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Fostering Synergies for Advancing Women's Rights in Post-Conflict Islamic States: A Focus on Afghanistan, Egypt, and Libya

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For the tenth annual U.S.-Islamic World Forum, we returned once again to the city of Doha. The Forum, co-convened annually by the Brookings Project on U.S. Relations with the Islamic World and the State of Qatar, is the premier international gathering of leaders in government, civil society, academia, business, religion, and the media to discuss the most pressing issues facing the United States and global Muslim communities.

Each year, the Forum features a variety of platforms for thoughtful discussion and constructive engagement, including televised plenary sessions with prominent international figures addressing broad issues of global importance; sessions focused on a particular theme led by experts and policymakers; and working groups that bring together practitioners to develop partnerships and policy recommendations. The 2013 Forum continued its strong record of success. Over three days together, we assessed the impact of the significant transitions underway in Afghanistan and Pakistan, examined the economic challenges still looming in the aftermath of the Arab Spring in Egypt and throughout the region, and evaluated the regional effects and impact of the crisis in Syria. We also explored how art functions as a vehicle for political expression and accountability, and we examined how the events of the past decade in the Middle East have helped to shape Arab identity. For detailed proceedings of the Forum, including photographs, video coverage, and transcripts, please visit our website at <http://www.brookings.edu/about/projects/islamic-world>.

Each of the four working groups this year focused on a different theme, highlighting the multiple ways in which the United States and global Muslim communities

interact with each other. This year's working groups included: Rethinking the "Red Line": The Intersection of Free Speech, Religious Freedom, and Social Change; On the Brink: Avoiding Economic Collapse and Promoting Inclusive Growth in Egypt and Tunisia; Diplomacy and Religion: Seeking Common Interests and Engagement in a Dynamic World; and Advancing Women's Rights in Post-Conflict States: A Focus on Afghanistan, Egypt, and Libya.

The opinions reflected in the papers and any recommendations contained therein are solely the views of the authors and do not necessarily represent the views of the participants of the working groups or the Brookings Institution. All of the working group papers will be available on our website.

We would like to take this opportunity to thank the State of Qatar for its partnership and vision in convening the Forum with us. In particular, we thank H.E. Sheikh Ahmed bin Mohammed bin Jabr Al-Thani, the Minister's Assistant for International Cooperation Affairs and the Chairman of the Permanent Committee for Organizing Conferences; and H.E. Ambassador Mohammed Abdullah Mutib Al-Rumaihi for their collective support and dedication to the U.S. Islamic World Forum and the Project on U.S. Relations with the Islamic World.

Sincerely,



Dr. William F. McCants
Fellow and Director
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Abstract

Conveners:

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Susan Hayward

Political transitions in states emerging from conflict pose challenges and offer opportunities. In the countries we considered in this working group, there is a renewed emphasis on democracy (with its principle that all citizens are equal), but also on defining a role for Islam within the state. Efforts to incorporate Islamic religious concepts into the formal constitutions of Afghanistan, Egypt, and Libya have left important questions unresolved, especially in regards the rights of women. The challenge of fostering common approaches among Muslim women activists, members of the *ulama* (religious leaders) as well as legal advocates is daunting, yet finding common ground among such diverse stakeholders on women's rights in Muslim-majority states is critical to advancing democracy and human development. With this challenge in mind, the focus of this working group was to find consensus on ways to champion and sustain progress on women's rights amid renewed Islamic constitutionalism. By enlisting activists and religious leaders to draw on lessons learned and reason together, a more tailored approach emerged based upon each nation's respective cultural, institutional, and human development.

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Introduction

Post-conflict transitions pose challenges and offer opportunities.¹ This contrast is no better highlighted than in the political and social aftermath of conflicts within a multitude of Muslim-majority states (including those associated with the “Arab Spring” as well as Afghanistan and Iraq) where, in particular, there has been renewed emphasis on establishing a role for Islam and Islamic law within the state. The reasons for this renewed emphasis are varied, but stem in part from the failures of past regimes to govern in a representative, effective, and accountable manner. The new governments also seek to confer some popular legitimacy upon themselves and reflect the Islamic identity and sensibilities of the broader population because of “the universality and centrality of religion as a factor in the lives of the Muslim peoples.”² Consequently, there is no place better suited for reflecting such a sentiment than within a state’s constitution, thus the legal phenomenon known as Islamic constitutionalism. Even as some seek to enshrine – or in some cases have already achieved – a role for Islam and Islamic law within their constitutions, there re-

mains an important task yet to be addressed: how to define those terms, because the very definitions, while legal in nature, have a real and measurable effect on the lives of everyday citizens.

