THE UNIVERSITY OF HULL

Equal Before Allah, Unequal Before Man?

Negotiating Gender Hierarchies in Islam and International Law

being a Thesis submitted for the Degree of Doctor of Philosophy

in the University of Hull

by

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ABSTRACT

This study engages in a conceptual analysis of human rights in Islam and international law, and the application of this analytical discourse to explore the nature of women's human rights in the Islamic tradition. It has been argued that women's human rights in Islam are not entirely irreconcilable with current formulations of international human rights instruments emanating from the United Nations. The basic premise of the argument stems from a recognition that the Islamic legal tradition is not a monolithic entity. On the basis of its main sources, namely the *Quran*, *Hadith*, *Ijma* and *Qiyas*, Islamic law lends itself to a variety of interpretations that have far reaching implications for women's human rights in Islam. (Part I)

A further factor raised in this study is the disparity between the theoretical perspectives on women's human rights, and, its application to Muslim jurisdictions determined by elements of cultural practices, socio-economic realities and political expediencies on the part of governments. The present study uses the example of Pakistan to demonstrate the divergence between theory and practice of Islamic law in these jurisdictions. The concept of what has been termed an emerging 'operative' Islamic law, consisting of a combination of elements including principles of Islamic law, secular codes of law and popular custom and usage has also been introduced. (Part II)

Part III of the thesis is devoted to an evaluation of the development of the international norm of non-discrimination on the basis of sex and some 'Islamic' human rights documents affecting women's human rights. The analysis provides an insight into the response of Muslim States to international human rights instruments affecting women through a discussion in the light of reservations to the Women's Convention. The study concludes by posing the question whether a move towards convergence between international and Islamic schemes of women's human rights is discernible or not.

Equal Before Allah, Unequal Before Man?
Negotiating Gender Hierarchies in Islam and International Law

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To my Dearest Ali, Sango, Isfand and Zara

with all my love and gratitude

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I consider myself fortunate that the subject of my doctoral thesis, is very close to my heart; it is the story of a Muslim, Pakistani, Pukhtun woman attempting to analyse her identity amidst the multiplicity of regulatory norms surrounding her. The fact that my husband and three children have valiantly stood by me and struggled for three years to make it possible, is proof itself of the diversity of Muslim women's lives. I certainly do not present the image of the stereotype, oppressed women, we are portrayed to be! My husband and children have adequately seen to that.

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LIST OF ABBREVIATIONS

AC	Appeal Cases
AIR	All India Reporter
AJCL	American Journal of Comparative Law
AJIL	American Journal of International Law
As.YIL	Asian Yearbook of International Law
ASIL	American Society of International Law
AustLJ	Australian Law Journal
AYIL	Australian Year Book on International Law
BDIL	British Digest of International Law
BJIL	Buffalo Journal of International Law
Buff.LR	Buffalo Law Review
BYIL	British Year Book of International Law
Cal.WestILJ	California Western International Law Journal
CBR	Canadian Bar Review
CEDAW	Committee on the Elimination of Discrimination Against Women
CERD	Committee on the Elimination of All Forms of Racial Discrimination
CHRLR	Columbia Human Rights Law Review
CII	Council of Islamic Ideology
CLC	Civil Law Cases
CLP	Current Legal Problems
CMRA	Child Marriages Restraint Act
Col.JTL	Columbia Journal of Transnational law
CRC	Convention on Rights of the Child
DCHD	Democratic Commission for Human Development
DMMA	Dissolution of Muslim Marriages Act
ECHR	European Convention on Human Rights
ECOSOC	UN Economic and Social Council
EFA	Education for All
EHHR	European Human Rights Reports
EJIL	European Journal of International Law
EPL	European Public Law
FATA	Federally Administered Tribal Areas
FB	Full Bench
FCR	Frontier Crimes Regulation
GAOR	UN General Assembly Official Records
GNP	Gross National Product
Harvard.LJ	Harvard Law Journal
HLR	Harvard Law Review
HRCP	Human Rights Commission of Pakistan
HRLJ	Human Rights Law Journal
HRQ	Human Rights Quarterly
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
ICLQ	International and Comparative Law Quarterly

ICoJ	International Commission of Jurists
IHRR	International Human Rights Reports
IJIL	Indian Journal of International Law
IJSL	International Journal of the Sociology of the Law
ILM	International Legal Materials
ILO	International Labour Organisation
ILR	International Law Reports
IMR	Infant Mortality Rate
Kar.	Karachi
Lah.	Lahore
LQR	Law Quarterly Review
MERIP Reports	Middle East Research and Information Project Reports
MFLO	Muslim Family Laws Ordinance 1961
MIA	Moore's Indian Appeals
MJIL	Michigan Journal of International Law
MLD	Monthly Law Digest
MLR	Modern Law Review
MPL	Muslim Personal Law
NGO	Non-Governmental Organisation
NLR	National Law Reporter
NWFP	North West Frontier Province
NYLSLR	New York Law School Law Review
NYUJILP	New York University Journal of International Law and Politics
OAS	Organisation of American States
OAU	Organisation of African Unity
OIC	Organisation of Islamic Conference
PATA	Provincially Administered Tribal Areas
PC	Privy Council
Pesh.	Peshawar
PLD	Pakistan Legal Decisions
PLJ	Pakistan Law Journal
PML	Pakistan Muslim League
PML (N)	Pakistan Muslim League-Nawaz Sharif
PPP	Pakistan Peoples Party
Proc. ASIL	Proceedings of the American Society of International Law
Rec des Cours	Recueil des Cours de l'Academie de Droit International
SC	Supreme Court
SCMR	Supreme Court Monthly Review
SD	Shariat Decisions
SDPI	Sustainable Development Policy Institute
U5MR	Under Five Mortality Rate
UDHR	Universal Declaration on Human Rights
UNDP	United Nations Development Program
UNESCO	United Nations Educational, Scientific and Cultural Organisation
UNICEF	United Nations International Children's Emergency Fund
UNTS	United Nations Treaty Series
Va.JIL	Virginia Journal of International Law
VJTL	Vanderbilt Journal of Transnational Law

WAFJ	Women Against Fundamentalism Journal
WLR	Whittier Law Review
WLUML	Women Living Under Muslim Law
WSIF	Women Studies International Forum
YLJ	Yale Law Journal
YIMEL	Yearbook of Islamic and Middle Eastern Law
YJIL	Yale Journal of International Law

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The International Covenant on Civil and Political Rights GA Res. 2200 (XXI), UN GOAR, 21st Sess., Supp. No. 16, at 52, UN Doc. A/6316 (1966), reprinted in 999 UNTS 171 and 6 *ILM* 368 (1967).

The International Covenant on Economic, Social and Cultural Rights GA Res. 2200 (XXI), UN GOAR, 21st Sess., Supp. No. 16, at 52, UN Doc. A/6316 (1966), reprinted in 993 UNTS 3 and 6 *ILM* 360 (1967).

Optional Protocol to the International Covenant on Civil and Political Rights 16 December 1966, GA Res. 21/2200A GOAR 21st Session, Supp. at 59, UN Doc. A/6316 (1966), 999 UNTS 302, entered into force 23 March 1976.

Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, 1949, 96 UNTS 272 (1950).

Convention on the Political Rights of Women, 1952, 193 UNTS 135 (1953).

Convention on the Nationality of Married Women, 1957, 309 UNTS 65 (1957).

Convention on the Consent to Marriage, Minimum Age for Marriage and Registration of Marriages, 1962, 521 UNTS 231 (1962).

ILO Convention (No.100) concerning equal remuneration for men and women workers for work of equal value, 29 June 1951, reprinted in 165 UNTS 303 (1951).

Convention Against Discrimination in Education, 1960, 429 UNTS 93 (1960).

European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950, 213 UNTS 221 (1955).

American Convention on Human Rights, 1969, OASTS 1 (1969), reprinted in 9 *ILM* 99 (1970) and in 65 *AJIL* 679 (1971).

African Charter on Human and peoples' Rights, 1981, OAU Doc. CAB/LEG67/3/Rev.5 (1981), reprinted in 21 *ILM* 58 (1982).

Convention on the Rights of the Child, 1989, UN G.A. Res. 44/25, reprinted in 28 *ILM* 1448 (1989).

Convention on the Elimination of All Forms of Discrimination Against Women, 1979, UN G.A. Res. 34/180, 34 UN GAOR Supp. (No. 710.46) at 193, UN Doc. A/34/46 (1979).

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INTRODUCTION

1. Background of the Study

The question of whether Islam is opposed to women's human rights and equality has assumed a special significance in the post United Nations (UN) era where a considerable body of international human rights law has emerged codifying norms of non-discrimination and complete equality between men and women. Although Islamic countries[1] as member States within the UN have ratified many of the international human rights instruments and hence undertaken binding legal obligations, their dissatisfaction at what they perceive as the 'secularisation'[2] and 'westernization'[3] of human rights instruments is evident. Most Asian and African States do not relate to the rights language and concepts emanating from certain human rights instruments, perceiving them as manifestations of cultural imperialism and euro-centrism. In the Islamic context (within Asia and Africa), the situation is further aggravated where some aspects of international human rights law are considered both culturally and religiously alien.

The international norm of non-discrimination on the basis of sex as reflected in the UN human rights instrument culminated in adoption of the UN Convention on the Elimination of All Forms of Discrimination Against Women (hereinafter the Women's Convention)[4] This Treaty[5] has evoked particularly strong objections from many

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1 Countries with a Muslim population of 70% and above are considered as 'Islamic countries'. This study uses the membership list of the Organisation of Islamic Conference (OIC) as reference for identifying Islamic countries.

2 The term denotes the belief that religion should be separated from the State. The misconception that exists in the minds of many Muslims regarding 'secularisation' is that it is equated with 'irreligious' rather than 'non-religious'. Separation of 'Church' and 'State' is perceived as unIslamic and hence unacceptable to the average Muslim despite the fact that in reality most Muslim jurisdictions are governed by secular as well as laws based on religious doctrine.

3 While generalisations about what constitutes the 'Western' notion of human rights would not be valid, in this study the term is being used in the sense of the liberal democratic tradition of rights in Western Europe and North America.

4 Adopted by the General Assembly of the UN on 18th December 1979 and entered into force on 3rd September 1981.

5 As of 16 January 1998, the Women's Convention had attracted 97 signatures and 161 ratifications. Out of these, 41 signatures/ratifications came from Islamic countries.

Islamic countries on the basis that some of its substantive provisions contain values and pronouncements contrary to the *Sharia'* (principles of Islamic law) on the status of women.[6] A further factor affecting the recognition of the substantive provisions of the international human rights norms is the increasing disillusionment of citizens of many Islamic countries with their respective governments and an increasing demand for an Islamic system of government by Islamic "revivalist"[7] movements in these countries. These movements reject most Western and secular human rights norms and values and hence most human rights instruments including the Women's Convention.[8]

My interest in the study of women's human rights in Islam and, to what extent these formulations are compatible with current discourses in international human rights law has been with me for many years. I chose it as the subject of my LL.M. dissertation entitled "The Role of International Human Rights Law in Improving the Position of Women in the Muslim World,"[9] for my book, *A Comparative Study of the United Nations Convention on the Elimination of All Forms of Discrimination Against Women, Islamic Law and The Laws of Pakistan,*[10] and a number of articles and contributions to edited collections.[11] But the enormity of the discourse and its

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6 A clear manifestation of this objection is the sweeping reservations entered by Muslim States Parties to the Women's Convention in the name of Islam addressed in chapter 7 of this study.

7 I have reservations regarding use of the term 'fundamentalist' for these movements, as the term has come to be equated with extremist and even terrorist groups. Also, fundamentalism as a concept does not exist in Islam; at least not in the meaning ascribed to it in contemporary discourse. 'Islamic resurgence' is another term often employed to describe such movements. See generally, J. W. Bjorkman (ed.,) *Fundamentalism, Revivalists and Violence in South Asia* (1988) New Delhi: Manohar Publications; Y. M. Shoueiri, *Islamic Fundamentalism* (1990) London: Pinter Publishers Ltd; M. K. Pasha and A. I. Samatar, "The Resurgence of Islam" in J. H. Mittelman (ed.,) *Globalisation Critical Reflections* (1996) Boulder CO: Lynne Rienner; H. Afshar, "Why Fundamentalism? Iranian Women and their Support for Islam" (1995) 6 *Women: a Cultural Review.*

8 For a critique of human rights documents emanating from the UN and counter 'Islamic' arguments, see A. A. Mawdudi, *Human Rights in Islam* (1976) Leicester: The Islamic Foundation; S. Tabandeh, *An Islamic Commentary on the Universal Declaration on Human Rights* (1970) F. J. Goulding: Guildford.

9 Submitted to the University of Hull in September 1991.

10 This research was undertaken in 1994-95 to lobby the Government of Pakistan to sign the Women's Convention.

11 S. S. Ali & S. Mullally, "Women's Rights and Human Rights in Muslim Countries: A Case Study" in H, Hinds, A. Phoenix and J. Stacey (eds.,) *Working Out. New Directions for Women's Studies* (1992) London: Falmer Press pp. 113-123; S. S. Ali, "The Constitutional, Legal, Ideological and Customary Status of Women in the NWFP" in H. M. Naqvi and U. K. Adeel

many subject areas is very compelling indeed, demanding further research in the area.[12]

2. Rationale and Objectives of the Study

The primary objective of this study is to engage in a conceptual analysis of human rights in Islam and international law, and application of this analytical discourse to explore women's human rights in the Islamic tradition. It will be argued that women's human rights in Islam are not entirely irreconcilable with current formulations of international human rights instruments emanating from the United Nations. The basic premise of the argument stems from a recognition that the Islamic legal tradition is not a monolithic entity. On the basis of its main sources, namely the *Quran, Hadith, Ijma* and *Qiyas*, Islamic law lends itself to a variety of interpretations that have far reaching implications for women's human rights in Islam. An important underpinning to the present thesis is about the silencing of the more egalitarian aspect of Islam by patriarchy; a task achieved by adopting a 'literalist' as opposed to a 'progressive' interpretation of the sources of Islamic law. Furthermore, that contrary to common perception, the principles of Islamic law, or *Sharia'*, do[es] not consist of immutable, unchanging set of norms, but have an in-built dynamism that is sensitive and susceptible to changing needs of time. Over the centuries however, and with the decline of the Muslim intellectual tradition,[13] a fossilisation of Islamic law set in,

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(eds.,) *Development, Change and Rural Women in Pakistan* (1995) Peshawar: Pakistan Academy for Rural Development pp. 31-52; S. S. Ali, "A Critical Review of Family Laws in Pakistan: A Women's Perspective" in R. Mehdi and F. Shaheed (eds.,) *Women's Law in Legal Education and Practice in Pakistan* (1997) Copenhagen: New Social Science Monographs pp. 198-223; S. S. Ali, "The Conceptual Foundations of Human Rights: A Comparative Perspective" (1997) 3 *EPL* pp. 261-282; S. S. Ali, "Is an Adult Muslim Woman *Sui Juris*? Some Reflections on the concept of "consent in marriage" without a *wali* (with particular reference to the *Saima Waheed* case)" (1996) 3 *YIMEL* pp. 156-174.

[12] Ann Elizabeth Mayer has addressed the issue of human rights in Islam and international law in an excellent book entitled *Islam and Human Rights. Traditions and Politics* (1995) 2nd edn., Boulder, CO: Westview Press. She however devotes only a small part of her book to women's human rights in these legal traditions and the gap waits to be filled.

[13] This decline has, for the most part been ascribed to the 'closing of the doors of *ijtihad*', or independent legal reasoning and judgement after the tenth century, and coincides with the decline of Muslim political power. See, M. Iqbal, *Reconstruction of Religious Thought in Islam* (1971) Lahore: Sh. Mohammed Ashraf at p. 168.

affecting adversely a wide range of people and institutions, including women.[14] A further factor proposed to be raised in this study is the disparity between the theoretical perspectives on women's human rights, and, its application to Muslim jurisdictions determined by elements of cultural practices, socio-economic realities and political expediencies on the part of governments.

Recent years have witnessed a spurt of literature concerning women in Muslim societies but, it is submitted, these have been largely confined to philosophical, sociological and historical accounts.[15] A legal analysis of women's human rights in Islam on the basis of sources of Islamic law, is, at best rudimentary and it is hoped that the present study will make some contribution towards this analytical discourse. Further, that this comparative work will highlight the existence of commonalties between women's rights in Islam and international law, as well as points of divergence between the two sets of legal norms.

By virtue of the subject matter of the study itself, it is essential to provide some concrete examples from various Islamic countries regarding the factual position of Muslim women. The present study will use the example of Pakistan to demonstrate the divergence between theory and practice of Islamic law in these jurisdictions. One hopes however, that the study will not emerge simply as a synopsis of findings on the material condition of Muslim women in diverse cultural traditions. What is being

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[14] This trend started soon after the death of the Prophet Mohammed when tribal rivalries resurfaced and 'Establishment Islam' sought legitimacy by appropriating Islam. Male scholars took over the task of interpreting and commenting on the *Quran*, the basic source of rights, leading to a tradition where the religious text became imbibed with male-oriented interpretations preaching male superiority.

[15] Some works on Muslim women include: L. Beck & N. Keddie (eds.,) *Women in the Muslim World* (1978) Cambridge: Harvard University Press; J. L. Esposito, *Women in Muslim Family Law* (1982) Syracuse: Syracuse University Press; A. al-Hibri, "A Study of Islamic Herstory: Or how did we ever get into this mess?" (1982) 5 *WSIF*; B. Utas (ed.,) *Women in Islamic Societies* (1983) London: Curzon Press; F. Hussain (ed.,) *Muslim Women* (1984) New York: St. Martin's Press; F. Mernissi, *Beyond the Veil* (1987) Bloomington: Indiana University Press; D. Kandiyoti (ed.,) *Women, Islam and the State* (1991) London: Macmillan Academic and Professional Ltd; F. Mernissi, *Women and Islam* (1991) Translated by Mary Jo Lakeland, Oxford: Basil Blackwell; L. Ahmed, *Women and Gender in Islam: Historical Roots of a Modern Debate* (1992) New Haven: Yale University Press; C. F. El-Solh & J. Mabro (eds.,) *Muslim Women's Choices* (1994) Oxford: Berg Publishers. For a comprehensive list of research on Muslim women, see E. Fernea, "Ways of Seeing Middle Eastern Women" (1995) Vol. 6 (1) *Women: A Cultural Review* pp. 60-66.

sought through this analysis is, to highlight the issue of how rights of Muslim women have become subsumed in the (male) gendered institutions of society, including its legal institutions and the need to unravel these rights by interpreting the basic texts of Islam from a woman's perspective. Rights, duties and obligations are reflective of culture, traditions and customs of society as well as economic and political factors, and, in the Islamic tradition this is all too often the case. Cultural practices discriminatory to women have been shrouded in religious belief whereas religious norms favouring women conveniently ignored.[16] Undemocratic regimes have denied human rights to their citizens, and attempted to lay the blame on the doorstep of religion. By deconstructing the position of women in Islam as enunciated in diverse legal systems of Islamic countries, and rebuilding a core of human rights for women in Islam on the basis of the primary sources of Islamic law, one hope to retrieve, to a certain extent, the egalitarian spirit of Islam with particular reference to the position of women.

Another objective of this study lies in addressing the situation arising from Islamic 'revivalist' movements urging the re-institution of laws and practices set forth in the core discourses of early Islam. The urge to succumb to a desire of ignoring 'revivalist' debate regarding women's human rights in Islam is gaining currency within

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[16] It is not possible to include an exhaustive list of such cultural practices, a few will therefore have to suffice here. Female circumcision, a cultural practice is erroneously given a religious formulation even though this custom has very little to do with Islam. Inheritance rights for women are clearly sanctioned by Islam but very often ignored by Muslim societies. Similarly, it is pertinent to mention here that Islam gives complete and unrestricted access and control over ones property and resources, irrespective of gender; custom alienates women from both. Male members of the family control all resources even that earned by women. Women have no obligation to spend their resources on household expenses; that is the sole responsibility of the male members of the household. The reality is different as a large number of female-headed households have emerged in the world and many families survive on the sole earnings of a woman. Dower or *mahr* is a sum or other property that the wife is entitled to from the husband at the time of marriage; in customary law very few women acquire control over it. Education is the right, indeed, religious obligation of every Muslim, male and female, old and young. But very often girl-children are excluded from this process due to customary practices that demand seclusion of the female and place restrictions on her mobility. Under Islamic law, every male and female has the right to enter into marriage by exercising full and free consent, but many Muslim families deny their children, particularly female children this right due to restraints of cultural norms.

Muslim scholarly discourse.[17] But it is submitted, that this course would leave the field wide open for legitimating 'revivalist' interpretations regarding Islamic law in general and women's human rights in particular. Therefore, studies such as the instant one, hopes to ensure that voices other than those presenting Islam as a restrictive and retrogressive tradition are also heard.

The present study also seriously endeavours to create bridges of understanding between women in the West and their sisters in Muslim jurisdictions. This is necessitated by some prevalent misconceptions regarding what is no doubt an intrinsic connection between issues of culture and women's status in society. While 'Western' feminist discourse did not hold abandonment of 'Western' culture as an essential prerequisite for liberation and equal rights at any stage of their struggle, it has been argued that progress of women in non-western cultures can only be achieved by giving up their native cultures.[18] It seems that such writers are not fully aware of the intricate dynamics of male-female relationship in Muslim countries and also perhaps, underestimate the skills of Muslim women in negotiating the existing inequalities and gender hierarchies within their cultural milieu. Muslim women can, and are pursuing feminist goals by challenging and redefining their cultural heritage, but this does not mean setting aside all their cultural norms. One of the important objectives of this study therefore is to dispel the notions held by many 'Western' feminists regarding the oppressive conditions of Muslim women world-wide and their supposed inability to negotiate gender inequalities in their respective societies.[19]

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[17] The writings of Reza Afshari provide an example of this position. See, for instance, R. Afshari, "An Essay on Islamic Cultural Relativism in the Discourse of Human Rights" (1994) 16 *HRQ* 235-276 and Lindholm's response against adopting the secularist approach for advancing human rights in Islam. T. Lindholm, "Response to Reza Afshari on Islamic Cultural Relativism in Human Rights Discourse" (1994) 16 *HRQ* 791-794.

[18] See the discussion in Fernea, "Ways of Seeing Middle Eastern Women" *op. cit.*, n. 15 at pp. 60-66.

[19] Fatima Mernissi and Leila Ahmed in particular believe that non-western women can and should work towards equal rights from within their own perspectives, whether cultural or religious. *Op. cit.*, n. 15.

A further concept proposed to be explored in the present study relates to the perception of law as an autonomous entity, distinct from the society it regulates. A legal system is regarded as different from a political or economic system. It is believed that because law "operates on the basis of abstract rationality, and is thus universally applicable and capable of achieving neutrality and objectivity",[20] therefore it is a complete entity in itself and capable of achieving equality for everyone to whom it applies. This is a widely accepted norm in 'Western' academic circles, mitigating against inclusion and enjoyment of women's human rights in domestic legal systems.[21] This is so because a legal system does not operate in a void and cannot be separated from the political, economic and cultural context in which people live. This argument is particularly relevant in the context of women in the Islamic tradition since a number of norms justifying women's inequality with men are based on economic superiority of the male.[22] It will be one of the objectives of this study to argue that the presumption of law as a gender and class neutral system is not based on a realistic perception of how it is actually applied in societies where, socio-economic and gender disparities exist and, that international law of human rights and treaties addressing women's human rights have not taken on board these inadequacies present in legal systems whether domestic or based on international law.[23]

3. Methodological Approach

Since the present study is comparative in nature, proposing to break new ground in developing categories of women's human rights in Islam and its compatibility with the international norms of non-discrimination on the basis of sex, it is essential to study in detail both sets of laws, rules and regulations. At the outset, an

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[20] H. Charlesworth, C. Chinkin and S. Wright, "Feminist Approaches to International Law" (1991) 85 *AJIL* at p. 613.

[21] *Ibid.*

[22] See for example, verse 4:34 of the *Quran* which states that men have advantage over women since they are providers and maintainers of women on whom they spend out of the wealth God has bestowed upon them.

[23] See discussion in chapters 6 and 7 of this study.

intensive research into all *Quranic*[24] verses and *Ahadith*[25] relating to women's human rights will be undertaken. The context and background of *Quranic* verses forming the source of women's rights will be explored and an attempt will be made to place them within various classifications and categories of human rights. Works of Muslim scholars including Mohammed Iqbal, Ustad Mahmood Mohammed Taha, Subhu Mahmassani, Majid Khadduri, Abdullahi Ahmed An-Naim, Fazlur Rahman, Fatima Mernissi, Riffat Hassan, Haleh Afshar, Aziza al-Hibri and Leila Ahmed, to mention a few, will be drawn upon to reinforce the arguments advanced.

In order to bring into focus the divergence between theory and practice of women's human rights in Islamic tradition, it is important to discuss its application in diverse Islamic jurisdictions. To this end, legal reforms, mainly in the area of family law, of some Muslim countries will be analysed.[26] Reports of government appointed commissions constituted with a view to legal reform (focusing on Pakistan), including the Commission on Family Laws set up by the Government of Pakistan (1955), the Committee on Women's Rights (1976) (Pakistan), the Commission on the Status of Women, 1985 (Pakistan), and the Senate Commission of Enquiry on the Status of Women, 1997 (Pakistan), will be analysed. A number of Conference Declarations, the Tehran Declaration of April, 1995 concerning "The Role of Muslim Women in an Islamic Society", and the Islamabad Declaration of August 1995 adopted at the First Muslim Women Parliamentarians Conference held in Islamabad, Pakistan, will also be discussed to assess the pronouncements emanating from Islamic political forums as

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[24] The *Quran* is believed by Muslims to be of divine origin and the very word of God.

[25] Plural of *Hadith*, meaning the words of the Prophet Mohammed. Most Muslims believe that along with the *Quran*, the two form the primary source of Islamic law. A very small minority of Muslims do not accord the *Hadith* the same status as that of the *Quran*. From the point of view of women's human rights, it is pertinent to point out that many of the *Hadith* contain pronouncements of male superiority

[26] For example, Act No. 25/1920; Act No. 25/1925 and Law No. 100/1985 of Egypt; The Civil Code under Act No. 40/1951; The Personal Status Law No. 188/1959; Act No. 21/1978 of Iraq; The Civil Code, Provisional Law No. 43/1976; The Personal Status Law, Provisional Law No. 61/1976 of Jordan; Royal Decrees No. 343/57/1 and 379/157 promulgating the Personal Status Law in Morocco; Personal Status Code Decree of 13/8/56; Decree of 18/7/57; Civil Status Act no. 3 of 1/8/57; The Child Marriages Restraint Act, 1929; The Dissolution of Muslim Marriages Act, 1939; The Muslim Family Laws Ordinance, 1961 of Pakistan.

indicators of women's human rights in Islam. Organisation of Islamic Countries (OIC) statements and pronouncements in the field of human rights including the Cairo Declaration on Human Rights in Islam, and the Universal Islamic Declaration on Human Rights, will be used to identify practice of Muslim States in the field. I will also be drawing upon and developing some of my previous work on the subject.[27]

Likewise, the element of international human rights law in the current study will be analysed with the help of a number of primary and secondary materials available in the area. The *travaeux preparatoires* of a number of UN Conventions relating to specific rights of women, the proceedings/reports of the UN Commission on the Status of Women, the Drafting Committee of the Women's Convention, the proceedings of the Committee on the Elimination of All Forms of Discrimination Against Women (CEDAW), general comments and recommendations of CEDAW and other relevant documents of UN and regional human rights systems. Conference documents from the four World Women Conferences will also be analysed as will the various UN human rights conferences to date.

It is proposed to undertake this study in three parts. Part I, consisting of two chapters provides the theoretical framework for the thesis. Chapter I presents a conceptual analysis of human rights in Islam and international law, proceeding to develop a theoretical framework of women's human rights in the Islamic tradition (chapter II). Part II describes the application of women's human rights in Muslim jurisdictions using the case of Pakistan. This section of the thesis consists of three chapters. Thus chapter III, entitled "Public" and "Secular"? Women's Human Rights Under Constitutional Law, looks at rights afforded to women under the constitution of Pakistan and its impact when juxtaposed against prevalent 'Islamic' provisions undermining these rights. Chapter IV discusses Muslim Personal Law in Pakistan and its implications for women's human rights. Chapter 5 then attempts to describe some customary practices affecting women and "Cultural Islam." The concept of what has

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[27] *Op. cit.*, n. 11.

been termed an emerging 'operative' Islamic law, consisting of a combination of elements including principles of Islamic law, secular codes of law and popular custom and usage will be introduced in this chapter. Part III of the thesis is devoted to an evaluation of the development of the international norm of non-discrimination on the basis of sex and some 'Islamic' human rights documents affecting women's human rights (chapter 6). The final chapter provides an insight into the response of Muslim States to international human rights instruments affecting women through a discussion in the light of reservations to the Women's Convention. The study concludes by posing the question whether a move towards convergence between international and Islamic schemes of women's human rights is discernible or not.

PART I

WOMEN'S HUMAN RIGHTS IN ISLAM: INITIATING THE DISCOURSE

The universality of human rights, particularly in the post-United Nations era, is largely assumed. The yardstick commonly used to measure this perceived universality is the momentum towards human rights instruments adopted by international and regional organisations,[1] the constitutions and bills of rights of numerous States incorporating human rights norms,[2] and the Declarations made at the various World Conferences on Human Rights[3] by virtually all national and international leaders. At the same time, a closer look at the above statements and documentation reveals the fact that the rhetoric of human rights does not always not match its reality.

While it may be argued that some elements[4] of international human rights law contained in the many Declarations, Covenants and Conventions have acquired a *ius cogens*[5] character, yet it would not be valid to extend this principle to all areas of human rights such as women's human rights, and the international norm of non-discrimination on the basis of sex.[6] This contention draws support from the vast

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1 More than a hundred documents affecting human rights have been logged since 1945. These include United Nations Treaties, other universal treaties, United Nations documents, instruments adopted by United Nations Agencies, and regional organisations. For a comprehensive list, see, H. J. Steiner and P. Alston (eds.,) *International Human Rights in Context Law Politics Morals* (1996) Oxford: Clarendon Press at pp. 1229-1234.

2 A. H. Robertson and J. G. Merrills, *Human Rights in the World* (1989) 3rd. edn., Manchester: Manchester University Press at p. 27 states that the Universal Declaration of Human Rights ". . . has inspired more than forty State constitutions, . . . and examples of legislation quoting or reproducing provisions of the Declaration can be found in all continents."

3 Including the United Nations World Conference on Human Rights, Vienna, June 1993.

4 For example the right to be free from slavery, genocide and torture.

5 A peremptory norm of general international law accepted and recognised by the international community of States as a whole from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character. (Article 35 of the Vienna Convention on the Law of Treaties).

6 An in-depth analysis of this issue is undertaken in chapter 6 of the present study.

number of reservations entered by States Parties to the UN Convention on the Elimination of All Forms of Discrimination Against Women (Women's Convention),[7] the multi-lateral treaty encapsulating the international norm of non-discrimination on the basis of sex. Among the States that have entered reservations to the substantive provisions of the Women's Convention are Muslim States Parties who put forward the argument that although Islam affords many human rights to women, the formulation and interpretation of these rights is very different to the concept of human rights in international human rights instruments.

Part I of the present study therefore proposes to initiate the discourse into women's human rights in Islam and international law by unfolding the various conceptual categories of human rights in both traditions. Chapter 1 seeks to engage in a comparative discussion of the conceptual foundations of human rights and highlight areas of commonality and differences.

Chapter 2 attempts to develop a theoretical framework of women's human rights in the Islamic tradition using the conceptual foundations of human rights laid down in chapter 1. A number of classifications and categories of women's human rights will be employed for analysing the legal position and human rights of women in Islam.

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[7] Adopted by the UN General Assembly on 18 December 1979, entered into force on 3 September 1981, G.A. Res. 34/180, 34 UN GAOR, Supp. (No. 46), UN Doc. A/34/46, at 193 (1979), reprinted in 19 ILM 33 (1980).

CHAPTER I

HUMAN RIGHTS IN ISLAM AND INTERNATIONAL LAW: A CONCEPTUAL ANALYSIS

1.1 Introduction

This chapter is devoted to a conceptual analysis of human rights in Islam and international law. The purpose of initiating this discussion is an attempt to critically review existing formulations of 'rights' in these diverse traditions as it has important implications when applied to women's human rights in Islam and international law. Since the present study is essentially comparative in nature, various issues and concerns central to the human rights debate in 'Western'[13] and Islamic tradition, will be addressed. It will be argued that despite widely divergent manifestations and formulations of human rights in these traditions, there exists space for a human rights discourse within a pluralistic Islamic tradition with a reasonable degree of commonality with the current international human rights discourse.

It may be useful to initiate the discussion by establishing the parameters of what constitutes 'rights' in Islam and in the 'West', as these conceptual parameters inform and determine the process of law-making and legal entitlements affecting the position of women in various Islamic jurisdictions as well as in international human rights instruments. A question that will need to be addressed is whether 'rights' are objective concepts, or whether they are culturally/ideologically defined. Donnelly asserts that human rights is really a set of social practices.[14] If rights are indeed a set of social practices and capable of being culturally defined by roles played by people in a society at various points in history, then this concept may not be universally

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[13] The author is aware of the dangers of broad generalisations in using the term, 'Western,' which itself is not a monolithic entity. The term 'Western' is being used here in contradistinction to say, the Islamic, Hindu, Chinese, and African traditions and not to signify homogenity in what may be described as a largely Western European and North American, liberal, political tradition of rights that informed the UN human rights instruments, especially the Universal Declaration of Human Rights.

[14] J. Donnelly, *Universal Human Rights in Theory and Practice* (1989) Ithaca: Cornell University Press, at p. 17.

applicable. On the other hand, writers such as Weissbrodt[15] and Vasak[16] state unequivocally that human rights has become a universal ideology. Can it therefore be argued that human rights are identifiable, concrete, legal norms, capable of being objectively defined and hence applicable world-wide to all societies on an identifiable scale? We would also be able to ascertain what constitutes a 'human right' in a certain context and when and by whom it is violated. The problem, however, of adopting this line of argument is that we would be assuming that human rights is a monolithic concept, readily recognisable and universally acceptable, irrespective of the countless variations of concretely different ideological, cultural, political and economic environment, and experiences.

A number of issues may therefore be raised in this regard. For instance, how accurate would it be to state that the notion of human rights is a purely 'Western' concept? (assuming that there is a single homogenous 'Western' tradition). Do non-western religious and cultural traditions have equivalent concepts, lending strength to the belief in the universality of human rights?

Linked to the above and one of the main objectives of this inquiry is the question: Is there a human rights discourse in Islam? What are the parameters of such a discourse, if at all existent? Are the normative source/s of this discourse exclusively based on divine texts? What is the nature of these sources of rights; are they immutable and static, not lending themselves to evolution and modification or, are they dynamic? What is the degree of compatibility or otherwise between the rights discourse within the Islamic tradition and one from an international legal perspective?

1.2 The Definitional Debate and Nature Of Human Rights

In dealing with the questions posed in the previous section, it is proposed to take as our point of departure the definitional debate over the term human rights.

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[15] D. Weissbrodt, "Human Rights: An Historical Perspective" in P. Davies (ed.,) *Human Rights* (1988) London: Routledge at p. 1.

[16] K. Vasak, "Toward a Specific International Human Rights Law" in K. Vasak (ed.,) *The International Dimension of Human Rights* (1982) Vol. 2 at p. 672.

Despite the vast array of literature on the subject of human rights and the importance it has acquired in domestic and international law, it is interesting to note that for the most part, there is a lack of agreement even on the meaning of either a 'right' or 'human right'.[17] Rights, it may be argued, is an ambiguous term used to describe a variety of legal relationships.[18] According to Hohfeldian analysis, 'right' may be used in its strict sense of the right-holder being entitled to something with a correlative duty in another. The term may also be used to indicate an *immunity* from having a legal status altered. Sometimes right may indicate a *privilege* to do something. And, finally, a right may refer to a *power* to create a legal relationship.[19] Despite all the foregoing terms being identified sometimes as 'rights', each concept invokes different protections and produces variant results.[20]

In attempting to develop a rigorous conceptual framework of human rights in Islam and international law, applicable to women, Hohfeld's vocabulary and analysis of 'rights' may be employed rather usefully in identifying comparative categories of rights in both traditions. Hohfeld creates more than one formulation of 'right' and warns against treating all rights as belonging to a single category or class. It may be argued however, that all four categories of legal advantage identified,[21] may be considered as species belonging to one generic group while bearing in mind the inherent differences. Hence, in describing various classes of claims and entitlements, in Islam and international law, the Hohfeldian analysis provides a framework in which to place various human rights, ranging from economic, social and cultural rights, to civil and political rights as well as the more controversial third generation or group rights. In the context of the present inquiry it is important when comparing rights accorded

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17 A. D. Renteln, "The Unanswered Challenge of Relativism and the Consequences for Human Rights" (1985) 7 *HRQ* 514 at 515-516; J. J. Shestack, "The Jurisprudence of Human Rights" in T. Meron (ed.,) *Human Rights in International Law Legal and Policy Issues* (1984) Oxford: Clarendon Press at pp. 70-75; A. Belden Fields & Wolf-Dieter Narr, "Human Rights as a Holistic Concept" (1992) 14 *HRQ* 1 at p. 1.

18 Shestack, *Ibid.* at p. 71 and accompanying footnotes.

19 The words, immunity, privilege and power are used here in the sense ascribed to them in Hohfeldian analysis of rights. See W. N. Hohfeld, *Fundamental Legal Conceptions as Applied to Judicial Reasoning* (1923) W. W. Cook (ed.,) New Haven: Yale University Press.

20 Shestack, *op. cit.* n. 5 at p. 71.

21 i.e., rights, liberties, privileges and powers.

to women in Islam and international law to address the question whether both traditions consider civil and political rights, economic social and cultural rights and group rights as 'true rights', or, are second and third generational rights simply aspirational targets? Does Islamic law and international human rights law place concerns and issues of women's human rights at the same level of priority as human rights of other classes of persons, or are they in the form of hierarchical entitlements? In other words are all categories of human rights described above invested with a legal status that protects them from derogation or limitation.[22]

How then, may 'human rights' be defined, a concept regarding which even the definitional debate remains unresolved and ridden with controversies. It has to be said that despite this lack of agreement on the subject, there has been no dearth of attempts at providing a working definition. The classic definition of a human right is stated to be "a right which is universal and held by all persons."[23] Cranston describes it thus: "A human right by definition is a universal moral right, something which all men, everywhere, at all times ought to have, something of which no one may be deprived without a grave affront to justice, something which is owing to every human being simply because he is human".[24] Donnelly reiterates Cranston's view by this simple yet concise definition, "Human rights are the rights one has simply because one is a human being."[25] These formulations of what constitutes a human right, it may be argued, begs the question of universality of human rights and whether these are after all, based on values common to all humankind?

Weston makes the point that while there may be a general acceptance of the concept of human rights, such agreement does not exist with regard to its "substantive scope" i.e., its specific content.[26] The current and on-going debate regarding the 'Western' and Islamic human rights concepts is, arguably, one that primarily revolves around this "substantive scope" of human rights rather than its existence or absence

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[22] Shestack, *op. cit.* n. 5 at p. 74.
[23] A. D. Renteln, "The Concept of Human Rights" (1988) *Anthropos* 83:343-364 at p. 347.
[24] M. Cranston, *What Are Human Rights?* (1973) 2nd edn., London: Bodley Head at p. 36.
[25] J. Donnelly, *The Concept of Human Rights* (1985) London: Croom Helm, at p. 1.
[26] B. Weston, "Human Rights" in 20 *New Enclyclopaedia Brittanica* (1992) 15th edn., at p. 656.

within the Islamic tradition. Thus, it may be argued that while all known cultures, ideological or religious traditions afford some manner and extent of legal or moral advantage or right to its members, yet the actual content and list of entitlements and claims, as well as mechanisms of enforcement and implementation of such regimes will, in all probability vary.

A number of writers on human rights, purporting to present the concept from a non-western tradition[27] lead us to believe that the concept of human rights is a synonym for total, unrestrained freedoms and entitlements; the term 'duty' being unrelated to rights and relegated to the confines of 'underdeveloped', non-western societies such as Islamic ones. The inference one generally draws, therefore, is that engaging in any comparative discourse on the subject of human rights is an exercise in futility since the main condition of entry into this discussion is to subscribe to the rights language of the West. Reading through Sir John Laws's stimulating article, "The Constitution: morals and rights"[28], it came as a recent reminder that notions of 'duty' and 'morality' are indeed an integral component of the Western discourse on rights, despite the fact that these may not appear as prominently as in non-western discussions on the matter.

A key element in the present study, in what clearly involves more than one conceptual framework (that of a Western notion of human rights and one involving an Islamic framework), is the search for an equivalent in the Islamic tradition, of the phrase 'human rights'. Although it may have been said many times in the past, a word of caution may be in order here. Searching for conceptual equivalents[29] in cross-cultural and comparative studies, such as the present one, often engenders a strong feeling of inadequacy, particularly when one is looking for comparable terms in

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27 See for example, A. E. Mayer, *Islam and Human Rights, Tradition and Politics* (1995) 2nd edn., Boulder, Co: Westview Press at p. 44; B. Tibi, "Islamic Law/Shari'a, human rights and international relations", in T. Lindholm and K. Vogt (eds.,) *Islamic Law Reform and Human Rights, Challenges and Rejoinders* (1993) Copenhagen: Nordic Human Rights Publications, at p. 87.

28 J. Laws, "The Constitution: morals and rights" (1996) *Public Law*, 622-638.

29 For a very interesting discussion on the subject see, R. Pannikar, "Is the notion of human rights a Western concept?" (1982) 120 *Diogenes* 75.

different languages. Words are expressions of cultural beliefs, convictions and ideologies that reflect more than what the limited phrases or sentences say. Some words carry within them a whole array of historical baggage of why and when certain words were clothed in the meanings they currently hold. In the human rights debate in particular, it is very pertinent to bear in mind the historicity of the term and what it meant at a certain point in time. If other religious and cultural traditions do not have exact words to identify with the terms under discussion, this absence of comparable words does not in itself indicate the absence of such a debate within that tradition.

How may we define 'human rights' from within the Islamic tradition (with a legal and cultural tradition dating back to the seventh century), when clearly the phrase under discussion is itself a new construct of fairly recent 'Western' origin? Some writers argue, that such an exercise would not be very fruitful since there is no such term as 'rights' in the Islamic tradition, only 'duty', hence the absence of a discourse on a concept which is non-existent.[30] It is submitted that within the Islamic tradition, the term *'huq'* (a right; plural *'huqooq'*) has always existed and is one that translates with relative ease into the English term 'rights'. Furthermore, that 'right' or 'rights' is the established meaning of the term in Arabic in the sense of a claim right (to use the Hohfeldian classification of rights), is also evident from the use of the term in languages that drew on Arabic.[31]

Abdul Aziz Said on the other hand highlights the element of duty when defining the Islamic concept of human rights by stating that Islam:

> "(I)s a belief system predicated fully upon *Haqq*, which is the Arabic word for right. But *Haqq* is also truth. It is justice. It is duty. It is the word of the Divine. *Haqq* is God. The essential characteristic of human rights in Islam is that they constitute obligations connected with the Divine and derive their force from this connection."[32]

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[30] See U. Khaliq, "Beyond the Veil? An Analysis of the Provisions of the Women's Convention and the Law as Stipulated in Sharia'h", forthcoming in *BJIL*.

[31] For instance, in Persian, Urdu and Pukhto (Pushto), although in the Pukhto spoken in Afghanistan, the term '*huq*' or '*huqooq*' are used to denote law.

[32] A. A. Said, "Precept and Practice of Human Rights in Islam" (1979) 1 *UHR* 63 at p. 63.

Mohammed Arkoun, a distinguished Muslim scholar is of the view that "Islamic thought always included a discourse on the rights of God and the rights of man (*huquq Allah/huquq adam*), with the former having primacy and priority over the latter. . . . (T)he respect of human rights is an aspect of, and a basic condition for, respecting the rights of God."[33] Having said that, it has to be conceded that the extent and application of human rights in Islam, *equally, and to all human beings*, poses a number of problems.[34]

In seeking to define human rights, one may have to deal with the issue at two levels. First, the level of formal analysis of the concept in an effort to exhibit the logical structure and to reveal and refine conceptual distinctions.[35] Secondly, the definitional issue deals with the normative base of the concept seeking to be defined by attempting to explain the moral foundation of rights.[36] It is to these issues that we now turn our attention.

1.3 Foundations of Human Rights in the 'Western' Tradition

Human rights are widely accepted as individual entitlements that grew from European modern thought on natural law. The legal and political roots of human rights as incorporated in the post-United Nations human rights documents starting with the Universal Declaration of Human Rights (UDHR)[37], the International Covenant on Civil and Political Rights (ICCPR)[38], the International Covenant on Economic, Social and Cultural rights[39] (ICESCR) and other international human rights instruments were formulated between the 17th and the 20th centuries in

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33 Mohammad Arkoun, *Rethinking Islam. Common Questions, Uncommon Answers* (1994) Boulder Co: Westview Press at p. 108.

34 Traditional Islamic law does not accord, women and non-Muslim minorities the same rights as Muslim men. This issue will be addressed in further detail at a later stage in this chapter and in subsequent chapters of this study.

35 N. E. Simmonds, *Central Issues in Jurisprudence. Justice, Law and Rights* (1986) London: Sweet and Maxwell at p.129.

36 *Ibid.*

37 Adopted and proclaimed by General Assembly Resolution 217 A (III) of 10 December 1948.

38 Adopted and opened for signature, ratification and accession by General Assembly Resolution 2200 A (XXI) of 16th December 1966.

39 *Ibid.*

England, France, and the United States. It is stated that a new conception of popular sovereignty and individual rights was conceived through the philosophic and legal writings of Grotius, Locke, Paine, Voltaire, Rousseau, Mill, Montesquieu, Kant and Jefferson. This, in turn, was grounded in a new view of the nature of man, and the relationship of each individual to others and to society. These times witnessed such landmarks as the English Petition of Rights (1627), the Bill of Rights (1688), the Habeas Corpus Act (1689) passed by the English Parliament, the American Declaration of Independence (1776), the United States Constitution (1787), the American Bill of Rights (1791), and the French Declaration of the Rights of Man and Citizen (1789), all of which constitutionalized and institutionalised a Western standard of human rights and liberties. Whereas the 17th and 18th centuries were eras during which the concept of natural rights was institutionalised within the context of the nation state in the West, the 20th century witnessed the extension of this concept and its institutionalisation in regional and international organisations, particularly in the Council of Europe [40] and the United Nations.

Donnelly, in a number of writings, appears to support the above stated view of human rights as a product of 'western' thought, culture and civilisations by arguing that:

> "most Non-western cultural and political traditions lack not only the practice of human rights but the very concept. As a matter of historical fact, the concept of human rights is an artefact of modern western civilisation."[41]

Renteln, while discussing universalism versus relativism in relation to the concept of human rights, is also of the view that the basic problem is that the discourse on rights comes from the Western political tradition the dominance of which

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[40] For instance, in the European Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 4th November 1950 with 11 Additional Protocols, and the European Social Charter, Turin, 18th October 1961.

[41] J. Donnelly, "Human Rights and Dignity: An Analytic Critique of Non-Western Human Rights Conceptions" (1982) American Political Science Review 76 at p. 303.

is revealed in any major human rights text.[42] She states however, that this does not mean that other societies lack ideas expressed in the western rights framework.[43] Sinha, argues that the current formulation of human rights contains three elements which reflect western values:

One of the fundamental unit of society is the individual, not the family. Two, the primary basis for securing human existence in society is through rights, not duties. Three, the primary method of securing rights is through legalism whereunder rights are claims and adjudicated upon, not reconciliation, repentance, or education.[44]

Laqueur and Rubin in the introduction to *The Human Rights Reader* deny that the concept of human rights is a western concept. They argue:

> "Nor is it true that the idea of human rights is an invention alien to most non-western cultures and that it has been foisted on a more or less unwilling world. Even if there were no explicit covenants to that effect in traditional societies in Asia, Africa and Latin America, the idea of freedom was hardly alien to those civilisations."[45]

John Strawson, however, challenges the oft-repeated notion of [human] rights as emanating from a purely Western philosophy and tradition on two grounds: one, that the existence of a single, homogenous, monolithic 'Western' human rights tradition is highly questionable and, secondly, that historical and philosophical roots of rights are distinctly discernible in non-western cultural and religious traditions.[46] He argues that in the human rights discourse of the West:

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42 Renteln, *op. cit.*, n. 5 at p. 517.

43 *Ibid.*

44 S. P. Sinha, "Human Rights: A Non-Western Viewpoint" (1981) *Archiv fur Rechts-und Sozialphilosophie* 67 at p. 77.

45 W. Laqueur and B. Rubin (eds.,) *The Human Rights Reader* (1979) New York: New American Library at p. 1.

46 J. Strawson, "Reflections on the West's Question: "Is there a Human Rights Discourse in Islam?" paper presented at the Critical Legal Conference, University of Edinburgh, September 8-10 1995 at p. 2.

> "Non-western societies are relegated to backwardness, usually on the neo-Weberian grounds that they are invariably traditional societies, rural and static. As far as Islam is concerned it has the added element of divine revelation, which the West has determined to mean that Islam is forever confined to its origins in the seventh century (C.E.). Despite the fact that some leading Western scholars accept that human rights concepts have not existed 'even in the western tradition until rather recently' most, nevertheless, argue that their origins are contained within the European discourse. Nearly all are united in agreeing that there is little basis for an understanding that such concepts could lie in the intellectual traditions of non-western societies."[47]

Strawson's views cited above are clearly a minority opinion and one to which even some Muslim scholars would not subscribe. If human rights in their present formulations are indeed a Western construct, should the non-western world then simply renounce human rights and withdraw from any discussion on the issue? Or, should there be a serious intra- and inter-cultural discourse to search for what Pannikar terms 'the homeomorphic equivalent'[48] of human rights in diverse cultural and religious traditions. It is with the conviction that human rights are indeed imperative for human life and dignity that engagement in this debate on the existence of a human rights tradition in Islam is sought.

1.4 Sources of Human Rights in Islam

Before an inquiry can be made into the extent to which there is a human rights tradition in Islam and how it is applied to women, a basic understanding of the sources of the *Sharia'* (principles of Islamic law),[49] is essential. This inquiry is necessitated due to the fact that the concept of human rights in the Islamic tradition is firmly grounded in its sources and accompanying juristic techniques, namely the *Quran, Hadith, Ijma, Qiyas* and *Ijtihad.* The issue of whether the *Sharia'* is static and immutable, or receptive to concepts such as human rights, may be addressed by analysing these sources and how they are applied within the Islamic legal tradition.

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[47] *Ibid.*

[48] Pannikar, *op. cit.*, n. 17 at p. 77.

[49] I believe that my major point of difference with most scholars writing on Islamic law is that I define the *Sharia'* as principles of Islamic law as opposed to Islamic law itself.

The *Quran*, believed by Muslims to be the word of God, is the primary source of Islamic law and the *Sharia'*. Any human rights regime must therefore, conform to those rights and duties, privileges and obligations enjoined upon believers in the *Quranic* verses.[50] Out of the 6666 verses of the *Quran*, about 500 have a legal element the vast majority of which deal with worship rituals, leaving only about 80 verses of legal subject matter in the strict sense of the term.[51] Of particular interest in the context of our present inquiry, is the principle of *naskh* (abrogation or repeal of the legal efficacy of certain verses of the *Quran* in favour of other verses). The content of some of the later verses appear contradictory to the earlier ones.[52] Since the *Quran* is the primary source of Islamic law, the question of legal validity of every verse therein is crucial. Questions facing Muslim jurists down the ages have been: Can one (later), *Quranic* verse abrogate another (earlier) verse? If the later verse abrogates the earlier one, then what of the principle that each and every verse of the *Quran* has absolute authority and validity? If the answer to the first question is 'no' and if both sets of verses as the words of God are equally valid, are Muslims at liberty to choose whichever verse they wish to use as the basis of a rule of law? There is a difference of opinion regarding the subject in the Islamic legal tradition and it is particularly important in the context of human rights of women and minorities since some *Quranic* verses tend to create gender hierarchies and legitimise discrimination

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[50] A. R. I. Doi, *Shariah: The Islamic Law* (1984) London: Ta Ha Publishers at pp. 21-22. The *Quran* which is the Arabic language was revealed piecemeal over a period of 22 years, 2 months and 22 days according to the needs of time and to provide solutions to the problems which came before the Prophet Muhammad. The *Quran* is divided into 114 chapters and contains 86,430 words and 323,760 letters of the alphabet. The total number of verses are 6666. In order to facilitate its reading, the *Quran* is divided into 30 sections and 540 ruku and 7 manazil.

[51] Vesey-Fitzgerald, "Nature and Sources of the Sharia'," in M. Khadduri and H. J. Liesbensy (eds.,) *Law in the Middle East* (1955) Washington DC: The Middle East Institute, at p.87; Liebesny, *The Law of the Near and Middle East*, p. 12; F. Rahman, *Islam* (1979) 2nd. edn., London: University of Chicago Press, at p. 69; and N. J. Coulson, *History of Islamic Law* (1964) Edinburgh: Edinburgh University Press at p. 12 cited at footnote 35 in A. A. An-Naim, *Towards an Islamic Reformation: Civil Liberties, Human Rights, and International Law* (1990) Syracuse: Syracuse University Press at p. 20.

[52] It has been argued by the Sudanese Muslim reformer, Ustadh Mahmood Mohammad Taha that the *Quranic* verses revealed during the Meccan era are more egalitarian and democratic in spirit while the Medinese verses display an heirarchical trend. Abdullahi Ahmed An-Naim who translated the book of Taha entitled, *The Second Message of Islam* has written extensively on the subject.

against women and non-Muslims while others enjoin complete equality of rights and treatment.[53] It appears to be the opinion of the Hanafis[54] and most of the Shafei and Maliki jurists that one *Quranic* text may repeal another. At the same time it is also stated that even though the injunction of the *Quranic* verse may have been repealed, its words would still be regarded as part of the *Quran.*[55] The inference of this view would be to base a rule of law only on the later verse and not on the superseded one. But a small minority of Muslim writers contend that since each and every word of the *Quran* holds equal legal validity, it would be legitimate to base a rule of law upon a repealed verse if doing so advanced the interests of justice.[56]

The *Hadith*, i.e., the custom or usage of the Prophet Mohammed is known as *Sunna*; i.e., his words and deeds. *Hadith*, means the traditions of the Prophet Mohammed - the records of his actions and his sayings. Unlike the *Quran*, which was written and compiled during the lifetime of the Prophet Mohammed, the *Ahadith* (plural of *hadith*), were not so compiled. It was after the death of the Prophet that the community realised that in addition to the *Quran*, the sayings and actions of the Prophet were guiding principles for Muslims. The *Hadith* constitute the second source of Islamic law. The *Ahadith* were not compiled under state supervision. At first, a particular Companion (*Sahabi*) of the Prophet Mohammed had his own collection of the words/deed of the Prophet in memory or in writing. These collections were then passed on to others thus starting a chain of narrators of

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[53] See An-Naim, *Towards an Islamic Reformation, op. cit.*, n. 39; A. A. An-Naim, "A Modern Approach to Human Rights in Islam: Foundations and Implications for Africa" in C.E.Welch Jr., and R. Meltzer (eds.,) *Human Rights and Development in Africa* (1984) Albany: SUNY Press; A. A. An-Naim, "Religious Minorities under Islamic Law and the Limits of Cultural Relativism" (1987) 8 *HRQ* 1; A. A. An-Naim, "The Islamic Law of Apostacy and its Modern Applicabilty: A Case from Sudan" (1986) 16 *Religion* 197; A. A. An-Naim, "The Rights of Women and International law in the Muslim Context" (1987) 9 *WLR* 491.

[54] Muslims are divided into *Sunni* and *Shia*. *Sunnis*, who form the predominant majority of Muslims are further sub-divided into Hanafi, Shafei, Maliki and Hanbali after the names of the founders of these schools of juristic thought. *Shia* are sub-divided into Athna Asharia, Zaidya and Ismailya.

[55] A. Rahim, *Muhammadan Jurisprudence* (1995) Lahore: Mansoor Book House, at p. 94.

[56] Taha and A. A. An-Naim subsrcibe to this view. Taha was the founder-leader of the Republican Brotherhood in the Sudan, who had little electoral succes but under the leadership of Taha emphasised the need for Islamic reform and liberation. That their ideas are far from acceptable to the large majority of Muslims can be ascertained from the fact that Ustad Taha was hanged by the Sudanese government of Jafar Numairy in 1985 as an apostate from Islam.

traditions of the Prophet. But since narration of *Hadith* is an important act akin to giving testimony in court, it becomes imperative to have rules governing its transmission.[57]

Hadith literature however, is surrounded by controversies; in particular due to the question of their authenticity.[58] It is a historical fact that numerous *Ahadith*, were generated to reinforce societal norms and political expediency.[59] By narrating *Ahadith* favourable to its own group, political legitimacy could be acquired by the ruling elite. [60] Unfortunately for Muslim women, this policy of using *Hadith* for excluding political rivals was employed to introduce a mysogynistic trend within the Islamic tradition by attributing to the Prophet sayings that were derogatory of women.[61]

In addition to the two primary sources of Islamic law given above, there are other juristic techniques accepted as its secondary sources; these include, *ijma*, *qiyas* and *ijtihad.*

Ijma or consensus of opinion has been defined as agreement among the Muslim jurists in a particular age on a question of law.[62] Its authority as a source of laws rests on certain *Quranic* and *Hadith* texts.[63] The four Sunni schools of thought

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[57] A tradition or *Hadith* is composed of two essential parts: the text or *matn* of the tradition and the chain of trasmitters or *isnad* "over whose lips it (*Hadith*) had passed." Due to the very nature of *Hadith* literature, there emerged principles of criticism of the Hadith relating to both the *matn* and *isnad.*

[58] According to Muslim jurists, no doubt can reasonably be entertained as to the authenticity of any verse of the *Quran.* There are however, only 5 or 6 *Ahadith* which can be said to be so proved. The reason for this is that, while the texts of the *Quran* were collected by authority of the State soon after the death of the Prophet, the traditions were not so collected.

[59] The *Hadith* implying prohibition of a woman becoming head of State is one such example.

[60] F. Mernissi, *Women and Islam*, Translated by M. J. Lakeland (1991) Oxford: Basil Blackwell Ltd., at p. 46.

[61] Riffat Hassan a Muslim woman theologian has discussed this at length in her work where she takes up *Ahadith* that go against the spirit of Islam or against an express verse or injunction of the *Quran.* See, R. Hassan, "The Role and Responsibilities of Women in the Legal and Ritual Tradition of Islam", Paper presented at a bi-annual meeting of a Trialogue of Jewish - Christian-Muslim scholars at the Joseph and Rose Kennedy Institute of Ethics, Washington, D.C., 1980.

[62] Rahim, *Muhammadan Jurisprudence*, *op. cit.*, n. 43 at p. 97. Rahim cites the following authorities: 'Taudih', p. 498; 'Mukhtasar', Vol. II, p. 29; 'Jam'ul-Jawami', Vol. III. p.288.

[63] The following *Quranic* verses (among others) are cited for *ijma'* as a source of law:
- "Today we have completed your religion."
- "Obey God and obey the Prophet and those amongst you who have authority."
- If you yourself do not know, then question those who do."

Two *Ahadith* of the Prophet Muhammad are particularly used to establish the validity of ijma:
- "My followers will never agree on what is wrong"; and
- "It is incumbent upon you to follow the most numerous body."

hold *ijma* to be a valid source of laws not only on the authority of the texts such as the above, but also on the unanimity of the Companions of the Prophet Mohammed to that effect.[64] *Ijma* is an essential and characteristic principle of Sunni jurisprudence, one upon which the Muslim community acted as soon as they were left to solve the first and most important constitutional problem that arose on the death of the Prophet Mohammed, namely, the selection of the spiritual and executive head of the community. The election of Abu Bakr as the first among what are known as the "Rightly Guided Caliphs" by the votes of the people was based on the principle of *ijma*.[65]

Qiyas, translated as analogical deduction is the fourth source of Islamic law. As a source of law, it comes into operation in matters which have not been covered by a text of the *Quran* or tradition (the term tradition is used interchangeably with the *Hadith* of the Prophet Mohammed), nor determined by consensus of opinion. The law is thus deduced from what has been laid down by any of these authorities, by the use of *Qiyas*.[66]

An important source of *Sharia'*, but one which is usually known as a juristic technique in Islamic jurisprudential terms is *ijtihad*. In the literal sense, the term implies striving hard or strenuousness, but technically it means exercising independent juristic reasoning to provide answers when the *Quran* and *Sunna* are silent on a particular subject. *Ijtihad* was meant to occupy a central place in juristic deduction. A person qualified to carry out *ijtihad* is known as *mujtahid*. It is in the doctrine of *ijtihad* that the Islamic legal doctrine was meant to find its evolutionary path. Historically however, with the emergence of the four schools of juristic thought, it was declared that 'the doors of *ijtihad* had closed forever' and that independent

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[64] 'Bazdawi', p. 253; 'Taudih', p. 283; 'Mukhtasar', Vol.II, p. 30; 'Jam'ul-Jawami', Vol. III, p. 308.

[65] This election of Abu Bakr as the first Caliph of Islam however laid the foundation of the deep and irrevocable schism between the Muslim community of the time as some of them felt that Ali, the cousin and son-in-law of the Prophet should have succeeded to this office. The sect of Islam that arose out of this divide is known as *Shia*.

[66] Rahim, *Muhammadan Jurisprudence*, *op. cit.*, n. 43 at p. 117.

juristic reasoning and hence legal development in keeping with the times, was precluded for ever.

Over the centuries Islamic law developed by drawing upon the above sources and juristic techniques. *Sharia'* which is now used interchangeably with the phrase Islamic law, became rigid and less amenable to changing needs. Since the *Sharia'* drew heavily upon the two primary sources, the *Quran* and *Sunna* for its formulations, in due course of time the entire corpus of the *Sharia'* was elevated to the status of divine law, immutable; hence beyond evolution and change. *Sharia'*, it may be argued, by its very definition has evolution built into its meaning and cannot be rigid. (The term *Sharia'* means a watering place, a flowing stream, where both animals and humans comes to drink water. Stagnant and standing water is *not Sharia'*).[67] How is it then, that a concept that has mobility built into its meaning is perceived as being averse to developing new legal concepts such as human rights? It is submitted that Muslim scholars have failed to make use of the inbuilt dynamism and flexibility in the *Sharia'*; neither have those juristic techniques where principles of one school are applied to litigants who in theory belong to another school of Islamic juristic thought.[68] In this context, responsibility for under-utilisation probably also stems from the lack of appreciation of how Islamic law and jurisprudence works and has evolved over the centuries. It also reveals the fact that writers professing a static view of *Sharia'*, are unaware of the plurality of legal tradition in Islam or simply impatient with its complexities and desire them to 'will them away' by refusing to engage in a discussion on the subject.[69] If Muslim scholars (and indeed this movement must come from within the Muslim community) succeed in overcoming this psychological barrier of not being able to work on reforming the *Sharia'* which they

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[67] In the opinion of An-Naim, *Sharia'* was constructed by Muslim jurists and although derived from the *Quran* and *Sunna*, is not divine because it is the product of human interpretations of those sources. An-Naim, *Towards an Islamic Reformation, op. cit.*, n. 39 at p. 185.

[68] Such as the doctrines of *taqlid* and *talfik*.

[69] There is some evidence to suggest that this plurality irritated the colonial authorities in nineteenth century India, for example, who wanted to 'apply' a cut and dried Islamic law in the courts. For an interesting discussion on the subject see, M.Anderson, "Islamic Law and the Colonial Encounter in British India" in C. Mallat and J. Connors (eds.,) *Islamic Family Law* (1990) London: Graham and Trotman.

perceive as being divine law, whole new vistas for evolving concepts such as human rights in cross-cultural discourse would open up.

The foregoing discussion on the sources of human rights raises what may be described as the main point of divergence between the concept of human rights emanating from the 'West', and those in the Islamic tradition i.e., the existence of a divergent normative base, one supposedly secular,[70] the other of divine origin. Is it this divergence of justificatory sources that has led to the denial by many writers of the presence of a human rights discourse in the Islamic tradition? The following section of this chapter attempts to address this issue.

1.5 'Secular' and 'Western' versus 'Divine' and 'Islamic' Human Rights: A Clash of Traditions?

Samuel P. Huntington in his much publicised and controversial article "The Clash of Civilisations"[71] links the international debate over whether human rights are western, and thus unsuitable for non-western cultures, to a clash of civilisations: western and Islamic. He argues that differences in culture and religion create differences over policy issues such as human rights so that the promotion of human rights by the west merely provokes civilisational clashes.[72] (The premise here is that human rights is an alien construct for Islamic cultures and that there is no room for any common ground of discussion). While disagreeing with most of the views put forward by Huntington, it has to be conceded that these views appear to have been prompted by arguments made by some Muslim scholars[73] and representatives of governments of a number of Muslim countries,[74] who believe that the human rights

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[70] The fact that medieval Christian philosophers such as St. Thomas Aquinas justified the existence of natural rights on the basis that they were sanctioned by God, appears to have been overshadowed by the later day secular approach adopted by Grotius and others after him.

[71] S. P. Huntington, "The Clash of Civilisations" (1993) 72(3) *Foreign Affairs*, pp. 22-49.

[72] *Ibid.* at p. 29.

[73] For instance the writings of A. A. Maududi, *Human Rights in Islam* (1976) Leicester: Islamic Foundation; Syed Qutb, S. Tabendah, *A Commentary on the Universal Declaration on Human Rights* (1970) Guildford: Goulding.

[74] Governments of the Islamic Republic of Iran, Saudi Arabia, Iraq, Bangladesh, Egypt and Pakistan, to name a few.

norms as enunciated by the West are built on an unstated premise i.e., secularism. Therefore, it is argued, human rights appear independent of the authority of any specific religion and find legal validity by human acceptance of these principles/norms/laws. By contrast, Islamic law is of divine origin, is immutable and unchangeable and has a completely different normative base. Furthermore, "universal human rights" in keeping with their Western liberal roots are individual based whereas in Islam (as in other religious traditions), rights are duty based and interdependent on duties one owes to God and the community.[75] Thus, despite commonalities[76] between human rights in Islam and those stated in the international human rights instruments, some basic points of divergence exist and present difficulties of acceptance and implementation in Muslim countries even where comparable rights and privileges exist within the Islamic tradition.[77] For instance, the position of the Islamic Republic of Iran in relation to its legal obligations under international law is a case in point.[78] It continuously refuses to comply with international human rights Instruments such as the UDHR, the ICCPR, and the ICESCR for the following reasons:

> "Divergence does not emerge from the context, it rises from the very initial phase. Islamic law is founded on the very original concept that divinity reigns supreme and divine law is pre-eminent to human law. The Declaration is genuinely secular in its theme and essence and as such, differs from Islamic law in its origin. There may be similarities or even complete compatibility on some provisions, in particular those that meet the conditions of *jus cogens*, but the original perceptions remain widely apart." [79]

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[75] Thus duties, within Islamic tradition are divided into two broad categories, "*Huqooq Allah*" or duty owed to God and "*Huqooq al Ibaad*" or duty towards humanity and are indissolubly linked with duties.

[76] For instance, respect for human dignity protected in the *Quran* in verse 17:7 "Surely we have accorded dignity to the sons of Adam." or as stated in the farewell address of the Prophet: "Your persons, properties and honour are declared sacred like the sanctity attaching to this day, this month and this spot. Let them not be violated." and comparable human rights in the preamble of the UDHR as well as its articles 1, 3, 17, etc.. Also see the ICCPR and ICESCR for similar provisions.

[77] A number of Islamic and 'western' writers tend to over-generalize the discussion and overlook contributions of writers who include notions of justice, equality and God-given rights and duties.

[78] T. Meron, "Iran's Challenge to the International Law of Human Rights" (1989) 13 *Human Rights Internet Reporter* 8 at p. 8.

[79] *Ibid*, at p. 9.

Mohammed Arkoun is also of the opinion that one of the important reasons for Muslim resistance to the notion of human rights is its avowedly secular base. He argues that difficulties of Muslims with human rights may be seen within a specific set of historical circumstances and social complexities. Therefore, "I appreciate the pertinence of research on the meaning of the opposition between divine and secular origins of human rights."[80]

Riffat Hassan on the other hand argues that even though many international human rights instruments do not make a direct reference to God, it does not necessarily follow that God-centred or God related concepts are excluded from them. Hassan's remarks in this connection are particularly apt. She writes:

> "To me it seems truly remarkable that an organisation such as the UN, where every word of every declaration is fought over in an attempt by each country and bloc to protect its vested interest, could arrive at a document such as the UDHR which, though "secular" in terminology seems to me to be more "religious" in essence than many "*fatwas*" given by Muslim and other religious authorities and agencies."[81]

Hassan's comments on the "religiosity", (if one may term it so) of the international human rights instruments, however do not represent "mainstream" views[82] within Muslim countries. For example, in signing the United Nations Convention on the Elimination of All Forms of Discrimination Against Women (the Women's Convention),[83] a number of Muslim States Parties have entered far reaching reservations on the basis that some of the human rights provisions of this treaty conflict with the *Sharia*.[84] As far back as 1948, the Kingdom of Saudi Arabia

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80 Arkoun, *Rethinking Islam, op. cit.*, n. 21 at p. 111.

81 R. Hassan,"On Human Rights and the Quranic Perspective" in A. Swidler (ed.), *Human Rights in Religious Traditions* (1982) New York: Pilgrim Press, at p. 53.

82 See for instance, the writings of Syed Qutb, an Muslim Arab scholar and Maulana Maudoodi, a Pakistani religious scholar who wrote prolifically on the subject and founded the right wing political party, the Jamaat-i-Islami.

83 Adopted on 18 December 1979 as General Assembly Resolution 34/180, United Nations Doc. A/34/46; entry into force, 3rd September 1981.

84 In this regard, a number of articles have been published analysing the reservations entered by Muslim States Parties. Some of these include, B. Clark, "The Vienna Convention Reservation Regime and the Convention on the Elimination of Discrimination Against Women" (1991) 85

abstained from signing the UDHR on the grounds that human rights (particularly the freedom of religion clauses) were in violation of the *Sharia*.[85]

At a UNESCO meeting of 19 September 1981, a Universal Islamic Declaration of Human Rights (UIDHR), prepared by "Eminent scholars, Muslim jurists, and representatives of movements and currents of Islamic thought" was presented as a response to the perceived exclusion of Muslims from the domain of human rights as propounded in the West and to argue that there does indeed exist a human rights tradition in Islam. All twenty three articles of the UIDHR are based on verses of the *Quran* or on selections from official Sunni compilations of *Hadith*.[86] The religious normative base of the document is however most pronounced as the introduction will show:

> "Islam gave humanity an ideal code of human rights 1400 years ago. The purpose of these rights is to confer honour on humanity and to eliminate exploitation, oppression, and injustice. Human rights in Islam are deeply rooted in the conviction that God, and God alone, is the author of Law and the source of all human rights. Given this divine origin, no leader, no government, no assembly or any other authority can restrict, abrogate or violate in any manner the rights conferred by God."[87]

Whatever may be the problems of the way in which individual rights are formulated in the UIDHR, and how and to what extent these are at variance with comparable human rights documents authored under the aegis of the United Nations,

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AJIL 281; R. Cook, "Reservations to the Convention on the Elimination of Discrimination Against Women" (1990) 30 *VJIL 643;* S. S. Ali, *A Comparative Study of the United Nations Convention on the Elimination of All Forms of Discrimination Against Women, Islamic Law and the Laws of Pakistan* (1995) Peshawar: Shaheen Printing Press; J. Connors, "The Women's Convention in the Muslim World" in Mai Yamani (ed.,) *Feminism and Islam* (1996) Reading: Ithaca Press pp. 351-366; C. Chinkin, "Reservations and Objections to the Convention on the Elimination of All Forms of Discrimination Against Women" in J. P. Gardner (ed.,) *Human Rights as General Norms and a State's Right to Opt Out* (1997) London: The British Institute of International and Comparative Law 64-84 and others.

[85] It is interesting to note that Pakistan, a country that came into existence on the basis of its Islamic identity, voted in favour of the UDHR and stated that Islam stood for freedom of religion! For details of this debate see, D. Little, *Human Rights and the Conflict of Cultures: Western and Islamic Perspectives on Religious Liberty* (1988) Columbia: University of South Carolina Press.

[86] Arkoun, *Rethinking Islam. op. cit.*, n. 21 at p. 106.

[87] Quoted in Arkoun, *Ibid.*

a positive aspect is the 'owning' of human rights as a universal concept and no longer a purely alien, 'Western' construct.[88] The virtue of this Declaration, in the words of Mohammed Arkoun, is that

> "it expresses the convictions, modes of thought, and demands that contemporary Muslims are coming to embrace. . . (T)o cloak such precious rights as religious freedom, freedom of association, freedom of thought, and freedom of travel in the full authority of the Islamic tradition is not a negligible accomplishment."[89]

Another document, the Cairo Declaration on Human Rights in Islam (the Cairo Declaration)[90] issued by the Nineteenth Conference of Foreign Ministers adopted by the member states of the Organisation of the Islamic Conference in 1990 recognises the "importance of issuing a Document on Human Rights in Islam that will serve as a guide for Member States in all aspects of life."[91] This document too, has strong religious overtones. It consists of twenty-five articles covering a wide range of civil and political and economic, social and cultural rights as well as group rights resembling current international human rights documents. These rights have however, been formulated differently to their more 'secular' international law counterparts in that the Cairo Declaration invokes for legitimation of rights afforded, the values, norms and injunctions of the Islamic religion. Articles twenty-four and twenty-five are particularly forceful in this regard as they state clearly that rights and freedoms stipulated in this Declaration are subject to the Islamic *Sharia'* which is to be the only source of reference for the explanation or clarification of any of the articles of this document.[92]

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[88] For a contrary view, see A. E. Mayer, "Universal Versus Islamic Human Rights: A Clash of Cultures or a Clash With a Construct?" (1994) 15 *MJIL* 307.

[89] Arkoun, *Rethinking Islam,op. cit.*, n. 21 at p.107.

[90] A/45/421 S/21797, Res. No. 49/19-P.

[91] *Ibid.*

[92] Document A/45/421 S/21797, Res. No. 49/19-P at p. 207.

1.6 Rights-based and Duty-based Human Rights: A Valid Distinction?

In this section, it is proposed to look into the arguments made by some writers that what the west perceives as human rights are essentially entitlements, *sans* obligations, while rights in the Islamic tradition are duty-based. The distinction of rights-based and duty-based human rights, is, it may be submitted, artificial and misleading, and one which has been over-emphasised. Using the Hohfeldian analysis of rights, it appears that no matter what tradition of rights one is referring to, the strong correlativity of rights (or a variant thereof), and duties (or corresponding burden) comes across quite clearly. It may be argued that in order to emphasise the concept in an individualistic society, the point of reference has been shifted from duties to rights. But is there any difference in how a right (in the strict sense) is enforced/enforceable if not by placing the corresponding duty on the object of the duty? As Simmonds argues:

> ".....if rights are strictly correlative to duties, then a person has established legal rights only insofar as there are established duties corresponding to those rights....this gives the law a rather static appearance as it needs to be represented by a long list of duties. But if we were to talk of rights without established correlative duties, we may think of the law as imposing duties, and perhaps creating new duties, in order to protect established rights. ...seen from this perspective, the law is not static but has an inner dynamic of its own...new duties may be recognised as a response to specifically legal considerations, in the attempt to give better legal protection to established legal rights.....people are much more willing to assert the existence of rights to various amenities than they are to ascribe specific duties."[93]

In any rights regime, there is some corresponding 'burden', whether it is rights in the strict sense, privileges, powers or immunities. Society, and by extension, the individual would be the poorer if rights were the end, and not merely a means to achieving an end, i.e., individual autonomy and human dignity. Therefore, when it is argued that the 'Western' concept of human rights is rights based, it may well be to

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[93] Simmonds, *op. cit.*, n. 23 at pp. 133-134.

avoid the question of correlative duties ad oversimplify difficult concepts. Furthermore, as Laws argues:

> "the individual's autonomy is a function of man's moral nature, which cannot be defined in terms of rights, though it gives rise to them. An attempt to define it in terms of rights is a serious mistake. It would be to deny man's shared morality. If it becomes a systematic feature of a prevailing social philosophy, it would tend to give rise to a community of selfish individuals, and therefore no community. A society whose values are defined by reference to individual rights is by that very fact already impoverished. Its culture says nothing of individual duty - and certainly nothing of aspiration; and therefore nothing of community."[94]

In what might be construed as a case for duty-based or at least duty related rights, Laws argues that Parliament is subject to the rule of law and is unable (even in theory), to make any law it pleases. The Islamic notion of rights and duties is based on a similar concept, with the difference that it is divine law which is the higher morality that curtails absolute and unbridled individual or state regulations, laws and decrees.

Bassam Tibi, a Muslim scholar states that Islam is a distinct cultural system in which the collective body, not the individual, lies at the centre of the respective worldview. Muslims as believers, have duties, *faraid*, vis-à-vis the community, but no individual entitlements. To establish human rights in Islam as individual rights it is thus necessary to introduce a concept of rights and to shift away from the concept of duties.[95] From Tibi's arguments it appears that he accepts the presence of both rights and duties as being present in the Islamic tradition; it is the predominance of duties that he believes obscures individual rights as the discussion below illustrates.

Duty/Obligation-based classifications of actions as well as classes of rights are present within Islam and may be compared with any of the classification of rights in the western liberal tradition. Human actions are divided into five classes, as follows:[96]

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[94] Laws, *op. cit.*, n. 16 at p. 624.
[95] Tibi, "Islamic Sharia, Human Rights and International Relations", *op. cit.*, n. 15 at pp. 86-87.
[96] Doi, *Sharia'h: The Islamic Law*, *op. cit.*, n. 38 at pp. 50-51.

