as a cultural artifact rendered obsolete by the presence of international law, INGO activists are unlikely to create links with potential allies in the Islamic world. If INGOs seek impact in the Muslim world, and if they are genuine in their recommendations commanding reform of *Shari'a* laws, then reformist jurists may offer the only hope for such an outcome. Alliances with such individuals, and inclusion of their arguments in INGO texts, might make the difference between eliciting actual change and prompting reactionary replies.[104] But when INGOs refer to basic interpretation of substantive Islamic law as "radical" or "extremist," when they compare Pakistan and Algeria as though they were federal states in a single country, it becomes even more difficult to develop a meaningful reform discourse or to become creative with the legal tools available within Islamic law. Indeed, these approaches warp local conceptions of the possibility offered by international human rights law. As viewed through the lens of INGO reports, the law itself appears Eurocentric, confrontational, patronizing, and, in many cases, irrelevant.

INGOs thus risk building a wall between human rights work and Islamic legal reform. The more that INGOs rely on the moves they currently employ, the less likely Islamic legal reformers will be to connect with human rights discourse. The more INGOs ignore and misunderstand Islamic law, the less likely Islamic reformers will be to consider human rights advocacy a tenable language through which Islamic reform can move forward.

G. Alternatively, Closes Out Radical Secular Option

Conversely, we might imagine that certain local activists, political groups, and collective alliances seeking to end abuses against individuals do, in fact, prefer to aggressively secularize domestic law rather than pursue gradual internal reform. In some situations, it may be the case that local publics do not seek Islamic legal solutions, but rather want to explore possibilities for removing Islamic content from the law altogether. One might argue that the approaches I point to in INGO reports would be ideal for such activists. After all, the secularizing recommendations I have highlighted all urge states to immediately repeal offending legislation or to draft specific language in their constitutions. However, where secular voices do exist, or where they are developing in the region, they do not benefit from current INGO methodologies. A radical secular project within an Islamic law context might take any

104. I make this point in the context of increasingly detailed, specific, practicable, and sophisticated INGOs' recommendations. *Compare* DOUBLE JEOPARDY, *supra* note 2, *with* CRIME OR CUSTOM?, *supra* note 76, at 3, 4.

number of forms in the future. For instance, such a project may be based on debates within *Shi'a* scholarship that questions the capacity of any state to properly apply Islamic law,[105] or may argue that human rights law must actually be read as more authoritative than Islamic law in certain circumstances, or might posit that Islamic law must be confined merely to governing the relationship between believer and God, without the state. Whatever its sources, the secular option will not be advanced by ignoring the force and jurisprudential depth of *Shari'a* in many contemporary Islamic societies.[106]

H. In a Zero-Sum Calculus, God Always Wins

Current INGO approaches risk creating situations in which Muslims must decide to either side with human rights or to side with God. Whatever its intrinsic appeal, international human rights law is unlikely to be favored in this ultimatum.[107] This has little to do with Islamic law or human rights law. As the primary voice of human rights, matched only by Western governments, INGOs bear a great deal of responsibility for the way arguments about human rights are understood in the region. By failing to articulate fully their views on Islamic law, and by avoiding clear and explicit statements about textual conflict (that is in some cases quite narrow), INGOs may create the impression among Muslim readers that they must make a much starker choice than what is actually required.[108]

Pragmatically speaking, creating the impression that Muslims must, for example, either repeal all aspects of *Shari'a* personal status law or comply with CEDAW (without articulating any alternatives or presenting any paths between the two) is not good for human rights. Though they may be sincerely interested in increasing their compliance with CEDAW, imagining better lives for women, or making divorce more accessible and more equitable, when their choice is framed as an either/or, many Muslims may believe that they

---

105. *See, e.g.*, Mohsen Kadivar Home Page, http://www.kadivar.com (last visited Dec. 11, 2005). Mohsen Kadivar is an Iranian cleric who has initiated a controversial debate over the nature of Islamic government and secularism. His website presents a wealth of information on these issues.

