I. Introduction

Women’s Rights and Islam are at the core of heated debate and controversy. Some scholars argue that a secular set of laws is the only mean to safeguard gender equality, while others consider Islamic law to promote and protect women’s rights.¹ This debate is mirrored in the international arena, where countries that follow Islamic law (Shari’a) have refused to be bound by provisions of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) claiming that Islamic law is not compatible with certain rights stipulated in the treaty.

To what extent can these reservations be considered valid?

This thesis will attempt to show that invoking Islamic law *per se* is not a valid justification for such reservations. It is the interpretation of the law and its operation within a patriarchal social system that seem to undermine the protection of women’s rights. Thus, these reservations can be regarded as contradicting the “object and purpose” of CEDAW, as articulated in the Vienna Convention on the Law of Treaties 1969.²

The thesis is divided into five main chapters. After the introduction, Chapter two offers a general legal framework to the issue of reservations to human rights treaties, it also tackles the question of “object and purpose,”³ which is an essential part of the argument presented.

In the third chapter a focus is made on CEDAW and the reservations invoking Islamic law. It will be made clear that these ones are broad and lack explanation in proving how *Shari’a* is not compatible with the reserved provisions.

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³ *Id.*
Thus, Chapter four offers an overview of Islamic law and its stance concerning women’s rights to emphasize the role of reasoning in the field and the permanent possibility of interpretation, which seems to offer a counter-argument to most of the reservations made by Islamic countries.

Finally, case studies will be illustrated in the last chapter. Egypt, Tunisia and Saudi Arabia offer three different applications of Shari’a in national systems. The case of Egypt is used as an example of a moderate application of Islamic law, an application that is interpreted through judicial means, trying to balance between the traditional and the modern views of Islamic law. Tunisia, which does not invoke Islamic law in its reservations, seems to support the idea that Islam can be compatible with women’s rights; it offers a progressive application of the law. And finally, Saudi Arabia follows a literal and traditional application of Shari’a, which, as it argues, supports its general reservation to the Convention, a reservation that questions its willingness to comply with its international obligation.

These cases highlight the contrasts in the application of the law, which renders the reservation claiming “Shari’a” void of meaning. Countries should specify which “Shari’a” they follow and offer detailed reports to the Committee so as to validate their reservations. By doing so, not only will these ones be limited in number, but those that will successfully prove incompatibility with Islamic principles will initiate a dialogue, a dialogue among Islamic scholars that will definitely be beneficial, not only in understanding Islamic law, but also in increasing awareness among Muslim societies, and Muslim women.
II. Reservations under International Law

These first pages will attempt to offer a general legal framework to the main question as presented in the introduction. The first chapter is concerned with the reservation regime, as it is practiced in the international arena. It will emphasize the unique aspect of human rights treaties in that respect.

A. The 1969 Vienna Convention on the Law of Treaties

As partly codified customary international law, the 1969 Vienna Convention on the Law of Treaties constitutes a strong framework to treaty law. The latter being a source of international law, is supported by the principle of *pacta sunt servanda*, which requires states to act in good faith and to fulfil the obligations to which they consented to be bound by.\(^4\)

1. Defining reservations

According to Article 2 of the Vienna Convention on the Law of Treaties:

“Reservation” means the unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State.\(^5\)

A State is therefore able to ratify an international treaty and to refuse to be bound by certain provisions. As Malcolm Shaw notes it, “the capacity of a state to make reservations to an international treaty illustrates the principle of sovereignty of states.”\(^6\) As a matter of fact, the idea of state consent, which derives from sovereignty, is the main characteristic and the basis of international law.

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\(^6\) SHAW, supra note 4, at 822.
It is important to highlight the difference between reservations and international statements (such as understandings or interpretative declarations). “In the latter instance, no binding consequence is intended with regard to the treaty in question. What is involved is a political manifestation for primarily internal effect that is not binding upon other parties.” Yet, ‘qualified’ interpretative declarations (as opposed to ‘mere’ interpretative declarations) might, in certain cases, have the same legal effects as reservations.

2. Permissibility of Reservations

Although states can make reservations, these ones are governed by certain conditions, which are specifically mentioned in the Vienna Convention on the Law of Treaties. Article 19 of the Convention stipulates that:

A State may, when signing, ratifying, accepting, approving or acceding to a treaty, formulate a reservation unless:
(a) The reservation is prohibited by the treaty;
(b) The treaty provides that only specified reservations, which do not include the reservation in question, may be made; or
(c) In cases not falling under subparagraphs (a) and (b), the reservation is incompatible with the object and purpose of the treaty.

In other words, if the treaty in question does not forbid its members to make reservations, then states are free to make them as long as they are compatible with “the object and purpose” of the convention. In theory, the conditions above seem to limit the number of reservations and to ensure that the integrity of a treaty be protected. Yet, in practice, the concept of “object and purpose” includes two main complexities. On one hand, it is a very general criteria validating a reservation and so difficult to define. On the other hand, defining the concept is left to members states.

And in numerous instances, states have opposing views on whether a reservation

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7 Id.
8 SHAW, supra note 4, at 823.
contradicts the “object and purpose” of a convention or not. In that respect, the question of permissibility becomes more complex. Shaw argues that the effect of impermissible reservations remains an open issue “one school of thought takes the view that such reservations are invalid and the other that the validity of any reservation is dependent upon acceptance by other states.”\(^\text{10}\) Concerning the first point, Shaw highlights the fact that “a further problem is to determine when these conditions under which reservations may be deemed to be impermissible have been met. This is especially difficult where it is contended that the object and purpose of a treaty have been offended. The question is also raised by the authority able to make such a determination.”\(^\text{11}\) The second school of thought holds that the permissibility of a reservation depends on its acceptance by other state members to the convention. Concerning acceptance and objection to reservations,\(^\text{12}\) Article 20 of the Vienna Convention states that:

1. A reservation expressly authorized by a treaty does not require any subsequent acceptance by the other contracting States unless the treaty so provides.
2. When it appears from the limited number of negotiating states and the object and purpose of a treaty that the application of the treaty in its entire between all the parties is an essential condition of the consent of each one to be bound by the treaty, a reservation requires acceptance by all parties.
3. When a treaty is a constituent instrument of an international organization and unless it otherwise provides, a reservation requires the acceptance of the competent organ of that organization.
4. In cases not falling under the preceding paragraphs and unless the treaty otherwise provides:
   (a) acceptance by another contracting state of a reservation constitutes the reserving State a party to the treaty in relation to that other State if or when the treaty in force for those States;
   (b) an objection by another contracting State to a reservation does not preclude the entry into force of the treaty as between the objecting and reserving States unless a contrary intention is definitely expressed by the objecting States;

\(^\text{10}\) SHAW, supra note 4, at 828.
\(^\text{11}\) Id.
\(^\text{12}\) Id.
(c) An act expressing a State’s consent to be bound by the treaty and containing a reservation is effective as soon as at least one other contracting State has accepted the reservation.\(^{13}\)

The International Court of Justice’s (ICJ) advisory opinion on the Reservations to the Genocide Convention Case, which has reformed the reservation regime and has supported the doctrine of “universality”, complements the understanding of the above article.


Antonio Cassese, world-leading academic and former judge and president of the UN International Criminal Tribunal for the former Yugoslavia, clearly presents the importance of the advisory opinion concerning the reservations to the Convention on the Prevention and Punishment of the Crime of Genocide. He argues that a new reservation regime was introduced by this Opinion:

Traditionally, (…) reservations had to be accepted by all other contracting parties for the reserving State to become bound by the treaty. The principle of unanimity favoured the ‘integrity of treaties’ (…). This old regulation of reservations proved to be totally inadequate when membership in the international community increased, the more so because the newcomers belonged to political, economic, and cultural areas different from those of Western Christian countries. The very liberal doctrine of ‘universality of treaties’ came therefore to be upheld. Thus, a regime was envisaged, first in the important Advisory Opinion delivered in 1951 by the ICJ on Reservations to the Convention on Genocide and then in the 1969 Vienna Convention.\(^{15}\)

On November 16\(^{th}\) 1950, the UN General Assembly adopted a resolution seeking the International Court of Justice’s advisory opinion about questions concerning the permissibility of making reservations. This request emerged after


member states to the Convention on the Prevention and Punishment of the Crime of Genocide objected to reservations made by other parties. The three main questions presented to the Court were:

I- Can the reserving State be regarded as being a party to the Convention while still maintaining its reservation if the reservation is objected to by one or more of the parties to the Convention but not by others?
II- If the answer to Question I is in the affirmative, what is the effect of the reservation as between the reserving State and:
   (a) The parties which object to the reservation?
   (b) Those which accept it?
III- What would be the legal effect as regards the answer to Question I if an objection to a reservation is made:
   (a) By a signatory which has not yet ratified?
   (b) By a State entitled to sign or accede but which has not yet done so?

The main question arising from the Advisory Opinion concerns the issue of “object and purpose.” As stated, a reservation is permissible “if (it) is compatible with the object and purpose of the Convention.” In light of the above case, Cassese’s argues that: the universality of a treaty and the number of states ratifying it supersede the integrity of the convention. Defining the “object and purpose” is left to other member States. Thus, the answer to the second question: if a party considers a reservation to be against the “object and purpose”, then “it can in fact consider that the reserving state is not a party to the convention.” This affirmation implies that treaty relationships will be fragmented and that the application of any treaty will be based on two questions:

1) Whether the State party has made a reservation to the treaty.

2) Whether other parties have considered the reservation to be compatible with the “object and purpose” of the treaty.

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17 Id.
18 Id.
19 Id.
20 Id.
Depending on the above answers, provisions will be applicable in certain cases, not in others. Reserving states will only be considered parties to the treaty by states that accepted their reservations, which means objections to reservations can serve political motives.  

**B. Reservations to Human Rights Treaties**

Reservations to human rights treaties have been treated differently in several cases presented to international courts. The rising trend consists in regarding “impermissible reservations as severing that reservation so that the provision in question applies in full to the reserving state.” In other words, the reservation is not taken into consideration and the state party is bound by the obligations stipulated in the “reserved” provision. This trend seems to protect the integrity of human rights treaties, which is a fundamental issue since these treaties protect and promote basic inalienable rights. Cassese argues that “under this view, standards on human rights must prevail over concerns of sovereign states. If there is conflict between the two . . . , the former must prevail.” In the cases presented below, it is worth noting that courts are in charge of defining the “object and purpose” of the convention and holding reservations admissible or not.

**1. The European Court of Human Rights**

Several cases brought before the European Court of Human Rights are considered by scholars to be precedents in demonstrating the unique nature of human rights

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22 SHAW, supra note 4, at 829.
treaties. Thus, it is important to take the rulings of this Court into consideration when tackling the issue of reservations to human rights conventions.

**Case of Belilos v. Switzerland**

1) Facts and Procedure

**Belilos** is considered to be a precedent in the issue of reservations to human rights treaties. Concerning the facts, Mrs Marlene Belilos, a Swiss student was arrested on 16 April 1981 for having participated in an unauthorized demonstration (a demonstration for which no permission was issued). Mrs Belilos denied participating in the demonstration. And as an appeal to the decision held against her by the Police Board, “Mrs. Belilos applied to the Criminal Cassation Division of the Vaud Cantonal Court to have that decision declared null and void. She claimed principally that in view of the requirements of Article 6 of the Convention, the Police Board had no power to make a determination of the disputed offence; and in any event, she asked the court to hear her former husband and to redetermine the facts fully.”

Article 6 (1) of the European Convention on Human Rights stipulates that:

> In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgement shall be pronounced publicly by the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or the extent strictly necessary in the opinion of the court in special.

Nonetheless, Switzerland had issued an interpretative declaration concerning the above article when ratifying the European Convention on Human Rights, it claimed that:

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24 See CASSESE, supra note 15, at 130.


“The Swiss Federal Council considers that the guarantee of fair trial in Art. 6, paragraph 1 (art. 6-1), of the Convention, in the determination of . . . any criminal charge against the person in question is intended solely to ensure ultimate control by the judiciary over the acts or decisions of the public authorities relating to . . . the determination of such a charge.”

Mrs Belilos, after exhausting all national means, applied to the European Court of Human Rights on 24 March 1983.