1) *Fard* or *Wajib*: a compulsory duty the omission of which is punished;

2) *Mandub* or *Mustahab*: An action which is rewarded, but the omission is not punished;

3) *Jaiz* or *Mubah*: An action which is permitted, to the commission or omission of which the law is indifferent;

4) *Makruh*: An action which is disliked and disapproved by the *Sharia'* but it is not under penalty;

5) *Haram*: An action which is forbidden. It is punishable by law.[97]

Contrary to popular belief, however, law and morality, it may be argued, are not fully merged within the Islamic tradition. For instance, unilateral repudiation (*talaq*) by a husband of a wife is morally reprehensible or *mukruh* but, even when pronounced in a particularly disapproved[98] form (*bidda'* or "innovation"), is none the less legally valid or effective.[99]

Even from a cursory glance at the above classification of actions, it may be said that they accord individual rights as well as create corresponding duties. Taking the five categories of actions (in the Islamic tradition) on the Hohfeldian scale of rights, liberties, powers and immunities, one may compare them as follows:

If we consider *fard/wajib* and *haram* as two ends of a continuum, with *mandub, jaiz* and *mukruh* along the same line, we come up with figure 1:

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[97] *Ibid;* see also Coulson, *A History of Islamic Law, op. cit.*, n. 39 at pp. 83-84.

[98] *Talaq* or dissolution of the marriage contract at the instance of the husband has to follow certain modes and *talaq* must be pronounced at specific intervals. The purpose is to give the husband time to reconsider his decision and for the couple to resume life together. During the Ummayad rule, these prescribed modes of *talaq* underwent substantive innovation or *bidda'*. The husband could now pronounce *talaq* in one sitting thus eliminating all chances of reconciliation. See M. A. Mannan, *Principles of Muhammadan Law* (1995) Lahore: PLD Publishers chapter 15.

[99] The Prophet Muhammad is reported to have said that of all the actions permitted by God, the most reprehensible is *talaq*. For a full list of authorities and discussion on this *Hadith*, see *Khurshid Bibi v. Muhammad Amin*, PLD 1967 SC 97. Also see, A. Hussain, *Status of Women in Islam* (1987) Lahore: Law Publishing Company, at p. 568.

Hohfeldian analysis of rights and obligations 'Islamic' analysis of rights and obligations

Right[a] **(in the strict sense)**	**Duty**	***Huq*** **(in the strict sense)**	***Fard/Wajib/Haram***
Right[b] (in the wider sense) - liberty - power - immunity	Corresponding burden - no right - liability - disability	*Huq* (in the wider sense) *Mandub/Mustahab* *Jaiz/Mubah* *Makruh*	Corresponding burden - action rewarded; omission not punished - action permitted; legal indifference - action disapproved but is not

[a] just as rights in the strict sense correlate to duty in the strict sense, so *huq* (right) has the correlative of the term *fard/wajib*.

[b] just as liberty/power/immunity are privileges afforded under the broader definition of rights, so *mandub*, *jaiz* and *makruh* afford privileges to persons within the Islamic tradition.

Fard/wajib would correspond to duty/right in the strict sense;[100] *mandub/jaiz/makruh* are actions that cannot be equated with rights in the strict sense of the term but are permissible under the law in the same way as liberties/powers/immunities would be in the Hohfeldian analysis. *Haram* denotes an action forbidden by law; a duty in the nature of a compulsory act of omission, the commission of which entails infringement of a right in the strict sense. In this sense, *haram* would be comparable to duty in the strict sense of the term.

Rights mentioned in the classification in the Islamic tradition may be divided into the following categories:

1) *Huqooq Allah*, the rights of Allah (God). These can be of two kinds: (a) Spiritual; dealing with man-Allah relations, such as prescribed prayers, fasting, etc.; (b) Mundane; dealing with man-man relations such as payment of *zakat*, the charity tax, prescribed by Islam on wealth.

2) *Huqooq al Ibad*, the rights of people. These can be of three kinds: (a) Familial; dealing with matters such as marriage, divorce and inheritance; (b)

100 *Fard* may be defined as a duty in the nature of an act of commission the correlative of which is a right in the strict sense.

Contractual; dealing with business transactions, buying, selling, gifts and so forth; (c) Societal; dealing with civil and criminal law, and public order.[101]

In summary, it may be argued that rights and duties are both present in Islam. What needs to be given serious thought however, is to translate these concepts into contemporary rights language that both western and Islamic traditions can recognise and acknowledge.

1.7 Islam, Human Rights and Individualism

Many writers[102] on Islamic law contend that there is a strong element of anti-individualism in Islam and since "[H]uman rights are inherently individualistic, they are rights held by individuals in relation to, and even against the state and society",[103] such a view is foreign to Islam.[104] Coulson argues in the same tone to establish that the individual has no rights vis-à-vis the state but appears to establish the reverse when he expresses the view that *Sunni* political theory sees the ideal State as a co-operative partnership in which both governor and governed owe a common obedience to the revealed law. He continues and I quote at length:

> "since the duty of the Imam is to govern according to the dictates of the *Sharia'h*, two major qualifications are required of him. In the first place his own behaviour must be, outwardly at any rate, in conformity with the law; that is to say, he must possess the quality of *'adala* or high moral probity. In the second place, he must have a specialist knowledge of the law, the ability to interpret it and apply it; in other words, the quality of ijtihad (independent judicial reasoning). But in this respect the authority of the ruler is, in principle, no greater than that of any qualified *mujtahid.*(one who possesses the powers of

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[101] M. M. Ali, *The Concepts of Islamic Ummah and Sharia'h* (1992) Selangor Darul Ehsan: Pelanduk Publications, at pp. 62-65.

[102] Some of the writers who have contributed to this debate include, Donnelly, *The Concept of Human Rights, op. cit.*, n. 13; B.Tibi, *Islam and the Cultural Accommodation of Social Change* (1990) Boulder Co: Westview Press; Arkoun, *Rethinking Islam, op. cit.*, n. 21; Mayer, "Universal Versus Islamic Human Rights, *op. cit.*, n. 76; An-Naim, *Toward an Islamic Reformation, op. cit.*, n. 39 and many others.

[103] J. Donnelly, "Cultural Relativism and Universal Human Rights" (1984) 6 *HRQ* 400-419 at p. 411.

[104] These views also appear among others, in R. J. Vincent, *Human Rights and International Relations* (1986) Cambridge: Cambridge University Press at. 42; D. E. Arzt, "The Aplication of International Human Rights Law in Islamic States" (1990) 12 *HRQ* 202-230 at p. 206.

> *ijtihad*).... He is in no sense a legal sovereign of the type of the English Parliament, which has the power to make or unmake law..... Yet to represent, in actual fact, a real guarantee of individual liberties, the idea of the rule of law must carry with it certain implications. The first of these is, obviously enough, the recognition of certain individual liberties by the law itself. No such recognition is to be found in the *Sharia'h*; and the formulation of a list of specific liberties of the individuals against the State, in the manner, for example, of the American constitution, would in fact be entirely foreign to its spirit..... A distinction is indeed drawn between the rights of God (*huquq Allah*) and the rights of men (*huquq al ibad*), but most authorities would regard only property rights as belonging essentially to the latter class;"[105]

Schacht has challenged Coulson's views, and argues that Islamic law is indeed extremely individualistic in its entire structure and cites a number of instances in support of his contention. He states that in connection with the relationship of the individual and the state, a number of solutions have been provided by Islamic law that go decisively in favour of the rights of individual.[106] Schacht also singles out the Islamic law of inheritance, *waqf* (mortmain), contracts and private property to illustrate his point.

The head of state in Islam cannot be a judge in his own case.[107] The sanctity of property is an absolute rule for all schools of law, both between private persons and in their relationship with the state. Neither can the state confiscate private property.[108] Regarding the institution of *waqf*, Schacht is of the opinion that the way in which "it[*waqf*] functions technically, where the will of the founder is law and free from any of those legal restrictions which surround the concept of a charitable trust in English law for instance, is strictly individualist."[109] Similarly, the modification which the

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[105] N. J. Coulson, "The State and the Individual in Islamic Law" (1957) 6 *ICLQ* 49 at p. 50.

[106] J. Schacht, "Islamic Law in Contemporary States" (1959) 8 *AJCL* 133-147 at p. 138.

[107] M. Hamidullah, *Muslim Conduct of State* (1987) 7th edn., Lahore: Sh. Muhammad Ashraf.

[108] Schacht, "Islamic Law in Contemporary States" *op. cit.*, n. 94 at p. 140 This provision was explicitly formulated as early as the second century of the hegira (8th century A.D.) by Abu Yusuf in a treatise, *Kitab al-Kharaj*, Bulaq, Cairo 1302, at p. 34. He wrote at the command of the Caliph Haron-al Rashid on revenue and other matters of government. He says: "It is neither law for the Imam, nor has he the power, to give as a concession to anyone that which belongs to a Muslim or to a protected person, or to deprive them of anything which they possess, except he has a claim against them; in this case, he may exact from them that to which he has the right."

[109] Schacht, "Islamic Law in Contemporary States" *Ibid.* at p. 139.

Quran introduced into the agnatic system of inheritance that prevailed in Arabia, aimed indeed at giving to some classes of relatives who had hitherto been excluded from the succession, fixed shares in inheritance; but the way in which succession technically works, where every single heir succeeds directly to his individual share, is strictly individualist.[110] (With reference to the law of inheritance as being individualist, it must be argued that Schacht in his enthusiasm for defending the Islamic tradition, overlooks the fact that the truth perhaps lies somewhere between the two extremes. On the one hand, the individual has the right (power? using the Hohfeldian scale of rights) to dispose of his/her property to whomever he wishes, while on the other hand, there are limits placed on his/her power of disposition in the interest of maintaining familial/societal harmony.[111] The rule of *pacta sunt servanda* is one of the fundamental principles of Islamic law.[112] Its classical formulation in Islamic law is "the Muslims are bound by their stipulations."[113] Schacht sums up his discussion by arguing that :

> "Whatever may be the case of other features of traditional Islamic law, its fundamental concepts concerning sanctity of contracts, the respect for private property, and the relationship of the individual and state, are well in line with the trend of contemporary Western legal thought."[114]

Some Muslim scholars like Abdul Aziz Said however, have argued that Islam does not recognise the right of private ownership, only a 'right to use', since God owns all.[115] This right to use should subscribe to the norm of moderation and

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[110] *Ibid.*

[111] Islamic law of testamentary and intestate succession requires that an individual may, by will, dispose only upto one-third of the property, leaving the two-thirds for his/her heirs. It is a duty of the individual to provide for his/her wife, children, and kindred but he may also use his discretion by disposing off all his property by way of gift (*hiba*) during his lifetime.

[112] Passages from the *Quran* afford sanction as well as sanctity to this principle.For example: "O ye who believe, fulfil your undertakings"; "And those who keep their pledges and their covenant . . . these will dwell in gardens, honoured."

[113] Quoted by Schacht "Islamic Law in Contemporary States" *op. cit.*, n. 94 at p. 139.

[114] *Ibid.* at p. 147.

[115] Said, "Precepts and Practice of Human Rights in Islam" *op. cit.*, n. 20 at p. 71; Arzt, "The Application of International Human Rights Law in Islamic States" *op. cit.*, n. 92 at p. 207.

leadership of the Islamic system should regulate it and protect the community from excess.[116]

The significance of Schacht's argument insofar as individual human rights are concerned cannot be overstated. After all, the main contention of critics of the concept has been the problem of implementing a human rights regime in the arena of world politics where sovereign states are reluctant to afford legal personality to the individual. If the Islamic tradition accedes to the individual that *locus standi* vis-à-vis the State, how can a human rights discourse be absent within that legal tradition?

1.8 Human Rights as Hierarchical Entitlements? Rights of White, Free, Male, Elite in the 'Western' tradition and entitlements of Adult, Free, Male, Muslims in the Islamic:

The seventeenth and eighteenth century documents, proclamations and declarations heralding the present international human rights movement were, contrary to claims of universality, confined initially and for a long period thereafter, to a white, male, elite. The proponents of the American Declaration of Independence issued in 1776 stated: "We hold these truths to be self-evident, that all men are created equal; that they are endowed by their creator with certain unalienable rights, that among these are the right to life, liberty and the pursuit of happiness". But the authors of this Declaration excluded women from political participation, instituted property qualifications for voting,[117] sanctified slavery and accorded slaves the status of property.[118] The universalist claims of the American Declaration of Independence did not apply to black slaves, Native Americans, or women.[119] The feminist critique of human rights also centres around this argument of human rights being a product of the

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[116] *Ibid.*

[117] People still need to have a 'home address' to qualify as a voter in the United Kingdom today, which in a sense, appears to retain the spirit of the earlier property related law for the right to vote.

[118] A. B. Fields and W. Narr, "Human Rights a Holistic Concept" *op. cit.*, n. 5 at pp. 2-3.

[119] *Ibid.* Likewise, Locke accepted the institution of slavery and appeared to have no problems accepting restriction on political rights for people who did not own property. Neither did he argue that the rights of men and women were equal.

"dominant male half of the world, framed in their language, reflecting their needs and aspirations and exclusionary of women's concerns, needs and experiences.[120] One may argue therefore, that the concept of individual human rights as hierarchical entitlements of a few was conceived, and grew up, in a specific historical and geographical context and was used to justify political shifts in power within these contexts.[121]

In addressing the problem of human rights in Islam as hierarchical entitlements, Muslim scholars including Mohammed Arkoun,[122] Abdullahi Ahmed An-Naim,[123] Bassam Tibi[124] and Riffat Hassan[125] among others, have argued that any discussion on human rights in Islam must take account of the historical context within which the *Sharia'* was constructed and applied by the early Muslims. The Muslim scholar Khadduri stated that

> "Human rights in Islam, as prescribed by the divine law (*Sharia'*) are the privilege only of persons of full legal capacity. A person with full legal capacity is a living being of mature age, free, and of Moslem faith. It follows accordingly, that non-Moslems and slaves who lived in the Islamic state were only partially protected by law or had no legal capacity at all."[126]

A further qualification may be added here with regard to the status of women. Although women have full legal capacity under *Sharia'* in relation to most civil and

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[120] These contradictions in the universalist character of human rights emanating in Western tradition were challenged by Mary Wallstonecraft in her *Rights of Women and Rights of Men*. Her writing was shrugged off and considered unimportant until recently when the feminist movement gained momentum. See E. Brems, "Enemies or Allies? Feminism and Cultural Relativism as Dissident Voices in Human Rights Discourse" (1997) 19 *HRQ* 136 at 137. H. Charlesworth, C. Chinkin and S. Wright, "Feminist Approaches to International Law"(1991) 85 *AJIL* pp. 613-645 and others.

[121] A. B. Fields and W. Narr, "Human Rights a Holistic Concept" *op. cit.*, n. 5 at pp. 2-3.

[122] Arkoun, *Rethinking Islam*, *op. cit.*, n. 21.

[123] An-Naim, *Towards an Islamic Reformation, op. cit.*, n. 39.

[124] Tibi, "Islamic Law/Sharia', Human Rights and International Relations" *op. cit.*, n. 15.

[125] Hassan, *op. cit.*, n. 69.

[126] M. Khadduri, "Human Rights in Islam" (1946) *Annals of the American Academy of Political and Social Science* 243 at p. 79.

commercial law matters, yet they do not enjoy human rights to the full extent as afforded to Muslim men.[127]

The issue of human rights in the Islamic tradition with regard to women reveals that although they are provided complete equality in the ethic-religious (*ibadaat*) categories in *Quranic* legislation, women's status is inferior to men in the socio-economic (*muamalaat*) sphere of life.[128] With regard to women's human rights, equality in 'origin' (creation) is perhaps the most essential right, as this negates the popular story of Eve being born from the rib of Adam.[129] In the area of spiritual and moral rights and obligations imposed upon them, in their relationship to their Creator, and in the compensation prepared for them in the Hereafter,[130] women have been accorded complete equality, including accountability and responsibility.[131] In the socio-economic sphere, Islam has accorded women civil and property rights, including rights of inheritance. She has been guaranteed complete control over what she earns and possesses.[132] A woman is *sui juris* (legal person) and can make independent decisions as regards entering into a contract, and the acquisition, disposal and alienation of property. The property laws of the *Quran* guarantee women the right to have full possession and control of their wealth including dower, during marriage and after divorce.[133] In the area of family law too, certain provisions afford women complete equality. For example, the right to enter marriage of her own will, on attaining adulthood, without an intermediary (*wali*). [134]

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127 An-Naim, *Towards An Islamic Reformation op. cit.*, n. 39 at p. 171.

128 John Esposito uses a system of hierarchisation of human rights to explain women's human rights in Islam. For a detailed discussion see, J. Esposito, *Women in Muslim Family Law* (1982) Syracuse: Syracuse University Press at pp. 106-108.

129 This story of the creation is not present in the *Quran* or the *Hadith*, but has somehow cropped up in religious literature to subvert the equality verses of the *Quran* which states thus: "He created you from one being, then from that (being) He made its mate." The *Quran*, verse 39:6

130 eg., as stated in *Quranic* verses 33:35; 9:71; 40:40; 9:72; 48:5; 57:12; 3:195; and others.

131 See the *Quran*, verse 33:35; 16:97; 4:1.

132 The *Quran*, verse 4:7; 4:32 and 3:285.

133 The *Quran*, verses 4: 7; 4:11; and 4:12 as regards inheritance and bequeathal rights of women and 4:4; 4:24; 4:20; 4:21; 2:229 for full possession and control over their wealth.

134 This however is a controversial right since under the Shafi law a women always needs a guardian even though she has attained puberty.

But, as mentioned above, in the category of rights dealing with the socio-economic sphere of life, the *Quran* accords more rights to men, but these rights have been framed so as to appear as corrective of wider forms of discrimination in pre-Islamic Arabia and/or seen as protecting women along with other disadvantaged sections of society. It is submitted that it is these categories, that initially were meant to be the starting point of a journey towards equal rights, became fossilised and immutable, resulting in perpetuation of gender hierarchies in Islam. For example, women inherit half the share that men are entitled to,[135] the testimony of a woman is worth half that of a man in financial transactions reduced to writing.[136] This incapacity is not only confined to commercial transactions reduced to writing; in fact in cases wherever *hadd* punishment may be inflicted, the testimony of women and non-Muslims is not accepted.[137] The laws of marriage within Islam enjoin strict monogamy on women whereas men may marry upto four wives, and also confine her to a Muslim spouse, while men may marry from among "*kitabia*"[138] women.[139]Some *Quranic* laws that regulate the structure of authority in the Muslim household stipulate that within the context of marriage and as a member of the husband's household, the wife is his responsibility and hence under his authority. The *Quran* thus endows the man both with authority over the woman in the family setting, coupled with the obligation to provide for her by way of material support.[140] The classic verse confirming male superiority (or at least perceived as such by most Muslims) is Verse 4:34 which arguably even gives husbands to beat their wives for disobedience.[141]

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[135] The *Quran*, verse 4:11.

[136] The *Quran*, verse 2:282.

[137] For details, see for example, the Hudood Ordinances, 1979 promulgated by General Zia of Pakistan. For adverse implications and human rights violations of women as a result of these laws see, A. Jehangir and H. Jilani, *The Hudood Ordinances: A Divine Sanction?* (1990) Lahore: Rohtas Books, and R. Mehdi, "The Offence of Rape in the Islamic Law of Pakistan" (1990) 18 *IJSL* 19-29 and S. S. Ali, "Gender, Islamic Fundamentalism and Human Rights: A case study of Pakistan" (1991) 2 *WAFJ*.

[138] *Kitab* literally means book. *Kitabia* means women of the book. Here it implies women professing one of the revealed religions i.e., Christainity, Judaism.

[139] The *Quran*, verse 2:221 and 5:5.

[140] B. Stowasser,"Religious Ideology, Women, and Family" in B. Stowasser (ed.), *The Islamic Impulse* (1987) London: Croom Helm at p. 293.

[141] Muslim female scholars such as Riffat Hassan, "On Human Rights and the Quranic Perspectives" *op. cit.*, n. 69; Aziza Al-Hibri, "A Study of Islamic Hersory or How Did We Ever

Islamic law also accords the Muslim male a unilateral right to dissolve the marriage tie without assigning any cause [142] and without the interference of the court. [143] On the other hand it confers on a woman the right to seek dissolution of the marriage tie by foregoing her dower, with the difference that the woman has to convince the court of her fixed aversion and irretrievable breakdown of the marriage (*khula*).[144]

In summary, it may be argued that in the area of women's human rights, a literal application of some verses of the *Quran* and *Hadith* has resulted in laws that are discriminatory to women. These verses, are however open to a variety of interpretations; serious efforts must be made to legislate on the basis of interpretation of the religious texts that are favourable to women's human rights. The potential to create laws based on equality is present in the Islamic tradition and must be explored.

1.9 Concluding Remarks

An analysis of the conceptual foundations of human rights from a comparative perspective leads one to the conclusion that there is a human rights discourse within the Islamic tradition. Further, that discourse has certain similarities with the current human rights concepts emanating from the 'West' and incorporated in international human rights instruments. A number of obstacles may be identified as having a bearing on the problem of human rights discourse in Islam. Participants of the discourse of human rights in the Islamic tradition usually pursue three main lines of arguments.

Get into this Mess?" (1982) *WSIF* 207; Amina Wadud Muhsin and others have challenged this male interpretation and presented a feminist interpretation of this verse. See, A. Wadud-Muhsin, "The Quran, Sharia' and Citizenship Rights of Muslim Women in the Umma" in N. Uthman (ed.,) *Shari'a Law and the Modern Nation-State* (1994) Kuala Lumpur: Sisters in Islam at pp. 77-80.

[142] In a famous Pakistani case, *Khurshid Bibi vs. Muhammad Amin* PLD 1967 SC 97, their Lordships were of the view that *Talaq* is not an unfettered right of the husband as the *Quran* in 4:35, provides for the appointment of arbiters to curtail the unbridled exercise of this right. These fetters are hardly effective if the husband is determined to go ahead with the pronouncement of divorce.

[143] Despite this privilege accorded to the husband in traditional Islamic law, many Muslim countries have legislated certain procedural requirements that have to be undertaken to finalise the divorce. See for instance, the Muslim Family Laws Ordinance, 1961 of Pakistan.

[144] PLD 1967 SC 97.

There are those (usually) Muslim scholars who engage in the dialogue as apologists for the Islamic tradition, and are unwilling to take on board the diversity within that legal tradition and will only use in their arguments, traditional, conservative opinions.[145] Then there are writers who, though conceding some reference to human rights in Islam, argue that there is no worthwhile discourse to engage in. Such writers primarily use as examples the literal, traditional, simplistic approach of Muslim writers on the subject citing legal documents of countries such as Saudi Arabia and the Sudan which are not representative of the true spirit of Islam, being, in this writer's opinion, unrepresentative authoritarian regimes.[146] The category of scholars who write in a true comparative spirit willing to explore the diversity of Islamic jurisprudence and attempting to comprehend the concept of human rights in the Islamic tradition is a very small minority when compared to the total number of Islamic jurists. [147]

The human rights discourse in the Islamic tradition has not been approached in the true intellectual spirit of engaging in a dialogue of "equals". As Edward Said remarks: "The essence of this tradition is to subject Islamic law to European intellectual judgement, by seizing the 'superior location' made available by European power."[148] One of the reasons for this attitude may well be the colonial experience which almost all Muslim states underwent and the period of utter decline that the economic, political and social institutions of Muslims faced. It is also important to bear in mind that the post-colonial Muslim states were mostly ruled by unrepresentative oppressive regimes where it did not favour the latter to acknowledge the concept of human rights. It is also pertinent to mention here that in some ways the concept of human rights as espoused by Islam was unpalatable to a predominantly

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145 Writers such as A. A. Maududi, the founder of the right wing political party in Pakistan, the Jama'at-i-Islami.

146 See the writings of Mayer, *Islam and Human Rights, op. cit.*, n. 15; Donnelly, *The Concept of Human Rights, op. cit.*, n. 13; and many others

147 F. Rahman, *Islam and Modernity* (1982) Chicago: Chicago University Press; F. Rahman, "Status of Women in the Quran" in G. Nishat (ed.,) *Women and Revolution in Iran* (1983) Boulder, Co: Westview Press, pp. 37-54; N. Coulson, *A History of Islamic Law, op. cit.*, n. 41; J. Schacht, *An Introduction to Islamic Law* (1964) Oxford: Clarendon Press; An-Naim, *Towards an Islamic Reformation, op. cit.*, n. 39, are some of the writers on the subject.

148 E. Said, *Orientalism* (1978) Harmondsworth: Penguin.

capitalist 'West' as it contains within it strong elements of economic, social and cultural and third generation rights. As has been pointed out: "The formal structure of Islamic law is individualist, and that one of its material aims has been social improvement, ought not to obscure this important fact."[149]

The fact that the *Quran* itself was revealed progressively over a period of almost 23 years, has evolution of ideas and progress built into it. In fact, progression appears to be the philosophy of the *Quran.* The apparent vagueness of many *Quranic* injunctions, the plurality of its legal tradition, its susceptibility to varying interpretation makes it appear a very fertile ground for innovation and development of legal rules to keep abreast of the times.[150]

In summation it may be argued that although the concept of human rights as enunciated in post-1945 human rights documents emanating mainly from the United Nations but also illustrated by other human rights regimes such as the European Convention on Human Rights, may appear to reflect a purely 'Western' human rights discourse in its formulations, yet non-western traditions such as the Islamic tradition, clearly have equivalents. There is a strong case for recognising and working towards universal human rights discourse across these diversities.

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149 Schacht "Islamic Law in Contemporary States" *op. cit.*, n. 94 at p. 138.

150 This possibility is particularly important to explore in the area of women's human rights, a subject that will be taken up in subsequent chapters of this study.

CHAPTER II

WOMEN'S HUMAN RIGHTS IN ISLAM: TOWARDS A THEORETICAL FRAMEWORK

2.1 Introduction

The purpose of this chapter is to highlight the gap between what may be described as the Islamic 'ideal' of women's human rights as opposed to the contextual realities of the status of women in various Muslim jurisdictions today. As indicated in chapter I of the present study, rights afforded to women in the Islamic tradition emanate from its main sources, i.e., the *Quran*, *Hadith*, *Ijma* and *Qiyas*. Yet, the body of principles informing Islamic law, collectively known as the *Sharia'* do not form a homogenous entity as these depend on interpretations of the sources, particularly the *Quran* and *Hadith*, influenced by cultural and ethnic differences, historical contexts, colonial pasts, the sect or school of jurisprudence (*madhab*) that a particular community subscribes to, as well as political and economic policy of Muslim States.

It has been argued that the basic tone and complexion of Islam is reformative, enjoining upon people equity and justice for all.[1] The ethical voice of the *Quran* is said to be egalitarian and non-discriminatory.[2] At the same time, it concedes to resourceful, adult Muslim men, as the privileged members of society, responsibility to care for (and exercise authority over), women, children, orphans, and the needy. The *Quran* therefore also contains verses validating the creation and reinforcement of hierarchies based on gender and resources. But these verses are very few, not

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1 For this line of argumentation see generally, F. Rahman, "Status of Women in the Quran" in G. Nashat (ed.,) *Women and Revolution in Iran* (1983) Boulder CO: Westview Press; J. L. Esposito, *Women in Muslim Family Law* (1982) Syracuse: Syracuse University Press; A. al-Hibri, "A Study of Islamic Herstory: Or how did we ever get into this mess?" (1982) 5 *WSIF*; B. Utas (ed.,) *Women in Islamic Societies* (1983) London: Curzon Press; F. Hussain (ed.,) *Muslim Women* (1984) New York: St. Martin's Press; F. Mernissi, *Beyond the Veil* (1987) Bloomington: Indiana University Press; F. Mernissi, *Women and Islam* (1991) Translated by Mary Jo Lakeland, Oxford: Basil Blackwell; L. Ahmed, *Women and Gender in Islam: Historical Roots of a Modern Debate* (1992) New Haven: Yale University Press; A. A. An-Naim, *Toward an Islamic Reformation* (1990) Syracuse: Syracuse University Press and R. Hassan, "An Islamic Perspective" in J. Belcher (ed.,) *Women, Religion and Sexuality* (1990) Geneva: WCC Publications.

2 *Ibid.*

exceeding 6 out of a total of 6666 that make up the text of the *Quran*. Yet it is difficult to understand why and how these 6 verses outweigh the remaining 6660, and the position of women in Islam appears to be determined solely on rules derived from a literal and restrictive reading of these few verses.[3]

A number of scholars have challenged the restrictive interpretations of the religious text in Islam. They argue that norms in the Islamic tradition, discriminatory to women, are a result of the fact that historically it was men who acted as commentators and interpreters of the religious texts as well as legislators, jurists and judges and people in power.[4] It has also been observed that latter day legal, political and economic developments in the Muslim world too contributed to a perpetuation of an Islamic legal tradition seeking to uphold gender inequality as the dominant theme of the *Quran*.[5] These scholars have attempted to present alternative interpretations to the *Quranic* verses that declare the inherent superiority of Muslim men, by arguing for a radically different construction to be placed on them. The present chapter explores this pluralistic Islamic legal tradition based on varying interpretations of the religious text in an attempt to develop a theoretical framework for analysing women's human rights in Islam.

2.2 From the Saintly to the Evil? Conflicting Images of Women in *Quran* and *Hadith* Literature and Implications for Women's Human Rights in Islam

Developing an analytical framework of women's human rights in Islam implies going beyond the textual sources of law to capture the perception of the 'feminine' in

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[3] These *Quranic* verses include the following: 2:221; 2:228; 2:282; 24:30; 4:3; 4:34 and will be dealt with below.

[4] *Op. cit.*, n. 1.

[5] The Muslim world has had more than its fair share of authoritarian regimes where the voice of the people was rarely heard. Traditionally, women were confined to the home and public life, i.e., matters of State, government and making interventions in public life was considered outside her domain. The last three centuries also saw the vast majority of Muslim countries colonised and hence suppressed under alien rule. The post-colonial era brought its own political and economic problems. It is not surprising therefore that, in countries where the male population found itself unable to share in governance, women's participation and empowerment was far more problematic.

the Islamic tradition.[6] But this tradition, it may be argued, was not and indeed could not have been a complete break with the immediate past and was in fact accompanied by at least some historical and cultural 'baggage' of pre-Islamic Arabia. Thus, despite an entirely new ideological perspective, Islam's view of the feminine was influenced by the very culture it had come to change.[7]

There can be no doubt that generally speaking, the *Quranic* images of women are favourable, particularly when studied against the background of the *Jahilliyya.*[8] Both her social status and legal rights were vastly improved by express injunctions in the *Quran*, some granting her complete equality with men. Other pronouncements aimed at protecting her in a predominantly male environment as well as corrective of practices affecting her position adversely.[9] It must also be acknowledged, however, that *Quranic* laws, while improving the status of women, do not establish political, social, or economic equality of the sexes, as "Men are a degree above women".[10]

But it has to be acknowledged that the tone of the *Quranic* verses creating the gender hierarchy, does not represent women in any derogatory manner; rather kindness and fairness of treatment is enjoined. The only concept in the *Quran* relating to women that may be construed as negative is that of a woman's potential for becoming *nashiz* (disobedient). This term occurs prominently in verse 4:34 of the

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6 For a detailed discussion on the subject see R. W. J. Austin, "Islam and the Feminine" in D. MacEoin & A. Al-Shahi (eds.,) *Islam in the Modern World* (1983) New York: St. Martin's Press.

7 *Ibid.*; Al-Hibri believes that by preaching the equality of all human beings, Islam struck at the heart of patriarchy, but that through a process of co-option, patriarchy was able to devour Islam and quickly make it its own. Thus women's position suffered a setback. See Al-Hibri, "A Study of Islamic Herstory or How Did We ever Get Into This Mess?" in A. Al-Hibri (ed.,) *Women and Islam* (1982) Oxford: Pergamon Press, pp. 207-219. Other Muslim feminists agree with Al-Hibri, for example, Fatima Mernissi and Leila Ahmed. Modernist Muslim scholars, Fazlur Rahman and Abdullahi Ahmed An-Naim also subscribe to the view that a clean break with the pre-Islamic Arab tribal culture was not possible; hence the advancement in the position of women was not achieved to the optimum levels as envisaged by Islam.

8 The term *jahilliya* denotes ignorance, and is used to describe the period immediately preceding Islam.

9 See section below.

10 The *Quran*, verse 2:228. Other verses pointing towards male superiority include Verse 4:34, highlighting the fact that men are in charge of women; Verse 2:282, that the evidentiary value of a woman's testimony is half that of a man's; Verse 24:30 that women remain inside their houses in seclusion, and to veil in case they had to venture out of their houses; Verses regulating dissolution of marriage where despite a number of safeguards for women inequality of men and women remains as the husband can repudiate his wife, whereas she cannot do the same.

Quran, where men are permitted to "beat lightly" women who are disobedient. There is no comparable injunction regarding a "disobedient" man, hence the question as to why only women have been singled out for disobedience? The wider implications of this concept are evident from commentaries of this verse validating restrictions upon women, keeping them "in control", lest they become disobedient. The dictates of the *Quran* were thus made the basis of interpretation and hence accommodation, adaptation, and adjustment to later reality and contexts of a rapidly changing Islamic society.[11]

Hadith literature mirrors and further heightens this tension and conflict regarding women where her images span "the whole spectrum from the saintly to the evil and unclean."[12] At one end of the spectrum are images of saintly, extraordinary women, favoured by God and blessed with unusual powers and extraordinary experiences. These are the wives of the Prophet Mohammed to whom the term "*Ummahat al-Mu'minin*" (Mothers of the Believers) is applied as a finite group. It is important to note that *Hadith* literature lays emphasis on the fact that by virtue of this title, the wives of the Prophet Mohammed are elevated to a position above male believers. As regards ordinary women, Stowasser is of the view that the general attitude reflected in the *Hadith* is a positive one. She states that:

> "It (*Hadith*) elaborates on the *Quranic* teachings regarding spiritual equality of women and men, and provides detailed information on women who perform all the religious duties enjoined by Islamic doctrine, thereby proving their full membership in the faith, such as prayer, almsgiving, the freeing of a slave, ritual slaughtering of sacrificial animals, and fasting (although the latter, according to some, should be done with the husband's permission except during *Ramadan* when the husband's consent is not necessary). As for the holy war, its equivalent is the blameless pilgrimage. Regarding martyrdom, the woman who dies in childbirth is a martyr. Women also build mosques, and can even act as prayer leaders."[13]

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[11] B. Stowasser, "The Status of Women in Early Islam" in F. Hussain (ed.,) *Muslim Women* (1984) St. Martin's Press at p. 25.

[12] *Ibid.*, at p. 29; Austin, *op. cit.*, n. 6.

[13] *Ibid.*, at p. 30. Stowasser relies on the major compilations of *hadith* literature in her research including Abu Da'ud, *Sunan* (1292) Cairo; Ahmad ibn Hanbal, *Musnad*, 6 vols. (1313) Cairo; al-Bukhari, *Sahih*, vols. I-III, L. Krehl (ed.,) (1862-1868), Leiden; vol. IV, Th. W. Juynboll (ed.,)

Marriage is advocated by the Prophet Mohammed in numerous *Ahadith* and declared a meritorious institution. A wife should be given her full share of sexual pleasure by her husband, while the wife must not shun her husband's bed, and if she denies herself to him and he is annoyed because of her denial, "the angels curse her till dawn." *Hadith* literature also declares that women should be cared for and treated with kindness by their husbands. They should be given the right to indulge in their own idiosyncrasies, since a "woman is like a rib which will snap if one tries to straighten her natural crookedness."

But the framework of an essentially patriarchal social order impacted on the positive images of women and the nature of women came to be perceived in a different light. This perception is therefore also highlighted in *Hadith.* Thus some *Hadith* describe women as morally and religiously defective; that women, houses and horses are ominous; prayer is interrupted if dogs, donkeys and women pass too closely by the place of prayer. Women make up the larger part of the inhabitants of Hell, because of their unfaithfulness and ingratitude towards their husbands; a people that entrust their leadership to a woman will not prosper. At the same time, women are committing a sin if they leave the mannerisms and confine of their sex. Thus the Prophet Mohammed is supposed to have pronounced a curse on women who behave and act like men.[14]

The above description of women in *Hadith* literature is only a brief but representative sample of the conflicting images of women in the religious texts of Islam. The relevance of these conflicts for women human rights cannot be overstated as it shows that accommodating the principle of equality in an Islamic human rights scheme involves dealing with two aspects in the Islamic tradition, one egalitarian and the other mandating sexual and religious discrimination, as well as mixed reactions of contemporary Muslims to these two aspects.[15] The question that Mayer and other

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(1907-1908) Leiden; Ibn Sa'ad, *Tabaqat* (1904-1908) Leiden prepared under the direction of E. Sachau.

[14] *Ibid.*, at p. 32.

[15] A. E. Mayer, *Islam and Human Rights Tradition and Politics* (1995) Boulder CO: Westview Press at p.79; S. Mahmassani, "Adaptation of Islamic Jurisprudence to Modern Social Needs" in

writers on Islamic law pose is, why Muslims (and probably other religious and cultural traditions as well), have made such selective and scarce use of the ethical dimension of regulatory norms favouring equality and non-discrimination for women. For instance, nowadays there is general agreement among Muslims that slavery is unacceptable, and the large body of the *sharia'* regulating it has been effectively discarded.[16] Why is it then, that Muslims are so deeply divided on the question of whether legal distinctions based on sex and religion have become similarly superseded, and need to be addressed in the light of changing circumstances and needs of the community? Why do they so vigorously disagree about whether a legal system in which women and non-Muslims were given equal rights with Muslim men would be compatible with the requirements of Islam? There are no easy or straightforward answers to these questions. But an analysis of women's human rights in Islam grounded in the two basic sources of Islamic law, the *Quran* and *Hadith*, in conjunction with the science of exegesis (*tafsir*) of the *Quran*, may be employed in developing a theoretical framework leading to the view that the various categories of rights and privileges are not immutable but subject to an evolutionary process. This perception in turn may provide space for the argument that equality between the sexes is possible within the Islamic legal tradition.

2.3 *Ibadaat* and *Muamalaat*: Esposito's Hierarchical Notion of Rights in the Islamic Tradition

In this section it is proposed to look into women's human rights in Islam based on an hierarchical notion of rights as developed by John Esposito. As the very word of God, the *Quran* is the fundamental textual source of Islamic law. Esposito states that the primary legal value of the *Quran* stems from the fact that it is an ethico-

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J. Donohue and J. Esposito (eds.,) *Islam in Transition. Muslim Perspectives* (1982) New York: Oxford University Press at pp. 181-187; Also see views of writers at *op. cit.*, n. 1.

[16] One would find it extremely difficult to come across any constitution or law in any part of the Muslim world sanctioning slavery today, despite the fact that the *Quran* contains clear texts regulating the practice. See, on this point Rahman, *op. cit.*, n. 1.

religious revelation and acts as the source book of Islamic values from which specific regulations of substantive law (*furu-al-fiqh*) are derived through human effort.[17]

Esposito believes that this task may be achieved through Muslim exegesis which is a systematic study of the value system of the *Quran* and the hierarchization of its ethico-religious values.[18] This method would resolve the problem of *naskh* (abrogation, the suppression of one *Sharia'* rule by a later one where divergent regulations exist) as well as supply a reasonable explanation for the comprehensiveness of the *Quran*. Most importantly, it would provide a context within which one could understand the value of specific *Quranic* regulations by shifting the emphasis beyond the specific regulations to its intent, to the value it sought to uphold.[19] Thus the *Quranic* prescription has two levels of importance - the specific injunction or command, whose details may be relative to its space and time context, and the ideal or *Quranic* value, whose realisation the specific regulation intends to fulfil. Since the task of the Muslim community is the realisation of these *Quranic* values, the goals of jurists is to ensure that *fiqh* regulations embody these *Sharia'* values as fully and perfectly as possible.

Verses from the *Quran* have been used by different factions to both support a woman's subservience to a man and to defend her rights to equality. This seeming contradiction can therefore be resolved by an analysis of the relevant *Quranic* verses through a system of "hierarchization of *Quranic* values" used by John Esposito to deal with human rights of women in Islam. This method, it is stated, is reminiscent of the process by which *Quranic* values were first applied to newly encountered social situations in the formative period of Islam by differentiating between the socio-economic and the ethic-religious categories in *Quranic* legislation.[20] While women's status is inferior to men in the former, they are full equals in the latter as to the spiritual and moral obligations imposed upon them, in their relationship to their

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[17] Esposito, *op. cit.*, n. 1 at p.106.
[18] I. R. al-Faruqi, "Towards a New Methodology of Quranic Exegesis" *Islamic Studies* (1962) 35.
[19] Esposito, *op. cit.*, n. 1 at p. 107.
[20] *Ibid.*

Creator, and in the compensation prepared for them in the Hereafter.[21] While the status difference of men and women in the socio-economic sphere belongs to the category of *Muamalaat* (social relations), which are subject to change, their moral and religious equality belongs to the category of *Ibadaat* (religious duties towards God), which are immutable.[22] By applying the principle of "hierarchization" of *Quranic* values, the Muslim reformers argue that the moral and religious equality of men and women "represents the highest expression of the value of equality"[23] and therefore constitutes the most important aspect of the *Quranic* paradigm on the issue. Keeping this scheme of "hierarchization" in mind, it is possible then to categorise women's human rights in Islam.

A word of caution needs to be included here. Although Esposito's attempt at hierarchization of rights within the Islamic tradition is an important step in his endeavour to develop a modern framework for achieving equality for the sexes, we must not lose sight of the fact that in his attempt to realise the legislative value of *Quranic* verses, he places emphasis on exegesis or *tafsir*. This, Esposito believes is due to the necessity to get at the motive, intent, or purpose behind *Quranic* passages. This approach reasserts the original influence of *Quranic* values in the early development of law and, as such, seeks to renew the process by which *Quranic* values were applied to newly encountered social situations in the first centuries of Islamic legal history.[24] But it is submitted that the process of exegesis itself (as will be discussed below) resulted in some restrictive interpretations to *Quranic* verses regarding the status of women.

2.4 Women's Human Rights in Islam As Categories Of Entitlements

Side by side with the "hierarchization" of women's human rights in Islam, it is also proposed to use a method of "categorisation" of these rights. Hevener classifies

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[21] For example, as stated in *Quranic* verses 33:35; 9:71; 40:40; 9:72; 48:5; 57:12; 3:195; and others.

[22] Esposito, *op. cit.*, n. 1 at p.108.

[23] *Ibid.*

[24] *Ibid.*

international human rights instruments relating to women, as having undergone a progressive journey through three stages, each representing international consensus on women's human rights.[25] These categories are: **protective, corrective, and non-discriminatory**. The protective category is one where laws are formulated which reflect a societal conceptualisation of women as a group which either should not or cannot engage in specified activities. They imply that women are a subordinate, weak and disadvantaged group in society; hence the need to extend protection of unlimited duration.[26] The second category is the corrective category which also identifies women as a separate group which needs separate treatment. But the aim of the corrective provisions is "to alter and improve specific treatment that women are receiving, without making any overt comparison to the treatment of men in the area. They may be of limited duration, depending on the time period required to achieve the alteration desired."[27] Finally, the non-discriminatory, sex-neutral, category includes provisions which reject a conceptualisation of women as a separate group, and rather reflect one of men and women as entitled to equal treatment. The concept is one which holds that biological differences should not be a basis for the social and political allocation of benefits and burdens within a society. These provisions treat women in the same manner as men.[28] For the purpose of analysing women's human rights in Islam, it is proposed to add here a fourth category, i.e., the **discriminatory** category wherein certain injunctions, rules and regulations of the *Quran* and *Hadith* literature may be placed, where women and men clearly appear unequal. In the remaining part of this section, it is proposed to use a combination of the methods of "hierarchization" and "categorisation" of women's human rights to discuss these within the Islamic tradition.

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[25] See N. Hevener, *International Law and the Status of Women*, (1983) Boulder, CO: Westview Press.
[26] *Ibid.*, at p. 4.
[27] *Ibid.*
[28] *Ibid.*

2.4.1 The non-discriminatory category of rights, *Ibadaat* and women's human rights

A number of writers on Islamic law,[29] believe that the basic ethical norm of the *Quran* is equality between the sexes. This equality comes across most prominently in issues such as the creation of man and woman, moral and spiritual obligations, and reward and punishment. The Islamic tradition is clear that God created men and women from one fundamental substance. As the *Quran* says:

> "He created you from one being, then from that (being) He made its mate".[30]

At the same time *Hadith* literature also presents instances where the principle of complete equality has been espoused. The Prophet Mohammed is reported to have said:

> "All people are equal, as equal as the teeth of a comb. There is no claim of merit of an Arab over a non-Arab or of a white over a black person: Only God-fearing people merit a preference with God. Thus men and women are equal."[31]

In the *Quran*, Adam and Eve are held jointly responsible for the transgression and consequent expulsion from paradise.[32] Verse 7:18-26 is self-explanatory in this regard:

> "He (God) said (to *Iblis*): Go forth from hence, degraded banished. As for such of them as follow thee, surely I will fill hell with all of you. And (unto man): O Adam! Dwell thou and thy wife in the Garden and eat from whence ye will, but come not nigh this tree lest ye become wrongdoers. Then Satan whispered to them that he might manifest unto that which was hidden from them of their shame, and he said: Your Lord forbade you from this tree only lest ye should become angels or become immortals. And he swore to them (saying): I am a

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[29] Including Esposito, Rahman, Hassan, Taha, An-Naim, Mernissi, Al-Hibri, and Stowasser.
[30] The *Quran*, verse 39:6.
[31] The last address of the Prophet Mohammed to the Muslims on the occasion of the *Hajjat-ul-Wida* (the last pilgrimage).
[32] Stowasser, *op. cit.*, n. 11 at pp. 22-23.

> sincere adviser unto you. Thus did he lead them on with guile. And when they tasted of the tree, their shame was manifest to them and they began to hide (by heaping) on themselves some of the leaves of the Garden. And their Lord called them (saying): Did I not forbid you from that tree and tell you: Lo! Satan is an open enemy to you? They said: Our Lord! We have wronged ourselves. If Thou forgive us not and have not mercy on us, surely we are of the lost! He said: Go down (from hence), one of you a foe to the other. He said: There shall ye live, and there shall ye die, and thence shall ye be brought forth. O Children of Adam! We have revealed unto you raiment to conceal your shame, and splendid vesture, but the raiment of restraint from evil, that is best. This is of the revelations of Allah, that they may remember."

On the ethico-religious level (or *Ibadaat* on Esposito's hierarchy of rights), the position of men and women are on an equal standing, "both as to their religious obligations toward God and their peers as well as their consequent reward or punishment".[33] In support of this argument, Esposito cites verses 9:71-72 of the *Quran* which state thus:

> "The Believers, men and women, are protectors one of another: they enjoin what is just, and forbid what is evil; they observe regular prayers, practice charity, and obey God and His Apostle. On them will God pour His mercy ... God hath promised to believers men and women, gardens under which rivers flow, to dwell therein, and beautiful mansions to dwell in gardens of everlasting bliss".

Similarly, the following verses also reflect equality in moral and spiritual obligations:

> "For Muslim men and Muslim women, for believing men and believing women, for devout men and devout women, for true men and true women, for men and women who are patient and constant, for men and women who humble themselves, for men and women who give charity, for men and women who guard their chastity, and for men and women who engage in God's praise, for them has God prepared forgiveness and great reward".[34]

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[33] Esposito, *op. cit.*, n. 1 at p. 107; M. M. Taha, *The Second Message of Islam*, translated by A. A. An-Naim (1987) Syracuse: Syracuse University Press, at p. 139 where he argues that "Islam's original precept is complete equality between men and women."

[34] The *Quran*, verse 33:35. Taha, in support of the equality argument also cites other *Quranic* verses. These include: 40:17 "Today each soul is rewarded for what it earned, without unfairness.

"Whoever doeth right, whether male or female, and is a believer, him verily We shall quicken with good life."[35]

Along with equal rewards in the hereafter, equality in punishment is enjoined for violating Divine laws. So, for instance indulging in sexual relations outside marriage brings with it severe punishment for both men and women as stated in verses 24:2-4 below:

"The adulterer and the adulteress,
Scourge each one of them
(with) a hundred stripes.
And let not pity for the
Twain withhold you from
Obedience to Allah, if ye
believe in Allah
And the last day.
And let a party of believers witness their punishment.
The adulterer shall not
marry save an adulteress
Or an idolateress, and the
adulteress none shall marry none
Save an adulterer
or an idolater.
All that is forbidden unto believers".

Some *Hadith* literature and a few *Quranic* verses however in some areas tends to deviate from, and consequently undermine the afore-mentioned non-discriminatory *Quranic* norms. For instance, as opposed to *Quranic* verses (cited above), where both men and women have been mentioned separately as being absolutely equal in virtue and piety, a very famous and historically important *Hadith*, contained in the most authoritative *Hadith* collections, the Prophet Mohammed is quoted as having said to some women that they were inherently inferior to men both in matters of religion and

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Surely, God is swift at reckoning." Verse 74:38 "Every soul is pledged for what it has earned." Verse 6:164 "Nor does any bearer of burden bear the burden of another, no matter how overburdened and not even of a kin. You are to warn (those) who sincerely fear God and perform the prayer. And who pay alms (*zakah*) is cleansing himself, and to God (you) shall return."

[35] The *Quran*, verse 16:97.

intelligence. Asked how they were weak in religion, he allegedly replied, "Because when you menstruate, you are required neither to pray nor fast." Fazlur Rahman states that this *Hadith* is contradictory to the *Quranic* verses on equality of the sexes in matters of piety and religious merit.[36] In response to the further question as to why they (women) were inferior in intelligence, the Prophet Mohammed is reported to have said, "Is not your evidence (in a court) half of the value of men's evidence?" The women replied, "Yes."[37]

Even though the *Quranic* verse 2:282 has been used to lay down a rule that the value of the testimony that a woman gives in court in financial transactions has to be corroborated by another woman, thus leading to the commonly-held notion that the evidence of two women is equal to that of a single male, yet there are instances where the evidence of one woman outweighs that of a man. A woman's oath in cases where her husband accuses her of adultery is enough to avert punishment. Verses 24:6-9 state the following:

> "As for those who accuse their wives but have no witnesses except themselves; let the testimony of one of them be four testimonies, (swearing) by Allah that he is of those who speak the truth; and yet a fifth, invoking the curse of Allah on him if he is of those who lie. And it shall avert the punishment from her if she bear witness before Allah four times that the thing he saith is indeed false. And a fifth (time) that the wrath of Allah be upon her if he speaketh the truth."

Islam has accorded women civil and property rights, including rights of inheritance. She has been guaranteed complete control over what she earns and possesses:

> "And their Lord hath heard them (and He sayeth): Lo! I suffer not the work of any worker, male or female, to be lost. Ye proceed one from another"[38]

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[36] Rahman, *op. cit.*, n. 1 at p. 41.
[37] *Ibid.*
[38] The *Quran*, verse 3:285.

> "Unto the men belongeth a share of that which parents and kindred leave, and unto the women a share of that which parents and near kindred leave".[39]

> "Unto men a fortune from that which they have earned, and unto women a fortune from that which they have earned".[40]

The above-mentioned *Quranic* verses thus create an hierarchy of non-discriminatory rights. Some other examples of non-discriminatory laws granting Muslim women complete equality with men are: that she is *sui juris* (legal person) and can make independent decisions as regards entering into a contract, and the acquisition, disposal and alienation of property. The property laws of the *Quran* guarantee women the right to have full possession and control of their wealth including dower, during marriage and after divorce.[41] In the sphere of family law too, certain provisions afford women complete equality. For example, the right to enter marriage of her own will, on attaining adulthood, without an intermediary (*wali*).[42]

Contrary to popular belief, there is nothing in any verse of the *Quran* barring women from participation in public and political life, including the right to vote, holding public office such as head of State, judicial office etc. Many *Ahadith* however, declare some professions as out of bounds for women, one such being that of head of State. For instance, one of the most oft-quoted *Hadith* runs thus: "Those who entrust their affairs to a woman will never know prosperity."[43] This *Hadith* barring women from public life first appeared on the Muslim political scene about 25 years after the death of the Prophet Mohammed and was narrated by one Abu Bakra. He recollected

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[39] The *Quran*, verse 4:7.

[40] The *Quran*, verse 4:32.

[41] The *Quran*, verses 4:7; 4:11; and 4:12 as regards inheritance and bequeathal rights of women. and 4:4; 4:24; 4:20; 4:21; 2:229 for full possession and control over their wealth.

[42] This however is a controversial right since under Shafei law a women always needs a guardian to contract her in marriage even on attaining puberty. Even under Hanafi law it is subject to debate as seen in the recent Pakistani case *Asma Jehangir v. Abdul Waheed*, PLD 1997 Lah. 301. For a detailed discussion, see chapter 4 of the present study.

[43] Bukhari, *Sahih*, Vol. 4, p.226. The *Sahih* by Bukhari, along with five other *Hadith* collections, rank as the "Six" authentic compilations of the words and deeds of the Prophet Mohammed. these include *Hadith* collections of Muslim ibn'l Hajjaj; Timidhi; Abu Daud; Ibn Majah and Nisa'i. For details of works see A. Rahim, *Muhammadan Jurisprudence* (1995) Lahore: Mansoor Book House at pp. 1-31.

this *Hadith* at a highly opportune moment--the entry into Basra of the Caliph Ali after defeating Aisha (wife of the Prophet Mohammed) at the Battle of the Camel! Abu Bakra was among the notables of Basra who had refused to participate on either side in the civil war and was fearing a reprisal from the Caliph Ali. Conveniently recalling such a *Hadith* obviously meant soliciting political favour with a victorious leader at the cost of the vanquished foe. But this seemingly benign act of political expediency had far reaching on the status of women and how they would henceforth be perceived, for in this case the defeated insurgent leader happened to be a woman. *Hadith* being a source of Islamic law, has to be compiled scientifically along stringent rules to sift the authentic ones from those that have been fabricated or those that do not fulfil the rules laid down for determining authenticity of traditions.[44] One such rule is uprightness of character of the narrator. Applying this rule to Abu Bakra, he allegedly stands disqualified as he was convicted and flogged for false testimony (*Qadhf*), by the second Caliph, Umar Ibn-Al-Khattab.[45] Despite this questionable background, many Muslims quote this *Hadith* as "authority" for excluding women from decision-making and public life.

The historical context of the *Hadith* under discussion is reported to have been the occasion when the Prophet Mohammed received news that Khusro's daughter had succeeded to the throne. It is said that this woman was known to be highly authoritarian, and the comment in all likelihood was specifically in relation to her. Scholars like Dr. Abdul Hameed consider this *Hadith* as being informative in nature and certainly not an immutable injunction for Muslims at all times and in all ages.[46]

In contradistinction to the above *Hadith* one finds that in chapter 27 of the *Quran* entitled "Naml" or the Ants, Bilquis, the Queen of Sheba and her rule is

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[44] For a comprehensive discussion on classification of *Hadith*, and rules for authenticity see Rahim, *ibid.*, at pp. 58-65.

[45] Ibn al-Athir, *Usd al-Ghabra*, Vol. 5, p.38. For a detailed discussion of the circumstances surrounding narration of this *Hadith*, see Mernissi, *Women and Islam*, *op. cit.*, n. 1. For a critique of Mernissi's analysis see R. Afshari, "Egalitarian Islam and Misogynist Islamic Tradition: A Critique of the Feminist reinterpretation of Islamic History and Heritage" (1994) *Critique*, pp. 13-33.

[46] A. Hameed, *Mabadi-e-Nazam ul Hukam Al Islami* at pp. 876-878.

mentioned with great commendation. Verses 32-34 of that chapter in particular describes Bilquis as a ruler enjoying great wealth and dignity, and full confidence of her subjects. She administers the country in consultation with her Council who in turn are committed to her and carry out her bidding. Might we not therefore argue, that if Islamic injunctions were set against women as head of State or holding any other political office, the Queen of Sheba would not have found such honourable mention in the *Quran*? That women were an important constituent of the Muslim community and indeed expected to participate in political life is borne out by the fact that women as a group participated in the initial pledge of allegiance (*bay'a*) extended to the Prophet Mohammed by the Muslims.[47] This practice was continued in later years as well, making it an integral part of the political process.[48]

It is important to make the point here that Aisha, wife of the Prophet Mohammed actively participated in political and public life. She is one of the most renowned and credible narrator of *Hadith*, and is known to have completed and corrected many *Ahadith* reported inaccurately or inadequately.[49]

2.4.2 The Protective and Corrective Category, *Muamalaat* and women's human rights

In order to appreciate the protective and corrective category of women's human rights in Islam, it is important to study these against the background of the *Jahilliyya*. The basic teachings of the *Quran* focus on efforts to improve the condition of, and strengthen the weaker segments of society in pre-Islamic Arabia -- orphans, slaves, the poor, women, etc. -- segments which had been abused by the stronger elements in society.[50] Therefore *Quranic* verses aimed at ameliorating the plight of the

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[47] Stowasser, *op. cit.*, n. 11 at p. 34.

[48] L. P. Sayeh & A. M. Morse Jr. "Islam and the Treatment of Women: An Incomplete Understanding of Gradualism" (1995) 30 *TILJ* 311 at p. 323 and accompanying footnotes.

[49] *Ibid.*, at pp. 322-323 and accompanying footnotes. For a very interesting account of the life and personality of Aisha, wife of the Prophet Mohammed see, N. Abbott, *Aishah The Beloved of Mohammed* (1973) reprint edn., New York: Arno Press. For a more recent account, see D. A. Spellberg, *Politics, Gender, and the Islamic Past. The Legacy of Aisha Bint Abi Bakr* (1994) New York: Columbia University Press.

[50] Rahman, *op. cit.*, n. 1 at p. 37.

downtrodden classes, and women in particular stand out prominently. At the same time it has to be conceded that no matter how revolutionary the philosophy of Islam may have been, in order to take root among a tribal, patriarchal society, an outright break with the past would not have served any useful purpose. It is perhaps difficult to appreciate today, in the closing years of the twentieth century, the extent of reform brought about by Islam fourteen hundred years ago in laying the foundations of an egalitarian society based on the principles of social justice. Therefore a number of rights discussed in this section will no doubt come across as half-measures and incapable of according women the same degree of importance as men.

Using Esposito's "hierarchization" of *Quranic* values, we come to the second category of women's human rights, i.e., rights that deal with *muamalaat* or the socio-economic sphere of life. Here we discern some verses that accord more rights to men but have been framed so as to appear as corrective of wider forms of discrimination in pre-Islamic Arabia and/or seen as protecting women along with other disadvantaged sections of society. It may be argued that these categories are not immutable as they are susceptible and sensitive to changing perceptions of society.[51] As Fazlur Rahman argues, "although woman's inferior status has been written into Islamic law, it is by and large the result of prevailing social conditions rather than of the moral teaching of the *Quran*."[52] Changing social conditions may therefore propel protective and corrective rights into the non-discriminatory category.[53]

Among many Arab tribes, the girl child was an unwelcome intruder and was buried alive for reasons of poverty and honour.[54] The *Quran* describes the situation in the following words:

> "When one of them is given the glad tidings of (the birth of) a female, his face darkens as he tries to suppress his chagrin. He hides from

[51] In Hevener's categorisation of rights, the protective category is deemed of unlimited duration whereas rights placed in the corrective category may be of limited duration and no longer required when men and women achieve complete equality.

[52] Rahman, *op. cit.*, n. 1 at p. 37.

[53] It is here that my views on Hevener's categorisation differ to the extent that in applying these I perceive all four categories as a continuum flowing one from the other.

[54] Rahman, *op. cit.*, n. 1 at p. 37; Rahim, *op. cit.*, n. 43 at p. 10, and others.

people out of a sense of disgrace of the news he has been given and he ponders whether to keep her in disgrace or shove her under the earth. Evil is, indeed, what they judge".[55]

In the corrective category of women's human rights therefore, perhaps the most important piece of *Quranic* injunction is the prohibition on female infanticide and hence the right to life for the girl child.. In this regard the *Quran* enjoins thus:

"Slay not your children,
Fearing a fall to poverty.
We shall provide for
them and for you.
Lo! the slaying of them
Is a great sin".[56]

Hadith literature also contains a number of incidents and sayings of the Prophet Mohammed that are reflective of the concern that female infanticide gave rise to. Since pre-Islamic Arabia regarded the birth of a girl-child as a punishment and humiliation from the gods it was important that pronouncements be made to reinforce the *Quranic* statements prohibiting the practice and removing the prevalent misgivings entrenched in the Arab mind. These *Ahadith* were corrective of the social norm of female infanticide by engendering sentiments of love, affection and mercy for the girl-child in the hearts of their parents.[57]

The pre-Islamic practice of *zihar* whereby an Arab husband would make a pronouncement of divorce upon his wife by comparing her with the back of his mother (and therefore prohibited to him), was also abolished.[58] This prohibition came

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[55] The *Quran*, verse 16:58-59.

[56] The *Quran*, verse 17:31. Similarly, in verse 6:151 the same commandment is repeated in these words: "Kill not your children On a plea of poverty We provide for you and For them".

[57] It is related from Aisha, wife of the Prophet Mohammed, "If daughters are born to a parent and he treats them benevolently and beneficiently, he will be secured from the fire of Hell". Anas bin Malik reports, "He who brings up two girls and they attain puberty, will come on the day of judgement and he and I will be like this". Saying this the Prophet joined his fingers. Abdullah reports, "If a girl child is born to someone and he brings her up well and educates and trains her well and whatever mercy is shown to him by Allah is showered by him on his daughter, that girl will be a screen and curtain for him from the fire of Hell". Cited in A. Hussain, *Status of Women in Islam* (1987) Lahore: Law Publishing Company in appendix, pp. 1-10.

[58] For a discussion of the various kinds of divorce in pre-Islamic Arabia, see Rahim, *op. cit.*, n. 43 at p.8-9; Rahman, *op. cit.*, n. 1 at pp 38-39.

in the light of the humiliation caused to the woman as a result of this particular form of divorce. Verse 33:4 of the *Quran* states:

> "God has not put two hearts in any man's breast: He has not made your wives with whom you do zihar your mothers, nor has He made your so-called (i.e., adopted) sons your real sons."

Another corrective measure in the *Quranic* text relates to a pagan custom whereby a son inherited his stepmother as part of his father's legacy. The son could either force her to marry him or, debar her from remarrying anyone else for the rest of her life. In the absence of a son, the next male kin of the deceased had the same power over her.[59]

Another example of a protective/corrective right in the *muamalaat* hierarchy is the right of inheritance granted to women which is invariably half that granted to men in comparable situations. The *Quran* states:

> "God thus directs you as regards your children's (inheritance). To the male a portion equal to that of two females."[60]

Although the right to inheritance is corrective of the pre-Islamic custom of exclusion of women from any form of inheritance while also being protective of her vulnerable economic position, the half share is in any case discriminatory of her equal rights. But many writers on Islamic law have argued that this law does not discriminate against women. Perveen Shaukat Ali, for instance, is of the view that:

> "....In their opinion this is against the basic rules of justice to give women half of the male's share. It may, however, be pointed out that a woman is in no way a loser in this bargain. She gets her part of property from three different sources i.e., father, husband and son, and this makes her share almost equal to man."[61]

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[59] Rahim, *op. cit.*, n. 43 at pp. 7-9; Rahman, *op. cit.*, n. 1 at pp. 38-39. The prohibition came in verse 4:19 of the *Quran*.

[60] The *Quran*, verse 4:11.

[61] P. S. Ali, *Human Rights in Islam* (1980) Lahore: Aziz Publishers, at p.120.

It is submitted with respect to Perveen Shaukat Ali's argument, that men too inherit from other sources. They inherit from the mother, wife, and daughter and in most cases their share is double that of the woman's.[62] Inheritance rights of women may be placed in the protective category by virtue of the fact that *Quranic* injunctions ensure to women a basic minimum share, recognising the reality that they will always be a class of persons in need of protection. This is borne out by centuries of oppression where women have not and in all likelihood, will not in the foreseeable future be able to attain substantive economic parity with their male counterparts. At the same time, however, this minimum share does not preclude an enhanced share or a share equal to or more than that of a male. A parent, spouse or any other person may, by executing a valid gift deed, give away his/her entire wealth to a woman to the exclusion of all expectant male heirs. Similarly, a husband may, under a stipulation in the marriage contract, be divested of his entire possessions by way of dower, as there is no maximum limit to what may be given as dower to a wife.

In the area of family law, human rights of women are for the most part of the corrective/protective category although as mentioned above the initial premise of entering into the marriage contract is one of complete equality. However, once the contract is made, then inequality between the contracting parties emerges. For instance, under the "protective" right of dower as a "consideration" for the marriage contract, the husband becomes the protector and the wife, the protected. She retains the dower (or the right over it if not paid already), so long as she remains the wife or the husband dissolves the marriage tie by "*talaq*".[63] But if the wife is desirous of

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[62] For example, as a wife who has children, a woman inherits one eighth of her husband's estate; one-fourth if she is childless. A husband on the other hand inherits one-fourth from his wife if they have children, one half if they are childless. For a detailed exposition of the Islamic law of inheritance see, M. A. Mannan, *Principles of Muhammadan Law* (1995) Lahore: PLD Publishers chapter 6, 7, and 8.

[63] The unilateral right to terminate the marriage contract belongs to the husband under Islamic law which is technically known as "*talaq*". The husband has to pay the wife the dower on pronouncement of *talaq*.

terminating the contract,[64] then this protection of dower money or property must be returned to the husband to "ransom herself from her husband".[65]

The *Quran* also introduced significant changes in the concept of dower. In contrast to the pre-Islamic notion of dower as a form of bride-price to be appropriated by the father or other male relative of the woman, the wife became the sole recipient of this sum of money or other property. Islamic law developed dower into an essential component of the marriage contract. Furthermore, verse 4:20 also prohibited the practice of forcing one's wife to make a will in one's favour that remitted the dower or any other gifts the husband had given to her.

> "But if you do want to take another wife in her place (i.e., by divorcing her) and if you have gifted to her a heap of gold, do not take anything back from it; Will you take it back as a stunning lie and a clear sin? And how will you take it back when you have been intimate with each other and they have had solemn promises from you?"[66]

Haeri sums up this reform in family law in the following words:

> "In the seventh century AD the Prophet Mohammed unified the multiplicity of pre-Islamic modes of sexual mores of sexual unions by outlawing all but one form of marriage, namely marriage by contract. Fundamental to this rearranging of the existing social structure was the realignment of the role of the husband and wife into that of the principal transacting parties. As distinct from the pre-Islamic form of 'marriage of dominion', Islamic law recognised the wife - not her father - to be the recipient of the brideprice. Implicit in this act is a recognition of a degree of women's autonomy and volition. As a party to the contract, it is the woman herself who has to give consent - however nominally - for the contract to be valid. And it is the woman herself, not her father (custom aside), who is to receive the full amount of brideprice, be it immediate or deferred."[67]

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[64] The concept of the wife being able to "buy" her freedom by returning her dower is technically known as *khula* which affords a woman the right to get out of an undesirable union.

[65] The *Quran*, verse 2:229.

[66] The *Quran* verse, 4:20.

[67] S. Haeri, "Divorce in Contemporary Iran: A Male Prerogative in Self-Will" in *Islamic Family Law* (1990) London: Graham & Trotman, at p. 56.

It is an established fact that traditional Islamic law accords the Muslim male a unilateral right to dissolve the marriage tie (*talaq*) without assigning any cause [68] and without the interference of the court.[69] On the other hand it confers on a woman the right to seek dissolution of the marriage tie by foregoing her dower, with the difference that the woman has to convince the court of her fixed aversion and irretrievable breakdown of the marriage (*khula*)[70]. Although some leading judgements from the superior courts of Pakistan have tried to equate the right to pronounce *talaq* by the husband with the right of *khula* available to the woman,[71] yet it is submitted that there are major differences between these two modes of dissolution of marriage. No matter what obstacles one places in the husband's right to give *talaq*, at the end of the day by its very definition, *talaq* may be pronounced with or without the intervention of a court of law. On the other hand, if a woman fails to convince the judge of the genuineness of her case for *khula*, she cannot unilaterally terminate the marriage contract.[72] It is with these drawbacks in mind that the right of *khula* is being placed in the protective/corrective category of women's human rights rather than in the non-discriminatory one.

A further protective right as regards dissolution of marriage, is "*talaq-i-tafwid*" or delegated right of divorce given to the wife in the contract of marriage. Muslim women may take advantage of the fact that marriage is a civil contract and stipulations limiting or even prohibiting the husband from dissolving the marriage tie

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[68] In a famous Pakistani case, *Khurshid Bibi v. Mohammed Amin* PLD 1967 SC 97, their Lordships were of the view that *talaq* is not an unfettered right of the husband as the *Quran* in 4:35, provides for the appointment of arbiters to curtail the unbridled exercise of this right. These fetters are hardly effective if the husband is determined to go ahead with the pronouncement of divorce.

[69] Despite this privilege accorded to the husband in traditional Islamic law, many Muslim countries have legislated certain procedural requirements that have to be undertaken to finalise the divorce. See for instance, the Muslim Family Laws Ordinance, 1961 of Pakistan.

[70] PLD 1967 SC 97.

[71] For example in *Safia Begum v. Khadim Hussain* 1985 CLC 1869 and *Syed Mohammed Rizwan v. Mst. Samina Khatoon* 1989 SMCR 25.

[72] For instance, see *Aali v. Additional District Judge I, Quetta* 1987 CLC 27, *Raisa Begum v. Mohammed Hussain* 1986 MLD 1418 and many others.

can be incorporated in it. An effort at achieving some measure of equality may thus be successful.[73]

The right of the wife to be properly fed and clothed at the husband's expense is another protective right afforded to the woman.[74] This right is available to her even though she may be wealthier than the husband and capable of maintaining not only herself but him as well.[75]

The divorce laws stipulating a waiting period (*iddat*) during which the marriage is suspended, but not terminated, may also be seen in a protective/corrective framework. In the pre-Islamic laws of divorce, husbands were not required to follow any particular procedure for terminating the marriage contract. They could at will marry, divorce, and remarry the same woman. By laying down a waiting period before which the divorce became irrevocable, the unilateral right of divorce allowed to men (and not to women), was toned down and chances for reconciliation kept alive until the period of waiting expired.[76]

As regards the rights and privileges of a woman in her capacity as a mother, the concept of child care as a joint parental and social responsibility has deep roots within the Islamic tradition. While breastfeeding and its duration is recommended, the modalities are to be decided by "mutual consultation" of both parents. If the mother is unable to fulfil her duty, the father is under an obligation to make alternate arrangements, e.g., hiring a wet nurse etc. Where the parents are divorced and the

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[73] Here a note of caution as regards these stipulations favourable to women. Societal pressure strongly discourages use of these rights afforded to women. For details, see S. S. Ali, "An Analysis of the Trends of the Superior Courts of Pakistan in matters relating to Marriage, Dower, Divorce" (1993) Working Paper for the Women and Law Project, Women Living Under Muslim Laws.

[74] For example as enjoined in the *Quran*, verse 4:34.

[75] But this protective right to be maintained ceases as soon as the woman is divorced or is widowed. For the issue of post-divorce maintenance, see the famous Indian case of *Mohammed Ahmed Khan v. Shah Bano Begum and others* AIR 1985 SC 945.

[76] There are three modes of pronouncing talaq. *Talaq-i-Ahsan, Talaq-i-Hasan* and *Talaq-ul-Biddat.* The first two offer some scope for reconciliation as the divorce does not become irrevocable for some time. The time afforded before the divorce becomes irrevocable is the first kind of waiting period. Then there is the period of *iddat*, which is a period during which a woman whose marriage has been terminated either by death or divorce may not remarry. *Talaq-ul-Biddat* (the third kind mode), is an irrevocable divorce as soon as it is pronounced and there is no chance of reconciliation. This mode is not the one sanctioned by the Prophet Mohammed, and hence rejected by some Muslims.

mother has custody, the father is bound to feed, maintain, and pay the mother as he would any wet nurse for performing this job.[77] This placing of the monetary responsibility for the welfare of the child and the nursing mother, although within the protective category of human rights, reinforces the stereotype roles of men as providers and women as passive consumers and men's liability.

Regarding custody and guardianship of children, in cases of divorced parents, a mother is entitled to *hizanat* or custody of a boy up to the age of 7 and a female child until she attains puberty.[78] After that period, custody reverts to the father who is generally known as the "natural guardian" of his children. The mother cannot, under traditional Islamic law be recognised as the legal guardian of her own children. One does not come across any verse of the *Quran* establishing the father as the sole legal guardian of his children to the exclusion of the mother. However there is a saying of the Prophet, which is an extract of his sermon on the occasion of the Last Pilgrimage (*Hajjat-ul-Wida*), to the effect that "the child belongs to him/her on whose bed it is born." In the patriarchal social organisation it is the man who has to provide the household effects (including the bed on which the child is born). It has thus been inferred over the centuries that the child "belongs" to the father. This is also in line with the above mentioned principle of Islamic law where the father is made to pay for feeding and rearing the child, even if it is by the child's own mother. But what is very

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[77] "Nor should he (father) to whom the child is born
(be made to suffer) because of his child.
(An heir shall be chargeable in the same way
if they both decide on weaning)
if they desire to wean the child by mutual consent,
And, (after) consultation, it is no sin for them,
And if you wish to give your children out to
Nurse, it is no sin for you provided ye pay
(the nursing woman as hired).
What is due from you (i.e., money that has been either
fixed or according to common practice)
Observe your duty to Allah, and know that Allah
Is Seer of what ye do." Also see discussion on this point in S. S. Ali and B. Jamil, *The United Nations Convention on the Rights of the Child, Islamic Law and Pakistan Legislation: A Comparative Study* (1994) Peshawar: Shaheen Printing Press, chapter 3.

[78] These are not uniformly applicable rules as only the Hanafi Sunni school of thought adheres to them. Under Shia law, a mother is only entitled to custody of her minor children up to the age of 2 years in case of a male child and 7 years in case of a female. See Mannan, *op. cit.*, n. 62, chapter 18.

important to realise is that these recommendations/injunctions are always prefaced by the economic superiority of the man. The question posed here is: What would be the position if one were to reverse situations and the woman/mother was the breadwinner/provider of the family?

2.4.3 Discriminatory Category of Rights: The Verse 4:34 Debate

In the hierarchization and categorisation of rights, we now come to an area where the male is provided status, control, and authority over the woman (although in recent years some male and female scholars and theologians[79] are challenging the male-oriented interpretation of some of these verses). In this section it is proposed to analyse these *Quranic* verses that arguably establish and reinforce gender hierarchies within the Islamic tradition. Although the most oft-quoted verse in this regard is verse 4:34 of the *Quran*, yet male dominance and priority is determined by this verse used in conjunction with verse 2:282 (testimony of women), verses permitting polygamy, superior right of the male to terminate marriage etc. Each of these verses used over the centuries as sources of positive law on the subject in various Muslim jurisdictions are open to diverse interpretations to the point where they have even been used to promote women's rights. (see discussion below).

Some *Quranic* laws that regulate the structure of authority in the Muslim household stipulate that within the context of marriage and as a member of the husband's household, the wife is his responsibility and hence under his authority. The *Quran* thus endows the man both with authority over the woman in the family setting, coupled with the obligation to provide for her by way of material support.[80] The

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[79] See for instance the work of Riffat Hassan who is to the author's knowledge the first and one of the very few female theologians in the Muslim world and has written prolifically on the subject. Some of the more relevant to our present discussion are: R. Hassan, "The role and responsibilities of women in the legal and ritual tradition of Islam." Paper presented at a bi-annual meeting of a Trialogue of Jewish-Christian-Muslim scholars at the Joseph and Rose Kennedy Institute of Ethics, Washington, DC, on October 14, 1980; R. Hassan "On Human Rights and the Quranic Perspective" in A. Swidler (ed.), *Human Rights in Religious Traditions* (1982) New York: Pilgrim Press; R. Hassan, "An Islamic Perspective" *op. cit.*, n. 1.

[80] B. Stowasser, "Religious Ideology, Women, and Family" in B. F. Stowasser (ed.,) *The Islamic Impulse* (1987) London: Croom Helm at p. 293.

classic verse confirming male superiority (or at least perceived as such by most Muslims) is the following:

> "Men are the protectors
> And maintainers of women,
> Because God has given
> The one more (strength)
> Than the other, and because
> they support them from their means.
> Therefore the righteous women
> Are devoutly obedient, and guard
> In (the husband's) absence
> What God would have them guard.
> As to those women
> On whose part ye fear
> Disloyalty and ill-conduct,
> Admonish them (first)
> (Next), refuse to share their beds,
> (And last) beat them lightly
> But if they return to obedience,
> Seek not against them
> Means (of annoyance)
> For God is Most-High
> Great (above you all)."[81]

As mentioned above, a number of scholars have taken up the challenge of reinterpreting verse 4:34. Riffat Hassan, for instance argues that:

> "While Muslims through the centuries have interpreted Sura An-Nisa:34 as giving them (men) unequivocal mastery over women, a linguistically, and philosophically/theologically accurate interpretation of this passage would lead to radically different conclusions. In simple words what this passage is saying is that since only women bear children (which is not to say either that all women should bear children or that women's sole function is to bear children)- a function whose importance in the survival of any community cannot be questioned- they should not have the additional obligation of being breadwinners whilst they perform this function. Thus during the period of a woman's child-bearing, the function must be performed by men (not just husbands) in the Muslim "Ummah".... It enjoins men in general to

[81] The *Quran*, verse 4:34.

assume responsibility for women in general when they are performing the vitally important function of child-bearing."[82]

It is submitted however with respect to Riffat Hassan's interpretation of verse 4:34 of the *Quran* that, although by virtue of her innovative interpretation, one may succeed in placing this verse in the protective category of rights for women, her argument cannot be used to acquire non-discriminatory status for women. What is perhaps possible is to emphasise that verses where wealth has been described as the sole determinant of superiority, such as verse 4:34, we may assume that were women to achieve that measure of financial autonomy, they would be accorded the same status as men in a similar position.[83]

A further point with regard to Riffat Hassan's interpretation lies in the fact that she fails to come up with a plausible explanation of why men (in that particular superior position) are justified in beating the woman (women) in their charge. According to her view all three stages of admonishment are invokable only if women (*en masse*), refuse to procreate. However, it has to be said that neither a textual reading of the verse nor any contextual evidence leads one to this inference of the said verse as presented by Riffat Hassan.[84]

Aziza Al-Hibri, another Muslim scholar analyses verse 4:34 in the following manner: "Men are *qawwamun* over women in matters where God gave some of them more than others, and in what they spend of their money." Al-Hibri argues that the problematic concept here is *qawwamun*, which is difficult to translate. She says that while some writers translate it as 'protectors' and 'maintainers' (e.g. A.Y. Ali's translation), this is not quite accurate as the basic notion involved here is one of moral guidance and caring.[85] The 'standard' interpretation of the above passage declares men as being in charge of women's affairs because men were created by God as superior to woman (in strength and reason) and because they provided for women

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[82] R. Hassan, extract from a paper presented at a *Quranic* interpretation meeting held in Karachi, Pakistan (8th-13th July 1990), under the auspices of Women Living Under Muslim Laws.