106. *See, e.g.*, Salbiah Ahmad, *Islam in Malaysia: Constitutional and Human Rights Perspectives*, 2 MUSLIM WORLD J. HUM. RTS. 1, 24–29 (2005) (noting that "Shari'ah as commonly understood by Muslims to mean the divinely ordained way of life, cannot retain that quality once it is enacted as positive legislation (*siyasa*)"). Ahmad is part of an emerging network of Muslim lawyers and activists exploring the relationship between human rights, Islam, and secularism.

107. One author observes, "[i]f there is a conflict between international human rights law and what a believer holds is necessary for eternal salvation, it would be both irrational and impious to accord priority to the law." Michael Freeman, *The Problems of Secularism in Human Rights Theory*, 26 HUM. RTS. Q. 375, 386 (2004).

108. As one commentator notes in a different context,

> All-conquering Western modernism, with its share of arrogance and prejudice, is widely rejected as an identity by young Muslims. When the Italian prime minister, Silvio Berlusconi, said Western civilization was superior to Islamic civilization, he was seen as being blunt about something widely felt. Similarly, when President George W. Bush spoke of a "crusade," Muslims thought they were hearing the truth behind the circumlocutions.

Roger Cohen, *10 Reasons Terror Meets Silence From Muslims*, INT'L HERALD TRIB., Oct. 26, 2005, at 2.

have no option but to choose God's law. Most Muslims are completely aware of the conflicts between the two legal regimes. This is far less controversial than most INGOs seem to believe. The question, instead, is how this conflict is articulated, and what options are offered for its resolution. INGOs are in a position to imagine a range of choices, to provide creative recommendations drawn from global resources and rich international and comparative experience, and to bring forward bold and progressive arguments that can be marshaled or retooled by Muslims in particular contexts.

IV. The Way Forward

Judging on the basis of impact, the texts and performances of INGOs—utilizing shaming methodology, *caveat fidelis*, and the three approaches I have listed above—are fostering confusion and incoherence within the movement. In short, the INGOs are failing to appropriately engage with Islamic law. Such failures allow INGO professionals to shirk responsibility for the costs of their choices. In this Part, I recommend three possible solutions for INGOs to consider in shaping their work on Islamic law. I do not assume that any solution is inherently better. Each of the three has its clear benefits and clear costs, and a final decision on the most sensible course of action can only come through continued debate.

A. Authenticity Matters: Do Not Engage Islamic Law

After honestly assessing their work on the basis of the costs of the current encounters between INGO methodologies and Islamic law, human rights professionals may determine that they are unable to change the way they work. This may occur for a number of reasons: concern that a more complex position may implicitly support Islamic law, a lack of internal will to challenge orthodox methodologies, or an institutional imperative to continue to respond to the demands of the Western media. Alternatively, it may be determined that INGOs are fatally marked by their Western origins and, thus, can never authentically engage with *Shari'a*. INGOs may agree with the position taken by a number of scholars, both Western and Middle Eastern, that only Muslims can talk within Islamic Law and that only Muslims have the capacity to engage in an internal *Shari'a* debate.[109] In this view, no matter how many Arabs or Iranians are hired by INGOs, the fact that they are based in the West and work primarily in English will prevent them from having any impact on what are essentially insider debates about the future of Islamic law. If they conclude that this is, in fact, the case, INGOs should make the choice to cease writing reports or carrying out advocacy on issues that relate to substantive Islamic law. They should instead focus on the myriad human rights violations in the Muslim world that do not relate to *Shari'a.*

---

109. For this type of argument, see Heiner Bielefeldt, *Muslim Voices in the Human Rights Debate*, 17 Hum. Rts. Q. 587, 615–16 (1995).

As a complementary strategy, INGOs should use their connections with global media, powerful decision makers, and donors, and all other available resources, to support local activists and reformers who they believe *can* have an impact by engaging in internal Islamic legal debate. Such "insiders" would benefit from indirect intellectual support. For example, INGOs can offer reformist activists from the region access to libraries in Western universities, opportunities to interact with other Muslim scholars developing reform strategies, or simply direct financial and technical assistance. By ending their current muddled engagement, INGOs would bolster their credibility in the Muslim world and would channel all of their resources to violations where their interventions have impact and results.