2) Reasoning and Decision of the European Court of Human Rights

Article 64 (1) of the European Convention on Human Rights stipulates that:

Any State may, when signing this Convention or when depositing its instrument of ratification, make a reservation in respect of any particular provision of the Convention to the extent that any law then in force in its territory is not in conformity with the provision. Reservations of a general character shall not be permitted under this article.  

In the judgement, the Court went to define what is meant by “reservations of a general character” in the Convention, it held that these ones were reservations stated “in terms that are too vague or broad for it to be possible to determine their exact meaning and scope.” In other words, reservation should be specific, clear and focused on a particular issue. Moreover Article 64 (2) requires the reserving state to submit “a brief statement of the law concerned,” which Switzerland has failed to do.

Taking into consideration that Switzerland’s reservation did not comply with the two requirements of Article 64 of the European Convention on Human Rights, the Court held that Switzerland’s reservation was invalid, and that the breach entitled the applicant to compensation.

The above case highlights several important issues in the reservation regime and its implication on human rights treaties. First of all, it considers an interpretative

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declaration to have the legal value of a reservation. Secondly, the Court went to reject a declaration made by a State, and held the latter bound by the “reserved” provision. Thus, it protected the integrity of the European Convention of Human Rights and posed a limitation to Switzerland’s Consent. Thirdly, The Court was responsible in this case for interpreting Article 64 of the European Convention of Human Rights, and emphasized a principle already found in the Vienna Convention and in the ICJ’s advisory opinion on The Reservations to the Genocide Convention: reservations must not be of a general nature, they should not contradict the “object and purpose” of the treaty.

Belilos has been used as a precedent in numerous cases concerned with reservations to human rights conventions. Among these cases is the one presented below: the case of Weber v. Switzerland. Although the same country is in question, different legal arguments are presented: the Court avoids to touch upon the substance of the reservation and will focus on procedural elements. The coming case highlights how defining “the object and purpose” of a treaty can be complex and sensitive.

Case of Weber v. Switzerland31

a) Facts and Procedure
A Swiss journalist, Franz Weber who is resides in Clarens; in the Canton de Vaud filed a complaint against R.M on 2 April 1980 claiming defamation. R.M. had accused Mr Weber of tax evasion in a newspaper. The investigating judge “ordered disclosure of the Helvetia Nostra association and the Franz Weber foundation’s articles and their accounts for the previous two years.”32 Although R.M was charged with defamation and his appeal was dismissed, Weber files a complaint “alleging misuse of official authority and coercion, but the investigating judge of the Canton de

32 Id.
Vaud refused to take action”; the applicant challenged the Court en bloc. On 2 March 1982, Franz Weber publicly announced in a press conference his challenge and claim against the investigating judge. The next day, the President of the Criminal Cassation Division of the Vaud Cantonal Court, under Article 185 (3) of the Vaud Code of Criminal Procedure accused the Applicant of breach of confidentiality and ordered a fine of 300 Swiss Francs together with a probationary period of a year. Weber appeal to this decision was dismissed by the Criminal Cassation Division. And on 16 November 1983, his appeal to the Federal Court, based on Article 10 (on freedom of expression) and Article 6 (on the right to a fair and public trial) was also refused.

b) Switzerland’s Reservation

As highlighted earlier in Belilos, when ratifying the European Convention on Human Rights, Switzerland made a reservation to Article 6. The latter refers to the right to a “fair and public hearing.”

Switzerland’s reservation stipulates that:

The rule contained in Article 6 (1), of the Convention that hearings shall be in public shall not apply to proceedings relating to the determination … of any criminal charge which, in accordance with cantonal legislation, are heard before an administrative authority. The rule that judgement must be pronounced publicly shall not affect the operation of cantonal legislation on civil or criminal procedure providing that judgement shall not be delivered in public but notified to the parties in writing.

Thus, the government argues that Article 6 of the Convention could not be applied to the case, and does not support the applicant’s claim.

c) Court’s Reasoning and Decision

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In its judgement, the Court questioned the reservation to Article 6(1) on three
different grounds: the applicability of Article 6(1) to the case, the validity of
Switzerland’s reservation and the country’s compliance with this provision.
Concerning the first point, the Court held that Article 6(1) is applicable since the
national laws define the offence as being both disciplinary and criminal (if the latter
was solely disciplinary, the provision would not have been applicable). Moreover, it
interpreted the “confidentiality clause” as being applicable primarily to “those closely
associated with the functioning of the courts,” such as lawyers, judges etc…And
finally that the nature and “the degree of severity of the penalty” amounted to
considering the case as a criminal one.
Questioning the validity of Switzerland’s reservation, the Court refers to Article 64 of
the European Convention on Human Rights, as it previously did in the Belilos.38

1. Any State may, when signing this Convention or when depositing its
instrument of ratification, make a reservation in respect of any particular
provision of the Convention to the extent that any law then in force in its
territory is not in conformity with the provision. Reservations of a general
character shall not be permitted under this article.
2. Any reservation made under this article shall contain a brief statement of the
law concerned.39

The Court argues that since Switzerland did not present “a brief statement of
the law concerned”, the reservation to Article 6(1) is considered invalid. And
therefore, the applicant’s claim is valid. The European Court of Human Rights also
held that there has been a breach of Article 10 on freedom of expression and demands
the State to compensate the applicant. Throughout the case, reference is made to the
Belilos case, as a precedent in which Switzerland’s reservation was considered
invalid. Moreover it is interesting to highlight how, in this case, “the object and

36 Id.
37 Id.
“purpose” of the Convention were not mentioned. The Court based its judgement on procedural arguments and legal technicalities. For example, it referred to the procedures Switzerland should have complied with when making the reservation, and not on the substantive aspect of the reservation. This reasoning highlights the complexity of “the object and purpose” criteria, and how Courts prefer to avoid it, when the possibility is at hand.

On a more general note, Switzerland found itself bound by a provision it had reserved, and going back to Cassese’s point, human rights treaties have introduced another limitation to State consent, a new trend in the international legal order. The European Court of Human Rights was not the only international body to support this trend; the General Comment from the United Nations Human Rights Committee highlights the same issue and redefines key concepts pertaining to the reservation regime.

2. The Human Rights Committee

The General Comment No. 24 of 1994

The General Comment No. 24 issued in November 1994 concerns the reservations made by the 127 State parties to the International Covenant on Civil and Political Rights. The reservations amount to 150 in number, and undermine the integrity of the Treaty. The Committee has therefore addressed certain questions in this General Comment touching upon fundamental concepts, and reemphasizing the unique aspect of human rights instruments.

First, the Committee starts with precising the difference between a reservation and an interpretative declaration. This question, as illustrated in the Belilos case is

important because it highlights the binding nature of reservations, and the importance of understanding the implication of a statement, independently from its title. The General Comment offers a clear definition, stating that “if a statement, irrespective of its name or title, purports to exclude, modify the legal effects of a treaty in its application to the State, it constitutes a reservation.” 41

Secondly, the Committee goes on reemphasizing principles already present in the 1969 Vienna Convention on the Law of Treaties and in the ICJ’s Advisory Opinion on the Reservations to the Genocide Convention, such as the impossibility of States to make reservations incompatible with the object and purpose of a convention, and its obligation to respect jus cogens (peremptory norms) and customary international law. 42

Thirdly, the Committee focuses on the Optional Protocols of the Covenant. The First Optional Protocol concerns “the competence of the Committee to receive and consider communications from individuals who claim to be victims of a violation by a State party of any of the rights in the Covenant.” 43 A reservation to the latter would be considered as incompatible with the “object and purpose” of the Covenant, since it implies a state’s lack of good faith.

Fourthly and most importantly, the General Comment presents a key question concerning human rights treaties: which body is entitled to define the “object and purpose” of a Convention? 44 After presenting the ICJ’s Advisory Opinion on the Reservations to the Genocide Convention, the Committee emphasized that State parties are, legally speaking, are entitled to the above task. Nonetheless, “the Committee believes that its provisions (those of the Vienna Convention on the Law of

41 Id. at ¶ 3.
42 See, Id. at ¶ 8.
43 Id. at ¶ 13.
44 See, Id. at ¶ 16
treaties) on the role of State objections in relation to reservations are inappropriate to address the problem of reservations to human rights treaties."\(^{45}\) In other words, state reciprocity is no longer sufficient in establishing State obligations and another body should be responsible for defining the “object and purpose” of treaties, and thus of accepting or refusing reservations. The Committee states that it “is particularly well placed to perform this task”\(^{46}\) and that State parties should use reservations as a temporary mean to reform domestic laws, while reporting to the responsible body.\(^ {47}\)

The above General Comment underlines several questions concerning reservations to human rights instruments. Nonetheless, on a practical level, the Committee’s comments are not binding and its decisions about the permissibility of reservations would not be either. It is therefore important to keep in mind that although a new trend is emerging in the human rights sphere, the international community is based on a system of state consent and sovereignty, which seems to prevent human rights treaties from operating fully.

The trade-off that seems to exist between the integrity and the universality of human rights treaties is a challenge that Ryan Goodman attempts to overcome. He argues “that reservations to human rights treaties should be presumed to be severable unless for a specific treaty there is evidence of a ratifying state’s intent to the contrary.”\(^ {48}\) He supports this argument claiming that “third party institutions”\(^ {49}\) should be responsible for determining the validity of reservations, not third state parties “because state O’s objections apply only to the relationship between itself and state R. Accordingly, state O can not prevent the incompatible reservations from affecting the

\(^{45}\) Id. at ¶ 17.
\(^{46}\) U.N. Human Rights Committee, General Comment 24/52, supra note 40, at ¶ 16.
\(^{47}\) Id.
\(^{49}\) Id. at 532.
constitutive elements of the treaty."\(^5\) In addition, the validity of a reservation would depend on "the state’s consent to be bound"\(^5\) by the treaty. In other words, Goodman states that "[a] reservation is not essential if the state would have ratified the treaty without it. An inessential reservation would be nullified, and the state would remain bound to the treaty without the benefit to the reservation."\(^5\) The author offers a new understanding of state consent, which can generate answers to the reservation regime. His ideas will be referred to in the case studies of Chapter IV as well.

For the purposes of this thesis, the coming chapter will focus on the Convention on the Elimination of All Forms of Discrimination, as an international human rights law treaty, it is faced with the challenges presented above.

\(^5\) Id. at 535.
\(^5\) Id. at 532.
\(^5\) Id. at 532.
III. Reservations to CEDAW and their Implications

As presented in Chapter 1, reservations to human rights conventions challenge their integrity and their efficiency in protecting the stipulated rights. The coming chapter will add focus to the above analysis by narrowing down the study to the Convention on the Elimination of All Forms of Discriminations Against Women and in questioning the validity of specific reservations: those invoking Islamic law.

A. CEDAW 1981

The Preamble of the United Nations Charter stipulates that one of the organization’s main objectives is “to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small”\(^{53}\). In 1946, the United Nations Commission on the Status of Women was set up to protect women’s rights and promote “equal rights of men and women” as stipulated in the UN Charter. After thirty years, the General Assembly adopted on 18 December 1979, the Convention on the Elimination of All Forms of Discrimination against Women, which entered into force on 3 September 1981\(^{54}\) and is considered to be “the culmination of more than thirty years of work by the United Nations Commission on the Status of Women”\(^{55}\). The Convention is also known as the international bill of rights for women. At its entry into force, the treaty was ratified by 20 member states, while today 185 states are bound by it.\(^{56}\)

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\(^{53}\) U.N. Charter Preamble.


\(^{56}\) Id.
The Convention is composed of a preamble and 30 articles. The preamble emphasizes the general principles of the United Nations, mentioning the importance of “international peace and security,” as well as referring to major human rights documents, such as the Universal Declaration of Human Rights, the International Covenants on Human Rights as well as resolutions by the agencies of the UN. The preamble also highlights the importance of enhancing and protecting women’s rights as part of the larger project of development. Article 1 defines discrimination against women as:

Any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.