Perhaps no group of citizens is more directly affected by the scope and meaning of the terms “Islam” and “Islamic law” than Muslim women. The primary reason for this is because personal status laws are considered central to Islamic law. Specifically, among all legal topics addressed within the Qur’an and Sunnah, the sacred sources of Islamic law, matters of personal status predominate. Such laws deeply affect the daily lives of women because they order social relations and define the rights and duties of women with respect to fundamental social and familial practices. Personal status laws can nonetheless be subject to a variety of interpretations that ensure equity between the genders and still remain faithful to a nation’s Islamic identity. In the context of Muslim-majority countries undergoing political transitions, achieving this balance will depend on fostering synergies among political activists, legal advocates, and religious leaders.

1. In its earliest incarnation, this paper was presented at the U.S.-Islamic World Forum in Doha, Qatar in June 2013 and represents a collaborative effort between and among four of the U.S. Institute of Peace’s Centers for Conflict Management, and Centers of Innovation in Gender and Peacebuilding, Rule of Law, and Religion and Peacemaking.

2. Abdullahi An-Na’im, *Toward an Islamic Reformation: Civil Liberties, Human Rights, and International Law* (Syracuse, NY: Syracuse University Press, 1996), 3.

The Opportunity: Fostering Synergies Among Activists, Advocates and Religious Leaders

1. The Three Pillars Approach

Drafting constitutions in post-conflict settings is complicated because of the number of competing interests involved and the momentousness of the undertaking. To ensure that rights of women are protected, political activists, legal advocates, and Muslim religious leaders need to find common ground and collaborate. Admittedly, at times, each of these pillars of social change seem to oppose the advancement of equality for women. In particular, the last group – religious leaders – has sometimes been a barrier to women’s rights. However, each pillar brings its own strengths and necessary components to fostering a sustainable pathway for change.

a. First Pillar: Political Activists

Political activists are instrumental to an agenda for social change because they provide a movement with a voice and help to mobilize communities effectively. Activism can take on a variety of approaches ranging from political campaigning, to economic engagement, to the strategic use of social media. In political activism aimed at advancing women’s rights, activists recently drew on international treaty obligations that focus attention to individual rights while reflecting universal, cross-cultural, and transitional sentiments about the rights of women. They used these tools to frame and champion their cause and to put pressure on political elites to pursue policies that align with international legal norms. Included among these international obligations are the Universal Declaration of Human Rights (1948),

the Convention on the Elimination of All Forms of Discrimination against Women (1979) and, most recently, United Nations Security Council Resolution 1325 (2000). Resolution 1325 serves as the first formal and legal document from the United Nations Security Council that requires all states to respect both international human rights law and international humanitarian law regarding the rights and protections of women and girls during and after armed conflicts.

Political activism is not always relegated to non-governmental or social groups; political leaders also engaged in it too. Sometimes the most effective political activism is born by politicians who either run on a platform for political change or who become champions of a political movement once they are in office.

b. Second Pillar: Legal Advocates

Legal advocates are an indispensable player in social change movements. They are vital precisely because in an era of Islamic constitutionalism, the state is the source and enforcer of legal authority. Legal advocates also operate at the convergence of state authority and individual rights, and it is in the courts in particular where they play a vital role in both cementing and sustaining social change within the state’s governmental structures. Although the vast majority of states employ both formal and informal systems to promote social change, legal advocates work within the formal (state) systems of authority

and in tribal and community settings. Their advocacy for non-state groups carries an even greater weight since they are often closely tied to the communities they represent. More generally, legal advocates have advanced social change through litigation, proposal of new legislation, and by creating new modes of legal analysis and interpretation. Whereas political activists galvanize popular support, legal practitioners establish legal precedents aimed at cementing social change within societies. They can also help direct the short, medium, and long-term activities of political activists in ways that will be the most successful and strategic in terms of creating meaningful legal change.

c. Pillar Three: Religious Leaders

Equally as important is the role of the religious leader in advancing social change in these contexts. History attests that religious leaders, especially within the Islamic religious tradition, are those designated within their societies who are often thought of as giving voice to the law, particularly Islamic law. Consider the term *ulama* (literally scholars; the singular is *alim*) which is itself a broad term that encompasses anyone who possesses intimate knowledge (*'ilm*) of Islam. The *ulama* include theologians; religious teachers at *madrassas* (literally schools but best understood as Islamic religious schools); and prayer leaders (called imams and mullahs among Sunnis), who often preside over various religious functions. The most prestigious members of the *ulama* are the jurists, or *fuqaha* (the singular is *faqih*). Throughout history, Muslim religious leaders have straddled the divide between legal advocates and political activists who have done much to motivate and inspire the public. Their proximity to the public, their influential role in shaping social norms and public attitudes, and their ability to galvanize and orchestrate popular movements, particularly on issues perceived to have a moral or religious component, mean that religious scholars have to be a part of any effective movement for the advancement of women,

especially when religious authority is at the heart of Islamic constitutionalism.