B. Openly Challenge Islamic Law on Human Rights Grounds

INGOs may decide that the conflicts between Islamic law and human rights are simply too great to bridge through newly theorized methodologies or alternate approaches to engagement. It may be the case that what seems to be lurking in human rights texts, which is today largely hidden from view, is, in fact, the deep belief on the part of INGOs that Islamic law cannot be reformed. Perhaps human rights professionals, many of whom have spent years traveling to various countries in the Middle East, interviewing hundreds of victims of flogging, domestic violence, unfair trials, blasphemy charges, restricted speech, and limited freedom of religious expression, have in fact come to the conclusion that as long as any aspect of *Shari'a* has power anywhere outside of the private sphere of personal belief, it is a threat to human rights.

If this is the case, other approaches will seem inadequate. If they choose this path, INGOs should no longer be concerned about clashing civilizations or echoing the Bush administration. They should instead be open about their apparent conviction that international human rights law takes precedence over Islamic law as a means of ordering modern society. Here, INGOs should develop human rights arguments that directly challenge the application of Islamic law, explicitly advocate secular solutions, and support those in Muslim countries who might share their beliefs. If the numerous INGO texts cited in this Article are correct in their claim that many Muslims are appalled by the application of *Shari'a* but are afraid to express this view, then this approach might ultimately prove successful. This approach might serve to embolden local secular activists and might fashion a new and honest human rights methodology that no longer tiptoes around *Shari'a*, but openly claims that human rights law and religious law cannot successfully co-exist.

C. Develop Innovative Approaches to Islamic Law

This solution is the reverse of the authenticity strategy, acknowledging that international human rights activism, by definition, subverts the claim that only nationals of a particular state, or believers of a certain faith, have the authority to comment on human suffering within their communities. Instead of

accepting their current lack of expertise as an inherent and unchangeable characteristic, INGOs may choose—as they have done in other substantive fields like international humanitarian law, HIV/AIDS and human rights, and lesbian, gay and transgender rights—to broaden their methodology, deepen their expertise, develop new research techniques, or enter fields that were previously considered ill-suited to human rights work. In this vein, all human rights activists (whether based in Tunis or New York) already make constant interventions into fields, discourses, and battles that are not their own, thus opening up the notion of authenticity to multiple sites of power, research, and influence. This approach assumes that being a Muslim is not inherently different from being a Catholic[110] or a Jamaican,[111] and that human rights professionals are well-equipped to make transformative recommendations or take sides in contested and divisive political and religious legal debates.

If they were to choose this option, INGOs would have to shift their current methodology. Shaming would likely give way to more subtle interventions. Organizations could, for example, choose to hire *Shari'a* experts, develop a permanent presence in the Middle East, devote large parts of reports to discussing the rules and debates that animate a particular Islamic legal struggle, and craft recommendations based largely on Islamic legal reform approaches. Due to the very restricted space for Islamic legal debate in many countries in the region, INGOs could create openings for bold and creative thinking on Islamic law tying together various parts of the world, from Cairo to New York, and from Brussels to Baghdad. INGOs could also marshal their significant resources (intellectual, financial, and political) to create alliances and networks among activists, Islamic legal scholars, judges, and lawyers working in different ways on similar issues. This approach would take a significant up-front investment of time and resources: INGOs would have to trust that the force of their arguments, the depth and breadth of their alliances, and the strength of their interpretation could overcome their perceived "Western" identity. In deepening their Islamic legal expertise, and creating stronger links in the region, INGOs might begin to rely less on Western media coverage or political pressure and imagine new forms of enforcement and new ways of measuring impact. Rather than eliciting outrage and shock by using graphic descriptions of stoning or amputation, INGOs could utilize human rights law to incubate new legal strategies for appealing such sentences, reinterpreting textual bases for their enforcement, or creating networks of lawyers with powerful skills, dedicated to ensuring that such sentences are not applied.

---

110. *See generally* DECISIONS DENIED, *supra* note 31.

111. *See generally* HUMAN RIGHTS WATCH, HATED TO DEATH: HOMOPHOBIA, VIOLENCE AND JAMAICA'S HIV/AIDS EPIDEMIC (2004).