[83] This argument needs further research and refinement.

[84] Hassan, *op. cit.*, n. 1 at pp. 110-112.

[85] al-Hibri, *op. cit.*, n. 1 at p. 217.

(they spend their money on them). Al-Hibri challenges it on two counts; that it is unwarranted and that it is inconsistent with other Islamic teachings.[86] She concludes therefore that:

> "nowhere in the passage is there a reference to the male's physical or intellectual superiority. Secondly, since men are *qawwamun* over women in matters where God gave some of the men more than some of the women, and in what the men spend of their money, then clearly men as a class are not *qawwamun* over women as a class. The conditions of being *qawwamun* as specified in the passage are two.
>
> 1) that the man be someone whom God gave more in the matter at hand than the woman and
> 2) that he be her provider
>
> If either condition fails, then the man is not *qawwamun* over that woman. If both obtain, then all it entitles him to is caring for her and providing her with moral guidance. For, only under extreme conditions (for example insanity) does the Muslim woman lose her right to self-determination, including entering any kind of business contract without permission from her husband. . . . It is worth noting that the passage does not even assert that some men are inherently superior to some women. It only states that in certain matters some men may have more than some women."[87]

Al-Hibri also makes the point that according to her interpretation of verse 4:34, no one has the right to counsel a self-supporting woman and since "Islam emphasises democracy and enjoins Muslims to counsel each other in making decisions, this resolution falls totally within the spirit of Islam."[88]

The second line of argument pursued by Al-Hibri in support of her alternate explanation, is to state that the traditional interpretation is inconsistent with other Islamic teachings. She cites verse 9:71 of the *Quran* which declares that: "The believers, men and women, are *awliya*, one of the another" *Awliya* may be translated as meaning protectors, in charge, guides. In fact, conceptually it is quite similar to the term *qawwamun*. Al-Hibri then poses the question:

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[86] *Ibid.*
[87] *Ibid.*, at p.218.
[88] *Ibid.*

> "How could women be *awliya* of men if men are superior to women in both physical and intellectual strength? And, how could women be in charge of men who have absolute authority over them?"[89]

Esposito, arguing in the same vein as Riffat Hassan and Al-Hibri, initiates the discussion by stating that in the socio-economic sphere, scholars of Islam agree that a major concern of the *Quran* was the betterment of woman's position by establishing her legal capacity, granting her economic rights (dower, inheritance, etc.), and thus raising her social status.[90] However, *Quranic* verses such as 4:34 the traditional interpretations of which would support what today would be deemed an inequitable position for women. This verse has been interpreted as indicating men's priority over women. According to Pickthall's translation of the *Quran,* verse 4:34 states that

> "Men are in charge of women, because Allah hath made one to excel the other, and because they spend their property (for the support of women)."[91]

However, the "priority" attributed to men over women is best understood as originating from their greater responsibility as protectors and maintainers within the socio-economic context of Arabian society during the Prophet's time. Men, by virtue of their duty to defend and support their extended family members, enjoyed more rights and subsequently a different status in Muslim society. This understanding of man's role is illustrated by another possible translation of the same *Quranic* verse:

> "men are the guardians (i.e., protectors and maintainers) over women because God made some of them (to excel) over others and because they (men) provide support from their wealth."[92]

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[89] *Ibid.* al-Hibri also quotes a saying of the Prophet Mohammed where he spoke in favour of equality of the sexes: "All people are equal, as equal as the teeth of a comb. There is no claim of merit of an Arab over a non-Arab, or of a white over a black person, or of a male over a female. Only God-fearing people merit a preference with God" citing M. A. Rauf, *The Islamic View of Women and Family* (1977) New York: Speller at p. 21.

[90] Esposito, *op. cit.*, n. 1 at p.107.

[91] M. M. Pickthall, trans., *The Meaning of the Glorious Koran,* n.d. New York: Mentor p. 83.

[92] Esposito, *op. cit.*, n. 1 at p. 108.

Esposito, too appears to be in agreement with the view that it is primarily the economic superiority and responsibility for the household that accords to the male a degree of excellence, but only to those men, who fulfil this task and not all men.

Barbara Stowasser in her study of the status of women in early Islam states that verses such as 4:34 have fallen prey to the *Quranic* interpreters who in their enthusiasm to ensure maximum application of *Quranic* provisions attempted to place

> "a fence about the law by requiring a precautionary margin in order to ensure the entire fulfilment of its dictates, so the interpreters of the *Quran* demanded more than the original."[93]

As a justification of her argument Stowasser cites a number of commentaries of the *Quran* and shows how each successive commentator became more restrictive of women's rights. Consequently, by the time one reaches the 17th century, women have been completely excluded from all spheres of public life and made 'invisible.'

The earliest comment on verse 4:34 cited by Stowasser is taken from Abu Jafar Mohammed Jarir al-Tabari's (d. 923) work. He says that:

> "*Men are in charge of their women* with respect to disciplining (or chastising) them, and to providing them with restrictive guidance concerning their duties towards God and themselves (i.e., the men); *by virtue of that by which God has given excellence (or preference) to the men over their wives*: i.e., payment of their dowers to them, spending of their wealth on them, and providing for them in full. This is how God has given excellence to (the men) over (the women), and hence (the men) have come to be in charge of (the women) and hold authority over them in those of their matters with which God has entrusted them."

Tabari's interpretation of this verse is very literal and specifically endowing men with authority over their women in the family setting coupled with the obligation to provide for their women by way of material support.[94]

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[93] Stowasser, *op. cit.*, n. 11 at p.25, quoting R. Levy, *The Social Structure of Islam*, p. 126.
[94] *Ibid.*, at p. 26.

The second commentary of verse 4:34 is taken from Nasir al-Din Abu aI-Khayr'Abd Allah ibn Umar al-Baydawi (d. 1286). This interpretation following some 350 years after Tabari, becomes more detailed and restrictive, and sanctioning the view of women as creatures incapable of and unfit for public duties.[95]

> "*Men are in charge of women*, i.e., men are in charge of women as rulers are in charge of their subjects .... *God has preferred the one (sex) over the other*, i.e., because God has preferred men over women in the completeness of mental ability, good counsel, complete power in the performance of duties and the carrying out of (divine) commands. Hence to men have been confined prophecy, religious leadership (*'imama*), saintship (*wilaya*), the performance of religious rites, the giving of evidence in law courts, the duties of the Holy War, and worship (in the mosque) on Friday, etc., the privilege of electing chiefs, the larger share of inheritance, and discretion in matters of divorce, by virtue of that which they spend of their wealth, in marrying (the women) such as their dowers and cost of their maintenance."[96]

It is clear therefore that verse 4:34 has been used to bring within its ambit the entire legal personality of a woman, denying to her independent personhood. Ahmad ibn Mohammed al-Khafaji (d. 1659) further 'refined' the restrictive detail provided by Baydawi's exegesis by stating that religious leadership (*imama*) (which is inaccessible to women) is understood to include both the *imama kubra* and the *imama sughra*. He understands *wilaya* not as 'saintship' but as 'assuming of responsibility (*tawallin*) for the woman in matters of marriage, which means the power to make decisions', (which in any case by this time was no longer theirs).[97]

The religious rites (*sha'a'ir*) from which women are barred according to Baydawi, are: the call to prayer (*adhan*), the second call to prayer (*iqama*), the Friday sermon, Friday worship (in the mosque), and the *takbirat al-tashriq* (certain rites during the Pilgrimage).[98]

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[95] *Ibid.*
[96] *Ibid.*
[97] *Ibid.*
[98] *Ibid.*

The foregoing discussion on the varying interpretations of verse 4:34 clearly outlines its importance in creating gender hierarchies within the Islamic tradition. But the most far reaching implications for women's human rights lies in the justification of this verse for physically chastising a 'disobedient' woman. Very little comment in this regard has been offered by any of the writers mentioned above including Riffat Hassan, Al-Hibri or Esposito.[99] Fazlur Rahman however, does take up the issue and offers the justification that:

> "the Quran appears to be saying is that since men are the primary socially operative factors and bread-winners, they have been wholly charged with the responsibility of defraying household expenditure and upkeep of their womenfolk. For their duties and economic struggles and experiences they have become entitled to manage women's affairs and, in case of recalcitrance on the part of women, to admonish them, leave them alone in their beds and as a last resort, beat them."[100]

2.4.4 Evidentiary Value of Women's Testimony

Verse 2:282 of the *Quran*, provides another example where pronouncements of arguably restricted application, have been used as justification for creating gender hierarchies within the Islamic tradition. A number of Muslim jurisdictions including Pakistan have legislated on the basis of this verse, thus legally reducing the status of women.[101] The verse states that the testimony of a woman is worth half that of a man in financial transactions reduced to writing:

> "And get two witnesses,
> Out of your own men,
> And if there are not two men,
> Then a man and two women,
> Such as ye choose,
> For witnesses,

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[99] Mernissi has dealt with the issue at some length in her work, *Women and Islam, op. cit.*, n. 1 where she argues that the verse was revealed at a point in time when the newly formed Muslim (male) community feared that the Prophet Mohammed by prohibiting violence against women, was encouraging a 'female rebellion'. Verse 4:34 seems to have quelled those fears forever and reinstated male superiority.

[100] Rahman, *op. cit.*, n. 1 at p. 44.

[101] Section 17 of the Qanoon-i-Shahadat Order, 1984.

So that if one of them errs,
The other can remind her."[102]

Hadith literature has further presented this inequality in the value of evidence of a woman as reflecting an innate inferiority of women as opposed to superiority of men. As mentioned above, a *Hadith* quotes the Prophet Mohammed as having stated that women were inferior both in matters of religion and intelligence. The reason the Prophet Mohammed is supposed to have cited for a woman's inferiority in intelligence is that the value of her evidence is half that of a man's.[103] Fazlur Rahman, in analysing this *Hadith* appears to be questioning its authenticity when he argues that it (*Hadith*) presupposes the development of the law of evidence in early Islam.[104] As regards verse 2:282, he is of the opinion that the *Quran* is not stating any general law of the evidentiary value of male and female statements as the law.

> "If the *Quran* did really regard a woman's evidence as half that of a man's, why should it not allow the evidence of four females to be equivalent to that of two males and why should it say that only one of the males may be replaced by two females? The intention of the *Quran* apparently was that since it is a question of financial transaction and since women usually do not deal with such matters or with business affairs in general, it would be better to have two women rather than one -- if one had to have women -- and that, if possible at all, one must have at least one male."[105]

Fazlur Rahman then goes on to state that one can simply not deduce from verse 2:282 a general law to the effect that under all circumstances and for all purposes, a woman's evidence is inferior to a man's. He is convinced that this verse does not have the slightest intention of proving any rational deficiency in women vis-

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[102] The *Quran*, verse 2:282.

[103] But some writers have stated that the intellectual status of a Muslim woman is "neither marred nor degraded by the commandments of the Quranic verse". R. El-Nimr, "Women in Islamic Law" in M. Yamani (ed.,) *Feminism and Islam* (1996) Reading: Ithaca Press at p. 95. El-Nimr's views appear to be representative of many Muslim writers including Mawdudi who argue in a defensive, apologetic vein. She describes reasons of emotional, physical and psychological strain as disabling women from acting as competent witnesses.

[104] It may be pertinent to point out with reference to this statement of Fazlur Rahman that while he is not explicitly setting it out, he appears to be challenging the authenticity of this *Hadith*.

[105] Rahman, *op. cit.*, n. 1 at p. 42.

à-vis men. As an example, Fazlur Rahman cites the example of classical Islamic law regarding women with knowledge of gynaecology as the most competent witnesses in cases involving gynaecological issues.[106] Finally, he also puts forward the suggestion that even if a law could be formulated on the basis of such a generalisation, then may we not change the law when social circumstances so change that women are not only educated equally with men but are also conversant with business and financial transactions?[107]

With respect to the arguments presented by Fazlur Rahman, it is submitted that looking at the formulation of the verse under discussion in its socio-economic perspective, one is inclined to argue that against the background of the social milieu of 7th century tribal Arabia, involving a woman as witness in an activity that clearly lay within the public sphere of life and was until that time out of bounds for women, may be regarded as an important first step. It was without doubt corrective of complete non-recognition of women as legal persons capable of participating in financial transactions reduced to writing. However, what is a matter for concern is the fact that this step towards according woman greater autonomy and legal personality was frozen in time and not taken forward towards achieving equality. Furthermore, one has to acknowledge that this incapacity (of women to give evidence) is not only confined to commercial transactions reduced to writing. In fact in cases wherever *hadd* punishment[108] may be inflicted, the testimony of women and non-Muslims is not even accepted.[109] A further example is that of the contract of marriage in Islam which is also in the nature of a financial transaction, and here too, women who witness signing of the marriage deed suffer from the same disability.[110]

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[106] *Ibid.*

[107] *Ibid.*

[108] *Hadd* means limit. In legal terms it means mandatory punishments limits for which have been laid down in the *Quran.*

[109] For details, see for example, the Hudood Ordinances, 1979 promulgated by General Zia of Pakistan. For adverse implications and human rights violations of women as a result of these laws see, A. Jehangir and H. Jilani, *The Hudood Ordinances: A Divine Sanction?* (1990) Lahore: Rohtas Books, and R. Mehdi, "The Offence of Rape in the Islamic Law of Pakistan" (1990) 18 *IJSL* 19-29 and S. S. Ali, "Gender, Islamic Fundamentalism and Human Rights: A case study of Pakistan" (1991) 2 *WAFJ.*

[110] C. Hamilton, *The Hedaya* (1989) Karachi: Darul-Ishrat at p. 74.

But it may be argued that verse 2:282 is not necessarily of general universal application. This may be inferred from verse 24:6-9 of the *Quran* where a woman's oath by which she defends herself against her husband's accusation of adultery outweighs that of the man's (her husband's) in the absence of witnesses.

2.4.5 Inheritance rights of women: A Fixed, Unchangeable Share or the Basic Minimum?

Another sensitive issue concerning rights of women in the sphere of family law is that of inheritance. As mentioned above, women generally inherit half of what men in comparable situations would inherit. While this was a progressive initial step in a society where, as Fatima Mernissi remarks, the newly converted Meccan aristocrats did not mind sharing Heaven and the rewards of the Hereafter with their Muslim sisters. What hurt their egos (and economic interests) was that they were being required to share their worldly possessions in this world with women who until the dawn of Islam were little more than the chattels and property of these very men.[111] Over the centuries, this entitlement of women to half the share of a man in a comparable situation became the fixed, unchangeable and only share that she was entitled to.[112]

Of the many justifications advanced by Muslims (men and women) regarding the half share in inheritance rights for women the following may be mentioned as the most repeated:[113]

a) women are not providers for households, while men are; hence greater burden requiring greater share;

b) *Quranic* injunctions do not require a Muslim wife to share her resources with her spouse or spend it on household expenses even though the husband may be destitute. On the other hand, a wife may seek a decree for dissolution of her

[111] Mernissi, *op. cit.*, n. 1 at p. 120.
[112] Rahman, *op. cit.*, n. 1 at p.45.
[113] These views are based on personal communications with a wide range of people as well as readings on the subject. For a recent empirical study on the subject see S. S. Ali, "Using Law for Women in Pakistan" in A. Stewart (ed.,) *Gender, Law and Justice,* (forthcoming) Blackstone.

marriage on the grounds that her husband is incapable of, or will not maintain her;

c) a husband is required to pay his wife a sum of money or other property as dower as part of the marriage contract, therefore in addition to her half share in inheritance, she also receives a further share as dower.

With regard to the above arguments, it is submitted that the situations described above are subject to changing realities of society, as well as the socio-economic circumstances of the present day and are therefore weak justifications. Thus, for instance, are men always the 'bread-winners' of families? Is it not a fact that there are millions of families around the world where women are heads of households and have had to take on responsibility for meeting entire household expenses. As to the second line of argument, while women are not legally required to share responsibility for the household, yet one would have to look very hard indeed to find a family where the woman, despite having the resources goes hungry and places her spouse and children in a similar predicament. As to c), it may be argued that the amount of dower stipulated in the marriage contract is invariably less than an equivalent share in inheritance. Furthermore, in case of a woman seeking dissolution of marriage from her husband, she will have to forego this amount.

2.4.6 Polygamy: An Acknowledgement of "Different Needs" or Statement of Male Superiority?

The third issue to be addressed in the discriminatory category of rights is that of restrictions imposed on women within the institution of marriage without corresponding limitations on men. Thus *Quranic* injunctions enjoin strict monogamy on women and also confine her to a Muslim spouse, while men may marry up to four wives at any one time from among "*kitabia*"[114] women.[115] Polygamy is permitted in Islam although as the *Quranic* verse allowing it states, it is with certain provisos:

[114] *Kitab* literally means book. *Kitabia* means women of the book. Here it implies women professing one of the revealed religions i.e., Christianity, and Judaism.

[115] The *Quran*, verse 2:221 and 5:5.

"Marry women of your choice, two, three or four, but if you fear that you shall not be able to deal justly (with them) then only one".[116]

The debate around polygamy raises a number of questions. Does, for instance, the *Quranic* verse create an obligation for all male Muslims to emulate the practice or, is it a qualified 'right' to be exercised under certain 'controlled' circumstances set out in the verse above?[117] Al-Hibri, is of the opinion that the mere fact that the Prophet Mohammed was polygamous in his later life is no evidence of a 'right' of Muslim men to also be polygamous. She argues on the basis of the *Quranic* verses that state quite clearly that neither the Prophet nor his wives are like other men and women.[118] Secondly, the passage in the *Quran* which has been used to justify polygamy also attaches a condition for such action i.e., requiring the man to make an undertaking to deal justly with all his wives. Reinforcing this condition is the *Quranic* (verse 4:129) statement that "Ye are never able to be fair and just among women even if you tried hard." "Modernist" Muslim scholars are of the opinion that for evolving a rule of law relating to polygamy these two *Quranic* verses must be read and interpreted together.[119] The implication of the combined passages in the opinion of Al-Hibri would be as follows:

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[116] The *Quran*, verse 4:3.

[117] A. R. I. Doi, in his book entitled *Shariah: The Islamic Law* (1984) London: Ta Ha Publishers at p. 146. outlines the various circumstances for which he considers polygamy to be the 'best solution.' These situations include the wife suffering from a serious disease; where the wife is barren; is of unsound mind, where the wife is old and infirm; where the wife is of 'bad character' and cannot be reformed; where the wife moves away from her husband's place of residence, is disobedient and difficult to live with; as a result of many men dying during war leaving behind a large number of widows. The final reason that Doi advances is that of the husband feels that he simply cannot do without another wife and is capable of providing equal support to the existing wife(ves), then he is justified in doing so. Doi has in effect provided a carte blance to the man to marry if he feels like it. This hardly appears in consonance with the contextual rationale behind the *Quranic* verse.

[118] The *Quran*, verse 33:32, 50. For example, while the Prophet encouraged widows and divorcees to remarry, his own wives were not be remarried after his death. They were considered 'the mothers of all believers', and no believer may marry his mother. However as the Prophet grew older he gave his wives the choice to leave and marry another male more fulfilling perhaps of husbandly duties. All but one wife refused to leave him. See, al-Hibri, *op. cit.*, n. 1 at p. 216 (citing J. Al-Afghani (1945) p.79.

[119] al-Hibri, *ibid.*, at p. 216; Rahman, *op. cit.*, n. 1 at p. 45-49. Law reform in Muslim jurisdictions in the twentieth century has relied upon this interpretation.

a) If you can be just and fair among women, then you can marry four wives

b) If you cannot be just and fair among women, then you may marry only one

c) You cannot be just and fair among women; From which follows: i.e. you may marry only one wife. Furthermore, given (c) the condition for (a) is never satisfied, so that we can never conclude: You may marry four wives.[120]

In response to the above argument, it has to be said that some Muslim thinkers claim that the words 'justly' and 'just' occurring in the two *Quranic* passages above have two different meanings; hence the view that these cannot be combined to draw an inference.[121] Abdur Rahman Doi also challenges the view of the modernists who consider verse 4:129 as a legal condition attached to polygamous unions.[122] Citing Shaikh Mohammed bin Sirin and Shaikh Abubakr bin al-Arabi, he makes the point that the inability to do justice between women referred to in the *Quran* is in respect of love and sexual intercourse only which is beyond the control of the man. Justice required of man is, in the opinion of these scholars confined to matters of providing equality in residence, food, clothes to co-wives. So long as a man can provide these, he is seen as being just between women.[123]

2.4.7 *Hijab* (Veiling of Women): A Prescription for Female Modesty or Symbolic Division of Muslim Space on the basis of Gender?

In the Islamic tradition veiling represents the ultimate dichotomy into the public and private spheres of life with the woman confined to the private sphere. But there exists a wide range of views among scholars of Islam regarding this institution and its implication for women's human rights. General and vaguely phrased *Quranic* verses regarding modesty in behaviour for men and women have been interpreted in a variety of ways by male Muslim scholars, a process that many writers believe led to an

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[120] al-Hibri, *op. cit.*, n. 1 at p.216. Taha's arguments follow a similar line. He states that polygamy is not an original precept in Islam and a combined reading of verse 4:3 and 4:129 leads to an implied prohibition of polygamy. For Taha's views see his work, *op. cit.*, n. 33 at p. 140.

[121] al-Hibri, *ibid.*, and accompanying footnotes.

[122] Doi, *op. cit.*, n. 117, chapter 8, especially pp. 147-150.

[123] *Ibid.*

ever-increasing exclusion of Muslim women from the public sphere of life.[124] Stowasser is of the view that *Quranic* exegesis prescribed veiling in absolute and categorical fashion and the wide degree of difference between the commentaries of Tabari, Baydawi and al-Khafaji go to show how Muslim women were forced to disappear behind the veil, not only physically but as a symbol of their invisibility from public life.[125] While Tabari argued that veiling did not include covering the face, half the forearm, eye make-up, rings, bracelets and dyes, Baydawi's interpretation of verse 24:30 reads as follows:

> "*Let them lower their gaze* before the men at whom it is not lawful to look, and *let them guard their private parts* by veiling them, or by bewaring of (or: guarding against) fornication. The lowering of the glances is presented because the glance is the messenger of fornication. And let them not display of their adornment such as jewellery, dress, make-up - let alone the parts where they are worn or applied - to those to whom (such display) is not lawful .... what is meant by adornment is the place where adornment is put (or worn) ...." [126]

As to the opinion that the prohibition to display does not include the face and hands, because they are not pudendal, Baydawi argues clearly

> "this applies to prayer only, not appearance, because the whole body of a free woman is pudendal, and it is illicit for anyone (except the husband or the *dhawu mahram*)[127] to look at any part of her except by necessity such as (medical) treatment, or the bearing of witness."

Later commentaries such as al-Khafaji's Hashiya on al-Baydawi, this restrictive interpretation is further heightened. al-Khafaji justifies the complete 'disappearance' of women behind the veil on the authority of al-Shafei declaring categorically

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[124] For a 'feminist' interpretation of *Quranic* verses enjoining veiling and segregation, see Mernissi, *op. cit.*, n. 1; Ahmed, *op. cit.*, n. 1.

[125] Stowasser, *op. cit.*, n. 11 at p. 27.

[126] *Ibid.*, at pp. 26-27.

[127] A male within the prohibited degrees of relationship with whom a Muslim woman cannot lawfully enter into a contract of marriage. In addition the husband who is her *mahram*, these include a father, brother, son, uncle, whether paternal or maternal, grandfather, whether paternal or maternal.

> "the whole body of the woman is pudendal, even face and hand, without exception (absolutely)."

Since this interpretation so obviously contradicts the *Quranic* exemption "except that which is apparent", al-Khafaji and others deal with it by interpreting this verse as

> "a command of exception from the established rule, which applies to such exceptional circumstances as the giving of evidence in law courts and medical treatment only."

Among the twentieth century Muslim scholars, Mawdudi is perhaps the most vocal in his restrictive treatment of veiling as an 'Islamic' institution. In his much-read and publicised book entitled *Purdah*,[128] he argues vociferously for the institution on the basis that segregation will prevent 'loose western morals' from creeping into Islamic society, and keep the family intact.[129] In the discussion on the sphere of operation of women and segregation, he initiates the debate by stating that women are rulers of their household and accountable for their actions within it. They (women) have been released from certain religious obligations (that men must fulfil). As examples Mawdudi cites the Friday congregation as not being obligatory on women, neither is participating in the holy war (*jihad*) compulsory on her. A woman may not travel without her *mahram*. In short, he states that Islam abhors the venturing out of the home of a woman unless it is absolutely imperative such as to earn a living.[130]

But modernist Muslim writers challenge this restrictive and literal interpretation of the *Quranic* verses on veiling and segregation. Fazlur Rahman puts forward the view that the *Quran* advocates neither the veil nor segregation of the sexes; rather it insists on sexual modesty.[131] He further states that it is also certain on

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[128] Mawdudi, *Purdah* (1997) edn., Lahore: Islamic Publications.

[129] *Ibid.* This study uses the Urdu version and all page numbers referred to are taken from this edition.

[130] *Ibid.*, at pp. 235-239.

[131] Rahman, *op. cit.*, n. 1 at p. 40.

historical grounds that there was no veil in the Prophet's time, nor was there segregation of the sexes in the sense Muslim societies developed it. In fact the *Quranic* statements on modesty imply that neither the veil nor segregation of the sexes existed.[132] Hence the need to place some ground rules for male-female interaction. If segregation of the sexes existed, there would have been no point in asking the sexes to behave with modesty. The *Quran* states in verse 24:31:

> "Say (O Mohammed) to believing men that they should observe modesty of the eye and guard their sexual parts - - this is purer for them, but God knows well what they do. And say to believing women that they should observe modesty of the eyes and guard their sexual parts and let them not display their attractions except those naturally exposed - - and let them cast down their head-scarves onto their bosoms".

It is pertinent to make the point here that 'modesty of the eye' spoken of in the verse above is in connection with both sexes and not only with regard to women. Secondly, this injunction would have no meaning at all if the sexes were segregated or if *hijab* (veiling) as we know it today were observed.[133] The injunction to "not display their attractions except those naturally exposed" have been interpreted in various ways, some restrictive, others liberal. However, it is generally presumed that attractions as are commonly exposed include the face, half the forearm, and any cosmetic or jewellery on these such as rings, bangles, henna or other colouring for hands and nails.[134] The words "and let them cast their head-scarves down their bosoms" also prove that covering the face is not required by this verse.

Other verses of the *Quran* laying down guidelines to women for venturing outside the house appear in chapter 33. Verses 59-60 of chapter 33 state, that Muslim women including women of the Prophet Mohammed's household must "draw tight their outer garments" when they go out at night "so that they can be recognised as

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[132] *Ibid.*
[133] *Ibid.*
[134] *Ibid.*

Muslim women and not molested" and the "Hypocrites"[135] who are said to have molested women are threatened with exile if they do not refrain from such actions. Fazlur Rahman is of the opinion that there is nothing in these verses that calls for the veil as such.[136] In the same chapter verse 33:30 warns the wives of the Prophet Mohammed against any suggestions of immodesty and are threatened with a "double punishment" if they are immodest; verse 33:32 states that the "Hypocrites" are eager to spread rumours about the Prophet Mohammed's wives who are advised "not to speak in an inaudible voice to any male -- if you are God-fearing -- lest he in whose heart there is sickness covets to exploit the opportunity". This verse however, is a special case addressed to the Prophet Mohammed's wives, whom the *Quran* declares to be "Mothers of the Faithful" in verse 33:6. On the strength of these *Quranic* verses it may be argued that segregation and veiling has roots deeper than and preceding Islam and is also strongly linked to class, acting primarily in its present manifestation as a symbol of honour or status.[137]

Ustadh Taha differentiates between the conceptual parameters of *al-hijab*, which requires covering of all of the woman's body except her face and hands and *al-sufur*, which permits more exposure, provided modest dress is maintained in general.[138] He believes that Islam's original precept is *al-sufur* because in his opinion the

> "purpose of Islam is chastity, emanating from within men and women, and not imposed through closed doors."[139]

The veil, Taha further argues, was imposed as a transitional requisite and would become redundant when inner chastity, is achieved through education and discipline.[140] Women Muslim scholars in recent years have questioned the restrictive

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135 The "Hypocrites" were certain inhabitants of Medina who had reluctantly converted to Islam, but were engaged in subverting it.
136 Rahman, *op. cit.*, n. 1. at p. 41.
137 *Ibid.*
138 Taha, *op. cit.*, n. 33 at p. 141.
139 *Ibid.*
140 *Ibid.*

interpretation of *Quranic* injunctions on veiling and segregation of the sexes.[141] Nazirah Zein-Ed-Din sums up the feeling of outrage and frustration of the Muslim women in her excellent work entitled *As-Sufur wal Hijab* in the following words:

> "What is this unjust law (of veiling) which is permeated with the spirit of tyranny and oppression? It is in violation of the Book of God and His Prophet may God bless his soul. This law is the law of the victor, the man who subdued the woman with physical force. Man tampered with God's book to make this law. He prided himself on his tyranny and oppression, even as those hurt him too. He made the law independently, not permitting the women to share in a single letter. So, it came out in accordance with his desires and contrary to the will of God." [142]

2.5 Gradualism as a method of Interpretation for Women's Human Rights in Islam

As mentioned earlier, Islamic jurisprudence consists of an interplay between the *Quran*, *Hadith*, and its subsidiary sources including *ijma*, *qiyas* and *ijtihad*. [143] Although Muslims accept the *Quran* as the primary and authoritative textual source containing the word of God and *Hadith* as an inspired secondary source that can shed light on the interpretation of the verses of the *Quran*,[144] yet when it comes to deriving laws from these sources, serious differences of opinion between the various schools of juristic thought arise, as will have become evident from the preceding sections of this paper. These differences emanate from a major, and irreconcilable difference in perspectives regarding the injunctions laid down in the *Quran*. The view of conservative, 'literalist' Muslim scholars is that whatever is considered permissible in the *Quran* is valid action for all times, and the changing perception of concepts,

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[141] Mernissi; Ahmed, *op. cit.*, n. 1.

[142] N. Zein-Ed-Din, *As-Sufur wal Hijab* (1928) Beirut at p.140 cited in al-Hibri, *op. cit.*, n. 1 at p. 219.

[143] Rahim, *op. cit.*, n. 43; Mahmassani, *op. cit.*, n. 15; Esposito; Rahman, *op. cit.*, n. 1; F. Rahman, *Islam and Modernity Transformation of an Intellectual Tradition* (1982) Chicago: University of Chicago Press; F. Rahman, "Islam: Challenges and Opportunities" in A. Welch and P. Cachia (eds.,) *Islam: Past Influence and Present Challenge* (1979) Edinburgh: Edinburgh University Press.

[144] Sayeh and Morse, *op. cit.*, n. 48 at p. 317.

institutions and actions is no justification for modification in the law. The modernist view on the other hand argues for taking account of the historicity of Islamic law based on *Quranic* text that spoke to the times, claiming that legal rules of Islam are subject to rationalisation, and changes in interpretation of its rules are permissible, indeed inevitable.

Modernist Muslim scholars argue that the *Sharia'*, or principles of Islamic law, is meant to have an in-built dynamism and receptivity to change and was developed by jurists in the early years of Islam to administer appropriate rulings in a new factual setting.[145] It is said that *Sharia'* allows different interpretations of existing precedent in at least three situations as laid down in the *Quran* and *Sunna*: necessity or public interest, change in the facts which originally gave rise to the law and, change in the custom or usage on which a particular law was based.[146] If one of the three conditions given above is present, the jurist may adapt existing law to the new situation, and his ruling then becomes a part of the *Sharia'*, provided it does not contradict the *Quran*. Sayeh provides an illustration of the process where he explains how the Prophet Mohammed's rule of a volumetric measurement for wheat and barley, was changed to measurement by weight.[147]

Gradualism draws upon these principles and implies a method of interpretation that proceeds by degrees over time, advancing slowly but regularly.[148] It is a conceptual framework that is said to have the potential of highlighting the overall pattern in the evolution of the status of Muslim women beginning with the rights of women in the patriarchal society existing prior to the Prophet, followed by the rights

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[145] *Ibid.* Also see Rahman, Hassan, al-Hibri, *op. cit.*, n. 1; Mahmassani, *op. cit.*, n. 15.

[146] Sayeh and Morse *ibid.*, at p. 317 and accompanying footnotes.

[147] *Ibid.*

[148] As a methodology, gradualism holds a particular appeal to modernist Muslim scholars including Mohammed Abduh, Fazlur Rahman, Mohammed Iqbal, Tahir al-Haddad, Esposito, Al-Hibri, Riffat Hassan and many others although various scholars writing on the subject differ in the exact formulation for application to specific situations. But with reference to this particular example used, it is submitted that the issue is fairly non-controversial. One would be hard put to identify similar departures from earlier Islamic norms. Moreover, one wonders how and to what extent this principle may be employed in the area of women's human rights as arguably the rules in this area are based on clear express verses of the *Quran*, to which this principle (and indeed all others), are subservient.

enumerated for women in the *Quran*, and ending with the treatment of women in Muslim society today.[149] A Tunisian scholar Al-Tahir al-Haddad also argues for using gradualism as a method for interpretation of *Quran* in order to achieve equal rights for women in the Islamic tradition.[150] In his controversial book entitled *Our Women in the Law and in Society*, al-Haddad uses the methodological premise employed by some other Muslim reformists, (in his case Mohammed Abduh), namely that Islamic law is not immutable and was not revealed all of a piece but developed as the historic Islamic community developed. Al-Haddad not only argues for the temporality of the *Sharia'*, his 'daring audacity' is to claim that the precepts of the *Quran* itself were not eternal but subject to historical contingency.[151] Norma quotes al-Haddad thus:

> "Islam is the religion which holds to the principle of gradualism in legislating its laws according to (limiting) capacity. There is nothing which states or indicates that the stage achieved during the Prophet's lifetime was the hoped-for final (stage) after which there would be no end since gradual (evolution) is linked to the difficulties of those issues for which gradual steps are to be taken ..."[152]

Sayeh and Morse argue that gradualism is ideally suited to Islam because, while the *Quran* does enumerate certain legal standards, it consists primarily of very broad and general moral directives that may be used as indicators of evolution and growth of the community.[153] As a process applied to Islamic law, it presupposes two main elements; one, that the end-result one is attempting to achieve does not contradict a clear *Quranic* injunction on the subject and secondly, that each

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[149] Sayeh and Morse, *op. cit.*, n. 48 at p. 318.

[150] N. Salem, "Islam and the Status of Women in Tunisia" in F. Hussain (ed.,) *Muslim Women* (1984) New York: St. Martin's Press at p. 143.

[151] *Ibid.*, at p. 144 al-Haddad distinguishes between the eternal principles in Islam; such as the creed of unity, ethical requirements, justice and equality, and those precepts dependent upon human contingencies; particularly as they related to conditions in the *jahilliya* period of Arabia. According to al-Haddad, the basic tendency within Islam, actually within the *Quran* itself, is to take a gradualist approach such that its precepts are suited to its historic reality and thus effective.

[152] Al-Haddad thus believes that the texts of Islam tend to "take woman along with man on the road of equality in all aspects of life." He acknowledges that the social situation of women should be improved and encouraged towards equality since mere laws without a conducive environment will not make men and women equal in real life.

[153] Sayeh and Morse, *op. cit.*, n. 48 at p. 318 citing Esposito, *op. cit.*, n. 1.

succeeding stage of Islamic society identified with and internalised the (proposed) evolving principle. In addition to the above, applying the methodology of gradualism also appears to use examples of a succession of *Quranic* verses on a subject that progressively moved from recommendatory discontinuance of a practice before imposing a final mandatory prohibition. And, finally, how does one justify application of the process to practices/norms in respect of which no final prohibition exists in the *Quranic* text?

Sayeh and Morse[154] cite two examples during the lifetime of the Prophet Mohammed, one identifying application of gradualism and the other where it was not required. It is argued by them that for practices less central to the basic characteristics of society such as the practice of charging interest on loans there appeared no reason to slowly acclimate people to effect this change, therefore a clear directory and final admonition against the practice was pronounced in the *Quran* in verse 2:275-276. [155] By contrast there existed certain cultural practices and habits common to Arab society at the time that were less amenable to instant change and had to be modified slowly and gradually. For example, Arabs were accustomed to drink alcohol and gamble, and initially the *Quran* did not prohibit the practice outright but issued a recommendation (verse 2:219). Later a verse was revealed which imposed a moratorium on drinking alcohol during the hour of prayer.[156] The final stage was an outright and absolute interdiction of all intoxicants and of gambling in all circumstances.[157] This change of practice was brought about by a series of verses revealed over a number of years.[158]

It has been argued that the same method may be used in relation to women's human rights and in the gradual 'phasing out' of practices adverse to equal rights for women. Examples of areas where gradualism may be used include dower, polygamy, and right to education. The concept of dower underwent a process of change since

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[154] *Ibid.*, at p. 319.

[155] Despite the fact that it was a very important practice affecting adversely a few rich merchants of Meccah, yet by and large the community benefited and resistance was not high.

[156] The *Quran*, verse 4:43.

[157] *Ibid.*, verses 5:90-92.

[158] Sayeh and Morse, *op. cit.*, n. 48 at p. 320.

the promulgation of Islamic norms. Starting from a position where it (dower) was the bride-price paid by the husband to the male members of the woman's family, it was modified to become a sum of money or other property paid by the husband to the wife as a mark of respect to her and to be held by her as her property.[159] As regards polygamy, Islam restricted the practice of virtually marrying as many women as a man was inclined to, to up to four, with provisos but also with arguably, sufficient space to abolish the practice by gradualism.(This has been discussed above) Sayeh is of the view that verse 4:129 read in conjunction with 4:3 permitting polygamous unions, "upon closer analysis appears as a microcosm of the gradualism inherent in Islam."[160] In this regard, however, it is submitted that the potential for polygamy to be declared redundant in the Islamic legal tradition through gradualism appears a difficult proposition for the following reasons: While in the case of gambling and alcohol, clear *Quranic* verses may be cited in support of complete prohibition of these practices, the same cannot be said about polygamy. as one does not come across verses that present a comparable finality as do the verses on gambling and alcohol. In response to this argument one may mention here the institution of slavery is perhaps the classic example of gradualism. While slavery is no doubt recognised in the *Quran*, yet strong regulatory verses are also present the tone of which is towards abolition of the practice. Despite the fact that there is no final injunction for its abolition, there would be few Muslims in the world today who would argue that slavery as an institution should be maintained on the basis that the *Quran* does not expressly prohibits it. How then might we explain the strong and persistent resistance to applying the gradualist approach to the position of women?

The strongest and most workable example provided by Sayeh and Morse of the process of gradualism is that of education as an effective tool for empowerment of

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[159] For a discussion of the modification of the concept of dower within the Islamic tradition , see Sayeh and Morse, *ibid.*, at pp. 326-327; Rahim, *op. cit.*, n. 43 at pp. 282-283; Rahman, *op. cit.*, n. 1; Haeri, *op. cit.*, n. 67, and others. The case of dower as the sole property of the wife however needs to be distinguished here because the relevant verses of the *Quran* sanctioning dower clearly identify the stage at which the practice has arrived i.e., that the family of the wife have no right over the dower as it belongs to her.

[160] Sayeh and Morse, *op. cit.*, n. 48 at pp. 328-330.

women. The argument made by Sayeh and Morse is that in comparison to the pre-Islamic society, Islam improved the status of women. This process for improvement was arrested soon after the death of the Prophet Mohammed and steadily after the last of the Rightly-Guided Caliphs.[161] The various schools of interpretation that developed over the centuries had one thing in common - a patriarchal value system. A further contributing factor was that soon after the death of the Prophet Mohammed, men alone began to assume the role of interpreting the *Quran.*[162] These schools began to disallow the participation of women in public life, and as a result, *Quranic* scholarship and interpretation of Islamic law became the province of men, with predictable results for the rights of women in society. It is argued therefore that the principle of gradualism that could not be taken to its logical conclusion of complete equality, rights and dignity for men and women alike was arrested as a result of these factors. Starting from the premise that pre-Islamic custom did not provide adequate opportunities for equal acquisition of knowledge to men and women, Islam declared it as a religious obligation and incumbent for every Muslim whether man or woman, to be educated.[163] The position of women in the Muslim world today bears testimony to the fact that wherever women have been afforded the opportunity of education, other rights have followed suit. Thus the practice of child marriage, denial of access to

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[161] One may perhaps be able to concede that were this tradition of progressive interpretations to have continued it may have brought within its ambit issues addressing women's position as well, and issues addressing women's position, but Islamic history took a contrary course in that after the era of the first four Caliphs, the prestige of rulers rested in sheer force rather than on successorship to the Prophet Mohammed. Because of this development, later day Islamic rulers required doctrinal legitimacy. Therefore, in addition to retreating to patriarchal interpretation, as a result of political necessity rulers attacked the roots of independent thinking, causing a retreat of critical thought. The threat of individual violence against Muslim scholars advocating free will in the interpretation of Islam and the imposition of an official dogma effectively limited religious interpretation. See H. Enayat, *Modern Islamic Political Thought* (1988) at p. 13 cited by Sayeh and Morse, *ibid.*, at 318. Finally in the tenth century, the *Sunni* religious leadership decided that henceforth only accepted schools of interpretation would delineate the meaning of the *Quran* and the *Hadith* based on their earlier *ijtihad.* This is known as the closing of the doors of *ijtihad.* In *Sunni* Islam therefore today, judges are severely limited in their authority to engage in *ijtihad,* and accordingly their flexibility and adaptability in applying principles of interpretation such as *Sharia* is limited. Mahmassani, *op. cit.*, n. 15; M. Iqbal, *Reconstruction of Religious Thought in Islam* (1971) Lahore: Sh. Mohammed Ashraf.

[162] Sayeh and Morse, *ibid.*, at p. 321; see also Al-Hibri, Esposito, Rahman, Ahmed, and Mernissi, *op. cit.*, n. 1.

[163] Sayeh and Morse, *ibid.*, at p. 324.

resources, lack of participation in public life and employment, and a host of other areas of discrimination have receded and encroachment on women's rights minimised.

Application of the principle of gradualism to women's human rights poses a number of problems. The most crucial of this is the pre-requisite for a genuine belief among Muslims that Islam was not intended to freeze human history at the point in time at which God's word (the *Quran*) was revealed to the Prophet Mohammed and that a contextual approach to law-making based on *Quranic* injunctions does not entail relinquishing its status as the primary source of Islamic law.

2.6 Evolutionary Approach to Women's Human Rights in Islam

The late Sudanese reformer, Ustadh Mahmood Mohammed Taha, adopted a very revolutionary approach in dealing with issues such as women's rights within Islam. In his work *The Second Message of Islam*, he outlines his novel technique of reformulating *Sharia'*.[164] He calls for the shifting of legal efficacy from one set of *Quranic* verses to another in keeping with the needs of societies today.[165] He believes that the inferior status of women[166] and practices such as the wearing of the veil (*hijab*),[167] polygamy,[168] and segregation of men and women,[169] are not original precepts of Islam. Rather, these discriminatory practices were imposed only for a transitory period as immediate change from the *Jahilliya* to complete equality was considered too drastic a step for 7th century Arabian society to adopt and imbibe.[170] The true message of Islam, according to Taha, is one of complete equality.[171] He suggested that the fundamental and universal message of Islam is to be found in the *Quran* and *Sunna* texts of earlier stage of Mecca. These earlier verses were not lost

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[164] For a comprehensive treatment of Taha's approach, see his work, *op. cit.*, n. 33.
[165] *Ibid.*, at p.23.
[166] *Ibid.*, at p.139.
[167] *Ibid.*, at p.143.
[168] *Ibid.* at p.140.
[169] *Ibid.* at p.145.
[170] The justification for these changes was that the latter injunctions were not suitable for the people at the earlier time. Even the *Quran* states in 3:159:
"It is part of the Mercy of God that thou dost deal gently with them. Wert thou severe or harsh hearted, they would have broken away from about thee."
[171] Taha, *op. cit.*, n. 33 at p.139.

forever despite subsequent superseding texts. Its implementation was merely postponed until such time as it would be possible to enact them into law.[172]

Taha's approach has been taken up by his followers and students, among them Professor Abdullahi Ahmed An-Naim. He believes that by conceding the basic premise of Taha's revolutionary thinking, a whole new era of Islamic jurisprudence, compatible with international human rights law can begin. For instance, the fact that "traditional" *Sharia'* does not treat women and non-Muslims equally with male Muslims is beyond dispute. Besides seeking to justify such discrimination in apologetic terms, modern Muslim scholars claim that some of the objectionable rules may now be reformed by reviving the techniques of *ijtihad.* But *ijtihad* has its limitations since it is not permitted in any matter governed by an express and definite text of the *Quran* or *Sunna.* Within the context of women's human rights, this becomes problematic as some of the most obviously discriminatory texts are in fact based on them.[173] The only way out of this dilemma, in the words of An-Naim, is to

> "evolve Islamic law on a fresh plane rather than waste time in piecemeal reform that will never achieve the moral and political objective of removing all discrimination against women."[174]

An-Naim has applied Taha's approach in his writings on religious minorities under *Sharia'* as well as women's human rights.[175]

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[172] *Ibid.*, at p.23.

[173] The *Sunna* which provides authority for the exercise of *ijtihad*, the Prophet Mohammed's instructions to Ma'adh ibn Jabal when he appointed him governor of Yemen, describes *ijtihad* as a last resort, to be exercised only when no explicit and definite ruling can be found in the *Quran* or *Sunna.*

[174] An-Naim, at *op. cit.*, n. 1 at p. 168.

[175] Some of An-Naim's writings include, An-Naim, "A modern approach to human rights in Islam: Foundations and implications for Africa" in C. E. Welch, Jr. and R. I. Meltzer (eds.), *Human Rights and Development in Africa* (1984) Albany: State University of New York Press; An-Naim, "Religious Minorities Under Islamic Law and the Limits of Cultural Relativism" (1987) 9 *HRQ* 1, and An-Naim, "The Rights of Women and International Law in the Muslim Context" (1987) 9 *WLR* 491.

2.7 Equal Before Allah, Unequal before Man? Dilemma of Women in the Muslim World

Attempting to develop a theoretical framework of women's human rights in the Islamic tradition poses insurmountable difficulties, the basic and most crucial of these being: How and to what extent, might religious texts be employed as sources of positive law and rights? Are competing sets of norms in the *Quranic* text equally valid, and if so, might we base a rule of law on either, in the light of the general principles of *naskh* (abrogation) laid down by Muslim jurists regarding the order of revelation of the *Quran*? A book of Divine revelation such as the *Quran* coming together over twenty-three years, is by its very nature open to varying interpretations. But how much space is one afforded to discuss and critique laws derived by jurists taking account of the historicity of events, particularly norms that may be completely out of line with contemporary needs of society? And finally, where does one seek legitimation for alternative human rights schemes and categories within the Islamic framework, such as the ones discussed in the present chapter?

It is also evident that restrictive rules of interpretation of the *Quran, Hadith* literature and the process of law-making based on these sources combined to push into the background whatever norm of equality and egalitarianism Islam represented. Leila Ahmed presents the view that:

> "Even as Islam instituted, in the initiatory society, a hierarchical structure as the basis of relations between men and women, it also preached, in its ethical voice (and this is the case with Judaism and Christianity as well), the moral and spiritual equality of all human beings. Arguably, therefore, even as it instituted a sexual hierarchy, it laid the ground, in its ethical voice, for the subversion of the hierarchy."[176]

Is it this principle of 'subversion' present in the ethical *Quranic* norms that may, after all be employed to justify a framework for women's human rights in Islam today?

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[176] Ahmed, *op. cit.*, n. 1 at p. 238.

A common feature of the various frameworks of women's human rights discussed above is that these highlight the fact that no matter what methodology one attempts to employ, there appears no escape from certain clear *Quranic* verses creating gender hierarchies. When we concede to every word of the *Quran*, law-making authority, how can one deny to one group of Muslims the right to legislate on the basis of verses that discriminate against women, just as another group would aspire to invoke the non-discriminatory verses in order to create laws affording complete equality between the sexes.?

Whether it is Esposito's hierarchization of *Quranic* values, Hevener's categorisation of rights, Taha'a evolutionary approach or the modernists' method of gradualism, complete equality as the term has come to be understood in modern day usage is difficult to infer from any of these schemes. It might be strategically opportune to seek a rigorous implementation of all the protective/corrective category of rights before embarking upon the 'equality' and non-discrimination path. By applying the Islamic paradigm of equality of human dignity and worth, and requiring 'those in authority' i.e., men and the State to accept responsibility for fulfilling the material needs of women, children and other disadvantaged sections of society in their charge, and provide them access and control over resources, a move towards substantive as opposed to mere formal equality for all may be possible.

PART II

WOMEN'S HUMAN RIGHTS IN ISLAM: APPLICATION IN MUSLIM JURISDICTIONS

A CASE-STUDY OF PAKISTAN

In order to understand the rights of a Muslim woman within the Islamic tradition, one needs to locate her in the concentric rings of religion, class, law and society that form the multiple layers of her identity and encompass her from the moment she is born. Since the Islamic world embraces an overwhelming complexity of social forms and cultural ways, the diversity in sexual, behavioural patterns is enormous.[1] Muslim women live under widely different conditions and their rights and obligations and the influence they can exert over their own lives change considerably from one part of the Muslim world to another.[2] Norms within a particular cultural milieu, economic and political conditions, all play a crucial role in determining what rights are conceded to a Muslim woman in a particular Muslim jurisdiction. Therefore, a single, categorical statement regarding the human rights of Muslim women in the world today would simply not be a valid one as these vary from society to society and from one age to another. At the same time, as was identified in chapter 2 of this study, one must bear in mind that the variation of Muslim women's rights is also influenced by the different interpretations of the religious text offered to justify restricting the space given to Muslim women in the Islamic tradition.[3]

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1 I. Nicolaison, Introduction in B. Utas (ed.,) *Women in Muslim Societies* (1983) London: Curzon Press and Atlantic Highlands, USA., Malmo and Humanities Press Inc., at p. 2.

2 *Ibid.*

3 In fact, views restricting Muslim women's rights far outnumber those interpretations of the religious text in Islam that afford women greater equality with men. See discussion in chapter 2 of the present study.

Part II of this study attempts to highlight the disparity between theoretical perspectives on women's human rights in Islam, and its application in Muslim countries. It will be argued that a variety of factors, ranging from religious injunctions, cultural practices, and socio-economic realities, to political expediency on the part of governments determine what rights a Muslim woman gets in these jurisdictions. Continuously changing social parameters determine the application of law, even one espoused by religion. It will be argued on the basis of evidence provided that reality is different from a number of theoretical assumptions made about the position of Muslim women. Over the centuries, and with the emergence of sovereign nation states on the one hand and, internationalisation of the world on the other, an 'operative'[4] Islamic law has come into existence that is not entirely in keeping with traditional Islamic law principles nor completely irreconcilable with current international human rights instruments relating to women's human rights. It is this 'operative' Islamic law that influences women's human rights in Muslim jurisdictions. Although reference will be made to a number of Muslim jurisdictions, the debate will basically focus on Pakistan.

Pakistan[5] provides an interesting and unique case-study of the rhetoric and reality of women's human rights in Islam. It is the only country in the world to have come into existence on the basis of an Islamic identity. She is a post-colonial country

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[4] The term 'operative' Islamic law is presented as a concept denoting a multiplicity of norms derived from sources, both 'secular' and 'Islamic' to form regulatory guidelines for the conduct of governments in Muslim countries. This law informs action both in the context of domestic and international relations. Again, while there may exist a small core of common rules among Muslim jurisdictions, the 'operative' Islamic law varies from one Muslim country to another.

[5] Pakistan is a south-Asian country with an estimated population of 137.4 million, 97% of whom profess the Islamic faith. Some important statistical information is as follows: area 804 sq. kilometres; life expectancy at birth 62.3 years; adult literacy rate 37.1%; annual population growth (1960-1994) 2.9%; estimated population growth (1994-2000) 2.7%; GDP 60,649 million dollars; Human Development Index (HDI) 1994 is 0.445. Source: Newsletter Regional Centre for Strategic Studies, Colombo, January 1998.

and thus shares the historical and political manifestations of the phenomenon with a number of Muslim countries. Pakistan has followed a pattern similar to other Muslim jurisdictions in terms of reformist ideology (particularly family law reform), alongside 'revivalist' thinking and movements. Legal pluralism emerging from a combination of regulatory norms in terms of customary practices, statute law (secular or civil codes) alongside law based on religion. Pakistan also presents similarities with most Muslim jurisdictions in that the crux of 'personal status law' is the only one being adhered to in the name of religion.[6]

This case-study spreads over three chapters, each attempting to address a particular aspect of the identity of Muslim women in Pakistan, and rights afforded therein. Chapter 3 confines the analysis to women's human rights in the 'public' and predominantly 'secular' sphere of life under the constitution and other related laws. Areas highlighted include the equality norm of the constitution vis-à-vis its Islamic provisions, women's rights to education, health, economic rights, employment and political participation.

Chapter 4 focuses on what may be termed the 'private' and 'Islamic' sphere. A discussion of Muslim Personal law, its application to women and trends of courts in this area will be analysed using the *Saima Waheed*[7] case as an example.

Chapter 5 looks at the 'inner core' of a Muslim woman's identity under customary practices using the case of the North West Frontier Province of Pakistan. This chapter advances the argument that of all the three sets of rules i.e., constitutional, Islamic and customary practices, it is the last named that form the most

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[6] Turkey is the only Muslim country that has a completely secular legal system including family law.

[7] *Abdul Waheed v. Asma Jehangir* PLD 1997 Lah. 301. The case is popularly known as the *Saima Waheed* case.

resilient regulatory norms affecting women's rights. During the course of the discussion, it is also proposed to look into the issue of what will be termed as Islamic "revivalism" and its consequences for Muslim women. The concluding section introduces the concept of an emerging 'operative' Islamic law informing human rights of women which is influenced by a number of factors extraneous to religion including international human rights instruments.

CHAPTER III

'PUBLIC' AND 'SECULAR'? WOMEN'S HUMAN RIGHTS UNDER CONSTITUTIONAL LAW

3.1 Introduction

The purpose of this chapter is to present an analysis of women's human rights in Pakistan in what may be defined as the 'public' and 'secular' sphere as provided under the constitution and other related laws. Areas addressed include a discussion of the equality norm entrenched in the constitution vis-à-vis its Islamic provisions. Women's rights to employment, education, health and political participation will also be analysed in the light of constitutional developments in recent years.

3.2 The Public/Private Dichotomy, Legal Pluralism and Women's Human Rights in Muslim Jurisdictions

Caught in the grip of competing and unresolved normative conflicts, legally pluralistic jurisdictions such as Pakistan (and most countries constituting the Muslim world), find themselves in a hybrid legal system fraught with contradictions, duality and compromise. Nowhere is this conflict more apparent than Pakistan where Islamic law, English secular legal principles and customary norms interact to produce an amoebic, boundary-less set of regulatory norms. Which set of rules will dominate varies from time to time and on a case by case basis. Thus 'secular' law is more likely to govern the 'public' sphere including matters of state, inter-state relations as well as relations with international institutions, administrative matters and financial

regulations. Disputes in the area of family law will primarily be governed by principles of Islamic law.

Connected to the issue of the legal pluralism is the public/private dichotomy of life. It has been argued by some writers that Islam attempted to break down the barrier of the public/private dichotomy.[1] As an example is cited the living quarters of the Prophet Mohammed (the centre of private life), and the architecture of the mosque (then the centre of political and public life), at the time when the first Islamic state was established at Medina. The door of his wife, Aisha's room opened directly into the mosque thus creating a space in which the distance between the public and private life was nullified.[2] This arrangement played a decisive role in the lives of women and their relationship to politics and indeed, public life in general.[3] It was also symbolic of their participatory role in all fields of life and facilitated the formulation of political demands by women, particularly ones challenging male privileges.[4]

Islamic Jurisprudence, does not present a public/private divide in the legal sense in that since there is no division between state and religion, and religion is '*din*' i.e., a way of life and not merely a system of belief, therefore a dichotomy cannot be said to exist on this basis. Reality, however, stands out in stark contrast to this as Muslim jurisdictions not only created such a divide but also led to a validation of these spheres very soon after the death of the Prophet Mohammed. In fact in present times,

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1 F. Mernissi, *Women and Islam*, translated by M. J. Lakeland (1991) Oxford: Basil Blackwell, at pp. 111-114.

2 *Ibid.*, at p. 112.

3 Mernissi *ibid.*, citing Tabari, *Tafsir*, Vol. 22. At p. 10 Tabari presents examples of how women posed demands for rights. He declares that Umm Salama, one of the wives of the Prophet Mohammed once queried him as to why the *Quran* mentions men and not women? In other words, this heavily loaded question was demanding legal personality and recognition of women from Islam. The proximity of the living quarters and the mosque ensured that whatever response was received by the Prophet Mohammed was within hearing distance of his wives and hence could be further transmitted to other Muslim women. It is said that the 'equality' verse of the *Quran*, 35:33 was revealed as a response to Umm Salama's query.

4 Mernissi, *ibid.*, at pp. 113-114.

the public/private divide has been strengthened by creating a public sphere where 'secular' laws have been introduced and are applied with impunity even in States created in the name of Islam (e.g., Pakistan).[5] As opposed to this, a separate 'private' sphere has emerged for which the term 'Muslim personal law' has been coined by jurists because it pertains to issues governing marriage, dower, divorce, inheritance, polygamy, custody and guardianship. Interestingly, and by design, one might add, all laws affecting the status of Muslim women have historically been relegated to Muslim personal law. This private sphere is zealously guarded as the bastion of Muslim identity, legal tradition and jurisprudence. In this 'protected' sphere too, Islamic law is applied after undergoing a subtle, almost imperceptible process of filtration through a maze of cultural norms and prevailing political and economic compulsions.[6]

3.3 Constitutionally Guaranteed Equality for Women and the 'secular' 'public' sphere: Replicating the *Ibadaat* category of non-discriminatory rights in Islam?

A common factor in post-colonial statehood has been a written constitution deriving inspiration from similar institutions of their erstwhile 'masters'.[7] Coupled with this is the very important human rights document, the Universal Declaration of

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5 The entire foundations of Statehood and its various institutions are 'secular'; so is the bulk of statute law derived from the colonial era. The fact that an appallingly low percentage of the budgetary allocation is set aside for areas such as health, education and other basic facilities of life is not at all in keeping with Islamic injunctions of the State's obligations towards its citizens. Lack of accountability on the part of those in authority is also unIslamic. Similarly, in inter-(Islamic) State relationships, benefit of an Islamic Ummah is not always evident. Muslim States including Saudi Arabia, Kuwait and the Gulf States deny rights of citizenship to residents who have lived there and served these nations for decades. This denial is very 'worldly' and 'secular' bearing no connection with the Islamic spirit of Muslim brotherhood.

6 Chapter 4 and 5 of this study addresses these issues.

7 Thus member States of the Commonwealth of Nations, as former colonies of the British Empire, have incorporated elements of the Westminster-style institutions as well as fundamental rights chapters in their constitutions. See, A. H. Robertson and J. G. Merrills, *Human Rights in the World* (1989) 3rd edn., Manchester: Manchester University Press at p. 27.

Human Rights (UDHR),[8] provisions of which, have been virtually replicated in the constitutions of more than three dozen Asian, African and Middle Eastern countries including Pakistan.[9]

In the context of application of women's human rights in Muslim jurisdictions, it is interesting to note that there is an equality norm deeply entrenched in the constitution of Pakistan inspired by the equality norm of human rights instruments adopted by the United Nations.[10] Women are provided complete equality under the constitution of Pakistan and this norm of non-discrimination is reiterated in many of its provisions both in the chapter on Fundamental Rights as well as Principles of Policy.[11] Article 25 of the constitution is the main constitutional provision affording equality before law and equal protection of the law, and states thus:

"1) All citizens are equal before law and are entitled to equal protection of law.
2) There shall be no discrimination on the basis of sex alone.
3) Nothing in this article shall prevent the State from making any special provision for the protection of women and children."[12]

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[8] Adopted and proclaimed by General Assembly Resolution 217 A (III) of 10 December 1948.

[9] Robertson and Merrills, *op. cit.*, n. 7.

[10] It has been stated that the constitution of Pakistan incorporates about two-thirds of the thirty rights enumerated in the UDHR. See, M. Haleem, "The Domestic Application of International Human Rights Norms" in *Developing Human Rights Jurisprudence, The Domestic Application of International Human Rights Norms* (1988) London: Human Rights Unit pp. 91-108 at p. 106.

[11] The major difference between fundamental rights and those afforded as principles of policy is that while the former are justiceable in a court of law, the latter are not so enforceable.

[12] Article 25 of the constitution of 1973 had its counterpart in the constitution of 1956 as article 5 which read as follows: "5. Equality before Law. -- (1) All citizens are equal before law and are entitled to equal protection of law. (2) No person shall be deprived of life or liberty save in accordance with law." Similarly, in the 1962 constitution, the same subject was dealt with in article 15: "15. Equality of citizens. -- All citizens are equal before law and are entitled to equal protection of law. In the Interim Constitution of Pakistan (1972), this equality provision became article 22 with a material addition incorporated in clause (3). "22. Equality of citizens.-- (1) All citizens are equal before law and are entitled to equal protection of law. (2) There shall be no discrimination on the basis of sex alone. (3) Nothing in this article shall prevent the State from enacting any special provision for the protection of women." In the 1973 constitution, as we have seen above, this article remained in the same form except that it was renumbered as article 25 and the words "and children" added to clause (3). In the American Constitution, Amendment XIV corresponds to article 25 of the constitution of Pakistan. It runs thus: "Section 1. -- All persons born or naturalised in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without due process of law; nor

One may compare the constitutional guarantee of equality between men and women and its application by courts as comparable to the *ibadaat* category of rights.[13] It is also important to note that article 25 of the constitution has been successfully invoked in areas that fall within the 'public' sphere, such as the right to education and employment.[14] Why this provision has never been employed to uphold women's equality within the 'private' sphere is perhaps indicative of its limits to the *ibadaat* category of rights and not extendible to the *muamalaat* area where equality is more difficult to achieve.

3.3.1 Application of the equality norm as espoused by article 25 of the constitution of Pakistan: An overview in the light of reported case-law

In a legally pluralistic jurisdiction such as Pakistan, norms informing the legal system are varied and at times in conflict. The first and foremost issue in our discussion of the equal rights provisions in the constitution therefore, is the concept of equality itself and its interpretation by courts. The superior judiciary in Pakistan has applied article 25 to promote equality between men and women, as well as by using it in conjunction with other provisions of the constitution to advance this equality.[15] Litigation in the area has arisen due to a literal and narrow interpretation of affirmative action measures mitigating against the equality article (25) of the constitution.[16]

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deny to any person within its jurisdiction of equal protection of the laws." Article 14 of the Indian Constitution is also similarly worded. The 1972 constitution of Bangladesh has article 27 as the equality provision that provides for equality before the law and equal protection of the law.

[13] Cf. the theoretical framework of women's rights in Islam discussed in chapter 2 of this study.

[14] See discussion of reported case law below.

[15] In addition to article 25, there exist a number of other constitutional provisions permitting the State to adopt affirmative action measures assisting women to achieve meaningful equality with men. These include, *inter alia*, articles 26; 27; 32; 34; and 37.

[16] For example, where 'special' quota of seats were reserved for female students in medical colleges, and female applicants exceeded this quota and were able to get places in 'open' competition with

The case of *Shrin Munir v. Government of Punjab*,[17] is a major landmark in the area. The petition arose when girl students applying to medical colleges in Punjab were denied admission to these institutions on the basis that seats reserved for them as an affirmative action measure were filled up. Therefore, even though on merit, these girl students were entitled to places, the same were given to male students on the plea that girl students were only entitled to seats reserved for them and no more. The girls' plea was that this was a violation of article 25 of the constitution, as well as a misapplication of the affirmative action measures outlined in the constitution. Their Lordships declared in very clear terms that:

> "Clause (2) of article 25 prohibits distinction on the basis of sex alone. However, the very next clause (3) controls the rest of article 25 by providing that "nothing in this article shall prevent the State from enacting any special provision for the protection of women and children." It implies, therefore, that while the difference on the basis of sex can be created and maintained, it shall be done only in those cases where it operates favourably as a protective measure for and not against women and children. The field of prohibition, of adopting sex, as a criteria for making a distinction, is thereby reduced to only that category wherein sex is adopted as a standard for discriminating against females generally and against males only if it is not as a measure protective of females..... In interpreting the constitution and also in giving effect to the various legislative measures, one distinction has to be consistently kept in view and it is that classification based on reasonable considerations is permissible and not violative of the principle."[18]

The *Shrin Munir* case, had as its precursor, the case entitled *Mussarat Uzma Usmani etc. v. Government of Punjab*.[19] This was similar in nature to the *Shrin Munir* case and A. S. Salaam, J., as he was then, while declaring restrictions placed upon girl

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their male colleagues, a narrow interpretation resulted in denying the female applicants places beyond the fixed quota.

[17] PLD 1990 SC 295.

[18] *Shrin Munir v. Government of Punjab*, PLD 1990 SC 295 at p. 309.

[19] PLD 1987 Lah. 178.

students to compete on open merit seats as illegal/invalid, interpreted article 25 of the constitution of Pakistan in the following words:

> "The provision is clear, categorical and unambiguous altogether. It laid down that all are equal, there shall be no discrimination on the basis of sex alone and that the State may make law for the protection of women. All are equal, man and woman, neither man nor woman shall be discriminated against; laws may be made for the protection of women - not against them. How are the (girls) petitioners being treated equally when they were being denied admission even though they have nearly hundred marks more than the boys? Are they not being discriminated against only because they are girls? If they were boys with these marks they would have been given admission...." [20]

Another recent constitutional petition, entitled *Naseem Firdous v. Punjab Small Industries Corporation*,[21] tested the application of the equality norm laid out in article 25 of the constitution of Pakistan in conjunction with article 27 that safeguards against discrimination in services. In this case, the petitioner, already employed by the Punjab Small Industries Corporation in 1977 and promoted to the position of Assistant Director (Design) in 1983 was prevented from applying for the position of designer in the same department as the advertisement was restricted to 'male only' applicants. The plea of the employers was that the position of designer was essentially a 'male' job; this statement was made regardless of the fact that the petitioner, a woman was already performing that very job for close to a decade. The court declared the justification of article 27 as conflicting with the equality article of the constitution and hence invalid/illegal.

It may thus be argued on the basis of reported case law invoking article 25 of the constitution, that the equality norm between men and women has been strictly

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[20] *Ibid.*

[21] PLD 1995 Lah. 584.

upheld by the superior courts in Pakistan.[22] Permissible classification has been interpreted to mean only one that is likely to advance the interest of women and certainly not one that may be used against them.[23]

3.3.2 Islamic Provisions and the constitution of Pakistan: Conflicting or Complementary Norms?

Pakistan was carved out of the Indian subcontinent to provide a separate homeland for Indian Muslims (in August 1947 on the departure of the British colonisers). In other words, Pakistan came into existence in the name of Islam and Islam was therefore, integral to statehood itself. Yet the precise role that Islam was to play within the constitutional framework of the State was unclear. In order to chart a course towards constitution-making stamped with an Islamic identity, Pakistan's first constituent Assembly passed a resolution popularly known as the Objectives Resolution in March 1949. This resolution became the Preamble to all the constitutions of Pakistan and was eventually made a substantive part of the constitution as a new provision, article 2-A of the 1973 constitution in 1985.[24] The resolution provided, *inter alia* that:

> ... sovereignty over the entire universe belongs to God Almighty alone; and

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[22] The statement above must be read with the proviso that cases where women and girls approach the courts to seek justice and equal rights is not the norm in Pakistan, and the cases discussed above belong to the few educated girls and women who are among the more privileged sections of the community in that they are aware of their rights, the law and the avenues available for redress.

[23] A fair amount of jurisprudence has built up around article 25 of the constitution, including, *Fazal Jan v. Roshan Din* PLD 1992 SC 811; *State v. Zia-ur-Rehman and others* PLD 1973 SC 49; *Federation of Pakistan v. Saeed Ahmed Khan and others* PLD 1974 SC 151; *Government of Pakistan v. Zafar Iqbal and others* 1992 CLC 219; *Pakistan Post Office v. Settlement Commissioner and others* 1987 SCMR 1119; *Mst. Noor Jehan Begum v. Abdul Majid Shaida and another* Law Notes 1967 (NUC) SC 15 and *S. Sharif Ahmed Hashmi v. Chairman, Screening Committee, Lahore and another* 1978 SCMR 367.

[24] Revival of Constitution Order, 1985 (P.O. No. 14 of 1985).

> ... Muslims shall be enabled to order their lives in the individual and collective spheres in accordance with the teaching and requirements of Islam as set out in the Holy Quran and the Sunna.

All four constitutions[25] of Pakistan contained provisions highlighting its 'Islamic' nature. Article 1 of the 1956 constitution defined Pakistan as an Islamic Republic.[26] Part III of the constitution contained a number of provisions concerning the role of Islam in the State.[27] Thus article 25 provided that the State should enable the Muslims of Pakistan to order their lives in accordance with the requirements of the *Quran* and *Sunna* by, *inter alia*, providing facilities to understand the Islamic philosophy of life,[28] making teaching of *Quran* compulsory,[29] promoting Islamic moral standards,[30] and securing the proper organisation of *zakat*, *waqfs* and mosques. Part XII of the constitution also contained a number of Islamic provisions, the most significant of which was article 198 which provided that

> "No law shall be enacted which is repugnant to the injunctions of Islam as laid down in the Holy Quran and Sunna ... and... existing law shall be brought into conformity with such injunctions."

The formulation of these provisions, however, left the decision of whether a law was repugnant to Islam or not, in the hands of the National Assembly. The constitution also provided for the appointment of a Commission the function of which was to make recommendation for bringing existing laws into conformity with the requirements of Islam. The Commission also had as its brief to compile such injunctions as could be given legislative effect by the National Assembly. That Islamic

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[25] Adopted in 1956, 1962, the Interim Constitution of 1972 and 1973.
[26] But it was argued that this did not have the effect of making Islam the State religion. See G. W. Choudhury, *Constitutional Development in Pakistan*, (1969) 2nd edn., at p. 103.
[27] Entitled the "Directive Principles of State Policy".
[28] Constitution of Pakistan, 1956, article 25(2)(a).
[29] *Ibid.*, article 25(2)(b).
[30] *Ibid.*, article 25(2)(c).

law is not a monolithic entity and, that there may be more than one interpretations and hence laws based upon such diverse interpretations, was also taken into account in a note of explanation to article 198. It stated that

> "In the application of this article to the personal law of any Muslim sect, the expression *Quran* and *Sunna* shall mean the *Quran* and *Sunna* as interpreted by that sect."

The 1956 constitution thus called for a gradual process of 'Islamisation'; the pace and direction of which was retained in the hands of the National Assembly.

The 1962 constitution of Pakistan continued this trend and contained provisions to the effect that no law should be repugnant to Islam and existing laws should be brought in conformity with Islam.[31] Part X of the constitution relating to Islamic institutions contained a number of innovations. Article 199 provided for the establishment of an Advisory Council of Islamic Ideology, whereas article 207(1) for an Islamic Research Institute. The main function of these two institutions was to tender advice to national and Provincial Assemblies, the President or the Governor as to whether a proposed law was in accordance with the Principles of Law-Making.[32]

Thus in the first two constitutions of Pakistan the role of Islam within the state was a strictly curtailed one. This position was maintained in the 1973 constitution with some important changes. Islam was declared the State religion.[33] Further, Islamic provisions were contained in Part IX of the constitution. Article 227 provided that all existing laws be brought into conformity with the injunctions of Islam and that no law

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[31] Initially the 1962 constitution did not include a provision for bringing existing laws into conformity with the requirements of the *Quran* and *Sunna*, but following protests from the National Assembly, this provision was included as the First Amendment Act of 1963.

[32] Article 6(1).

[33] Article 2.

should be enacted which was repugnant to such injunctions. The question of repugnance to Islam was to be determined by the National Assembly with the advice of the Council of Islamic Ideology (CII).[34] The process of bringing all existing laws in conformity with the injunctions of Islam was to be carried out only in the manner provided for in Part IX entitled "Islamic Provisions" of the constitution.[35] No role for the judiciary was envisaged under this arrangement.

In summation it may be argued that successive constitutions of Pakistan attempted to maintain an element of Islam in its various provisions without challenging a number of laws in force in the country that may be perceived by some as opposed to or indeed violating Islamic norms.[36] At the same time, it is evident that from its very initial phase, the constitutions of Pakistan were a patchwork of 'secular', western-style written documents with some Islamic provisions thrown in for good measure. To this day, these norms have co-existed parallel to each other in an uneasy relationship. But this fragile balance and compromise between the constitution on the one hand and Islamisation on the other was thrown into disarray by the programme of Islamisation initiated by General Zia ul Haq in 1977.

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[34] Established under article 228 of the 1973 constitution. Article 230 set out the functions of the Council of Islamic Ideology which included inter alia: "... to advise a House, a Provincial Assembly, the President or a Governor on any question referred to the Council as to whether a proposed law is or is not repugnant to the injunctions of Islam; ... to make recommendations as to the measures for bringing existing laws into conformity with the injunctions of Islam and the stages by which such measures should be brought into effect;"

[35] That is, by the legislature with the advice of the CII article 227(2) of the constitution.

[36] Laws such as the Dissolution of Muslim Marriages Act, 1939 and the Muslim Family Laws Ordinance, 1961 are examples that were given constitutional protection and brought outside the perview of any scrutiny to determine the Islamic nature of laws.

3.3.3 'Islamisation' of the Constitution: Redefining the Equality Norm?

On assumption of the office of Chief Martial Law Administrator in July 1977, Zia-ul-Haq proclaimed that 'Islamisation' was his prime objective.[37] He particularly focused on a promise to restore the sanctity of the *chadar aur chardiwari* (women veiled and within the four walls of the house). His preoccupation of 'Islamising' Pakistani society extended conveniently to measures where he would not be presented with any real threat or confrontation, i.e., the position of women.

In common with other Islamist movements of this century, the regime of General Zia-ul-Haq combined political struggle with cultural phenomena in a bid to seek a return to values and structures of the past, including traditional sex roles.[38] In a comparative study of the 'Islamisation' programmes undertaken in Iran, Afghanistan and Pakistan, Valentine Moghadam argues that in all cases the process of social change is marked by "a disorienting collision of tradition and modernity which calls cultural identity into question and politicises gender relations and the position of women."[39] She says that women are perceived as the bearers of culture and repository of traditions and thus become a compelling signifier of a community's religious-cultural-identity.[40]

'Islamisation' in Pakistan, as was subsequently made evident, was therefore in actual fact the imposition of General Zia-ul-Haq's image of the 'rightful place' of a

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[37] General Zia-ul-Haq came into power in a military coup after overthrowing the democratically elected government of Zulfiqar Ali Bhutto. He suspended the fundamental rights contained in the 1973 constitution and ordered the constitution to be held in abeyance. Previous Martial Laws (1958 and 1969) had resulted in abrogation of the then constitutions of 1956 and 1962 respectively.

[38] S. Mullally, "Separate Spheres: Protective Legislation for Women in Pakistan" (1995) 4 *As.YIL* at p. 65.

[39] V. Moghadam, "Patriarchy and the Politics of Gender in Modernising Societies: Iran, Pakistan and Afghanistan" (1992) 7 *International Sociology* 35, at p. 39.

[40] *Ibid.*, at 39-40.

woman in a Muslim society and seeking the establishment (restoration?) of an Islamic society through these images. The articles in the constitution of Pakistan according formal equality to women were held in abeyance while a number of laws appeared on the statute book that were discriminatory to women.[41] These measures obviously contradict the over-arching constitutional norm of equality.

3.3.4 Evidentiary Value of Women and 'Islamisation' of Laws in Pakistan

The *Quran* contains specific verses where the evidentiary value of one woman must be collaborated by that of a second woman (in certain financial transactions reduced to writing).[42] The law of evidence[43] in Pakistan however, had made no reference to any such conditions and the evidence of male and female witnesses had always been considered equal.[44] The 'Islamisation' period of the 1970's soon made this equality a thing of the past and women's position as a witness became suspect for a number of reasons.

Under a Presidential Order, a number of drastic amendments were made in the law of evidence by the Qanoon-i-Shahadat Order 1984.[45] Section 17 of this law in dealing with the competence and number of witnesses provides that,

> "in matters pertaining to financial or future obligations, if reduced to writing, the instrument shall be attested by two men, or one man and two women, so that one may remind the other, if necessary, and evidence shall be led accordingly; and (b) in all other matters, the

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[41] e.g., The Hudood Ordinances, 1979 and The Qanoon-i-Shahadat Order, 1984 to be discussed below.