Some women's political activist-oriented organizations that have recently sought to frame women's empowerment within Islam have been dismissed by co-religionists, politicians who are especially mindful of questions about who controls religious authority and members of the traditional ulama within a variety of Muslim-majority states and seen their impact limited exactly because their campaigns did not include leaders trained in Islamic theology who are recognized authorities. As with the other two pillars, religious leaders must be engaged in the initial stages of a campaign to protect the constitutional rights of women, and they must be given a meaningful role. Too often, religious leaders are engaged by political activists in the final stage of a campaign, in an "instrumentalist" fashion, that brings them on simply to bless agendas that have already been set by others. This approach can quickly backfire.

It should be noted that nearly all formal or authoritative religious leaders in Islam are men, not women. That said, there has been a recent upsurge in institutional efforts to educate women and girls in Islamic theology and jurisprudence. For example, women-only madrassas have been founded in numerous countries, including but not limited to Iran, Pakistan, Bangladesh, India, and Indonesia. These forms of Islamic education produce women with the capacity and legitimacy to argue from within an Islamic perspective in an authoritative manner. In Morocco, Egypt, Palestine, and elsewhere, women are increasingly serving as preachers, religious judges, and scholars. As women begin to hold greater authority to interpret religious law and shape theology and tradition, they often challenge patriarchal religious interpretations. The three pillar approach assumes healthy and consistent engagement of both male and female religious authorities.

II. Past Examples of Fostering a Three-Pillars Synergy

Collaboration among activists, advocates, and religious leaders to advance major social change is not without precedent. Various American movements for civil rights and immigration reform, the South African solidarity movement against apartheid, and fights to address HIV/AIDS, all serve as examples of initiatives in which these pillars have worked together successfully. Across the Muslim world, leaders have been developing and utilizing strategies that assert women's rights within an Islamic constitutional framework by emphasizing the diversity of legal opinions in the broader and historical Islamic legal tradition, while at the same time emphasizing Islamic law's compatibility with the concepts of fundamental individual rights, including women's rights, and women's participation in the political process. A few examples follow:

1. Transnational Lessons Learned Based on Political Activism. Muslim women leaders and activists should increase opportunities to network across borders and share strategies. Many successful advocacy strategies have sought to overcome divisions between women through approaches aimed at securing broad bases of local support. The Moroccan example comes to mind. Following independence in 1956, conservative clerics pushed for a wholesale adherence of Islamic law. The Moroccan king allowed the *Mudawana* (personal status code) to remain the legal authority on family law issues. Despite the Moroccan government's codifications in 1957, it was substantially revised more than thirty years later but through royal fiat, which in the eyes of many women simply failed to go far enough. In October 2003, King Mohammed VI proposed substantial reforms to the *Mudawana*, but it encountered strong resistance from conserva-

tive Islamic groups. To combat such conservative religious resistance he took two important steps: (1) he reached out directly to civil society, particularly women's groups, who in turn rallied people to their cause, and (2) he framed his series of proposed reforms as part of his larger Islamic legal reforms, which won final passage in the Moroccan parliament in 2004.³

While the Moroccan example is particularly appealing and undoubtedly an example of political activism within the Islamic legal tradition, it is also one of limited application. First, change came about largely through royal fiat, rather than popular upheaval. Second, although parliament passed the *Mudawana* reforms 2004, it could not have done so without the king's support.

Similarly, in Iran, the One Million Signatures campaign was consciously inspired by the success of the Moroccan signature campaign. One Million Signatures networked activists throughout Iranian cities and provinces in an effort to bring men and women together to push for women's rights from the ground up in the framework of the Shi'i Islamic legal tradition. While the initial push within was met with significant resistance that included the arrests of various activists, the bottom-up campaign has continued. The movement has recently received new life with the recent election of President Hassan Rouhani. Women's groups remain cautiously optimistic. During his campaign, Rouhani has publicly made certain pledges on women's rights including, for example, ending segregation at universities (which was something that his predecessor President Mahmoud Ahmadinejad had implemented), as well as pushing for employment opportunities for women and addressing

3. See generally John Hursh "Advancing Women's Rights Through Islamic Law: The Example of Morocco," 27 Berkeley J. Gender L. & Just. (2012): 252.

discriminatory laws against women in the employment sector. Rouhani has begun to ease restrictions on women's dress, but this remains an ongoing process.⁴

2. Enabling Women's Present and Future Participation in Shaping Islamic Law. As highlighted above, experience reveals that the majority of Muslim women who are attached to their religion will be less hostile to legal changes to personal status laws that build on a solid Muslim feminist jurisprudential basis. To this end, organizations such as Women Living Under Muslim Laws (WLUML) have worked to increase information-sharing and scholarship that "demystifies" Islamic law. WLUML hosts a database on the variety of Islamic laws regarding women. Another organization is Fatayat in Indonesia, which trains members on matters of Islamic law in order to encourage women's participation in religious debates.