The following articles in the convention add clarification to this definition by stipulating specific rights. Articles are grouped in six main parts. The first part focuses on policy measures, while the second and the third highlight civil rights, such as the right “to vote in all elections . . . to participate in the formulation of government . . . [and] to participate in non-governmental organizations and associations.” Part IV focuses on marriage and family life, while the last two parts concern procedural matters. Throughout the convention, three main core issues can be discerned:

a) Civil rights and the legal status of women: The legal status of women is the main focus of the Convention. For example, the right of women to participate in the political sphere is highlighted throughout the first 14 articles: Article 7 is concerned with her right to vote, Article 8 stresses “her equal right to represent her country at an

58 Id.
59 Id.
60 Id. at art. 1.
61 Id. at art. 7.
international level.” Nationality rights are also protected under Article 9, and equal rights in employment education and socio-economic activities are among the protected civil rights. Concerning the private sphere, Article 16 the Convention focuses on women’s rights in marriage and in the family sphere. Civil rights are relatively tangible, and violations of these rights are found directly in domestic laws, which might prevent women from being equally treated in both the private and public spheres. In practice, violations of these rights can be pinpointed, and thus the Convention can have a proactive role in focusing upon them.

b) A second emphasis is put on reproductive rights. For example Article 5 encourages “a proper understanding of maternity as a social function” and Article 6 aims at eliminating women trafficking and exploitation. The Convention does not merely state “negative rights”, it encourages States to actively provide for women and “positively” act in protection of their rights.

c) As stated at the CEDAW 29th session “the third general thrust of the Convention aims at enlarging our understanding of the concept of human rights, as it gives formal recognition to the influence of culture and tradition on restricting women’s enjoyment of their fundamental rights” In other words, the Convention’s articulation of rights reflects the underlying understanding that culture can in certain cases define, restrict or violate women’s rights. The effect of tradition and cultural practices on the rights of women is a recurrent and fundamental issue that is present throughout the Convention, but is also at the core of numerous questions since it is one major cause that led to the reservations imposed on CEDAW.

63 Id.
B. Reservations to CEDAW 1981 and their Permissibility

1. Article 28 of CEDAW

The permissibility of doing reservations to CEDAW is covered by Article 28(2), which implicitly refers back to the 1969 Vienna Convention on the Law of Treaties, and stipulates that: “A reservation incompatible with the object and purpose of the present convention shall not be permitted.”

The Committee on the Elimination of All Forms of Discrimination Against Women, created in 1982, supervises the implementation of the Convention.

Although the Convention does not specifically state articles to which reservations are impermissible, the Committee considers that Articles 2 and 16 to be central to the “object and purpose” of the Convention.

On one hand, Article 2, is important to be fully analyzed, stipulates that:

States Parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women and, to this end, undertake:

(a) To embody the principle of the equality of men and women in their national constitutions or other appropriate legislation if not yet incorporated therein and to ensure, through law and other appropriate means, the practical realization of this principle;
(b) To adopt appropriate legislative and other measures, including sanctions where appropriate, prohibiting all discrimination against women;
(c) To establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination;
(d) To refrain from engaging in any act or practice of discrimination against women and to ensure that public authorities and institutions shall act in conformity with this obligation;
(e) To take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise;
(f) To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women;

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67 CEDAW Prog. Rep., supra note 55.
68 Id.
(g) To repeal all national penal provisions which constitute discrimination against women.\textsuperscript{69}

In brief, Article 2 is a comprehensive Article which states the general obligation of State parties to “condemn discrimination against women”. It also demands member States to actively change domestic laws and practices, which might violate women’s rights. It is quite obvious that a reservation to this Article is considered by the Committee as impermissible since Article 2 is a brief summary of the whole Convention and stipulates the core issues and responsibilities of its parties.

Nonetheless, the Article covering so much and demanding States to take long term measures (such as changing constitutional provisions), is prone to reservations: the general terms included seem to expand States obligations. States not only will need time, but also resources to ensure these reforms.

On the other hand, Article 16 concerned with equality of men and women in marital rights and family relations is considered to be another core Article by the Committee. It states that:

1. States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women:
   (a) The same right to enter into marriage;
   (b) The same right freely to choose a spouse and to enter into marriage only with their free and full consent;
   (c) The same rights and responsibilities during marriage and at its dissolution;
   (d) The same rights and responsibilities as parents, irrespective of their marital status, in matters relating to their children; in all cases the interests of the children shall be paramount;
   (e) The same rights to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights;
   (f) The same rights and responsibilities with regard to guardianship, wardship, trusteeship and adoption of children, or similar institutions where these concepts exist in national legislation; in all cases the interests of the children shall be paramount;

(g) The same personal rights as husband and wife, including the right to choose a family name, a profession and an occupation;
(h) The same rights for both spouses in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property, whether free of charge or for a valuable consideration.

2. The betrothal and the marriage of a child shall have no legal effect, and all necessary action, including legislation, shall be taken to specify a minimum age for marriage and to make the registration of marriages in an official registry compulsory. 70

Women’s rights in the private sphere are mainly covered by the Article above. That is the reason why the Committee considers it to be a core Article and argues that reservation to it should not be permissible71.

Nonetheless, reservations to these two articles have been made and few countries have withdrawn them. The question relating to the objectivity of the “the object and purpose” test remains an open question.

2. Reservations Invoking Islamic Law

The core issue in this paper is on reservations invoking Islamic law. It is therefore important to keep in mind that the study offered below is not a comprehensive analysis of all the reservations made to CEDAW 1981, but it will uniquely focus on those justified by Shari’a.

Article 2

As mentioned previously, States make reservations to Article 2 invoking its incompatibility with Islamic law. This Article defines the main responsibilities of State parties and the duties they should fulfil for the protection and promotion of

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women’s rights. The reservations invoking Islamic Law were made by Bangladesh, Syria, Bahrain, Egypt, Libya, Morocco and Singapore.

On one hand, Bangladesh, Bahrain, Egypt, Libya and Syria have not given any specific detail about the laws contravening the provision, nor about the eventual steps taken towards the promotion of women rights. The reservations are generally short and broad. For example, Bahrain stated that:

“The Kingdom of Bahrain makes reservations with respect to the following provision(s) of the Convention: Article 2, in order to ensure its implementation within the bounds of the provisions of the Islamic Sharia.”\(^\text{72}\)

Egypt stipulated: “A General reservation on article 2: The Arab Republic of Egypt is willing to comply with the content of this article, provided that such compliance does not run counter to the Islamic Sharia.”\(^\text{73}\)

“And Libya as well very shortly articulated that: “Article 2 of the Convention shall be implemented with due regard for the peremptory norms of the Islamic Sharia relating to determination of the inheritance portions of the estate of a deceased person, whether female or male.”\(^\text{74}\)

Finally, Syria enumerated all its reservation in one paragraph very briefly stating also invoking Islamic Shari’a.\(^\text{75}\)

On the other hand, Morocco and Singapore elaborated about its reservation to Article 2, giving detail about their national systems and Morocco seems to offer more explanation about Islamic law and its relation with women’s rights, it states that:

With regard to article 2: The Government of the Kingdom of Morocco express its readiness to apply the provisions of this article provided that:

\(^\text{73}\) Id. at 11.
\(^\text{74}\) Id. at 17.
\(^\text{75}\) Id. at 28.
- They are without prejudice to the constitutional requirement that regulate the rules of succession to the throne of the Kingdom of Morocco;
- They do not conflict with the provisions of the Islamic Shariah. It should be noted that certain of the provisions contained in the Moroccan Code of Personal Status according women rights that differ from the rights conferred on men may not be infringed upon or abrogated because they derive primarily from the Islamic Shariah, which strives, among its other objectives, to strike a balance between the spouses in order to preserve the coherence of family life.76

Algeria, Jordan, Lebanon and Tunisia have also made reservations to Article 2, but in their case, claiming incompatibility with national legislation.77

**Article 16**

Article 16 concerns women’s rights in the private sphere. It touches upon issues such as equal rights between men and women in marriage, divorce and property. The countries that made reservations to this Article are: Bangladesh Article 16(1), Bahrain, Egypt, Iraq, Kuwait Article 16(f), Libya Article 16 (c) and (d), Morocco, Syrian Article 16 (2) and Singapore.78

Bahrain, Kuwait and Syria are very brief and general in their reservations. For example, Kuwait states that: “The Government of the State of Kuwait declares that it does not consider itself bound by the provision contained in article 16 (f) inasmuch as it conflicts with the provisions of the Islamic Shariah, Islam being the official religion of the State.”79

Other countries offer more explanation, such as Morocco touch upon the meaning of equality in Islamic law, “which guarantees to each of the spouses rights and responsibilities within a framework of equilibrium and complementary in order to preserve the sacred bond of matrimony.”80 Egypt as well elaborates on the issue of

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76 *Id.* at 22.
77 *Id.* at 29.
78 *CEDAW 14th mtg.*, *supra* note 72, at 27.
79 *Id.* at 16.
80 *Id.* at 22.
divorce, and Singapore mentions its “multi-racial and multi-religious society and the need to respect the freedom of minorities to practise their religious and personal laws”\textsuperscript{81} as supporting the implementation of \textit{Shari’a}.

Also in the case of Article 16, Algeria, Jordan, Lebanon and Tunisia have claimed incompatibility with domestic laws, but did not mention \textit{Shari’a}.

General reservation:

While some States, as noted above, presented specific reservations invoking \textit{Shari’a}, others made general reservations. For instance, the Kingdom of Saudi Arabia made a general reservation, stating that:

“In case of contradiction between any term of the Convention and the norms of Islamic law, the Kingdom is not under obligation to observe the contradictory terms of the Convention.”\textsuperscript{82}

Clearly, the scope of the reservation in this case is much broader. It covers the Convention as a whole. To what extent can Saudi Arabia be considered as a member Party remains a question.\textsuperscript{83}

The above presentation shows that countries abiding by Islamic law in their national legislations have not, in all cases, done the same reservations. For example, Iraq and Kuwait did not make a reservation to Article 2. Nonetheless, it is valid to argue that the same Articles (2 and 16) pose the main controversies because the Committee considers them to be core provisions, and imposing reservations on them amounts to an incompatibility with the “object and purpose” of the Convention.\textsuperscript{84}

Moreover, the scope of the reservations vary to a great degree, certain countries make elaborate reservations, with specific detail, while others are broader and more general.

\textsuperscript{81} \textit{Id.} at. 11.
\textsuperscript{82} \textit{Id.} at. 26.
\textsuperscript{84} \textit{Id.}
Finally, it is worth noting that Indonesia, which follows Islamic law, has not made any substantive reservation to CEDAW 1981, the only reservation it made concerned procedural matters.\textsuperscript{85}

3. Reactions to the Reservations

The reservations invoking \textit{Shari’a} have generated numerous objections. They generally touch upon the lack of explanation given by reserving countries, and, in some cases, mention the absence of good faith. Objections vary in length, detail and not all objecting countries mention reservations invoking Islamic. Examples are illustrated below:

Australia objected Bahrain’s reservations states that:

\begin{quote}
The Government of Austria further considers that, in the absence of further clarification, the reservation to articles 2 and 16 which does not clearly specify the extent of Bahrain's derogation from the provisions in question raises doubts as to the degree of commitment assumed by Bahrain in becoming a party to the Convention since it refers to the contents of Islamic \textit{Sharia}.\textsuperscript{86}
\end{quote}

Canada, although objecting to reservations by the Maldives, does not mention reservations invoking \textit{Shari’a}.\textsuperscript{87} Denmark, objected Saudi Arabia’s general reservation, as well as the reservations made by Bahrain and Syria.\textsuperscript{88} It is noteworthy that it did not mention other countries that have made the exact same reservations, such as Egypt and Morocco.\textsuperscript{89} The same is applicable to Estonia’s objection to the reservation made by Syria, but does not mention other countries.

It is interesting to see how countries are selective in their objections. The “object and purpose” test does not seem to apply uniformly to all countries, whether political interests are taken into consideration remains a question.