[42] The *Quran*, verse 2:282. See discussion in chapter 2 of this study.

[43] Codified in colonial times as the Evidence Act, 1872.

[44] Except that in the case of witnesses to marriage contracts, the general practice has always been of male witnesses.

[45] 10 of 1984. No. F. 17(2)/84-Pub. The Qanoon-i-Shahadat was proposed and drafted by the Council of Islamic Ideology (CII), an advisory body in April 1982. The CII was provided for in the 1962 and 1973 constitutions of Pakistan with the brief to examine laws for their conformity or otherwise to Islam. It did not play an active role in the years between 1962 and 1977; it was General Zia who in his rule (1977-88) activated the CII and encouraged it to produce the most reactionary and at times absurd interpretations of 'Islamic' laws.

> Court may accept, or act on, the testimony of one man or one woman, or such other evidence as the circumstances of the case may warrant."[46]

Section 17 has come under severe criticism, not least as representing a misinterpretation of the *Quranic* verse on which it is purported to be based. Verse 2:282, it is argued, suggests requirements for witnessing of financial transactions reduced to writing, the tone being recommendatory and not mandatory; secondly it relates to monetary notes or debt notes. There is very little justification in basing such a broad based rule of substantive law on it to include financial or future obligations.[47] More importantly, incorporating a literal interpretation of verse 2:282 goes against the spirit and purpose behind it. Mumtaz and Shaheed's words sum up the situation very aptly:

> "Seen in the context of seventh century Arabia the verse is an indication of the inclusion of women in matters of monetary transactions where women may not have been so active. Ironically, the same verse is being used in 20th century Pakistan to exclude them."[48]

A major cause of concern is that, whereas section 17 of the Qanoon-i-Shahadat Order, 1984 is supposedly confined to financial transactions reduced to writing, the wording of the section leaves much to the discretion of the court to

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[46] The original draft had required two men or one man and two women's testimony in all matters. But due to widespread protests in the country from women's rights groups and others, the original draft was watered down and the provision is now applicable only to financial transactions reduced to writing. For a detailed discussion on the subject see, K. Mumtaz and F. Shaheed, *Women of Pakistan Two Steps Forward, One Step Back?* (1987) Lahore: Vanguard, chapter 7.

[47] See debate A. M. Weiss, "Women's Position in Pakistan: Sociocultural Effects of Islamisation" (1985) *Asian Survey*, Vol. XXV, No. 8, p. 863, pp. 871-872; S. S. Ali, "Women's Rights as Human Rights in the Islamic Tradition" in A. Stewart (ed.,) *Gender, Law and Justice* (1998) Blackstone; A. Hussain, *The Status of Women in Islam* (1987) Lahore: Law Publishing Company, Ch. IV; F. Rahman, "Status of Women in the Quran" in G. Nashat (ed.,) *Women and Revolution in Iran* (1983) Boulder CO: Westview Press; Mumtaz and Shaheed, *ibid.*, at chapter 7. For the theoretical discussion see chapter 2 of this study.

[48] Mumtaz and Shaheed, *Women of Pakistan, ibid.*, at p.110. On similar views, also see Hussain, *Status of Women ibid.*; Rahman, *ibid.*

determine the competence of a witness in accordance with the injunctions of Islam. This is bound to lead to varied interpretations with the potential of extending its application to other areas as well.[49] One example of this lies in the Criminal Law Amendment Act 1997 where one form of proof of homicide is "by evidence as provided by section 17 of the Qanoon-i-Shahadat, 1984."[50] In other words, a wide margin of appreciation is given to the judiciary, who may or may not share the same opinion on the interpretation of the Islamic law of evidence.[51] One judge may, for instance, hold a woman's testimony equal to that of man's, another may hold the reverse view. It is interesting to note however, that in the 13 years of its existence on the statute books, section 17 of the Qanoon-i-Shahadat has not been invoked in a court of law even once. This speaks volumes for the 'operative' Islamic law evolved over the years.[52] At the same time, the very fact of its continued existence on the statute books makes the Qanoon-i-Shahadat akin to the proverbial sword of Democeles hanging over the heads of the millions of women in Pakistan. That the law has never been invoked to devalue the evidence of a woman is no assurance that it never will in the future be put to such use, leaving women in a very uncertain and indeed vulnerable position with regard to their legal personhood.[53]

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[49] See *Report of the Commission of Inquiry for Women* (1997) Islamabad (*Commission of Inquiry Report*) at p. 76.

[50] The *Criminal Law Amendment Act,* 1997, Section 304(1)(b).

[51] *Commission of Inquiry Report, op. cit.*, n. 49 at pp. 56-57. In cases of hurt too, the law provides for the same categories of proof. See section 304(2), *Criminal Law Amendment Act,* 1997.

[52] It is important to note here that customary law in most parts of Pakistan also does not entertain the evidence of women. See discussion on customary practices in chapter 5 of the present study. A single reported case cited by the *Commission of Inquiry Report, ibid.*, at p. 76 relates to the matter of *qisas* (retribution) where it was stated that the law required the evidence of one man and two women. (*Rashida Patel v. Federation of Pakistan* PLD 1989 FSC 95).

[53] The resistance the amended law of evidence met from the women of Pakistan may be gauged from the fact that between October 1982 and October 1984, it remained the main issue for women's organisations. See Mumtaz and Shaheed, *op. cit.*, n. 46 at pp. 106-107. The 'highlight' of the protest took the form of a demonstration on 12 February 1984 when women demonstrated on the streets of Lahore (Pakistan) before the High Court and were baton-charged and tear-gassed

3.3.5 The 'Islamic' Criminal Laws: Another blow to the Equal Rights Norm of the Constitution of Pakistan

In 1979, General Zia-ul-Haq promulgated a set of six laws in the area of criminal law known as the Hudood Ordinances.[54] Up until then, criminal law was a field governed by codified laws of the colonial era[55] with scope of Islamic law confined very much to the domain of personal status law. The preamble to the Hudood Ordinances declare that the object is to modify existing criminal law and bring it into conformity with the injunction of Islam as set out in the *Quran* and *Sunna*. The Ordinances divide punishment into two categories: *hadd* and *tazir*. *Hadd* means a punishment, the measure of which has been definitely fixed in the *Quran* or *Sunna*. *Tazir* is a punishment other than *hadd* where the court is allowed discretion both as to the form in which such punishment is to be inflicted and its measure. The Hudood Ordinances, however, depart from general Islamic jurisprudence by making provisions both for the form and measure of punishment.

These laws undermine, indeed contradict the over-arching constitutional norm of equality enshrined in the 1973 constitution on two important counts. First, the evidentiary value of a woman and non-Muslim is discounted and, secondly, as a result of this lower evidentiary value attached to testimony of women and non-Muslims, rapists and/or thieves are liable to escape maximum punishment even if the offence is proved beyond reasonable doubt.

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by police. Many were arrested. This day is now celebrated as the Pakistan Women's Day by women in Pakistan.

[54] Enforcement of Hadd (Prohibition) Order (IV of 1979); Offences Against Property (Enforcement of Hudood) Ordinance (VI of 1979); Offence of Zina (enforcement of Hudood) Ordinance (VI of 1979); Offences of Qazf (Enforcement of Hadd) Ordinance (VIII of 1979); The Execution of Whipping Ordinance (IX of 1979).

[55] The Pakistan Penal Code, 1860 and the Code of Criminal Procedure, 1898.

Thus under section 7 of The Offence Against Property (Enforcement of Hudood) Ordinance, 1979 proof of theft liable to *Hadd* takes one of the following forms, either (a) the accused pleads guilty of the commission of theft liable to *Hadd*, or (b) at least two Muslim adult male witnesses other than the victim of the theft, about whom the Court is satisfied, having regard to the requirements of *tazkia al-shuhood*, that they are truthful persons and abstain from major sins (*Kabair*), giving evidence as eyewitnesses of the occurrence;

Likewise, section 8 of The Offence of Zina (Enforcement of Hudood) Ordinance 1979, proof of *zina* or *zina bil jabr* liable to *Hadd* may be submitted in one of the two forms, namely, that (a) the accused makes before a Court of competent jurisdiction a confession of the offence; or (b) at least four Muslim adult male witnesses, about whom the Court is satisfied, having regard to the requirements of *tazkia al-shuhood*, that they are truthful persons and abstain from major sins (*Kabair*), giving evidence as eye witnesses of the act of penetration necessary to the offence.[56]

Under the section 8(b) of the same law, proof of *zina* or *zina-bil-jabr* liable to *Hadd* is the same and is the following:

> "(b) at least four Muslim male adult witnesses about whom the Court is satisfied having regard to the requirements of "tazkiyyah al-shuhood" that they are truthful persons and abstain from major sins (kabair), given evidence as eye witnesses of the act of penetration necessary to the offence:
>
> Provided that, if the accused is a non-Muslim the eye-witnesses may be non-Muslims."

[56] The above mentioned Hudood laws also discriminate against women because they fix a lower age of criminal responsibility for girls than for boys as puberty is considered the age of majority under this law. Thus a girl as young as 9 as opposed to a boy of 18 is exposed to the rigours of this law.

The inference from the above law is that:

No distinction is drawn between proof for *zina* and *zina-bil-jabr*. Therefore the presence of 4 adult male Muslims must be prepared to give testimony before a rapist is punished under *Hadd*. If the required standard of proof for *Hadd* is not met, the case may be tried under *Tazir* where the standard of proof in entirely a matter of discretion for the judge. Most rape trials in Pakistan since the promulgation of the Hudood Ordinances are tried under *tazir*, given the almost impossible standard of proof for *hadd* punishments. A further hurdle that complainants of rape face is that where a victim of rape is unable to prove the offence and the court finds that she consented to sexual intercourse, the charge may be converted to *zina* (adultery or fornication), and the complainant herself becomes the accused. Furthermore, if the complainant is pregnant as a result of rape, this is taken as proof that sexual intercourse outside of marriage has taken place.[57] In a number of cases the alleged rapist has been acquitted because of lack of conclusive evidence, whereas the woman complaining of rape has been convicted of zina having failed to establish that her pregnancy was the consequence of rape.[58] If the only witnesses to a rape or *zina* act are non-Muslims and the victim and offender Muslim, then such witnesses stand disqualified.

It is submitted that the framers of this law confused the *Quranic* verses relating to *Lian* or false accusation of a wife by a husband and those relating to *Qazfh* or imputation and have extended their application to the offence of rape as well. The

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[57] See, generally, A. Jehangir & H. Jilani, *The Hudood Ordinances: A Divine Sanction?* (1990) Lahore: Rohtas Publications; R. Mehdi, *The Islamisation of the Law in Pakistan*, (1994) Surrey: Curzon Press; R. Mehdi, "The Offence of Rape in the Islamic Law of Pakistan" (1990) 18 *IJSL*, pp. 19-29; C. H. Kennedy, "Islamisation in Pakistan: Implementation of the Hudood Ordinances" (1988), *28 Asian Survey*, p. 307.

[58] See for example *Safia Bibi v. The State* NLR 1985 SD 145; *Shabbir Ahmed v. The State* PLD 1983 FSC 110.

purpose of the *Quranic* verses was to protect the honour and reputation of human beings in general and women in particular by requiring the stringent rule of producing 4 adult male Muslims before condemning a person as an adulterer or adulteress.[59]

The Zina Ordinance has been controversial since the day it was promulgated. Its working has resulted in adverse implications for women on a number of counts. Before the Zina Ordinance was enforced, adultery was dealt with under the Pakistan Penal Code. Women could not be tried for *zina* as it was a crime coming in the perview of adultery. Complaints could only be made by the husband of the woman accused of the offence but women could not be punished under the law. The offence was bailable and compoundable and if the complainant chose to drop charges, or not to prosecute the offender, criminal proceedings against the accused were automatically dropped. Very few cases of adultery have been reported. This situation soon underwent a drastic change when women were included within the scope of punishment for the offence of adultery. Allegations of *zina* suddenly soared into thousands. The *Commission of Inquiry Report* states that

> "This clearly indicates that as long as it was only the male who could be punished for adultery, there was a reluctance to prosecute. The Ordinance became a tool in the hands of those who wished to exploit women."[60]

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[59] The *Quran*, verse 24:4-9 states: "And those who accuse honourable women but bring not four witnesses, scourge them (with) eighty stripes and never (afterwards) accept their testimony - they indeed are evil-doers. As for those who accuse their wives but have no witnesses except themselves; let the testimony of one of them be the four testimonies, (swearing) by Allah that he is of those who speak the truth. And yet a fifth invoking the curse of Allah on him if he is of those who lie. And it shall avert the punishment from her if she bear witness before Allah four times that the thing he saith is indeed false. And fifth (time) that the wrath of Allah be upon her if he speaketh truth."

[60] *Commission of Inquiry Report, op. cit.*, n. 49 at p.66. It also points out to data collected from the Women Police Station Karachi South where around 80% of cases registered are under the Zina Ordinance.

It became clear in a fairly short period of time that the Zina Ordinance was being used for reasons other than to bring 'immoral' men and women to justice.[61] The statement of appeals filed in the Federal Shariat Court between 1980 and 1987 is an indicator of the exceptionally high rate of acquittal for women accused of *zina*.[62] Here it may be pointed out that the *Qazfh* law concerning false accusations against women does not appear as an effective deterrent.[63]

The above discussion on inroads into the constitutional guarantees of equality contained in article 25 of the constitution thus amount to prima facie violations of its norms. But a reading of paragraph 3 of article 25 allowing 'special measures' for the protection of women in conjunction with article 27 prohibiting discrimination in services yet permitting exclusion of women in jobs that "entail the performance of duties and functions which cannot be adequately performed by members of either sex....." may be used to justify the provisions of the Hudood Ordinances and the Qanoon-i-Shahadat Order. Moreover, both these provisions of the law have been validated by clause 19 of the Eighth Amendment Act 1985. This Act further provides that, notwithstanding anything contained in the constitution, any such law may not be called into question 'in any court on any ground whatsoever'.[64] Thus, pending a repeal of this amendment, the guarantees of equality before law and equal protection

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[61] Jealous ex-husbands who wanted to implicate their ex-wives as 'punishment' for a failed marriage found this law particularly useful; likewise, families employed it for teaching recalcitrant daughters marrying against their will. It has even been recorded that husbands wanting to contract a subsequent marriage in the presence of an existing wife and wishing her out of the way have filed a case of *zina* against her.

[62] Of the 3339 appeals filed, 1174 were dismissed and 701 were partially accepted. The former Chief Justice of Pakistan, Justice Mohammed Afzal Zullah confirmed that 95% of all Hudood cases in the superior courts of Pakistan are decided in favour of women. (*The Daily Muslim*, Islamabad, March 9, 1993).

[63] Weaknesses in the law is apparent from a perusal of case law on the subject. See for instance, *Haji Bakhtiar Said Mohammed v. Dure-e-Shahwar* PLD 1986 FSC 187; *Nek Bakht v. The State* PLD 1986 FSC 174; *Nuzhat Jabin v. The State* PLD 1996 FSC 15; and *Mst. Faiz Begum v. The State* 1995 P. Cr.LJ 1601.

[64] Section 19(2) of the Eighth Amendment Act (XVIII of 1985).

of the law ring hollow and are insufficient to restore it to more than a formal provision of the constitution resting on rather uneasy foundations. It might therefore be inferred that one set of constitutional provisions are being used to undermine another set of provisions in the same document. How seriously might one take the equality norm of article 25 of the constitution of Pakistan as providing equal rights to women?

3.3.6 Insertion of article 2A as a substantive provision of the constitution: The ensuing debate and implications of women's rights

Inclusion of the Objectives Resolution,[65] as Article 2-A of the constitution[66] has created a potential to subvert the equality provisions of the constitution. Article 2-A, as mentioned above, has been referred to by courts as 'the corner-stone of Pakistan's legal edifice' and the 'bond which binds the nation', embodying the spirit and fundamental norms of the constitutional concept of Pakistan.[67] But it was not accepted as a supra-constitutional document nor even a justiceable provision. It had often been invoked unsuccessfully before the superior judiciary in attempts to establish the illegality or otherwise of actions taken by the Executive. Hamoodur Rehman CJ, stated in no uncertain words that:

> "... the Objectives resolution of 1949, even though it is a document which has been generally accepted and has never been replaced or renounced will not have the same status or authority as the Constitution itself until it is incorporated within it or made part of it."[68]

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[65] Formerly the preambuler statement of the constitutions of Pakistan, 1956, 1962, the Interim Constitution, 1972 and 1973.

[66] Under the Revival of Constitution Order, 1985 (P.O. No. 14 of 1985).

[67] *Asma Jehangir v. The Government of the Punjab* PLD 1972 SC 139.

[68] *State v. Zia-ur-Rehman* PLD 1973 SC 49.

With the inclusion of article 2-A as a substantive part of the constitution, it appeared that the conditions laid down by Chief Justice Hamoodur Rehman were satisfied. But the judgements emanating from the High Courts and Supreme Court of Pakistan did not reflect the same clarity as to the exact implications of including the Objectives Resolution as article 2-A of the constitution. Thus ensued a stream of conflicting judgements. Some of these elevated the said article to a supra-constitutional status and meaning that the judiciary could now examine all matters against the benchmark of Islam without any constraints placed by the Constitution on the jurisdiction of the Federal Shariat Court.[69] Pursuing such a line of argument obviously endangered the equality provisions of the constitutions as well as the little respite offered to women by virtue of the few laws codified to advance their rights.[70]

The danger to women's rights, it was feared, might occur in the garb of testing the equality provisions of the constitution, as well as laws affording some protection

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[69] See the case of *Irshad Khan v. Mrs. Parveen Ajaz* PLD 1987 Kar. 466 where Justice Tanzil-ur-Rehman, one of the chief exponents of Article 2-A held that it was "in the nature of a paramount clause and supra-constitutional instrument". In *Habib Bank v. Mohammed Hussain* PLD 1987 Kar. 616, Justice Rehman invoked similar views regarding the importance of Article 2-A. It may be noted that the Federal Shariat Court was established through Presidential order No. 1 of 1980 by incorporating Chapter 3-A to Part VII of the Constitution of Pakistan. It is felt that the function assigned to it, i.e., to declare any law repugnant to Islam, is already being fulfilled by other institutions including the superior judiciary and the Council of Islamic Ideology.

[70] These laws are the Dissolution of Muslim Marriages Act 1939 and the Muslim Family Laws Ordinance 1961. Even prior to the insertion of the Objectives Resolution as Article 2-A of the constitution, the assault on the MFLO had begun. The Appellate bench of the Supreme Court in *Federation of Pakistan v. Mst. Farishta* PLD 1981 SC 120 set aside a ruling of the Shariat Bench of the Peshawar High Court to the effect that section 4 of the MFLO was contrary to the injunctions of Islam. In *Mirza Qamar Raza v. Tahira Begum* and others PLD 1988 Kar. 169, Justice Tanzil-ur-Rehman ruled that although personal laws had been placed outside the jurisdiction of the Federal Shariat Court, the insertion of article 2-A into the constitution had extended power to the superior courts to review such legislation, to determine whether these were compatible with the requirements of Islam. He found several provisions in the MFLO repugnant to Islam. In *Mst. Kaniz Fatima v. Wali Mohammed* PLD 1989 Lah. 489, the Lahore High Court expressly dissented from the supra-constitutionality doctrine advanced by Justice Tanzil-ur-Rehman in, inter alia, *Mirza Qamar Raza v. Tahira Begum* PLD 1988 Kar. 169. Further, Justice Allah Nawaz declared that the Court did not have jurisdiction to declare constitutionally protected law to be invalid on grounds of repugnance to Islam and further that he was not in agreement with Justice Tanzil-ur-Rehman with regard to the legal status of the MFLO which, in Justice Allah Nawaz's view was valid, subsisting law.

to women (the DMMA and the MFLO), to see whether these laws were indeed "in consonance with the injunctions of the *Quran* and *Sunna*." The Supreme Court soon resolved the issue of the supra-constitutionality of article 2-A in the case of *Hakim Khan and others v. Govt. of Pakistan.*[71] Justice Shafiur Rehman sounded a note of caution at the 'runaway' pace at which enthusiasts of 'Islamisation' were using this particular provision of the constitution. He said that

> "There are settled, classic, accepted principles of interpretation of constitutional provisions. They should not be lost sight of, ignored or violated in the euphoria for instant Islamisation of Constitution, Government and Society."[72]

The controversy however, is far from resolved as the conflict results from the divergent normative base of the constitutional guarantee of equality on the one hand, to the Islamic provisions and mechanisms for 'Islamising' laws and in the process undermining this equality norm on the other.

But the most important question regarding the debate in relation to the equality provisions of the constitution affecting women is the conflicting views over the structure and hierarchy of norms enunciated through various constitutional amendments. It has to be conceded that the constitution of Pakistan draws inspiration from a variety of sources including international human rights instruments, Islamic law as well as secular norms. Which norm will be predominant in the event of a conflict, and what body/forum has the deciding capacity, remains the unanswered question.

A final point here is that although one may argue that Islamic law does not necessarily entail discrimination against women, yet it is difficult to ignore the fact

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[71] PLD 1992 SC 595.

[72] PLD 1992 SC 595 at p. 630. A final resolution came in the judgement of the Supreme Court in *Mst. Kaneez Fatima v. Wali Mohammed* PLD 1993 SC 901.

that the vast majority of Muslims have come to accept rights as hierarchical, with adult, male Muslims possessing the most rights and women and non-Muslims the least. So in the light of the equality norm of the constitution, as espoused by article 25 on the one hand, and the fundamental right to freedom of religion (article 20) on the other, how does on reconcile these two (competing) rights?[73] If freedom of religion means the right to practice the Islamic religion as an individual believes it to be, and if part of that belief entails considering women as unequal to men, how does one reconcile this with article 25 of the constitution enunciating equal rights? These opposing trends are visible in case law interpreting article 25 and the meaning of equality for women on the one hand and formulation of statute law and customary practices acknowledged by society on the other. That the two trends do not necessarily identify with each other and that their rights have very insecure foundations, is the reality that women in Pakistan have to live with.

3.4 The Protective/Corrective *muamlaat* Category of Women's Human Rights in the Public Sphere in Pakistan: Testing The Limits of Affirmative Action Measures

Article 25 of the constitution of Pakistan outlining equality before law and equal protection of the law appears to rest alongside the reality that the vast majority of women are placed among the weakest and most disadvantaged groups within a community and hence in need of more than formal statements of equality. It may also be argued that even the equal rights provisions in the constitution permit and indeed,

[73] This potential conflict is also present in international human rights instruments and will be addressed in a later chapter of this study.

acknowledge women as a separate class and in need of protective/corrective regulations.[74] Several constitutional provisions undertake a positive obligation on the part of the government for affirmative action to alleviate the status of women. This section attempts to discuss critically the limits to the effectiveness of such measures in the light of the situation of women in areas of political participation, health and education, employment and economic rights. It will be argued that gender hierarchies created and strengthened in these areas find very little justification in religious injunctions. The perception in customary practice, of women as unequal and subordinate to man, appears to dominate the scene combined with the lack of political commitment on the part of successive governments in Pakistan to invest in their citizens.

3.4.1 Economic Rights of Women in Pakistan: Rhetoric and Reality

It may be argued that Islamic law in recognising a wide range of economic rights for women, in effect, transcends the public/private dichotomy.[75] This includes the right to earn, acquire, access and dispose of their property, both movable and immovable. An adult Muslim woman may not be coerced into dealing with her possessions by any one, including close male relatives such as her father, brother, husband and son.[76] But these rights appear to have remained for the large part in the domain of theory; reality being at variance with this formal equality. In this section it

[74] For instance, article 25(3) of the constitution of Pakistan.

[75] Economic activity, it may be said, falls primarily in what is termed as the public sphere.

[76] As discussed in chapter 2 of this study. It is worth mentioning here that 'interference' with the property of the wife and preventing her from exercising her legal rights over it, is a ground for the wife to seek dissolution of her marriage under the DMMA, section viii(d).

is proposed to look into the reality of economic rights available to women in Pakistan.[77]

It may be argued that economic independence is an important means to achieving empowerment. But the problem of acquiring some measure of economic rights for women in Pakistan is that religion and custom are used to reinforce women's 'protected' and hence economically dependent position. Thus, while Islam allows women to own and inherit property, yet the fact that the share in inheritance is invariably half that of men in similar relationships, is itself a crucial drawback. It is estimated that very few women get even their half share of inheritance.[78]

In the rural areas of Pakistan, in particular, a clear violation of the rights to inheritance takes place where agricultural land is often not given to daughters and kept 'in the family'.[79] Dowry (trousseau) is considered as an appropriate share of daughters in parental property and women rarely have access to or control over property in their names. Where women do inherit property, the same is mostly taken

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[77] A note of caution needs to be sounded here though. Class and gender are the 'double burden' that women in Pakistan carry throughout their lives. See S. S. Ali, "The Constitutional, legal, Ideological and Customary Status of Rural Women in the NWFP" in H. M. Naqvi and K. Adeel (eds.,) *Development, Change and Rural Women in Pakistan*, (1995) Peshawar: Pakistan Academy for Rural Development p. 31. But one may also make the point that women from more affluent classes do not face the severe economic deprivations that their sisters from the lower economic classes are confronted with. At the same time we must bear in mind that wealth is not always accompanied by autonomy for women. For a slightly different perspective see, A. Jalal, "The Convenience of Subservience: Women and the State of Pakistan" in D. Kandiyoti (ed.,) *Women, Islam and the State* (1991) London: Macmillan pp. 77-114. Also see, I. H. Malik, *State and Civil Society in Pakistan. Politics of Authority, Ideology and Ethnicity* (1997) London: Macmillan pp. 139-167; A. Weiss, "Implications of the Islamisation Program for Women" in A. Weiss (ed.,) *Islamic Reassertion in Pakistan. the Application of Islamic laws in a Modern State* (1987) Lahore: Vanguard, pp. 97-114.

[78] S. S. Ali, "A Critical Review of Family Laws in Pakistan: A Women's Perspective" in R. Mehdi and F. Shaheed (eds.,) *Women's Law in Legal Education and Practice in Pakistan North South Cooperation* (1997) Copenhagen: New Social Science Monographs, where about 50% respondents drawn from rural and urban centres of the North West Frontier Province of Pakistan claimed to have received or hoped to receive some share in inheritance. less than 47% however, showed similar hopes for immovable property.

[79] Meaning the male line of the family. See further, chapter 5 of this study on customary practices relating to the position of women.

over and controlled by male heirs through general powers of attorney, gift deeds or relinquishment deeds in favour of the male heirs.[80]

Access to credit, the right to bank loans, mortgages and other forms of financial credit are rights which in theory are available to both men and women in Pakistan. But a number of social, cultural and economic barriers mitigate against the exercise of these rights and access to existing sources of credit. First of all there is the general impression about women that they need the support of a male relative to guide them as financial concerns fall outside the domain of women's perceived roles and functions.[81] Then there is the general environment and unwritten rules of the 'public' sphere inhibiting women's access and participation in economic activity. Obstacles to women's mobility in terms of transport in reaching banks and other lending institutions during daylight hours are numerous. Beyond certain hours, it is 'improper' for women to be seen outside the house and women therefore are restricted in reaching these.

Financial institutions such as the Agricultural Development Bank of Pakistan (ADBP), the Industrial Development Bank of Pakistan (IDBP), and other banks do not have enough female staff to cater to women borrowers. Women get deterred when dealing with male staff of these institutions.[82]

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[80] A survey conducted in 1995 of over 1000 rural households in the province of Punjab found that only 36 women owned land in their own name and only 9 of them had the power to sell or trade it without permission of the male members of their household. In nearly two-third of the households surveyed, it transpired that daughters did not inherit land either because it was customary for sons only to inherit or because these women could not exercise the right even where they did inherit the property. See, *Commission of Inquiry Report*, *op. cit.*, n. 49 for details.

[81] Very few women, even educated and middle class women are seen in banks and other financial institutions in Pakistan.

[82] See, for example, data of National Development Finance Corporation (NDFC), where 0.1% loan disbursements have been awarded to women and the IDBP, where 0.5% of women have been given loans. Information available shows that where they exist, community based credit programmes are used extensively by women. Examples are the Aga Khan Rural Support programme and the Orangi Pilot Project. Both these projects have demonstrated positively that women are credit worthy despite the fact that they may not own assets and may even be illiterate.

The First Women Bank was set up by the Government in 1989 as a first step towards improving the socio-economic status of women. This Bank caters specifically to the needs of women by offering both traditional and non-traditional credit and banking facilities.[83] This Bank is controlled, managed and run by women. It is too early to see the extent of impact that the First Women Bank has had in integrating women as active partners into the mainstream of socio-economic life of the country.[84]

Finally, although no religious injunction makes any overt suggestion to this effect, State policies very often fail to recognise women as primary earners or as heads of households, the number of women in both categories is on the increase. While official figures estimate about 5% of women-headed households, an intensive study carried out in Karachi about 10 years ago indicated 10% households as being headed by women.[85] This state of affairs results in further problems for women as the burden of provider and head of households entails being more 'visible' and in the public sphere, a situation not looked upon with great favour by societal norms.[86]

Government of Pakistan, Ministry of Women Development and Youth Affairs, *Pakistan National Report* (first draft) (*National Report, First Draft*) October (1994) Islamabad: Printing Corporation of Pakistan Press, chapter 5 pp. 20-29.

[83] *Ibid.* at pp. 21-22.

[84] The First Women's Bank has been recommended by an International organisation, "Euromoney" for its excellent recovery rate (97.60%). *Ibid.*, p.21. Having said that a number of issues clearly need to be addressed to make it cater to the special needs of women in Pakistan. These include requirements for loan eligibility (which currently stands at 50% equity on the part of women running the institutions requesting the loan), collateral offered against loans etc. It has been noticed that many women are unable to avail these facilities as they are unable to put down the requirement of collateral and equity. Another important problem in the working of the First Women Bank lies in the rural/urban disparity in the disbursement of loans, and it has been reported that only a negligible percentage goes to rural women. See *National Report First Draft*, *op. cit.*, n. 82 at p. 23. Bangladesh, a predominantly Muslim country, appears to have a different experience and the Grameen Bank is now considered one of the major 'success stories' in the region for granting women financial autonomy through loans etc. Women's Co-operatives are functioning efficiently and have a high return rate for loans advanced to women to set up their own businesses.

[85] This economic inequality of women and lack of recognition as heads of households is further compounded by the State allocating State lands for homes or lease sites, as well as loans for family enterprises etc. in the name of male members of the family. *Commission of Inquiry Report, op. cit.*, n. 49 at pp. 97- 98.

[86] These societal norms restricting women to the private sphere fail to take on board the dilemma of women who have been forced to negotiate in the public sphere, not necessarily out of choice but

3.4.2 "Seek Knowledge from the Cradle to the Grave"[87]: Muslim Women and the Right to Education

Education is an important tool of empowerment for the individual male and female. In Pakistan (and most other Muslim jurisdictions) however, access to education is very poor.[88] Where available, the male child has priority to schooling; facilities for girls and women are minimal. This section proposes to highlight the role of factors extraneous to religion in denying education rights to women, including under-resourcing, political expediency and customary practices inhibiting women's participation in education.

It may be stated that the foundation of Islam is laid on acquisition of knowledge for all and is exhorted as a religious duty irrespective of gender.[89] The very first revelation received by the Prophet Mohammed began with the word, "Read... "

> "Read! In the name of
> Thy Lord and Cherisher.
> Who created - created
> Man, out of a (mere)
> Clot of blood. Read!
> And thy Lord
> Is most bountiful. He
> Who taught (the use of
> the pen - taught man
> that which he knew not)".[90]

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because they have no other choice. So, for instance, how does a widow with very young children pay electricity and gas bills, if not by leaving the confines of her house? Or, again, who buys the grocery, medicines and such necessities of life?

87 A very famous and oft-quoted pronouncement of the Prophet Mohammed. Other *Ahadith* emphasising the importance of education state thus: Seek knowledge even if you have to go to China". "Educate your children for they are born for a time that is not yours."

88 See generally, H. Stokke, "Pakistan" in P. Baehr, H. Hey, J. Smith and T. Swinehart (eds.,) *Human Rights in Developing Countries Yearbook* (1994) Deventer: Kluwer Law and Taxation Publishers at pp. 329-330.

89 A *Hadith* of the Prophet Mohammed states thus: "To acquire knowledge is the obligation of every Muslim man and woman."

90 The *Quran*, Verses XCVI:1-5. Other verses on the subject include: Verses LV:1-4. "God, most Gracious! It Is He who has taught The Quran. He has created man. He has Taught Him speech (and intelligence)". Likewise, Verses II:31-34 of the *Quran* elucidate the same theme thus: "And he taught Adam the nature Of all things; then He placed them Before the Angels, and said; "Tell

The rhetoric however, does not match reality by any account. It is indeed difficult to understand how defiance of a clear injunction of Islam (i.e., the right to education for all), is justified by a jurisdiction where virtually every pronouncement is punctuated by Islam.

Neither the constitution of Pakistan nor any other laws discriminate against women in the field of education.[91] In fact cognisant of adverse customary practices, the Principles of Policy in the constitution contains provisions to advance the position of women in the field of education:

> Article 37(b). "The State shall remove illiteracy and provide free and compulsory secondary education within the minimum possible period;
> (c) make technical education and professional education generally available and higher education equally accessible to all on the basis of merit;"[92]

A few other laws in the area of education have also found their way on the statute books including The Provincial Primary Education Ordinance, 1962; The West Pakistan Primary Education Act, 1964, The Workers Children Education Act, 1972 and the Literacy Ordinance, 1985. Despite the presence of these laws, primary compulsory education has not been notified in all districts of Pakistan.[93]

Me The nature of these if ye Are right." "They said: 'Glory To Thee; of knowledge We have none, save What Thou Hast taught us; in Truth It is Thou Who art perfect in Knowledge and wisdom." "He said: "O Adam! Tell them Their natures." when he Had told them, Allah said: "Did I not Tell you That I know the secrets Of heavens And earth, and I know What ye Reveal And what ye conceal?"

91 cf. *Shrin Munir* and other cases referred to in section 3.4 of this chapter.

92 These measures are subject to certain limitations. Firstly, article 29(2) in the chapter entitled Principles of Policy provides that "In so far as the observance of any particular Principle of Policy may be dependent upon resources being available for the purpose, the Principles shall be regarded as being subject to the availability of resources." Secondly, article 30(2) further waters down the impact of article 37(b) and (c) by stating that "The validity of an action or of a law shall not be called in question on the ground that it is not in accordance with the Principles of Policy, and no action shall lie against the State, any organ or authority of the State or any person on such ground."

93 The province of Punjab took the lead in notifying compulsory primary education in 1995.

Education, is a very neglected field in Pakistan and, as stated above, very few Pakistanis whether male or female, have access to it.[94] An extremely small percentage of resources are made available for education, generally varying between 2.5%- 2.7% of the GNP.[95] At the government level there is little or no commitment to the cause of education rights for all. This trend has its roots in the feudal structures of society, particularly the rural areas in Pakistan. Members of Parliament who are in decision-making positions make a concerted effort to ignore the needs of their constituents since in their view, ignorant and illiterate voters are easier to pacify and less likely to challenge the authority of the politicians in their areas. Further, denial of education maintains the status quo of class hierarchies and perpetuates their power base. Education is one of the only chances working class people have to upward mobility and better economic opportunities, which in turn is a real threat to those who have been wielding unshared power over them for generations.

The cause of women's education is a step more problematic. Foremost, is the issue of entry of the girl child into the public sphere since enrolment in school means breaking with centuries-old tradition of gender segregation and stereotyped roles for girls and women, requiring them to come out of the four walls of the house. Female education is thus fraught with greater difficulty than their male counterparts as it exposes women to the 'outside' world and, (strange) men. Statistics available for literacy rates are eloquent expressions of this denial of education rights to women in Pakistan.

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[94] For an overview of the educational scene in Pakistan, including educational institutions, enrolment, funding etc., see Government of Pakistan, *Pakistan 1995. An Official Handbook* (1995) Islamabad: Printing Corporation of Pakistan Press, pp. 146-154.

[95] Figures available for previous years are: In 1993-94, 2.2% of the GNP was spent on education; in 1994-95 it was raised to 2.4% and in 1995-96 to 2.5%. Source: Government of Pakistan, *Economic Survey 1995-96*, Islamabad: Printing Corporation of Pakistan Press, at p. 112.

In 1970, the literacy ratio of male Pakistanis was 30% compared to 11% females.[96] In 1981,[97] literacy among women was 16% as compared to 35% literate males.[98] Gender inequalities are further accentuated in rural-urban imbalances, whereby rural female literacy rates were 7.3%, compared to 32% for males, and urban literacy rates were 33.7% females to 51.5% males.[99]

The female literacy rate in Pakistan, according to the *Pakistan Economic Survey 1992-93*, rose from 16% in 1981 to 23% in 1993.[100] This is still less than half the rate for males. The female literacy level is 7.3% in the rural areas. The lowest rate of female literacy is in Baluchistan where only 1.7% of the female population is literate.[101] Figures available for 1995-96 estimate the overall literacy rate at 37.9%; 50% for males and 25.3% for female literacy in the country.[102]

In terms of access to education, it is pertinent to point out that only 30% of the country's schools are for girls.[103] In 1985-86, only about one third of the approximately 940,000 five year old girls living in rural areas were going to school. Fewer than one in six rural girls completed five years of education (considered the minimum for achieving basic literacy.) Drop-out rates at different levels of school

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[96] UNICEF Report, 1994.

[97] When the last population census took place. In 1997-98 a new census is being conducted. Results are still unavailable.

[98] Government of Pakistan, *Fourth World Women Conference, Beijing, September 1995 Pakistan National Report (Beijing Report)* (1995) Islamabad: Printing Corporation of Pakistan Press at p. 20.

[99] *Ibid.* The absolute numbers of illiterate persons swelled from 43 million in 1981 to an estimated 50 million in 1991, majority of whom were women. This figure includes adult illiterates, primary school drop-outs and those who have not had access to any educational opportunities.

[100] Government of Pakistan, *Pakistan Economic Survey, 1992-93*, Islamabad: Printing Corporation of Pakistan Press.

[101] *Ibid.*

[102] *Pakistan Economic Survey 1995-96*, Islamabad at p. 111. Adult literacy rate in 1994, according to the UNDP, *Human Development Report* 1997 stood at 37.1%.

[103] See S. S. Ali, *A Comparative Study of the United Nations Convention on the Elimination of All Forms of Discrimination Against Women, Islamic Law and Laws of Pakistan (CEDAW Study)* (1995) Peshawar: Shaheen Printing Press at pp. 71-73.

remain high. Only 3% of rural 12 year old girls were still in school as compared to 18% for boys.[104]

Segregation at high school and college levels has resulted in not providing any facilities for girls as the demand for educating boys is more pressing according to cultural norms.[105] The high schools for boys are seven times more than similar level schools for girls. Similarly, the number of girls colleges lie somewhere between 20-30% of the total number of colleges country-wide.[106] There are 24 Universities, State funded (barring a few); these are co-educational and thus remain open to both men and women but the ration of male-female students remains very low.[107]

Some of the reasons for this miserably low level of literacy, poor primary school enrolment and high drop-out rate for girls include

> "the low priority given to the girl-child by her family and the State, a complete neglect of her future well-being, lack of mobility of women and a hostile attitude of the general public thus rendering it unsafe for a female child to play outside her home and encourages parents not to send her to school but to put her to work instead and get away with it."[108]

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[104] *Ibid.*

[105] Thus, despite provisions of complete equality with males, female children suffer from implicit and covert discrimination in the form of State policies arguing that in the face of limited resources, it is 'better' and more 'practical' to establish educational institutions for male students.

[106] These are rough estimates as the last census took place in 1981 and most statistical data currently available are estimates.

[107] *The Economic Survey 1991-92*, of the Government of Pakistan suggests that women students form 13.6% of the student population at Pakistani Universities. In professional colleges (e.g., Medical Schools, women students constitute 26.2% of the total students enrolled. This reflects a rise from 1951 statistics where female students were only 9.6% of the student body and formed 8.0% of the students in professional colleges. Private Universities are now being encouraged by the Government and 9 have so far been given charter.

[108] I. N. Hassan, *The Education Status of Women - Pakistan Report* (1994) Islamabad: Asian Development Bank/Federal Ministry of Education, Government of Pakistan at p. 23. cited in Ali, *CEDAW Study, op. cit.*, n. 103 at p.73. For a similar analysis, also see *Beijing Report*, op. cit., n. 98 at pp. 19-27; *Commission of Inquiry Report, op. cit.*, n. 49 at p. 92; S. S. Ali, "Higher Education and the Legal Status of Women", Journal of Law and Society; S. S. Ali, *Developing a Database for Rural Women's Training and Employment in the NWFP* (1994) Peshawar: ILO. U. K. Adeel, "Participatory Education as an Instrument of Change" in H. M. Naqvi and U. K. Adeel (eds.,) *Development, Change and Rural Women in Pakistan* (1995) Peshawar: Pakistan Academy for Rural Development at pp. 77-86.

The above cited views of Dr. Hassan are further corroborated by numerous other studies on the education rights of women in Pakistan. From the existing case-studies on the reasons for low female literacy and access to education, the predominant majority of women state that they could not receive education because of cultural and family traditions such as early marriage and purdah. Lack of educational institutions[109] and almost non-existent means of transportation in the remote and inaccessible parts of the province is another major contributory factor. Poverty and lack of resources is yet a further hindrance in the way of female education as where there is a choice between sending a male and female child to school, the parents choose to send the son.[110]

The right to education, is a basic human right acknowledged as a cardinal principle of the Islamic tradition, the *Quran* drawing a permanent moral distinction between the educated and the ignorant by saying: "Can they who know and they who do not know be deemed equal?"[111] Successive governments in Pakistan have paid consistent lip-service to its cause. The *Beijing Report* states in no uncertain terms that

> "In view of the fact that the attainment of literacy and basic education is a human right, and also that the linkages between education, decreased fertility and improved health have made education a necessity for the success of national development programmes, Pakistan has committed itself to the Education For All (EFA) philosophy, and subsequently at the Conference on EFA of the Nine High population Countries."[112]

But, for the millions of women in Pakistan who are simply deprived of their

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[109] Adeel, *ibid.*, at p. 81 states that "In a recent survey that I conducted in District Swabi, it was shocking to find out that even the major villages of the District do not have a Middle or High School for girls."

[110] See F. Hussain, *Status of Women in the NWFP* (1991) A study for the USAID, Islamabad.

[111] The *Quran*, verse 23:9.

[112] *Beijing Report, op. cit.*, n. 98 at p. 19.

right to know, education is arguably the only catalyst that can bring usher in a meaningful change in their status and they wait for rhetoric to become reality.

3.4.3 "The Strong Muslim (believer) is better and closer to God than the weak one."[113] Women's Access to basic health facilities

As the *Hadith* above suggests, it is the right of every Muslim to aspire to be closer to God by being physically strong and in good health. The government of an Islamic state is therefore, under an obligation to facilitate attainment of the highest standards of health as a religious duty. In Pakistan, where Islam is said to have provided the very rationale for statehood, abysmally low resource allocation to the health care system makes a mockery of the Islamic principles of social justice for all.[114] The right to health and health-care facilities is not recognised as a fundamental right in the constitution of Pakistan. There are two provisions in the Principles of Policy (these being non-justiceable), that reflect some responsibility to be undertaken by government in the area of health care. Very few citizens would however, fall within its ambit as the article is restricted in its application to persons under some disability. The article reads thus:

> "The State shall provide basic necessities of life, such as food, clothing, housing, education and medical relief for all citizens, irrespective of sex, caste, creed or race, as are permanently or temporarily unable to earn their livelihood on account of infirmity, sickness or unemployment."[115]

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[113] Al Azhar Working Group, *Child Care in Islam*, at p. 40 citing a *Hadith* of the Prophet Mohammed.

[114] Figures for 1993-94 budgetary allocation for health services were 0.67% of the GNP; in 1994-95 these dropped to 0.64% whereas in the financial year 1995-96 it rose to 0.75% of the GNP. (Source: Government of Pakistan, *Economic Survey 1995-96, op. cit.*, n. 95 at p.114.

[115] Article 38(d) of the constitution of Pakistan.

Article 35 is specifically addressed to women and children (within marriage) and provides that

> "The State shall protect the marriage, the family, the mother and child."

It has to be acknowledged that inadequate health care is a severe problem for both men and women in Pakistan. But, access to existing meagre health care facilities is far more problematic for women than for men due to the restraints on their choices and mobility. These include, in particular, denial to reproductive choices, neglecting the health of the girl-child who later becomes a mother herself and suffers the burden of continuous and numerous child bearing years. In this section it is proposed to discuss some of the factors effecting health care facilities for women in Pakistan and bring to the fore that in the area of health, as in other social service sectors, a clear contravention of religious norms is widespread.

There exists a severe lack of infra-structure and supporting legislation for ensuring health services to the general population, and as indicated earlier, fewer women than men are able to access what little is available.[116] The *Beijing Report* makes the statement that

> "when resources are scarce, gender-discrimination in access to food, health care, and education is seen to be more pronounced. The greater

[116] It has been reported that presently, the private medical sector is said to provide coverage to around 70% of the population. In addition to this, a number of NGOs are active in the health sector. These include the Aga Khan Health Services, All Pakistan Women's Association, Behbood, the Red Crescent Society, Edhi Welfare Trust, Family Planning Association of Pakistan, the TB Association, and Pakistan Voluntary Health and Nutrition Association. Studies have shown that in private as well as out-patient departments of government-run hospitals, male patients outnumber the females, in particular children. See, for example, T. Akhtar, *Gender Differentials in Access to health care for Pakistani Children*, Vol. III (1990) Islamabad, UNICEF; T. Akhtar, "Health Care for Rural Women" in Naqvi and Adeel, *op. cit.*, n. 77 at pp. 87-98 and P. A. Khan, Health Care for Rural Women at pp. 99-107.

levels of deprivation of women and girls is reflected in their lower nutritional status, higher mortality and lower levels of education."[117]

A discussion on women and health has therefore to be taken in the wider context of social development and problems encountered in attaining it. Women and children are most susceptible to major 'killer' diseases including pneumonia, diarrhoea, among children and pregnancy complications among women that take the highest toll on human lives in the country.[118] The majority of Pakistani women live in the rural areas. They have a life expectancy of 59 years. The average woman gives birth to 6 children. Pakistan's infant mortality rate (IMR) is an estimated 95 per 1,000 live births and the under 5 mortality rate (U5MR) is around 137 per 1,000. The maternal mortality rate (MMR) is 500 per 100,000 live births.[119] Comparative statistics from other countries in the region show that Pakistan is considerably worse off than its neighbours at similar stages of development.[120]

An essential component of women's health and indeed, an indicator of her level of empowerment is her reproductive rights.[121] In Pakistan, these rights are recognised neither legally nor culturally, and are frowned upon by most 'religious' persons. Family planning and the use of contraception is thus, a subject, whereupon discussion is highly discouraged. There are misgivings about the concept ranging from

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[117] *Beijing Report, op. cit.*, n. 98 at p. 10.

[118] The *Beijing Report, ibid.*, states that "Male-female differences in health care are also notable. The reported incidence of diarrhoea and administration of oral rehydration therapy are about the same for boys and girls, but a higher proportion of boys than girls is taken for treatment, and also for immunisation. . . . There are considerable male-female differences in expenditures incurred in medical care." Also See Ali, *CEDAW Study, op. cit.*, n. 103 at pp. 84-90; *Commission of Inquiry Report, op. cit.*, n. 49 at pp. 92-95.

[119] UNICEF Report, 1994 cited in Ali, *ibid.* at pp 86-87.

[120] See T. Akhtar, in Naqvi and Adeel, *op. cit.*, n. 77 at pp. 93-98.

[121] Reproductive rights include a woman's right to have control over her own fertility, to delay marriage and childbirth, to be able to decide freely and responsibly with her partner, the spacing and timing of their children. Reproductive rights also means the ability to access reliable information and quality reproductive health care, including safe, acceptable and reliable family planning services. (*Commission of Inquiry Report, op. cit.*, n. 49 at p. 93).

a fear among women that it may be harmful for their sexuality, that it is injurious to health, that failing to produce children will lessen their worth in the eyes of the family and community, and so on. Contraception and abortion are somehow equated and religious injunctions invoked against family planning and the use of contraception.[122]

In the light of the above discussion, it may be argued that women's right to health, is lost in the multiplicity of norms to which her identity is subject in a legally pluralist jurisdiction such as Pakistan. Lack of political will on the part of those in authority coupled with the near absence of accountability of those in power results in the dismal situation in the social sector. Women, forming as they do, the most marginalised group, suffer most in the process.

3.4.4 Women and Employment Rights: Breaking Down the public/private dichotomy?

Islam has accorded women employment rights including the right to earn, acquire and dispose of her property. There is no injunction prohibiting her to engage in gainful employment. The *Quran* states in this regard:

> "And their Lord hath heard them (and He sayeth): Lo! I suffer not the work of any worker, male or female, to be lost. Ye proceed one from another."[123]

Another verse emphasises the importance of just wages, regardless of sex of the worker by providing as follows:

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[122] It may be stated here that there is no *Quranic* injunction prohibiting contraception and family planning. In *Hadith* literature, there are certain examples supporting '*azl*' (coitus interruptus) whereas others lead to a contrary inference. The matter thus is one surrounded by ambiguity and as Riffat Hassan, a Muslim scholar argues, "in a sense - remains open." R. Hassan, "An Islamic Perspective" in J. Becher (ed.,) *Women, Religion and Sexuality* (1990) Geneva: WCC Publications.

[123] The *Quran*: verse 3:285.

> "Unto men a fortune from that which they have earned, and unto women a fortune from that which they have earned."[124]

In practice, application of employment rights for women, raise a number of issues. These arise out of a combination of religious beliefs and cultural practices inhibiting women's participation in the workplace. Most prominent among these is the conviction that the woman's place is in the home, that the job-market lies within the public sphere which is a male domain, and that 'good' women stay within the *chardiwari*.

Constitutional and other legal norms, however, do not prohibit women from undertaking employment and other economic activity. At the same time, all legal provisions in this regard, are invariably protective in nature. The 1973 constitution in its equal rights as well as affirmative action articles reiterates women as a group being in need of protection.[125] Article 27 provides safeguard against discrimination in services:

> "27. Safeguard against discrimination in services. - (1) No citizen otherwise qualified for appointment in the service of Pakistan shall be discriminated against in respect of any such appointments on the ground only of race, religion, caste, sex, residence or place of birth:
>
> Provided that, for a period not exceeding (twenty) years from the commencing day, posts may be reserved for persons belonging to any class or area to secure their adequate representation in the service of Pakistan:
>
> Provided further that, in the interest of the said service, specified posts or services may be reserved for members of either sex if such posts or services entail the performance of duties and functions which cannot be adequately performed by members of either sex....."[126]

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[124] *Ibid.*, verse 4:32.

[125] Cf. discussion on the scope and application of article 25 of the constitution of Pakistan.

[126] But protective legislation may work against the interests of women and this very provision of the constitution has been invoked to declare women 'unfit' and 'ineligible' for certain categories of work. Cf. the case of *Mrs. Naseem Firdous v. Punjab Small Industries Corporation* PLD 1995 Lah. 584 where article 27 of the constitution was invoked to refuse a woman employee the job of designer.

The basis for a positive duty on the State to take "special measures" for the "protection" of women workers can be found in two further articles of the constitution. Article 35 and 37(e) provide respectively that:

> "The State shall protect the marriage, the family, the mother and the child."
>
> "The State shall make provision for securing just and humane conditions of work, ensuring that children and women are not employed in vocations unsuited to their age or sex, and for maternity benefits for women in employment."[127]

This need to place women squarely in the 'protected' category of workers is reflected in both domestic as well as international labour standards adopted by Pakistan. That there are no comprehensive labour laws addressing the problems of women in employment and many gaps exist in domestic legislation is beyond doubt.[128] Areas where legislation is urgently required include legislation relating to home workers and domestic workers, the vast majority of whom are women. Laws on equal treatment or equal pay within the workforce is also absent.[129] A brief review of some gender-specific protective legislation for women in Pakistan is presented below:

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[127] Article 37(e) finishes on a positive note, suggesting a duty on the State to make provision for maternity benefits for women in employment. But, as mentioned earlier, the Principles of Policy themselves, however, are not rules of law, their true position having been determined by Article 30 which provides that the validity of an action or of a law shall not be called in question on the ground that it is not in accordance with the Principles of Policy and no action shall lie against the State, any organ or authority of the State or any person on such ground. See *Mohammed Saddiq v. Commissioner, Lahore Division*, PLD 1962 Lah. 999.

[128] S. Mullally, *Women and Employment Legislation in Pakistan: A Review*, November 1994. (This report was the first part of a British Council funded project which had as its brief, inter alia, to review existing employment laws relating to women in Pakistan, constituting a working party of academics, lawyers, representatives of various organisations, etc. and presenting draft employment legislation for women in Pakistan.

[129] Pakistan is a party to the ILO Discrimination (Employment and Occupation Convention, 1958, but to date has not taken any steps to incorporate its principles in domestic law.

An important provision meant to protect women from working 'unsuitable' hours is present in The Mines Act 1923,[130] and The Factories Act 1934.[131] Both these laws prohibit women from working between the hours of 7 pm and 6 am. The W.P. Shops and Establishments Ordinances 1969 in its section 7(4) also places similar restrictions on its female workers by providing that: "Except with the permission of Government, no woman or young person shall be employed in any establishment otherwise than between the hours of 9.00 am and 7 pm."

Another set of protective employment legislation relating to women that address issues of health hazards in the workplace, include The Mines Act 1923 section 23-C given above, The Factories Act 1934 Sections 27, 32, 33-F sub-section 2, 33-Q, and the Hazardous Occupations Rules, 1963. These sections set out particular categories of work or areas of work (e.g., below ground in a mine or near certain machines) that are considered dangerous for women.

In the area of maternity, too, some laws provide benefits for the pregnant and nursing mother-worker. These include The Mines Maternity Benefit Act, 1941, The West Pakistan Maternity Benefit Ordinance, 1958, The West Pakistan Maternity Benefit Rules, 1961, The Provincial Employees Social Security Ordinance, 1965, section 36. Under the Maternity Benefit Ordinance 1958, and the Mines Maternity Benefit Act, 1941 the employer is liable to pay a maximum of Rs.1. 50 and 75 paisas

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[130] Section 23-C of which states: "Employment of women. - (1) No woman shall be employed in any part of a mine which is below the ground. (2) No woman shall be allowed to work in a mine above ground between the hours of 7 pm and 6 am. (3) The provisions of this section shall not apply to women who do not perform manual work and are - (a) holding positions of managerial or technical character; or (b) employed in health and welfare services."

[131] Which states in section 45: "Further restrictions on the employment of women. (1) - The provisions of this chapter shall, in their application to women workers in factories, be supplemented by the following further restrictions namely:- (a) no exemption from the provisions of section 36 may be granted in respect of any woman; and (b) no woman shall be allowed to work in a factory except between 6 am and 7 pm: Provided that the (Provincial Government) may, by notification in the (official gazette), in respect of any class or classes of factories and for the whole year or any part of it, vary the limits laid down in clause. . . ."

respectively as daily wages to a mother as maternity benefits for her absence during the period of six weeks immediately preceding delivery of the child, and for each of the six weeks succeeding that day. But these laws apply only to factories and mines and do not cover all working mothers. These laws also prescribe that no employer shall knowingly employ a woman in a factory during the six weeks following the delivery of her child.[132]

The Provincial Social Security Ordinance, 1965 provides for maternity benefits to a mother covered under its provisions at rates notified by the Provincial governments.[133] These benefits are payable for a maximum of 12 weeks, and cover all days on which she does work for salary; at least six weeks of this period should precede the delivery.

It is evident that the scope of these maternity benefits are marginal. The rates need to be revised in view of the high cost of living and the benefit extended to all. Furthermore, in view of the fact that only a very tiny percentage of women workers are employed in the formal sector where these laws would be applicable, the reality is that that the bulk of women workers simply slip through this safety net.

Although "invisible" in official data, it is widely accepted that women are actively involved in the key economic sectors, especially in agriculture, animal products, small-scale manufacturing and the services.[134] Among the poorest strata of

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[132] Sec. 3, The Maternity Benefit Ordinance, 1958 and sec. 3(1) The Mines Maternity Benefit Act, 1941.

[133] Sec. 36, The Provincial Employees' Social Security Ordinance, 1965.

[134] The failure to improve productivity of female labour is an important constraint to development in Pakistan as it to women's empowerment. The Human Development Report, 1993 compiled by UNDP places the total female Labour Participation Rate at an estimated 11% of the total population. The *Economic Survey 1992-93* shows the Refined Activity Rate - population of persons over 10 years of age - as 12.76%. figures for later years do not indicate any dramatic change with the figures for 1993-94 standing at 13.32%. Independent assessment of women's economic participation are much higher than official statistics. They put the female Labour Participation Rate at about 20-30% of full time workers and a greater number of part-time

the population, the earnings of women workers are shown to be critical to the subsistence of the household, and a considerable number of working women are the principal earners in low-income families. Research in the area of female domestic servants indicates that most women are constrained to work as domestic helpers due to the husbands or other male members being drug addicts, disabled or have simply abandoned their families.[135]

Many factors are inhibiting the "visibility" of women in the employment sector. For instance, much of women's work comes as unpaid family labour. The persistence in gender disparities in education is a major constraint limiting women's employment in the modern high productivity sectors of the economy. They comprise less than 5% of the federal civil servants and there is a 2% quota for them in the provincial services. The representation of women in the formal sector institutions is negligible. The expansion of women's employment is increasingly concentrated in the informal sector and that too, in the lowest paid activities, particularly as domestic workers, and in home-based income-earning activities where the level of exploitation is high. In the rural sector, women bear a heavy burden of both productive and household activities. Rural women spend long hours on daily maintenance tasks such as fetching water, fuel collection, food processing, looking after livestock etc.. In the urban economy, women are employed as office workers, factory workers, piece-rate workers (home-based, self-employed, wage workers, brick makers, construction workers).

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workers. For a more detailed discussion, see F. Shaheed and K. Mumtaz, *Women's Economic Participation: A Status Report* (1990) Islamabad: UNICEF.

[135] S. Khattak and S. S. Ali, "Domestic Servants and the Need for Legislation: The Case of the NWFP." 1993, Paper presented at an international Workshop entitled Employment Legislation for Women in Pakistan, organised by the British Council, Pakistan.

The labour force participation rate regarded as an important indicator of the status of women shows that women are invariably employed at lower levels of the occupational hierarchy. One comes across very few women who have made it to positions where they can affect policy and decision-making. Although in professions such as teaching, medicine etc... men and women get the same salary, yet this is not true for the bulk of employed women who are mostly in the informal sector. By and large resistance to employment of women in what is perceived as the public sphere of life is still very strong and the social barriers are not about to break down easily. It is argued that this invisibility of women in gainful employment is due to the fact that within the cultural norms of Pakistani society, particularly rural Pakistan, men are supposed to be the providers and maintainers of women. If a woman goes out of the house to earn money it reflects adversely on the men of the household who are perceived to be too incompetent and not "men" enough to support their women folk.

3.4.5 Muslim Women and the Right to Political Participation

The *Commission of Inquiry Report* in its chapter on political participation (of women in Pakistan) starts with a particularly apt statement on the position of women in this area. It states that:

> "Women of Pakistan remain literally marginalised in respect of a citizen's fundamental right of political participation. It is disingenuous to say that they have an equal right with men in law. It is the equality of a lamb and a lion. Considering all the decades of discrimination, subordination and effacement from public life that women have been subjected to, even when entry into a competition is equally open, it remains for them a handicap race many times over."[136]

[136] *Commission of Inquiry Report, op. cit.*, n. 49 at p. 9.

As discussed earlier, there is no indication in the *Quran* regarding women's exclusion from public life and political participation. An important example in this regard is the right of women to participate in offering the *baya'* (oath of allegiance) to the head of State where women and men both participated as equals.[137] Another instance is the praiseworthy governance of the Queen of Sheba in the *Quran.*[138]

Controversy over the extent and scope of this participation arose due to the narration of the *Hadith* by one Abu Bakra concerning a Muslim woman acting as head of State.[139] Two conflicting views have existed alongside each other; one inspired by the spirit of equality in the Islamic tradition and the other resting on Hadith literature where women are confined to the 'private' familial sphere of life. Over the centuries, therefore, and one might add, with the emergence of totalitarian regimes in Muslim jurisdictions, political participation of both men and women became minimal.

Present day Muslim jurisdictions reflect this ambivalence towards women's role in public life. Thus some Muslim states including Kuwait and Saudi Arabia deny women the right to vote or run for public office (although in the case of these two countries, the same may be said for men who are denied any role in the governance of the country).[140] Others, including Pakistan, Turkey, Jordan, Indonesia (to name but a few), afford complete equality to women in this regard.

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[137] See discussion in chapter 2 of this study.

[138] *Ibid.*

[139] *Ibid.*

[140] It is interesting to note that a conference on Human Rights in Islam was organised in 1981 by the joint efforts and collaboration of the International Commission of Jurists, University of Kuwait and the Union of Arab Lawyers in Kuwait itself. The publication resulting from this conference in its chapter 2 entitled, Recommendations of the Seminar, sections 39-42 is devoted to women's rights and status. section 39 calls upon Islamic States "to include provisions in their legislation ensuring the political rights of women as guaranteed by Islam, notably their right to vote, to nominate themselves for election, to be appointed to public posts and to participate in decision-making." International Commission of Jurists, Kuwait University & Union of Arab Lawyers (eds.,) *Human Rights in Islam* (1982) Geneva: International Commission of Jurists at p. 19.

The constitution of Pakistan contains a number of provisions emphasising the importance of participation of women in national spheres of national life. Thus, for instance article 34 of the constitution provides that:

> "Steps shall be taken to ensure full participation of women in all spheres of national life."

Similarly, article 32 expresses further 'good will' in this regard by stating that

> "The State shall encourage local government institutions composed of elected representatives of the areas concerned and in such institutions special representation shall be given to peasants, workers and women."

Both articles suggest a positive duty on the part of the State to undertake affirmative action measures in order to realise the objectives stated therein at local and national levels of government.

Framers of the constitution, bearing in mind the prevalent social conditions mitigating against women, provided special seats for women in Parliament.[141] Thus, the constitution of Pakistan in article 51(4) states thus:

> "Until the expiration of a period of ten years from the holding of the third general election to the National Assembly, twenty seats shall be reserved for women."

Similarly, 5% seats were reserved for women in the Provincial Assemblies.[142] These seats were filled by indirect election in that when the National and Provincial

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[141] Parliament, consists of a lower house, the National Assembly and an upper house, the Senate. By the Revival of the Constitution of 1973 Order, 1985 (P.O. No. 14 of 1985), the words "Majlis-e-Shoora (Parliament)" were substituted for the term Parliament.

[142] Under Article 106(4) of the constitution of Pakistan which states that "Until the expiration of a period of ten years from the commencing day or the holding of the third general election to the Assembly of a Province, whichever occurs later, there shall be in the Assembly a number of additional seats reserved for women equal to five per centum of the number of members of that Assembly specified in clause (1)."

Assemblies met after the general election, they would form an electoral college and elect the women members.[143] But these provisions of the constitution lapsed in 1990 and despite the public commitment given by major political parties to reviving these seats, a constitutional amendment to achieve this is urgently awaited.[144]

One of the main reasons for articulating the demand for reserved seats for women in Parliament and indeed, in other decision-making bodies is that even in the face of strong constitutional and statutory provisions, women have been virtually invisible in public life. This fact may be gauged from their membership level in political parties, their representation in decision-making bodies of the political parties and the number of party tickets issued to them in general elections.[145] The central executive committees of the two major political parties in Pakistan may be taken as representing the rule; the Pakistan Peoples' Party (PPP) has currently 3 women out of a total membership of 21 on this body whereas the Pakistan Muslim League (Nawaz) (PML), has 5 out of 47.[146]

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[143] Article 51(5) of the constitution of Pakistan which states that "(5) As soon as is practicable after the general election to the National Assembly, the members to fill seats reserved for women which are allocated to a province under clause (4) shall be elected in accordance with law on the basis of the system of proportional representation By means of a single transferable vote by the electoral college consisting of the persons elected to the Assembly from that Province." A similar clause is present in the constitution for election of women members to Provincial Assemblies as article 106(6).

[144] The demand for restoration of reserved seats for women in the National and Provincial legislature has been voiced consistently by women's organisations in Pakistan. For example, in 1994-95, the National Consultative Committee on Women set up by the government obtained the signatures of 148 sitting members of Parliament (from government as well as the opposition), in support of restoration of these seats. In July 1995, at a workshop organised by women's rights organisations the representatives of three major political parties in Pakistan, the Pakistan Peoples Party, the Pakistan Muslim League and the Awami National Party signed a joint declaration in support of revival of the reserved seats for women in Parliament (including the Senate where the lapsed provision had not applied).

[145] Statistics cited in this discussion are taken from Shirkatgah, "Women in Politics" Lahore, Special edition, May 1994; M. Rafi, "Women 's Political Leadership in Pakistan" APWIP *Newsletter*, Vol. 1, 1994; Ali, *CEDAW Study, op. cit.*, n. 103 at pp. 60-65, and *Commission of Inquiry Report, op. cit.*, n. 49, chapter 2.

[146] *Commission of Inquiry Report, ibid.*, at p. 10. Most political parties in Pakistan do not appear to maintain clear membership records and so it is not possible to ascertain the level of membership of women in these.

Miss Fatima Jinnah is the only Pakistani woman to run for the Presidency when she was fielded as a candidate against the incumbent Ayub Khan in 1965, an election she lost.[147] The first general election held in Pakistan in 1970, in many ways marks the commencement of the contemporary era of women's political participation.[148] Only one woman, the trade unionist, Dr. Kaneez Fatima contested on a general seat. In the second general election held in 1977, the only woman to contest on a general seat, and win, was Begum Nasim Wali Khan from a constituency in the North West Frontier Province of Pakistan.[149] Subsequent general elections held in the country in 1985,[150] 1988,[151] 1990[152] and 1993[153] showed similar results. The 1988 election proved a landmark for women in the political history of Pakistan and the Muslim world as both got their first ever and youngest woman Prime Minister, Benazir Bhutto.

In the latest general election held in Pakistan in 1997, the PPP and its coalition partner fielded 9 women out of a total 161 candidates for the National Assembly

[147] Miss Jinnah was the youngest sister of the founder of Pakistan, Quaid-i-Azam Mohammed Ali Jinnah. The 1965 election is alleged to have been rigged by the supporters of her rival Ayub Khan.

[148] It was the first general election held in the country based on adult franchise, one man one vote principle.

[149] An unlikely place for a woman to run (and win) from being one of the most conservative and traditional areas of Pakistan! But this is evidence of the many faces of the Muslim woman.

[150] The 1985 elections were held on a non-party basis and boycotted by all major political parties. 13 women contested general seats but only one, Syeda Abida Hussain from Jhang was returned. Later that year, in a bye-election another woman was returned to Parliament. In the four Provincial Assemblies, two women (from the province of the Punjab), were successful.

[151] In the 1988 elections, 27 women contested on general seats. Four were elected including Benazir Bhutto and her mother Nusrat Bhutto, widow of the late Zulfiqar Ali Bhutto.

[152] In the 1990 elections however, a nominal number (8) of women candidates were fielded with only two women, Benazir Bhutto and her mother Nusrat Bhutto emerged victorious.

[153] The 1993 election saw 13 women candidates running for Parliament, four being returned to the National Assembly and five women winning seats in various Provincial Assemblies. (3 from Punjab, one each from Sindh and the NWFP. Not a single women was elected from the province of Baluchistan)

seats, whereas the PML(N), put up 6 out of a total of 177 candidates.[154]

The statistics given above reflect the minimal representation of women in public life and is evidence of the absence of commitment on the part of the political parties to include women in the political and decision making process. Further, this invisibility of women in what is clearly perceived as the 'public sphere' of life, bears virtually no relationship to the fundamental rights and Principles of Policy chapters outlined in the constitution of Pakistan. Nor does this attitude bear any resemblance to other statutory laws in the country where men and women are accorded complete formal equality. The 'operative' law on the subject therefore appears one that draws on patriarchal cultural norms to seek legitimacy for women's exclusion from the political process.

The attitude of excluding women from the political process in leadership roles on the other hand does not match the multitudes of women voters that throng the polling stations and are by all accounts, considered crucial to the outcome of any election. Political parties have active 'women's wings' that run campaigns for their male candidates and conduct door to door visits, act as polling agents etc. Yet in far flung conservative, rural areas of the country including the tribal belt of Pakistan prevails a 'gentleman's agreement' where all rival candidates agree to keep 'their' women indoors on election day, thus denying them the right to vote.[155] In the 1997 election, where for the first time in the history of the country, tribal areas of Pakistan

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[154] *Commission of Inquiry Report, op. cit.*, n. 49 at p. 10. The Report also states that the proportion of women candidates fielded in the four provincial assemblies was similarly negligible and only one woman was returned out of a total of 460 seats.

[155] Ali, *CEDAW Study, op. cit.*, n. 103 at p. 60; also see section on Political Participation in S. S. Ali, *Developing a Database on Rural Women's Training and Employment in the NWFP* (1994) Peshawar: ILO.

were given the right to vote, decisions taken by *jirgas*[156] resulted in large scale denial of franchise to the female electorate. It is reported[157] that announcements were made on the public address systems of mosques that voting by women was unIslamic and a woman going to use her right to vote would do so at the peril of her house being burnt down. As a result of these pronouncements, no more than 37 women out of 6,600 registered ones were able to cast their votes. The inadequacy, and indeed, ineffectiveness of public officials to enable women to use their vote was quite evident in this case.[158]

The situation of women in local government[159] is similar to their poor representation at the national level. The constitution of Pakistan in article 32 provides that the state

> "shall encourage local government institutions, composed of elected representatives of the area concerned, and in such institutions special representation will be given to peasants, workers and women."[160]

The Governments of Punjab, Sindh and NWFP passed their respective Local Government Ordinances in 1979 and Baluchistan in 1980. Except for the province of the Punjab which expressly provides for reserved seats for women at all levels of local government, the other three are vague on the issue by stating that this will be decided

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[156] Informal alternate dispute resolution forum of the Pukhtun and Baluch people in Pakistan and Afghanistan.

[157] *Commission of Inquiry Report, op. cit.*, n. 49 at p. 10.

[158] *Ibid.*

[159] The history of local government in Pakistan may be traced to the *panchayat* system which is described as a gathering of village elders for the purpose of arriving at decisions. For details of this historical overview see, T. Moharram Khan, *Central-Local Government Relations in Pakistan since 1979* (1996) PhD dissertation, University of Leeds at pp. 1-4.

[160] Although local government finds mention in the Principles of Policy of the constitution, it is not accorded constitutional recognition as a third tier of government. Without this protection, local bodies are subject to frequent dismissals and protracted litigation in courts. *Commission of Inquiry Report, op. cit.*, n. 49 at p. 14.

by the provincial government through a notification.[161]

The local government system in Pakistan has a number of serious drawbacks which impact its effectiveness. Ironically, it has been during periods of Martial law and military rule that local bodies have functioned rather than during democratic rule in Pakistan. Local bodies are a crucial tier of government in which people at the grassroots can play an effective and meaningful role.[162] The *Commission of Inquiry Report*, is of the view that this is the political arena most accessible to women and one in which they can participate with greater familiarity and confidence.[163] Saba Khattak's incisive analysis on low representation of women in local government identifies a different perspective on the subject.[164] Khattak argues that the participation of women in government is a function of their general socio-political status. Therefore, while the existence of role models such as Benazir Bhutto or Begum Nasim Wali Khan is an encouragement for women, one has also to recognise the fact that most women who are political leaders at the national and provincial levels have achieved their position due to their (upper) class background where women's participation in politics or public life is now acceptable.[165] She also makes the point that in larger constituencies, these women remain at a relatively 'safe distance' from

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[161] Ministry of Local Government, Government of Pakistan (1994) pp. 19, 169, 359, 513. With the exception of the NWFP, other provincial governments through notifications give women 2 reserved seats at the Union Council level and 2 seats or the equivalent of 10% representation at the higher levels such as in District councils and going on to municipal Committees and Corporations. Punjab had passed an Ordinance in which the quota for women was raised to 33% but the Ordinance lapsed without any elections being held under it and the new law has reverted to the old quota.

[162] *Commission of Inquiry Report*, *op. cit.*, at p.14.

[163] *Ibid.*

[164] S. Khattak, *Women and Local Government* (1996) Working Paper Series No. 24, Islamabad: Sustainable Development Policy Institute at p.14.

[165] Khattak, *ibid.*, at 14. This point is often raised and the argument made that women who are countenanced in political life are ones who belong to influential political families. But the same explanation may be advanced for the male members of these very families. Thus, where women are mothers, daughters, sisters and wives of the elite, the male politicians too, are fathers, sons, nephews etc. of the same people.

their constituents, and are able to attract their votes without close interaction with the rank and file of the masses. Class sensibilities thus remain unruffled.

On the other hand, women attempting to participate in local politics will have to appeal for support to a limited geographical area across class lines. It becomes difficult for well-placed families in rural areas to allow their women to participate in local politics precisely because they will have to interact with people from all classes and seek their vote. They will also have to deal with those sections of the electorate that do not approve/condone/accept women's role in public life. It may be therefore that a top-down approach to women's participation in public life may be a useful strategy.[166]

A further problem, and indeed the main source of the ineffectiveness and weak position of women councillors in local bodies rests upon the method of their election, which is the vote of their male councillors.[167]

Charting the course for an 'operative' Islamic law on the subject of women's participation in political and public life raises a number of theoretical issues. The first relates to the acceptance of women in political life by the public at large. Considering the situation across the world in general and Muslim jurisdictions in particular, this is no mean achievement. The attitude displayed by religious parties is noteworthy as their position appears to be more on the lines of a swinging pendulum rather than any concerted position based on an informed reading of Islamic jurisprudence. The Jamaat-i-Islami (the right-wing religious party), whole-heartedly supported the

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[166] *Ibid.*

[167] *Ibid.* at p. 17. A question that is often asked in relation to the low political participation of women is that despite having similar cultural and literacy rates up to 1947, the Indians appear to have done far better particularly in local government. 33% seats have been set aside in local bodies and the government is seriously thinking of incorporating similar provisions at the state and federal legislatures. *Commission of Inquiry Report, op. cit.*, n. 49 at p. 11, citing *Panchayat Raj Update* February 1996, Institute of Social Sciences.

candidature of a woman, Fatima Jinnah, the sister of the founder of Pakistan, Mohammed Ali Jinnah as head of State in the 1965 general elections. On another occasion, the Jamaat-i-Islami had no qualms in allowing one of their woman members, Nisar Fatima, to sit in the hand-picked Parliament of the late General Zia-ul-Haq in 1985. The same political party however, invoked the Islamic tradition and enthusiastically opposed Benazir Bhutto as Prime Minister because she was a woman and declared that Islam forbids a woman from becoming Head of State. Needless to say, very few took these pronouncements seriously. On the other hand, custom and general attitudes of the community at large reinforces the prevalent attitude of marginalising women from public life, with the proviso that some women from influential political families are gracefully accepted as leaders.

Linked to the above issue and one raised previously, is the presence of a class divide, both among the leaders and the led. Concessions to the elite are made and women of the upper classes are permitted to cross boundaries between the public/private at will and their convenience. This class-based societal norm is untenable in the Islamic tradition yet appears quite acceptable among the populace.

3.5 Concluding Remarks

This chapter attempted to engage in an analysis of women's human rights under the constitution of Pakistan and other related laws with a view to ascertaining the position of women in the so-called 'public' and 'secular' sphere of life. It appears that despite formal provision for complete equality between men and women under these laws, women are absent from the debate in the public sphere, an arena that is essentially assumed to be non-gendered. One reason for this absence in the opinion of

Halliday is due to institutional inertia.[168] Even where some headway in gender issues is perceived within government policy-making and implementing bodies, these issues are placed at relatively less important positions.[169] This is compounded by the fact that the domain of practice e.g., government ministries, is itself a male dominated arena. Thus the gender blindness of various debates is seldom perceived. Saba Khattak argues that even where this is perceived, it is done in a very elementary manner so that it leads to co-optation rather than a positive move. For instance in Pakistan, politicians and policy-makers, conscious of women's absence, as well as responding to women's demands, inserted a number of provisions in the constitution and other laws as affirmative action measures. These include the fields of education, health, employment and political participation. A minimal number of seats were reserved for women, public sector employment, educational institutions, Parliament and in local government. The few reserved seats make women's presence insignificant while policy-makers can point to their gender sensitivity and support for women's issues.[170] That other competing sets of regulatory norms play a more effective role in holding women back from being accepted in the public sphere is ignored.

A recurring theme emerging in the present chapter, and this study, is the multiplicity of rules informing the discourse of women's human rights and various categories of rights. While women are supposedly equal to their male counterparts in constitutional doctrine, the same is not quite true in the area of personal law where they are subject to male control. It is this subordinate status of women in the private sphere which appears the dominant image of women, and one that will be addressed in Chapter 4.

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[168] F. Halliday, "Hidden from international relations: women and the international arena" in R. Grant & K. Newland (eds.,) *Gender and International Relations Theory* (1991) Bloomington and Indianapolis: Indiana University Press pp. 159-160.

[169] Khattak, *op. cit.*, n. 164 at p.3.