3. Involving Islamic Religious Leaders in Formulating an Agenda for Change. Just as Islam itself does not possess unitary interpretations of law, religious leaders are not a monolithic bloc and instead have a variety of opinions about the role of women in society. Thus far, women's groups have had some difficulty engaging effectively with religious leaders (both male and female) in efforts to champion and advance women's equality under Islamic law. But there are some promising exceptions. In Indonesia, many of the strongest proponents of women working within Islamic frameworks were male *ulama*. In one instance, a male religious leader at President Wahid's Institute held training sessions on women and Islamic law for religious leaders and students in Islamic boarding schools. Such efforts promote differing interpretations of Islam to challenge

monolithic, patriarchal interpretations that may dominate the political discourse. Further, these efforts seek to influence not only those who already hold power in communities, but also the next generation of religious leaders.

4. See Rochelle Jones, "Breaking Through the Iron Ceiling: Iran's New Government and the Hopes of the Iranian Women's Movements" *Thompson Reuters Foundation*, September 13, 2013, <http://www.trust.org/item/20130913154000-fae4q/>; United Nations Office of the High Commissioner for Human Rights, "Iran: UN Expert Hails Release of Rights Defender Nasrin Sotoudeh, and Urges Government to Free Remaining Ones," September 23, 2013, <http://www.ohchr.org/EN/News-Events/Pages/DisplayNews.aspx?NewsID=13766&LangID=E>.

Background

1. A Concise Survey of Islamic Constitutionalism

To gain an understanding of the complexity of the issues, we first need an understanding of Islamic constitutionalism. At a minimum, constitutionalism is generally understood to describe the philosophy that holds that government can and should be legally limited in its powers, and that its authority depends on enforcing these limitations, typically in the form of constitutional laws. In a broader sense, constitutionalism can be considered a reflection of the philosophical orientation of the state itself, with constitutionalism being so deeply ingrained that its expression is both implicit as well as explicit.⁵ Stated differently, a constitution is often described as a “coordinating convention” that establishes “self-regulating” institutions that both “enable” and “constrain” popular and governmental behavior.⁶

Some have argued that Islamic constitutionalism is actually anti-constitutional because an Islamic constitution would be circumscribed by the authority of an outside body of religious law. In practice, Muslim-majority states have adopted three different approaches to making Islam a part of their constitutional structures:

1. States that see themselves as manifestations of Islam, meaning that Islam serves as the state

religion, Islamic law has supremacy over other laws, and the state itself is structured to reflect its Islamic identity (i.e., an Islamic Republic);

2. States that declare Islamic law to be the supreme law of the land. Their constitutions often stipulate that Islamic law is the principal or the singular source of legislation, or they may contain “repugnancy clauses” designed to ensure that promulgated laws conform to Islamic law and that courts and legislatures are empowered to oversee adherence to that law; and,
3. States that declare Islam as the official religion of the state. These states have endorsed the role of Islam within the state, but have not gone so far as to declare that religion shall rule the state’s affairs. Some of these states do allow Islam to hold sway in certain areas, like personal status laws.

Even as the approaches to Islamic constitutionalism have varied, so too have the definitions of what constitutes Islamic law.

5. See Scott Gordon, *Controlling the State: Constitutionalism from Ancient Athens to Today* (Cambridge, Massachusetts: Harvard University Press, 1999), 4.

6. See generally, Stephen Holmes, *Passions and Constraints: On the Theory of Liberal Democracy* (Chicago: University of Chicago Press, 1995).

II. The Inherent Ambiguity of Islamic Law

Constitutionalism is predicated upon the idea of law inasmuch as constitutionalism requires that the conduct of the different organs of the state vis-à-vis citizens, as well as vis-à-vis each other, be regulated by laws, or rules (which may or may not be written). For those seeking to enshrine some form of Islamic law in the constitution, they must first define its limits. Although Islamic law is frequently equated with the *shari'a*, they are not the same thing. *Shari'a* is an Arabic term that literally means “a path to the source of water.” The term appears only once in the Qur'an, where it is used to distinguish between a completely whimsical path of lawlessness and a straight path bound by certitude. According to the Qur'an, the *shari'a* is the certain or straight path within religion. Of course, what constitutes that certain path is open for debate. Most Islamic legal scholars attempt to define the *shari'a* as the clear and specific commands attributed to God as laid out within the sources of Islamic law: the Qur'an and the words and actions of the Prophet Muhammad. While this definition is broadly accepted, it still must take into account that even the most specific commands derived from the sources are bound by time and context, not to mention shaped by the chains of transmission, changing human understanding of the terms contained therein, and the inherent ambiguity contained within any written language. Consequently, the *shari'a* cannot be readily deciphered simply by repeating a command from the above-mentioned sources. Scholars caution that because the *shari'a* is the law as laid out by God, but understood and interpreted by humans, all that results from its interpretation is a human—and therefore fallible—understanding of Divine law, which, in effect, is *not* the *shari'a*.