\textsuperscript{85} CEDAW 14\textsuperscript{th} mtg., \textit{supra} note 72, at 14.
\textsuperscript{86} \textit{Id.} at 36.
\textsuperscript{87} \textit{Id.}
\textsuperscript{88} \textit{Id.} at 37.
\textsuperscript{89} \textit{Id.}
Brandt and Kaplan state that scholars have previously argued that international courts and mechanisms can offer an answer to the debate concerning Islamic law and reservations to CEDAW.\(^90\) Nonetheless, the authors believe that based on practical experience, “seeking judicial fora to solve . . . the tension between women’s and religious rights is unlikely to produce results.”\(^91\) The alternative proposed is to render reservations more specific and focused. The authors use Egypt and Bangladesh’s broad reservations as examples to prove the main challenge to overcome. In the same article, Brandt and Kaplan mention that States should in “good faith”, “submit a detailed explanation of how Shari’a conceivably conflicts with CEDAW provisions.”\(^92\) They believe that such an explanation would be considered as a step forward and would “resolve tensions between religious rights and women’s rights.”\(^93\)

Lijnzaad adds that “the reservations invoking shari’a law appear to be detrimental to the Convention’s goal of eliminating discrimination.”\(^94\) She argues that there are two methods to analyze the issue: one could use “the approach based on the law of treaties, which has the advantage of avoiding the delicate subject of cultural relativity,”\(^95\) or “the approach based on human rights law, which may raise questions of conflict of rights.”\(^96\) In other words, according to Lijnzaad, treaty law offers a stronger and more tangible framework to the debate than the human rights law framework. Completely enclosing the issue in its legal aspect can prevent unending debate over cultural relative issues.

\(^91\) Id.
\(^92\) Id.
\(^93\) Id.
\(^95\) Id.
\(^96\) Id.
Although Lijnzaad’s argument is valid at a theoretical level, practically speaking, treaty law -highlighting the issue of object and purpose- has not prevented the debate from arising and has not offered answers either. Brandt and Kaplan’s idea of requiring States to provide further explanation about how Islamic law is incompatible with CEDAW seems to be more efficient on a practical base.\textsuperscript{97}

Concerning the issue of “object and purpose”, Belinda Clark argues that:

\begin{quote}
Although the standard is intended to be an objective one, it is subjectively applied, i.e., compatibility is assessed by the sole judgement of every other party. Looking at those which are (or are not) the objecting states in respect of a particular reservation demonstrates that political or extralegal considerations come into play when states evaluate the compatibility of reservations.\textsuperscript{98}
\end{quote}

In other words, the “object and purpose” test is, in some cases, used as a political instrument and not as a legal one.

To sum up, the lack of uniformity between the reaction of countries following Shari’a and making reservations to CEDAW 1981 presents one main question: What is Islamic law? How is it applied? And to what extent is it compatible with women’s rights, as articulated in CEDAW? These questions will be tackled in the coming chapter.

\textsuperscript{97} Brandt, Kaplan, \textit{supra} note 90, at 140.
\textsuperscript{98} CLARK, \textit{supra} note 21, at 301.
IV. Islamic Law and Women’s Rights

This chapter is primarily concerned with defining Islamic law, presenting its sources and highlighting its stance concerning women’s rights. The presentation hereafter is in no way exhaustive or comprehensive, but these few pages will attempt to emphasize one main characteristic of Islamic law: its flexibility. It is through the possibility of interpreting and reinterpreting according to the social context it operates in, that one can reach a progressive articulation of women’s rights. The focus of this chapter will be made on women’s status in personal law, since it is within this field that the majority of the reservations to CEDAW have been made by countries following Shari’a.

A. Shari’a and Fiqh: A Crucial Distinction

Before analyzing the sources of Islamic law, it is important to present a major distinction between Shari’a and Fiqh so as to avoid confusion in presenting the sources hereunder. Shari’a “literally means the pathway, or the path to be followed (…). In [a] technical sense Shari’a refers to the canon law of Islam and includes the totality of Allah’s commandments.”99 The commandments are broad and general principles to be followed. Fiqh is “the process of deducing and applying Shari’a principles and injunctions in real or hypothetical cases or situations.”100 In applying the broad principles to specific situations, one reaches the practical application of Shari’a. Thus, it is possible to deduce from these general norms specific laws pertaining to different fields of law (as known is the modern legal systems), such as personal status law, criminal law or public law. Fiqh is in and of itself a

100 Id.
methodology.\textsuperscript{101} As a matter of fact, in the analysis of Islamic law, \textit{Fiqh} is at the core of the debate, not \textit{Shari`a}. The interpretations and practical implementation of the broad norms found in the Quran and \textit{Sunna}, which are the sayings and the deeds of the Prophet, can be diverse and sometimes controversial. In other words, depending on the context and on the tools of interpretation, the same verse from the Quran can be interpreted differently. Yet, it is in the diversity of opinions and flexibility that one can reach an area of compatibility between Islam and international standards of women’s rights.

**B. Sources of Islamic Law (Usul al Fiqh)**

The sources of Islamic law are important to analyze because they include tools and methods of reasoning and interpretation, which are essential in understanding the issue of women’s rights in Islam. Other than the Quran and the \textit{Sunna}, the other sources depend on consensus, human reasoning, public interest and sometimes on custom. These elements are changing and evolving, thus they are the essence of flexibility in \textit{Shari`a}. If used in a progressive way, one can ensure the protection of women’s rights.

**1. The Quran**

The sacred book of Islam is believed to be the revealed word of God to the Prophet. As noted by Abdel Haqq, “The Quran is not and does not profess itself to be a code of law or a law book. Instead, it serves as the cornerstone upon which Islamic law is based- the primary source for the principles of law- in addition to selected, specific

\textsuperscript{101} \textit{Id.}
injunctions.”\(^\text{102}\) There is overall consensus about the supremacy of the Quran over the other sources among Islamic scholars and schools of thought. Abdulahi An-Na’im argues that:

> The key to understanding the role of the Quran in the formulation of Shari’a is the appreciation that the Quran primarily sought to establish certain basic standards of behaviour for the Muslim community rather than to express those standards as rights and obligations.\(^\text{103}\)

In other words, the Quran highlights basic and general principles to be later articulated by interpretation into a code of rights and obligations.

Jamal J. Nasir highlights, “the wording of a Quranic ruling is either conclusive and binding (qati’) . . . , or contingent (zanni).”\(^\text{104}\) The author adds that the verses can be literally or metaphorically interpreted.\(^\text{105}\) From that perspective, the differences found between the schools of thought can be partially explained by the broadness of Quranic verses, which, in some cases, leave room for interpretation.

### 2. The Tradition or Sunna

Sunna means “the exemplary mode of conduct”\(^\text{106}\). It represents the second main source of Islamic law. It is divided into: the sayings of the Prophet (Hadith or Sunna qaulia), his acts (Sunna filia) and his tacit consent (sunna taqririyya).\(^\text{107}\) The Prophet’s sayings and deeds are divided into three groups, according to their degree of certitude, since the Sunna was transmitted orally:

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\(^{102}\) Abdel Haqq, supra note 99, at 11.  
\(^{105}\) Id.  
\(^{106}\) Wael Hallaq, A History of Islamic Legal Theories 10 (Cambridge University Press 1997).  
\(^{107}\) Nasir, supra note 104, at 20.
“- Mutawatir: “i.e.: a tradition handed on through an uninterrupted chain of trustworthy witnesses. This is absolutely certain.”\textsuperscript{108}

- Mash-hoor: This term qualifies a tradition that misses “a link in the chain by which it is handed down.” Nonetheless, “Mash-hoor is a strong legislative source, carrying high probability if not certitude.”\textsuperscript{109}

- Khabar Al-Ahad: It is the Hadith or the saying of the Prophet, which was transmitted by one narrator uniquely. To be accepted, this type of Sunna has to fulfil certain criteria, depending on the schools of thought.”\textsuperscript{110}

3. Consensus or Ijma’

In cases where the Quran and the Sunna fail to answer legal questions, ijma’ or consensus is considered as another source of fiqh. “Learned scholars of Islam and/or community of Muslims of a particular era come to agreement on an issue, and individual reasoning via several methodologies.”\textsuperscript{111}

4. Analogy or Qiyas

Another form of reasoning in absence of Quranic and Sunna guidance would be the methodology of analogy. Nonetheless, this source is subordinate to ijma’, in other words, if consensus has not been made about an issue, then qiyas would be accepted as a source of legislation.\textsuperscript{112} It consists in comparing a case that has a common feature with the case at hand, ‘illa, and applying the judgement of the latter to the former. Only qualified scholars are entitled to exercise this form of individual reasoning.\textsuperscript{113}

\textsuperscript{108} Id. at 21.
\textsuperscript{109} Id.
\textsuperscript{110} Id.
\textsuperscript{111} ABD EL HAQQ, supra note 99, at 17.
\textsuperscript{112} Id.
\textsuperscript{113} AN-NA’IM, supra note 103, at 25.
5. Other Sources

- **Istihsan** (Public Interest)

  The idea of public interest has been referred to in different terms, according to the schools of thought. The Hanbali School names it *Istislah*, while the Maliki School uses the term *Masaleh Mursala*. Although slight differences exist in the specific definition of each term, scholars agree that:

  *Istihsan* is the process of selecting one acceptable alternative solution over another because the former appears more suitable for the situation at hand, even though the selected solution may be technically weaker than the rejected one.\(^{114}\)

Public interest is considered to be a source of legislation based on reasoning, but subordinate to the sources mentioned above.

- **Istihab** (Presumption of Continuity)

  *Istishab* “stands for the proposition that a situation or thing known to exist continues to exist until the contrary is proven.”\(^{115}\) Presumption of innocence in Islamic law stems from this form of reasoning.

- **‘Urf** (Custom)

  The schools of thought give custom, as source of law, different importance. As An-Na‘im argues the Maliki and Hanafi schools recognize it, while the Shaf‘i school completely rejects the use of custom as a source of law.\(^{116}\) Nonetheless, “prevailing customs may be given recognition only where they do not contravene Islamic principles.”\(^{117}\)

  To summarize the above paragraph, *Fiqh* is based on numerous sources. Other than the Quran and *Sunna*, they have the common feature of engaging human reasoning and interpretation in the articulation of Islamic legislation. *Fiqh* is based on

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\(^{114}\) *Id.* at. 18.  
\(^{115}\) *Id.* at. 26.  
\(^{116}\) *Id.*  
\(^{117}\) *Id.* at. 19.
human reasoning, and, although it is derived from a number of general principles, believed to be divine, the application of these ones is changeable and flexible. In order to highlight the implications of human reasoning in Islamic law, the coming part will emphasize the methodologies used and/or proposed by Islamic scholars in the interpretation of Islamic law.

C. The Sunni Classical Schools of Thought

For the purpose of this thesis, the Schools of thought, which will be relevant in the later chapters, are the four major Sunni Schools of thought. Their creation is the result of “the dialectical interplay between the text and individual opinion.”\(^{118}\) Thus, their presentation is essential for a comprehensive understanding of the different methodologies used in Islamic jurisprudence.

1. The Hanafi School

Abu Hanifa al-Nu’man b. Thabit (699-767) was the founder of the Hanafi School. He used *qiyaṣ* as a tool of “legal deduction”\(^{119}\) and “[his] methodology was reflected not only in his answering of actual cases but also in his inventing of hypothetical sample cases which he examined within the texts, deducing and applying the relevant reasoning that he found there.”\(^{120}\) In other words, his methodology highly depended on analogy and deduction.

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\(^{119}\) Id. at 13.

\(^{120}\) Id. at 13.
Concerning the geographical influence of this school, Schacht affirms that the Hanafi School spread from Iraq and Syria to the Ottoman Empire, leaving its traces today in countries, like Egypt.\(^{121}\)

2. The Shafei School

Abdulah bin Shafei, known as Shafei “[] was able to produce a clear and independent Islamic methodology in understanding the law.”\(^{122}\) Schacht argues that Shafei considered the Quran and the *Sunna* as “the two principles”\(^{123}\) and gave consensus and analogy a subordinate place.\(^{124}\) He also recognizes *istislah* or public interest as ibn Hanbal.\(^{125}\)

3. The Maliki School

Malik b. Anas’s methodology puts an emphasis “on the norms and practices of Umar and the people of Medina [,which] made his school a fundamental textual base of the Islamic legal fabric.”\(^{126}\) In other words, he recognizes, in addition to the principles sources of Islamic law, the role of custom and traditions.