[170] *Ibid.*

CHAPTER IV

'PRIVATE' AND 'ISLAMIC'? A DISCUSSION OF MUSLIM PERSONAL LAW AND IMPLICATIONS FOR WOMEN'S HUMAN RIGHTS

4.1 Introduction

The theoretical framework of women's human rights in the Islamic tradition presented in chapter 2 of this study suggests that, in the area of family law, women are perceived as a class of persons in need of protective rather than equal rights with men.[1] At the same time, however, there exists sufficient ambiguity and vagueness in the principles of Islamic law to justify exploration of alternative views favourable to women, and on a basis of equality with men.[2] The present chapter proposes to discuss the application of Muslim Personal law and its implications for women's human rights in Pakistan. It will use *Abdul Waheed v. Asma Jehangir*,[3] (the *Saima Waheed* case), as an example of how the legal issue of whether an adult Muslim woman can enter into a valid contract of marriage without the intervention of her *wali* (guardian), was argued within a framework of customary norms demanding women's subordination to their male kin. The discussion will also be used as evidence of an emerging Islamic law on women's rights that remains fluid and unsettled, holding the possibility of securing women's rights on the one hand, and reducing her to a perpetual legal minor on the other.

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1 For instance, the husband is charged with the responsibility of 'providing' for his wife and children; a husband is obligated to lay down a sum of money or other property as dower for his wife in the contract of marriage, inheritance laws of Islam provide the female heir a minimum of half share compared to a male heir in similar relationships, and so on.

2 Some alternative and progressive interpretations have indeed, been employed in a number of Muslim jurisdictions where family law reform has been undertaken. In Pakistan these 'reformed' laws include The Child Marriages Restraint Act, 1929, the Dissolution of Muslim Marriages Act, 1939 and the Muslim Family Laws Ordinance, 1961.

3 PLD 1997 Lah. 301.

4.2 Background to the legislation affecting family law in Pakistan: An overview[4]

Laws affecting women's rights and position in the family, are derived from a variety of sources. Family law in Pakistan is a mixture of codified law and customary practices based on religious norms and administered in a secular, procedural framework of a modern day dispute resolution forum - the judiciary.[5] A recurring statement in this study is, that statutory laws are not the only determinants in the final resolution of conflicts, particularly in multi-faceted societies such as ours. Cultural norms and religious rules are just as potent a force, if not more, as legislative enactments. The judiciary cannot be expected to operate in a vacuum; neither can it steer clear of societal norms and political pressures. Nowhere is this trend more visible than in judgements handed down in family law cases which reflect the status of women both in the eyes of the law as well as society. A distinctive feature of the legal system in Pakistan is that since a combination of Muslim Personal Law (both codified and uncodified with all its variations)[6] and statutory law is applied by courts in adjudicating such cases, therefore more room and discretion is available to judges to put their own construction to existing principles.[7] Another factor in the current

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[4] This section draws on research conducted for Working Papers commissioned by Shirkatgah, Lahore for the Women and Law (Pakistan) Country Project, Shirkatgah, Lahore, 1992-93. These include, S. S. Ali, and N. Azam, "Trends of the Superior Courts of Pakistan in Guardianship and Custody cases (1947-92): An Analysis" (Ali and Azam, Custody and Guardianship); S. S. Ali and R. Naz, "An Analysis of the Trends of the Superior Courts in Pakistan in Cases relating to Marriage, Dower and Divorce" (Ali and Naz, Marriage, Dower, Divorce); and K. Arif and S. S. Ali, "Trends of the Superior Courts Regarding Succession and Inheritance Rights of Women", A compilation of these papers is presented in C. Balchin (ed.,) *A Handbook on Family Law in Pakistan* (1994) Lahore: Shirkatgah. For this section see Introduction of the Handbook. For a very detailed discussion on the subject see, K. Arif, "The Evolution and Development of Muslim Family Law in Colonial India," unpublished paper.

[5] Some of the laws regulating family issues in Pakistan include, The Majority Act, 1875; The Guardians and Wards Act, 1890; The Child Marriages Restraint Act, 1929; The Muslim Personal Law (Shariat) Application Act, 1937; The Muslim Personal Law (Shariat) Application Act, 1962; The Muslim Personal Law (Shariat) Application (Removal of Difficulties) Act, 1975; The Muslim Personal Law (Shariat) Application (Removal of Doubt) Ordinance, 1972; The Dissolution of Muslim Marriages Act, 1939; The Muslim Family Laws Ordinance, 1961; The West Pakistan Rules under the Muslim Family Laws Ordinance, 1961; The West Pakistan Family Courts Act, 1964; The West Pakistan Family Court Rules, 1965; The Dowry and Bridal Gifts (Restriction) Act, 1976; The Dowry and Bridal Gifts (Restriction) Rules, 1981.

[6] Some provisions of Muslim Personal law have been incorporated in statutes, but there is no one consolidated code covering all areas of personal law. Neither would it be possible to have one uniform code, primarily due to divergent views of the various schools of juristic thought in Islam.

[7] For an in-depth analysis of Pakistani case-law (1947-92) in the area of family law see *op. cit.*, n. 4.

discussion, is the colonial impact on statutory laws as well as moulding general trends of courts in pre-partition India[8] that has continued to the present day. In the following sections it is proposed to provide a brief overview of the development of Muslim Personal law from the arrival of Islam in the subcontinent to the later period of British colonial rule.

4.2.1 The Period of Muslim Rule in the subcontinent

Prior to the arrival of the British, the Indian sub-continent[9] had seen centuries of Muslim rule. Islamic law was introduced by Mohammed bin Qasim soon after he conquered Sindh in 712 AD. But it was firmly established in India only from the end of the 12th century, when the system of administration of justice through *Qazis* (and with the help of *Muftis*) as practised in other Muslim countries, was introduced.[10] The Mughal Emperors also took the administration of justice very seriously, with the Emperors often hearing cases themselves. It was during this period that institutions were developed for deciding cases according to *Sharia'* (the single exception was Emperor Akbar, who fancied himself a divine head and King and created a new religion the *'Din -i-Ilahi'*).[11] But the influence of the Mughal institutions remained limited only to *Qasba* towns.[12] Further, in the imperial interests of Mughal rule, communities that retained local institutions and practices that were against *Sharia'*, were tolerated.[13]

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[8] See generally, M. R. Anderson, "Islamic Law and the Colonial Encounter in British India" in C. Mallat and J. Connors (eds.,) *Islamic Family Law* (1990) London: Graham and Trotman. Also see *B. Z. Kaikaus v. President of Pakistan* PLD 1980 SC 160 for a brief history of the administration of Muslim law in India.

[9] Of which Pakistan was a part until 1947.

[10] The history of the introduction, establishment and development of the legal system during the seven centuries preceding the advent of British rule in India is not within the scope of this study. We will therefore, only confine ourselves to the British period (1857-1947) and after, when dealing with background of the family law as applicable in Pakistan.

[11] For details regarding the administration of justice in India during the early Muslim and Mughal period, see Ibn S. Jung, *The Administration of Justice In Islam*, Lahore: Law Publishing Co. pp. 57-88.

[12] Anderson, *op. cit.*, n. 8.

[13] See K. I. Ewing (ed.,) *Sharia and Ambiguity in South Asian Islam* (1988) Berkeley.

4.2.2 The Early Period of British Rule in India

When the British first entered India through the agency of the East India Company, they had two broad goals: first to extract economic surplus, in the form of revenue, from the agrarian economy, and second, to maintain effective political control with minimal military involvement.[14]

During the earlier years the Company was authorised by Charters[15] from the Crown, the first of such Charters[16] authorised the Governor and Company, to make laws and orders as were necessary for good government of the Company and that such laws and orders should be reasonable and not repugnant to the laws of England. The Charter of 1622 authorised the Company to chastise and correct all English persons residing in the East India and committing any misdemeanour either with Martial Law or otherwise. In 1661[17] the Governor of the Council of the Company was empowered to try all persons (including non-Europeans) in civil as well as criminal cases, living within the Company's control.

After 1694 the Company, on authority from the Mughal Ruler, started holding Zamindar's Courts mainly for the purpose of collection of rent but having both civil as well as criminal jurisdiction. The Zamindar's courts, the official language of which was Persian, applied indigenous law as well as procedure. The British continued the administration of Muslim and Hindu laws with the help of Indian officers called "Advisers to Courts."

4.2.3 The 'Anglicisation' of the Administration of Justice

In the 18th century the Company had began to combine mercantile pursuits with military and political activities.[18] In 1726 the establishment of the Mayor's Court

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[14] D. Washbrook, "Law, State, and Agrarian Society in Colonial India" (1981) 15 *Modern Asian Studies.*

[15] The Charters of 1600, 1622, 1726, 1773 and 1833.

[16] Charter dated 31.12.1600, to the Governor and Company of Merchants of London trading in East India.

[17] By the Charter dated 3rd April 1661.

[18] Jung, *op. cit.*, n. 11 at p. 89.

in the three Presidency towns[19] for the first time derived authority and jurisdiction from the Crown under the Charter.[20]

After the battle of Plassey, and the grant of Dewani to Lord Clive by the Mughal Emperor Shah Alam in 1765, the Company emerged as the supreme political power in Bengal.[21] The Diwan authorised the collection of provincial revenue and the administration of civil justice (but not criminal justice).[22] Local officials performed these functions under the supervision of an English Resident. In 1772 the Company decided to "stand forthwith as the Diwan" and assume these responsibilities. The Warren Hastings Plan of 1772 established an hierarchy of civil and criminal courts.

With the development of the judiciary on the lines of the English legal system,[23] therefore, many changes came about in the local administration of justice. Islamic Law relating to crime, punishments, revenues, land tenancy, proceedings, evidence and partly transfer of property were gradually replaced by enactments of the Legislature.[24] Thus, as the state apparatus of the colonisers became stronger, large portions of Islamic law were replaced by laws of British origin.[25] One of the earliest Anglicising trends was application of the doctrine that in cases where indigenous laws seem to provide no rule, the English concept of "justice, equity, and good conscience" should apply.[26] With the expansion of the Company's influence, similar systems were established in other Presidency towns. The exception was the Punjab,[27] where on the

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19 Bombay, Madras and Calcutta.

20 By George I's Charter of 1726 which authorised the Governors and Council of the three Presidencies 'to make, constitute and ordain bye laws, rules, and Ordinances for the good government and regulation of the several corporations hereby created and of the several towns, places and factories aforesaid respectively, and to impose reasonable pain and penalties upon all persons offending against the same or any of them'.

21 A. Moudud, "Administration of Justice Under The British Rule And The Birth Of The High Court" PLD 1968 Jour 50.

22 Jung, *op. cit.*, n. 11 at p. 89.

23 Systematised transformation of the educational set-up resulted in lawyers trained to appear in "Anglicised" courts and familiar with the English legal system.

24 see J. Fisch, *Cheap Lives and Dear Limbs: The British Transformation of the Bengal Criminal Law, 1769-1818* (1983) Wiesbaden. Some of the attempts at legislation include Regulation IX of 1793, Regulation IV of 1797, the Criminal Procedure Code 1861, the Indian Evidence Act 1872.

25 Anderson, *op. cit.*, n. 8.

26 *Ibid.*

27 Which became a British province in 1849.

instructions of the Governor General, native institutions and practices as far as they were consistent with the distribution of justice to all classes,[28] were upheld.

4.2.4 Personal Law Left Largely Untouched

Although the courts established under the Hastings Plan followed British procedure, they nevertheless applied indigenous legal norms in matters regarding inheritance and marriage etc. i.e., 'Mohammedan' law to Muslims in such cases. The Court also had *Maulvis* to advise it on Islamic law. But in practice this proved of little effect as the administrators usually did not interfere in the agrarian society.[29] Thus, despite the Anglicisation of the general legal system, certain aspects including marriage, dower, divorce, maintenance, custody and guardianship of children, gifts, wills and *waqfs* were still governed by Islamic law with only minor modifications. It is generally accepted that this approach of the British was due to the fact that family law was viewed as a politically sensitive matter, interference in which might have sparked off resistance thereby weakening colonial power.[30] Today, when the west bemoans the degraded status of women in our society, it would be pertinent to point out their own negative role in the fossilisation of Islamic family laws. By indulging in selective "emancipation" of the "natives", and conveniently overlooking areas affecting women, the British colonisers dealt a heavy blow to women's rights in the Indian subcontinent. For instance, customary law was allowed to govern in areas particularly detrimental to women. One such area is inheritance and succession. Although Islamic law gives women a share in inheritance, yet custom which denies it to her was made the overriding rule until the fourth decade of the 20th century.

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[28] W. C. Rattigan, *Digest of Civil Law for the Punjab chiefly based on the Customary Law*, 10th edn., (1925) Lahore: The Civil and Military Gazette Press.

[29] Anderson, *op. cit.*, n. 8 at p. 207.

[30] But it must also be remembered that in 18-19th century Britain itself, women had few legal rights, especially in the area of family law.

4.2.5 Custom as a Source of Law: Attempt at Codification

After the events of 1857, the Directors of the Company transferred their possessions in India to the Crown.[31] The Hastings system had not proved very successful, as it depended mostly on accurate translation of religious texts[32] and advisors to the court. In the 19th century the British began to focus on customs as a source of law[33] which led to compilation (or codification) of the local customs of various regions.

In the 19th century, after achieving a degree of stability in India, the British made some efforts to provide 'common law applicable to all classes of the inhabitants of India with due regard to the feelings and usages prevalent among them',[34] despite debating various suggestions[35] however, the idea was not pursued.

During the 18th century, several laws had been enacted that gave preference to Customary Law over the Personal laws. Important among these (and applicable to areas now part of Pakistan) were:

i) The Bombay Regulation IV of 1827.

ii) The Punjab Laws Act IV of 1872.

iii) The Bengal, Agra and Assam civil courts Act VIII of 1887

iv) The NWFP Laws And Justice Regulation IV of 1901.

Section 5 of the Punjab Laws Act 1872 which was akin to Section 27 of the NWFP Laws And Justice Regulation 1901 and section 26 of the Bombay Regulation (IV of 1827) reads as follows:

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[31] Under the Imperial Act (For Better Government Of India) 1858.

[32] Translations of renowned works of Islamic law was undertaken. For example, Hamilton's *Hedaya* (1791); translations of *Al-Sirajiah* and its commentary known as the *Sharifiyah*, Baillie's *Digest of Muhammadan Law* (translation of *Fatawa Alamgiri*); The Tagore Law Lectures (1891-92), the translation of *Mishkat-ul-Masabih*, (extracts from *Fatawas* by Kazee Khan). Also worthy of note are *Muhammadan Jurisprudence* by Abdur Rahim (1911) and *Principles and Precedents of Muhammadan Law* by Macnaghten.

[33] Anderson, *op. cit.*, n. 8 at p. 215.

[34] The Charter Act of 1833 provided for the appointment of a commission for this purpose, which become the first of the three such law commissions.

[35] The report of the Indian Law Commission (*Lex Loci* Report) declared that neither Muslim nor Hindu law could be the *Lex Loci* of India as both were 'the consequence of the indissoluble union of law with religion'. It recommended that a declaratory Act be passed making the law of England as the law of India, subject to some safeguards. The recommendations were never carried out.

"(5) In questions regarding succession, special property of females, betrothal and marriage, divorce, dower, adoption, guardianship, minority, bastardy, family relations, wills, legacies, gifts, partitions, or any religious usage or institution, the rule of the decision shall be

a) any custom applicable to the parties concerned, which is not contrary to justice, equity and good conscience, and has not been by this or any other enactment altered or abolished, and has not been declared to be void by any competent authority;

b) The Muhammadan Law in cases where the parties are Muhammadans, and the Hindu Law, in cases where the parties are Hindus, except in so far as such law has been altered or abolished by legislative enactment, or is opposed to the provisions of this Act, or has been modified by any such custom as is above referred to."

Thus, custom was made the first rule of decision in all the matters mentioned, which relevant to our present discussion included marriage, dower, divorce, succession, special property of females, wills, etc. Personal law was to be applied only if customary law had no rule on a particular point. Thus customary law would outweigh the written text of the law.[36]

Enforcing customary laws presented problems of their own, as customs differed from tribe to tribe and place to place, and were often unwritten. There being no presumption in favour of a custom,[37] it had to be found on evidence by the person alleging it.[38] For a custom to be valid i.e., legally enforceable, it had to be immemorial, reasonable and continuous,[39] in accordance with the principles of 'justice, equity and good conscience, and not declared void by any competent authority.[40] Therefore, to establish whether a particular custom was applicable or not, was a lengthy, complex

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[36] *Collector of Madura v. Moottoo Ramalinga* (1868) 12 MIA 397.
[37] AIR 1837 Lah. 742; AIR 1944 Lah. 442.
[38] AIR 1945 Lah. 17 (F.B).
[39] PLD 1949 P.C. 18.
[40] Restrictions laid down by the Punjab Laws Act, 1872 and other laws.

and time consuming process. Finally, customs are hardly ever fixed and are liable to modifications whereas to be characterised as laws, a certain element of certainty was required.[41] The venture to install custom as legally enforceable rules in the subcontinent thus met with failure.

4.2.6 Codification of Islamic Family Law

In the early 20th century, an assault was mounted on customary laws by Muslims of the sub-continent, more as a political move than by a desire of that community to be governed by Muslim Personal law. At the turn of the present century, with the formation of the All India Muslim League started, Muslims mobilising around politics of Muslim identity. In 1914, the *Anjuman-e-Khawatin-e-Islam* or the All India Muslim Women's Conference was formed. Although of little importance then, it later on played an important role in the enactment of the Shariat Applications Acts. The Muslims of India needed something to prove that they were one nation governed by the same set of laws rather than many different communities or nations following different local usages and customs, only professing the one religion, which they did not follow. Thus began the assault on customary laws which came in the form of the various Shariat Acts.

On attaining provincial autonomy in 1935, the NWFP Legislative Assembly enacted the NWFP Muslim Personal Law (Shariat) Application Act 1935 (MPL). It became the first of a series of such Acts enacted with an object to replace customs by MPL. in certain specified areas where the parties were Muslim. Sec 2 of the Act reads:

"Sec 2. Decision in certain cases to be according to Muslim Personal Law

In questions regarding succession, special property of females, betrothal, marriage, divorce, dower, guardianship, minority, bastardy, family relations, wills, legacies, gifts or any religious usage or institution including Waqf (trust and trust property), the rule

[41] *Gazette of India*, part V, p. 137.

of decision shall be the Muslim Personal Law (Shariat), in cases where the parties are Muslims:

Except in as far as such law has been altered or abolished by legislative enactments or is opposed to the provisions of the North-West Frontier Province Law and Justice Regulation, 1901."

In 1937 the Central Legislature enacted the Muslim Personal Law (Shariat) Application Act (XXVI of 1937), extending the application of Muslim Personal Law to the whole of India. Sec 2 of this Act reads:

"2. Notwithstanding any custom or usage to the contrary, in all questions (save questions relating to agricultural land) regarding intestate succession, special property of females, including personal inherited or obtained under contract or gift or any other provision of Personal Law, marriage, dissolution of marriage, including, *talaq, ila, zihar, lian, khula* and *mubaraat*, maintenance, dower, guardianship, gifts, trust and trust properties, and Waqfs (other than charities and charitable institutions and charitable and religious endowments) the rule of decision in cases where the parties are Muslim shall be the Muslim Personal Law (Shariat)."

Thus once again agricultural land was saved from the purview of Islamic law to please the landed gentry of India who otherwise professed to be demanding its application to Muslims of India. It was only in 1948, that the West Punjab Muslim Personal Law Shariat Application Act, 1948 included agricultural land in its section 2 above.

4.2.6.1 Child Marriages Restraint Act 1929 (CMRA)[42]

Another piece of colonial legislation in the area of family law was the CMRA. This law aimed at restraining the solemnisation of child marriages[43] is one that can truly be placed in the category of standard-setting legal norms rather than laws one would expect immediate widespread use of. It provides for punishment to persons

[42] Act XIX of 1929.
[43] *Ibid.*, Preamble.

(parents or guardians) who contracted their minor children in marriage.[44] But keeping in view the prevalent social norms and in the interest of the minors themselves, marriages contracted in contravention of the CMRA were not made invalid.

4.2.6.2 The Dissolution of Muslim Marriages Act, 1939 (DMMA)[45]

This is one the most important pieces of legislation promulgated in the area of Islamic family law in the subcontinent. The preamble states that its purpose is to:

"consolidate and clarify the provisions of Muslim law relating to suits for dissolution of marriage by women married under Muslim law and to remove doubts as to the effect of the renunciation of Islam by a married Muslim woman on her marriage tie."

The DMMA codifies and regulates to that extent, grounds on which a woman married under Muslim law may obtain a judicial decree of dissolution of marriage from the courts. An important provision of the DMMA is section 5 which states that a dissolution of the marriage contract under this Act will not effect the wife's right to dower.

Section 2(vii) of the DMMA also extends the option of puberty available to a Muslim girl to repudiate her marriage if brought about while she was a minor, to include a marriage contracted on her behalf by her father or grandfather.

4.2.6.3 The Muslim Family Law Ordinance, 1961 (MFLO)

After independence, due to consistent pressure from women, a Commission on Marriage and Family Laws was set up in June 1955 with the brief to find ways of restricting polygamy and giving women more rights of divorce than had been granted to them under the DMMA. The Commission presented its report in July 1958 but it was not until 1961, that some of its recommendations took the form of the Muslim Family Law Ordinance, 1961.[46]

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[44] *Ibid.*, sections 4, 5, 6 and 7.
[45] Act VIII of 1939.
[46] VIII of 1961.

The MFLO contained some very important provisions that were advantageous to women. For the first time the principles of *talaq-i-ahsan* and *talaq-i-hasan* were incorporated into the law of the land and an effort made at regulating and formalising the process of divorce.[47] Secondly, polygamy was restricted in that a husband desirous of a subsequent marriage had to submit to the Arbitration Council besides seeking the permission of the existing wives.[48] In the event of the husband contracting such marriage, the MFLO made him immediately liable to payment of the dower of the existing wife/wives.[49] The Ordinance under its sec. 4 also provided security for children of predeceased issue of a propositus. In addition to this the MFLO amended the CMRA, by raising the legal age of marriage for females from 14 to 16 years and from 18 to 21 for males.[50]

The politics of personal law both during the colonial era and in post-independence Pakistan has had an important bearing on women's rights in this sphere. For instance, while promulgating *Shariat* laws, the purpose was ostensibly to accede to the long-standing demand of the Muslim community to be governed by their religious laws. Yet these very laws excluded inheritance from the purview of *Shariat* laws which recognised women as heirs, to please the Muslim landed gentry of India.[51] In fact, in the interest of political expediency, unIslamic customary practices denying Muslim women their rights were ignored when 'Islamising' other laws.[52] This trend of excluding women from inheritance continued well into the post-independence era and it was only in 1962 that amendments to the Muslim Personal (Shariat) Application Act concede this right to women. [53]

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[47] Sec. 7, MFLO, 1961.

[48] Sec. 6, MFLO, 1961.

[49] *Ibid.*

[50] *Ibid.*, sec. 10 and 12. But sec. 12 now stands omitted by Federal Laws (Revision and Declaration) Ordinance (XXVII of 1981).

[51] See for instance, sec. 2 of the Muslim Personal Law (Shariat) Application Act, 1937.

[52] For example, see sec 26, Regulation IV of 1827 which says: "the law to be observed in the trial of suits shall be Acts of Parliament and Regulations of Government applicable to the case: in the absence of such Acts and Regulations, the usages of the country in which the suit arose; if none such appears, the law of the defendant, and in the absence of specific law and usage, justice, equity and good conscience alone."

[53] In the province of the Punjab, the Muslim Personal (Shariat) Application Act, 1948 was only passed by the Punjab Assembly when women demonstrated outside the Assembly urging

Likewise, the only piece of progressive legislation in Pakistan in the area of family law came as a result of a Family Law Commission[54] that had actually recommended abolishing polygamy, among other reforms. But due to pressure from certain reactionary groups an elected government could not implement them. It took a military dictator, General Ayub Khan to promulgate the MFLO and that too only limiting/inhibiting[55] and not abolishing polygamy.

In 1979, the then military dictator, General Zia-ul-Haq gave the country his flavour of 'Islamisation' by promulgating the Hudood Ordinances, 1979, the Qanoon-i-Shahadat Act, 1984 and the Qisas and Diyat Ordinances. These laws contain provisions that have had a direct impact on the implementation and application of the law with regard to women. In some instances such as non-registration of marriage and divorce, these laws have complicated the implementation of family laws, often to the detriment of women.[56]

The use of legislation as a tool of social engineering, particularly where the position of women in family law is concerned, is very uncertain and fluid. Case law presents both positive and negative trends, primarily because this is an area closely

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members to vote in favour of the bill. The reluctance of members stemmed from the fact that majority of the Assembly's members belonged to the landed class. See, A. Jalal, "The Convenience of Subservience" in D. Kandiyoti (ed.,) *Women, Islam and the State* (1991) Basingstoke: Macmillan at p. 87.

[54] Known as the Commission on Marriage and Family Laws, appointed by the Government of Pakistan, Ministry of Law Resolution No. F.17(24)/55-Leg., dated 4th August 1955. The report of this Commission was published in the Gazette of Pakistan Extraordinary on 20th June 1956 under notification no. F. 9(4)/56-Leg. In 1975 the Pakistan Women's Rights Committee was set up. The report of this Committee chaired by Mr. Yahya Bakhtiar, then Attorney General of Pakistan was submitted in 1976. Nothing came out of this exercise as the report came out at a time when the government of the day was caught up in a political crisis that eventually brought it down. In 1985, the third report, known as the Report of the Commission on the Status of Women, 1985, chaired by Begum Zari Sarfaraz also made some useful recommendations. But the government declared the report as a classified document as it was only when a new government came into power in 1988 that the report was made available to the people of Pakistan. The latest in the series of reports is the report of the Commission of Inquiry for Women submitted in 1997.

[55] Albeit rather half-heartedly.

[56] See discussion in chapter 3 of this study. For a detailed discussion on the subject also see, Ali and Naz, Marriage, Dower Divorce, *op. cit.*, n. 4.

guarded as the repository of cultural norms and identity. The *Saima Waheed* case, presented below is being used as an example of this multiplicity of norms and legal pluralism employed by dispute resolution forums in deciding cases in family law.

4.3 Is An Adult Muslim Woman *Sui Juris*? A Discussion on the Legal Status of Women in Pakistan With Reference to the *Saima Waheed* Case

In this section it is proposed to make an analysis of application of Islamic family law as it affects women's rights in Pakistan in the light of the *Saima Waheed* case. *Saima Waheed*, an adult Muslim woman[57] contracted a marriage without the knowledge or approval of her parents in the beginning of 1996, though she continued to reside with her parents. Her father, on hearing of the clandestine union, strongly disapproved, returned the *nikahnama*, or marriage certificate and purported to cancel it. Saima Waheed, in defiance of her family's wishes to end what they considered an undesirable match, however, left the family home and took up residence in a women's refuge managed by a non-governmental organisation. Her father, immediately filed criminal charges against the refuge, alleging that his daughter had been abducted, and also argued that Saima's marriage was void *ab initio*, since he, the *wali*, had not given his consent.

Saima, in turn, petitioned the court for a declaration upholding her marriage. The case attracted intense and widespread media attention both at home and internationally. During the pendency of the petitions, the Chief Justice of the Lahore High Court referred the case to a larger bench of the Lahore High Court. Issues raised in the petition included, *inter alia*:

[57] And an undergraduate student at the Government College for Women, Lahore (Pakistan).

(i) whether parents have a right to be obeyed, and whether this right of obedience is judicially enforceable; (ii) whether marriage in Islam is a civil contract or not; and (iii) whether permission of the *wali* is or is not one of the main condition of a valid *nikah* (contract of marriage).

The case, it is submitted, has not only re-opened a debate that one believed to have been well-settled for centuries, at least among Hanafi Sunni Muslims, it has also called into question the entire legal personality of a Muslim woman and rights accorded to her in Islam.

In order to address the issue in hand, it is proposed to provide an overview of the definition of the institution of marriage in Islam, the nature, capacity, form and requisites of a valid contract of marriage. A section will be devoted to the concept of guardianship in marriage and the related right of *Khiyar-ul-Bulugh* (option of puberty) and how statute law has affected the mould of traditional Islamic norm surrounding this concept. The interaction and interplay between, Islamic law, statutory law and customary norms and practices in relation to marriage will also be discussed particularly where interpretation of the doctrine of *kafat* or equality in marriage is concerned. It will be argued that the black letter law is not the sole determinant of what, when and how women's rights are recognised and conceded in a legally pluralistic society such as Pakistan and, of the three sets of laws/norms, it is customary practices and societal norms that hold sway and influence over dispute resolution forums, whether formal or informal.

4.3.1 Definition of Marriage

The central idea in Muslim family law is the institution of *nikah* or marriage.[58] Almost every legal concept revolves around the central focal point of the status of the marriage.[59] It is through marriage that paternity of children is established and relationship and affinity are traced.[60] Mulla defines marriage (*nikah*) as "a contract which has for its object the procreation and legalising of children".[61] "*Nikah* or marriage implies a particular contract used for the purpose of legalising generation."[62] However, Baillie states, on authority from *Kifayah*,[63] that marriage is also instituted for the "solace of life" and is one of the "prime or original necessities of man".[64] Therefore, marriage remains lawful even in extreme old age, after hope of offspring has ceased or during "*marz-ul-maut*", (terminal illness).[65]

All major writers on Islamic law agree that marriage according to Islam is in the nature of a contract;[66] hence all the requisites of a valid contract must be fulfilled. First of all, the parties to the marriage contract must have capacity.[67] Every adult Muslim of sound mind may enter into a valid contract of marriage.[68] Marriage of a Muslim who is of sound mind and who has attained puberty[69] is void if it is brought

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[58] A. Rahim, *The Principles of Muhammadan Jurisprudence* (1995) Lahore: Mansoor Book House at p. 275.

[59] D. Pearl, *A Textbook on Muslim Personal Law* (1979) London: Croom Helm at p. 42.

[60] Rahim, *op. cit.*, n. 58 at p. 275.

[61] M. A. Mannan (ed.,) D. F. *Mulla's Principles of Mahomedan Law* (1995) Lahore: PLD Publishers at p. 387.

[62] C. Hamilton, *The Hedaya* (*Hedaya*) (1957) Lahore: Premier Book House at p. 25.

[63] *Kifayah*, vol. iii, at p. 577.

[64] N. B. E. Baillie, *A Digest of Moohammudan Law*, (*Baillie*) Part II (1965) Lahore: Premier Book House at p. 4.

[65] *Ibid.*

[66] *Ibid.*

[67] Mannan, *op. cit.*, n. 61 at p. 388.

[68] But a minor may be validly contracted into marriage by his or her guardian. See *Ibid.* at pp. 406-409.

[69] Traditional Islamic Law (e.g. *Hedaya*) states that "the earliest period of puberty with respect to a boy is twelve years and with respect to a girl nine years." But puberty is presumed, in the absence of evidence, on completion of the age of fifteen years.

about without his/her consent.[70] "*Ejab-o-qabool*" i.e., declaration and acceptance[71] at one meeting in the presence and hearing of two adult and sane witnesses[72] legally confirms the contract of marriage.[73] In the opinion of the author of *Hedaya*, "evidence is an essential condition of marriage".[74] Malik on the other hand maintains that publicity of the marriage is only a condition and not positive evidence.[75] Either party to the marriage contract or their representatives (*wakil*) may take the initiative in this regard.[76] The law does not insist upon any particular form in which the contract should be effected and completed.[77]

4.3.2 Dower

Dower or *mahr*, is another essential element of the marriage contract, although the exact implications and legal effects flowing from it remain controversial. Baillie defines it as

> "the property which it is incumbent on a husband, either by reason of it being named in the contract of marriage, or by virtue of the contract itself, as opposed to the usufruct of the wife's person".[78]

It is known by several names, as *muhr*, *sudak*, *nuhlah*, and *akr*.[79] It is argued that dower

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[70] Even if a guardian has contracted a minor or a person of unsound mind into a valid contract of marriage, ratification of the contract is essential when the minor attains puberty and when the person of unsound mind regains sanity respectively.

[71] *Kifayah*, *op.cit.*, n. 63 at p. 577.

[72] The presence of two male or one male and two female witnesses is required. In *Baillie*, *op. cit.*, n. 64, vol. i, pp. 6-7 it has been argued that a female may act as witness to a marriage, but the presence of at least one male one is compulsory. According to this view therefore a marriage with only four female witnesses would not be valid. Shafei differed on this point deeming the testimony of females inadmissible except in cases relating to property.

[73] *Hedaya, op. cit.*, n. 62. But according to Shia Law, the purpose of having witnesses are required simply to advertise the union and do not constitute an essential of the marriage contract.

[74] *Ibid.*, at p. 26.

[75] *Ibid.*

[76] *Ibid.*, at pp. 25-26.

[77] A. Hussain, *Status of Women in Islam* (1987) Lahore: Law Publishing Company at p. 451.

[78] *Baillie*, *op.cit.*, n. 64 at p. 91.

> "is not the exchange or consideration given by the man to the woman for entering into the contract;[80] but an effect of the contract imposed on the husband as a token of respect for its respect, the woman".[81]

"*Nikah*" in its primitive sense, means carnal conjunction, and requires only the union of the parties.[82] Hence the marriage contract is valid even though no dower were mentioned, and even though it were expressly stipulated that there should be no dower.[83]

It is argued however, in response to the above view that "*mahr*" or dower is that financial gain which the wife is entitled to receive from her husband by virtue of the marriage contract itself whether named or not in the contract of marriage, in which case "*Mahr Mithl*" (proper dower) becomes due.[84] Dower therefore is a right which comes into existence with the marriage contract itself and is its integral component.[85]

The wife may remit the dower or any part thereof in favour of the husband or his heirs.[86] But this remission must be made with free consent.[87] It has been held that where a woman remits her dower either under mental stress in the period following

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[79] *Inayah*, vol. ii., at p. 52, cited in *ibid.*

[80] *Kifayah*, vol. iii at p. 204, cited in Rahim, *op. cit.*, n. 58 at p. 282.

[81] *Hedaya*, op. cit., n. 62 at p. 58.

[82] *Baillie, op.cit.*, n. 64.

[83] *Ibid.*, at p. 44.

[84] Mannan, *op. cit.*, n. 61 at p. 426.

[85] Dower is of two kinds; specified i.e., one which is expressly mentioned in the marriage contract and proper i.e., that which is due by the contract itself. Proper dower or "*mahr mithl*" means literally, dower of the like or the woman's equals. It is determined by the court in cases where dower has not been specified in the marriage contract after taking into account the dower of other women belonging to the wife's family. Specified dower is classified as either prompt or deferred. Prompt dower is payable on demand, and deferred on dissolution of marriage by death or divorce. Prompt dower may also be demanded before consummation of the marriage. Even after consummation has taken place, the wife may refuse to live with the husband unless he pays her the prompt dower, and this non-payment would be a complete defence to a suit for restitution for conjugal rights.

[86] *Baillie, op.cit.*, n. 64 at p. 553.

[87] *Ibid.* Also see Mannan, *op.cit.*, n. 61 at p. 431-432.

her husband's death,[88] or during his lifetime to gain/retain his favour, she is not acting as a free agent. Such a decision is not one made with free consent and therefore not binding on her.[89]

Dower is a debt which must be paid to the wife by the husband.90 After his death, the wife is entitled to recover it from his estate and if she is legally in possession of his estate, she may retain it until her debt is paid off.91

4.3.3 Valid, Irregular And Void Marriages[92]

The Hanafi School of law classifies marriages as valid (*sahih*), irregular (*fasid*), or void (*batil*).[93] A void marriage is no marriage in the eyes of the law.[94] It does not create any civil rights or obligations between the parties and the offspring of such a marriage are illegitimate.[95] The obstacle in void marriages is permanent and perpetual and cannot be remedied. Marriages prohibited on the ground of

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88 Some pre-1947 case-law exists on the subject. For instance, see *Nurannessa v. Khaje Mohamed* (1920) 47 Cal. 537, 56 I.C.8; *Hasnumiya Dadamiya v. Halimunnissa Hafizullah* (1942) 44 Bom. L.R.126, (42) A.B. 128.

89 *Shah Bano v. Iftikhar Muhammad Khan* (1957) 2 W.P. 748; PLD 1956 Kar. 363.

90 Period of limitation for a suit to recover prompt dower is 3 years from the date of demand and refusal, or, where no demand has been made during the continuance of the marriage, on dissolution of the marriage by death or divorce.(Limitation Act, 1908, Sch. I, Art.103).The period of limitation for a suit to recover deferred dower is 3 years from the date when the marriage is dissolved by death or divorce. But see Muslim Family Laws Ordinance, 1961 for changes.

91 Mannan, *op.cit.*, n. 61 at pp. 435-448.

92 These categories appear in *Mulla's Muhammadan Law*. Baillie uses the term "invalid" for irregular marriage.

93 The Shias do not recognise irregular marriages at all. They do however have an institution of "temporary" (*muta*) marriage whereby a man and a woman may validly contract themselves into a union for a particular period of time. In a *muta* the period of cohabitation and dower is fixed and on the expiry of the stipulated period, the marriage automatically dissolves. For a detailed discussion of the nature and incidents of *muta* see S. Haeri, *The Law of Desire: Temporary Marriage in Shia Iran* (1989) London: I. B. Tauris.

94 Mannan, *op.cit.*, n. 61 at p. 401.

95 *Ibid.*

consanguinity, affinity, and fosterage are void.96 Marriage with a woman who has her husband alive and who has not divorced her, is also void.97 Likewise, marriage of an adult and sane person brought about without his/her consent is void.98

An irregular (fasid) marriage is one that suffers from a temporary bar or informality. Instances of irregular marriages are marriage with a woman during her "*iddat*" or waiting period,[99] marriage contracted without witnesses,[100] a fifth marriage by a man already having four wives,[101] and (in some cases) a marriage due to difference of religion is irregular.[102] Remarriage with a thrice repudiated wife without an intervening marriage (*halala*) too, is irregular.[103] In addition to this, a marriage of unlawful conjunction is also irregular.[104]

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[96] Under Islamic Law, some relations are such that it is prohibited to enter into a valid contract of marriage with them. There are three classes that constitute these "prohibited degrees of relationship". The first is prohibition on the ground of consanguinity i.e., blood relationship. Thus a man cannot lawfully marry his mother, grandmother how highsoever, his daughter, grand-daughter how lowsoever, sister whether full, uterine or consanguine; niece or great-niece how lowsoever, and aunt or great-aunt how highsoever, whether paternal or maternal.
The second category of prohibited degree of relationship is on the ground of affinity. A man is prohibited from marrying his wife's mother or grandmother how highsoever, wife's daughter or grand-daughter how lowsoever, the wife of his father or paternal grandfather how highsoever; and the wife of his son's son or daughter's son how lowsoever.
The third set of relatives with whom a man may not contract a valid marriage are those prohibited on the ground of fosterage.

[97] Mannan, *op.cit.*, n. 61 at p. 393.

[98] *Ibid.*, at p. 388.

[99] *Iddat* is the period following dissolution of marriage either by death or divorce during which it is incumbent upon a woman not to contract another marriage. The purpose of *iddat* is, primarily, to determine whether the woman is pregnant or not. The duration of *iddat* (following divorce) is three menstrual cycles; if she is not menstruating, then three lunar months. Should the woman be pregnant, *iddat* terminates upon delivery. Duration of *iddat* when marriage terminates on death, is 4 months and 10 days or delivery (if woman is pregnant) whichever is later.

[100] Baillie, *op.cit.*, n. 64 at p. 155.

[101] *Ibid.*, at p. 30.

[102] It is lawful for a Muslim male to marry not only a Muslim female but also a *Kitabia* (follower of a revealed religion, e.g., a Christian or a Jew). But if he marries an idolatoress or a fire-worshipper, the marriage would be irregular. A Muslim woman, on the other hand, may only contract a valid marriage with a Muslim male. If she marries a non-Muslim male even if he a *Kitabi*, the marriage is irregular. This point however, is controversial. In *Baillie* and the *Hedaya*, it is stated that since the bar is of a temporary nature therefore it is correct to classify such marriages as irregular. But Fyzee regards it as void.

[103] *Baillie, op.cit.*, n. 64 at p. 151. But this procedure for remarriage of a divorced couple is now governed by the Muslim Family Laws Ordinance, 1961.

An irregular marriage has no legal effect before consummation and can be terminated by either party,[105] either before or after consummation.[106] Once the marriage has been consummated, the wife becomes entitled to dower, she is bound to observe the *iddat*, and the issue of the marriage is legitimate.[107] An irregular marriage however, does not create mutual rights of inheritance between husband and wife.[108]

A valid marriage is one where all the requisites have been fulfilled. Baillie describes a number of legal effects of such a contract.[109] For example, it legalises the mutual enjoyment of the parties in a manner permitted by law or according to nature.[110] It imposes on the husband the obligation of *mahr* or dower, and of maintenance of his wife.[111] It establishes on both sides the rights of inheritance and the prohibited degrees of relationship.[112]

4.3.4 Marriage in Islam: Civil Contract or Sacrament?

In the discussion on whether an adult Muslim woman is *sui juris* (in relation to marriage) and has the right to enter into marriage of her own accord and volition, one of the key issues to be addressed is the nature of the institution of marriage itself. Is it a civil contract or a sacrament divinely ordained and determined, or is it a combination of both? In the *Saima Waheed* case, the contractual nature of marriage was

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[104] Unlawful conjunction means where a man combines in marriage two women who are so related to each other by consanguinity, affinity or fosterage, that if either had been a male, they could not have lawfully intermarried. For instance, two sisters or an aunt and niece.

[105] The woman may, in addition to the right of suing in court, avoid an irregular marriage by relinquishment. This aspect of the law has been discussed in detail in *Muhammad Miskin v. Nasim Akhtar* (1979 CLC 558).

[106] Mannan, *op.cit.*, n. 61 at p. 401-402 and *Baillie*, *op.cit.*, n. 64 at pp. 156-158.

[107] *Ibid.*

[108] *Baillie*, *op.cit.*, n. 64 at pp. 694-701.

[109] *Ibid.*, at p.13.

[110] *Ibid.*

[111] *Ibid.*

[112] *Ibid.*

questioned and linked to whether an adult Muslim woman could enter it without the consent of her *wali*. If marriage is indeed a civil contract, then an adult Muslim woman is perfectly capable of entering it of her own accord. But if marriage was primarily in the nature of a religious and social obligation, a narrow interpretation of religious and social injunctions might well lead one to infer otherwise.

Mulla highlights the contractual nature of the institution of marriage in Islam and cites[113] from the leading 19th century case on the subject, *Abdul Kadir v. Salima*,[114] in which their Lordships stated that

> "marriage according to the Mahomedan law is not a sacrament but a civil contract. All rights and obligations it creates arise immediately and, are not dependent on any condition precedent such as payment of dower by a husband to a wife".

In the opinion of Aftab Hussain, too, a contract of marriage, as a civil institution, rests on the same footing as other contracts.[115] "The parties retain their personal rights against each other as well as against strangers; ... have power to dissolve the marriage tie, should circumstances render this desirable".[116]

Ameer Ali states that marriage is essentially a contract between two parties (the husband and wife), and being in the nature of a contract, unless expressly stipulated, does not confer any right on either party over the property of the other. The legal capacity of the wife is not subsumed in that of the husband and so she retains the same powers of using and disposing of her property, or of entering into contracts regarding it, of suing and being sued without her husband's consent. She

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[113] Mannan, *op. cit.*, n. 61 at p. 387.
[114] (1886) 8 All. 149.
[115] Hussain, *op. cit.*, n. 77 at p. 451.
[116] *Ibid.*

may even sue her husband without the intervention of a trustee or next friend and is in no respect under his legal guardianship.[117]

Haeri on the other hand argues that the contract of marriage in Islam though essentially contractual in nature, has religious overtones and undertones in that, the broader outline of the marriage contract is divinely determined.[118] Thus, despite some flexibility,[119] laws regarding the rights of husband and wife cannot be modified by the parties at the drawing up of the contract. She states that of the variety of sexual unions sanctioned by pre-Islamic Arab society under the name of marriage, the Prophet Mohammed outlawed all but one form, namely marriage by contract which resulted in substantial change and, indeed, improvement in the legal position of women.[120]

Rahim, believes that "Muslim jurists appear to regard the institution of marriage as partaking both of the nature of *ibadaat* or devotional acts and, *muamalaat* or dealings with men. It is founded on contract for which consent of both parties is essential".[121]

From the foregoing discussion it appears that although there might appear some difference of opinion regarding marriage in Islam, its contractual nature has not been denied by any scholar writing on the subject. The controversy arises when one questions the exact nature and parameters of this contract in relation to the position of women in Islam and their rights to negotiate it independently of their male relations.

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[117] S. A. Ali, *Muhammadan Law*, Vol. 2, pp. 243-244, cited in Hussain, *ibid.*, at p. 451.

[118] S. Haeri, "Divorce in Contemporary Iran: A Male Prerogative in Self-Will" in C. Mallat & J. Connors (eds.,) *Islamic Family Law* (1990) London: Graham & Trotman at p. 56 citing *Encyclopaedia of Islam*, Vol. 3, Leiden, 2nd edn., at p. 914.

[119] For instance, the right to choose marital residence, or the delegated right to divorce, or *talaq-i-tafwid* may be stipulated in the marriage contract.

[120] Fir a detailed account of the various kinds of marriages prevalent in pre-Islamic Arab society see, Rahim, *op. cit.*, n. 58 at pp. 2-13.

[121] *Ibid.*, at p. 276.

Men are perceived as in charge of women and marriage is an important means of creating new social alliances through these 'charges'. In the *Saima Waheed* case, the contractual nature of marriage was questioned and linked to whether an adult Muslim woman could enter marriage without the consent of her *wali*. In this case, it was not her marriage *per se* that her father objected to, it was the socially unacceptable match and manner in which it was conducted, that was the main cause for acrimony. So, for instance, behind the seemingly simple question of whether marriage is a civil contract or not, lurk the following issues:

i) If marriage is indeed conceded as a civil contract between two parties (a man and woman), surely this would also entail recognition, at least initially, of a certain measure of equality between the two contracting parties. It is this semblance of equality, no matter how token, that is socially unacceptable.

ii) Muslim society does not appear to have any problems in accepting that an adult Muslim woman is (legally) capable of entering independently and of her own accord, into various kinds of contracts and transactions, such as the right to own, buy, sell and otherwise dispose of her property, engage in trade and commerce, etc. But the notion of a woman being able to exercise her choice by entering into a contract of marriage is seen as an affront to the male honour as she is considered the '*izzat*' of the family and negotiating a marriage contract with a male without an intermediary poses a threat to existing social structures. In the *Saima Waheed* case this issue appeared to overshadow all other (legal) issues. It was argued that within the existing social norms there simply could be no other way for a woman to use her independent choice of entering into a contract of marriage, except by

"freely mixing with males and then selecting one of them as her future husband. This way of life is neither permitted nor encouraged by any fiqh or school of thought because it is against basic teachings of Islam that people from both sexes should have free access to each other."[122]

iii) Highlighting the contractual element of marriage creates a distinct possibility of entering stipulations in the contract curtailing the husband's prerogative of unrestrained divorce, polygamy etc..

iv) Last, but certainly not least, accepting marriage as a contract, changes the complexion of dower, its meaning and implications for both parties. If marriage is a contract, how does one classify it? Is it, as Coulson believes, akin to a contract of sale,[123] dower being the 'price' in exchange for the sexual union with the wife as the object of sale? If dower is not the consideration for the marriage contract and as argued by most Muslim scholars, is a gift to the wife, and a mark of respect for her, why is (at least some of it), payable only at the time of dissolution of marriage, and returnable to the husband in case a wife seeks to opt out of the marriage contract?

Haeri, writing in the Iranian context, but making a statement, that may well be applied with relative ease to other parts of the Muslim world, remarks that

"the ambivalence of the *ulama* regarding classification of marriage as a contract stands in sharp contrast to the clarity of their position on the contractual nature of marriage as far as divorce is concerned. They put emphasis on the contractual logic of marriage in order to provide changes in the law of divorce to spell relief for women. What they have consistently chosen to neglect is the fact that men and women do not negotiate a marriage contract from a position of social, psychological, economic, or legal equality. This is where the tension lies, and where most of the confusion surrounding the spouses' expectations of marital relations arises. On the one hand the *ulama* object strongly to the notion that bride price functions like price in a contract of sale, or that reward in a temporary marriage is like wage earned by a lessee. On the

[122] *per* Ihsan-ul-haq Chaudhary, J. at pp. 11-12.
[123] N. Coulson, *A History of Islamic Law* (1964) Edinburgh: Edinburgh University Press at p. 111.

other hand, in discussing divorce and deciding its outcome they emphasise the role of contract and the sanctity of the initial agreement between the spouses."

This ambivalence regarding the contractual nature of marriage is adequately reflected in the *Saima Waheed* case. The arguments against marriage being a contract are advanced in order to make a case that marriage, as a social institution is only valid where the *wali* has negotiated it. What then is the significance of *wali* or marriage guardian. It is to this subject that we now turn our attention.

4.3.5 Guardianship In Marriage (*Jab'r*), Equality in Marriage (*Kafat*) and Option of Puberty (*Khiyar-ul-Bulugh*)

In this section it is proposed to look into three concepts linked with the validity of a contract of marriage and having a strong bearing on the position of women in Islam. Consent, freely given, by both parties, is one of the essentials of a valid contract of marriage. How that consent is given or construed to be given, is as much determined by the custom as much as legal rules.[124] But is this right to consent (or not) of the parties to the marriage, absolute? or is it subject to a superior right vested in the guardian? Two other issues also arise here. The first is the doctrine of *kafat* or equality in marriage which implies the right of a guardian to withhold consent and/or seek annulment of a marriage that he considers unequal. The second issue is the meaning, scope and extent of the concept of *jab'r* or guardianship in marriage.

[124] In the vast majority of marriages conducted in Pakistan, the consent of the woman is acquired by one of her close male relatives who enters the '*zenana*' or women's part of the household and asks the woman if she agrees to appoint him as her representative to consent on her behalf. The consent of the woman often comes in a nod of the head often with the active participation of her friends and relatives who gather to witness the scene. Very few women actually sign their marriage contract (many being illiterate in any case); some women in cities and large towns are an exception.

These three concepts, used in combination have been used to curtail the right of an adult Muslim woman to independently enter into a contract of marriage.

4.3.5.1 Consent in Marriage by Adult Muslim Woman versus Consent to Marriage by *Wali*: Competing or Complementary rights?

Ihsan-ul-haq Chaudhary, J. in the *Saima Waheed* case stated that although the full and free consent of a woman forms an essential element of a valid marriage, this consent is qualified by the overriding right of the *wali* or marriage guardian to withhold or accord assent.[125] This assumption raises the following questions: If marriage is indeed a civil contract with the man (prospective husband) and woman (prospective wife) as the contracting parties, then in what capacity is the consent of the *wali* essential to the validity of this contract?

It may be argued that the focal point on which rests this entire debate appears to be the legal competence of the adult female which capacity is considered suspect. Of the four Sunni Schools of thought in Islam, it is only the Hanafis that concede to an adult Muslim woman the right to enter into marriage of her own accord. The established opinion of the Hanafi school of thought (to which the vast majority of Pakistani Sunni Muslims belong) is that

> "A woman who is an adult, and of sound mind, may be married by virtue of her own consent, although the contract may not have been made or acceded to by her guardians; and this, whether she be a virgin or *Siyeeba.*"[126]

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[125]He states that marriage without the consent of *wali* is not valid; even a proposal and acceptance on behalf of both parties did not constitute a valid contract of marriage. (pp. 7-8). At p. 13, he also states that permission of the girl and the wali is essential, but the wali and not the girl herself is the contracting party.

[126] *Hedaya, op. cit.*, n. 62 at p. 34 states that this is the opinion of Imam Abu Hanifa and Abu Yusaf as it appears in the Zahir Rawayet. At the same time, it states that it is recorded from Abu Yusaf, that the marriage of a female cannot be contracted except through her guardian. Muhammad however, holds that although such a marriage may be contracted, yet its validity is suspended upon the guardian's consent. Also see Pearl, *op. cit.*, n. 59 at p. 43.

Other schools of Sunni thought including the Maliki and Shafei assert that a woman can under no circumstances contract herself in marriage to a man, either with, or without the consent of her guardians.[127] In other words, she is not *sui juris* and lacks legal competence to enter into a valid contract of marriage of her own accord and volition. Malik and Shafei do not stop at this: a woman is not considered competent to contract either her daughter or her slave in marriage; she is also considered unable to act as an agent (in a contract of marriage) for anyone because

> "the end proposed in marriage, is the acquisition of those benefits which it produces, such as procreation, and so forth; and if the performance of this contract were in any respect committed to women, its end might be defeated, they being weak in reason, and open to flattery and deceit."[128]

Mohammed argues that this apprehension is done away by the permission of the guardian being made a requisite condition.[129] However, it is relevant to make the point that it is recorded that Mohammed afterwards adopted the sentiments of the two elders (i.e., Abu Hanifa and Abu Yusaf) upon this point, and agreed with them, that the marriage here treated of is lawful, and that its validity is not suspended upon the approbation of the guardian.[130]

Among the Hanafis it is not lawful for a guardian to force into marriage an adult virgin against her consent.[131] This is contrary to the doctrine of Shafei, who considers an adult virgin the same as an infant, with respect to marriage, and argues that since the former cannot be acquainted with the nature of marriage any more than

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[127] *Hedaya*, *op. cit.*, n. 62 at p. 34.
[128] *Ibid.*
[129] *Ibid.*
[130] *Ibid.*
[131] *Ibid.*, at p. 41.

the latter, therefore the father is empowered to conclude the contract without her consent including the amount of dower to be paid to her by the husband. On the other hand the argument of the Hanafi scholars is that the woman, in this case, is free, and a *Mokkatiba* (that is, subject to all the obligatory observances of the law, such as fasting, prayer, and so forth), therefore no person is endowed with any absolute authority of guardianship over her. It is further argued that the position of an adult woman is not comparable to that of infants, over whom others are necessarily endowed with authority, since their understanding is yet immature. The understanding of an adult woman

> "is held complete, in consequence of her having attained to years of discretion; for, if it were otherwise, she would not be subject to the observances of the law: from all which it follows that this woman is the same as an adult son; and that all her acts with respect to matrimony are good and valid, the same as his with respect to property; neither is her father empowered to make seizin of her dower without her consent expressed or virtually understood, as he is not at liberty to do so where she has forbidden him".[132]

If the validity of the marriage requires the consent of the woman, how then is such consent to be given. Detailed discussion is presented in the *Hedaya* regarding procedures to be adopted and inferences drawn. The *Hedaya* distinguishes between consent given by an adult virgin female to her marriage and token of consent taken from a *Siyeeba*. While the adult virgin may give her consent impliedly by remaining silent or a smile, the same is not considered sufficient in the case of a *Siyeeba*. If a guardian propose a marriage to a *Siyeeba* (a woman with whom a man has had carnal connection), it is necessary that her compliance be particularly expressed by words clearly indicating her consent.[133]

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[132] *Ibid.*, pp. 34-35.
[133] *Ibid.*

A distinction is made between the manner of consent given to a contract of marriage by an adult virgin female to her guardians as in father, grandfather and brother and one to be accorded when the proposition is made by a *Walee Bayeed* (or a guardian of a more distant degree than her father, grandfather, uncle, brother). Here too, mere silence or smile or even laughter is not considered enough and an explicit verbal compliance must be made as expression of consent.[134]

In contrast to the Hanafi law, in both Shafei and Maliki law, an adult virgin has no capacity to contract herself in marriage. She needs the consent of her guardian, and indeed it is possible for a guardian to contract into marriage his daughter who has reached puberty without the necessity of obtaining her consent. The girl only becomes capable of contracting herself in marriage when she ceases to be a virgin by reason of a consummated marriage or an illicit sexual relationship.[135]

4.3.5.2 *Kafat* or Equality in Marriage

Linked to the issue of consent in marriage by an adult Muslim woman as a contracting party, is the doctrine of *kafat* or equality. According to traditional Islamic law, *kafat* provides the *wali* a right to withhold consent to or seek annulment of the marriage of his ward on grounds of it being an unequal match. As a legal concept, *kafat* is riddled with contradictions, as it has the potential of being hazardous to the fundamental norms of equality of humankind underlying virtually every principle of Islamic teaching. *Kafat* or equality signifies the equality of a man with a woman, in several particulars defined in accordance with societal norms of what constitutes

[134] *Ibid.*
[135] *Ibid.*, pp. 34-38.

equality such as lineage, freedom (i.e., whether the prospective husband is a slave, a freedman or a free man), character, fortune or profession.[136]

There is no evidence in the *Quran* regarding the doctrine of *kafat*; equality of match in marriage being mentioned only in the context of faith and character. Thus from the *Quranic* perspective, if a man is a Muslim of sound moral character that is sufficient qualification for him to marry a Muslim woman of sound character.[137]

Certain sayings of the Prophet Mohammed however, appear to present a different view. For instance, in the *Hedaya*, the discussion on *Kafat* mentions the Prophet Mohammed as having stated:

> "Take ye care that none contract women in marriage but their proper guardians, and that they be not so contracted but with their equals".[138]

Thus it has been argued that

> "because the desirable ends of marriage, such as cohabitation. society and friendship, cannot be completely enjoyed excepting by persons who are each other's equals (according to the customary estimation of equality), as a woman of high rank and family would abhor society and cohabitation with a mean man; it is requisite, therefore that regard be had to equality with respect to the husband; that is to say, that the husband is equal to his wife."[139]

If a woman were to contract herself in marriage with a man who is not considered her equal in social terms, then, according to Abu Hanifa and Abu Yusaf, the marriage is illegal and her *wali* has the right to annulment of the union.[140] This statement, however, establishes the point that an adult Muslim woman may enter into

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[136] *Ibid.*, at p. 41.

[137] See for instance the *Quran*, verse 2: 221 of *Sura Al -Baqara*; and verse 24:32 of *Sura An-Noor*. It may be pointed out here that these verses allow a free woman to marry a slave if he is a Muslim and possesses good moral character.

[138] *Hedaya, op. cit.*, n. 62 at p. 40.

[139] *Ibid.*

[140] *Ibid.*, at p. 39.

a contract of marriage ; for how otherwise might her *wali* seek annulment if there was no marriage at all?

It has been stated that if a woman contract herself in marriage, consenting to receive a dower of much smaller value than her proper dower, the guardians have a right to oppose it, until her husband agrees either to give her a complete proper dower, or to separate from him. This has been recorded as Abu Hanifa's view. The two disciples, Abu Yusaf and Imam Mohammed maintain that the guardians are not possessed of any such authority; and their argument is, that whatever the dower may be above ten *dirhams* is the right of the woman, and no person can oppose her in relinquishing that which is her own; as where a woman, for instance, chooses to relinquish a part of the dower, after the amount of it has been specifically stipulated.[141] Imam Hanifa is said to have believed that, although the dower belongs to the woman herself, yet (at a social level),

> "the guardians assume a certain degree of respect and consideration from the magnitude of the dower; and its smallness is an occasion of shame to them; wherefore regard is had to that, as well as to equality: contrary to the case of a woman relinquishing her claim to any part of her dower after it has been specifically stipulated, because no disgrace falls upon the guardians from such dereliction."[142]

The same discussion also states that if a father should contract in marriage his infant daughter, agreeing to a very inadequate dower; or if he should contract his infant son, engaging for an extravagant dower, this is legal and valid with respect to them.[143]

On the other hand, the doctrine of *kafat* is not extended to cases where the husband is of a higher rank than his wife as on marrying a woman of lower socio-

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[141] *Ibid.*, at p. 41.
[142] *Ibid.*
[143] *Ibid.*

economic status, she is raised to his status, the man being considered the head of the household. One is therefore led to argue that the doctrine of *kafat* was strongly influenced by tribal Arab society where power and influence was controlled through marriage and kinship and through *kafat*, the male believed he was protecting the women in his charge from undesirable matches and degradation among their peers.

That *kafat* or equality is a later day development in Islamic thought is averred by Coulson.[144] He is of the view that this doctrine provides an example of interaction of the various schools of juristic thought in Islam in the realm of family law. *Kafat*, was unknown to early Medinan law, but was later adopted into the Maliki system. Here, however, it never assumed so elaborate a form as it did in Hanafi law. The Hanafis, for example, hold that the trade or occupation of the husband is an important element in determining whether he is the equal of his spouse, and recognise for this purpose a detailed hierarchy of the professions; the Malikis, on the other hand, do not consider this a material factor at all. Nor does the doctrine have the same significance within the general scheme of Maliki family law as it has for the Hanafis, where it is primarily designed to protect the interests of the marriage guardian; for he is allowed to obtain, on grounds of non-equality, the annulment of a marriage contracted by his adult ward without his consent or intervention. In Maliki law a marriage can be validly contracted only by the bride's guardian and a petition for annulment on grounds of non-equality is accordingly restricted to cases where the husband has fraudulently misrepresented his status.

Aftab Hussain states that although according to the pure Hanafi doctrine the guardian of a Muslim girl

[144] Coulson, *op. cit.*, n. 123 at p. 94.

> "may apply to the judge to set aside an ill-assorted union, it is doubtful if in this age the courts may exercise such a discretion and interfere with the consent of the spouses, if they are adults."[145]

He is of the opinion that the view presented in works such as *Hedaya*, simply proves the bias of the Arabs inter se and against non-Arabs and also negates one of the strongest principles of Islam i.e., equality irrespective of class, colour or creed.[146] Therefore it is submitted that inequality affording a guardian the right to plead for annulment of a contract of marriage rests on more substantive grounds than those based simply on the basis of material wealth and descent of the husband.[147] Among the Shia Muslims, equality has reference only to Islam of the husband and his ability to support his wife.[148]

4.3.5.3 Guardianship in marriage and *Khiyar-ul-Bulugh*

Islamic law recognises three broad categories of guardianship or *wilaya*: guardianship (i) of person, (ii) of property, and (iii) in marriage or *wali*. In each case, guardianship is said to terminate upon the ward attaining the age of majority, except in the case of marriage guardian which is the subject of much controversy among the four Sunni schools of thought.[149]

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[145] Hussain, *op. cit.*, n. 77 at p. 457.

[146] See for instance the *Quranic* verses exhorting complete equality among humankind. Verse 49:13 - "O mankind! Lo! We have created you male and female, and have made you nations and tribes that you may know one another. Lo! the noblest of you in the sight of Allah is the best in conduct. Lo! Allah is Knower, Aware". The last Sermon of the Prophet Muhammad also states that no Arab has any superiority over a non-Arab or any non-Arab over an Arab, nor a white man over a black, nor a black over the white except on the basis of piety. All people are descendants of Adam and Adam was made of soil.

[147] Hussain, *op. cit.*, n. 77 at p. 459.

[148] *Ibid.*

[149] A. A. A. Fyzee, *Outlines of Muhammadan Law* (1974) 4th edn., Delhi: Oxford University Press at p. 208.

A distinguishing feature of traditional Islamic law is that it empowers a father or other guardian to impose the status of marriage on his minor children/wards. This power of imposition is called *jab'r*; the abstract right of guardianship or *wilayat* or *wilaya*, and the guardian so empowered is known as *wali*.[150]The *wali*, under all four schools of Sunni jurisprudence has the power to give his minor children/wards of both sex in marriage without their consent, until they reach the age of puberty or *bulugh*.[151] It has been argued by Abdur Rahim that *wilaya* has only been allowed as a matter of necessity, "for a proper and suitable match may not always be available".[152]

A minor can only be given in marriage by a marriage guardian or *wali*;[153] minority in the absence of specific proof, terminates at 15.[154] A *wali* must be (i) a person who has attained puberty (ii) is of sound mind, and (iii) a Muslim. It is extremely doubtful whether a non-Muslim can be a guardian for the marriage of a Muslim girl.[155]

The right to contract a minor a marriage belongs successively to the father, paternal grandfather how highsoever, and brother and other male relations in the order of inheritance enumerated in the Table of Residuaries. In default of paternal relations, the right devolves upon the mother, maternal uncle or aunt, and other maternal relations within the prohibited degrees. In default of maternal kindred, it devolves upon the ruling authority.[156] The only guardians for marriage recognised by

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[150] *Ibid.*

[151] *Ibid.* Also see Mannan, *op. cit.*, n. 61 at pp. 406-414; Ameer Ali, *op. cit.*, n. 117 at p. 243.

[152] Rahim, *op. cit.*, n. 58 at p. 279.

[153] Mannan cites Macnaghten, p. 58, secs. 14-16 to state that a boy or a girl who has attained puberty is at liberty to marry anyone he or she likes, and the guardian has no right to interfere if the match be equal. If the bride is a minor she cannot appoint an agent or *vakil* to enter into the contract of marriage on her behalf. the consent must be given by her legal guardian. note here the distinction between *vakil* and *wali*

[154] Fyzee, *op. cit.*, n. 149 at p. 208.

[155] *Ibid.* Fyzee also cites Mannan, *op. cit.*, n. 62 at pp. 408-409.

[156] Fyzee, *ibid.*

the Shia law are the father and paternal grandfather how highsoever.[157] Shafeis and Malikis, do not recognise a woman as *wali* at all.

Most writers of Islamic Law are of the view that if a father or grandfather contracts a minor in marriage, it (the marriage), is valid and binding and cannot be repudiated by the minor on attaining puberty.[158] But where the father or father's father has acted fraudulently or negligently,[159] as where the minor is married to a lunatic, or the contract is to the manifest disadvantage of the minor, the contract is voidable at the option of the minor on attaining puberty. [160]

However, if the marriage has been contracted on behalf of the minor by a guardian other than the father or grandfather, the minor has the right to exercise what is technically called "*khiyar-ul-bulugh*" (option of puberty).[161] This option is lost if after attaining puberty and of being informed of the marriage and her right to repudiate it, a female acts after unreasonable delay.[162] Consummation of the marriage with the consent of the female also extinguishes this right.

The more or less unqualified right of the *wali* to contract a minor in marriage has been placed under considerable restraints by statute law introduced in the first half of the Indian sub-continent. With the passage of the Child Marriages Restraint Act 1929, it became an offence to contract child marriages. Initially a child was defined as under 18 in the case of a male and under 14 in the case of a female (which was later raised to 16). If a male above 18 contracts a child marriage he shall be punishable with

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157 Mannan, *op. cit.*, n. 61 at pp. 411-413; *Hedaya, op. cit.*, n. 62 at pp. 36-39.

158 Mannan, *ibid.*, at pp. 409-410 citing *Baillie, op.cit.*, n. 64 at p. 50 and *Hedaya, op.cit.*, n. 62 at p. 37.

159 For an interesting discussion in this regard see, *Noor Muhammad v. The State* 1976 PLD Lah.516.

160 See note 158; also see Pearl, *op. cit.*, n. 59 at p. 44.

161 *Ibid.*

162 *Ibid.* In the case of a male, the right to exercise the option of puberty, continues until he has ratified the marriage either expressly or impliedly as by payment of dower or cohabitation.

imprisonment or with fine or both. In addition, whoever performs, conducts or directs any child marriage shall be punishable with imprisonment and/or fine, unless he proves that he had reason to believe that the marriage was not a child marriage. The minimum ages have been raised to under 16 for a girl and under 21 for a boy in Pakistan and Bangladesh, [163] and under 18 for a girl and under 21 for a boy in India.[164] It is important to stress however, that a marriage solemnised in contravention of the CMRA is nevertheless valid.

By the Dissolution of Muslim Marriages Act, 1939 (DMMA), all restriction on the option of puberty in the case of a minor girl whose marriage has been arranged by a father or grandfather has been abolished, and under sec. 2(vii) of the Act, a wife is entitled to dissolution of her marriage if she proves the following facts, namely, (1) the marriage has not been consummated, (2) the marriage took place before she attained the age of fifteen years, and (3) she repudiated the marriage before attaining the age of eighteen years.[165] A further effect of the DMMA, also means that the age of puberty for determining an adult Muslim woman capable of entering into a valid contract of marriage has been expressly fixed at fifteen without an opportunity of rebuttal, whereas in traditional Islamic law, it was a question of fact.[166]

It must be pointed out here that in addition to the ground now available under the DMMA, for exercising the option of puberty, the classical law would still appear to be applicable. If a girl given in marriage by a guardian other than her father or grandfather attains puberty before 15 (or 16 as in Pakistan), she has a right of

[163] Sec. 12(1)(c) Muslim Family Laws Ordinance 1961.
[164] Child Marriage Restraint (Amendment) Act 1978.
[165] Mannan, *op. cit.*, n. 61 at p. 410.
[166] See the judgement in *Daulan v. Dossa,* 1953 PLD Lah. 332.

repudiation at that point. The classical law and the statutory law, therefore, exist side by side.[167]

Although, the above changes restricting the right of a *wali* to contract his minor children in marriage have been on the statute books for decades. Yet, in the *Saima Waheed* case, their Lordships were not inclined to base their decisions on either the DMMA or the CMRA. This fact goes to show that when it comes to religious norms reinforced by customary practices, the black letter law is hardly an effective reference point even in superior courts.

The next question that needs to be addressed is: How is the option of puberty by an adult Muslim woman exercised or considered exercised? The general rule with regard to the option of puberty is that where a minor has attained puberty, and is informed of her being contracted in marriage by her *wali*, and of her right to repudiate it, she responds in one of the following ways:

i) she accedes to the contract by remaining silent or by conduct indicative of assent such as admitting the husband to carnal connection, or

ii) expresses disapprobation.

It is also stated in the *Hedaya* that where a man informs a woman that she has been contracted in marriage to him, and she refutes knowledge or of her consent of such event, her declaration is to be credited, unless the man can produce evidence in support of her consent and approbation.[168] Where no evidence is forthcoming, the woman's declaration is to accepted and an oath must not be imposed upon the woman.

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[167] Pearl, *op. cit.*, n. 59 at p. 44.
[168] *Hedaya*, *op. cit.*, n. 62 at p. 36.

It may be noted from the above example that once again one is confronted with the shifting borders of equality between men and women in Islam. If women are incapable of making independent choices, how is it that in so important a matter as marriage, her word is considered as good as a man's, and she is able to withdraw unilaterally from a contractual obligation?

Abdur Rahim sums up the varying shades of opinion in Islamic jurisprudence in this regard. He states that Islamic law is based on the patriarchal principle. The conception of family life in Islam is not allowed to overshadow its fundamental principle of individual responsibility and liberty. Each member of the family is endowed with full legal capacity. Whatever authority the laws vests in the head of the family is based either on contract or on necessity for the protection of those members of the family who are unable to take care of themselves.[169]

4.4 The *Saima Waheed* Case: Opening Up Pandora's Box?

The *Saima Waheed* case decided by the Lahore High Court (Pakistan) in 1997, illustrates the wide ranging controversies surrounding the institution of marriage, and by extension the position of women in Islam. Legal issues raised in the petition, it is submitted, were subsumed in and discussed more in the light of prevailing customary norms than legal reasoning. The case was decided by majority decision and the dissenting Judge, Ihsan-ul Haq Chaudhary presented a number of reasons, according to his view of Islamic society, for holding that marriage in Islam was indeed a sacrament and not a civil contract; that rights of parents in this regard were legally enforceable and, that an adult Muslim woman could not enter into a valid

[169] Rahim, *op. cit.*, n. 58 at p. 275.

contract of marriage without the intervention of her male guardian. A prime example of this line of argument presents itself in His Lordship's judgement when commenting upon Dr. Tanzeelur Rehman's Code of Muslim Personal Laws, Vol. I. Dr. Rehman argues that "A major Muslim male or female can marry without intervention of the guardian". To this His Lordship responds in a rather harsh tone:

"We are national judges and as such custodians of the morals of the citizens, therefore it is not possible to subscribe to the opinion expressed by Dr. Tanzeel ur Rehman",[170] inferring therefore that Dr. Tanzeelur Rehman by accepting the right of a Muslim woman to contract marriage was somehow promoting immoral views. In fact,[171] the learned judge appeared to be making out a strong case for accepting customary practices as the overriding sources of law. To this end, His Lordship laid out the social ceremony of marriage in great detail and presented it as a substitute for legal requirements of marriage. Thus he appears to believe that as an essential to a valid marriage, the woman's family must arrange an assembly for the *nikah* ceremony to which friends and family must be invited. That the proposal and acceptance (*ejab-o-qabool*) must be made in this assembly convened by the woman's family, that with the permission of the *wali*, the woman will give her consent and, the contracting party to the marriage will be the *wali* and not the woman herself. His Lordship placed marriage in Islam in the category of *ibadaat*, a *sunnah* of the Prophet Mohammed, and at best, as a social contract. He also denied that dower was consideration for the marriage but that it was a gift of free will to the wife. He also argued that *ejab-o-qabool* does not constitute a valid contract of marriage.[172]

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[170] At p. 54 A of judgement.
[171] *Ibid.*, at pp. 10-12.
[172] *Ibid.*, p. 8.

In response to this description, it is submitted, that marriage ceremonials and rituals vary from one society to another. What is important is the legal requirements constituting a valid contract of marriage. Losing sight of this reality in the maze of diverse societal norms will not bode well either for legal development in Islamic jurisprudence, or the position accorded to women in Islam. While making the above statements, one wonders whether His Lordship was aware of a centuries old Pukhtun custom where *nikah* assembly is gathered at the bridegroom's home, and *nikah* itself is solemnised after the bride (yet unwed in legal terms), is taken there.

A further difficulty that also arises in the arguments made in the *Saima Waheed* case is, that one set of rights are being pitted against another set of rights in an attempt to create an hierarchy of rights. Thus, consent in marriage by an adult Muslim woman to her marriage is being equated to a parallel but superior right to consent vesting in her male guardian. But, all evidence produced, even by the petitioner in support of his right of *wali*, only reinforced the view of the court that the nature of the right of the guardian differed substantially from the right to consent of the woman. Hers was the basic requisite to validate the contract; his was a supplementary, protective, advisory role. If the *wali* was not heeded, it did not render the marriage void; at best a plea for an annulment could be made. As Ramday J. rightly points out, if marriage without a guardian's consent was not a valid contract, then why would its dissolution at the instance of the guardian result in payment of dower?[173]

The notion of *Khiyar-ul-bulugh* itself indicates that guardianship in marriage is protective in nature and terminates upon puberty. *Khiyar-ul-bulugh* brings with it an

[173] *Per* Ramday, J. at p. 42.

in-built right to repudiate an existing (valid) contract entered into on behalf of a minor on behalf of a minor (male or female). Does it stand to reason that an adult Muslim woman has the right to repudiate an existing contract, entered on her behalf when she was a minor but is unable to make a new one on becoming adult?

The most potent argument however lies in the capacity of an adult married woman to modify the terms of her contract of marriage, or even terminate it. In accepting this (non-controversial) right, she is considered competent to relinquish her dower, seek an addition to it through negotiations with her spouse, or reduce it if she so desires. A Muslim married woman, as party to a marriage contract may seek dissolution of this contract through *khula*, *mubarat* or judicial decree from a competent court of law.[174]

Ramday, J. in his well considered judgement has to a certain extent balanced out the opinion forwarded by the dissenting judge, Ihsan-ul Haq Chaudhary, J. by dealing at some length with the legal position of women in Islam and how it has accorded her an elevated status as well as complete legal personality. His judgement also lamented the influence of the west in weakening family bonds and obedience to parents, and although he conceded that in strict legal terms, marriage of an adult Muslim girl without her *wali's* intervention was valid, the ideal he believed to be aspired to was a situation where the *wali* and the two contracting parties (male and female) were in complete unison.

In summation, it is submitted that from the writings on the subject as well as judgement in the *Saima Waheed* case one may be able to argue that the concept of *wali* (male guardian) required to be present at the contracting of marriage, is a result

[174] Grounds under the Dissolution of Muslim Marriages Act, 1939, or the Muslim Family Laws Ordinance, 1961 may be pleaded.

of the socially constructed gender roles existing since times immemorial. The 'head of the household', 'protector' and 'provider' has traditionally been male, and therefore, he would be inclined to control all actions of members of his household. It is not difficult for legal norms to be so completely subsumed in custom and socially acceptable roles, so that there comes a point in time when one is simply unable, or is hard put to disentangle the web of rules made up of law, custom and religious norms. What is more pertinent to our discussion is the fact that interpretations of religious and other kinds of laws are cast in a mould that is 'acceptable' to a certain society. Thus, an 'operative' Islamic law emerges based on constitutional, religious and 'secular' law but heavily conditioned by customary practices of a particular jurisdiction. Chapter 5 of this study law will address this 'inner core' of women's rights informed by custom as a source of law.

CHAPTER V

CUSTOMARY PRACTICES AND 'CULTURAL ISLAM': EMERGENCE OF THE 'OPERATIVE' ISLAMIC LAW ON WOMEN'S HUMAN RIGHTS

5.1 Introduction

The discussion in two preceding chapters indicates that of the three sets of rules i.e., constitutional, Islamic and customary practices, it is the last named that forms the most resilient, inner core of regulatory norms affecting women's rights in Pakistan. It is these customary practices that will be addressed in the present chapter using the case of the North West Frontier Province (NWFP) of Pakistan. During the course of the discussion, it is also proposed to look into the issue of what will be termed as Islamic 'revivalism' and its consequences for Muslim women. The concluding section will outline the concept of an emerging 'operative' Islamic law informing human rights of women which is influenced by a number of factors extraneous to religion including social, economic and political circumstances, as well as international human rights instruments.

5.2 The Role of Customary Practices in Perpetuating Gender Hierarchies in Muslim Jurisdictions: The Case of the North-West Frontier Province of Pakistan

Women in Pakistan have a layered identity; each 'layer' outlining certain rights and obligations. She is simultaneously subject to various sets of rules; the gap between the *de jure* and *de facto* rights within each set widening as one moves from constitutional law, to Islamic and customary law. Customary practices in Pakistan are

not uniform and vary from region to region.[1] Yet one uniform trend pervades across the country; that of according women subordinate status. This notion is so deeply entrenched in the popular psyche, that even where religion and formal law gives a certain right to women, its denial by sheer force of custom invariably prevails.[2]

A further impact of this legal pluralism is that since 'formal' dispute resolution forums, i.e., courts, lie squarely within the 'public' sphere, the vast majority of women are reluctant to approach these forums for redressal of their grievances.[3] Research indicates that women in Pakistan use courts with extreme caution and with far less confidence that their male counterparts, and that too, as a last resort.[4] The result is that most disputes are laid before 'informal' dispute resolution forums, i.e., *jirga*,[5] *panchayat*,[6] etc., that apply customary practices placing women at a huge disadvantage.[7]

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1 Pakistan is made up of people from diverse ethnic, racial and linguistic origin; hence diversity in customary practices. Most prominent, these groups include Punjabi, Sindhi, Baluch, Pukhtun (Pathan), people from the Northern Areas (Gilgit, Hunza etc.), and people from the State of Azad Jammu and Kashmir). In addition to ethnic and regional diversity, customary practices are also subject to the urban/rural divide, particularly where attitudes towards women's issues are concerned.