Consequently, Islamic law is a broader term than *shari'a*. Used to describe not only the specific commands contained within the Qur'an

and Prophetic tradition, it also encapsulates the broad array of interpretations including the particular legal interpretations of scholarly jurists. But these jurists or scholars, however highly respected they may be, can present only their own personal views or understanding of what the *shari'a* rules are on any given matter. Moreover, the Qur'an and Prophetic tradition cannot be understood or have any influence on human behavior except through the efforts of (fallible) human beings. Said another way, but worth emphasizing, “[a]lthough the law is of divine provenance, the actual construction of the law is a human activity, and its results represent the law of God as humanly understood. Since the law does not descend from heaven ready-made, it is the human understanding of the law – the human *fiqh*...that must be normative for society.”⁷ Therefore, even though the *shari'a* is based on God's revelations, it cannot be drawn up except through human understanding, which means both the inevitability of different opinions and the possibility of error, whether among scholars or the border community in general.

Taken to its logical conclusion, any codification of *shari'a* law produces a set of laws that are thoroughly and fundamentally human. These laws are a part of *shari'a* law only to the extent that any set of human legal opinions is arguably a part of *shari'a*. A code, even if inspired by *shari'a*, is not *shari'a* – a code is simply a set of positive commandments that were informed by an ideal but do not represent the ideal.⁸

7. Bernard Weiss, *The Spirit of Islamic Law* (Athens: University of Georgia Press, 1998), 116.

8. Khaled Abou El Fadl, “Constitutionalism and the Islamic Sunni Legacy,” *UCLA J. Islamic & Near E.L.*, no. 1 (2002): 67.

Case Studies in Detail

1. Afghanistan

Perhaps one of the most enduring legacies of the fall of the Taliban is the constitution of the Islamic Republic of Afghanistan. The Afghan constitution, however, stands unique because it includes more references to the Islamic faith than any other modern constitution. Adopted in 2004, it includes provisions that declare that (1) the state shall be an Islamic Republic; (2) Islam shall serve as the state religion; and (3) no law shall be repugnant to the tenets of the Islamic religion.⁹ In addition, the Afghan constitution includes various other religious provisions within its constitution, such as those that stipulate that the date of the new year shall be based on the Prophet Muhammad's exodus from Mecca to Medina, the national anthem shall include the phrase "God is Great," and the president and the first and second vice presidents shall be Muslim.

At the same time, for the vast majority of Afghans, traditional forms of justice are seen as more accessible and legitimate. The barrier between these two systems of justice is more than just geographic: it involves two systems of legitimacy. On the one hand, the formal system of justice takes its cues from the 2004 Constitution and includes collections of statutory laws passed at different times over the past 30 years. These laws have an avowed adherence to Islamic law and are enforced

through the formal bodies of the state. On the other hand, informal dispute resolution bodies, which handle the bulk of disputes across the country, involve a blend of customary and tribal norms along with interpretations of Islamic law that are often enforced through local tribal bodies and regional power-brokers. This reality reflects the fact that tribal codes such as the Pashtunwali, which trace their origins back millennia, are often conflated with Islamic legal norms, which trace their origin to the seventh century.

Although one system precedes another by centuries, Islamic law has long been seen as a transcendent source of legal authority in Afghanistan, a position carved out in the Constitution, which states that "no law shall contravene the tenets and provisions of the holy religion of Islam in Afghanistan." The reality remains, however, that even among Afghanistan's religious scholars, it is unclear where the fault lines between culture, customary law, and religious law lie. This sentiment was highlighted by a decree issued on Women's Day 2012 by the Afghan Ulama Council—the presidentially appointed religious body of Afghanistan—which declared, "men are fundamental and women are secondary."¹⁰ While no such unconditional notion exists in either classical or contemporary Islamic jurisprudence, it is a sentiment bolstered by

9. See The Constitution of the Islamic Republic of Afghanistan, ("Constitution of Afghanistan") <http://www.afghanembassy.com.pl/cms/uploads/images/Constitution/The%20Constitution.pdf> (23 September 2013).

10. The Dari version of the text of the Ulama Council statement is available on President Karzai's website at <http://president.gov.af/fa/news/7489> (23 September 2013).

Pashtun customary norms but cloaked in a veil of Islamic legitimacy. The Council's decree demonstrates why, at the fault-lines of custom and Islamic law, women's rights remain of utmost consideration within Afghanistan. The reasons include a lack of in-depth knowledge of Islamic law and a narrow interpretation that curtails the rights of the already disadvantaged.