4. The Hanbali School

Ahmad ibn Hanbal is the founder of the Hanbali School. As Melchert argues, “the greatest extant collection of Ahmad’s learning is his massive *Musnad*.”\(^{127}\) The *Musnad*, is a collection of *Hadiths* or sayings of the Prophet, and is reflective of ibn

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\(^{122}\) *Izzi Dien, supra* note 188, at 20.

\(^{123}\) *Schacht, supra* note 121, at 61.

\(^{124}\) *Id.*

\(^{125}\) *Id.*

\(^{126}\) *Izzi Dien, supra* note 118, at 16.

\(^{127}\) *Christopher Melchert, The Formation of the Sunni Schools of Law 9\(^{th}\)-10\(^{th}\) Centuries C.E.*, 138 (Brill, 1997).
Hanbal’s methodology, “[who] would refer to a weak hadith in preference to analogy.”\textsuperscript{128} He accepted the principles of masaleh mursala as well as istihsan.\textsuperscript{129} The Hanbali School is followed nowadays in Saudi Arabia, Kuwait as well as in Gulf States.\textsuperscript{130}

To sum up, the Classical Schools interpreted the verses of the Quran and the sayings in the Sunna according to the tools of reasoning recognized as being sources of Islamic law, such as analogy or interest. In addition to this methodology, modern methods of interpretation are being discussed among scholars; these ones will be presented in the coming section.

D. Methods of Interpretation

1. Ijtihad

The sources presented above, other than the Quran and Sunna, all use ijtihad to reach a legal outcome. “Ijtihad literally means hard striving or strenuousness, but technically it means exercising independent juristic reasoning to provide answers when the Quran and Sunna are silent.”\textsuperscript{131} An-Na’im states that during the eighth and ninth centuries A.D. ijtihad had a major role in the construction of Islamic law. Since the tenth century A.D. “the doors” of ijtihad closed and as Joseph Schacht argues:

This freedom to exercise one’s own judgement independently was progressively restricted by several factors, such as the achievement of local, then general consensus, the formation of groups or circles within the ancient schools of law, the subjection of unfettered opinion to the increasingly strict discipline of systematic reasoning, and last but not least the appearance of numerous traditions from the Prophet.\textsuperscript{132}

\begin{footnotes}
\footnotetext[128]{IZZI DIEN, supra note 118, at 23.}
\footnotetext[129]{Id. at 25.}
\footnotetext[130]{Id.}
\footnotetext[131]{AN-NA’IM, supra note 103, at. 27}
\footnotetext[132]{SCHACHT, supra note 121, at 70.}
\end{footnotes}
The qualification of those practicing *ijtihad* has also been a controversial question during the tenth century leading to the end of this methodology. An-Na’im not only calls for a reopening of “the doors” of *ijtihad* but he also emphasizes the importance or redefining it and rearticulating its limitations. For examples, one of the limitations he presents is that “under the historical formulation of *usul al-fiqh* . . ., *ijtihad* is not possible even in matter settled through *ijma’*.” He supports his claim by referring to Umar (the second guided caliph and leading Companion of the Prophet), who used *ijtihad* even in matters where the Quran and *Sunna* were precise and clear. In other words, An-Na’im challenges the hierarchy of sources established throughout the history of Islamic jurisprudence and calls for their reanalysis. He states that:

[C]ontemporary Muslims have the competence to reformulate *usul al fiqh* and exercise *ijtihad* even in matters governed by clear and definite texts of the Quran and *Sunna* as long as the outcome of such *ijtihad* is consistent with the essential message of Islam.

### 2. *Taqlid*

*Taqlid* or “the following of authoritative opinions” has, according to Coulson, enabled scholars to select different opinions and views from the authoritative schools of Islamic thought to respond to the new demands of society. Schacht argues that:

Whatever the theory might say on *ijtihad* and *taklid*, the activity of the [] scholars, after the ‘closing of the door of *ijtihad*’, was no less creative, within the limits set to it by the nature of *Shari’a*, than that of their predecessors. New sets of facts constantly arose in life, and they had to be mastered and moulded within the traditional tools provided by legal science.

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133 AN-NA’IM, *supra* 103, at 28.
134 *Id.*
135 *Id.*
136 *Id.*
137 HALLAQ, *supra* note 106, at 121.
139 SCHACHT, *supra* note 121, at 73.
Schacht adds that this rigidity found in the methodology of taqlid helped “Islamic law to maintain its stability over centuries which saw the decay of the political institutions of Islam.” In other words, it maintained the Islamic legal framework integral and protected it from opinions that might have lacked credibility and would have led to a fragmentation within Islamic jurisprudence. But the rigidity highlighted by Schacht was also at the core of numerous critiques calling for a “reopening of the doors of ijtihad”. Selecting views from different schools of thought (selective methodology) seems weak in establishing argumentative consistency. From that standpoint, Hallaq synthesized these critiques and classified them into two groups: “religious utilitarianism” and “religious liberalism.”

3. The Utilitarian Approach

As Hallaq presents it, Muhammad ‘Abduh, who is an “Egyptian scholar, journalist, theologian, jurist, grand mufti, and reformer, regarded as an architect of Islamic modernism”, introduced the idea of religious utilitarianism. Rashid Rida who was a “Syrian Islamic revivalist, reformer, and writer. [He] lived in Egypt from 1897 until his death. [And he was a] close associate and disciple of Muhammad Abduh,” developed the idea of utilitarianism into a more comprehensive philosophy and legal framework. The underlying support of this approach is the idea of interest.

“Aside from matters of worship and religious ritual, which were to remain in the

140 "Id. at. 75
141 HALLAQ, supra note 106, at 214.
144 HALLAQ, supra note 106, at 214.
145 Id.
purview of revelation, Rida upheld a legal theory strictly anchored in natural law, where considerations of human need, interest and necessity would reign supreme in elaborating a legal corpus.” To construct his theory, Rida establishes a number of premises, which enable him to be read in a moderate light: depending on the Quran and Sunna, he offers a new method of interpretation. In other words, he finds support to his idea in the classical scholarly discourses. Nonetheless, the ambivalence found in Rida’s methodology was controversial: He relied on the earlier authorities, to emphasize the ideas of need and interest, while “rejecting traditional legal theory,” transforming a minor concept such as interest into the base of his methodology.

This ambivalence, as Hallaq argues, justifies “that these writings remained mere academic discussions, failing to affect the world in practice.” In continuation of Rida’s theory, ‘Abd al-Wahhab Khallaf confines in his own utilitarian approach “the scope of the Quran to a few, general, principles and rules [he] was clearly attempting to circumscribe its legislative function significantly.”

The main critique addressed to religious utilitarianism is its subjectivity and lack of consistency in its methodology. As Hallaq summarizes it, “To speak of these concepts [istsilah and necessity] without a methodology that can control the premises, conclusions and the lines of reasoning these concepts require a highly relativistic venture.” Thus “religious liberalism” offers an alternative, which seems to be based on a consistent methodology.

4. The Liberal Approach

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146 Id. at. 219
147 Id.
148 Id.
149 Id.
150 HALLAQ, supra note 106, at 220.
151 Id. at. 222.
152 Id. at. 231.
153 Id.
Religious liberalism is a methodology that consists in understanding religious texts in their social contexts, “the connection between the revealed text and modern society does not turn upon a literalistic hermeneutic, but rather upon an interpretation of the spirit and broad intention behind the specific language of the texts.” Among the supporters of such a methodology is Muhammad Sa’id ‘Ashmawi, who is an “Egyptian judge, intellectual, lecturer, and former head of the State Security Tribunal. . . . [He] holds a secular orientation and advocates the separation of religion and politics [and] articulates critical views of political Islamist movements.” He also introduces a distinction between “religion as a pure idea and religious thought as an elaboration of that idea.” In other words, he separates divine and human laws, doing so in an elaboration of six premises. He argues that Shari’a is a “state of mind”, a genuine desire of the society to be governed by this law. In addition, he considers Shari’a to be “revealed for particular reasons that have to do with a particular human reality.” In ‘Ashmawi’s opinion, Islamic law should be interpreted in ways serving general interest. He also argues that “the Quranic discourse pertains in one way or another, to the Prophet,” he emphasizes the difference between universal principles and principles related uniquely to the Prophet. Finally, in his opinion, he mentions the existing link between Shari’a and the pre-Islamic era, which complements his theory of contextualizing the law. In essence, ‘Ashmawi “reverts to the distinction between religion as a pure, divine idea and the religious system as a human creation based on that idea.” Although the practical application of such a methodology has been

154 Id.
156 HALLAQ, supra note 106, at 232.
157 Id.
158 Id. at. 234.
159 Id. at. 235.
highly contested, followers of ‘Ashmawi, such as Rahman and Shahrur employed the “textual/contextual analysis”\textsuperscript{160}, which seem to offer a stronger theoretical base for reform compared to the utilitarian methodology, which does not follow a homogeneous framework.

Analyzing these different methodologies of interpretation highlight the evolving and changing nature of Islamic law. It also emphasizes the ongoing debate about finding common grounds between the principles of Islam and the demands of a modern world. The overlapping of these two frameworks can offer a counter-argument to the reservations invoking Shari’a to CEDAW. To analyze this question in depth, it is necessary to present women’s status and rights within Islamic law, and to show once again that the issue leaves spaces for interpretation, spaces that could promote women’s rights.

E- Women’s Rights in Islamic Law

The aim of this section is to illustrate women’s rights under Islamic personal status law. To maintain a focus, and relate the study to the CEDAW reservations, women’s rights in marriage, divorce and inheritance will be at the core of this section. It will be argued that although in certain areas practical inequalities (based on the social system) exist between men and women in the application of Islamic law, different interpretations can be used in the promotion of women’s rights. The major inequalities will be presented, then responded to in order to highlight the role of human reasoning and interpretation, but also to emphasize that “a ceiling exists” in the practical application of Islamic norms. In other words, due to embedded beliefs, even the most progressive interpretation can reach a limit in practice. The coming part

\textsuperscript{160}Ibid. at. 254.
focuses on how Shari’a is applied de facto, compared to a de jure possibility of interpretation. Before analyzing the different areas of debate, it is important to keep into consideration that equality is a major principle in Islam and that, as Ann Elizabeth Mayer puts it:

Not only did the Quran attack institutions of pre-Islamic Arabia that contributed to women’s degraded and vulnerable status, but Islam also conferred rights on women in the seventh century that women in the West were unable to obtain until quite recently. Muslim women, for example, enjoyed full legal personality, could own and manage property, and, according to some interpretations of the Quran, enjoyed the right to divorce on very liberal grounds.\textsuperscript{161}

The areas of debate in question, where Shari’a seems to discriminate on the basis of gender are the following:

1. Marriage

- Concluding the Marriage Contract:

Although exceptions exist, the general rule in Islamic countries consists in denying women their right to contract their marriage. “A Muslim woman needs a wali (guardian) to contract the marriage on her behalf.”\textsuperscript{162} The justification behind this legal requirement is the protection of women “who may be victimized by designing men”\textsuperscript{163}. As Al-Hibri argues, “this concern appears reasonable, but it makes sense legally only if we adopt a patriarchal view of women. A rational independent woman of sound judgement requires no protection (although she may seek advice).”\textsuperscript{164}

Within Islamic jurisprudence, one can find a support to the above argument, the Hanafi School of thought recognizes “the mature woman’s right to contract her own

\textsuperscript{163} \textit{Id.}
\textsuperscript{164} \textit{Id.}
marriage.” The base of that view is that Islamic law enables women to contract in financial issues. Thus, they have the right to contract their own marriages. This example demonstrates how within different schools of Islamic jurisprudence, one can attain a progressive understanding of women’s rights.

- Obligation to Obey the Husband (ta’ah):

The Quran stipulates that: “Men are the protectors and maintainers of women, because Allah has given the one more (strength) than the other, and because they support them from their means.” This verse has been used and abused to support men’s superiority to women and to justify women’s submission to them. Nonetheless, as Aziza Al-Hibri notes:

The Qur'an was describing (and not recommending) in this ayah a situation akin to the traditional one existing at the time, where some women were financially dependent. In those circumstances, the ayah informs us, God gave the man supporting the responsibility (taklif, not privilege) of offering the woman guidance and advice in those areas in which he happens to be more qualified or experienced. The woman, however, is entitled to reject both (otherwise the advisory role is no longer advisory).