2 Examples include: the right to enter into marriage of her own free will, right of inheritance, access and control over her property, right to education, mobility, employment etc.

3 Society in Pakistan may be defined as a transitional one, that is moving from an informal to a formal state of social organisation. Therefore most people prefer to resolve their disputes within their communities rather than going further afield and lay their grievances before 'strangers'. Being in a transitional state, at a social level, most people are not exposed to the procedural formality that accompanies a formal court system. For women, it is virtually impossible to handle the all male, unfamiliar environment.

4 For an analysis of forty five years of trends of superior courts in Pakistan in family law cases, see S. S. Ali, and N. Azam, "Trends of the Superior Courts of Pakistan in Guardianship and Custody cases (1947-92): An Analysis" (Ali and Azam, Custody and Guardianship); S. S. Ali and R. Naz, "An Analysis of the Trends of the Superior Courts in Pakistan in Cases relating to Marriage, Dower and Divorce" (Ali and Naz, Marriage, Dower, Divorce); and K. Arif and S. S. Ali, "Trends of the Superior Courts Regarding Succession and Inheritance Rights of Women".

5 Council of Elders among the Pukhtuns and Baluch tribes of Pakistan and Afghanistan.

6 Council of Five Elders who resolve disputes in rural communities in Sindh and Punjab provinces of Pakistan.

7 These forums are all male forums; as a rule, women do not appear before these forums. See discussion below.

The place of women in Pukhtun society[8] and consequently under its customary law (*riwaj*), is aptly summed up by remarks of the American author of a very famous book on the Pukhtuns entitled *People of the Khyber*,[9] who remarks that

> "Pukhtun men do have wives, mothers, sisters, daughters, aunts, nieces and female cousins but they preferred to speak very little about women, whether their own or anyone else's!"[10]

Not only is a woman not mentioned in conversation among men, she literally does not exist. A typical response of a man queried about the number of his offspring is likely to be: '*maal da khudai, dua danai di*' (it is God's wealth (referring to his children), I have two pieces). The two 'pieces' here is understood as two male children; the female child is completely ignored when counting children. Similarly, family trees, whether written or oral bear no mention of any women members.[11] Women, in customary law, are legal non-entities at worst; at best they are perpetual legal minors under the guardianship of male relations.

The secondary position of the Pukhtun woman becomes adequately apparent from the moment she is born.[12] The celebrations accompanying the birth of a boy by

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[8] Pukhtuns or Pathans as they are popularly referred to, are people inhabiting the North Western parts of Pakistan. Although there have been some writings on Pukhtun society, published work focusing on Pukhtun women is sparse. For a general overview of Pukhtuns see O. Caroe, *The Pathan*; J. W. Spain, *People of the Khyber* (1962) New York: Praeger; A. S. Ahmed, *Millennium and Charisma Among Pathans. A Critical Essay in Social Anthropology* (1976) London: Routledge and Kegan Paul; A. S. Ahmed and Z. Ahmed, "Tor and Mor: binary and opposing models of Pukhtun womanhood" in T. S. Epstein and R. A. Watts (ed.,) *The Endless day: rural women, Asian case-studies* (1981) Oxford: Pergamon Press.

[9] Spain, *ibid.*

[10] *Ibid.* at p. 143.

[11] The author belongs to the Manaizai, Pukhtun tribe of Swat in the North West Frontier Province of Pakistan and can confirm this from her own family tree, which is all male!

[12] A question asked of respondents from Punjab, Sindh, Baluchistan and the North West Frontier Province aimed at gauging the family's response to the birth of a girl child showed that at a national level, only 37.12% of surveyed families celebrated the occasion while the remainder felt depressed and frustrated at the new-born not being a boy. In the NWFP itself only 29% of respondent families stated that they celebrated the arrival of a female child. Democratic Commission for Human Development, *Report on Human Rights Situation in Rural Communities in Pakistan* (1996) Lahore, (hereafter DCHD, *Human Rights Situation Report*) at pp. 72-73.

firing shots in the air and congratulating the family[13] stand out in stark contrast to the messages of "consolation" received by the parents of a new-born baby girl.[14] A recent study when exploring possible reasons for this difference in attitude towards male and female children, found that at least one quarter of respondents lamented the birth of a girl child because of the implied economic burden.[15] Other reasons advanced for their discriminatory attitude was the belief that the birth of a daughter was a source of degradation, or that the daughter belonged to her would-be husband's family and hence an alien to her natal family.[16]

That the woman is not *sui juris* or a free agent under *riwaj* is an established fact and one which the Pukhtun male will reiterate without the slightest hint of hesitation. For instance, the woman's consent and/or participation in drawing up her marriage contract is considered of no consequence.[17] She is considered the property of her male agnates (father, brother etc.) to be bartered away at a suitable bride-price known as "*sar paisey*".[18] In some parts of the NWFP, the amount is invariably appropriated by male relatives and only a negligible portion of it utilised to provide clothes, furniture or other household goods for the bride. The amount of the bride-price is considered a matter of prestige for the bride's family and is reflective of their status and esteem in society. This practice contradicts the Islamic law requirement of

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[13] The *Qasabgar* or messenger goes from door to door informing all relatives and friends of the family to whom a boy is born. The people so informed, under custom, give a sum of money to the messenger as a token of the happiness with which they have received these good tidings. This money or other gift is known as "*zairey*".

[14] A person who does not have a male issue is known as "*miraat*", which indicates that he has no one to inherit his belongings or property "*miraas*". This situation i.e., of being a *miraat* is the worst of predicaments for a Pukhtun as in the event of his death, his property would devolve on his nearest male agnates.

[15] DCHD, *Human Rights Situation Report op. cit.*, n. 12 at p. 72.

[16] *Ibid.*

[17] *Ibid.*, at p. 81. At the national level, around 82.18% of the families surveyed did not bother to elicit the consent of their daughters when arranging their marriage. The NWFP figure is 87.50%.

[18] In Baluchistan, this sum paid to the male relatives of the bride is known as '*walwar.*' No such custom prevails in the Punjab where heavy dowry is expected by the family of the bridegroom.

a valid marriage where dower must be stipulated in the marriage contract and is the sole property of the woman.[19]

The above discussion reinforces the argument that women are viewed as property, bought and sold at will by male relatives for advancing their own financial and marital gains. To this end, it is pertinent to mention here the practice of 'exchange' marriages. The incidents are as follows: A woman is married to a man on condition that a man in her family will marry a woman in her husband's family. This custom is prevalent not only among the low-income groups but also among middle and high income groups in the country, although the exact level of incidence is not accurately known. The supposed rationale behind such exchange marriages is that these were more economical and dowries and dower was not an issue. The real objective of exchange marriages is, no doubt quite sinister since the only gain achieved is the denial of any economic empowerment to two women. By denying a woman her dower, a flagrant violation of Islamic law is being made by both husbands; similarly by not making any gift of a dowry, the parents of the woman also participate in her economic disempowerment. And, finally, the most dangerous consequence, is that the state of happiness or unhappiness, as the case may be, of one couple is directly tied to the other. In the NWFP, this custom is known as *Adal Badal*, elsewhere as *Watta Satta* (Punjab) and *Addo Baddo* (Sindh).[20]

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[19] There exist some variation in the custom of *sar paisey*. The custom as described above is confined to the tribal belt of the NWFP. In the urbanised areas, known as the 'settled' areas of the province, dower is indeed stipulated in the marriage contract and as the property of the woman herself.

[20] Nafisa Shah, in her elaboration of the custom in the context of Sindh states that where no match is available at the time, a pregnant woman in the family pledges to give her child when it is born. '*Pet likhi ni*' literally means agreement to give the child in her womb. If there is no pregnant woman in the family at the time, the match is 'in arrears' but the agreement must be honoured even if it takes a generation to come about. N. Shah, "The Rites of Wrongs", *Newsline*, January 1993 at p. 38.

The inherently lower status of the bride's family as the "girl-giver" vis-à-vis the bridegroom's family as the "receivers" is reflected in the custom that the formal marriage ceremony is solemnised in the house of the bridegroom. As mentioned in chapter 4 of this study, the bride, is transported to the groom's house where the actual ceremony of marriage , the *nikah*, takes place.[21]

At the actual ceremony of *nikah*, the woman's token consent is acquired by sending into the *Zanana*,[22] a few close male relatives, one of whom is named as the *nikah* "father" or *nikah* "brother" in whose presence she gives her consent to the marriage. The *nikah* brother or father acts as *wakil* or agent of the bride, and represents her at the nikah ceremony.23 Written registration forms of marriage as required by domestic law in Pakistan are seldom used in rural areas and the contract is mostly a verbal one.24 The findings of a study conducted by the Women's Study Centre, University of Peshawar, NWFP, in 1995 also point to the fact that more than half the respondents had never seen a marriage registration form. In response to the

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[21] This custom appears to be confined to the NWFP and other parts of Pakistan and indeed, the Muslim world follows a practice where the marriage contract is signed in the home of the bride's natal family.

[22] The women's part of the household.

[23] An overwhelming majority of the residents of the NWFP are Muslims and marriage is solemnised under Islamic law. Therefore the consent of the woman is essential and this formality is dispensed with in soliciting her approval at the time of marriage which usually consists in the nod of the head.

[24] Section 5 of the Muslim Family Laws Ordinance, 1961 (MFLO) requires that every marriage solemnised under Muslim Law be registered. A written form (*nikahnama*) is available with Nikah Registrars whose duty it is to enter these marriages in a register maintained for this purpose. A large part of the population disregards this law. Further, there exists an anomalous situation in the NWFP in that the MFLO does not extend to certain parts of the province including the Provincially Administered Tribal Areas (PATA) or the Federally Administered Tribal Areas (FATA). The empirical research conducted by the Women's Study Centre, University of Peshawar in 1995, reinforced this belief and found that only 57% of the marriage ceremonies were recorded according to the requirements of the MFLO.

question whether these women had signed their own marriage forms, almost half answered in the negative.25

After getting married a woman's "ownership" (so to speak), is transferred to her husband's family who then onwards assume total control of her life. Even if she is widowed, she still remains the property of her husband's male kin and any man desirous of marrying her is required to "deal" with them. The *Riwajnama*[26] of the Malakand area clearly states that if a rule of *riwaj* is disregarded by him i.e., the present husband of the woman, then the male kin of the deceased husband are justified in starting an enmity with him for failing to seek their permission for the marriage.[27] The practice in these areas is to marry off the widow to one of the surviving brothers of the deceased husband.[28]

The mobility and decision-making ability of a woman, whether married, single or widow is restricted. The famous Pukhto saying sums up this restricted space for women by declaring: "*Khaza da kor da ya the gor!*" (A woman belongs either to the house or the grave). In a similar vein, the *riwaj* of the former state of Swat had a provision to the effect that "chicken, eggs and women" could not be removed from the territorial jurisdiction of the state without a valid "*rahdari*".[29] The custom of confining women to the home is reflected in the DCHD *Human Situation Report*, where the only occasions on which women are allowed to venture out of the confines

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[25] The author, a University Professor of Law, and a student of Law at the time of her marriage 24 years ago, has no knowledge of her own marriage contract. (It probably does not exist as the marriage was conducted orally and, the likelihood is that it never got transcribed on paper).

[26] *The Riwajnama Malakand Agency* is a compilation of customary practices of the area. It was published in November 1964 by Manzoor-i-aam Press, Peshawar under orders of the then Political Agent, Dir, Swat, Chitral at Chakdara Mr. Zafar Ali Khan.

[27] *Ibid.* at p. 15.

[28] This custom finds no support or mention in either Islamic law or the family law of Pakistan. Arguably, were a woman forced into such a marriage to approach a court of law, she would succeed in having it annulled.

[29] A permit for removing restricted/prohibited goods from the jurisdiction of the State.

of their homes are to attend wedding ceremonies or on the death of a relative. The survey shows that of the families queried, only 16.2% allowed women to meet relatives, 10.4% to meet with friends and 8.13% to leave the house for recreation purposes.[30] Denial of the basic right to education is also a direct result of customary practices confining women to the home. Whereas both Islamic law and constitutional guarantee of providing education without discrimination on the basis of sex is recorded, entrenched custom holds sway in the NWFP. A World Bank Report states that

> "NWFP's aggregate literacy rate of 21.5% is about two-thirds of the national average and conceals severe inequities between .... and males and females. For example, the literacy rates for males and females are, respectively, 34% and 8%."[31]

It is argued that State policies reinforce societal trends by providing fewer school for girls as compared to boys.[32] When queried for reasons of this discrimination towards girl students, the response of the government is that since most schools in the rural areas remain under-utilised due to low enrolment, therefore it makes more sense to divert these funds to boys' educational institution.[33]

A further manifestation of the negation of women's personhood and as akin to property of their male kin is the custom of settling blood feuds through offering women as "peace offering " to the heirs/family of the victim. Vendettas are settled

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[30] DCHD, *Human Rights Situation Report, op. cit.*, n. 12 at p. 74.

[31] The World Bank, *Staff Appraisal Report Pakistan North-West Frontier Province Primary Education Program*, (Report No. 13432-PAK) 1995, at p. 1.

[32] Statistics for 1992-93 available from the Directorate of Schools, NWFP, Peshawar is evidence of this contention. There are 7644 primary schools for boys as opposed to 3752 for girls. The same pattern continues to middle schools where 757 are for boys and 260 for girls. 980 high schools are available for boys and only 200 for girls.

[33] The DCHD, *Human Rights Situation Report, op. cit.*, n. 12 at p. 87 states that 49% of surveyed families in the NWFP disallow their girl children to receive education. Reasons cited by families for this denial range from absence of an all-girl school in their village/neighbourhood, social values that canvass the view that female education makes girls rebellious and demanding, and that girls should stay at home and help in household chores.

through *jirgas* where the family of the murderer offers to make peace with the family of the person murdered. The victim's family present certain demands for accepting the offer. It may include a demand for a girl from the murderer's family to be handed over in marriage to the aggrieved family. This custom known as "*swara*" is gradually dying out and is not very common today,[34] although a few judgements of the Peshawar High Court have validated compromise deeds where a daughter's hand in marriage is promised to a man of the victim's family.[35]

Insofar as the dissolution of marriage by divorce is concerned, it is a near impossibility due to the principle in Pukhtun society of woman being the *izzat* or honour of the man. Consequently, were the man to divorce his wife, he would be relinquishing his "honour" and thus run the risk of another man appropriating it for himself! *Zantalaq*, or a man who has divorced his wife is one of the strongest and most provocative form of abuse in the Pukhto language. This notion of denying women the right to opt out of a marriage is also in contravention of the right to dissolution of marriage accorded to women under Islamic law and codified law of Pakistan.[36]

Pukhtun women are, by and large excluded from inheritance in general and landed property in particular. The major reason is that since descent and recognition is reckoned through male ascendants, a woman inheriting her father's land is seen as snatching it away from the rightful owners and passing it to her husband's "alien" family. Even today, in many areas of the NWFP, if a man dies leaving behind only

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[34] This custom is known as *faisle jo sangh* in Sindh.

[35] As an example may be cited the order sheet in a murder case where the parties came to a compromise, signed by the District and Sessions Judge, Charsadda (NWFP) on the 28th January 1993 which states that: ". . . . In lieu of the compromise, Saadullah also promised to give the hand of his daughter Mst. Rani Begum to the step-son of the deceased, namely, Riaz . . . "

[36] The DMMA and MFLO.

daughters, his property is immediately taken over by his brothers or other close relatives. This is the concept of "*Tarboor*", or nearest male agnate/s who are considered the rightful owners of the property of a man who dies without a male issue. This practice of denying women a share in inheritance is in contradiction to clear principles of the Islamic laws of inheritance.[37] But here too, customary laws supersede religious as well as statute law.[38] Research demonstrates the disparity between religious pronouncements and constitutional and other legal provisions on economic rights of women.[39] Most women, at the time of marriage, receive dower and dowry in the form of jewellery, cash or some movable and/or immovable property.[40] But of those who receive immovable property, only a meagre 1-2% enjoyed access or control over it. Cash stipulated as dower was hardly ever paid to the woman at the time of the marriage; the jewellery however, was. Yet few women had control over their own jewellery.[41]

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[37] A custom prevalent in some parts of Sindh attains the purpose of keeping wealth within the (male) family by denying sisters and daughters the right to marry in what may be translated as "Marriage" to the *Quran* or *Haq Bakshwana.* In this ceremony, the girl forgoes her right to marry, by symbolically wedding the *Quran.* The occasion is celebrated like a wedding, though its spirit is sombre. On such occasions there is a special dinner for the Syed women known as *qandhori sache Sardar ji mani* - the Prophet Mohammed's dinner in which seven Syed women eat after bedecking themselves with jewels and *attar.* The leftovers are buried because they are considered sacred; the Syed women having eaten them, no one else may touch these. The climax of the occasion is when the bride who is dressed in a beautiful *gaj*, is made to pray and announce that on the day of judgement she will testify that the decision to remain unmarried was her own. Reasons for *haq bakshwana* varies from the desire to keep property within the family to questions of honour. In upper Sindh, these women of God are known as *sattis*, they wear white and spend their lives teaching the children of their brothers, the *Quran.* (See N. Shah, *op. cit.*, n. 20 at p. 38).

[38] Islamic law of inheritance concedes to women one half of the share given to a male. Thus a sister will inherit half of what her brother gets.

[39] See S. S. Ali, "A Critical Review of family Laws in Pakistan: A Women's Perspective" in R. Mehdi and F. Shaheed (eds.,) *Women's Law in Legal Education and Practice in Pakistan North South Cooperation* (1997) Copenhagen: New Social Science Monographs at pp. 205-211.

[40] *Ibid.*

[41] *Ibid.* As to expectations of receiving a share in inheritance, about 50% of the respondents claimed to have received or hoped to receive some share; less than 4% ever got immovable property. Reasons for denial of inheritance rights for women included custom that demanded property to remain with the male members of the family. Many women believed that since they get dowry from their families at the time of their marriage, it serves as compensation for not receiving a share in the property later on when the parents pass away. A few respondents were of the opinion

Last, but not least, women are completely excluded from traditional prestige conferring and decision making Pukhtun institutions such as the *jirga*, the *hujra*,[42] *lakhkar*,[43] *Maliki*[44] etc.... This exclusion is indicative of the subservient position of Pukhtun women within the societal hierarchy.

The *jirga* which among the people of the North-West Frontier Province of Pakistan is the equivalent of a court, is traditionally an all male institution. The *Riwajnama of Malakand*[45] says that

> "This is the unanimous view of the *jirga* of Swat Ranizai that a woman will not be presented before a jirga for recording evidence that is a' a woman's evidence is not to be considered as credible."

All customary norms determining a woman's position are upheld as the rule of decision-making by the *jirga*, so although the Pukhtun *jirga* has traditionally been known to be an egalitarian institution, giving justice where it was due, yet its worldview of justice is one where women are nor visible.

That customary norms are deeply entrenched and not easily displaced may be shown by the fact that even the British colonial rulers used it to their advantage by maintaining a *jirga* under an otherwise extremely oppressive legal regime known as the Frontier Crimes Regulations, 1901 (FCR).[46] The supposed intention of the British was of non-intervention in the local customs of the 'natives.' What they achieved in reality was to stunt the natural progression of customary practices and prevent its further growth. To quote an instance, article 14 of the FCR provides punishment for a

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that since brothers look after their sisters all their life, so sisters should not demand any right to inheritance.

[42] The *hujra* is a place where (male) guests are entertained and where the men of the community socialise, discuss important matters, make decisions, etc. It is an important social institution in Pukhtun society.

[43] The tribal army.

[44] Chiefship or head of a tribe.

[45] *Riwajnama, op. cit.*, n. 26 at p.51.

[46] Regulation III of 1901.

married woman who knowingly commits adultery, but no such punishment is provided for the man who is her partner in this act. One will probably never come across a graver miscarriage of justice where two persons accused of the same offence are meted out completely opposing treatment. It stands to reason that by its very definition, a man and a woman accused of adultery are equal participants in the offence. Yet, the law turns a blind eye to one party simply on the basis of gender.

It has to be conceded however, that this profile of the Pukhtun woman is not a generally uniform one. Being a transitional society, one comes across pockets of urbanised areas within the NWFP where women are educated, own property, have a say in marriage and participate in other important decisions of their lives. They engage in paid employment as doctors, nurses, teachers, bankers, in various government departments, and in trade and industry. But the percentage of such privileged women is negligible and the vast majority conform, in varying degrees, to the description given in the preceding paragraphs.

It may be argued therefore, that customary practices provide a receptive environment for a restrictive interpretation of Islamic law to create a subordinate status for women in Muslim jurisdictions. Since custom is the inner core and most influential of norms regulating and informing the view point of millions of illiterate Muslim men and women, therefore a selective use of Islam that matches this notion of women's rights in Islam falls well within the realm of belief and expectation. This partnership of custom and retrogressive views on women and Islam came into the fore and gained currency over the past few decades. In Pakistan this move towards 'Islamisation' acquired impetus during the 1970s when the late General Zia-ul-Haq assumed power in a military coup in 1977. The next section of the chapter attempts to

highlight the relationship between Islamic 'revivalism' and the decline of women's human rights in Muslim societies.

5.3 Crisis of Muslim Identity, Islamic 'Revivalism' and Implications for Women's Human Rights in Islam

An examination of the political projects of contemporary Muslim States and their historical transformations play an important role in any analysis of the rights of women in Muslim societies today.[47] Thus, what is today known as 'Islamic revivalism' and its implications for women follows on directly from the colonial and post-colonial situations of Muslim States.

The trauma of colonial domination resulted in a crisis of Muslim identity since the era forced Muslim States into near oblivion, "a quasi-disappearance where they saw themselves as non-existent, veiled - almost feminised entities."[48] The western colonial powers had interfered with the legal systems of their Muslim colonies, and, at the level of State legislation various sectors of social life had been withdrawn from the control of religious laws and replaced by civil laws for example, penal laws, taxation, constitutional laws and the laws of contract and obligations.[49] The one exception was the family and personal law aspect of Islamic legislation which was held on to most tenaciously.[50] Michael Anderson argues quite convincingly that under British colonial

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[47] D. Kandiyoti, "Introduction" in D. Kandiyoti (ed.,) *Women, Islam and the State* (1991) Basingstoke: Macmillan at p. 2.

[48] F. Mernissi, *Women and Islam*, translated by M. J. Lakeland (1991) Oxford: Basil Blackwell Ltd., at p. 21.

[49] See discussion on the subject in chapter 4 of this study.

[50] *Ibid.* Also see I. Nicolaison, "Introduction" in B. Utas (ed.,) *Women in Islamic Societies* (1983) London: Curzon Press Ltd., and Atlantic Highlands, USA., Malmo and Humanities Press Inc., at p. 7; M. Anderson, "Islamic Law and the Colonial Encounter in British India" in C. Mallat and J. Connors (eds.,) *Islamic Family Law* (1990) London: Graham and Trotman.

rule in the sub-continent, Islamic law was rigidified with the consequence that gender hierarchies were made more pronounced.[51]

In the context of Pakistan, it is important to bear in mind that in pre-partition India, Islam was a communally based religion which served as an ethnic marker and subsequently an integral component to Pakistani nationhood itself.[52] Women were viewed as pillars of Muslim social structure, and providing the only reference point for continuity of a long lost glorified Muslim past. Codification of Muslim personal law was demanded by the Indian Muslims more as a redeeming factor of their identity rather than commitment to a whole hearted adherence to Islamic injunctions.[53]

After attaining independence, States such as Pakistan had to establish an identity by redefining it. This included facing issues of democracy and mass participation which no Muslim state in the post-colonial era found itself ready to cope with. The result was to return to an elitist system to the exclusion of the polity, a large number of which were women.[54] Unable to generate an ideology for coping with social change and problems of modernisation, Muslim states, including Pakistan therefore, sought to solve their ideological as well as identity crisis by turning to Islam.

The use of Islamic 'revivalism' is thus intimately linked with the crisis of Muslim identity. It has, as mentioned earlier, also been reinforced by the failure of nationalist and socialist movements to bring about successful liberation from

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[51] Anderson, *Ibid.*

[52] See A. Jalal, "The Convenience of Subservience: Women and the State of Pakistan" in Kandiyoti *op. cit.*, n. 47 at pp. 79-85.

[53] This is clearly reflected in the acceptance by the Indian Muslims of the Muslim Personal (Shariat Application) Act, 1937 that denied Muslim women their right to inherit agricultural land.

[54] Mernissi, *op. cit.*, n. 48 at p. 21.

oppression, exploitation and poverty.[55] Islamic societies the world over seem to be in a state of flux today and are caught in an upsurge of 'Islamic revivalism', vehemently advocating a return to pure Islamic ideals, a return to strict religious practice, to the observance of the text i.e., a study of the *Quran* and *Hadith* and a return to principles of religious law, the *Sharia'*, in short, a quest for a return to the fundamentals, as it were.[56] Be it Iran or Pakistan, Algeria or the Sudan, seeds of a strong politico-religious movement have been sown. Broadly speaking, three different views have emerged among people of the post-colonial Muslim states. On the one hand there are the secularists who advocate a complete break between religion and the state, perceiving secularisation as a panacea for all ills to which their societies are a prey.[57] At the other end of the spectrum are the Islamic revivalists for whom the term 'fundamentalist' was coined and extensively used.[58] They argue for imposition of an all pervading law based on Islamic principles or *Sharia'*. The third category consists of those 'Islamic reformists' who were instrumental in initiating legal reform in the post World War II era among the newly emergent independent Muslim countries.[59] Proponents of this view opined that a progressive interpretation of Islam is required if Muslim societies are to make any progress. The present ascendancy to prominence and power of the 'Islamic revivalists' is primarily due to the disillusionment with these

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[55] Iran, Sudan, Pakistan and Algeria are among countries where 'Islamic Revivalism' has appeared, whereas Turkey, Bangladesh and Tunisia are, comparatively new entrants in the field.

[56] Although it is outside the scope of this study to enter into a detailed discussion of the nature, extent and causes of this 'revival, reference to it is essential and will be made because of the impact of this 'revivalist' agenda on the rights of Muslim women.

[57] For instance, Turkey, declared itself a secular state and under the Turkish constitution of 1982, Art. 24 prohibits even the notion of religious law as law for society.

[58] The term fundamentalist does not have an exact conceptual or literal equivalent in the Arabic language. It actually was used in the beginning of this century for some Protestants in North America who preached a particular notion of Christian belief. In the West, fundamentalist has all sorts of unsavoury connotations; terrorism and violence being one. Therefore, I would prefer to use the term 'revivalist' instead.

reforms and a feeling of alienation by the Muslim masses who see them as western inspired impositions and conspiracies to rob them of an Islamic way of life. But this call for a return to the fundamentals and the ensuing agenda has generated an ongoing controversy as states have proceeded with this so-called process of 'Islamisation'[60] in a highly selective and discriminatory manner. It has been argued that one reason for this controversy is the fact that central and most fundamental to the quest for origins is the need for Muslim men to claim vehemently that their women miraculously escaped social change and the erosion of time and that hence, their family and other institutional structures remain intact despite 'corrupting' western cultural influences.[61]

Pakistan provides a unique paradigm for Islamic revivalism as it presents a two-decades old (1977-1998) case study of the concerns and issues that accompany the attempt to re-assert an Islamic identity and implement Islam in the modern nation-state of today.[62] It also reinforces the contention of writers on the subject that

> "Typically women - and the reaffirmation of indigenous customs relating to women and the restoration of the customs and laws of past Islamic societies with respect to women - are the centrepiece of the agenda of political Islamists."[63]

Leila Ahmed is of the view that the revivalist position regarding women is problematic in that, essentially reactive in nature, it traps the issue of women with the

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[59] For example, in Egypt, Pakistan, Morocco, Tunisia etc., some laws particularly in the area of family law, were made based on a progressive interpretation of the *Quran*. The DMMA and MFLO of Pakistan are examples.

[60] In Pakistan this term was coined during the regime of the late General Zia-ul-Haq, who promulgated laws reflecting his view of Islam that were extremely discriminatory to women, the minorities and other disadvantaged sections of society.

[61] F. Mernissi, "Muslim Women and Fundamentalism", July/August 1988, no. 153 MERIP REPORTS at p. 8.

[62] This is due both to the origins of Pakistan and to its political realities. J. L. Esposito, "Foreword" in A. M. Weiss (ed.,) *Islamic Reassertion in Pakistan. The Application of Islamic Laws in a Modern State* (1987) Lahore: Vanguard at p. ix. Cf. discussion in chapter 3 of this study.

[63] L. Ahmed, *Women and Gender in Islam: Historical Roots of a Modern Debate* (1992) London: Yale University Press at p. 236.

struggle over culture.[64] Further, culture and religion are so intertwined in the popular imagination that a recall of pre-colonial days and return to Islamic ideals and way of life, is perceived as synonymous. Thus the call of the Islamic 'Revivalist' for a return to the *hijab* and seclusion of women for instance, has to be understood and seen not as a statement about daily behavioural practices but as a psychological need to maintain a minimal sense of identity in a confusing and shifting reality.[65]

There are number of manifestations of the near obsession of the 'revivalists' with the 'women' issue. In the context of Pakistan for instance, the government chose to ignore the clearly unIslamic fiscal laws based on interest or *"riba,"* and promulgated instead the Hudood Ordinances (1979), the Qanoon-i-Shahadat (Law of Evidence 1984) and the Enforcement of Shariah Act (1991), an area of law which would adversely affect women and other disadvantaged sections of society.[66]

The discrimination against women was more pronounced and visible at the social level. In 1980, the government issued a series of directives ordering all women employees to wear 'Islamic dress' which meant wearing a *chaddor* (shawl) over whatever dress they were wearing. Female announcers of the State run television were instructed that they could only appear on air with their heads covered and in full-sleeved attire.[67] It is important to make the point here that the role of the *hijab* as a symbol of resistance to the colonisers (as in the case of the Algerian liberation movement), and in some instances, a political statement (as in the case of Iran) was

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[64] *Ibid.*

[65] Mernissi, *op. cit.*, n. 61.

[66] See discussion in chapter 3 of this study.

[67] The topic of dress became quite an issue and one television presenter (Mehtab Channa) who refused to obey this new dress code lost her job. The impact in the public sphere of life was that women who were seen in shopping centres or other public places without their heads covered were subject to harassment. For a detailed discussion and incisive analysis see chapter 6 in K. Mumtaz and F. Shaheed, *Women of Pakistan Two Steps Forward, One Step Back?* (1987) Lahore: Vanguard.

absent in Pakistan.[68] The step was an 'establishment' move to restrict women's freedom of movement and confine her to the private sphere of life.[69]

5. 4 Emergence of the 'Operative' Islamic law on Rights of Muslim Women

The multiplicity of norms affecting women's human rights in Muslim jurisdictions, renders it extremely difficult to sketch with any degree of accuracy the fine details of the 'operative' Islamic law on the subject. Broad variations exist across class, gender, urban and rural differences. Certain common factors, however, cut across these divisions and may usefully be employed as indicators to identify the phenomenon.

By far the most salient feature of the 'operative' Islamic law lies in fact that it thrives in a plural legal system composed of constitutional/statute law, Islamic law and customary norms. All three systems operate parallel to, and draw on each others' conceptual and normative sources.[70] Further, the socio-economic and political circumstances prevailing within the country also play a crucial role in determining the selective use of these three sets of regulatory norms.[71]

An analysis of the constitutional and other legal provisions, personal status laws and customary norms outlining women's rights in Pakistan, thus, fails to provide any conceptual clarity in that area. In the true spirit of legal pluralism, the various legal systems involved in a determination of the status of women, appear to be

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[68] L. Ahmed, *op. cit.*, n. 63 at p. 235.

[69] Here though custom was at variance with the perceived Islamic veiling of women because it is only the affluent families who are able to afford the luxury of veiling women. The vast majority of women, toil in the fields alongside the men and consider themselves fortunate if they have a decent pair of clothes to wear.

[70] See generally, S. S. Ali and K. Arif, *Blind Justice for all? Parallel judicial systems in Pakistan: implications and consequences for human rights* (1994) Lahore: Shirkatgah.

[71] Thus, General Zia-ul-Haq played the 'Islamic' card when attempting to legitimise usurping power from an elected government in Pakistan in 1977 and appealed to the slogan of protecting the sanctity of women and the four walls of the home.

"systemically closed but cognitively open."[72] Although being cognitively open has the potential advantage in that an interaction between parallel legal systems may lead to the advancement of justice, yet in the instant case, it is the reverse. Provisions of law advocating equality between the sexes (as required by the constitution of Pakistan), are disregarded and watered down by reading into these, an element of inherent inferiority of women (under certain religious and customary norms). The emergent 'operative' Islamic law therefore evolves on the premise of male dominance and perpetuation of gender hierarchies.

A further distinctive feature of the 'operative' Islamic law is the apparent contradiction in terms between its various components. Formal equality is violated by substantive inequality resulting in a wide disparity between constitutional norms and other sets of regulatory norms affecting the position of women. Measures adopted to 'protect' women under constitutional provisions are interpreted and implemented to achieve inequality rather than promote non-discrimination. Application of article 26 of the constitution of Pakistan providing equality in respect of access to public places, is an example.

> "26. Non-discrimination in respect of access to public places. - (1) In respect of access to places of public entertainment or resort, not intended for religious purposes only, there shall be no discrimination against any citizen on the ground only of race, religion, caste, sex, residence or place of birth.
>
> (2) Nothing in clause (1) shall prevent the State from making special provision for women and children."

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[72] For this line of argument, see the fascinating article by K. Balz, "*Sharia*' and *Qanun* in Egyptian Law: A Systems Theory Approach to Legal Pluralism" (1995) 2 *YIMEL* 37-53.

A review of article 26 of the constitution shows, that rather than promoting equality, this article has the potential of acting to the detriment of women's rights. This is due to the fact that 26(1) places restrictions on women to worship freely in places made for religious purposes. The inference drawn here is that equality in access to public places is not breached where women are only permitted to use these only subject to special arrangements. Bearing in mind the prevalent customary practices of the majority of the people in Pakistan, it is clear that in most mosques, 'special' arrangements will not be forthcoming as such a facility would come into conflict with rural communities (and Pakistan constitutes of 75% rural) that practice an Islam where women pray in the privacy of their homes. Thus despite no legal or religious bar, access to the place of worship, the mosque is restricted for Muslim women.[73]

Manifestation of the 'operative' Islamic law in the socio-economic and political sphere and state policies consist of a clear negation of explicit Islamic injunctions. These include denial of citizenship and nationality rights to women, equal and adequate opportunities for education, health facilities and access to economic resources.[74] Very few Muslim countries have welfare structures in place; the fact that the early Islamic states had all such systems fourteen centuries ago does not appear to influence present day Muslim governments.[75]

In the area of family law too, the 'operative' Islamic law has evolved by a selective use of Islam. Two examples will suffice here. The first relates to the practice of polygamy, which is prevalent in all Muslim communities[76] although the level of

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[73] Some large mosques in urban centres have initiated the 'special' arrangements which means a separate compartment or part of the main prayer hall where women may pray.

[74] See analysis in chapter 3 of this study.

[75] Family benefits and child benefits were paid out regularly. See Al-Azhar Working Group, *Child Care in Islam*, n.d. Cairo: Al-Azhar.

[76] No statistical data is available on the extent of polygamous unions in Pakistan, but it is widespread enough to cause concerns among the people. This concern is reflected in various

incidence varies from jurisdiction to jurisdiction. Despite verses of the *Quran* permitting the practice, polygamy is not looked upon favourably by any community in Pakistan. One therefore comes across a number of mechanisms employed to subvert the intentions of 'potential' polygamists. This usually occurs in the form of exorbitant dower stipulated in the marriage contract, discouraging the husband from taking subsequent wife/ves. The vast majority of families also endeavour to counter polygamy by providing their daughters with education which is increasingly being perceived as an important tool for empowerment and imperative for economic independence. Other families will, to the best of their economic capabilities, provide a lavish 'dowry' and other gifts to further entrench the position of the woman. Polygamy is therefore considered a violation of women's rights and a grave injustice to them despite the fact that religion permits it.

The second example presented here is that of a near-total denial of the inheritance rights of women, again in contravention to clear *Quranic* injunctions. A research of case law on inheritance in Pakistan shows that very few cases are brought before the courts.[77] One of the inferences drawn by the researchers was that pressure from both family and society to forego one's inheritance to the male relatives is so compelling for women, that they are simply unable to approach the courts for a recognition of their right. That position is now getting increasingly rare due to a

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Commissions on women constituted from time to time by the Government of Pakistan. Consensus on abolishing it under a progressive interpretation of the relevant *Quranic* verses on the subject has not met with any real success. The first Commission on Marriage and Family Laws set up in 1955 recommended prohibiting the practice, but to no avail. The MFLO, 1961, attempted to restrict polygamy by requiring a husband to seek the consent of the existing wife before contracting another marriage. The Women's Rights Committee set up in 1976 noted that the practice continued unabated and little heed was paid to the restriction laid down in the MFLO. In 1985 another Commission on the Status of Women was set up that also reported on the continued practice of polygamy. The 1997 Report of the Commission of Inquiry on Women discusses the issue at length pp. 30 -34, urging legal safeguards for its restriction and eventual phasing out.

[77] See K. Arif and S. S. Ali, "Trends of the Superior Courts of Pakistan Regarding Succession and Inheritance of Women in Pakistan" (1993) Lahore: Shirkatgah.

number of reasons including economic compulsions, women becoming more aware of their rights, exposure to women's rights debates and a more vocal expression of their rights by women. Although no statistical evidence is forthcoming, yet, of the very few women who do get a share in inheritance, these are hardly ever given even the half share (compared to men in similar relationships), as stipulated in Islamic law. The 'operative' Islamic law that seems to be emerging, albeit at a painstakingly slow pace, is for women to be given a little 'something' out of the property of their parents and that too, as 'largesse' offered by the male heirs.

The emergence of this 'operative' Islamic law has also been influenced by international human rights instruments and there is strong evidence that it has played an important role in developing an outward-looking approach to human rights positions taken by government as well as human rights activists in the country. Human rights instruments, particularly the few that Pakistan is a signatory to, invariably find mention in all the reports of commissions appointed by government to address the situation of women.[78] Thus, the fact that Pakistan is a signatory to the UN Charter, the UDHR, the UN Convention on Rights of the Child (CRC) and the Women's Convention is flagged up in any discussion or context of women's human rights and used as a reference point for advancing women's rights in the domestic context.

An important dimension of the 'operative' Islamic law at the domestic level therefore, is the use of international standards on human rights. At the same time, it is

[78] See for instance, Government of Pakistan, *Review and Appraisal of Implementation of Nairobi Forward-Looking Strategies for the Advancement of Women. Pakistan National Report (First Draft)* (1994) Islamabad: Printing Corporation of Pakistan Press; Government of Pakistan, *Pakistan Country Paper. World Summit for Social Development* (1995) Islamabad: Printing Corporation of Pakistan Press; Government of Pakistan, *Fourth World Conference on Women Beijing September 1995. Pakistan National Report* (1995) Islamabad: Printing Corporation of Pakistan Press.

important to explore whether the "official" approach of Muslim States matches this rhetoric when it comes to subscribing to the international human rights norm of non-discrimination on the basis of sex at the international level. Part III of this study will address this issue in greater detail.

PART III

INTERNATIONAL DISCOURSES ON WOMEN'S HUMAN RIGHTS: IMPACT ON WOMEN'S RIGHTS IN THE ISLAMIC TRADITION

Traditional international law, of which human rights law is an offshoot, has historically been a male domain. The concerns of public international law, at first sight, do not have any particular impact on women. Issues of sovereignty, territory, use of force and state responsibility, appear gender free in their application to the abstract entities of states.[1] Recent years, however have seen an increasing critique of this view and it has been argued that international law is in fact, a 'thoroughly gendered institution'.[2] In an interesting article entitled "Alienating Oscar? Feminist Analysis of International law", Charlesworth advances the view that historically, the formation of the State depended on a sexual division of labour and the relegation of women to a private, domestic and devalued sphere.[3] She argues that men dominated in the public sphere of citizenship and political and economic life. The state institutionalised the patriarchal family both as the qualification for citizenship and public life and also as the basic socio-economic unit. In short, the functions of the state were identified with men, and it was this male dominance in matters of state that has been transported to the international arena and entrenched in discourses of international law including human rights law.[4]

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1 H. Charlesworth, C. Chinkin & S. Wright, "Feminist Approaches to International Law" (1991) 85 *AJIL* 613-645 at p. 614; also see F. Halliday, "Hidden from international relations: women and the international arena" in R. Grant and K. Newland (eds.,) *Gender and International Relations* (1991) Buckingham: Open University Press pp. 158-169, at p. 159.

2 *Ibid.*, at p. 615. This article by Charlesworth et al. mounted one of the earliest challenges to international law as a gender-neutral concept and institution.

3 H. Charlesworth, "Alienating Oscar? Feminist Analysis of International Law" in D. Dallmeyer (ed.,) *Reconceiving Reality: Women and International Law*, 1993, Washington DC: the American Society of International Law, pp 1-18 at p. 9. Also see, R. grant, "The Sources of gender bias in international relations theory" in R. Grant and K. Newland (eds.,) *Gender and International Relations* (1991) Buckingham: Open University Press pp. 11-12.

4 *Ibid.*

That this state of affairs is now no longer tenable is the opinion of a number of writers on the subject. Halliday, for instance provides some examples of how international law is closely related to gender issues and can no longer afford to ignore these.[5] He argues that a strong sense of awareness among women regarding their rights has emerged over the past two decades which includes critiques of power and its symbolisation in gender terms, as well as discussions of specifically gendered definitions of security, rights and authority.[6] Human rights are examples where it is directly relevant to analyse the role of states and other actors denying or promoting women's rights. Further, international economic processes strongly affect women around the world, particularly the structural adjustment policies of many third world countries, often at the behest of International Monetary Fund (IMF) and World Bank have had gender-specific consequences.[7] Even the apparently most insulated arena of all, i.e., family relations, is affected by changes at the international level.[8] But by far the most contentious dimension of the affect of international law on women is that of religion. Changes in religious policy and perspectives affects the rights of women and this is particularly true for Muslim countries where the rise of Islamic revivalist movements in the 1970s and 1980s has affected many aspects of women's lives.

Women's human rights are thus, complexly interwoven strands of socio-economic, legal, political, religious and cultural strands linked to the problem of women's subordination at national and international levels. Part II of this study identified the main contours of an "operative" Islamic law incorporating these various

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5 Halliday, *op. cit.*, at p. 161.

6 *Ibid.*

7 *Ibid.*

8 For example, changes in medicine, contraception, new role models and ideologies of male-female and parent-child. Women's positions in the family and indeed in society is affected by international and transnational trends. *Ibid.*

strands mentioned above defining women's human rights in domestic jurisdictions. Part III covering two chapters attempts to explore a similar phenomenon and its manifestations at the international level. To this end, chapter 6 will discuss development of the international norm of non-discrimination on the basis of sex, evaluating the position of women's human rights in international law. Chapter 7 looks at the response of Muslim States, both individually and collectively to international human rights instruments affecting women, in the light of reservations to the Women's Convention.

CHAPTER VI

DEVELOPMENT OF THE INTERNATIONAL NORM OF NON-DISCRIMINATION ON THE BASIS OF SEX: AN EVALUATION OF WOMEN'S HUMAN RIGHTS IN INTERNATIONAL LAW

6.1 Introduction

This chapter provides a brief account of the development of the international norm of non-discrimination on the basis of sex through international human rights instruments synthesising in the United Nations Convention on the Elimination of All Forms of Discrimination Against Women (the Women's Convention).[1] Other major developments at the international level contributing to international human rights law relating to women, including the World Conference on Human Rights held in Vienna in 1993 (the Vienna Conference), the International Conference on Population and Development, in Cairo, 1994 (ICPD), and the Fourth World Women Conference, Beijing 1995 (the Beijing Conference), will also be addressed. Since most of the substantive rights relating to women in the international human rights arena (as is true for other human rights) is a post-United Nations phenomenon, it is proposed to trace the development of women's human rights from that point in time.

The second level at which it is proposed to address the issue is to trace parallel developments emanating from Muslim States as a collective entity from the platform of the Organisation of Islamic Conference (OIC).[2] Three documents, the Cairo

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1 GA Res 34/180, 34 UN GOAR Supp. (No 710.46) at 193, UN Doc. A/34/46 (1979); entered into force on 3 September 1981.

2 The OIC is an international organisation with headquarters in Jeddah, the Kingdom of Saudi Arabia. It was founded in September 1969, when heads of States and Governments of Islamic countries assembled in Rabat, Kingdom of Morocco, to deplore the act of arson in the Holy Al-Aqsa Mosque and to declare their firm resolve to close ranks and to consult together, with a view to promoting close co-operation among themselves in the economic, political, cultural and spiritual fields. The number of member countries went up from the 25 founders to the present 55. These include, Afghanistan, Albania, Algeria, Azerbaijan, Bahrain, Bangladesh, Benin, Brunei, Burkina Faso, Cameroon, Chad, Comoros, Djibouti, Egypt, Gabon, Gambia, Guinea, Guinea-Bissau, Indonesia, Iran, Iraq, Libyan Arab Jamahiriya, Jordan, Kazakistan, Kuwait, Kyrghyzistan, Lebanon, Malaysia, Maldives, Mali, Mauritania, Morocco, Mozambique, Niger, Nigeria, Oman, Pakistan, Palestine, Qatar, Saudi Arabia, Senegal, Sierra Leone, Somalia, Sudan,

Declaration on Human Rights in Islam (the Cairo Declaration)[3], the Tehran Declaration on the Role of Women in Islamic Societies (the Tehran Declaration),[4] and the Islamabad Declaration on the Role of Muslim Women Parliamentarians in the Promotion of Peace, Progress and Development of Islamic Societies (the Islamabad Declaration),[5] will be used as evidence of the emerging trend in women's human rights in Muslim States. The fourth document entitled, the Universal Islamic Declaration of Human Rights (UIDHR),[6] although not officially representing the views of Muslim States, is the result of the work of a group of eminent Muslim scholars and has been widely disseminated internationally.

6.2 Development of the international norm of non-discrimination on the basis of sex: An overview

Human rights have traditionally been defined as "men's inalienable right to life, liberty and property."[7] The term men has sometimes been said to include women.[8] But this had not been reflected either in human rights theory or in its application. Modern theories of human rights and women's rights have historically developed in two separate theoretical strains.[9] Leading philosophers, such as John Locke in the 17th century and Jean Jacques Rousseau in the 18th century defined men as individuals

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Surinam, Syria, Tajikistan, Togo, Tunisia, Turkey, Turkmenistan, Uganda, United Arab Emirates, Uzbekistan and Yemen. Source: OIC web-site, http://www.sesrtcic.org/oicgenhp.htm.

3 Adopted by resolution No. 49/19-P, A/45/421 S/21797, by the Nineteenth Islamic Conference of Foreign Ministers (Session of Peace, Interdependence and Development), held in Cairo, Egypt from 31 July - 5 August, 1990).

4 Adopted by the OIC Symposium of Experts on the Role of Women in the Development of Islamic Society, held in Tehran, Iran from 17-19 April 1995 in accordance with resolution 10/7-C(IS) of the Seventh Islamic Summit Conference.

5 Published in Shirkatgah, *Newsheet*, Vol. 7 (1995) pp. 3-5.

6 Adopted on 19 September 1981 by the Islamic Council in Paris.

7 See e.g., John Locke, "An Essay Concerning the True Original Extent and End of Civil Government" and J. J. Rousseau, "From the Social Contract", in S. Commins and R. Linscott (eds.), *The World's Great Thinkers: Man and the State* (1947) New York: Random House, and the Preamble to the US Declaration of Independence.

8 R. Eisler, "Human Rights: Towards an Integrated Theory for Action" (1987) 9 *HRQ*, 287-308 at p. 288.

9 *Ibid.*

innately possessed of certain "natural rights."[10] Women, on the other hand, were defined not as individuals, but as members of men's households and thus, along with their offspring, under male control.[11]

In response, numerous women from around the world pressed for women's rights and argued that as members of the human race, they too, are entitled to the same basic rights as men.[12] Yet, even today, despite formal pronouncements of human rights, in many nations of the world, women find themselves confined to the private or familial sphere of life with little or no access to redressal of their human rights' violations. The distinction between the public or political and private or familial sphere has been transported from domestic jurisdiction into the international law sphere and, despite the fact that this dichotomy has no place in human rights discourse, continues to prevail. Women's rights have therefore been marginalised both institutionally and conceptually from national and international human rights movements.[13] Steiner and Alston sum up this inadequacy of the human rights movement in addressing women's human rights' issues by stating that

> "Of the several blind spots in the development of the human rights movement from 1945 to the present, none is as striking as the movement's failure to give to violations of women's (human) rights the attention, and in some respects the priority, that they require."[14]

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10 See Rousseau, *op. cit.*, n. 7.

11 Eisler, *op. cit.*, n. 8 at p. 289.

12 Among these women were, Mary Wollstonecraft and Abigail Adams in the 18th century and Elizabeth Cady Stanton and Sojourner Truth in the 19th century. In the 20th century, these numbers have swelled beyond enumeration as women's rights movement has grown in every country of the world.

13 For a detailed discussion of how the human rights of women have been split off from the mainstream of the international human rights movement see the special issue entitled "Symposium: Women and International Human Rights", guest ed., F. P. Hosken (1981) 3 *HRQ*.

14 H. J. Steiner & P. Alston (eds.,) *International Human Rights in Context. Law Politics Morals* (1996) Oxford: Clarendon Press at p. 887. Also see C. Bunch, "Women's Rights as Human Rights," (1990) 12 *HRQ* 486-498 at p. 487; J. Rehman, "Women's Rights: The International Law Perspective with Reference to Pakistan" in R. Mehdi & F. Shaheed (eds.,) *Women's Law in Legal Education and Practice in Pakistan. North South Co-operation* (1997) Copenhagen: New Social Science Monographs at p. 109, R. J. Cook, "Women", C. C. Joyner (ed.,) *The United Nations and International Law* (1997) Cambridge: Cambridge University Press and American Society of International Law at p. 182; C. Bunch, "Transforming Human Rights from a Feminist

Only recently have significant challenges been made to a vision of human rights which excludes women's experiences, at the level of governments, NGOs and the international community.[15] A wide array of human rights instruments have been promulgated by the UN and regional organisations for the protection of women's rights and non-discrimination on the basis of sex.[16] It is to these measures adopted by the UN and regional bodies that we now turn our attention.

6.2.1 The UN and Regional Approach to Women's Human Rights

The foundation of the UN was a response to the failure of states to respect human rights of individuals, including their own citizens.[17] The UN Charter (Charter)[18] provides a legal basis for international co-operation among its members for respect for human rights, including the elimination of discrimination on grounds of sex. In fact, the Charter was the first international treaty to spell out the principle of equality in specific terms. The Preamble to the Charter affirms "the equal rights of men and women" and gives priority to human rights before the rights of states. In addition to the Preamble, the goal of achieving equality between the sexes is reiterated in several Charter provisions with article 1(3) outlining the purposes of the UN to

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Perspective" in J. Peters and A. Wolper (eds.,) *Women's Rights Human Rights. International Feminist Perspectives* (1995) London: Routledge at pp. 11-15.

15 One of the earliest and ground-breaking article on the subject is H. Charlesworth, C. Chinkin and S. Wright, "Feminist Approaches to International Law" (1991) 85 *AJIL* 613. Over the past decade, an impressive range of writings on feminist approaches to international law, feminist legal theory, concerns of third world women have emerged. These include, A. Byrnes, "Women, Feminism and International Human Rights Law - Methodological Myopia, Fundamental Flaws or Meaningful Marginalisation?" (1988-90) 12 *AYIL;* S. Wright, "Economic Rights and Social Justice: A Feminist Analysis of Some International Human Rights Conventions" (1988-90) 12 *AYIL*; D. Dallmeyer (ed.,) *Reconceiving Reality: Women and International Law* (1993) Washington, DC: The American Society of International Law; C. Mohanty, "Under Western Eyes: Feminist Scholarship and Colonial Discourses" (1988) 30 *Feminist Review* 61; Bartlett, "Feminist Legal Methods" (1990) 103 *HLR* 831; C. MacKinnon, *Toward a Feminist Theory of the State* (1989) and C. Gould (ed.,) *Beyond Domination: New Perspectives on Women and Philosophy* (1983).

16 For a list of human rights documents adopted by the UN and regional institutions for the protection of human rights see, I. Brownlie, *Basic Documents on Human Rights*, 3rd edn., (1992) Oxford: Oxford University Press; P. R. Ghandhi, *International Human Rights Documents*, 1st edn., (1995) Blackstone.

17 Cook, *Women, op. cit.*, n. 14 at p. 184.

18 UNTS XVI; UKTS 67 (1946); Cmnd 7015.

include "promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion."[19]

Although promotion and protection of human rights on the grounds of non-discrimination was one of the main objectives of the UN, yet it has been argued that when the Charter came into operation in 1945, there were serious impediments in establishing a regime based on equality and non-discrimination. Colonialism had not yet breathed its last and racial, religious and sex-based discrimination prevailed in varying degrees.[20] Renteln is of the view that the major powers, particularly the United States and Great Britain had not been very supportive of sanctifying the cause of complete equality and non-discrimination.[21] In the opinion of Charlesworth, Chinkin and Wright, the inclusion of article 8 in the UN Charter (no restrictions on eligibility of women to participate in UN affairs in any capacity) presents an example of how gender-blind the vast majority of the participants were:[22]

> "While there was no overt opposition to the concept of gender equality at the 1945 San Francisco Conference, which drafted the Charter, some delegates considered the provision superfluous and said that it would be "absurd" to put anything so "self-evident" into the Charter."[23]

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[19] This affirmation is repeated in subsequent articles. Article 8 demands that there be no restrictions on eligibility of women to participate in any capacity in UN affairs; Article 13(1) declares that the General Assembly shall initiate studies to promote international economic and social co-operation without distinction as to . . . sex; Articles 55(c) and 56 provide that the UN and its members shall promote respect for international economic and social co-operation without distinction as to . . . sex); Article 62(2) states that the Economic and Social Council shall promote respect for human rights and fundamental freedoms for all; and article 76(c) lays down that the UN Trusteeship system shall encourage respect for human rights and fundamental freedoms for all without distinction as to . . . sex.

[20] Rehman, *op. cit.*, n. 14 at p. 110 and accompanying footnotes.

[21] A. D. Renteln, *International Human Rights Universalism versus Relativism* (1990) Newbury Park, California: Sage Publications at p. 219.

[22] Charlesworth *et al*, *op. cit.*, n. 15 at p. 622.

[23] *Ibid.* Laura Reanda notes on this point "It should be stressed . . . . that although at San Francisco a consensus was achieved on including in its Charter the principle of equality between the sexes, there was no common understanding of its meaning nor agreement on the concrete measures to be taken." L. Reanda, "The Commission on the Status of Women" in P. Alston (ed.,) *The United Nations and Human Rights: A Critical Appraisal* (1992) Clarendon: Oxford University Press, 265-303 at p. 300.

The concept of non-discrimination on the basis of sex found further elaboration with the adoption by the UN General Assembly of the Universal Declaration of Human Rights (UDHR).[24] Article 2 of the UDHR gives emphasis to entitlements to all rights and freedoms stated therein "without distinction of any kind, such as race, colour, sex . . or other status," and, although the Declaration is not legally binding in itself, it is widely treated as the "international community's authoritative guide to the meaning of human rights."[25] The UDHR found legal force through two covenants, namely the International Covenant on Civil and Political Rights (ICCPR)[26] and the International Covenant of Economic, Social and Cultural Rights (ICESCR).[27] Both Covenants reiterate the norm of non-discrimination by stating that a State party undertakes to respect the individuals' rights recognised in each Covenant "without distinction of any kind, such as race, colour, sex . . . or other status."[28] Non-discrimination on grounds, among others of sex, appears at several points in each of the two Covenants, in particular in article 26 of the ICCPR requiring equality before the law and equal protection of the law.[29]

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[24] Adopted on 10 December, 1948, GA Res. 217A (III), UN Doc. A/810, 1948.

[25] Cook, *Women*, op. cit., n. 14 at p. 184. Also see, A. Eide, G. Alfredsson, G. Melander, L. A. Rehof and A. Rosas (eds.,) *The Universal Declaration of Human Rights A Commentary* (1992) Oslo: Scandinavian University Press. For discussion on the UDHR as constituting part of customary international law see, R. B. Lillich, "Civil Rights" in T. Meron (ed.,) *Human Rights in International Law Legal and Policy Issues*, (1984) Oxford: Clarendon Press, chapter 4; H. Hannum, "Human Rights" in C. C. Joyner (ed.,) *The United Nations and International Law* (1997) Cambridge: Cambridge University Press, chapter 5.

[26] GA Res. 2200 (XXI), UN GOAR, 21st Sess., Supp. No. 16, at 52, UN Doc. A/6316 (1966), reprinted in 999 UNTS 171 and 6 *ILM* 368 (1967). The ICCPR entered into force on 23 March 1976.

[27] GA Res. 2200 (XXI), UN GOAR, 21st Sess., Supp. No. 16, at 52, UN Doc. A/6316 (1966), reprinted in 993 UNTS 3 and 6 *ILM* 360 (1967). The ICESCR entered into force on 3 January 1976.

[28] ICCPR article 2(1); ICESCR, article 2(2).

[29] Specific prohibition of discrimination appears in the ICCPR in: article 3 (equal rights of men and women with respect to the rights set forth in the Covenant; article 4 (measures derogating from the obligations cannot involve discrimination on grounds of . . . sex); article 14 (equality before the law); article 23 (equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution); article 24 (equal protection of the child irrespective of . . . sex) and article 25 (equal rights of citizens without distinction on grounds of . . . sex with respect to voting, public service and public representation). See also ICESCR, article 3 (equal rights of men and women with respect to rights set forth in the Covenant) and article 7 (equal pay for work of equal value).

Very soon after the adoption of the UN Charter in 1945, establishment of a body with a mandate to study and prepare recommendations on issues of special concern to women was proposed. The Commission on the Status of Women (CSW) was therefore established by the Economic and Social Council (ECOSOC) in 1946 in accordance with article 68 of the UN Charter.[30] Its function is two-fold: first, to prepare recommendations and reports to ECOSOC on promoting women's rights in political, economic, civil, social and educational fields. Second, to make recommendations to ECOSOC on urgent problems requiring immediate attention in the field of women's rights with the object of implementing the principle that men and women shall have equal rights and to develop proposals to give effect to such recommendations.[31] Views on the degree of success of the CSW in advancing the international norm of non-discrimination on the basis of sex by placing it on the human rights agenda, are not uniform. It has been argued by some writers that while the purpose of establishing the CSW was to bring women's rights concern into focus, yet this strategy has in itself been counter-productive.[32] In the words of Laura Reanda

> "the adoption of separate instruments and the establishment of specialised machinery to deal with specific women's rights has resulted in a narrowing of the global human rights perspective, in a 'ghettoization' of questions relating to women and their relegation to structures endowed with less power and resources than the general human rights structures."[33]

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[30] In all, six functional commissions were established. In addition to the CSW, there were five others including the Commission on Human Rights, Commission on Social Development, the Population Commission, the Sustainable Development Commission, and the Commission on Narcotic Drugs.

[31] S. Davidson, *Human Rights* (1993) Buckingham: Open University Press at p. 72; Cook, *Women, op. cit.*, n. 14 at pp. 186-187.

[32] M. Karl, *Women and Empowerment. Participation and Decision Making* (1995) London: Zed Books at p. 122. But see H. Pietila & J. Vickers, *Making Women Matter. The Role of the United Nations* (1994) London: Zed Books, at pp. 118-119 who are of the view that at first the creation of the CSW drew some criticism, but the work it has carried out over the years has amply demonstrated its importance.

[33] L. Reanda, "Human Rights and Women's Rights: The United Nations Approach" (1981) 3 *HRQ* 11 at p. 12.

The CSW has enjoyed most of its success in the area of setting international standards of women's human rights and a number of international conventions have been formulated under its sponsorship. These include the Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, 1949[34], the Convention on the Political Rights of Women, 1952,[35] the Convention on the Nationality of Married Women, 1957,[36] and the Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages, 1962.[37] Moreover, the CSW has assisted a number of specialised UN agencies, particularly the International Labour Organisation (ILO) and the United Nations Educational, Social and Cultural Organisation, (UNESCO), in developing international instruments to improve the conditions of women in employment, education and retirement. The ILO has a history predating the UN of setting standards for the specific protection of women in the workforce. These include matters such as maternity protection (1919) night work (1919), employment in underground mines (1935), and the Convention Concerning Equal Remuneration for Men and Women Workers for Work of Equal Value.[38] UNESCO adopted the Convention Against Discrimination in Education.[39]

Since 1945, more than two dozen different international legal instruments have been drafted which deal specifically with women. Each of these instruments reflects an international consensus on particular problems relating to women and, it may be said, provide a unique insight into the state of international consensus on the role of women in society.[40] However, because of their restricted scope and lack of provisions for

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[34] 96 UNTS 272 (1950). Although this Convention refers equally to men and women, but in practice applies mainly to women because they are the overwhelming majority of victims of such traffic and exploitation. See on this point, Pietila and Vickers, *op. cit.*, n. 32 at pp. 119-120.

[35] 193 UNTS 135 (1953).

[36] 309 UNTS 65 (1957).

[37] 521 UNTS 231 (1962).

[38] ILO Convention No. 100, reprinted in 165 UNTS 303 (1951). In this Convention, the ILO pioneered the principle of women's entitlement to equal pay for work of equal value to that performed by men.

[39] 429 UNTS 93 (1960).

[40] For a detailed description and analysis of international human rights instruments relating to women, see N. Hevener, *International Law and Status of Women* (1983) Boulder CO: Westview Press.

enforcement, these instruments had very little impact on the condition of women world-wide. Neither did they succeed in integrating women's human rights into the mainstream human rights framework. Dissatisfaction with the impact of existing instruments led, from the mid-1960's, to increasing efforts to develop international instruments providing global conceptualisation of the human rights of women and containing concrete measures of implementation and supervision. These efforts led to the adoption of the Declaration on the Elimination of All Forms of Discrimination Against Women in 1967[41] and culminated in the Convention on the Elimination of All Forms of Discrimination Against Women (the Women's Convention) in 1979. Therefore, it was with the adoption of the Women's Convention, that separate concepts of "women's rights" were recast in a global perspective, and supervisory machinery with terms of reference similar to those of existing human rights organs was provided for.

Beyond this development of international norms of non-discrimination on the basis of sex through the UN and its specialised agencies, regional conventions exist that are designed to achieve uniform observance of human rights principles among countries sharing common regional traditions. These include the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR),[42] the American Convention on Human Rights (ACHR),[43] and the African Charter on Human and Peoples' Rights (the African Charter),[44] and afford some further protection to women. Cook, in a review of the application of international human rights law to women, notes, that although international, regional and national courts have applied human rights principles to ensure that women's human rights are upheld, yet this has not always been to the full extent envisioned by the UDHR.[45]

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41 General Assembly Resolution 2263 (XXII), UN Doc. A/6717 (1967).
42 213 UNTS 221 (1955).
43 OASTS 1 (1969), reprinted in 9 *ILM* 99 (1970) and in 65 *AJIL* 679 (1971).
44 OAU Doc. CAB/LEG67/3/Rev.5 (1981), reprinted in 21 *ILM* 58 (1982).
45 R. Cook, "International Human Rights Law concerning women: Case-notes and comments" (1990) 23 *Vanderbilt Journal of Transnational Law* 779.

Within the UN system, the Optional Protocol to the ICCPR (OP),[46] has empowered the Human Rights Committee to act on individual complaints, and the ECHR empowers its Commission to consider individual complaints. In addition, some treaties such as the ACHR empower their respective courts to give advisory opinions with respect to the application of certain international human rights principles. Finally, States that are parties to international human rights treaties are obligated to protect these principles through their national courts and legislation.[47] Examples of cases dealt with by the Human Rights Committee regarding violations of women's human rights include *Lovelace v. Canada*,[48] re *Ameeruddy-Cziffra and nineteen other Mauritian Women*,[49] *Broeks v. The Netherlands*,[50] *Ato del Avellanal v. Peru*[51] and *Vos v. The Netherlands*.[52] Although the nature of complaints in the above mentioned cases varies, yet the common thread running through these was the element of discrimination on the basis of sex.

On the regional level, the European Commission on Human Rights and the European Court on Human Rights, too, have taken cognisance of cases involving women's human rights in areas ranging from marital status and motherhood, domestic violence and marital separation, disparate treatment of foreign wives, sexual assault of the mentally impaired, divorce and remarriage, abortion, retaining maiden name, unwed mothers and child custody, sex-discrimination and taxation and disparate treatment of foreign spouses. Leading cases in these areas include, respectively, *Marckx v. Belgium*; *Airey v. Ireland*; *Abdul Aziz, Cabalas and Balkandali v. UK*; *X and Y v. The Netherlands*; *Johnston v. Ireland*; *Bruggemann and Scheuten v. Federal Republic of Germany*; *Hagman-Husler v. Switzerland*; *Application No. 9639/82 v. Germany*; *Lindsay v. UK* and, *Application No. 11278/84 v. The Netherlands*. Within

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[46] GA Res. 21/2200A GOAR 21st Session, Supp. at 59, UN Doc. A/6316 (1966), 999 UNTS 302, entered into force 23 March 1976.

[47] The *Unity Dow Case* is a landmark in this regard.

[48] Communication No. R. 6/24, 36 UN GOAR Supp. (No. 40) at 166, UN Doc. A/36/40, 1981.

[49] Communication No. R. 9/35 UN GOAR Supp. (No. 40) at 134, UN Doc. A/36/40, 1981.

[50] Communication No. 172/1984, 42 UN GOAR Supp. (No. 40) at 139, UN Doc. A/42/40, 1987.

[51] Communication No. 202/1986, 44 UN GOAR Supp. (No. 40) at 96, UN Doc. A/44/40, 1989.

[52] Communication No. 218/1986, 44 UN GOAR Supp. (No. 40) at 232, UN Doc. A/44/40, 1989.

Europe, the European Court of Justice (ECJ) has, since the landmark decision in *Defrenne v. SABENA*[53] in 1976, continued to hand down a large number of judgements regarding issues of direct and indirect discrimination on the basis of sex. These include, *Webb v. EMO Air Cargo (UK) Ltd;*[54] *Gerster v. Freistaat Bayern;*[55] and *Kordeng v. Senator Fur Funanzen.*[56]

Similarly, under the ACHR, in an advisory opinion sought by Costa Rica on the Proposed Amendments to the Naturalisation provisions of the Political Constitution,[57] the inter-American Court of Human Rights held unanimously that the proposed naturalisation amendments constituted discrimination incompatible with article 17(4) and article 24 of the ACHR.[58]

So far as the African Charter is concerned, to date its article 2 has not been specifically applied to promote the equality of women. This article provides that

> "every individual shall be entitled to the enjoyment of the right and freedoms recognised and guaranteed in the present charter without distinction of any kind such as . . . sex . .."[59]

An interesting development in this regard however, has been utilisation in African (domestic) courts of treaty-based human rights standards. The landmark case is that of *Attorney General v. Unity Dow*,[60] where Unity Dow, a citizen and resident of Botswana challenged the country's Citizenship Act of 1984 as being

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53 Case 43/75 1976 ECR 455. The court ruled for equal pay between men and women.

54 Case C-32/93 1994 ECR I-3567. The court declared that discriminating on grounds of pregnancy constitutes direct discrimination, reinforcing an earlier decision in *Dekker v. Stichting Vormingscentrum Voor Jonge Volwassenen (VJV - Centrum) Plus.* Case C-177/88 1991 IRLR 27.

55 Case C-1/95 1997 IRLR 699.

56 Case C-100/95 1997 IRLR 710.

57 Advisory Opinion OC-1/82 of 24 September 1982.

58 *Ibid.*

59 One of the reasons cited for this lack of initiative is perhaps the disparity between the rhetoric and reality of the 'equal rights' statements written into the Charter. In the words of Khadija Elmadmad: "The African Charter [i]s characterised by a dualism of norms regarding women's rights, a contradiction between modernism and traditionalism as well as between universalism and regionalism . . . The African Charter ha[s] placed the rights of women in a 'legal coma'." cited in C. E. Welch, Jr., "Human Rights and African Women: A Comparison of Protection under two Major Treaties" (1993) 15 *HRQ* 549-574 at 555.

60 C. A. Civil Appeal No. 4/91 Botswana (unreported).

unconstitutional and violative of her fundamental rights through discrimination on the basis of sex.[61]

The foregoing discussion provided an overview of the development of the international norms of non-discrimination on the basis of sex, but, in order to appreciate the full scope and extent of this norm, a brief survey of some other developments advancing women's human rights is important. A number of Conferences have taken place under the auspices of the UN breaking new ground in placing women's rights firmly on the international human rights agenda. The next section proposes to engage in a brief analysis of these developments on women's human rights.

6.2.2 From Mexico to Beijing: Mainstreaming Women's Rights as Human Rights

The past two decades have seen a new era of women's human rights unfolding. The catalyst was the International Women's Year (IWY) in 1975 where joint initiatives of the United Nations and those of the women's movement interacted with each other and had a transformative effect on the perception of women's rights as human rights in international human rights discourse.[62] To mark the IWY, a World Conference on Women in Mexico City was held in 1975 which was attended by representatives of 133 countries. A World Plan of Action[63] addressing national governments and organisations within the UN system was drawn up and adopted at the Conference; it proposed actions and set targets for a ten-year period in a wide range of areas including political participation, education, health and employment.[64]

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[61] The case was filed in 1990. For details and comments on the case, see the judgement of Judge Horwitz, "In the High Court of Botswana Held at Lobaise" (1991) 13 *HRQ* 614-26; and L. C. Stratton, Note, "The Right to have Rights: Gender Discrimination in Nationality Laws" (1992) *Minnesota Law Review* 77, 197-239; C. Beyani, "Toward a More Effective Guarantee of Women's Rights in the African Human Rights System" in R. J. Cook (ed.,) *Human Rights of Women National and International Perspectives* (1994) Philadelphia: University of Pennsylvania Press, pp. 285-306.

[62] See Karl, *op. cit.*, n. 32 at pp. 121-148; Pietila & Vickers, *op. cit.*, n. 32, chapter 1.

[63] *Declaration of Mexico: Plans of Action* (1975) New York: United Nations.

[64] The World Plan of Action for the Implementation of the objectives of the IWY, proposed national action in the following areas: international co-operation and strengthening international peace;

The General Assembly of the UN approved the plan and declared 1976-1985 the UN Decade for Women, with the sub-themes of Equality, Development and Peace.[65] Other spin-offs from the IWY and the Decade for Women included the establishment of the UN Development Fund for Women (UNIFEM)[66] in 1976 and the UN International Research and Training Institute for the Advancement for Women (INSTRAW)[67] in 1982. Although the Mexico Conference was considered a success, its impact was not immediately visible and women's issues continued to be largely ignored in both national and international decision making.[68]

In 1980, halfway through the Decade for Women, a second UN Conference on Women was held in Copenhagen, to review the implementation of the World Plan of Action and develop it further for the second half of the Decade.[69] It appears to be the view of most writers that, while the Copenhagen Conference accomplished its objective, it was also marked by debate that reflected the approaches of the traditional political blocs and failed to consider issues from a feminist perspective.[70] Compared to the 'official' Conference, the parallel NGO Forum at Copenhagen, which brought

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political participation, education and training; employment and related economic roles; health and nutrition; the family in modern society; population; housing and related facilities; social services. Action on both the national and international levels was proposed in the areas of: research, data collection and analysis; mass media; participation of women in the United Nations bodies; international exchange of information. Source: Karl, *ibid.*, at p. 126.

65 It may be argued that the Mexico Conference was also a watershed for NGOs with concern for women's issues to organise themselves and run parallel sessions in a manner unprecedented up to that time. Called the International Women's Year Tribune, it brought together 4000 participants from around the world.

66 Established in 1976 as the Voluntary Fund for the decade for Women to fund innovative and catalytic projects, the Fund's name was changed to UNIFEM in 1985. It provides direct financial and technical support to low-income women in developing countries who are striving to raise their living standard. It also funds activities that bring women into mainstream development decision making. UNIFEM works in association with the United Nations Development Programme (UNDP).

67 The idea for a research and training institute for women grew out of the 1975 World Conference for Women and became a reality with the establishment of INSTRAW. This institution carries out research and training with the aim of integrating women into the development process and promoting women's participation in politics and public life.

68 For example, the Conferences on Human Settlements and Economic Co-operation in 1976, the Water Conference and Conference on Desertification in 1977, the Conference on Technical Co-operation Among Developing Countries and the Primary Health Care Conference in 1978 all failed to pay attention to women's roles, in spite of their obvious relevance to women.

69 See, United Nations, *Report of the World Conference of the United Nations Decade for Women: Equality-Development-Peace, Copenhagen* (1980) New York: United Nations.

70 See Karl *op. cit.*, n. 32 at p. 130; Pietila & Vickers *op. cit.*, n. 32 at pp. 78-79 and C. Bunch, "Copenhagen and beyond: prospects for global feminism" (1982) 5 *Quest: A Feminist Quarterly.*

together 7,000 women from around the world, provided the actual opportunity to discuss areas of specific concern to women. These areas included women and development, health and traditional practices as well as issues relating to working with the UN.[71]

The UN Decade for Women ended with a further UN Conference on Women in Nairobi in 1985 (the Nairobi Conference). This conference had two main objectives: to critically review and appraise the progress achieved and obstacles encountered in attaining the goals and objectives of the UN Decade for Women; and, to adopt unanimously the Forward-looking Strategies for the Advancement of Women to the Year 2000 (FLS).[72] The FLS was the result of a long process of preparation and government negotiation in the CSW and, like the World Plan of Action, is an intergovernmental document. Under each of the major themes of the Decade for Women - Equality, Development and Peace - the FLS looked at the obstacles facing women, presented basic strategies to overcome these and identified measures for implementation.[73] It was felt that the Decade for Women had not achieved as much as many women had expected and there was need for maintaining the tempo of mainstreaming women's rights as human rights. A 1990 evaluation of the FLS by the CSW revealed that the world community had become more conscious

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[71] Through the concerted efforts of NGOs, a Special Rapporteur was appointed to the UN Commission on Human Rights to follow up the matter of traditional practices harmful to women, e.g., female circumcision. Similarly, the plight of refugee women has continuously been raised and advocated before the UN High Commission fro Refugees. For a detailed discussion, see Karl, *ibid.*, at pp. 130-133.

[72] United Nations, *The Nairobi Forward-looking Strategies for the Advancement of Women* (1985) New York: United Nations.

[73] The comprehensive nature of the document can be seen in the list of the areas covered. Under equality, constitutional and legal equality, equality in social participation and equality in political participation and decision making are included. In the development, topics included are employment, health, education, food, water and agriculture, industry, trade and commercial services, science and technology, communications, housing, settlement, community development and transport, energy, environment and social services. Under the heading of peace came women and children under apartheid, Palestinian women and children, women in areas affected by armed conflicts, foreign intervention and threats to peace and peace education. In addition to these main themes, areas of special concern and international and regional co-operation were also highlighted.

and sensitive to issues affecting women. However, there seemed some loss of momentum in implementation.[74]

The 1990s presented new challenges and opportunities for women to build on the achievements and lessons learned in the previous decades.[75] As Marilee Karl says:

> "While United Nations conferences represent only the tip of the iceberg, the visible culmination of years of hard work and preparatory activities, they are landmarks in the work of putting women on the UN agenda."[76]

Major UN conferences held in the 1990s are testimony to this fact. Thus, in the UN Conference on Environment and Development (UNCED), or the Earth Summit, held in Rio de Janeiro in June 1992, ". . . was an encouraging landmark event for women in that it achieved consensus on the important role of women in promoting sustainable development . . . "[77]

The next and even more striking success for women came at the World Conference on Human Rights, held in Vienna in June 1993 where it was declared that:

> "The human rights of women and of the girl child are an inalienable, integral and indivisible part of universal human rights. The full and equal participation of women in political, civil, economic, social and cultural life, at the national, regional and international levels, and eradication of all forms of discrimination on grounds of sex are priority objectives of the international community."[78]

These pronouncements fulfilled the long-standing demand of identifying women's rights as human rights. The final document adopted by the Conference contains a major chapter, II.B.3, entitled "The Equal Status and Human Rights of Women". The

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[74] R. Wallace, *International Human Rights Text and Materials* (1997) London: Sweet & Maxwell at p. 47.

[75] The NGO Forum in Nairobi had mobilised and brought to the conference some 15,000 women together from all over the world. This in itself was no mean accomplishment as women from all cultures, religions, class and education levels interacted and shared experiences.

[76] Karl, *op. cit.*, n. 32 at p. 137.

[77] F. C. Steady, "Review of the implications for women of the recommendations of the 1992 Earth Summit", UNCED (1992) at p. 11, cited in Karl *ibid.*

[78] Part I, para 18, *Vienna Declaration and Programme of Action*, adopted following the "United Nations World Conference on Human Rights", Vienna, June 1993.