Nevertheless, over the past decade, Afghan women have made tremendous progress in securing greater rights and participation in the political process. Specifically, the 2004 Afghan Constitution formally enshrines equality between men and women as well as ensures women's participation in both Houses of the National Assembly.¹¹ More broadly, despite enduring obstacles often related to tribal culture, Afghan women's participation in parliamentary elections has been steadily increasing, over the past election cycles.¹² Further, in 2009, through the legal mechanism of a presidential decree, came the first of its kind Elimination of Violence Against Women (EVAW) law. The EVAW law criminalized numerous forms of violence, including child marriage, forced marriage, the selling and buying of women for the purpose or under the pretext of marriage, the traditional practice of *baad* which requires the giving away of a woman or a girl to settle a dispute, forced self-immolation and 17 other acts of violence including rape and physical abuse, while also specifying punishment for the perpetrators. Moreover, the law prescribes preventive measures for seven government ministries to implement and establishes a national High Commission for the Prevention of Violence against Women. The law itself was the product of efforts by civil society, particularly women's groups and the Ministry

of Women's Affairs steered the law's development to advance the law within the context of Islamic law's prohibition against violence against women, which was aided by the efforts by the Ministry of Hajj and Religious Affairs. Among its objectives, the law itself was the product of efforts by civil society, particularly women's groups. The Ministry of Women's Affairs' efforts to steer EVAW within the context of Islamic law's prohibition against violence against women were aided by the efforts by the Ministry of Hajj and Religious Affairs. For instance, among its objectives, the law lists "fighting against customs, traditions and practices that cause violence against women contrary to the religion of Islam," and preventing and prosecuting violence against women.¹³

Nevertheless, challenges remain, particularly concerning the understanding of the Constitution. In particular, yet to be resolved are how enumerated rights which declare men and women to be equal¹⁴ are to be reconciled with the sentiments contained in Article III which declare "no law may contradict the tenets of Islam." As the latter provision does not elaborate on what the term "tenets of Islam" means, it currently allows for political leaders to promote and impose particular interpretations and versions of Islam that suit their own agendas as well as their own cultural understandings of Islam. The Constitution also contains a unique provision that allows judges to use Hanafi jurisprudence in the absence of a particular law on a given subject.¹⁵ Moreover, such broad-based grants of discretion without elaboration as to what laws should be used or how they should be applied creates confusion in the duties and division of responsibility of government bodies and in effect negates the very notion of a constitutional system that is supposed to prescribe a government with limited powers.

11. Constitution of Afghanistan, Articles LXXXIII and LXXXIV.

12. See Jon Boone, "Afghan Elections: Record Number of Women Stand for Parliament," *The Guardian*, August 24, 2010, <http://www.theguardian.com/world/2010/aug/24/record-women-candidates-afghan-election>.

13. EVAW law, Article 2.

14. Constitution of Afghanistan, Article XXII.

15. The Hanafi school of jurisprudence represents one of the major schools of Islamic legal thought. Traditionally, the schools of jurisprudence are each named after the classical jurist who taught them, are historically and geographically based, and each contain and use different legal doctrines not discussed in detail here. The four primary Sunni schools are the Hanafi, Shafi'i, Maliki, and Hanbali schools and among the Shi'a is the Jafari school of thought. It is believed that throughout Islamic history, there were as many as five hundred such schools of Islamic legal thought but through time only the major schools remain today.

These and other issues are further complicated by the Constitution's lack of clarity regarding who is entitled to interpret the Constitution, best understood as the doctrine of judicial review. While the Constitution appears to give a role to the Supreme Court, it does not explicitly grant it final authority to interpret the Constitution. As a result, there are competing views as to who is the final arbiter on constitutional interpretation, including the politically-appointed Commission for the Supervision for the Implementation of the Constitution that claims it holds this authority. The reason for the Commission's position stems from the lack of clarity within the Afghan constitution-making process. Consequently, women's rights are a matter left open to continuous interpretation and modification, even as the Constitution purports to protect them. Further, the prospect of a future political settlement with the Taliban raises concerns for women that their hard-won rights after the fall of the Taliban might be rescinded.

2. Egypt

Following the ouster of President Hosni Mubarak in 2011, Egypt has been engaged in an ongoing transition to democratic governance. Parliamentary and presidential elections in 2012 resulted in the assumption of power by the Muslim Brotherhood. July 2013 saw the mass mobilization of opponents to President Morsi's administration, leading the military to intervene to suspend his presidency.

Despite the fact that numerous Egyptian women were actively engaged in the popular protests in Tahrir Square, the transition period has already presented challenges to women's ongoing participation in the political process. In 2010, for example, the Egyptian parliament passed a law mandating a quota of 64 new seats in the House for women, which represented a major increase from the four women who were elected and

seated in the parliament in the prior election. Yet in the immediate aftermath of the protests, after the Supreme Council of the Armed Forces (SCAF) gained control of the country, the quota was abolished.