Derived from the above verse, the idea of a wife’s obedience to her husband is stipulated in numerous legal codes in Islamic countries. Al-Hibri argues that the idea of ta’ah “enables the husband to prohibit the wife from leaving her home, unless she is willing to risk loss of financial support and, in some cases, divorce.” This concept is used as a justification to women’s rights abuses. The author adds that “this unbelievable oppression is an intolerable violation of Quranic and international

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165 Id.
166 Id.
168 Al-Hibri, supra note 162, at 12.
169 Id.
standards of human dignity.”

In support of her argument, Al-Hibri refers to the Sunna of the Prophet stating that:

[A]s a husband, the Prophet did not demand ‘obedience’ at home. Instead, his private life was characterized by cooperation and consultation, all to the amazement of some of the men who knew about it. This egalitarian model is not the basis of the Codes which have departed from this Sunnah.

In other words, the concept of ta’ah is related to the traditional patriarchal social systems that dominate most Islamic countries. In analyzing verses of the Quran and the Sunna of the Prophet, one can easily find support to a progressive articulation of women’s rights.

2. Polygamy

The Quran states: “marry of the women, who seem good to you, two or three or four; and if ye fear that ye cannot do justice (to so many) then one (only)”

The application of this verse has varied tremendously according to the time and location of the practice. In certain countries following Shari’a, polygamy is a protected right by the law, while in other countries, such as Tunisia, polygamy is prohibited. In the latter case, the reason behind the prohibition stems from a Quranic verse as well, which states that: “Ye are never able to be fair and just as between women, even if it is your ardent desire.” This verse seems to respond to the above verse (3) in men’s obligation to maintain equal treatment between their wives, or else to be under the obligation to completely refrain from taking a second wife.

Among the countries applying Islamic law, different procedural obligations are imposed. In Iraq, for example, the permission of a judge has to be sought prior to

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170 Id. at 9
171 Id.
172 Quran, supra note 167, at 4:3.
173 Quran, supra note 167, at 4:129.
taking a second wife. In Jordan, the only restriction to polygamy would be for a woman to include a condition in the marriage contract.\footnote{Nasir, supra note 104, at 67.}

Hafiz Nazeem Goolam affirms that “the majority of Muslim women around the world are unaware of the taqliq or prenuptial agreement. A Muslim woman has the right to lay down certain conditions in the taqliq before signing the marriage certificate, in order to safeguard her welfare and rights.”\footnote{Hafiz Nazeem Goolam, Gender Equality in Islamic Family Law: Dispelling Common Misconceptions and Misunderstandings 119 (Hisham Ramadan ed., Rowman & Littlefield Publishers 2006)} Examples of these conditions vary, under Jordanian law, a wife can restrict her husband from having another wife, and in case the husband fails to meet the condition, the woman is granted divorce.\footnote{Id.}

As Nasir affirms it, “like any other contract, a marriage contract can only be concluded through the two essentials or pillars (arkan) of offer and acceptance by the two principals of their proxies.”\footnote{Nasir, supra note 104, at 45.} Concerning the form of the marriage contract, jurists agree that it should have “immediate effect, and shall not be suspended or deferred to the future.”\footnote{Id. 55.} In addition, the woman has the possibility to add conditions to the marriage contract.

To summarize, the issue of polygamy is not as clear-cut as it may seem. From a theoretical standpoint, Quranic verses offer a support to both the argument in favor and against the issue. It is therefore left to human reasoning and Islamic scholars to decide upon its practical implementation. That is the reason why countries apply this concept differently.
3. Divorce

A common misunderstanding in western thinking is that the right to divorce vests in the husband, but it may be ‘transferred’ to the wife in certain instances.”¹⁷⁹ In response to this argument, the Quran stipulates that: “And women shall have rights similar to the rights against them, according to what is equitable.”¹⁸⁰

In application, Goolam mentions khul’ and Ibn Rushd’s philosophy of it:

Khul’ is provided for the woman, in opposition to the right of divorce vested in the man. Thus if trouble arises from the side of the woman, the man is given the power to divorce her, and when injury is received from the man’s side, the women is given the right to obtain khul’.¹⁸¹ Nonetheless, in the application of khul’, women lose their financial and property rights. And the only possibility of them getting a divorce on equal grounds with men is for them to seek judicial interference.

It is important to add that khul’ is not the only mean by which a woman can dissolve the marriage contract. As Mashhour noted, there are three other ways of doing it.¹⁸² “Delegated talaq or talaq tafwid” means that “a wife has the right to divorce only if the husband has delegated this right to her.”¹⁸³ This right enables her to end the marriage contract at her will. The other forms of divorce, that a woman can initiate, are the divorce by judicial interference or divorce when the husband violates a condition stipulated in the contract.

It is possible to argue, from a practical perspective that the rights of women to divorce encounter social and administrative obstacles: for example, in case of judicial interference, the bureaucratic system of courts might harm her, or that husbands very rarely delegate the right to divorce to their wives due to cultural stereotypes.

¹⁷⁹ GÖOLAM, supra note 175, at 120.
¹⁸⁰ Quran, supra note 167, at 2:228.
¹⁸¹ GÖOLAM, supra note 175, at 121.
¹⁸² Id.
¹⁸³ Mashhour, supra note 1, at 573.
Nonetheless, the point highlighted here is that from a legal perspective Islamic law does not prevent women from exercising this right, violations stem from the patriarchal system and the social stereotypes that must be overcome for eventual change.

4. Inheritance

Inheritance matters are specific under Islamic law, and the Quranic verse clearly stipulates that:

“Allah (thus) directs you as regards your Children's (Inheritance): to the male, a portion equal to that of two females.”

Chadhry offers an extensive analysis on inheritance laws under Shari’a. She highlights the importance of taking the maqasid or “the intent of the law” when understanding the above verse, adding that “the ultimate intent of the law is to promote and protect the maslaha, the well-being of humanity.” The author argues that this verse has been abused by the Islamic society to prove men’s superiority. Yet:

There seems to be a strong case for the proposition that the underlying rationale, the ‘illah, of a two to one ratio in estate distribution when male agnates and specialized female agnates inherit together, is that the males have the great financial responsibilities towards the specialized female agnates with whom they inherit, and toward the family in general.

Chadhry presents an important question: with the present social changes reforming the family and the role of women in the society, “how would the law change”? The author offers a very interesting answer: before reinterpreting the Quranic verses, which can be a very controversial and debated matter, one should use

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184 Quran, supra note 167, at 4:11.
186 Id.
187 Id. at 542.
188 Id. at 545.
the mechanisms within Islamic law that can increase women’s property.189 The examples given are the “inter vivos gift or hiba”, which gives “great freedom in the transfer of property (...) between kin”190 or use “a general Islamic principle [which consists in validating] that property owners may freely dispose of their property inter vivos.”191 In other words, with the consent of a brother, his sister can inherit as much as he does.

To summarize, inheritance laws, although specific in the Quran, are flexible in adapting to the demands of a modern society. It would only require States to recognize the other mechanisms found within Islamic jurisprudence to treat men and women equally in matters of property and succession. Again, it is important to highlight that it is only through knowledge and education that Muslim women will be able to understand and voice their rights knowing that their demands do not contradict their faith.

189 Id.
190 Id. at 546.
191 Chaudhry, supra note 185, at 546.
V. Case Studies: Egypt, Tunisia and Saudi Arabia

In order to understand the relationship between women’s rights and Islamic law in depth, one should analyze its application on a practical level. Therefore, this chapter will present the role and place of Shari’a in three different legal systems to highlight the immense differences in application and prove that reservations to CEDAW invoking Shari’a are void of meaning. The countries presented hereafter are Egypt, Saudi Arabia and Tunisia. The place given to Shari’a in the Egyptian legal system will highlight a stance that is based on a moderate judicial interpretation of religious laws. Tunisia will be used as an example of a more progressive and modern application of Shari’a, while Saudi Arabia will emphasize the strict and traditional application of Islamic law. The analysis of the domestic application of Islamic law will then be linked with the CEDAW reservation.

A. Egypt: Balancing between Modern and Traditional Values

1. Shari’a and Women’s Rights in the Egyptian Legal System

In order to fully analyze the role of Shari’a in the Egyptian legal system and its implications on women’s rights, this part will be divided into two main divisions. A general introduction to Article 2 of the Egyptian Constitution will first be presented. Then cases from the Supreme Constitutional Court, regarding women’s rights will be briefed to, finally, highlight the role of the Court in defining Islamic law. This part is particularly focused on the national laws of Egypt to gain a more comprehensive understanding of the practice of Islamic law, and to question the validity of Egypt’s claim behind its CEDAW reservations.
a) Article 2 of the Constitution\textsuperscript{192} 

Article 2 of the Egyptian Constitution stipulates that “Islam is the Religion of the State. Arabic is its official language, and the principles of Islamic Shari’a are the principal source of legislation.”\textsuperscript{193} As Gabr presents it, this provision had undergone an amendment in 1980\textsuperscript{194}. Previously, it stated that “Islam is the religion of the State, Arabic is its official language, and the principles of Islamic Shari’a are a principal source of legislation.”\textsuperscript{195} Lombardi questioned “what does it mean for Shari’a to be ‘the principal source of legislation’?”\textsuperscript{196} Islamists claimed that this Shari’a is “the supreme source”\textsuperscript{197} of legislation, while a more the secularist view understood this term as meaning “the preferred form of legislation.”\textsuperscript{198} Lombardi argues that this was not the only controversy generated by the 1980 amendment. In addition, the meaning of the term “Shari’a” was left to be defined as well. As Lombardi states it

Muslims generally agree on vague propositions such as ‘the Shari’a is the law revealed to the Prophet and recorded in the sacred literature of Islam’. There was, however, no consensus on how one should go about deriving law from sacred texts, and consequently there was no consensus on what laws had actually been revealed to the Prophet. Thus, there was no workable definition of Shari’a that was accepted by all Muslims.\textsuperscript{199} 

Nonetheless, faced with these controversies, “The Supreme Constitutional Court remains the most authoritative arbiter in these matters.”\textsuperscript{200} Through its cases, the Court was able to define Shari’a and offer answers to the questions Lombardi articulated.

\textsuperscript{192} EGYPT CONST. art. 2.  
\textsuperscript{193} EGYPT CONST. art. 2.  
\textsuperscript{195} Id. at. 216.  
\textsuperscript{197} Id. at. 85.  
\textsuperscript{198} Id.  
\textsuperscript{199} Id.  
\textsuperscript{200} Gabr, supra note 194, at 218.
b) The Supreme Constitutional Court: Defining Islamic Law

After the amendment of Article 2 of the Constitution, numerous cases were brought before the Supreme Constitutional Court challenging the constitutionality of laws, which did not seem, according to the applicants, compatible with Islamic law. The first cases were tackled from a procedural perspective, the justices avoided to define Islamic law and to be involved in its interpretation. The Ribba Case\textsuperscript{201} is one of the examples illustrating how the Court used technical and procedural arguments to avoid interpreting Islamic law:

On 31 May 1980, the President of Al-Azhar University claimed that Article 226 of the Civil Code, which permitted the payment of interest, was unconstitutional since it contradicted Article 2 of the Constitution stipulating that “Islamic Shari’a is the primary source of legislation”\textsuperscript{202}. The issue arose when the President of Al-Azhar University ordered medical instruments for student use at the Medical faculty and refused to pay the creditor the interest rate agreed upon. The Court found that indeed legislation should comply with the Constitutional provision, but this obligation did not extend to laws issued prior to the 1980 constitutional amendment. And in that case, rejected the claimant’s argument, and upheld the payment of interest.