Vienna Conference also brought to the fore the issue of violence against women as a human rights violation and urged the General Assembly of the UN to adopt the Declaration on the Elimination of Violence Against Women.[79] Atrocities in the former Yugoslavia and Rwanda also brought the issue of wartime rape for the first time to the attention of the international community.[80] It is important to note that women have been raped, mutilated and humiliated in almost all wars before and during the existence of the UN, but for the first time on 18 December, 1992, the Security Council unanimously adopted Resolution 798 condemning the rape of women in wartime.[81]

The International Conference on Population and Development (ICPD), was held in Cairo in September 1994, raising sensitive and crucial issues relating to reproductive rights of women and men's shared responsibility, including family planning, child-rearing and house-work. Chapter IV of the Conference Report entitled "Gender, Equality, Equity and Empowerment of Women" makes statements to the effect that:

> "Special efforts should be made to emphasise men's shared responsibility and promote their active involvement in responsible parenthood, sexual and reproductive behaviour, including family planning; prenatal, maternal and child health; prevention of sexually transmitted diseases, including HIV; prevention of unwanted and high-risk pregnancies; shared control and contribution to family income, children's education, health and nutrition; and recognition and

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[79] Adopted by the UN General Assembly as Resolution 48/104, 23 February 1994. A Special Rapporteur on Violence Against Women was also appointed at the 1994 session of the UN Human Rights Commission in Geneva.

[80] See C. Chinkin, "Rape and Sexual Abuse of Women in International Law" (1994) 5 *EJIL* 326; K. Harris and R. Kushen, "Surrender of Fugitives to the War Crimes Tribunals for Yugoslavia and Rwanda" (1996) 7 *Criminal Law Forum* 551; K. Ambos, "Establishing an International Criminal Court" (1996) 7 EJIL 529. For a discussion on exclusion of women's concerns from issues of armed conflict and use of force see generally, J. Gardam, "A Feminist Analysis of Certain Aspects of international Humanitarian Law" (1989-90) 12 *AYIL* 265 and C. Chinkin, "A Gendered Perspective to the International Use of Force" (1989-90) 12 *AYIL* 279.

[81] Pietila and Vickers, *op. cit.*, n. 32 at pp. 146-147. The Security Council also decided in May 1993 "to establish an international tribunal for the sole purpose of prosecuting persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia" after 1 January 1991. The mandate of this tribunal includes the "massive, organised and systematic detention and rape of women" - the first time in history that crimes of rape will have been considered by an International War Crimes Tribunal.

promotion of the equal value of children of both sexes. Male responsibilities in family life must be included in the education of children from the earliest ages. Special emphasis should be placed on the prevention of violence against women."[82]

The final major development within the UN human rights system for entrenching the norm of non-discrimination on the basis of sex in international human rights discourse, was the Fourth World Conference on Women held in Beijing in September 1995 (the Beijing Conference)[83] Its theme was "Action for Equality, Development and Peace," the culmination of more than two decades of human rights advocacy, activism, research and mobilisation within the UN as well as at national and international fora. The Beijing Declaration - Platform for Action,[84] as it is called, adopted at the Conference, encapsulates the international norm of non-discrimination on the basis of sex, highlighting the fact that women's rights are human rights. The main objectives of the Conference were:

> * To review and appraise the advancement of women since 1985 in terms of the objectives of the Nairobi Forward-looking Strategies for the Advancement of Women to the Year 2000.
>
> * To mobilise women and men at both the policy-making and grass-roots levels to achieve those objectives.
>
> * To adopt a "Platform of Action", concentrating on key issues - the "critical areas of concern" - identified as obstacles to the advancement of women in the world.. . . It will include actions to eradicate poverty, eliminate inequality in education; ensure access to relevant health care, employment and economic participation; further protection and preservation of the environment; end inequality in sharing of power and decision-making; improve images of women in the mass media, promote women's human rights and eliminate violence against women.
>
> * To determine priorities to be followed in 1996-2000 for the implementation of the FLS."[85]

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[82] Report of the ICPD, Cairo (1994) chapter IV, paragraph 4.27.

[83] The Beijing Conference was the largest meeting ever convened under UN auspices, with 17,000 registrants, including 5,000 delegates from 189 States and the European Union, 4,000 representatives from NGOs and more than 3,200 media representatives. The NGO Forum on women, held in nearby Huairou, drew nearly 30,000 people, mostly women.

[84] A/CONF. 177/20, 17 October 1995; 55 *ILM* 401, 1996.

[85] *Ibid.*

6.2.3 The Women's Convention: A Synthesis of the International Legal Norm of Non-discrimination on the Basis of Sex?

The Women's Convention represents the culmination of efforts to develop the international legal norm of non-discrimination on the basis of sex.[86] It was adopted by the General Assembly of the UN on 18th December 1979 and entered into force on 3 September 1981, thirty days after the 20th member state had ratified the treaty.[87] As of February 1998, the Women's Convention had 97 signatures and 161 ratifications and accessions.[88]

The Women's Convention is a major breakthrough in international human rights law since it recognises the need to go beyond legal documents to address factors which will help to eradicate de facto inequality between men and women.[89] The treaty is made up of six parts; Parts I-IV comprising substantive provisions; Part 5 containing provisions relating to monitoring and implementation mechanism and Part 6 consisting of some general provisions.

The Preamble is unusual both in its length and in its scope. While referring to the equal rights of men and women as proclaimed in various international legal instruments, the preamble recognises the need to go beyond these documents to address factors which will help to eradicate de facto inequality between men and women. The establishment of a New International Economic Order; the eradication of apartheid, racism, foreign occupation and domination; and the strengthening of international peace and security, including nuclear disarmament: these are all urged as being essential to the equality of men and women.

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[86] Since its adoption in 1979, the Women's Convention has been the subject of discussion and writings from diverse perspectives around the world. For an interesting selection of readings on the Women's Convention see, Steiner and Alston *op. cit.*, n. 14 at pp. 888-967. For particular references, see chapter 7 of the present study.

[87] Under article 27(1) of the Women's Convention

[88] United Nations, *Multilateral Treaties Deposited With the Secretary-General*, ST/LEG/SER.E/15 (1997) New York: United Nations, updated from the internet.

[89] Preamble, to the Women's Convention.

The definition of discrimination against women is in itself very important as it transcends the traditional public/private dichotomy by calling for the international recognition of women's human rights both inside and outside the familial sphere.[90] The framers of this Convention were alive to the fact that more often than not it is customs and practices rather than formal legislation that perpetuate discrimination against women.[91] Article 5 of the Convention addresses this issue by committing State Parties to actually modify "the social and cultural patterns of conduct of men and women" in order to eliminate prejudices and practices based on notions of inferiority and superiority of either sexes. Other substantive provisions demand of State Parties to grant women complete equality in every field of life, be it nationality, family matters, contracts, right to property etc.[92]

Part I outlines the obligations undertaken by States Parties to the Convention. Article 1 defines discrimination against women. The definition is important as it expressly addresses the traditional distinction between public and private spheres. It transcends this dichotomy by calling for the international recognition of women' human rights both inside and outside the private or familial sphere. Article 1 should be read together with article 4, which provides for the possibility of affirmative action aimed at accelerating de facto equality between men and women. Under article 4 however, any special measures taken may be temporary only and must be discontinued "when the objectives of equality of opportunity and treatment have been achieved". Article 2 describes the means by which to fight discrimination against women. Article 3 is an acknowledgement that every means should be employed to promote the advancement of women on a basis of equality with men in all fields. Article 5 is perhaps one of the most ambitious provisions in the Convention in that it obligates States Parties to do no less than to modify the behaviour patterns of its citizens. Paragraph (b), for example, stresses the need for "family education" to recognise the common responsibility of men and women in the upbringing and

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[90] Article 1 of the Women's Convention
[91] Article 2 of the Women's Convention
[92] Article 9, 13, 15, and 16 of the Women's Convention

development of their children. The traditional justification of denying human rights to women on the established customs and practices is thus directly challenged and rendered unacceptable. Article 6 requires States Parties to take that appropriate measures to suppress all forms of traffic in women and exploitation of prostitution of women.

Part II of the Women's Convention (articles 7-9), deals with the participation of women in political and public life both nationally and internationally. It also addresses the obligation on States Parties to grant men and women equal rights to acquire, retain or change their nationality, including the nationality of children.

Part III of the Women's Convention (articles 10-14), covers economic, social and cultural rights. Article 10 deals with equality in the field of education, article 11 deals with equality in the field of employment, article 12 with equality in the field of health care. Of particular interest is Article 14 which deals with the special problems of rural women. This was the first time that an international legal instrument had dealt with the problems facing such women.

Part IV deals with matters of civil law. Article 15 obligates States Parties to ensure equality before the law. Article 16 concerns issues of family law, in particular, the right to choose a spouse and enter into marriage, and equal rights and responsibilities for the parenting of their children. The inclusion of provisions on family law, even in the most general terms, represents a step towards transcending the traditional public/private dichotomies of international human rights law.

The implications for States Parties are potentially far-reaching indeed. Not only must they abolish all existing legislation and practices that are discriminatory, they are also under a positive obligation to eliminate stereotyped concepts of male and female roles in society. The hiding behind "traditional customs and practices" no longer remains. The language throughout the Convention is essentially non-discriminatory, representing a significant advance on previous legislation which was usually "protective" in tone, and, at best, "corrective". The possibility of

discriminatory practices creeping in, in the guise of "protective" legislation, is no longer acceptable.

Part V (articles 17-22) contains rules on the monitoring system of the Women's Convention. Pursuant to these provisions, the Women's Convention established the Committee on the Elimination of All Forms of Discrimination Against Women (CEDAW), a body of twenty-three experts, elected by States Parties to serve in their personal capacity.[93] CEDAW is established "for the purpose of considering the progress made in the implementation of the Convention".[94] The main part of this task is to be carried out through the examination of reports submitted by States Parties. These reports are to be submitted every four years or whenever CEDAW requests them.

However, unlike the Convention on the Elimination of All Forms of Racial Discrimination (on which the Women's Convention is closely modelled), no provision is made for one State to complain of a violation of the Convention carried out by another State. Neither is there any provision for an individual who claims to have suffered a violation of the Convention to submit a complaint against a State Party.[95] The approach taken to enforcement of the Convention is one of "progressive implementation" rather than a requirement of immediate action on part of States Parties. Rather than formally pronouncing a State Party to be in violation of the

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[93] A. Byrnes has written extensively on the working mechanisms of CEDAW. See in particular, A. Byrnes, "The Other Human Rights Committee" (1988) 14 *YJIL*; A. Byrnes, "Women, Feminism and International Human Rights Law - Methodological Myopia, Fundamental Flaws or Meaningful Marginalisation" (1989-90) 12 *AYIL* 207.

[94] Article 17(1) of the Women's Convention.

[95] In June 1993 The World Human Rights Conference in Vienna emphasised the need for "the adoption of new procedures to strengthen implementation of the commitment to women's equality and the human rights of women." It called upon the CSW and CEDAW to examine the possibility of introducing the right of petition through the preparation of an optional protocol to the Women's Convention. Since January 1994, efforts are underway towards the achievement of this goal, including discussions on a draft optional protocol but these have not yet reached fruition. See, A. Byrnes and J. Connors, "Enforcing the Human Rights of Women: A Complaints Process for the Women's Convention? (1996) 21 *Brooklyn Journal of International Law* pp. 682-797; A. Byrnes, "Slow and Steady wins the Race? The Development of an Optional Protocol to the Women's Convention" (1997) *Proccedings of the 91st Annual Meeting of the American Society of International Law* pp. 383-389; A. Byrnes, "Highlights in the Development of an Optional to the Women's Convention and Selected Background Materials" circulated at a consultation meeting organised by IWRAW in New York in January 1998.

Convention, the Committee has preferred to engage in a "constructive dialogue" with States Parties. The result of this has been that while, on the one hand, countries remain party to the Convention, and are not alienated within that system, neither do they feel under any immediate pressure to implement and conform to the requirements of the Convention.

To further improve its effectiveness, CEDAW has, since 1986 developed the practice of adopting General Recommendations on issues of grave concern to women's human rights as well as advance the cause of effective implementation of the Women's Convention. This practice has been facilitated by making optimum use of article 21(1) of the Women's Convention which provides that CEDAW

> "may make suggestions and general recommendations based on the examination of reports and information received from States Parties. Such suggestions and general recommendations shall be included in the report of the Committee together with comments, if any, from States Parties."

CEDAW has so far adopted a total of 22 General Recommendations on a wide range of issues.[96]

The reporting procedure is the only enforcement mechanism established under the Convention. Unfortunately, it is perhaps the least effective method devised by international law to try to enforce human rights standards. Its success or failure is very much dependent on the goodwill of the States Parties. The Committee's ability to assess the accuracy of States' reports and comment upon them has been hampered by the lack of information on the status of women in States Parties. This problem has been compounded by the lack of any formal procedures to ensure effective consultation between NGOs (non-governmental organisations) and members of the Committee. Such consultation is essential to ensure that Committee members have

[96] For text and complete list of these General Recommendations, see the web-site gopher://gopher.un.org:70/00/ga/cedaw/HRI-G1R1.EN.

access to independent information on the de facto status of women, thus enabling them to assess the accuracy of States Parties reports.[97]

One of the most serious problems encountered in implementing the Convention has been the reaction of Muslim States and the assertion by them of the supremacy of *Sharia'*. The Women's Convention has become the most reserved human rights instrument to date. Chapter 7 will address the issue in detail.

6.2.4 Women's Rights and Child Rights: Making the linkages

The linkages between women's rights and child rights are being presented in this section to bring into focus the fact that the girl-child as a common beneficiary of the UN Convention on Rights of the Child (CRC)[98] and the Women's Convention, may act as the final catalyst in concretising women's rights as human rights. This linkage may yet be the most important step in the journey of developing a norm of non-discrimination on the basis of sex. Thus the Vienna Conference of 1993 and the Beijing Conference of 1995 endorsing this point of view recognise that "the full implementation of the human rights of women and the girl child (is) an inalienable, integral and indivisible part of all human rights and fundamental freedoms."[99] As Savitri Goonesekere states:

> "This is a powerful development linking the Vienna and Beijing Declarations and commitments. Both sets of rights have their foundations in international human rights, and it is clear that gender equality cannot be realised without eliminating discrimination against girl children.. . . A positive environment therefore has been created for developing strategies and plans of action which recognise that the realisation of children's rights and the human rights of women are intrinsically linked, both because the core agenda is one of human

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[97] In this regard, the International Women's Rights Action Watch (IWRAW) based at the University of Minnesota has been regularly monitoring the implementation of CEDAW by holding annual parallel meetings with CEDAW. It has brought together thousands of women from around the world to participate in these meetings as well as for lobbying members of CEDAW.

[98] Adopted by the UN General Assembly Resolution 44/25 of 20 November 1989. Entered into force on 2 September 1990. Reprinted in 28 *ILM* 1448 (1989).

[99] *Vienna Declaration and Programme of Action*, para 18.

rights, and because gender inequality cannot be addressed without linking women's issues to the issue of equality of the girl child."[100]

A further dimension of vital importance in this discussion is that the CRC has developed a framework that recognises a child's right to survival and development, protection from exploitation and participation. The concept of indivisibility of socio-economic and civil and political rights, so crucial to affording opportunity to women in all phases of the life cycle is thus established. This in turn leads to the truly remarkable conclusion that, were (girl) children afforded equal rights from birth to the first eighteen years of their life, their rights as women would automatically follow. And, finally, through the CRC, a real possibility of developing a concept of universal human rights arises, as this is the human rights treaty that, barring the United States of America and Somalia, stands universally ratified.[101]

In evaluating universality of the norm of non-discrimination, it is pertinent to include in the discussion, the contribution of Muslim States towards the concept of equal rights for men and women as evolved in the UN human rights system. Alongside the UN and regional systems, Muslim States have in the past few decades, aligned themselves in a loose association at the international level, known as the Organisation of Islamic Conference (OIC). In recent years a number of conferences and meetings have been held under its auspices focusing on human rights (both in general terms and on some occasions on women's human rights in particular). It is proposed to analyse these human rights documents as evidence of an 'operative' Islamic international law on women's human rights in contradistinction to its jurisprudential concept as expounded in chapter 2 of this study.

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100 S. Goonesekere, "The Links Between the Human Rights of Women and Children: Issues and Directions" Key note address at the consultation meeting of UNICEF, IWRAW, Save the Children Alliance, New York 21 January 1998 at p. 8.

101 Information accessed from UN documents on the internet. See www.un.org/Depts/Treaty/final/ts2/newfiles/part_boo/iv_boo/iv_11.html

6.3 'Complementarity' equals 'Equality'? A 'Muslim' View of the Norm of Non-discrimination on the Basis of Sex

In chapter 2 of this study an attempt was made at developing a theoretical framework on women's human rights in the Islamic tradition. It was argued that the rights of Muslim women depended on a number of factors including the interpretation of religious text in Islam. Chapter 3, 4 and 5 of this study used the case of Pakistan to highlight political, economic and social factors in determining the human rights of women. The 'operative' Islamic law proposed in the study also presents itself in State practice at the level of international law as well. This section engages in an analysis of provisions on women's human rights from an Islamic perspective in the light of some documents adopted from 'Muslim' forums and are indicative of State practice as well. Three of these documents, have been formulated with the support of governments while the fourth is a compilation of human rights by a group of 'eminent Muslim scholars' and released by the Secretary-General of the Islamic Council in Paris 1981.

The OIC, comprised of 55 Muslim States represents a sizeable portion of the world community.[102] The recent waves of 'revivalism' and political resurgence in the Islamic world raise some very fundamental questions about the attitude of these States towards the present international legal order in general and international law, including women's human rights in particular. For instance, does this resurgence imply and include a reactivation of an Islamic theory of external relations based solely on the doctrine of *Jihad*? If so, then surely any collaboration in areas including subscribing to human rights norms emanating from the UN would be ruled out.

Moinuddin in his well-argued book[103] declares such an eventuality as untenable. He is of the opinion that, ". . . by agreeing to conduct their relations with other states on the basis of equality and reciprocity, Islamic States have abandoned a

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[102] For detailed information regarding the OIC and its Member States, see http://www.sesrtcic.org/oicgenhp.htm.

[103] H. Moinuddin, *The Charter of the Islamic Conference and Legal Framework of Economic Co-operation Among Its Member States* (1987) Oxford: Clarendon Press.

fundamental, theological, and legal doctrine."[104] In addition to the *Quran* and *Sunna*, Muslim jurists have employed several sources to construct the classical edifice of the *siyar*, or Islamic international law.[105] These include treaties and agreements made by Muslim rulers with non-Muslims,[106] official instructions of the Caliphs given to commanders in the field and other State officials,[107] juristic writings of eminent Muslim jurists embodying legal opinion on matters of *siyar*,[108] arbitral awards,[109] internal legislation of Muslim States regulating matters of *siyar* and unilateral declarations of a Muslim State with regard to *siyar*,[110] and custom and usage.[111] It has been contended that the sources of *siyar*, if interpreted in modern terms, conform generally to the same categories as defined by modern jurists and specified in article 38(1) of the Statute of the International Court of Justice (ICJ).[112]

Current State practice of Muslim States also lends credence to the emerging universality of principles of international law including human rights norms. It may be argued that a well established trend among Muslim States today is the full acceptance of and participation in the UN system in order to contribute to the development of universally acceptable principles of international law. Muslim States have, since the inception of the UN, actively collaborated in drafting human rights instruments, including the UDHR,[113] the CRC and the Women's Convention,[114] and ratified these

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104 *Ibid.*, at p.14.

105 See M. Khadduri, *The Islamic Law of Nations: Shaybani's Siyar* (1966) Baltimore: Hopkins Press at p. 8.

106 M. Hamidullah, *The Muslim Conduct of State* (1987) 7th edn., Lahore: Sh. Muhammad Ashraf at pp. 18, 32; Khadduri, *ibid.*, 142-157.

107 Hamidullah, *ibid.*, at pp. 18, 299-311; Khadduri, *ibid.*, at pp. 75-94.

108 Hamidullah, *ibid.*, at pp. 18, 23-28; Khadduri, *ibid.*, at pp. 8-9.

109 Hamidullah, *ibid.*, at pp. 153-156.

110 *Ibid.*, p. 33.

111 *Ibid.*, 34-37.

112 Moinuddin, *op. cit.*, n. 103 at p. 16. Article 38(1) of the Statute of the ICJ declares that the function of the Court is to decide disputes submitted to it in accordance with international law by applying: "(a) international conventions, whether general or particular, establishing rules expressly recognised by the contesting parties; (b) international custom, as evidence of a general practice accepted as law; (c) the general principles of law recognised by civilised nations; (d) subject to the provisions of article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

113 For an interesting discussion on the subject see generally, J. Kelsay, "Saudi Arabia, Pakistan, and the Universal Declaration of Human Rights" in D. Little, J. Kelsay, and A. A. Sachedina (eds.,)

important treaties. Furthermore, the principle of *pacta sunt servanda* is entrenched, as a religiously sanctioned norm in the *Quran* - the primary source of Islamic law. Hence, if a Muslim State has given its consent to human rights treaties, it incurs the strict legal obligation to honour it both in international law as well as ensure enforcement at home.[115]

Another dimension of this 'inclusionary' approach on human rights in Muslim State practice, is the trend to present alternative human rights documents from a Muslim perspective. Since the adoption of the UDHR, as the foundational human rights document emanating from the UN, Islamic scholars, politicians, and official statements of Governments of Muslim States have declared human rights as a basic norm of the Islamic tradition. Over the years, and in response to international human rights instruments, parallel documents offering the Islamic contribution and perspective to human rights have emerged. Among contemporary Muslim scholars, Syed Abu'l A'la Mawdudi, a Pakistani, and founder of the right-wing Islamic party, the Jamaat-i-Islami has written and spoken prolifically on the subject. In his much publicised pamphlet, *Human Rights in Islam*,[116] Mawdudi takes as his point of departure the human rights documents of the "West" and more specifically, the UN. He criticises them as inadequate and late entrants in the field where Islam had already granted human rights since seventh century Arabia.[117] Mawdudi's list of fundamental human rights includes the right to life, right to the safety of life, respect for the chastity of women, right to a basic standard of life, the individual's right to freedom, right to justice, equality of all human beings, right to co-operate and not to co-

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Human Rights and the Conflict of Cultures: Western and Islamic Perspectives on Religious Liberty (1988) Columbia: University of South Carolina Press, pp. 33-52.

114 L. A. Rehof, *Guide to the Travaux Preparatoires of the United Nations Convention on the Elimination of All Forms of Discrimination against Women* (1993) Dordrecht: Martinus Nijhoff; J. Connors, "The Women's Convention in the Muslim World" in M. Yamani (ed.,) *Feminism and Islam. Legal and Literary Perspectives* (1996) Reading: Ithaca Press, pp. 351-376.

115 J. Schacht, "Islamic Law in Contemporary States" (1959) 8 *AJCL* 133-147 at p. 139.

116 A. A. Mawdudi, *Human Rights in Islam* (1980) Leicester: Islamic Foundation translated by Prof. Khurshid Ahmed.

117 *Ibid.*, at p. 15; this point is also emphasised by K. Ahmed in the foreword at p.9.

operate.[118] But the only specifically women's right is respect for the chastity of women. Mawdudi, also devotes chapter 4 of his pamphlet to rights of citizens in an Islamic State. He enumerates a list of sixteen rights of citizens in an Islamic State using gender-neutral language implying the application of these rights to both men and women.[119] Ann Mayer, in her detailed exposition entitled *Islam and Human Rights*[120] criticises Mawdudi's presentation on the subject in general and women's human right in Islam in particular.[121] She makes the rather sweeping statement that in his pamphlet on human rights, Mawdudi simply avoided the subject of women's rights as he was

> "a canny politician who seems to have appreciated the damage that it would do to the credibility of his human rights scheme if he admitted that it aimed at denying fundamental rights to one-half of the population." [122]

One of the implications of Ann Mayer's statement is that since women do not have any rights in Islam therefore Mawdudi in his shrewdness avoided to engage in a discussion on the subject. This view, it is submitted is hardly plausible considering that even the harshest critics of the Islamic tradition have conceded that Islam does accord a number of fundamental human rights to women.

Another document reviewed here is authored by Sultanhussein Tabandeh, a Shia scholar who inherited the leadership of the Nimatullahi Sufi order, a mystical brotherhood affiliated with the Athna Asharyia sect of Shia Islam. The document entitled, *A Muslim Commentary on the Universal Declaration of Human Rights*,[123]

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[118] *Ibid.*, chapter 3 entitled, "Basic Human Rights" at pp. 17-22.

[119] These rights are as follows: security of life and property, protection of honour, sanctity and security of private life, security of personal freedom, right to protest against tyranny, freedom of expression, freedom of association, freedom of conscience and conviction, protection of religious sentiments, protection from arbitrary imprisonment, right to the basic necessities of life, equality before the law, rulers are not above the law, right to avoid sin, right to participate in affairs of the state. (*Ibid.*, at pp. 23-34.)

[120] A. E. Mayer, *Islam and Human Rights. Tradition and Politics* (1995) Boulder CO: Westview Press.

[121] Mayer, *ibid.*, at pp. 100-102.

[122] Mayer *ibid.*, at p. 100.

[123] S. Tabandeh, *A Muslim Commentary on the Universal Declaration of Human Rights* (1970) Guildford: Goulding, translated by F. J. Goulding.

was presented to the representatives of Muslim countries who attended the International Conference on Human Rights held in Tehran in 1968 as a response to the UDHR. Tabandeh, like Mawdudi, focuses on the prior claim to human rights by the Islamic religion. In his words, "Most of its (UDHR) provisions were already inherent in Islam, and were proclaimed by Islam's lawgivers and preceptors. . ." [124] What sets Tabandeh's views apart from Mawdudi, in the words of Mayer is that, "Tabandeh is exceptional in his forthright assertion that Islam opposed the idea of male-female equality."[125] While Mawdudi does not call for rejecting human rights instruments formulated at the UN, Tabandeh is adamant that the Islamic sources of human rights are the only authoritative ones, and, where any discrepancies exist, the UDHR should be rewritten to make it conform to Islam.[126] He (Tabandeh) also castigates representatives of Muslim countries who were involved in drafting of the UDHR for not rejecting in particular article 16 which provides for equal rights for men and women in matters of marriage and divorce and guarantees the right to marry without limitations due to race, nationality and religion.[127] In Tabandeh's opinion, a wife must obey her husband, consult his wishes, not go out of the house without his permission, take due care of the property, look after the household equipment, invite a guest only with her husband's agreement, uphold the family's good name, and maintain her husband's good standing when he is present or absent.[128] In short, Tabandeh's exposition of women's rights and her status in Islam is to a certain extent, representative of traditional and conservative Muslim writers and (male) Muslims alike.[129]

A further development in the movement towards articulating an Islamic model of human rights came in the form of recommendations adopted at an international seminar organised jointly by the International Commission of Jurists, Kuwait

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[124] *Ibid.*, at p. 1.
[125] Mayer, *op. cit.*, n. 120 at p. 98.
[126] Tabandeh, *op. cit.*, n. 123 at pp. 41-45, commenting on article 16 of the UDHR.
[127] *Ibid.*, at pp. 41-45.
[128] *Ibid.*, at p. 58.
[129] Cf. discussion in chapter 2 of this study on women's human rights in Islam.

University & Union of Arab Lawyers, in December 1980.[130] Participants included well-known scholars from the Muslim world including the Pakistani lawyer A. K. Brohi who presented the key-note address at the Seminar.[131] In chapter 2 of the Report entitled "Recommendations of the Seminar", four sections are devoted specifically to women's rights and status.[132]

> "39. Islamic States are called upon to include provisions in their legislation ensuring political rights of women as guaranteed by Islam, notably their right to vote, to nominate themselves for election, to be appointed to public posts, and to participate in decision-making.
>
> 40. Islamic States are recommended to adapt legislation and the training of their judges so as to ensure the protection of women's rights as recognised by Islam.
>
> 41. Commissions should be created to study all factors pertaining to the status of women and in particular the situation of women in education, employment and personal status, and to ensure that women's rights are respected in conformity with the principles of Islamic jurisprudence.
>
> 42. As women's rights will be safeguarded to a considerable degree through respect for human rights in general, Islamic and Arab governments are called upon to ratify international conventions on human rights, especially as they *do not* (emphasis added) conflict with Islam's attitude to women. Such ratification would, on the contrary, enhance international respect for these rights and emphasise Islam's vanguard role in the promotion of human rights." [133]

It may be argued that all four recommendations are important statements of women's human rights in Islam, departing as these do, from traditional pronouncements on the subject emanating from Muslim scholars including Mawdudi and Tabandeh. The point that stands out immediately is the variation in views regarding the rights of Muslim women. Thus, Kuwait, the host country for the

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[130] International Commission of Jurists, Kuwait University & Union of Arab Lawyers, *Human Rights in Islam, Report of a Seminar held in Kuwait, December 1980* (1982) Geneva: International Commission of Jurists.

[131] For a list of participants see *ibid.* A. K. Brohi's address was entitled, "The Nature of Islamic Law and the Concept of Human Rights" and included in *ibid.*, at pp. 43-60.

[132] *Ibid.*, p. 19.

[133] *Ibid.*

Seminar that recommended the right to vote and participation in public life for women, actually has laws denying the same to its women citizens. Further, the document accepts and indeed, applauds the efficacy and usefulness of an international human rights regime protecting women's rights particularly on grounds of compatibility with Islamic pronouncements on the subject.[134]

Following closely on the international seminar on human rights in Islam held in Kuwait in 1980, a Universal Islamic Declaration of Human Rights (UIDHR)[135] was adopted on the 19th September 1981 by the Islamic Council. The foreword[136] of this document states that it "is based on the *Quran* and *Sunnah* and has been compiled by eminent Muslim scholars, jurists and representatives of Islamic movements and thought."[137] The UIDHR does not take note of any international human rights document, treaty or convention recalling in its preambular statements, only the Islamic tradition. It consists of a preamble and twenty-three articles.[138] Although the UIDHR mentions the principle of equality and non-discrimination in a number of provisions[139] yet, as Mayer states,

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[134] The Seminar Report, at p. 20, *ibid.*, also recommended the developing of an Islamic Charter of Human Rights, ". . . in keeping with Islam's vanguard role in this respect, as a contribution to the endeavours to preserve and develop human rights in the world and to guarantee a better future. . . . The seminar appeals to the heads of Islamic governments to ensure that the above recommendations are discussed and put into effect especially at the Islamic Summit Conference, when the present topic will be considered."

[135] The text of the UIDHR is appendixed to this study and may also be accessed on the web site: http://www.alhewar.com/ISLAMDECL.html. (Appendix I)

[136] Presented by Salem Azzam, Secretary General of the Islamic Council in Paris.

[137] UIDHR, *op. cit.*, n. 135 at p. 2.

[138] See appendix I.

[139] UIDHR, preamble, g) "i) wherein all human beings shall be equal and none shall enjoy a privilege or suffer a disadvantage or discrimination by reason of race, colour, sex, origin or language." Similarly, article IX in providing a right to asylum also mentions non-discrimination thus: "a) Every persecuted or oppressed person has the right to seek asylum. this right is guaranteed to every human being irrespective of race, religion, colour and sex."

> "In order to present Islamic human rights in a diplomatic fashion that would deflect criticisms from an international audience, the UIDHR treatment of the status of women is deliberately obscure."[140]

She cites a number of examples where, in her view, women's rights are denied by applying Islamic principles. It is proposed to discuss three of these articles, i.e., articles, 3, 19 and 20 in an attempt to ascertain the degree of divergence between the UIDHR and similar documents adopted at the UN.

Article 3, entitled, "Right to Equality and Prohibition Against Impermissible Discrimination" has three sub-sections stating the following:

> "a) All persons are equal before the Law and are entitled to equal opportunities and protection of the Law.
>
> b) All persons shall be entitled to equal wage for equal work.
>
> c) No person shall be denied the opportunity to work or be discriminated against in any manner or exposed to greater physical risk by reason of religious belief, colour, race, origin, sex or language."

What appears to be problematic here is the phrase 'impermissible discrimination' giving the impression that, where permissible, discrimination will be permitted. the inference that may be drawn here is that on literal, traditional readings of the religious text in Islam, women may be discriminated against. The implications of article 3 therefore, do not bode well for the norm of non-discrimination on the basis of sex.[141]

The next provision of the UIDHR affecting the status of women is Article 19 outlining the "Right to Found a Family and Related Matters." Divergence between current human rights documents is evident from the opening statement of this article which declares that,

> "every person is entitled to marry, to found a family and to bring up children in conformity with his religion, traditions and culture. Every

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140 Mayer, *op. cit.*, n. 120 at p. 102.

141 For a similar line of argument, see Mayer *ibid.*, pp. 102-109.

spouse is entitled to such rights and privileges and carries such obligations as are stipulated by the Law."[142]

Within the Islamic legal tradition, a Muslim woman may only marry a Muslim male whereas a Muslim male may marry not only a Muslim women but also a woman professing one of the revealed religions (*kitabia*).[143] Right to mutual consideration and respect in marriage is provided in article 19 b), whereas article 19 c) establishes the husband as head of the household by obligating him to maintain his wife and children.[144]

Article 19 h) of the UIDHR provides for sharing obligations and responsibilities within the family. This provision differs from article 16(d) of the Women's Convention in that it stands qualified by the phrase ". . . to share . . . according to their sex, their natural endowments, talents and inclinations, bearing in mind their common responsibilities toward their progeny and their relatives."[145] Article 19 i) appears in line with UN human rights provisions in stating that, "No person may be married against his or her will, or lose or suffer diminution of legal personality on account of marriage."[146]

Article 29 of the UIDHR makes a detailed provision on rights of married women including, providing a wife the right to residence in her husband's house, to

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[142] UIDHR, article 19(a). The explanatory note provided states that "the term 'Law' denotes the Shariah, i.e., the totality of ordinances derived from the Quran and Sunnah and any other laws that are deduced from these two sources by methods considered valid in Islamic jurisprudence."

[143] Cf., article 16(1) of the UDHR which provides that: "Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and found a family." Article 16 of the Women's Convention provides that: "States Parties shall take 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 rights to enter into marriage."

[144] Cf., discussion in the *Quran*, verse 4:34 stating that men are providers and maintainers of women since they are obligated to provide for them out of their earnings.

[145] Cf., Article 16 (d) of the Women's Convention provides for "The same rights and responsibilities as parents, irrespective of marital status, in matters relating to their children; in all cases the interest of the children shall be paramount."

[146] Cf., article 16(2) of the UDHR which provides that "Marriage shall be entered into only with the free and full consent of the intending spouses." Article 16 (b) of the Women's Convention makes a similar statement: "The same right freely to choose a spouse and to enter into marriage only with their free and full consent."

receive maintenance during the subsistence of the marriage and for the period of *iddat* following dissolution of the marriage, right to seek dissolution of the marriage and inheritance.[147]

The Cairo Declaration on Human Rights in Islam (Cairo Declaration)[148] is an example of a human rights document formulated and adopted from an 'official' Islamic forum, namely the OIC on 5th August 1990. The Cairo Declaration consists of a preamble and 25 articles and is similar in tone and substance to the UIDHR. Article 1(a) lays down the principle of equality and non-discrimination by stating that :

> ". . . All men are equal in terms of basic human dignity and basic obligations and responsibilities, without any discrimination on the grounds of race, colour, language, sex, religion, belief, political affiliation, social status or other considerations. . . ."

Mayer reiterates her criticism of the UIDHR in her analysis of the Cairo Declaration by repeating her view that this document too has been drafted so as to avoid providing for equality of rights regardless of gender.[149] Since the document is annexed to the present study, it is proposed to discuss some of the articles that have an important bearing on the subject of women's human rights in Islam. Article 6 for instance, declares that:

> "woman is the equal to man in human dignity; and has rights to enjoy as well as duties to perform; she has her own civil entity and financial independence, and the right to retain her name and lineage."

Article 6 (b) is similar in formulation as article 19 (c) of the UIDHR making the husband responsible for the support and welfare of the family. Mayer, commenting on this article states that:

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147 Rights outlined in article 20 is in keeping with traditional principles of Islamic law. See, M. A. Mannan, *Mulla's Principles of Muhammadan Law* (1995) Lahore: PLD Publishers; J. Nasir, *The Islamic Law of Personal Status* (1986) London: Graham & Trotman.

148 Appears as annex to resolution No. 49/19-P. Document A/45/421. S/21797.

149 For a critique of the Cairo Declaration see Mayer, *op. cit.*, n. 120 at pp. 115-117.

"the first two of these rights were among the important improvements Islam made in women's rights over a millennium ago, but they are of less significance in the late twentieth century, when such minimal rights are taken for granted. The third "Right" does not advance women's rights in Middle Eastern societies, where women have traditionally kept their family names after marriage."[150]

This line of argument, it is submitted, appears to contradict Mayer's earlier statement where she states that the reason for Mawdudi's failure to bring up the subject of women's rights in Islam is that these are denied to women in that religious tradition.[151] Further, to brush away the right to retain her maiden name by Muslim women does not appear quite fair, since the same right, commonplace enough in non-western societies, is a coveted achievement of western feminists in recent years.

Two other documents, the Tehran Declaration and the Islamabad Declaration will now be assessed. These documents are distinctive in that the issues relating to the rights of Muslim women were debated, drafted and adopted by women, and in conferences where rights of Muslim women were the focus of discussion. These Declarations are also important statements on Muslim women's perspectives regarding their human rights prior to the Beijing Conference held in September 1995.

The first of these conferences was the OIC Symposium of Experts on the Role of Women in the Development of Islamic Society was held in Tehran, Islamic Republic of Iran from 17-19th April 1995.[152] The recommendations of the Symposium to the Twenty-third Conference of Islamic Foreign Ministers presents a number of interesting points of departure from other documents coming from Muslim forums including the UIDHR and the Cairo Declaration. The most prominent of these

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[150] *Ibid.*, at p. 116.

[151] *Ibid.*, at p. 100.

[152] This Symposium was organised in accordance with Resolution 10/7-C (IS), adopted by the seventh Islamic Summit Conference. Delegates from 34 Islamic countries participated in the deliberations. Three documents were submitted to the Seminar: Recommendations of the Seminar to the Twenty-third Islamic Conference of Foreign Ministers; Principles presented as Guidelines to the Fourth World Conference on Women in Beijing; and the Tehran Declaration on the Role of Women in the Development of Islamic Society.

is reiterating the commitment of member states of the OIC to the principles and objectives of the UN Charter.[153] Secondly, the interdependence and indivisibility between civil and political, and economic, social and cultural rights is clearly acknowledged and upheld.[154] The recognition of the element of 'cultural' Islam and the manner in which it has adversely affected rights and status of women in Muslim countries has also been underscored, coupled with the need to reject adverse cultural encroachments which are detrimental to the identity and personality of Muslim women.[155] This commitment is further elucidated by demanding the

> "eradication of all forms of violence and exploitation of women, including domestic violence, sexual exploitation, pornography, prostitution, trafficking in women, sexual harassment, genital mutilation and other negative traditional and cultural practices..."[156]

Genital mutilation, a stronger term than female circumcision has been used to describe the practices so often ascribed to the Islamic tradition, is sought to be discontinued.

Special protection for pregnant and nursing mothers is also demanded, but the fact that women's roles are not confined to motherhood is also made clear by the need for

> "facilities to effectively meet the requirements of women and encourage their participation in public life thus enabling them to reconcile their family and professional responsibilities with their political rights and participation in decision making."[157]

A particularly ground breaking provision of the recommendations is one that accepts the fact that women may be heads of households thus moving away from the traditional statement of men alone are, or can be, providers and maintainers of households.[158] Another important demand articulated in the recommendations is for

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153 See preamble of recommendations.

154 *Ibid.*

155 Recommendations of the Seminar to the Twenty-third Islamic Conference of Foreign Ministers, Para 1.4.

156 *Ibid.*, para 1.6.

157 *Ibid.*, para 1.8.

158 "Provision of necessary financial and social support and protection and empowerment of women heads of household . . . " *Ibid.*, Para 1.15.

facilitating and enhancing women's full access to appropriate, readily available, and free quality health care, and related services and facilities, including family planning, reproductive and maternal and infant health in the context of Islamic principle," thus ruling out the position by some that Islam prohibits family planning.[159] The importance of education as an effective tool of empowerment is underscored as is the recognition of women's roles as *Mujtahid.*[160] The twenty three points in the recommendations are condensed in the Tehran Declaration for consideration of the Twenty-third Conference of Foreign Ministers of the OIC.

The Islamabad Declaration was adopted at the first Muslim Women Parliamentarians' Conference in Islamabad on 1-3 August 1995.[161] The main objective of the conference was to allow women parliamentarians from Muslim countries to meet in order to forge closer links and develop deeper understanding of the problems facing Muslim women. This conference too, like the Tehran Symposium was significant in its timing, coming just before the Beijing Conference.[162] It adopted the Islamabad Declaration on the Role of Muslim Women Parliamentarians in the Promotion of Peace, Progress and Development of Islamic Societies (Islamabad Declaration). Since the document is appendixed to this study, it is proposed to highlight some of its main points to evaluate its contribution to the development of the international norm of non-discrimination on the basis of sex.

Similar to the Tehran Declaration, the striking feature of the Islamabad Declaration is the reiteration of recognition, and commitment to, international human rights instruments affecting women. It resolves to "promote the implementation, as

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159 *Ibid.*, Para 1.18.

160 A person with the capacity to engage in independent legal reasoning. This process is known as *ijtihad.* Para 1.3, Tehran Declaration.

161 Thirty-five high level delegations from Muslim countries participated. These included representatives from: Pakistan, Libya, Chad, Malaysia, Oman, Azerbaijan, Morocco, Syria, Yemen, Albania, Algeria, Kyrgyistan, Iraq, Bangladesh, Egypt, Palestine, Jordan, Senegal, Iran, Indonesia, Sudan, Turkish Republic of Northern Cyprus, Turkey and representative of the International Parliamentary Union.

162 Official report prepared by the Conference Secretariat, reprinted in Shirkatgah, *Newsheet*, Vol. 7 1995 at p. 1.

appropriate of the provisions of international conventions on the rights of women and urge all countries to adhere to these conventions."[163] It may be argued that by specifically taking note of human rights conventions affecting women's rights, the Islamabad Declaration appears to be formulating an 'operative' Islamic international law norm of non-discrimination on the basis of sex, evidence of which was barely visible in either the UIDHR or the Cairo Declaration.

A further outstanding feature of the Islamabad Declaration lies in its recognition of Muslim women's rights to participation in public and political life and decision making, including the right to become head of State and government.[164] This pronouncement, it is submitted, may also be employed as evidence of an emerging 'operative' Islamic law regarding women's right to public life.

Building upon the Tehran Declaration (although the connection between the two documents was not made officially), the Islamabad Declaration seeks to establish the interdependence and indivisibility of all three generations of rights. The Islamabad Declaration also sought to echo the linkage and interdependence now being sought within the UN system between the CRC and the Women's Convention. To this end, the Islamabad Declaration seeks: "To promote and protect the human rights of women at all stages of their life cycle in the true spirit of Islam."[165] A further commonality between the provisions of the Tehran and Islamabad Declarations, and those of human rights documents adopted at the UN, is the emphasis on women's central role within the family and the family itself as the basic unit of society.[166]

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[163] *Ibid.*, at p. 4.

[164] Cf., Tabandeh's view that women are not allowed in public life. Also note the *Hadith* where it is stated that "Those who entrust their affairs to a woman will never know prosperity."

[165] Islamabad Declaration, p. 3 paragraph (a).

[166] See, Preamble, of the Islamabad Declaration stating that "Recognising that woman, as enshrined in the *Quran* and *Sunnah*, is the centre of the family which is the basic unit of society and hence the cornerstone of the edifice of a stable, peaceful and prosperous polity." UN human rights instruments articulate similar formulations. see for example, article 23 of the ICCPR; article 10, ICESCR.

Both the Tehran and Islamabad Declarations acknowledge the fact that presently laws in Muslim countries do not accord equal rights to women call for working to promulgate laws supportive of women's positive role and rights in society: "We will make special efforts to abrogate discriminatory laws, as well as cultural and customary practices so that our society can advance on an egalitarian and just basis."[167] To this end, current human rights issues arising out of adverse cultural practices towards women, have also been addressed e.g., violence against women.[168]

As compared to the UIDHR and the Cairo Declaration, the Islamabad and Tehran Declarations present a tone and terminology that is closer to the women's rights language of the UN. A number of articles of the latter Declarations present similarity with human rights instrument emanating from the UN human rights instruments. But, alongside these similarities, some differences are also discernible, the most pronounced being the fact that interdependence of rights and obligations are both brought into prominence in the human rights documents presented from Muslim forums. That is not to argue, however, that UN human rights documents lack the element of corresponding obligations; the distinction appears one of where the emphasis lies.

Further, obligations of State Parties as opposed to individuals as key participants in the fulfilment of rights appears the norm presented in UN human rights instruments. This lack of emphasis on private actors has been critiqued on the basis that beyond State institutions, it is in the private sphere and at the level of society and community that human rights are denied to women. On the other hand, 'Islamic' human rights documents place responsibility squarely on the shoulders of recipients of these rights, i.e., individuals within the State, as well as State structures and institutions.

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[167] Islamabad Declaration, p. 3; Tehran Declaration, paras, 1.4 and 1.6.

[168] Islamabad Declaration, p. 4 "sustained efforts to end suppression, discrimination and violence against women in all forms especially domestic violence, women in armed conflict and crisis situations." Tehran Declaration, para 1.6.

Surveying the writings of Mawdudi, Tabandeh, the report of the Kuwait seminar, UIDHR, Cairo, Tehran and Islamabad Declarations, the question arises: How representative of Muslim thought, belief and views are these forums and writings? This question does not lend itself to an easy response as it is a very complex problem indeed and no straight forward answer is possible. What is evident however is: male interpretations of the Islamic tradition with regard to women's rights are invariably more restrictive than women's forums in their formulations of similar issues. For instance, the Tehran Symposium, despite being hosted by Iran, a regime known world-wide for its strong religious conviction, sought to present the more positive side of rights for Muslim women.

At the same time, it has to be conceded that the documents reviewed fail to adequately spell out and address the problematic areas relating to women's rights in Islam. These areas awaiting deliberation include evidence rights of women, polygamy, divorce, inheritance rights, custody and guardianship of children, and so on. What the Tehran and Islamabad Declarations have however achieved is to draw attention to these difficult areas by subsuming these under the heading of 'problems' sought to be resolved by Muslim women, or, through progressive 'women-friendly' interpretations of religious texts considered as legitimate grounds for the human rights of Muslim women.

6.4 Non-discrimination on the Basis of Sex: An Evolving Norm of Customary International Law?

The present chapter attempted to relate chronologically the various stages through which the UN human rights system has passed in evolving the conceptual parameters of women's human rights. It also presented a survey of some human rights documents emanating from Muslim forums and writers The question however, that

arises here is: How far has the norm of non-discrimination on the basis of sex become successfully entrenched within international human rights law? What is the substantive content of women's human rights as a result of the various instruments formulated on the subject, under the auspices of the UN and as a result of inputs from a Islamic perspective? The succeeding paragraphs of this section will address these questions.

The first inference that may be drawn from developments outlined above is that, at the level of international law, an hierarchy of rights has been created in existing human rights discourse. Of the human rights that form *jus cogens*, i.e., a peremptory norm of international law from which no derogation is permissible, genocide, slavery, torture and racial discrimination appear on the list with a certain degree of consistency. But it may be argued that non-discrimination on the basis of sex fails to find the same level of acceptance, leading to the view that *jus cogens* is gendered and that gender is undoubtedly male. Gender discrimination has also been omitted from the identified categories of what constitute contemporary customary international law of human rights. Section 702 of the *Restatement (Third), Foreign Relations Law of the United States*, provides that a state violates international law if,

> "as a matter of state policy, it practices, encourages, or condones conduct that includes genocide, torture, systematic racial discrimination, or a 'consistent pattern of gross violations of internationally recognised human rights."[169]

The following comment is made on the subject of gender discrimination and customary international law: freedom from

> "gender discrimination as a state policy . . . may already be a principle of customary international law."[170]

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169 *Restatement (Third), Foreign Relations Law of the United States*, sec. 702, p. 145.
170 *Ibid.*, note 11 at sec. 702.

Likewise, in describing peremptory norms of international law, the Human Rights Committee in its General Comment 24(52) of the Human Rights Committee (General Comment), non-discrimination on the basis of sex is not included in its list.[171] On the other hand some writers, have also pointed out that the norm of non-discrimination on the basis of sex constitutes a non-derogable right under major human rights instruments, including the ICCPR, the ICESCR, the Women's Convention and the CRC. [172] May it be argued then that the norm of non-discrimination on the basis of sex has become a part of *jus cogens*? This argument is particularly important with regard to the UDHR, considered by many as constituting a norm of customary international law. The problem arises due to the gulf between standards and enforcements of women's human rights contained in the above mentioned documents as this reflects a virtual non-recognition of these rights.[173] If this was not the case, then the question of the extent of legal obligations incurred on the part of States who have not ratified the above mentioned human rights instruments would become, essentially a non-issue, as States are bound by norms of customary international law.

A further hierarchy in international human rights law is created by the perception of rights as belonging to generations, each generation of decreasing value and importance. Thus civil and political rights described as first generation rights are accorded priority over economic, social and cultural rights that constitute second generation rights. Finally, and as some argue, the most controversial, are group rights

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[171] *General Comment on issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocol thereto, or in relation to declarations under article 41 of the Covenant.* CCPR/C/21/Rev.1/Add.6, Paragraph 8. Reproduced in (1995) 15 *HRLJ* 464-467.

[172] A. F. Bayefsky, "General Approaches to the Domestic Application of Women's International Human Rights Law" in R. J. Cook (ed.,) *Human Rights of Women National and International Perspectives* (1994) Philadelphia: University of Pennsylvania Press at p. 352.

[173] *Ibid.*

or solidarity rights as the third generation of rights. Women's status and situation in society is strongly affected when economic, social and cultural rights are relegated to second place, and even denied the status of rights.[174] This is evident in a number of explicit and implicit ways, for instance, in the formulation of civil and political rights vis-à-vis economic, social and cultural rights; enforcement mechanisms at national and international levels; resource allocation to economic, social and cultural rights, and so on. In the Islamic tradition too, hierarchies of rights exist. To recall Esposito's classification of *muamalaat* and *ibadaat* categories of rights, women's rights to equality appear restricted to the *ibadaat* or spiritual, moral and ethical dimensions, whereas, male, adult Muslims are accorded a higher degree of responsibility and rights in the *muamalaat* or socio-economic sphere of life.[175] It may therefore be argued that international human rights law as well as the Islamic tradition create and indeed lend support to an hierarchy of rights, relegating women's human rights to the lower rungs of the rights ladder.

Closely linked to the hierarchy of norms, *jus cogens*, and generational concept of rights, is the public/private dichotomy. One of the main areas of focus within human rights is the division drawn in most 'Western' legal systems between the public and private spheres of society. Moreover, this distinction is central to 'Western' legal thought and philosophical traditions from which it grows. A defining feature of liberal political theory has been commitment to spheres of individual autonomy, free from State intrusion. Thus the law, it has been argued, operates in the public sector of the legal, economic and political spheres, leaving the private sector of

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174 M. Waring, "Gender and International Law: Women and the Right to Development" (1989-90) 12 *AYIL* 177.

175 For details of this categorisation of rights in the Islamic tradition, see discussion in chapter 2 of this study.

home and family, in the confines of which most women operate, unregulated.[176] The reality however, is more nuanced than the straight forward division one is led to believe in. In the present day, it is difficult to believe that the private or domestic sphere goes unregulated. What actually transpires is that in the so-called private sphere of life, which is purportedly immune from law, there is always a selective application of law.[177] In the words of Elizabeth Schneider,

> ". . . this selective application of law invokes 'privacy' as a rationale for immunity in order to protect male domination. For example, when the police do not respond to a battered woman's call for assistance, or when a court refuses to evict her assailant, the woman is relegated to self-help, while the man who beats her receives the law's tacit encouragement and support.. . . The rhetoric of privacy that has insulated the female world from the legal order sends an important ideological message to the rest of society. It devalues women and their functions and says that women are not important enough to merit legal regulation."[178]

Human rights discourse, however, continues to focus primarily on the public and political sphere. The result is that abuses of women's human rights, many of which occur in the private or familial sphere, are excluded from the human rights agenda and perceived as a private, cultural or individual issue and not a political matter justifying state action. Thus, beating a "disobedient" wife has societal sanction in some cultures. Likewise, the practice of female circumcision has only recently been exposed to public attention and to date international human rights organisations have failed to adopt a firm position on this issue.[179] Charlesworth *et al* argue that the

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176 For a very interesting analysis on this subject see, H. Charlesworth, "The Public/Private distinction and the Right to Development in International Law" (1989-90) 12 *AYIL* 190.

177 E. Schneider, "The Violence of Privacy" (1992) 23 *Connecticut Law Review* 973 at 974.

178 *Ibid.*

179 For an illuminating discussion on the subject of female circumcision see generally, K. Boulware-Miller, "Female Circumcision: Challenges to the Practice, as a human rights violation" (1985) 8 *Harvard Women's Law Journal* 155; A. Slack, "Female Circumcision: A Critical Appraisal" (1988) 10 *HRQ* 437; N. Toubia, "Female Genital Mutilation" in J. Peters & A. Wolper (eds.,) *Women's Rights Human Rights. International Perspectives* (1995) New York: Routledge, pp.

marginalisation of women by domestic legal systems is exacerbated not only by the structure of international law, which emphasises the abstract entity of the State, but also by the almost total exclusion of women from its processes.[180] Within the UN system itself, article 2(7) of the UN Charter is a clear indication of the public/private dichotomy in place at the international level. It states that:

> "Nothing contained in the present Charter shall authorise the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any State or shall require the Members to submit such matters to settlement under the present Charter."

Although this provision has been watered down on a number of occasions by the UN, the very principle of the public/private dichotomy enshrined in this article continues to weaken the foundation of human rights documents affecting women emanating from the UN.[181]

On the other hand, the Islamic view of the State mitigates against a public/private dichotomy, as each and every sphere and aspect of life, is regulated by Islamic law, principles and norms on the subject. The concept of autonomy, either at an individual level or for the State is alien to the Islamic tradition.[182] Everyone, is accountable to God for his or her actions. At present however, State practice of Muslim States does not reflect this Islamic concept and women's human rights are violated with impunity in most Muslim jurisdictions in the name of Islam. It may be argued that the 'Western' concept of State sovereignty and an autonomous private

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224-237; A. M. Abdal Haleem, "Claiming Our Bodies and Our Rights: Exploring Female Circumcision as an Act of Violence", M. Schuler (ed.,) *Freedom from Violence* (1992) OEF International.

[180] Charlesworth, Chinkin and Wright, *op. cit.*, n. 15 at p. 625. On this point. also see generally, F. Halliday, "Hidden from international relations: women and the international arena" in R. Grant and K. Newland, (eds.,) *Gender and International Relations* (1991) Buckingham: Open University Press at pp. 158-169. For a detailed exposition on the issue of the public/private sphere, see A. Clapham, *Human Rights in the Private Sphere* (1993) Oxford: Clarendon Press.

[181] S. P. Subedi, "Protection of Women Against Domestic Violence: The Response of International Law" (1997) 6 *EHRLR* 587 at p. 591; R. Coomaraswamy, *Preliminary Report Submitted by the Special Rapporteur on Violence Against Women, Its Causes and Consequences*, presented to the UN Human Rights Commission: UN Doc. E/CN.4/195/42, November 1994, pp. 15-16, para 70.

[182] Moinuddin, *op. cit.*, n. 103, chapter 2.

sphere of life beyond State regulation, presents the major obstacle towards enforcement and implementation of human rights. The Women's Convention, the CRC and the UN Declaration on Elimination of Violence Against Women, has addressed this dichotomy and established that the State in accepting legal obligation for the protection of human rights of its citizens, must move beyond the public sphere and take cognisance of any violations of these rights taking place within the private sphere and by private actors.

Finally, in assessing the reality of equal rights for women in international human rights law, it is proposed to question the meaning, adequacy and efficacy of the term 'equality' with regard to the position of women. It may be argued that interpretations and manifestations of the concept is flawed on a number of counts. Equality is perceived and defined as being like a man. As Catherine Mackinnon writes, "man has become the measure of all things." Further, international human rights as well as domestic legal systems appear to function on the premise that formal equality translates into substantive equality. Nothing could be farther than the truth. People, whether men or women, starting from an inherently unequal position resulting from weak economic, social, health or other factors, will end up being unequal, despite the equality provisions in the laws. A number of questions flow from the above statement. For instance, why and how has the UN human rights movement resulted in marginalising women's rights? Is it because the political and public face of rights so crucial to men, is replicated and placed at a higher level on the hierarchy of rights at the international level? Coupled with this issue, is the lack of similar value placed on rights that are crucial to making women's rights a reality. Thus economic, social and cultural rights, including right to education, health, employment and so on, that can make the difference to women's lives, fail to make an impact in international human rights instruments. Thus, men and women start the race for equal rights from totally different starting points. Having the legal right to education rings hollow if there are no schools for girls and custom requires segregation of male and female children. The

legal right to employment is even more far fetched where basic education and skills necessary for that employment are unavailable to women. Further, if means of safe transport is unavailable from work and back, the right to employment becomes meaningless. And, finally, where hospitals are far away and ones that are within reach do not have female staff, women's rights to access these facilities border on the farcical. Hillary Charlesworth therefore raises a very fundamental question in relation to the human rights of women when she says: "Do legal rights really offer anything to women? Women's disadvantages are often based on structural injustice and winning a case in court will not change this."[183]

The 'equality' concept as pronounced in the non-discriminations articles of the various human rights instruments also fail to take account of the special needs of women. Thus women's needs as pregnant and nursing mothers, or basic carers of family members is thus obscured in the equality debate. Within the Islamic tradition, child bearing and rearing is considered a joint parental as well as social responsibility, and the need to provide help and support to women in child bearing and rearing situations is emphasised.[184] Further, although controversial in feminist discussions, mothers are under no obligation to breast feed or look after their children should they so choose. The father is under a legal obligation to provide financial and other support to a woman who decided to nurse their child.[185] Likewise, household work must be remunerated and taken account of in the event of a dissolution of the marriage contract. The latest legislation in Iran provides an example of this Islamic norm.

In summing up this analysis of the development of the international norm of non-discrimination on the basis of sex, it has to be admitted that the journey on the road to equal rights for men and women within the UN system has indeed come a long way from 1945. From modest beginnings in the UN Charter and the UDHR, the

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[183] Cited in R. Cook, "Introduction: The Way Forward" in R. Cook (ed.,) *Human Rights of Women. National and International Perspectives* (1994) Philadelphia: University of Pennsylvania Press at p. 4.

[184] S. S. Ali & B. Jamil, *The United Nations Convention on Rights of the Child, Islamic Law and Pakistan Legislation* (1994) Peshawar: Shaheen Printing Press, chapter 3.

[185] *Ibid.*

ICCPR and the ICESCR expanded on the concept. The decades of the seventies, eighties and nineties lent tremendous impetus to these initiatives and women's human rights are incapable of being ignored any more. The UN efforts were greatly facilitated by the NGO community world wide though timely interventions, particularly at the four world conferences on women. Each conference expanded the boundaries of what was the substantive content of women's human rights to reach in the final years of the 20th century, a point where virtually every aspect of women's lives are touched by the rights discourse. Although many problems persist, the major ones relating to state sovereignty and weak and ineffective enforcement mechanisms, yet a beginning has been made. Contributions from an Islamic perspective have been couched in terms of 'protective' rights for women, arguably on the basis that 'real' equality is better achieved by advancing women's rights through protective measures rather than pronouncements of equality that might leave them with little substantive equality. Finally, Muslim scholars and intergovernmental forums alike, in pronouncements on women's human rights, are careful to avoid the term 'equality'; 'Complementarity' and 'mutuality' appears the catchword in these quarters. An ambivalence towards instruments propounding 'equality' is evident in the response of Muslim States towards women's rights treaties including the Women's Convention. Chapter 7 proposes to analyse some of these issues.

CHAPTER VII

RESPONSE OF MUSLIM STATES TO INTERNATIONAL HUMAN RIGHTS INSTRUMENTS AFFECTING WOMEN: A DISCUSSION IN THE LIGHT OF RESERVATIONS TO THE WOMEN'S CONVENTION

7.1 Introduction

One of the most serious problems encountered in effective implementation of human rights treaties, is the vast number of reservations[1] and declarations[2] entered by States parties. This is particularly true of the Women's Convention that appears to be the most widely reserved human rights treaty today.[3] The number of far-reaching reservations entered to this treaty has been the subject of a global debate and the Women's Convention is seen as the most 'political' of all the human rights instruments.[4] At the same time, reservations to human rights treaties do not simply pose legal questions. Affecting as they do, interests of the most vulnerable and

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1 A definition of 'reservation' may be found in article 2(1)(d) of the Vienna Convention on the Law of Treaties, 1969 which states: "'reservation' means a 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 modify the legal effect of certain provisions of the treaty in their application to that State."

2 Although a fine distinction may be drawn between the terms 'declaration' and 'reservation', yet for the purposes of the present study, both are being discussed under the heading of reservations. For a detailed discussion on the distinctions and implications of the two terms see, F. Horn, *Reservations and Interpretative Declarations to Multilateral Treaties* (1988) Amsterdam: I. Sinclair, *The Vienna Convention on the Law of Treaties* (1984) 2nd edn., Manchester: Manchester University Press. For a summarised discussion, see A. Haugestad, *Reservations to the United Nations Women's Convention - with Special Focus on Reservations submitted by Muslim Countries* (1995) Studies in Women's law no. 39, Oslo: Institute of Women's Law.

3 As of 28 February 1998, 51 reservations and declarations had been entered to various provisions of the Women's Convention. The texts of reservations, declaration and objections with respect to human rights treaties deposited with the Secretary-General of the United Nations are published in the annual volume, "*Multilateral Treaties Deposited With the Secretary-General*", U. N. Doc. ST/LEG/SER.E/15 (1997). Updated versions of this material is published on the internet, at http://www/un.org/depts/treaty/ .

4 L. A. Rehof, *Guide to The Travaux Preparatoires of the United Nations Convention on the Elimination of All Forms of Discrimination Against Women* (1993) Dordrecht: Kluwer Academic Publishers, at p. vii.

marginalised groups in society such as women and children, they also raise very pertinent moral and social issues.[5] Reservations and declarations are also reflective of State practice and provide evidence of a State's response to norms espoused in a particular treaty. The purpose of this chapter is to engage in an analysis of reservations to the Women's Convention entered by Muslim States parties, assessing the extent to which these are indicative of an 'operative' Islamic law affecting women's human rights in international law.

The reaction of Muslim States to the Women's Convention has been very strong. There is an assertion by these States that in their view, international human rights treaties are subservient to the overriding supremacy of Islamic law; hence entering of reservations declaring that position.[6] It is important to make the point here that although many States have entered reservations to the Women's Convention, Muslim States are distinctive in identifying the religion of Islam as the main justificatory logic for adopting this particular course of action.[7]

Viewed from this perspective, we may pose the question whether these reservations are indeed indicative of a wider ideological conflict between women's

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5 T. van Boven, foreword in L. Lijnzaad, *Reservations to UN-Human Rights Treaties. Ratify and Ruin?* (1995) Dordecht: Martinus Nijhoff Publishers at p. v.

6 Lijnzaad, *ibid.*, Rehof, *op. cit.*, n. 4; B. Clark, "The Vienna Convention Reservations Regime and the Convention on Discrimination Against Women" (1991) 85 *AJIL* pp. 281-321; R. J. Cook, "Reservations to the Convention on the Elimination of All Forms of Discrimination Against Women," (1990) 30 *VJIL* pp. 643-716; J. Connors, "The Women's Convention in the Muslim World" in M. Yamani (ed.,) *Feminism and Islam. Legal and Literary Perspectives* (1996) Reading: Ithaca Press pp. 351-366; C. Chinkin, "Reservations and Objections to the Convention on the Elimination of All Forms of Discrimination against Women" in J. P. Gardner (ed.,) *Human Rights as general Norms and a State's Right to Opt Out. Reservations and Objections to Human Rights Conventions* (1997) London: The British Institute of International and Comparative Law; S. S. Ali and S. Mullally, "Women's Rights and Human Rights in Muslim Countries: A Case Study" in H. Hinds, A. Phoenix & J. Stacey (eds.,) *Working Out. New Directions for Women's Studies* (1992) London: Falmer Press pp. 113-123; S. S. Ali, *A Comparative Study of the United Nations Convention on the Elimination of All Forms of Discrimination Against Women, Islamic Law and the Laws of Pakistan* (1995) Peshawar: Shaheen Printing Press.

7 See "*Multilateral Treaties*", *op. cit.*, n. 3.

human rights as enunciated in the Islamic tradition, and in the human rights instruments formulated under the auspices of the United Nations. On the other hand, as is evident from the discussion in chapter 2 of this study, the concept of women's human rights in Islam is not entirely irreconcilable with international human rights norms on the subject such as those expressed in the Women's Convention. Furthermore, all Muslim States have not entered reservations in the name of Islam. How then, might one read the reservations entered to the Women's Convention by Muslim States Parties? How representative are these pronouncements of the theoretical as well as factual situations of Muslim women's positions in the reserving countries? What are the motivating forces and factors behind decisions to reserve a country's position on any provision of a human rights treaty. Should reservations and indeed, ratification of a human rights treaty itself be seen in the wider political and socio-economic perspective of domestic and/international context? And finally, do States ratify human rights treaties affording protection to individuals as a matter of real commitment or do they usually ratify these at 'politically opportune' moments?[8]

7.2 The Reservations Regime of Multilateral Treaties and its Application to Human Rights Instruments: An Overview of the Contemporary Position in International Law

Ruda's oft-quoted phrase used by writers on reservations sums up the difficulties inherent in a discussion on the subject. He is of the view that "The question of reservations has been one of the most controversial subjects of contemporary

[8] For example, a number of States including Pakistan and Malaysia signed the Women's Convention in the months leading to the Fourth World Women Conference in Beijing 1995.

international law."[9] This controversy is particularly discernible when dealing with reservations to human rights instruments.[10]

Multilateral treaty regimes, including reservations entered by States parties at the time of ratification are presently governed by the Vienna Convention on the Law of Treaties, 1969 (VCLT).[11] Traditionally, a reservation made subsequent to the conclusion of a treaty required the unanimous acceptance of all other treaty parties, unless the treaty otherwise provided.[12] In the decades of the nineteen fifties and sixties however, a view advancing the importance and desirability of widespread participation in treaties gained currency.[13] This led to a recognition for the need to evolve a flexible system whereby consent of all contracting States to reservations entered by co-contractants was not considered essential. It was this view which ultimately prevailed and came to be recognised as customary law on the subject.[14]

The *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* (The Genocide Case),[15] marks the first major departure from the unanimity rule and thus an important juncture in the development of contemporary theory on reservations to multilateral treaties. This case was the result of a difference of opinion arising about reservations to one of the earliest human rights treaties

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9 J. M. Ruda, "Reservations to Treaties" (1975) 146 *Recueil des Cours III* 95-218 at 101. Cited by Lijnzaad, *op. cit.*, n. 5 at p. 7.

10 See generally on this point, C. Redgwell, "Reservations to Treaties and Human Rights Committee General Comment No. 24 (52)" (1997) *ICLQ* 390-412 where she comments on the challenge mounted by the Human Rights Committee to what it perceives in the Vienna Convention on the Law of Treaties, 1969 as an unsatisfactory regime for human rights instruments.

11 U.K.T.S. 58 (1980), Comnd. 7964; (1969) *I.L.M.* 679.

12 C. Redgwell, "Universality or Integrity? Some reflections on Reservations to General Multilateral Treaties." (1993) 64 *BYIL* 245-282 at 246. For a comprehensive discussion on the subject I. Sinclair, "Vienna Conference on the law of treaties" (1970) 19 *ICLQ*; Sinclair, *The Vienna Convention, op. cit.*, n. 2. For a recent account see, Lijnzaad, *op. cit.*, n. 5 in Ch. 2.

13 Redgwell, "Universality or Integrity?", *op. cit.*, n. 12 at 247; Haugestad, *Reservations to the United Nations Women's Convention, op. cit.*, n. 2 in chapter 3.

14 *Ibid.*

15 ICJ Reports, 1951, p.15.

emanating from the United Nations, namely the Convention on the Prevention and Punishment of the Crime of Genocide (the Genocide Convention).[16] The Advisory Opinion issued by the International Court of Justice (ICJ) declared that "an objection to a minor reservation" should not have the effect of invalidating the ratification.[17] However, the ICJ also ruled that "The object and purpose of the Convention limit the freedom of making reservations and that of objecting to them."[18] This rule along with other legal principles concerning the effect of reservations, was later codified in the VCLT.[19]

It has been argued that making reservations to multilateral treaties is a well-accepted practice in international law.[20] It facilitates negotiation of treaties in an international context where State interests and sovereignty are jealously guarded, because States know that they may eventually accept an instrument without binding themselves to every single provision.[21] It also encourages ratification, because it is possible for a State to avoid assuming obligations in conflict with certain aspects of its

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16 Adopted by General Assembly Resolution 260 A (III), 9 December 1948; entered into force 12 January 1951. 78 U.N.T.S 277. The Genocide Convention attracted a large number of reservations; particularly its article IX regarding which 23 States had entered reservations; hence the need for an Advisory Opinion from the ICJ.

17 The Genocide Case, ICJ, Rep. 1951 at p. 24.

18 *Ibid.*

19 Articles 19-23 of the said treaty.

20 W. A. Schabas, "Reservations to the Convention on the Rights of the Child" (1996) Vol. 18 *HRQ* 472 at p. 473. A vast amount of literature has emerged in the past few decades on the subject. On reservations generally, see Horn, *op. cit.*, n. 2; D. R. Anderson, "Reservations to Multilateral Conventions -- A Re-examination, (1964) Vol. 13 *ICLQ* 450; D. W. Bowett, "Reservations to Non-Restricted Multilateral Treaties" (1976-77) 48 *BYIL* 67; M. Coccia, "Reservations to Multilateral Treaties on Human Rights" (1985) Vol. 15 *Cal. W. International Law Journal* 1; G. Fitzmaurice, "Reservations to Multilateral Conventions" (1953) 2 *ICLQ* 1; J. K. Gamble Jr., "Reservations to Multilateral Treaties -- A Macroscopic View of State Practice" (1980) Vol. 74 *AJIL* 372; D. N. Hylton, "Default Breakdown: The Vienna Convention on the Law of Treaties' Inadequate Framework on Reservations" (1994) Vol. 27 *Vanderbilt Journal of Transnational Law* 419; A. Pellet, *First Report on the Law and Practice Relating to Reservations to Treaties*, Preliminary Report, U.N. Doc. A/CN.4/470 (1995); D. Shelton, "Reservations to Human Rights Treaties" (1983) *Canadian Human Rights Yearbook* 205;

21 Schabas, *op. cit.*, n. 20 at p. 473; Rehof, *op. cit.*, n. 4 at p. 2; Lijnzaad, *op. cit.*, n. 5 at pp. 77-78.

internal legislation.[22] The chairpersons of United Nations treaty bodies have also recognised at their 1992 meeting that "there is an important and legitimate role for reservations to treaties."[23]

But in recent years with the increasingly expanding domain of human rights treaties, both regionally and internationally, there arises the question of whether the same treaty regime (with regard to reservations) for other multilateral treaties is adequate for human rights treaties. The purpose of multilateral treaties determines interstate relations, but the purpose of human rights treaties is protection of individuals and not the interest of States. Thus by partially limiting the scope of a human rights instrument, reservations detract from this purpose.[24] There does appear a distinct view among some writers on the subject that reservations to human rights treaties should not be possible.[25] Coccia's remarks are an example, "... the terms 'reservation' and 'human right' appear to contradict one another."[26] The widespread use of reservations in human rights treaties has frequently been criticised for weakening the overall effectiveness of the proposed norms which, by and large, are expressed as minimum standards.[27] At the same time, a point to be noted here is that

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[22] *Ibid.* For a recent and interesting article on the importance of understanding obstacles that can legitimately stand in the way of a State's implementation of human rights norms, see, J. McBride, "Reservations and the Capacity to Implement Human Rights Treaties" in P. Gardner, (ed.,) *Human Rights as General Norms And a State's Right to Opt Out* (1997) London: British Institute of International and Comparative Law at pp. 120-184.

[23] Effective Implementation of International Instruments on Human Rights, Including Reporting Obligations Under International Instruments on Human Rights, U.N. Doc. A/47/628, section 60 (1992).

[24] Schabas, *op. cit.*, n. 20 at p. 473.

[25] Lijnzaad, *op. cit.*, n. 5 at p. 77.

[26] M. Coccia, "Reservations to Multilateral Treaties on Human Rights" (1985) 15 *Cal. W. International Law Journal* 1 at 16.

[27] Compared to multilateral treaties in general, human rights treaties have a very high rate of reservation. See Clark, *op. cit.*, n. 6 at pp. 316-320. On this point also see, Schabas, *op. cit.*, n. 20 at p. 473; Cook, *op. cit.*, n. 6.

prohibitions to reservations are rare in human rights treaties and thus by inference, permissible.[28]

What then, is the appropriateness for human rights treaties of the general regime in respect of reservations to treaties embodied in articles 19-23 of the VCLT?[29] There is increasing concern that the flexible regime available for reservations under the VCLT, the basic purpose of which was to facilitate widespread participation in treaties, has achieved this goal at the expense of the integrity of treaties which are subject to sweeping reservations.[30] These articles are also under review by the International Law Commission (ILC), which took up the topic of reservations to treaties in 1994. Professor Alain Pellet of France was appointed as Special Rapporteur who submitted two reports but without challenging the efficacy of articles 19-23 of the VCLT.[31]

A challenge to the present law governing reservations to human rights treaties has however been mounted by the Human Rights Committee (HRC) in its General

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[28] Two examples predating the Vienna Convention are article 9 of the 1956 Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery, 266 U.N.T.S. 40 (1957), and article 9 of the 1960 Convention Against Discrimination in Education, 429 U.N.T.S. 93 (1962). ILO Conventions contain no reservations clause, but it is accepted ILO practice that reservations are prohibited. See M. J. Bowman and D. J. Harris, *Multilateral Treaties: Index and Current Status* (1984), p. 2.

[29] U.K.T.S. 58 (1980), Comnd. 7964; (1969) 8 *I.L.M.* 679. Redgwell, *op. cit.*, n. 10 at p. 392.

[30] For a very incisive analysis of this choice see, Redgwell, *op. cit.*, n. 12. For more recent work on the subject see, Lijnzaad, op. cit., n. 5; P. Gardner, (ed.,) *Human Rights as General Norms And a State's Right to Opt Out* (1997) London: British Institute of International and Comparative Law.

[31] The second report prepared by Pellet for the 48th session of the ILC, explicitly addresses the question of reservations to human rights treaties. In particular, he considers whether the general rule on reservations to treaties are applicable to all treaties regardless of their object. Pellet stresses the need to urgently examine the issue in the light of general international law principles. His report ultimately endorses the appropriateness of the general regime for all types of treaties and the balance achieved therein between flexibility encouraging participation and the integrity of the treaty text. This endorsement appears in line with the ILC's position on reservation to treaties indicating that it "is aware of the need not to challenge the regime established in articles 19-23 of the 1969 Vienna Convention on the Law of Treaties". See, *Report of the International Law Commission on the Work of its Forty-Eighth Session*. 6 May-26 July 1996.

Comment.[32] Redgwell describes it as "a bold step towards the articulation of a new and separate reservations regime in respect of human rights treaties".[33] The General Comment identifies what it perceives as a problem and the operational and legal difficulties of resolving it.[34] It asserted that it is for the HRC to determine the compatibility of reservations with the object and purpose of the ICCPR[35] and also delineates categories of reservations likely to raise concern in this context.[36] Although the General Comment met with strong criticism from countries such as the UK and the US which accused the HRC of attempting to establish "a different legal regime to regulate reservations to human rights treaties",[37] it does provide a useful guide to States in formulating reservations and as Higgins points out, "should assist, rather than alarm, States parties who wish to ratify the Covenant but have genuine domestic considerations to take account of."[38] It may be argued that the General Comment has brought the controversial issue of permissible reservations to human rights treaties to the fore, making the point that international law is not a static body of rules but a constantly evolving and dynamic process of norm-building.[39]

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32 *General comment on issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocol thereto, or in relation to declarations under article 41 of the Covenant.* CCPR/C/21/Rev.1/Add.6 adopted by the Committee at its 1,382nd meeting (52nd session) on 2 November 1994. Reproduced in (1995) 2 *IHRR* 10-15 and in (1995) 15/11-12 *HRLJ* 464-467.

33 Redgwell, *op. cit.*, n. 10 at p. 392.

34 R. Higgins, Introduction in Gardner, *op. cit.*, n. 30 at p.xvii. Higgins and Meron have described the current practice of reservations as unsatisfactory. See R. Higgins, "Human Rights: Some Questions of Integrity" (1989) 52 *MLR* 1 at 11; T. Meron, *Human Rights and Humanitarian Norms as Customary Law* (1989) pp. 16-17. Also see Shelton, *op. cit.*, n. 20 at p. 228.

35 See General Comment, at paragraph 18. This is a responsibility not assumed by other UN human rights treaty bodies such as CEDAW or CERD. See Redgwell, *op. cit.*, n. 10 at p. 392.

36 *Ibid.*, General Comment, paragraphs 8-12.

37 UK obseervations on General Comment 24, GAOR, 50th session, Supplement No. 40 (A/50/40), Annex VI, Section B.

38 Higgins, in Gardner, *op. cit.*, n. 30 at p. xvii.

39 Cf. the US comment that the Human Rights Committee in adopting the General Comment 'appears to have so little respect for established legal principle'.

In the light of the discussion in the preceding paragraphs, the question that must now claim our attention is that of reservations formulated to the Women's Convention by Muslim States parties and its implication for women's human rights. There is no doubt that the General Comment may be usefully employed as operational guidelines in addressing reservations by other treaty bodies including the Committee on the Elimination of All Forms of Discrimination Against Women (CEDAW), which is by all accounts the human rights treaty most plagued with reservations At the same time it is important to make the distinction that in delineating peremptory norms, the HRC did not include non-discrimination on the basis of sex in its list.[40] Therefore, when embarking on an analysis of reservations to substantive provisions of the Women's Convention, this lack of consensus on the part of the international community and the international human rights discourse needs once more, to be taken on board.