The 2012 Constitution of Egypt represents the most novel approach toward Islamic constitutionalism to date. The Constitution, which was signed into law in 2012 after being approved by voters in a two-stage referendum, replaces the 1971 Constitution, which had been suspended in 2011 after the removal of President Mubarak. While both constitutions designated Islam as Egypt's official religion and Islamic law as the principal source of legislation, for the first time, the 2012 Constitution defines the scope of Islamic law as designating "evidence, rules, jurisprudence and sources" accepted by Sunni Islam, Egypt's majority religious sect.¹⁶ The new constitution conferred unprecedented powers to Al-Azhar University, Sunni Islam's most respected contemporary religious institution, requiring its scholars to be consulted on all matters relating to the interpretation of Islamic law.¹⁷ At the same time, there is no articulated limit on the subjects requiring consultation with Al-Azhar, nor does the Constitution indicate who is required to obtain Al-Azhar's opinion. The suggestion is that Al-Azhar should be called upon to ensure that future legislation is in conformity with Islamic law but the wording leaves the matter open to interpretation, and thus open to abuse. The Constitution is also silent on the weight that must be given to such opinions. For example, should such opinions be treated as advisory in nature or are they to be viewed as precedent-setting resolutions for such matters requiring no appeal to another body?

The Constitution also contains an entire chapter on human rights and guarantees, yet women

16. See Unofficial Translation of the Constitution of Egypt at Art. 221, *Egypt Independent*, December 2, 2012, <http://www.egyptindependent.com/news/egypt-s-draft-constitution-translated>.

17. *Ibid.*, ¶2.

are discussed in the Constitution as a particular group only in the context of their responsibilities to the family. Though the Constitution's preamble states adherence to the principle of equality for all citizens without discrimination, no provision in the Constitution explicitly bars discrimination against women. The 1971 Constitution, in contrast, included a provision requiring the state to treat women and men equally in political, social, cultural, and economic spheres, though this equality was granted only insofar as it did not violate shari'a. Egyptian women advocated for the removal of this caveat in the new Constitution but instead the entire provision on equality was removed altogether.

As of writing of this paper the current Constitution has been suspended after the ouster of President Muhammad Morsi. Moreover, as of the writing of this paper, a new constitutional process has begun in which a Committee of Experts, specifically, ten legal experts—six senior judges and four well-known constitutional law professors—has been given one month to work on the daunting task of amending the existing constitution. As part of their initial findings was an insistence on both robust protection of women and minority rights while at the same time retaining a position for the role of Islam. Now, a subsequent committee, known as the Committee of Fifty, which is intended to be representative of the varied social and political groups of Egypt, will have two months to review the proposed changes and consider the entirety of the document before it is to be put up for a national referendum in November 2013.¹⁸ Consequently, in many respects, Egypt faces the very tensions about reconciling a constitutional role for Islam with questions of gender equality in the context of social tumult like Libya, mentioned below.

3. Libya

The NATO-assisted overthrow of Colonel Muammar Gaddafi's government in 2011 has been followed by an ongoing political transition in Libya. Though two years have passed, debates continue over the drafting of the country's new constitution. One current challenge involves whether the members of the committee that will draft the constitution should be elected or appointed by the General National Congress, Libya's new parliament. Whether the body is elected or appointed, the primary challenge for Libyan women will be to ensure their inclusion and participation in this drafting process. While Egypt's 2012 drafting process involved almost no women and produced problematic provisions, Libyan women are attempting to secure a different result.

In the most recent parliamentary elections, Libyan women secured 16.5 percent of all seats as part of the "zipper system" mechanism that allows for male-female parity in political parties' lists of candidates.¹⁹ In a promising development, these women parliamentarians recently formed a cross-party bloc with the goal of ensuring fair representation by women on the constitutional drafting committee. In a conscious attempt to avoid fragmentation, these women are joining with women's organizations and activists to sustain committed engagement on the Constitutional issue. Nonetheless, challenges remain in overcoming the perception that female activists only come from the elite or educated backgrounds, which has led the activists to reach out to rural Libyan women.

An ongoing debate within Libya is centered on the question as to whether Islamic law will serve as the sole or as part of a multitude of sources for legislation. The resolution of this question will impact the degree to which differing interpretations of Islamic law may be used and accepted, including with reference to women's rights and their participation in society.

18. See generally Carnegie Endowment for International Peace, "Guide to Egypt's Transition: Legal Framework," 24 September 2013, <http://egyptelections.carnegieendowment.org/category/legal-framework>.

19. See Dominique Soguel, "Libyan Elections Give Women a 17% Starting Point" *We-News*, July 18, 2012, <http://womensenews.org/story/the-world/120719/libyan-elections-give-women-17-starting-point#>.

Reflections of the Working Group and Conclusions

The challenges posed by post-conflict and periods of post-social upheaval are numerous yet are often interrelated to the basic questions posed of continuity, legitimacy, stability as well as identity. Perhaps no where is conflict and social upheaval more evident than in Muslim-majority states throughout North Africa, the Middle East, and South Asia. While the various social upheavals within the Islamic world are a recent political phenomenon, the discourse and the inclusion of Islamic legal provisions within various constitutions have existed for more than a century.