This case was among the first ones to arise after the amendment and is considered to be a precedent in the rulings of the Supreme Constitutional Court. Lombardi argues that in this case, “the Court announced the doctrine of non-retroactivity of Article 2.”\textsuperscript{203} But it is important to highlight that the religious and legal substance were not tackled, the Court merely based its judgement on procedural elements. Though tactful, the Court was eventually obliged to define Shari’a and

\textsuperscript{201} Al Mahkama al Dustureya al ‘Ulya [Supreme Constitutional Court] no. 20, 16 May 1985, AL Gareeda al Rasmeya 992-1000 (Egypt).
\textsuperscript{202} Id.
\textsuperscript{203} Lombardi, \textit{supra} note 196, at 90.
interpret it in numerous cases arising after the amendment, such as in the *Polygamy Case*.\(^{204}\)

Concerning the facts, a wife, through judicial means, filed for divorce after her husband married a second wife. She based her demand on Article 1 of law 100/1985 stipulating that:

> The husband should declare his social status in the marriage contract. If he is married, he has to declare in the document the name of the wife or wives and their addresses. The notary should notify the wives about the new marriage by means of a registered letter. The wife (ves) over whom the husband got married has the right to ask for a divorce if she suffered from a material or spiritual harm impeding cohabitation, even if she did not forbid her husband from marrying others in the marriage contract.\(^{205}\)

The husband questioned the constitutionality of the above law, claiming it contradicts Article 2 of the constitution, which states that “Islamic *Shari’a* is the primary source of legislation.”\(^{206}\) The husband held that by allowing the first wife to seek divorce, the Court prevents him for exercising his right to polygamy.

In that case, the Supreme Constitutional Court tackles the issue of polygamy and enters into a process of religious interpretation (or *fiqh*). It states that:

> When God allowed polygamy, it was in the interest of human beings and in a moderate way. If the husband could not guarantee the condition of fairness, he should marry one woman only. (…) It is impermissible legally for polygamy to harm a wife, otherwise it would mean that God’s rules are practically harmful. God, in fact, saw no contradiction between allowing polygamy and the opposition of the wife.\(^{207}\)

In support of this argument, the Court mentioned the Quranic verse concerning polygamy, emphasizing the husband’s obligation of fairness. It also referred to the general principles embodied in the *Sunna* such as the principle of “no harm and no harming”, which the Maliki School applies in personal status cases. It also elaborated


\(^{205}\) Id.

\(^{206}\) EGYPT CONST. art. 2.

its stance by referring to the Hanbali School, which allows women to stipulate in their marriage contract their right to divorce in case their husband takes a second spouse.\textsuperscript{208}

By doing so, the Court pointed out that limitations on polygamy have been accepted by the main schools of Islamic jurisprudence. In addition, the Court challenges the applicant’s claim arguing that law 100/1985 does not prohibit polygamy since it requires that women to prove they endured harm.

For these reasons, the Court rejects the applicant’s claim and charges him with lawyers’ fees.\textsuperscript{209}

Qualifying the reasoning of the Supreme Constitutional Court (SCC), Lombardi and Brown argue that the Court has been able to balance between liberal ideas of public interest and Islamic norms, state that:

The SCC has combined different approaches to Islamic legal interpretation in order to develop a method of interpretation that will be rhetorically attractive to a range of Islamists. At the same time, the SCC has articulated the theory in such a way that it leaves itself considerable discretion to interpret Islamic law in light of its basic assumptions about justice and social utility. Not surprisingly, it has exercised its discretion to develop a liberal interpretation of \textit{Shari’a}.\textsuperscript{210}

Concerning the Court’s methodology, Lombardi and Clark emphasize that it considers the Quran to be the primary source of Islamic law, but has not defined its stance concerning the other sources. The justices abide by “principles that are absolutely certain with regard to their authenticity and meaning.”\textsuperscript{211} In that respect they have taken “Rida’s method of establishing textual authenticity”\textsuperscript{212} and “Sanhuri’s

\begin{thebibliography}{9}
\bibitem{208} Id.
\bibitem{209} Id.
\bibitem{211} Id.
\bibitem{212} Id.
\end{thebibliography}
insistence that states are only obliged to respect those principles that have been consistently accepted by a critical mass of traditional jurists over centuries.\textsuperscript{213}

To illustrate their argument, Clark and Lombardi mention the 1996 Case on Veiling when the Minister of Education issued a decision forbidding school girls to wear the niqqab (full veil, covering face and hands) and a father challenged the constitutionality of the decision, arguing it contradicts Article 2 of the constitution. The Court starts by referring to the Quranic verses, which are not certain in their meaning. Therefore, “the decision is not ipso facto contrary to Shari’a.”\textsuperscript{214} Then the Court offered an interpretation to the general objective and goals of veils, concluding that it promotes “modesty”\textsuperscript{215}. In that respect, “it suggested that unveiled faces do not promote lewd behaviour and might actually prevent it.”\textsuperscript{216} In addition, the Court covered the social costs of veiling arguing that “it is concerned with the consequences if conservatives, by forcing their daughters to veil their faces, impeded their ability to work and engage in public activities.”\textsuperscript{217} Therefore, the Court rejects the applicant’s claim.

Thus one can not classify the Court’s methodology as fitting into the *ijithad*, the *taqlid* or the utilitarian approach, as presented in Chapter IV, since it partially borrows ideas from them all to reach a relatively well-balanced output, balancing between the religious norms and “human interests.”\textsuperscript{218} The Supreme Constitutional Court’s progressive application of Article 2 of the Egyptian constitution proves how flexible and evolving Islamic law is. The justices were able, in several instances, to defend and promote women’s rights through *Shari’a* based arguments.

\textsuperscript{213} Id.
\textsuperscript{214} Id.
\textsuperscript{215} See, Lombardi, *supra* note 210
\textsuperscript{216} Id.
\textsuperscript{217} Id.
\textsuperscript{218} Id.
2. Egypt’s Reservations to CEDAW

In relation to the application of Islamic law in its national system, Egypt made two reservations to CEDAW invoking Shari’a as their justification.

a) Article 2

As mentioned in Chapter 2, Article 2 is primarily concerned with policy measures that states should undertake to ensure the protection and promotion of women’s rights\(^{219}\). The Article mentions the need for legislative reform as well as the obligation of states:

“[T]o refrain from engaging in any act or practice of discrimination against women”\(^{220}\). Egypt made a reservation to this Article claiming that “the Arab Republic of Egypt is willing to comply with the content of this article, provided that such compliance does not run counter to the Islamic Shari’a.”\(^{221}\)

The above reservations does not precise the reasons why Islamic law could be incompatible with Article 2. And most critiques mention the general and imprecise nature of this reservation. Brandt and Kaplan argue that “although Egypt did not submit reservations to every provision of the Convention that conflicts with Shari’a, Egypt’s reservation to Article 2 exempts Egypt from abiding by any obligation or duty that does contradict Islamic law.”\(^{222}\) The authors also quote Jenefsky who adds that “Egypt’s broad reservation to Article 2 is incompatible with the object and purpose of the Women’s Convention.”\(^{223}\)

Nonetheless, as highlighted in Chapter 2, Article 2 itself is broad and general, statements such as the obligation of states to take “all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices


\(^{220}\) *Id.*

\(^{221}\) CEDAW 14\(^{th}\) mtg., *supra* note 72, at 11.

\(^{222}\) Brandt, Kaplan, *supra* note 90, at 140.

\(^{223}\) *Id.*
which constitute discrimination against women”224 are indeed imprecise. Whether religion is included in the term “customs and practices” or not is not clear. No further explanation is offered in the Committee’s General Comments about this term’s scope. Thus, one is faced with a conflict of rights: should women’s rights supersede cultural and religious rights? And, in any case, who defines the balance between them? The question should be answered by societal needs and public interest. As it was presented in Chapter IV, public interest is a source of Islamic law, which makes it very flexible. Islamic law is moulded by the demands of the society, thus an increase of education and awareness would emancipate women and lead them to demand their rights, a process that would lead to a reinterpretation of Islamic law.

b) Article 16

Article 16 focuses on “matters relating to marriage and family relations.”225 It tackles issues of guardianship, rights in marriage, divorce, property rights and adoption. Egypt states that:

Reservation to the text of article 16, concerning the equality of men and women in all matters relating to marriage and family relations during the marriage and upon its dissolution, without prejudice to the Islamic Sharia's provisions whereby women are accorded rights equivalent to those of their spouses so as to ensure a just balance between them. This is out of respect for the sacrosanct nature of the firm religious beliefs which govern marital relations in Egypt and which may not be called in question and in view of the fact that one of the most important bases of these relations is an equivalency of rights and duties so as to ensure complementary which guarantees true equality between the spouses. The provisions of the Sharia lay down that the husband shall pay bridal money to the wife and maintain her fully and shall also make a payment to her upon divorce, whereas the wife retains full rights over her property and is not obliged to spend anything on her keep. The Sharia therefore restricts the wife's rights to divorce by making it contingent on a judge's ruling, whereas no such restriction is laid down in the case of the husband.226

225 Id. at. art. 16.
226 Id.
Egypt’s reservation is based on the argument that Islamic law defines equality between spouses, dividing rights and obligations among them. It also states clearly that “religious beliefs govern marital relations in Egypt.”

This reservation is clearer than Article 2, both the Article and the reservation are specific in the issue they tackle. Brandt and Kaplan cite Abdullahi An-Na’im, who argues that “Egypt would not have bothered to enter a reservation on Article 16 if it had no intention to comply.” It other words, this reservation does not necessarily reflect bad faith from Egypt’s side, this reservation might be a tool used in favour of gradual progress in the field of personal status law.

To sum up, scholars agree that the diverse methodologies used by the Supreme Constitutional Court to interpret Islamic law do not offer a consistent framework. Nonetheless, Venkatraman adds that “[r]eservations to the Women’s Convention based on Shari’a lose their relevancy in light of Egypt’s selective, results-oriented, albeit important, reforms.” The author recommends that Egypt follows the example of Tunisia and Morocco and to pursue its process of reform. Although Egypt’s reservation to article 2 is regarded as invalid, it can be argued that Egypt’s reservation to article 16 is valid to a certain extent, since national personal status laws will only be compatible with the Convention after they undergo a process of reform. In other words, even if the SCC’s interpretation and judgements are progressive and moderate, the formulation of the law itself does not protect women’s rights. To achieve a reform within the laws themselves, a societal demand must rise. Through educational developments, women should be able to voice their rights and acquire them.

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227 Id.
228 Id.
229 See, Lombardi, supra note 190.
231 Id.
Reinterpretation of Islamic law will be initiated from that point, but it is important to take into consideration that these reforms are a “bottom-up” process and not a “top-down” one. In other words, the international community will never be able to impose upon the Egyptian society what it refuses to abide by; changes need to arise from the society. The latest example illustrating this process is the Personal Status Law of 2000 (khul’ law) allowing women to divorce without the consent of their husbands. Amira Mashhour argues that “it was a reflection of the rising powers of the women’s and human rights organizations during the 1990s.”

B. Tunisia: The Progressive Application of Islamic Law

1. Shari’a and Women’s Rights in the Tunisian Legal System

In Egypt, the interpretation of Islamic law is reflected in the application of the law, from the judgements of the Supreme Constitutional Court, whereas in Tunisia the interpretation of Shari’a is reflected in the articulation of the law itself. For this reason, the below section will emphasize how Tunisia has used Islamic law as a source of legislation, but offers a strong legal framework to protect women’s rights. In its reservations to CEDAW, Tunisia does not refer to Shari’a, it merely cites its national legislation and argues that these reservations are temporary.\(^{233}\) The objective of analyzing this country is to demonstrate how Islamic law is not contradictory to women’s rights or to the adherence to CEDAW provisions.

a) The Personal Status Code of 1956

The Personal Status Code of 1956 introduced major reforms in the field of family law, and rearticulated women’s rights in more progressive and liberal terms. Among the

\(^{232}\) Mashhour, supra note 1, at 583.

\(^{233}\) CEDAW 14th mtg., supra note 72, at 29.
important changes, polygamy was abolished. Moreover, it put an end to the form of divorce, which is unilaterally pronounced by the husband, Kaplan adds that: “Women possess equal rights to file for divorce on the same basis and conditions as men. Upon divorce, custody of children may be granted to either spouse, based on the best interest of the child.”

These reforms succeeded for numerous factors. First, “President Bourguiba’s moral authority as a historical figure of the independence movement, contributed to the popular support and societal legitimacy [which was] enjoyed by these reforms.” The second reason was the “mobilization of socialist forces at the grassroots level”, which was engaged in numerous educational and training programs aiming at increasing awareness among women. Last but not least the reforms also enjoyed an “Islamic legitimacy” since they were “innovative reinterpretations of religious laws.” Although a rise of a more conservative and traditionalist mentality at the end of the 1960s was notable, these reforms maintain their impact since they enjoyed a societal legitimacy. Amira Mashhour affirms that “the importance of the Tunisian model stems from the fact that the Personal Status Code in Tunisia is based on Islamic law and the spirit of the Quran and Sunna regarding gender equality.” She adds that the Shari’a is an important source of legislation. Yet, it is important to highlight that the Personal Status Code of 1956

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235 Brandt, Kaplan, supra note 90, at 129.
236 Venkatraman, supra note 230, at 1981.
237 Id.
238 Id.
239 Id. at 1982.
240 Id.
241 Id. at 1980.
242 Mashhour, supra note 1, at 587.
243 Id.
was a tool to develop the society, a modernizing force of change.”244 In other words, the reforms were led by a political will to protect and promote women’ rights.

b) Redefining Islamic Law

The reforms mentioned above were justified and supported by a reinterpretation of Islamic law. An-Na’im uses the example of the Tunisian reforms in the Personal Status Code of 1965 to illustrate how polygamy can be restricted.245 To support this reform, the government offered several arguments:

(1) Polygamy, like slavery, was an institution whose past purpose as no longer acceptable to most people; and (2) the ideal of the Quran was monogamy. Here [a reformist position] was espoused, namely that the Quranic permission to take up to four wives (IV: 3) was seriously qualified by verse 129: “Ye are never able to be fair and just between women even if that were your ardent desire” (IV: 129). Thus, polygamy was permitted, the Quranic ideal is monogamy.246

Hallaq argues that although these reforms reflect a form of reasoning or *ijtihad*, it is no way similar to the classical form of *ijtihad*.247 While Kaplan states that “Tunisia has followed the Islamic interpretative practice of *takkhayur*, or choosing the most suitable existing jurisprudence from among Islamic schools.”248 In any case, the method of interpretation, as Hallaq presents it, is not consistent: “[i]t goes without saying that neither this quasi-*ijtihad* nor the device of selection and amalgamation are sustained by any type of cohesive legal methodology.”249

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244 *Id.*
245 AN-NA’IM, *supra* note 103, at 45.
247 HALLAQ, *supra* note 106, at 211.
248 Brandt, Kaplan, *supra* note 90, at 131.
2. Tunisia’s Reservations to CEDAW

Tunisia has made three reservations and two declarations to CEDAW: on Article 9 referring to nationality laws, on Article 29, which focuses on the arbitration system of CEDAW in cases of dispute and on Article 16 on personal status. A general declaration was made, as well as a declaration with regards to Article 15 paragraph 4, concerning choosing the place of residence.

None of these reservations or declarations refers to Islamic law. As a matter of fact, the only justification given is “national legislation”, in specific reference is made to the Personal Status Code and the Constitution. The absence of reference to Islam helps demonstrate that, in light of a progressive interpretation of Shari’a, reservations invoking Islamic law are unnecessary. Thus, it is the interpretation of Islamic law that might represent an obstacle to the implementation of CEDAW, not the law itself.

Yet, as an exception to the general trend in Tunisia’s modern interpretation, the issue of inheritance seems to directly link its stance with Islamic law. The reservation made to Article 16 stipulates that:

The Tunisian Government considers itself not bound by article 16, paragraphs (c), (d) and (f) of the Convention and declares that paragraphs (g) and (h) of that article must not conflict with the provisions of the Personal Status Code concerning the granting of family names to children and the acquisition of property through inheritance.

Going back to the Code on Personal Status, it specifically states that in inheritance matters, it entirely follows the Maliki School of thought. The latter abides by the

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250 CEDAW 14th mtg., supra note, at 72.
251 Id.
252 Id.
two to one ratio between men and women in inheritance issues. Yet, it is important to note that inheritance is among the most controversial issues in Islamic jurisprudence, and that it would require immense scholarly work to reach a compromise between the Quranic verses and women’s equality.

Nonetheless, with reference to the reports submitted to the Committee, Kaplan argues that “Tunisia states that its reservations ‘must be regarded as temporary until various provisions of the Convention can be fully integrated into existing Tunisian legislation’. Since CEDAW does not require immediate compliance but simply a commitment to advance toward its goal ‘without delay’, Tunisia’s reservations, admittedly temporary, would seem unnecessary.”

In other words, there is not a direct conflict between national legislation and international norms, these reservations are not justified.

To conclude, Venkatraman argues that the Personal Status Code does not contradict Article 16, thus “Tunisia’s reservations to Article 16 seem impermissibly formulated and substantively unnecessary.” Kaplan adds that these reservations create a “perception of resistance and non-compliance”, which he argues is more damaging to CEDAW than it is useful.

As a matter of fact, the reservations which are indirectly linked to Islamic law are the least problematic among Tunisia’s reservations. The one concerning nationality law might generate more debate and questions. For the purpose of this thesis, Tunisia offers an example of how a progressive interpretation of Islamic law can promote women’s rights. Whether women’s rights are respected or not on a practical basis, is

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254 Brandt, Kaplan, supra note 90, at 134.
255 Venkatraman, supra note 230, at 1983.
256 Brandt, Kaplan, supra note 90, at 134.
257 Id.
258 See, CEDAW 14th mtg., supra note 72, at 29.
not the core of the argument here, but Islamic law does not seem to represent an obstacle to the general objective of protecting women’s rights.

III- Saudi Arabia: The Traditional Application of Islamic Law

1- Shari’a and Women’s Rights in the Saudi Legal System

Although Saudi Arabia claims its constitution to be the Quran, it follows a document named “Basic Law of Government”, which was adopted by Royal decree in 1993 by King Fahd. Article 1 of the Basic Law states that:

“The Kingdom of Saudi Arabia is a sovereign Arab Islamic state with Islam as its religion; God's Book and the Sunnah of His Prophet, God's prayers and peace be upon him, are its constitution…”

Islamic law is applied in all the fields of public and private life. Concerning human rights, Article 26 emphasizes that, “The state protects human rights in accordance with the Islamic Shari’ah.” No detail is given on the application of Shari’a. As a matter of fact, Sifa Mtango adds that, “the Basic Law is also silent on women’s rights. The government appointed clergy, and the Government as a whole, interpret Shari’a so as to permit the denial of certain rights to women.” In other words, the issue of women’s rights is left to the government to interpret and define without any legal protection.

Concerning the school of thought followed in Saudi Arabia, Frank Vogel states that “Saudi Arabia (…) acknowledged the Hanbali School.” The Hanbali School predominantly depends on the literal meaning of the Quranic verses

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260 Id.
261 Id.
263 FRANK VOGEL, ISLAMIC LAW AND LEGAL SYSTEM: STUDIES OF SAUDI ARABIA 10 (Brill 2000).
and reject both “free exercise of personal opinion”\textsuperscript{264} and the “use of analogical and systematic reasoning.”\textsuperscript{265} Hallaq argues that:

The traditional group, represented, among others, by the official advocates of the Saudi regime, which aims at applying the Shari’a in it presumably intact, puritanist traditional form, notwithstanding the reformist spirit of Wahhabism. (…) Despite their unanimous proclamation of the right to exercise \textit{ijtihad}, they mostly stressed the need to return to the pristine religious forms of the first Islamic generation.\textsuperscript{266}

In other words, as presented in the previous case studies, as well as in Chapter 3, it is within the possibility of interpretation that one is able to articulate women’s rights in a modern and progressive way. By refusing the means of interpretation (\textit{ijtihad}), the Saudi system confines itself to a rigid application of women’s rights, which seem to contradict the overarching principle of equality in Islamic law.

\section*{2- Saudi Arabia’s Reservations to CEDAW}

The Kingdom of Saudi Arabia has made a general reservations to CEDAW, which stipulate that:

“1. In case of contradiction between any term of the Convention and the norms of Islamic law, the Kingdom is not under obligation to observe the contradictory terms of the Convention.”\textsuperscript{267}

The above reservation applies to all the provisions of the Convention in case they would contradict Islamic law, such a reservation categorically contradicts the Vienna Convention on the Law of Treaties and seems to defeat both “the object and purpose” of the Convention. This type of ratification seems to question not only the protection of women’s rights in Saudi Arabia, but challenges the efficiency of the

\begin{thebibliography}{99}
\bibitem{SCHACHT2014} SCHACHT, supra note 121, at 63.
\bibitem{Id.} Id.
\bibitem{HALLAQ2018} HALAQ, supra note 106, at 213.
\bibitem{CEDAW} CEDAW 14\textsuperscript{th} mtg., supra note 72, at 26.
\end{thebibliography}
Convention and the Committee. In addition, Saudi Arabia has not submitted any reports to the CEDAW Committee, which is a clear and obvious sign of its unwillingness to comply with any of its duties towards women’s rights.

To conclude, As Sifa Mtango puts it:

Women in Saudi Arabia live under constant legal and cultural prohibitions, whether in the family or outside their homes. The restrictions imposed by the state in its laws and decrees are oppressive, but the support these laws obtain from the patriarchal structure in their society means that improving their status is not just a matter of legal and political reform, but will also require considerable social change.268

As already noted above, social changes are at the core of women’s emancipation and equality. Moreover, the interpretation of Islamic law depends on these societal elements as well as on political motivations. In short, it is not Shari’a per se that violates women’s rights, but its interpretation, which can be guided by motives other than the “general good”.

Back to the reservations, should Saudi Arabia’s ratification to the Convention be considered as void? Goodman argues that “the harm to state consent in voiding its membership in a treaty will outweigh the harm in voiding only the reservation and keeping the state bound.”269 Thus as the author argues, “the appropriate test for determining whether a reservation is severable turns on an intent-based inquiry.”270 An essential part of this inquiry depends on “the structure of conditional consent”,271 which takes as an assumption that a state tries to “promote women’s rights”272 while limiting the treaty’s interference in domestic matters.273 In the case of Saudi Arabia, an additional challenge emerges in defining women’s rights. Saudi Arabia, following a traditional application of Islamic law claims to apply

268 Mtango, supra note 262, at 51.
269 Goodman, supra note 48, at 536.
270 Id.
271 Id.
272 Id.
273 Id.
human rights according to it. In addition, it is important to keep into consideration that considering a reservation to be valid or not is distanced from the practical protection and promotion of women’s rights. These ones should be claimed and demanded on a national level, to be supported internationally.
VI. Conclusion and Recommendations

When questioning the validity of the reservations invoking Islamic law to CEDAW, one engages in a multi-dimensional analysis. At a theoretical level, Shari’a is not a valid justification behind the reservations to CEDAW, fiqh might be. In other words, it is the interpretation of Islamic law, which is amalgamated with customary norms, traditions and political motivations that one might find areas of contradiction between the applied Islamic law and women’s rights. But at a practical level, the international community will not be able to enforce international norms upon communities that hold embedded beliefs and rooted traditions. State sovereignty remains the pillar of international law. So how can CEDAW be implemented and how can it promote women’s rights in the specific cases mentioned above?

A step forward would be for countries to submit reports to the Committee clearly specifying how Islam contradicts the reserved provisions. This requirement would limit the number of reservations and would nullify reservations such as Egypt’s reservation to Article 2, which is broad, as well as Saudi Arabia’s general reservation which is self-defeating. The question deriving from this first recommendation would be: what if states are able to prove incompatibility? Goodman’s “intent-based”\(^{274}\) inquiry might be a solution to such a question as presented in Chapter 4. But most importantly, the State report justifying the need for a reservation will generate a dialogue, a debate among Islamic scholars, international organizations and politicians. As presented throughout this thesis, different interpretations exist, and for a report to be issued with precise detail, other institutions will be able to challenge it and offer alternatives. This can also lead to an increase in

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\(^{274}\) Goodman, supra note 48, at 532.
awareness among Islamic societies and Muslim women, which leads to the second recommendation:

Raising awareness on women’s rights should become a priority in Muslim countries. These rights are violated and abused in the name of religion. To achieve a progressive and modern interpretation of the law, women need to voice their demands, knowing that these ones do not undermine their faith. It is only through an “upward” process, a demand stemming from the society itself that progress can be achieved. The role of civil society becomes crucial in initiating this process and promoting a new understanding of gender equality.