More concretely, we conclude that the future of Islam lies within Islam, between Muslim and Muslim. It is a debate that is going on from Morocco to Iraq, from Pakistan to Indonesia. It is a debate about many things, but particularly significant is the discourse about the role of women in Islamic societies, especially in light of basic questions about human dignity, economic potential, and securing the needs of the next generation of Muslims. We will acknowledge a strident belief that the inclusion of Islamic legal provisions, especially within various constitutional frameworks, creates incompatibilities with matters as varied as democracy and gender equity. We assert that such conclusion ignores the variety of different forms of Islamic constitutionalism. Today, many Muslims live in democratic societies, in states led by women heads of state, with active groups that put forth political, legal, and religious effort to bring about equality and progress in the field of human development.

At the same time, the workshop uncovered an important internal divide which also deserves to be addressed: secular feminists tend to blame Islam for laws in Muslim countries which are oppressive to women. Muslim women, on the other hand, tend to defend Islam in light of their familiarity with the Islamic ideal based within the Islamic religious and historical narrative. We, however, conclude that both the fundamental failure of secular approaches and the rise of Islamic constitutionalism generally point to an inevitable, but yet perhaps controversial conclusion: the majority of Muslim women who are attached to their religion will not be liberated by a secular approach imposed from the outside by international bodies or from above by undemocratic governments. We assert our belief that the only way to resolve the conflicts of these women and remove their fear of pursuing rich and fruitful lives is to build a solid Muslim feminist jurisprudential basis which clearly shows that Islam not only does not deprive them of their rights, but in fact demands these rights for them. To achieve the aim of advocating on behalf of and sustaining the advancement of women's rights amidst an increased tendency toward Islamic constitutionalism, we assert the need to foster cooperation between (1) political activists; (2) legal advocates; and (3) religious leaders. Indeed, we conclude that the ability to advance women's rights in this particular context may well hinge on the ability of these three groups to effectively work together in support of the common goal of gender equality as measured by both law and society.

About the Brookings Project on U.S. Relations with the Islamic World

The Brookings Project on U.S. Relations with the Islamic World is a research initiative housed in the Saban Center for Middle East Policy at the Brookings Institution. The Project's mission is to engage and inform policymakers, practitioners and the broader public on the changing dynamics within Muslim-majority countries and to advance relations between Americans and Muslim societies around the world.

To fulfill this mission, the Project sponsors a range of activities, research projects, and publications designed to educate, encourage frank dialogue, and build positive partnerships between the United States and Muslim states and communities around the world. The broader goals of the Project include:

- Exploring the multi-faceted nature of the United States' relationship with Muslim states and communities, including issues related to mutual misperceptions;
- Analyzing the social, economic and political dynamics in Muslim states and communities around the world;
- Identifying areas for shared endeavors between the United States and Muslim communities on issues of common concern.

To achieve these goals, the Project has several interlocking components:

- The U.S.-Islamic World Forum, which brings together key leaders in politics, business, media,

academia, and civil society from the United States and from Muslim societies in Africa, Asia, Europe, and the Middle East. The forum also serves as a focal point for the Project's ongoing research and initiatives, providing the foundation for a range of complementary activities designed to enhance dialogue and impact.

- An Analysis Paper Series that provides high-quality research on key questions facing Muslim states and communities.
- Workshops, symposiums, and public and private discussions with government officials and other key stakeholders, focused on critical issues affecting the relationship;
- Special initiatives in targeted areas of demand. In the past these have included Arts and Culture, Science and Technology, and Religion and Diplomacy.

The Project's Steering Committee consists of Martin Indyk, Vice President and Director of Foreign Policy Studies (currently on leave); Tamara Cofman Wittes, Senior Fellow and Director of the Saban Center; William McCants, Fellow and Director of the Project on U.S. Relations with the Islamic World; Bruce Riedel, Senior Fellow in the Saban Center; Shibley Telhami, Nonresident Senior Fellow in the Saban Center and Anwar Sadat Chair for Peace and Development at the University of Maryland; and Salman Shaikh, Fellow and Director of the Brookings Doha Center.

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Charting the path to a Middle East at peace with itself and the world

Founded in 2002, the Saban Center for Middle East Policy brings together the most experienced policy minds working on the region, and provides policymakers and the public with objective, in-depth, and timely research and analysis. Our mission is to chart the path—political, economic, and social—to a Middle East at peace with itself and the world. Current research in the Center includes:

- What Makes Two States Possible?
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- Politics and Security in the Persian Gulf
- The Future of Counterterrorism
- U.S. Relations with the Islamic World
- Natural Resources and Conflict in the Middle East

The Saban Center was established on May 13, 2002 with an inaugural address by His Majesty King Abdullah II of Jordan. The Center was made possible by a generous grant from Haim and Cheryl Saban of Los Angeles, and is part of the Foreign Policy Studies Program at Brookings. The Center upholds the Brookings values of Quality, Independence, and Impact.

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- **The U.S.-Islamic World Forum:** A premier annual gathering of U.S. and Muslim world leaders to advance constructive partnerships, held in Doha or Washington.

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