7.3 Reservations to the Women's Convention: An Overview of the Debate in the Muslim Context

The implementation of secular human rights standards presents particular difficulties in Muslim States where most people perceive international human rights

[40] Paragraph 8 of the General Comments states that, "Reservations that offend peremptory norms would not be compatible with the object and purpose of the Covenant. Although treaties that are mere exchanges of obligations between States allow them to reserve *inter se* application of rules of general international law, it is otherwise in human rights treaties, which are for the benefit of persons within their jurisdiction. Accordingly, provisions in the Covenant that represent customary international law (and *a fortiori* when they have the character of peremptory norms) may not be the subject of reservations. Accordingly, a State may not reserve the right to engage in slavery, to torture, to subject persons to cruel, inhuman or degrading punishment, to arbitrarily deprive persons of their lives, to arbitrarily arrest and detain persons, to deny freedom of thought, conscience and religion, to presume a person guilty unless he proves his innocence, to execute pregnant women or children, to permit the advocacy of national, racial or religious hatred, to deny to persons of marriageable age the right to marry, or to deny to minorities to enjoy their own culture, profess their own religion, or use their own language."

instruments as reflections of 'Western' values and norms and hence both culturally and religiously alien. The term 'secular' in most Muslim societies is seen as being synonymous not only with 'unIslamic' but also 'Western'. At the governmental level, the degree of opposition to international human rights norms is determined to a large extent by ideological leanings of the particular Muslim State as articulated by the government in power, that may or may not be representative of the people's view on Islam.[41] An-Naim makes a particularly incisive point in this regard. He states that:

> "It is important to note that Islamic norms may be more influential at an informal, almost subconscious psychological level than they are at the official legal or policy level. One should not therefore underestimate the Islamic factor simply because the particular state is not constituted as an Islamic state, or because its legal system does not purport to comply with historical Islamic law, commonly known as *Sharia'*. Conversely, one should not overestimate the Islamic factor simply because the State and legal system are publicly identified as such. This is particularly important from a human rights point of view where underlying social and political attitudes and values may defeat or frustrate the declared policy and formal legal principles."[42]

Thus, as mentioned in chapter I of this study, countries like Iran reject unequivocally and completely, any notion of 'secular' human rights, whereas others such as Indonesia, Turkey and Tunisia, to mention a few, adopt a more compromising stance towards international human rights documents. These positions at international law are not however, indicative of the degree of 'Muslimness' of the people of these countries. Until very recently the majority of Muslim countries were reluctant to ratify the Women's Convention because they perceived it as a secularisation of women's rights. It was argued that the status of women in Islamic societies is strictly regulated

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[41] A. A. An-Naim, "Islam, Islamic Law and the Dilemma of Cultural Legitimacy for Universal Human Rights" in C. E. Welch, Jr., & V. A. Leary (eds.,) *Asian Perspectives on Human Rights* (1990) Boulder, CO: Westview Press at pp. 31-32.

[42] *Ibid.*

by Islamic law and cannot, it is claimed, be included in a secular human rights regime.[43]

Sharia', or principles of Islamic law, however, does not form a single coherent body of law. The corpus of *Sharia'* existing today is a collection of individual juristic opinions, and considerable differences continue to exist among jurists as to its requirements; hence the multiplicity of formulations on, among other subjects, women's human rights in Islam.[44] It may be argued that while *Sharia'* represents the human endeavour to understand and implement the core values and principles specifically referred to in the *Quran,* and has a religious nature, it is not immutable or unchangeable as is the *Quran* itself.[45] The true essence of the *Sharia'* is brought out by Parwez who describes it thus:

> "The Sharia refers to a straight and clear path and also to a watering place where both humans and animals come to drink water, provided the source of water is a flowing stream or spring".[46]

It is, therefore, as Hassan so forcefully argues:

> "no slight irony and tragedy that the Sharia, which has the idea of mobility built into its very meaning, should have become a symbol of rigidity for so many in the Muslim world.[47]

Thus, restrictive and literal interpretation of the religious text in Islam became the norm when the 'doors of *ijtihad*' were declared closed forever.[48] Women became

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[43] For text of reservations to the Women's Convention see, *Multilateral Treaties, op. cit.,* n. 3 at pp. 168-186.

[44] A. A. An-Naim, *Toward an Islamic Reformation* (1990) Syracuse: Syracuse University Press at p. 185.

[45] *Ibid.*

[46] G. A. Parwez, *Lughat-ul-Quran,* (1960) Lahore at p. 941.

[47] R. Hassan, "The Role and Responsibilities of Women in the Legal and Religious Tradition of Islam", paper presented at a biannual meeting of a Trialogue of Jewish-Christian-Muslim scholars on 14 October 1980 at the Joseph and Rose Kennedy Institute of Ethics, Washington, D.C., USA at p. 4.

[48] A. Rahim, *Muhammadan Jurisprudence* (1995) Lahore: Mansoor Book House at pp. 142-148.

the greatest victims of the abandonment of the *Sharia'* as an emancipatory and creative force since in the area of family law, which affected them acutely, need for reform or accommodation was neither felt nor forced. On the other hand, in the male and 'public' sphere, including structures of governance and financial matters, the pressures of a changing world forced modification in traditional Islamic norms.

A further element arising in the discussion of reservations to the Women's convention by Muslim States is the cultural influences on the perception of women's rights in Islam. Discussion of *Sharia'* would therefore, be incomplete without appreciating the impact of the more potent force of Islam as a cultural reality and a strong motivating force behind the rejection of international human rights obligations by Muslim States.[49] Since its initial phenomenal expansion within the first few decades of its existence, Islam has tended to incorporate and assimilate the social customs and institutions of the various regions and communities which converted to Islam.[50] In these societies, religion and culture interacted, creating a blend of 'cultural Islam,' the manifestations of which are evident in the diverse cultural patterns of various Muslim societies. In the Kordofan and Sarfur regions of the Sudan, for example, women enjoy relative autonomy as independent agricultural producers. According to Badri, some women in these regions own land, and even act as tribal chiefs; in some communities, women also have the same inheritance rights as men. Although Muslim, these tribes do not follow the *Sharia'* guidelines on inheritance which equate a man with two

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[49] Cf. Chapter 5 of this study.

[50] See for instance the practice of female circumcision in Egypt, the Sudan and other African countries; denial of inheritance rights to women, requirement of covering the face for women when venturing outside the home, accepting money as bride-price for a woman, accepting a woamn in exchange for resolving a blood feud and so on. Cf. the discussion on customary practices affecting women in chapter 5 of this study.

women.[51] In contrast, however, in some areas of Pakistan women are completely debarred from inheriting, particularly land.[52] Female circumcision, practised in Sudan, Egypt and some other African countries is virtually unknown in Pakistan. The Daudi Bohras - an Ismaili Shia sect - a community of approximately half a million, settled in port towns of Karachi (Pakistan) and Bombay (India) are exceptions in this regard. The argument of 'cultural Islam' with regard to female circumcision is further strengthened by the Egyptian connection of the Bohra community.[53] The varying shades of interpretation of *Sharia'* result in divergent views on what constitute 'Islamic' values and norms, thus paving the way for national governments to use religion as an escape route from domestic and international legal obligations.

With the above background of the diversity of *Sharia'* and 'cultural Islam' in mind, it is now proposed to analyse the reservations entered by Muslim States Parties to the Women's Convention and to evaluate their implications for women's human rights.

7.3.1 Reservations to the Women's Convention by Muslim States Parties: An Analysis

It has consistently been argued in this study that perceptions of what constitutes 'Islamic' norms and what falls outside its ambit varies widely, particularly where women's rights are concerned. Reservations formulated by Muslim States

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[51] H. K. Badri, *Women's Movement in Sudan* (1984) Khartoum: Khartoum University Press at pp. 69-71.

[52] In particular, the North West Frontier Province and Baluchistan province of Pakistan. Rural Sindh and rural Punjab also practice similar norms.

[53] For a discussion on the practice of female circumcision among Bohras see R. Ghadially, "All for "*izzat*". The practice of Female Circumcision among Bohra Muslims in India" in M. Helie-Lucas and H. Kapoor (eds.,) *Dossier 16*, Grabels: Women Living Under Muslim Laws pp. 13-20.

parties to the Women's Convention bear strong evidence of the disparate positions adopted by these jurisdictions on the subject.

In the years immediately following the coming into force of the Women's Convention, very few Muslim States[54] were parties to the Women's Convention.[55] This situation has improved considerably and presently forty Muslim jurisdictions have ratified and one country - Afghanistan - has signed and not ratified the Women's Convention.[56] Of these countries, the signature and ratification of Algeria, Bangladesh, Egypt, Iraq, Jordan, Kuwait, Libyan Arab Jamahiriya, Malaysia, Maldives, Morocco, Pakistan, Tunisia and Turkey are subject to substantial reservations. Albania, Azerbaijan, Benin, Bosnia & Herzegovina, Burkina Faso, Cameroon, Chad, Comoros, Gabon, Gambia, Guinea, Guinea Bissau, Mali, Mozambique, Nigeria, Senegal, Sierra Leone, Surinam, Tajikistan, Togo, Turkmenistan, Uganda and Uzbekistan have become party to the Women's Convention without entering any reservations while the reservations of Indonesia and Yemen are confined to article 29(1) relating to the settlement of disputes which may arise concerning the application or interpretation of the Women's Convention.[57]

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[54] The identifying criteria for Muslim countries are many and varied. One criteria is to consider those countries where Muslims constitute over 70% of the total population as Muslim countries. For statistics, see R. V. Weeks (ed.), *Muslim Peoples: A World Ethnographic Survey*, 2nd ed., (1984) Westport CT: Greenwood Press at pp. 882-911. In this study, the list of member States of the Organisation of Islamic countries (OIC), as the determining criteria for identifying States with large numbers of Muslim populations has been used.

[55] Ali & Mullally *op. cit.*, n. 6 at p. 117, cite ten Muslim States who have ratified the Women's Convention and one that has signed it.

[56] Albania, Algeria, Azerbaijan, Bangladesh, Benin, Bosnia & Herzogovnia, Burkina Faso, Cameroon, Chad, Comoros, Egypt, Gabon, Gambia, Guinea, Guinea-Bissau, Indonesia, Iraq, Jordan, Kuwait, Kyrgyzstan, Lebonan, Libyan Arab Jamahiriya, Malaysia, Maldives, Mali, Morocco, Mozambique, Nigeria, Pakistan, Senegal, Sierra Leone, Suriname, Tajikistan, Togo, Tunisia, Turkey, Turkmenistan, Uganda, Uzbekistan and Yemen. Muslim countries that have so far refrained from signature/ratification of the Women's Convention include, Bahrain, Brunei, Djibouti, Mauritania, Niger, Oman, Qatar, Iran, Kazakistan, Saudi Arabia, Somalia, Sudan, Syria, and the United Arab Emirates. Updated information on signatures, ratifications and accessions are available on the internet. A useful website is gopher://gopher.un.org:70/00/ga/cedaw/RATIFICA

[57] *Multilateral Treaties, op. cit.*, n.3.

7.3.1.1 Categories of reservations to the Women's Convention: General, Specific and Reservation based on repugnancy to Islamic law and *Sharia'*

Reservations entered by Muslim States to the Women's Convention may be categorised as: general, specific, and reservations justified on the basis of repugnancy to Islamic law and *Sharia*. They do not form distinct categories and, as will be evident from the discussion below, have been used in conjunction with each other.

(i) General Reservations

General reservations may be described as ones entered using justifications of supremacy of religion, the country's constitution, cultural practices, and other laws encompassing the entire ambit of substantive rights protected in the Women Convention. These reservations of a general nature are considered the most controversial, over-arching and amounting to negating any treaty obligation undertaken. The reservations entered by Algeria, Bangladesh, Egypt, Iraq, Libya, Malaysia, Maldives, Morocco, Pakistan, Tunisia and Turkey may be termed general since they impact on the overall obligations undertaken by States under the treaty.[58]

(ii) Specific Reservations

Entered to specific articles of the treaty, these are considered clearer and in some cases less objectionable than general reservations. But it may be argued that 'surgical' reservations of this kind targeting a number of articles of a treaty may have a cumulative effect of impairing a treaty beyond redemption. The VCLT provides only for a test of the compatibility of the reservation with the object and purpose of the treaty and does not explicitly contemplate the cumulative effect of multiple 'surgical' reservations. Muslim States have entered reservations against particular substantive

[58] *Ibid.*

provisions of the Women's Convention including, articles: 2, 5, 7, 9, 11, 13, 15, 16, 29(1).[59]

(iii) Reservations Justified on the Basis of Repugnancy to Islamic Law and *Sharia'*

As indicated earlier, reservations to the Women's Convention have been entered by a vast number of States, yet what sets Muslim States apart from the rest of the reserving States is that these have specifically cited the religion of Islam as the motivating force behind these reservations. States that have used adherence to Islam as justification for entering reservations to the Women's Convention include Bangladesh, Egypt, Iraq, Kuwait, Libya, Malaysia, Maldives, Morocco. Tunisia and Pakistan have not expressly cited Islam as reason for reserving their position, but, as will be seen in the discussion below, it may be argued that the religious argument may well be employed/inferred from the text of these general reservations.[60]

An important point of our discussion in the analysis of reservations by countries with vast Muslim populations is the differing justifications for entering reservations. Of the countries that have entered reservations, eight countries, Bangladesh, Egypt, Iraq, Kuwait, Libya, Malaysia, Maldives and Morocco make their reservations to the Women's Convention on the basis of conflict with *Sharia'*, whilst the others, namely Algeria, Indonesia, Jordan, Pakistan, Turkey, Tunisia and Yemen, do not expressly mention it. The reason for this lack of consistency in invoking *Sharia'* is due to the absence of a unified interpretation of religious law, which in turn increases the discretion of individual States Parties. There is considerable scope for

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[59] *Ibid.*
[60] *Ibid.*

differing judgements as to the nature and extent of conflict between *Sharia'* and the requirements of the Women's Convention. Libya, for example, has not entered reservations to specific articles of the Convention, but rather has entered a general reservation, stating that accession to the Convention: "cannot conflict with the laws on personal status derived from the Islamic Sharia."[61] No indication is given as to which provisions it considers to be in conflict with the requirements of the *Sharia'*, which permits a substantial degree of discretion to be retained by the state in the implementation of the Convention. Likewise, the Maldives entered a general reservation to the Women's Convention in the name of Islamic *Sharia'* stating that:

> "The Government of the Republic of Maldives will comply with the provisions of the Convention, except those which the Government may consider contradictory to the principles of the Islamic Sharia upon which the laws and traditions of the Maldives are founded...."[62]

Pakistan, on the other hand does not expressly invoke Islamic law in its declaration, stating instead that:

> "The accession by [the] Government of the Islamic Republic of Pakistan to the [said Convention] is subject to the provisions of the Constitution of Pakistan."[63]

It is also pertinent to make the point that the most reserved articles relate to rights of women in the area of family law, which has always been jealously guarded by Muslim States as being regulated by Islamic law, whereas other fields of life including the running of governments and financial institutions are not so guarded against

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[61] *Ibid.*, at p.175.
[62] *Ibid.*, p. 173.
[63] *Ibid.* A single reservation was also entered which states that: "The Government of the Islamic Republic of Pakistan declares that it does not consider itself bound by paragraph 1 of article 29 of the Convention."

'infiltration' of 'secular' laws. At the same time, reservations have been entered against certain articles, e.g., provisions granting equal nationality rights to men and women, that are clearly against the letter and spirit of Islam.

7.3.1.2 The 'Most Reserved' Articles of the Women's Convention by Muslim States: 'Islamic' or 'Secular' Reservations?

Although the reservations to the Women's Convention are wide and varied, it is proposed to address the four most reserved articles[64] for analysis in this section. **Article 2** is one of the basic provisions of the Women's Convention and contains the actual framework for the implementation of the Convention. Pursuant to this provision States parties agree to "pursue by all appropriate means and without delay a policy of eliminating discrimination against women."[65] Algeria, Bangladesh, Iraq, Egypt, Libya, and Malaysia have entered reservations to Article 2. By reserving their position regarding this article, it becomes very uncertain what obligations, if any, a State Party is undertaking. The good faith of such States must also be brought into question because, in the final analysis, they do not incur any additional obligations by becoming party to the Women's Convention on such terms.

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64 Article 2, 9, 15 and 16 of the Women's Convention.

65 Article 2 provides 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 realisation 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 act in conformity with this obligation; e. to take all appropriate measures to eliminate discrimination against women by any person, organisation 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; g. to repeal all national penal provisions which constitute discrimination against women.

The Algerian[66] and Iraqi[67] reservation to article 2 does not invoke *Sharia'* as the reason for reserving its position whereas Bangladesh, Egypt, Libya, and Malaysia specifically mention Islamic law and *Sharia'* as the cause for adopting such a position. Bangladesh formulates its reservation to this article in the following words:

> "The Government of the People's Republic of Bangladesh does not consider as binding upon itself the provisions of articles 2..... as they conflict with Sharia law based on Holy Quran and Sunna."[68]

Egypt, in making its general reservation on article 2 declares 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 Sharia."[69]

The Libyan Arab Jamahiriya had initially stated article 2 of the Women's Convention:

> "shall be implemented with due regard for the peremptory norms of the Islamic Shariah relating to determination of the inheritance portions of the estate of a deceased person, whether female or male."[70]

On July 5 1995, the Libyan Government notified the Secretary-General of the "new formulation of its reservation to the Convention, which replaces the formulation contained in the instrument of accession". The new, rather sweeping formulation reads as follows:

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66 "The Government of the People's Democratic Republic of Algeria declares that it is prepared to apply the provisions of this article on condition that they do not conflict with the provisions of the Algerian Family Code." *Multilateral Treaties, op. cit.*, n. 3 at p. 169.

67 The reservation entered by Iraq regarding article 2 of the Women's Convention simply states that: "Approval of and accession to this Convention shall not mean that the Republic of Iraq is bound by the provisions of article 2, paragraphs (f) and (g)..." *Ibid.*, at p. 172.

68 *Ibid.*, at p.170.

69 *Ibid.*, at p.171.

70 *Ibid.*, at p.173.

> "[Accession] is subject to the general reservation that such accession cannot conflict with the laws on personal status derived from the Islamic Shariah."[71]

The Malaysian reservation to article 2 forms part of a cluster of articles against which reservations have been entered in the name of 'Islamic Sharia law' and the Federal Constitution of Malaysia. It is not clear therefore where exactly the contradiction with articles 2 lies.[72] Morocco's declaration with regard to article 2 are quite detailed and present a combination of 'religious' and 'worldly' reasons for reserving her position. Article 2 of the Women's Convention appears to contravene the Moroccan rules of succession to the throne, an institution that has no support in the Islamic tradition, as well as certain provisions of domestic family law derived from Islamic law.[73]

The reservations to article 2 outlined above may be criticised on a number of counts: "their indeterminacy, imprecision and open-endedness are contrary to the certainty required for the acceptance of a clear legal obligation."[74] Two out of the six reserving States do not appear to find article 2 against the spirit of Islamic law, whereas the remaining four adopt a different position. These reservations, it is argued, fail to take account of the disagreements among Islamic scholars as to the requirements of *Sharia'*. Further, by subjecting the provisions of article 2 to evolving

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71 *Ibid.*, at p. 184.

72 *Ibid.*, at p.173.

73 *Ibid.*, at p.174. The reservation reads thus: "The Government of the Kingdom of Morocco express its readiness to apply the provisions of this article provided that: - 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."

74 Chinkin, "*Reservations and Objections to the Convention*" *op. cit.*, n. 6 at p. 70.

and varying interpretations of *Sharia'*, reserving Muslim states are indulging in arbitrary 'shifting' of goal posts of attaining women's human rights.[75]

Article 9 of the Women's Convention also figures among its 'most reserved' substantive provisions by Muslim States. It lays down that women shall be granted equal rights with men to acquire, change or retain their nationality and equal rights with men in respect to the nationality of their children.[76] Thirteen States have formulated reservations to this article of which ten are Muslim countries.[77] Thus Algeria states that:

> "The Government of the People's Democratic Republic of Algeria wishes to express its reservations concerning the provisions of article 9, paragraph 2, which are incompatible with the provisions of the Algerian Nationality Code and the Algerian Family Code.[78]

Egypt follows a somewhat similar line of argument in laying down her reservations to article 9 thus:

> "Reservation to the text of article 9, paragraph 2, concerning the granting to women of equal rights with men with respect to the nationality of their children, without prejudice to the acquisition by a child born of a marriage of the nationality of his father. This is in order to prevent a child's acquisition of two nationalities where his parents are of different nationalities, since this may be prejudicial to his future. It is clear that the child's acquisition of his father's nationality is the procedure most suitable for the child and that this does not infringe

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[75] Chinkin, *Ibid.*, at p.70; Connors, *op. cit.*, n. 6 at p. 356; For further analysis of the attitudes of Muslim States to international human rights law affecting women see generally, An-Naim, "Islam, Islamic Law and the Dilemma of Cultural Legitimacy for Universal Human Rights" *op. cit.*, n. 41 at p. 31; D. Arzt, "The Application of International Human Rights Law in Islamic States" (1990) 12 *HRQ* 202; R. Afshari, "An Essay on Islamic Cultural Relativism in the Discourse of Human Rights" (1994) 16 *HRQ* pp. 235-276; J. Leites, "Modernist Jurisprudence as a Vehicle for Gender Role Reform in the Islamic World" (1991) 22 *CHRLR* pp. 251-330.

[76] Article 9 states that "1. States Parties shall grant women equal rights with men to acquire, change or retain their nationality. They shall ensure in particular that neither marriage to an alien nor change of nationality by the husband during marriage shall automatically change the nationality of the wife, render her stateless or force upon her the nationality of the husband. 2. States Parties shall grant women equal rights with men with respect to the nationality of their children."

[77] The reserving countries include Algeria, Egypt, Iraq, Jordan, Kuwait, Malaysia, Morocco, Tunisia, and Turkey and Lebanon.

[78] *Multilateral Treaties, op. cit.*, n. 3 at p. 169.

> upon the principle of equality between men and women, since it is customary for a woman to agree, upon marrying an alien, that her children shall be of the father's nationality."[79]

Iraq, also reserving on article 9, paragraphs 1 and 2, does not further elaborate on its reasons for doing so,[80] neither does Jordan.[81] Kuwait, declares that under its domestic law, a child's nationality is determined by that of the father.[82] Morocco, too, invokes domestic law in formulating its reservation to article 9.[83] Tunisia's reservation to article 9(2) states that

> "The Tunisian Government expresses its reservation with regard to the provisions in article 9, paragraph 2 of the Convention, which must not conflict with the provisions of chapter VI of the Tunisian Nationality Code."[84]

Turkey has entered a declaration also citing national law on the subject as reason for reserving on article 9, paragraph 1 declaring:

> "Article 9, paragraph 1 of the Convention is not in conflict with the provisions of article 5, paragraph 1, and article 15 and 17 of the Turkish Law on nationality, relating to the acquisition of citizenship, since the intent of those provisions regulating acquisition of citizenship through marriage is to prevent statelessness."[85]

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79 *Ibid.*, at p. 171.

80 *Ibid.*, p.172.

81 *Ibid.*, p.173.

82 *Ibid.* The reservation reads thus: "The Government of Kuwait reserves the right not to implement the provision contained in article 9, paragraph 2, of the Convention, inasmuch as it runs counter to the Kuwaiti Nationality Act, which stipulates that a child's nationality shall be determined by that of his father."

83 *Ibid.*, at p. 174. The Moroccan reservation formulated with respect to article 9(2) of the Women's Convention runs in the following manner: "The Government of the Kingdom of Morocco makes a reservation with regard to this article in view of the fact that the Law of Moroccan Nationality permits a child to bear the nationality of its mother only in cases where it is born to an unknown father, regardless of place of birth, or to a stateless father, when born in Morocco, and it does so in order to guarantee to each child, its right to a nationality. Further, a child born in Morocco of a Moroccan mother and a foreign father may acquire the nationality of its mother by declaring, within two years of reaching the age of majority, its desire to acquire that nationality, provided that, on making such a declaration, its customary and regular residence is in Morocco."

84 *Ibid.*, p. 176.

85 *Ibid.*

With regard to the Malaysian reservation however, it is not quite clear whether she is reserving on article 9 on the basis of repugnancy to Islam or the Federal Constitution. The reservation formulated in a rather sweeping statement declares that

> "The Government of Malaysia declares that Malaysia's accession is subject to the understanding that the provisions of the Convention do not conflict with the provisions of the Islamic Sharia' law and the Federal Constitution of Malaysia. With regards thereto, further, the Government of Malaysia does not consider itself bound by the provisions of articles 2(f), 5(a), 7(b), 9 and 16 of the aforesaid Convention."[86]

From an analysis of reservations to article 9 by Muslim jurisdictions, it is interesting to note that no Muslim State has cited Islamic law as justification for entering this reservation. In fact, domestic legislation, informed by customary practice and assumptions of 'proper' gender roles is presented as the reason for these reservations. Reservations to article 9 may be presented of an 'operative' Islamic law formulated in domestic law and articulated at the international level. Muslim States may, with regard to this particular article be challenged by posing the question as to why they have entered what is, arguably an 'unIslamic' reservation? The concept of the *Umma* and universal 'Brotherhood' mitigates against geographical and national boundaries in the modern sense of the term; indeed denying nationality rights on the basis of gender goes against the very grain of Islamic law. It is also pertinent to make the point here that a large number of Muslim husbands show little compunction in

[86] *Ibid.*

adopting the nationality of their wife where that particular nationality has the potential of offering lucrative economic and social prospects.[87]

The third most reserved article of the Women's Convention as regards Muslim States is **Article 15:** This article obligates States Parties to treat men and women equally before the law. In particular, in civil matters, it states that women shall have a legal capacity identical to men, and the same opportunities to exercise this capacity. (e.g., equal rights to conclude contracts, administer property, equality at all stages of procedure in courts and tribunals). Further, that men and women shall have the same rights with regard to the law relating to the movement of persons and the freedom to choose their residence and domicile. Article 15 of the Women's Convention has also attracted a number of reservations from Muslim countries, including Algeria, Jordan, Morocco, Tunisia and Turkey. All five countries have cited domestic law of their respective jurisdictions as the motivating force behind reservations to this article. Thus the Algerian reservation mentions the Algerian Family Code,[88] the Jordanian reservation with respect to article 15(4) states briefly that a wife's residence is with her husband, Morocco's reservation on article 15(4) declares that

> "it can only be bound by the provisions of this paragraph, in particular those relating to the right of women to choose their residence and domicile, to the extent that they are not incompatible with articles 34 and 36 of the Moroccan Code of Personal Status."[89]

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[87] See for example the practice in Pakistani and other Asian families (Muslim and non-Muslim alike), where grooms are 'imported' from the country of origin to European and North American jurisdictions.

[88] *Multilateral Treaties, op. cit.*, at p.169. The Algerian statement states that to article 15(4) runs thus: "The Government of the People's Democratic Republic of Algeria declares that the provisions of article 15, paragraph 4, concerning the right of women to choose their residence and domicile should not be interpreted in such a manner as to contradict the provisions of chapter 4 (art. 37) of the Algerian Family Code."

[89] *Ibid.*, at p. 174.

The Tunisian[90] and Turkish[91] reservations are similarly worded, emphasising the overriding supremacy of their domestic law as the constraining factor in compliance with the provisions of article 15. Reservations to article 15 too, do not present any evidence of being reserved in the name of Islam and the inference here would be that Muslim States have entered these reservations on the basis of the domestic law of their jurisdictions. Connors, however, commenting on reservations of Muslim States to article 15 states that

> "reservations of this nature could be predicted from the discussion in the Commission on the Status of Women at the time of the preparation of the treaty, during which the Egyptian delegate explained that according to the *Quran*, the husband must choose the site of the matrimonial home and the wife has the same domicile as her husband, a position agreed with by the Indonesian and Iranian delegates."[92]

She further states that subsequently representatives of Egypt and Indonesia went on to accept the terms of article 15 as it now appears because their domestic law had been reformed and was consistent with its terms.[93] There is no evidence that the *Quran* in fact contains injunctions to this effect. The relative ease with which the Egyptian delegate ascribed the view that husbands have the right to choose the matrimonial home to the *Quran* is quite amazing. But what is even more surprising is

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[90] *Ibid.*, at p. 176. The Tunisian declaration to article 15, paragraph 4 of the Convention in the following words: "In accordance with the provisions of the Vienna Convention on the Law of Treaties, dated 23 May 1969, the Tunisian Government emphasises that the requirements of article 15, paragraph 4, of the Convention on the Elimination of All Forms of Discrimination Against Women, and particularly that part relating to the right of women to choose their residence and domicile, must not be interpreted in a manner which conflicts with the provisions of the personal Status Code on this subject, as set forth in chapters 23 and 61 of the Code."

[91] *Ibid.*, at p.176. Turkey's reservation to article 15, paragraphs 2 and 4 states that "Reservations of the Government of the Republic of Turkey with regard to the articles of the Convention dealing with family relations which are not compatible with the provisions of the Turkish Civil Code, in particular article 15, paragraphs 2 and 4....."

[92] Connors, *op. cit.*, n. 6 at p. 93.

[93] UN Doc.E/CN.6/SR.650 cited in *ibid.*

that when States decide to adopt a certain position, a change in domestic law on the point appears to override even the *Quran*, the primary source of Islamic law.

A contrary Islamic view regarding the choice of matrimonial residence raised in article 15(2) of the Women's Convention is presented by a Muslim scholar, Dr. A. Al-Khayyat. He is of the view that Islamic law affords an element of flexibility in terms of choosing the matrimonial home and residence. Bearing in mind the contractual nature of the Muslim marriage, it is not unIslamic for the husband to agree to the place of residence suggested by the wife as the matrimonial home. Dr. A. Al-Khayyat states that

> "a Muslim woman has the right initially to object to residing in a particular place she considers not suitable or harmful in any way to her well-being. A Muslim woman is entitled to specify this condition in her marriage contract, and it will become her lawful right."[94]

Article 16 deals with the situation of women in marriage and family relations. Pursuant to this provision States Parties undertake to take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations. Algeria, Bangladesh, Egypt, Iraq, Jordan, Lebanon, Libyan Arab Jamahiriya, Malaysia, Morocco, Tunisia and Turkey have entered reservations to article 16. The reservations entered to the present article are the most detailed and a strong manifestation of the belief that these are being entered in the light of conflicting Islamic law and *Sharia'* norms. Barring Algeria,[95] Jordan,[96] Tunisia[97] and Turkey,[98]

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[94] L. Nasser, *Implementation of CRC and CEDAW in the Arab Countries: An Analysis of Reservations. A case study of 6 project countries: Egypt, Jordan, Lebanon, Sudan, Morocco, Tunisia*, (1997) Amman: UNICEF at p. 15; for reservations invoking Islamic law and *Sharia'*, also see Lijnzaad, *op. cit.*, n. 5 at pp. 320-321; Chinkin, *op. cit.*, n. 6 at pp. 67-75.

[95] *Ibid.*, p.169. The Algerian reservations states that: "The Government of the People's Democratic Republic of Algeria declares that the provisions of article 16 concerning equal rights for men and women in all matters relating to marriage, both during marriage and at its dissolution, should not contradict the provisions of the Algerian Family Code."

that once more declare domestic law as the reason for reserving their respective positions under article 16, the remaining Muslim States quote Islamic law as their justification for entering reservations. Since these reservations are an important indication of what constitutes the 'operative' Islamic law on women's human rights, as propounded by Muslim States internationally, it is proposed to discuss these in some detail.

Bangladesh declares in a brief formulation that the

> "The Government of the People's Republic of Bangladesh does not consider as binding upon itself the provisions of articles .... and 16(1)(c)(f) as they conflict with Sharia based on Holy Quran and Sunna."[99]

No further details as to how the reserving provisions conflict with Islamic law on the subject. Egypt presents a more detailed explanation on entering reservation to article 16. It is stated 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 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 into question and in view of the fact that one of the most important bases of these relations is an equivalency of rights and

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[96] *Ibid.*, Jordan in a declaration made upon signature and confirmed upon ratification states that she does not consider herself bound by "... Article 16, paragraph (1) (c), relating to the rights arising upon dissolution of marriage with regard to maintenance and compensation; Article 16, paragraph (1) (d) and (g)."

[97] *Ibid.* The text of the reservation states 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."

[98] *Ibid.* Turkey has entered a reservation on article 16 paragraphs 1 (c), (d), (f) and (g) on the basis that that provisions of this article dealing with family relations are not completely compatible with the provisions of the Turkish Civil Code.

[99] *Ibid.*, at p. 170.

> duties so as to ensure complementarity 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 right to divorce by making it contingent on a judge's ruling, whereas no such restriction is laid down in the case of the husband." [100]

Notions of 'complementarity' and 'equivalency' are thus invoked as forming the basis of 'true equality'.[101] Egypt goes on to state that the *Sharia'* restricts the wife's right to divorce by making it contingent on a judge's ruling, whereas no such restriction is laid down in the case of the husband. The reason for this, it is claimed, is that, in accordance with the provisions of the *Sharia'*, the husband must pay bridal money to the wife and must maintain her fully. He must also make a payment to her upon divorce. The wife, however, retains full rights to her property and is not obliged to spend anything on her keep. It is submitted with regard to this argument that these statements fail to take account of the practice (prevalent particularly in India and Pakistan) whereby a woman brings a 'dowry' with her to the marriage. Neither is any account taken of the *de facto* contribution made by women to the maintenance of the household. The application of *Sharia'*, moreover, with respect to marriage and family relations, is not consistent in all Muslim countries. In Pakistan, for example, the Muslim Family Laws Ordinance, 1961, restricts the husband's power to declare unilaterally the dissolution of a marriage. Polygamy is legally and officially abolished in Turkey, Tunisia and Algeria, although it is permitted by the *Quran*. The entire premise of the argument for male dominance in marriage, during its subsistence and at its dissolution, therefore tends to disintegrate.[102] Another sensitive aspect of family

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[100] *Ibid.*, at p. 172-3.

[101] Cf., provisions of the Cairo Declaration on Human Rights in Islam, the Islamic Universal Declaration on Human Rights for similar positions on women's human rights.

[102] Ali and Mullally, *op. cit.*, n. 6 at p. 118.

law is the law relating to custody and guardianship of children.[103] Under traditional Islamic law, the mother is not entitled to guardianship of her child after the demise of the father or upon divorce. This rule, however, has been considerably diluted in its application by municipal courts in a number of Muslim countries. In Pakistan, for example, the courts have ruled that the best interests of the child should be the paramount consideration in determining custody or guardianship, and this may or may not require that s/he be awarded to the mother.[104] The requirements of Article 16(f) are not therefore, necessarily unacceptable to all Muslim countries.

Iraq has also entered a reservation to Article 16 reiterating the complementarity, rather than equality of rights within marriage by saying that:

> "Approval of and accession to this Convention shall not mean that the Republic of Iraq is bound by the provisions of (...) article 16 of the Convention. The reservation to this last mentioned (article 16) shall be without prejudice to the provisions of the Islamic Shariah according women rights equivalent to the rights of their spouses so as to ensure a just balance between them."[105]

Arab Libyan Jamahiriya also reserves its position on article 16(c) and (d) by declaring that rights afforded therein "shall be without prejudice to any of the rights guaranteed to women by the Islamic Shariah." Article 16 is included in Malaysia's list of reserved articles and the rationale is declared as Islamic *Sharia'* and the Federal Constitution of Malaysia.[106]

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103 See Article 16(f) of the Women's Convention.

104 For a detailed discussion of trends of the superior courts in Pakistan see, S. S. Ali and M. N. Azam, "Trends of the Superior Courts in Pakistan in Guardianship and Custody cases (1947-92)--An Analysis" (1993) Working Paper for the Women and Law Project, Lahore: Shirkatgah.

105 *Multilateral Treaties, op. cit.*, n. 3 at p. 172.

106 *Ibid,* at p. *173.* It may be noted here that in addition to the four articles reserved by Malaysia discussed in this section, the reservation of Malaysia entered against article 11 of the Women's Convention may be challenged as being unIslamic. Its reservation to article 11 of the Women's Convention requiring States parties to take all appropriate measures to eliminate discrimination in the field of employment, states that, "In relation to article 11, Malaysia interprets the

Morocco also reserves its position to article 16 and enters a detailed statement to this effect stating that

> "The Government of the Kingdom of Morocco makes a reservation with regard to the provisions of this article, particularly those relating to the equality of men and women, in respect of rights and responsibilities on entry into and dissolution of marriage. Equality of this kind is considered incompatible with the Islamic Shariah, which guarantees to each of the spouses rights and responsibilities within a framework of equilibrium and complementarity in order to preserve the sacred bond of matrimony.
>
> The provisions of the Islamic Shariah oblige the husband to provide a nuptial gift upon marriage and to support the family.
>
> Further, at dissolution of marriage, the husband is obliged to pay maintenance. In contrast, the wife enjoys complete freedom of disposition of her property during the marriage and upon its dissolution without supervision by the husband, the husband having no jurisdiction over his wife's property.
>
> For these reasons, the Islamic Shariah confers the right of dissolution on a woman only by decision of a Shariah judge." [107]

The argument advanced by reserving States on the basis that *Sharia'* appears to be that Islamic law requires that the wife maintain complete control over her own her own personal property including her dower and that she is not required to maintain herself or her family. Therefore it is argued, *Sharia'* is more favourable to the woman than the provisions of the Convention. This perceived advantage conferred by *Sharia'*, however, contributes significantly to the perpetuation of patriarchal forms of social organisation and to the exclusion of women from the 'public' and 'political' spheres. This objective is achieved by marginalising the woman in the 'private' domain where she is seen merely as a 'passive consumer', while the man is the

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provisions of this article as a reference to the prohibition of discrimination on the basis of equality between men and women only." What is being said here is that Malaysia reserves the right to discriminate on other grounds. (for example between Malays and non-Malays).

[107] *Ibid*, at p. 174.

'provider', the 'maintainer' and 'bread winner'. It is also clearly in conflict with the requirements of Article 5 of the Women's Convention which requires States Parties to take 'all appropriate measures' to eliminate stereotyped concepts of men and women.

The large number of reservations to article 16 which guarantees equality within marriage and upon its dissolution are significant. Chinkin argues that the purpose of article 16 is to ensure the application of the Women's Convention to the most private arena of human relationships, the family.[108] A critique of the 'western liberal democratic' concept of rights focused on the rights of the individual in the 'public' sphere of life to the detriment of the 'private' and predominantly 'feminine' sphere. She advances the opinion that reservations to exclude this private sphere from legal intervention appears to be the basic justification behind reservations to article 16 of the Women's Convention. In the Muslim context, the personal status law, largely focused around family law, and, has been considered as the 'last bastion' of the Islamic identity particularly in the post-colonial era where the dominant 'western' influence permeated virtually every section of public and private life. Hence the widespread reservations to this article.

In chapter 6 of this study reference was made to the useful linkages between the United Nations Convention on Rights of the Child (CRC) and the Women's Convention. The argument was advanced that the rather detailed formulation of rights covering every aspect of life in the CRC within the framework of non-discrimination on the basis of sex, presented a reinforcement of women's human rights in international law. In this section, this argument will be presented in the light of

[108] Chinkin, *op. cit.*, n. 6 at pp. 73-74.

reservations of Muslim States to the Women's Convention and how the near universal ratification of the CRC by Muslim States, impacts on women's human rights.

At an expert group consultation in New York on 24 January 1998, it was stated that comparing reservations entered against substantive provisions of the CRC and the Women's Convention, it is evident that the Women's Convention is the more heavily reserved treaty of the two.[109] What is interesting for our discussion here that articles reserved in the Women's Convention by Muslim States have been conceded and accepted within the framework of the CRC, most importantly, the equality and non-discrimination norm underlying every substantive provision of the CRC. Does it stand to reason that while Muslim States do not appear to have any problem in accepting equal rights for male and female children up to the age of eighteen, once beyond childhood, discrimination creeps in? The CRC clearly demand equal rights of children of both sexes to resources including education, health, recreation, and inheritance rights which Muslim States apparently do not question. This is evident from the substantial number of Muslim States who have ratified the CRC without any reservations. These include Azerbaijan, Bahrain, Benin, Chad, Gabon, Gambia, Kazakstan, Kyrgystan, Lebanon, Libyan Arab Jamhiriya, Mozambique, Niger, Senegal, Sierra Leone, Sudan, Tajikistan, Turkmenistan, Uganda, Uzbekistan, Yemen.[110] Why then are these same concepts rejected when formulated in the Women's Convention?

In conclusion, it may be argued that reservations entered by Muslim States are motivated by a wide range of factors including political, socio-economic as well as

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[109] S. S. Ali, "Some Issues Arising from Reservations to Multilateral Treaties (with particular reference to human rights treaties affecting women and children)." Paper presented at the IWRAW Consultation in New York, January 1998.

[110] *Multilateral Treaties, op. cit.*, n. 3 at pp. 205-221.

religious considerations. The situation is further complicated where no uniform position vis-à-vis Islamic law is adopted by Muslim States since each jurisdiction presents its own specific blend of an 'operative' and 'cultural' Islam, distinct from other Muslim jurisdictions. This is also reflected in the group of newly independent Central Asian Republics and some other Muslim States that have ratified the Women's Convention without any reservations.[111] Most importantly, a definitive view on what indeed constitutes a 'valid' reservation in the name of Islam and which has 'other' underlying reasons is difficult to extrapolate as no single school of Muslim juristic thought or jurisdiction is authorised to represent the entire Muslim world.

Bearing in mind the focus of the present study, and as an example of the processes through which States pass when deciding whether to ratify a particular human rights treaty with or without reservations, it is proposed to present a case study of Pakistan's ratification of the Women's Convention.

7.4 Application of 'Operative' Islamic law in the context of international human rights: The Case of Pakistan's ratification of the Women's Convention[112]

Pakistan is one of the signatories to the UN Charter[113] and the UDHR. The Pakistan delegation to the UN took an active part in the preparatory meetings leading

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[111] These include, Afghanistan, Azerbaijan, Benin, Chad, Gabon, Gambia, Kyrgyzstan, Lebanon, Mozambique, Senegal, Sierra Leone, Tajikistan, Turkmenistan, Uganda, Uzbekistan.

[112] I am greatly indebted to Mr. Abdul Wahab, Director UN desk at the Ministry of Foreign Affairs, Government of Pakistan, for his support throughout this research and providing materials in this regard. The numerous friends and colleagues in the human rights movement who persevered in organising meetings, arranging seminars and providing much needed support to keep the issue of ratification alive deserve a special thanks. The Norwegian Development Agency in Pakistan (NORAD) provided the financial assistance for the research project that resulted in publication of the book used to lobby the government of Pakistan urging it to ratify the Women's Convention, S. S. Ali, *A Comparative Study of the United Nations Convention on the Elimination of All Forms of Discrimination Against Women, Islamic Law and the Laws of Pakistan* (1995) Peshawar: Shaheen Printing Press.

[113] Pakistan was admitted to the United Nations as a Member State on 30 September 1947. See GAOR, 2nd. Session, 92nd plenary meeting, at p. 311; UN Doc. A/CN.4/149 at p. 7.

to the draft of the UDHR.[114] Despite a strong difference of opinion from some other Muslim States regarding certain provisions of the UDHR as being contrary to Islamic law,[115] the Pakistani delegates were outspoken in their support of the substantive provisions of the UDHR[116] and advanced a progressive interpretation of Islam on human rights.[117] The principles of the UDHR find affirmation in the 1956, 1962, and 1973 constitutions of Pakistan; indeed it has been pointed out that about two-thirds of the thirty human rights enumerated in the UDHR have found a place in these documents.[118] Since then however Pakistan has not become a party to any major international human rights instruments. The few exceptions to which Pakistan is a signatory are, the Convention on the Political Rights of Women, the Convention on the Elimination of All Forms of Racial Discrimination, (the Race Convention)[119] and the most recent additions (after much lobbying and struggle), the CRC and the Women's Convention.

It is interesting to note that while Pakistan was an enthusiastic participant and supporter of the norm of non-discrimination *inter alia*, on the basis of sex as formulated in the UDHR, this enthusiasm does not appear to have lasted for long. This is evident from her resistance to signing the ICCPR and the ICECSR, which in

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[114] See generally, I. Hussain, *Issues in Pakistan's Foreign Policy. Legal Perspectives* (1988) Lahore: Progressive Publishers.

[115] Saudi Arabia, a conservative Muslim State, abstained from voting in favour of the UDHR on the grounds that it provided for certain provisions unacceptable to Islam. For an interesting discussion on this point see, D. Little, J. Kelsay and A. A. Sachedina, *Human Rights and the Conflict of Cultures: Western and Islamic Perspectives on Religious Liberty* (1988) Columbia: University of South Carolina Press, pp. 33-52 (Saudi Arabia, Pakistan, and the Universal Declaration of Human Rights). Also see, A. Robertson and G. Merrills, *Human Rights in the World. An Introduction to the Study of Human Rights* (1989) Manchester: Manchester University Press at p. 70.

[116] Begum Ikramullah, one of the delegates stated that ". . . It was imperative that the peoples of the World should recognise the existence of a code of civilised behaviour which would apply not only in international relations but also in domestic affairs." GAOR, 3rd Session, Part 1, Third Committee, 90th meeting, 1st October 1948, at p. 37.

[117] Sir Zafrullah Khan, in disagreeing with remarks made by his Saudi Arabian colleague Mr. al-Barudi, regarding freedom of religion in Islam stated ". . . that the essential point was to repeat that for its part the Muslim religion had unequivocally proclaimed the right to freedom of conscience and had declared itself against any kind of compulsion in matters of faith or religious practice." *Ibid.*, p. 120.

[118] M. Haleem, "The Domestic Application of International Human Rights Norms" in *Developing Human Rights Jurisprudence. The Domestic Application of International Human Rights Norms*, (1988) London, Human Rights Unit, pp. 91-108 at p. 106.

[119] Adopted by General Assembly Resolution 2106 A (XX) of 21 December 1965.

fact are to a large extent, replications of most of the substantive provisions of the UDHR. It is submitted that in order to unravel the reasons for this ambivalent behaviour, the identity crisis that Pakistan is confronted with since its inception, needs to be highlighted.

The core element in this analysis is the Islamic identity of Pakistan; the basis of its existence. Yet, the founder of Pakistan did not envisage the country to be a theocracy, a position which was evident from his public expressions of Pakistan as a modern, democratic, State where everyone was equal before the law and was afforded equal protection of the law.[120] Parallel to these liberal, democratic pronouncements, existed religious and conservative forces demanding a clear expression and manifestation of the Islamic identity of the State of Pakistan.[121] In a short span of time the liberal democratic element inside as well as outside of government realised the importance of 'playing the Islamic card'.[122] They soon realised that a multi-ethnic, multi-cultural and multi-lingual polity that was Pakistan needed a central, theme to bind it together as a nation. Consequently, the Islamic identity of the country was highlighted in pronouncements from government, a trend that also found favour with the majority of the population for whom a 'cultural Islam' was an important part of their identity.[123]

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[120] These thoughts were presented by Muhammad Ali Jinnah, the founder of Pakistan in his Presidential address to the Constituent Assembly of Pakistan on 11 August 1947. For text of the address, see J. Ahmed (ed.,) *Speeches and Writings of Mr. Jinnah* (1964) Lahore: Sh. Muhammad Ashraf.

[121] The Jamaat-i-Islami, a rightist political party under the leadership of the famous Muslim scholar, A. A. Mawdudi, spearheaded the challenge on the 'modernists', including the founding fathers of Pakistan for dragging their feet on declaring unequivocally the Islamic identity and nature of the newly founded State.

[122] Thus, when the Constituent Assembly of Pakistan ran into difficulties in framing a constitution for the country, the Objectives Resolution was presented as the Islamic framework within which the Assembly would operate. Religious minorities raised their first voice of protest at this Resolution arguing that they were being relegated to second-class citizens in their own country. For a detailed discussion on this issue, see G. W. Chaudhary, Constitutional Development in Pakistan, 1971, London: Lowe and Brydonc; G. W. Chaudhary, "Religious Minorities in Pakistan" (1956) Vol. XLVI *The Muslim World*, pp. 313-323.

[123] A wide range of literature has been generated around this subject. See generally, A. M. Weiss (ed.,) *Islamic Reassertion in Pakistan* (1986) Syracuse: Syracuse University Press; F. Halliday and H. Alavi (eds.,) *State and Ideology in the Middle East and Pakistan* (1988) London: Macmillan Educational Ltd.

The above developments hindered adoption of any human rights documents emanating from a supposedly unIslamic forum (such as the UN was perceived to be since it was dominated by non-Muslim States). The process leading to the ratification of the Women's Convention in 1996 is an example of this attitude of successive governments in Pakistan as will be evident from the discussion below.

The demand for signing the Women's Convention was presented by women's NGOs and the human rights movement in Pakistan since its adoption at the UN in 1981. But it took 15 years of consistent and constant hard work and lobbying to keep the issue alive and to get the government to finally agree to this long standing demand of the women of Pakistan. Successive governments in Pakistan had taken up the initiative of considering accession to the Women's Convention on a number of occasions without yielding any positive outcome.[124] It was only the 1994-95 combined initiative on the part of the government of Pakistan and the women's movement that finally won the day and the instrument of ratification was entered on 12 March 1996.

In 1984 for the first time the government of Pakistan considered the issue but no decision was made regarding ratification/accession to the said treaty. In 1985, the Commission on the Status of Women, formed by the Government of Pakistan to assess the situation of women in Pakistan and make recommendations for improving their status, repeated the demand for accession to the Women's Convention.[125] However, no action was taken and, in response to the candid views presented in the report by its outspoken Chair, Begum Zari Sarfaraz, the Government of General Zia-ul-Haq withheld publication of the document.[126] The findings in the report clearly did

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[124] See Government of Pakistan, Ministry of Foreign Affairs, Islamabad, *Working Paper. The Convention on Elimination of All Forms of discrimination Against Women* (1994).

[125] Government of Pakistan, *Report of the Pakistan Commission on the Status of Women* (1986) Islamabad: Government of Pakistan Printing Press. See section on recommendations.

[126] The *Report of the Pakistan Commission on the Status of Women* was circulated when Ms. Benazir Bhutto assumed power in November 1988.

not match the views and notions of the 'official' Islam on women's rights then being canvassed by an Islamic 'revivalist' regime. Ratifying the Women's Convention was therefore placed in cold storage.

In 1987 on the instructions of the then Prime Minister, the Women's Convention was examined by various government ministries including the Ministries of Law and Justice, Religious Affairs, Education, Cabinet Secretariat and the Ministry of Foreign Affairs in consultation with the Legal Division.[127] It is interesting that the Government of General Zia-ul-Haq, known for its oppressive laws and policies regarding women, found it necessary to create a Women's Division in the Cabinet Secretariat that was later formed into a full-fledged Ministry of Women's Development and Youth Affairs in 1989.[128] It was recommended that Pakistan sign with a blanket reservation stating that:

> "The Government of the Islamic Republic of Pakistan agree to ratify the convention to the extent that article and sub-clauses are not repugnant to the teachings of the Holy Quran and the Government of Pakistan shall be the sole judge of the question whether such repugnancy exists."[129]

The Ministry of Foreign Affairs objected to this reservation on a number of grounds. It was felt that other States Parties would certainly enter objections as this reservation would be conceived as being contrary to "object and purpose of the Convention" under article 28(2) of the Women's Convention. The Ministry of Foreign Affairs also alleged that

> "The (Women's) Convention was the result of Western women rights activists and does not take into account the varied socio-economic conditions as well as the diverse customs, values, and religious and ethical perspectives of different societies in various parts of the world..

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127 *Working Paper, op. cit.*, n. 122 at p. 1.

128 The task of soliciting views from these institutions on Pakistan's decision to ratify the Women's Convention was performed by the Women's Division.

129 *Working Paper, op. cit.*, n. 122 at p. 2.

> . . Convention has been used by Western Human Rights activists as an instrument to not only criticise the situation in various Islamic countries but also the very fundamentals of the Islamic faith "[130]

And finally, a further reason for reluctance to ratify to the Women's Convention was, that becoming Party to this treaty entailed scrutiny by the international community of the position of women in Pakistan, including compilation of a country report and its discussion thereof in CEDAW; a situation that the Ministry of Foreign Affairs did not feel comfortable with. The matter therefore did not progress much further.

In 1989, the then Prime Minister issued a directive to look into the Women's Convention with a view to explore possible avenues for ratification. This was done to coincide with the 10th Anniversary of the Women's Convention and before the Prime Minister attended a UN sponsored symposium in New York. No positive outcome came of this initiative and reasons given above were repeated once more.[131]

During 1994-95, when Ms. Benazir Bhutto's tenure in office as Prime Minister, some serious efforts were initiated towards ratification. It is worth making the point here that the new motivation came from a letter written in August 1993 by the Secretary, Ministry of Women's Development to the Foreign Secretary recommending that

> "the issue of Pakistan's ratification may be re-examined in view of the fact that women in Pakistan have made substantial progress in improving their status and also as citizens of this country and that *Pakistan's non-ratification was creating international embarrassment* (emphasis added)."[132]

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[130] *Ibid.*, at p. 2.
[131] *Ibid.*, at p. 3.
[132] *Ibid.*, at p. 3.

A series of meetings were held in Islamabad. Four meetings are especially noteworthy[133] where representatives from all relevant ministries including the Ministry for Religious Affairs, the Interior Ministry, the Council of Islamic Ideology and NGOs[134] were asked for and presented their views and comments on Pakistan's possible ratification of the Women's Convention.[135] The outcome of all these meetings appeared to be that a case be prepared for the Government of Pakistan to sign the Women's Convention subject to one specific "temporary" reservation to article 2(f) which relates to requiring States Parties to

> "take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitutes discrimination against women."

The above view of entering a specific reservation however, met with stiff opposition from the Ministry of Women's Development backed by legal academics working on the subject, women's groups, and human rights activists who challenged the position of the government that ratification without at least one reservation was simply not possible.[136] The Government, it was obvious was keen to flag up its Islamic identity in the international community and in relation to its Muslim counterparts and reserving its position on article 2(f) as being opposed to Islamic law, would establish that point. The case of other Muslim countries who had entered substantial reservations was also highlighted and it was argued that a similar expectation was being held with regard to Pakistan's position.[137]

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[133] These meetings were held on the 5th October 1994, 4th January 1995, 31st January 1995 and 13th June 1995.

[134] The consensus among NGOs in Pakistan whose views were solicited was that Pakistan should ratify the Women's convention without reservations. See minutes of the meeting on Pakistan's adherence to the Convention on the Elimination of All forms of Discrimination Against Women held in the Foreign office on October 5, 1994 at 1030 hours;

[135] These views were sought by the Ministry of Foreign Affairs through O. M. No. UN(II)-9/4/94, dated 19th May 1994.

[136] The Government of Pakistan had constituted a committee of concerned individuals and organisations to assist the Government in the ratification process. See Ali, *op. cit.*, n. 6 for list.

[137] *Working Paper, op. cit.*, n. 122 at p. 6.

In response, it was argued by supporters of ratification without reservations, that Iraq, Egypt, Libya and other reserving States did not form the entire spectrum of Muslim countries and Turkey, Tunisia, Senegal, Mali, Indonesia and Yemen were equally 'Islamic' jurisdictions but had ratified the Women's Convention without reservations. Pakistan should come up with her own country position and not follow other countries blindly in the matter of entering reservations.[138]

At the cultural level as well, a major concern of successive Pakistani governments and an important consideration for failing to reach a decision in earlier initiates taken to accede to the Women's Convention, was that the Women's Convention somehow represents an alien western model of rights and development which is in contradiction to Islamic values and injunctions. It was primarily to cope with this argument that the comparative study of the Women's Convention with Islamic law and laws of Pakistan was undertaken.[139] It was stated that since one-sixth of the drafting committee on the Women's Convention was comprised of Muslim States, it is hard to believe how an 'unIslamic document' against the spirit of Islamic law could have got their approval and consent. Furthermore, although some Muslim States Parties had entered reservations to certain articles of the Women's Convention on the basis of it being repugnant to Islamic law and *Sharia'*, yet these countries were not uniform in their statements. Indonesia, Turkey, Tunisia, Mali and Senegal despite qualifying as Muslim States Parties had not invoked *Sharia'* in support of their reservations. [140]

Finally, a serious dilemma of the government was how to address the issue that some laws currently enforced in the country are clearly discriminatory to women.[141] The question was raised as to whether these laws will require

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138 Ali, *op. cit.*, n. 6 at pp. 131-141.

139 *Ibid.*

140 *Ibid.*

141 These laws include: The Child Marriages Restraint Act, 1929; The Offence Against Property (Enforcement of Hudood Ordinance) 1979; The Offence of Zina (Enforcement of Hudood Ordinance) 1979; The Offence of Qazf (Enforcement of Hudood Ordinance) 1979; The Qanoon-i-Shahdat Order, 1984; The Pakistan Citizenship Act, 1951; The Punjab/Sindh/NWFP/Baluchistan Muslim Personal Law (Shariat Application Act) 1962; The Pakistan Penal Code, 1860 (Proof of Qatl-e-Amd and Hurt liable to Qisas).

modification/repealing prior to ratification or, could the process of review of domestic laws continue after it? The view that certain provisions of domestic law, incompatible with the substantive provisions of the Women's Convention, should not preclude us from becoming a State Party, prevailed in the end. It was argued that a number of European, African and Asian countries have been in similar situations. They are however making an effort to overcome the problematic provisions in their respective domestic laws. What was required for the present moment for Pakistan was to demonstrate good-will and genuine concern for promoting gender equality by ratifying the Women's Convention.

It is uncertain what impact the consistent lobbying for ratification had on the final decision of the Government of Pakistan. One factor stands out quite clearly; the impending Beijing Conference scheduled for September 1995 was certainly an incentive, particularly as the Prime Minister was leading the country delegation. The Cabinet's decision to ratify the Women's Convention on the 21st August 1995, less than two weeks before the Beijing Conference, thus came at a politically opportune moment and placed the country in a favourable light vis-à-vis the international community. Contrary to the impression given by Government spokespersons that there would be no reservations or declarations, the instrument of ratification dated 12th March 1996 included the following declaration:

> *"The accession by [the] Government of the Islamic Republic of Pakistan to the [said Convention] is subject to the provisions of the Constitution of Pakistan."*

A single reservation was also entered which states that:

> *"The Government of the Islamic Republic of Pakistan declares that it does not consider itself bound by paragraph 1 of article 29 of the Convention."*[142]

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[142] *Multilateral Treaties, op. cit.*, n. 3 at p. 175.

The foregoing discussion describing the arduous journey on the road to ratification of the Women's Convention by Pakistan reiterates the main argument of this study i.e., the multiplicity of norms informing women's human rights. Legal pluralism based on religion, culture, political and socio-economic compulsions determine decisions of what rights are protected both in domestic law as well as international human rights law. The question that arises yet again is: how strong is the norm of non-discrimination on the basis of sex within international law? Muslim States (and others as well), have entered reservations to the Women's Convention that clearly make prospects of equal rights for women suspect, yet the response of the community of States in upholding these norms has also been weak and inadequate. The final section of this chapter discusses this issue.

7.5 Addressing Reservations to the Women's Convention by Muslim States: Response of the international community

The nature and extent of reservations to the Women's Convention by Muslim States have attracted objections by other States.[143] Firstly, it is uncertain whether the reservations are compatible with the "object and purpose" of the Women's Convention as required by its Article 28, as well as Article 19 of the VCLT.[144] The second, and more problematic situation is the question as to who or which is the competent body to make that decision.[145] The issue of reservations was raised at the

143 See Clark, *op. cit.*, n. 6 and Cook, *op. cit.*, n. 6.

144 Article 19(c) of the Vienna Convention on the Law of Treaties provides that a reservation may be formulated unless it is incompatible with the object and purpose of the treaty.

145 The *General Comment*, *op. cit.*, n. 32 appears to be inclined towards resolution of such a matter by the treaty body itself; this also seems to be the emerging consensus within CEDAW, although no formal statement to that effect has yet been arrived at. I am grateful for this insight to discussions on the matter with Ms. Salma Khan, Chairperson, CEDAW and Dame Sylvia Cartwright, member CEDAW.

1986 session of CEDAW, causing considerable controversy and tension.[146] At that time, the widest-reaching reservations had been entered by Bangladesh and Egypt who sought to subject the provisions of the Women's Convention to Islamic law and *Sharia'*. A number of delegations thus, considered the draft resolution presented to ECOSOC regarding reservations as anti-Islamic, notwithstanding that there had also been objections to reservations made by non-Muslim countries and which were unconcerned with Islamic law.[147] Non-Muslim third world countries were also drawn into the conflict, as the issue was perceived not only an attack on Islamic States but also an attack on all non-western countries. The outcome of the discussions was inconclusive and as yet no objective method of evaluating the compatibility of reservations with the "object and purpose" of the Women's Convention exists.

A number of States have entered objections to the above-mentioned reservations of Muslim countries to various substantive provisions of the Women's Convention, primarily on the basis of incompatibility with the object and purpose of the Convention and is therefore inadmissible.[148] The most active States in this regard have been Mexico, Germany and the Nordic States. Denmark's objection to the reservation of the Libyan Arab Jamahiriya declares that in the

> "view of the Government of Denmark this reservation is subject to the general principle of treaty interpretation according to which a party may not invoke the provisions of its internal law as justification for failure to perform a treaty."[149]

Finland's objection to the Libyan reservation runs thus:

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146 Clark, *op. cit.*, n. 6 at pp. 283-289.

147 *Ibid.*, also see discussion in Connors, "The Women's Convention" in Yamani, *op. cit.*, n. 6 at p. 361.

148 See objection made by Austria regarding reservations made by the Maldives, in *Multilateral Treaties, op. cit.*, n. 3 at p. 177.

149 *Ibid.*, at p.178.

> "The Government of Finland has examined the contents of the reservation made by the Libyan Arab Jamahiriya and considers the said reservation as being incompatible with the object and purpose of the Convention . . . *This objection is not an obstacle to the entry into force of the said Convention between Finland and the Libyan Arab Jamahiriya.* (emphasis added)"[150]

Finland has also objected to the reservations made by the Maldives upon accession stating that

> "In the view of the Government of Finland, the unlimited and undefined character of the said reservations create serious doubts about the commitment of the reserving State to fulfil its obligations under the Convention. In their extensive formulation, they are clearly contrary to the object and purpose of the Convention..... *However, does not that this objection constitutes an obstacle to the entry into force of the Convention between Finland and the Maldives* (emphasis added)."[151]

Mexico and Germany too, indicate that their objections should not be interpreted as impediments to the entry into force of the Women's Convention between Mexico and the reserving party or between Germany and the reserving party.[152] It is submitted that in registering their objections to what objecting States believe to be a violation of the equal rights for men and women, and at the same time maintain treaty relations with the reserving States, weakens the non-discrimination norm. Relations between sovereign States require that channels of communication remain open even at the worst of times; respect for divergent views of other States is also an important rule of inter-state relations. But, while all these compromises are being made, where does it leave women's human rights? Surely, if States were to indulge in torture, slavery, piracy or invasion of another State, would other States be equally satisfied by simply registering a protest?

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[150] *Ibid.*, at p. 178.
[151] *Ibid.*, at p. 178.
[152] But Sweden has been the most uncompromising in entering its objections. CEDAW/SP/1994/2.

That the international norm of non-discrimination on the basis of sex has not yet arrived at the junction of customary international law is also borne out by the fact that reservations to the Women's Convention is not the exclusive domain of Muslim States. The United States of America has not yet ratified the treaty; the United Kingdom has the dubious distinction of entering the most reservations by any single State to the Women's Convention.[153]

It may therefore be argued that while women's rights as human rights has found a place in international human rights law, a complete consensus to transform it into a universally accepted norm is still to come. This appears to be the position both in the Islamic tradition and non-Muslim jurisdictions.

[153] The United Kingdom has entered reservations and declarations to articles, 1, 2, 9, 10, 11, 13, 15, and 16 of the Women's Convention. For text of reservations see, *Multilateral Treaties, op. cit.*, n. 3 at pp. 176-177.

CONCLUSION

INTERNATIONAL VERSUS ISLAMIC SCHEMES OF WOMEN'S HUMAN RIGHTS: A MOVE TOWARDS CONVERGENCE?

The purpose of the present study was to engage in a comparative analysis of women's human rights in Islam and international law. The case study of Pakistan was used to demonstrate the divergence between theoretical formulations of the Islamic legal tradition, and its practical application for protection of women's human rights. A number of conclusions have been drawn from the foregoing discussions, reiterating the hypothesis that women's rights in Islam are not entirely irreconcilable with current provisions of international human rights instruments emanating from the UN. At the same time, some areas for future research in this direction have also been identified. These are presented below:

At a theoretical level, it is possible to conclude that women's human rights in international law has evolved in the 20th century from the protective, corrective stages to reach the non-discriminatory level.[1] The solid body of women's human rights built up through numerous UN Declarations, Conventions, Resolutions, General Comments of various Treaty Bodies, as well as regional human rights instruments and jurisprudence bears testimony to the fact that women's human rights have found a place on the international human rights agenda.[2] Chapter 2 of the present study attempted to demonstrate how the categories developed in the international human rights context, may usefully be employed in developing a

[1] These categories were used in chapter 2 of this study.
[2] Chapter 6 of the present study advanced this line of argument.

theoretical framework of women's human rights in the Islamic tradition that shared a number of similar features.[3]

This comparative approach to women's human rights in Islam and international law in turn, also brought into prominence the disparity existing between theory and effect of both legal traditions when applied to the situation of women. Notions of formal equality have been emphasised in major international human rights instruments as opposed to substantive equality,[4] largely on the assumption that by granting *de jure* equality, *de facto* equality would automatically follow. Although the Women's Convention, has to a great extent rectified this conceptual gap, weakness in implementation mechanisms of human rights treaties in general, forms a crucial barrier in this regard. It appears that international human rights law, has yet to extricate itself from the post-Westphalian notion (informing modern statehood), of male, public sphere, exclusionary formulation of institutions.[5] This attitude, transported to the international level, is due to the present day arrangement of civic life, where access to resources and institutions privileges men, while denying similar opportunities to women.[6] Human rights instruments, when providing equal rights for women fail to take account of this denial of equal opportunities; hence the conclusion that something more than formal pronouncements of the equality norm is required to translate it into a reality.

The Islamic legal tradition on the other hand, propounds the doctrine of equal worth and equal dignity of the human person, rather than using the phrase, equality

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3 The categories of corrective, protective and non-discriminatory rights were replicated in the Islamic tradition by the *ibadaat* and *muamalaat* classes of rights.

4 For instance, the Preamble of the UN Charter, as well as its articles, 1, 13 (1)(b), 55(c), 56, 62(2), and 76(c); article 2 of the UDHR, articles 2(1), 3, 16, 23, 24 and 26 of the ICCPR; articles 2, 3, 7 of the ICESCR.

5 S. Khattak, *Women and Local Government* (1996) Working Paper Series no. 24, Islamabad: Sustainable Development Policy Institute, at p. 8.

6 *Ibid.*

for men and women. In the area of women's human rights, it proceeds on the assumption that women as a class are perpetually 'protected' persons with men as their protectors and maintainers. This position results in conceptually divergent norms including 'mutuality' and 'complementarity' between men and women. Human rights documents presented from Islamic platforms, including the OIC, appear reluctant to include the term equality when formulating women's human rights. A strategy that may be suggested towards bridging these conceptual gaps between international human rights and Islamic law is to focus on, and adopt a basic needs approach. To this end, the CRC, to which Muslim countries have lent whole hearted support, might well act as a common denominator between international human rights affecting women, and women's human rights in the Islamic tradition. The scope of definition on the right to life in the CRC is said to include the right to survival, development and participation; in short the equal and optimum provision of life chances to every human being that is born into this world by facilitating equal access to resources. It stands to reason then, that where equal life chances for all children irrespective of sex are taken as the departure point for a viable rights strategy, chances of establishing a non-discrimination regime would appear more feasible. By entering the women's human rights discourse through a non-controversial channel, as, by demanding equal access for all to health care, nutrition, education, economic resources, employment, indeed, the entire range of rights, a new realm of empowerment for women would open up. This may result in rendering the 'equality' debate a little irrelevant, but with a strong potential for achieving *de facto* equality for women. The question arising for future research then is: Is it worth exploring and canvassing the alternative route of empowerment through access to basic needs in order to arrive at a non-discriminatory, 'formal' equality, destination?

A further commonality between international human rights law and Islamic law lies in the inherent contradictions within the two legal traditions regarding competing norms of religious freedom versus the norm of non-discrimination on the basis of sex. Discussions on whether the UN Declaration on the Elimination of All

Forms of Intolerance and Discrimination Based on Religion or Belief, 1981,[7] is not at some point likely to contradict provisions of the Women's Convention, for example, are not conclusive. If freedom of religion and belief is a human right guaranteed by all major international human rights instruments to all human beings, and under Islamic law women are debarred from marrying non Muslim men whereas Muslim men are allowed to marry non-Muslim women, will this right to discriminate against women be upheld by international human rights law in the garb of religious tolerance? Or, will the international norms of non-discrimination on the basis of sex take precedence and, for example, ban polygamy on the ground that the practice is violative of women's rights? These are important questions that may be addressed in the quest by women in the Muslim world to achieve equality and recognition as equal individuals.

The present study has also raised, for future research, a number of issues from the standpoint of international law and *as-siyar*, or Islamic international law, affecting women's human rights. The first relates to the issue of State sovereignty as an impediment in the enforcement of human rights instruments. Human rights treaties are signed by States undertaking obligations not to violate rights of individuals within their jurisdiction and offering themselves to scrutiny of the international community in this regard.[8] The reality however, is very different as most States jealously guard their state sovereignty and are reluctant to accept the individual as a subject of international law. Thus there are a number of instances where States against whom complaints of human rights violations have been made, refuse to allow fact-finding missions from international agencies responsible for such enforcement. Even where States are in breach of treaty obligations, international politics prevents any concrete action against delinquent states. In Islamic law, sovereignty belongs to God alone and state sovereignty cannot be made a pretext for violating human rights as all Muslims belong to one *Umma* (community of believers). Thus the often-used pretext of domestic

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7 G. A. Res. 36/55, GAOR, 36th Session, Supp. 51 (1981) at p. 171.

8 For implications regarding the position of individuals as third parties to treaties and possible subjects of international law see, C. Chinkin, *Third Parties in International Law* (1993) Oxford: Clarendon Press, pp. 120-133.

jurisdiction is not valid for any state action ignoring established human rights standards. It is a matter of interest for me to research and refine the question of how, if at all, this notion of universality of norms transcending geographical boundaries, might be usefully employed in protecting human rights within diverse jurisdictions.[9]

Related to the idea presented above is the predominantly 'western' notion of the public/private dichotomy of life and its implication for women's human rights. The common interpretation when signing human rights instruments is, that states or any state institution will not violate human rights. But it is common knowledge that most women's human rights are violated outside the domain of the state i.e., in the private sphere. In the Islamic view of the State, this dichotomy is non-existent as Islam, and hence a state espousing Islamic law, cannot subscribe to the notion that a right simply denotes 'freedom from interference,' predominantly, state interference in the private life of its citizens. Although it has to be conceded that presently this notion of ignoring violation of women's human rights in the private domain of life is also the norm in Muslim jurisdictions, yet it is important to explore the possibility of using the integrated approach of Islamic law to protect human rights, not only within Islamic jurisdictions, but also apply the same principle internationally?[10]

Alongside areas of commonality between international human rights norms affecting women and Islamic law, there exists a small, resilient core of issues where divergence is clearly visible. The need therefore is, to develop a methodology that is capable of identifying areas of real or perceived disparity, and present alternative formulations to make the two systems compatible. The discussion on women's human rights in the Islamic tradition does offer the possibility of compatibility with the

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[9] On the subject of *al-siyar* see M. Hamidullah, *The Muslim Conduct of State* (1987) 7th edn., Lahore: Sh. Muhammad Ashraf; H. K. Gottingen, "The Foundation of Islamic International Jurisprudence" (Muhammad al-Shaybani --- Hugo Grotius of the Muslims); M. Khadduri, "Islam and the Modern Law of Nations" (1956) 50 *AJIL* 358-372; G. M. Badr, "A Survey of Islamic International Law" (1982) 76 American Society of International Law Proceedings 56-65; S. Mahmassani, "The Principles of International Law in the Light of Islamic Doctrine" 117 Res des Cours 205; M. Khadduri & H. J. Liebesny (eds.,) *Law in the Middle East* (1955) Washington, DC: The Middle East Institute.

[10] The scope of the present study did not offer an opportunity for development of these ideas that clearly need a lot of further research and refinement as similar arguments have rarely been explored.

international norms of non-discrimination on the basis of sex, provided the historical formulations of international human rights law and the Islamic legal tradition are taken account of.[11] In this regard the methodological concepts used by various Muslim scholars including Mohammed Arkoun, Subhu Mahmassani, Fazlur Rahman, Fatima Mernissi, Ustadh Taha, Riffat Hassan Aziza al-Hibri and Abdullahi Ahmed An-Naim may be consolidated to develop an appropriate methodology for women's human rights.[12] Some examples of how this matter may be approached are given below:

There is no doubt that a divergence exists between traditional formulations of some areas of *Sharia'* and international human rights law regarding equal rights for men and women. For instance, article 16 of the Women's Convention guarantees women equal rights with men, at the time of entering into marriage, during its subsistence and upon dissolution. By contrast, the right of *talaq*, the right to marry more than one wives, the right to chastise a 'disobedient' wife, are essentially male privileges and ones that are not offered to Muslim women. Each of these 'male' rights are subject to substantial limitations, and, in some cases virtual denial. Thus, the unilateral right of a Muslim husband to dissolve the marriage contract by pronouncing *talaq* may be taken away from him. Stipulations may be entered into the contract of marriage forbidding the exercise of this right by the husband.[13] At the same time, the right to opt out of a marriage given to Muslim women through the doctrine of *khula* may be placed on a similar legal plane with the right of *talaq* available to the husband.[14]

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[11] J. Leites, "Modernist Jurisprudence as a Vehicle for Gender Role Reform in the Muslim World" (1991) *CHRLR* 251 at p. 253.

[12] An-Naim's remarks sum up the suggestion presented here that Muslim scholars need: " to undertake an enlightened construction of fundamental Islamic sources in order to achieve complete equality for Muslim women and non-Muslims, thereby overcoming all human rights objections to the modern application of Islamic law." A. A. An-Naim, "Islam, Islamic Law and Human Rights" in C. Welch, Jr., and V. A. Leary (eds.,) *Asian Perspectives on Human Rights* (1990) Boulder CO: Westview Press, at p. 48.

[13] For a very incisive discussion on the subject, see L. Carroll and H. Kapoor (eds.,) *Talaq-i-Tafwid: The Muslim Woman's Contractual Access to Divorce* (1996) Graebels: Women Living Under Muslim Laws.

[14] See the landmark Pakistani case of *Khurshid Bibi v. Muhammad Amin* PLD 1967 SC 97 for a recognition of this possibility. Later day case law from the superior judiciary in Pakistan has not lent complete support to the judgement in this case and has held that *khula* is not an absolute

In the context of the evidentiary value of a Muslim woman's testimony admissible in court, the concept of the 'operative' Islamic law introduced in this study may be used to accord equal value to the testimony of men and women. For years, Muslim jurisdictions have conceded equal rights to women in this regard; even after the promulgation of section 17 of the Qanoon-i-Shahadat Order, 1984 in Pakistan, no court has led evidence in accordance with the new 'Islamic' provision. The obvious conclusion to be drawn from this state of affairs is that men and women have equal rights to testify in court, and that this is the accepted, operative law on the subject. An-Naim's methodology of reformation of *Sharia'* may also be employed by asking the questions as to what category one could place this right (*ibadaat* or *muamalaat*)? Why, in seventh century Arabia was a woman's evidence in financial matters reduced to writing considered half that of a man's, the testimony of the second woman being only of a corroborative nature, and so on. Refinement of these arguments as well as further research projects are needed to present legal formulations advancing women's human rights in this sphere of life.

In the matter of inheritance rights of Muslim women being half of those accorded to men, the premise of a patriarchal society cannot be overstated. Since a man is given the duty of providing for the family and he is supposed to spend on his family members out of his earnings whereas a woman need not, hence it was argued that this justified the double share in inheritance. Compatibility with the norms of international human rights laws could be achieved were one to take account of and recognise the existence of hundreds of thousands of female headed households in the world today. Would the burden of 'provider' originally only a man's, not entitle a woman to a share equal to him enabling her to fulfil her responsibilities as head of the household? Further, inheritance is not the only manner of transferring resources, and the half share for women presently considered as mandatory, being the minimum and not the maximum to which a woman is entitled. And finally, there is no bar for a

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right of the wife but a controlled one. See for instance, *Abdul Rahim v. Shahida Khan* PLD 1984 SC 329.

person to gift away his entire estate to anyone, irrespective of gender. It may be concluded that the possibility of varied and wide ranging interpretations of regulatory norms within the Islamic tradition, coupled with the ambiguity and vagueness of many of its formulations may provide welcome space for alternative and progressive interpretations to advance women's human rights. An important strategy may be for Muslim women across jurisdictions to share successes achieved in this direction resulting in cross fertilisation of ideas as well as strengthening the discourse on equal rights for all within the Islamic legal tradition.[15]

The discussion on the now well-established practice of incorporating fundamental rights into the constitutions of many Muslim jurisdictions also provides an avenue for ensuring a core of universally respected women's human rights.[16] Mohammed Arkoun supports this view and remarks that

> "By integrating the principle of respect for human rights [in their respective constitutions], a large number of States have created a legal arena where it is theoretically possible for citizens to respond to violations by initiating protest procedures. Here as elsewhere, reality differs greatly from principle, but creating a legal arsenal for potential future use is not a negligible achievement. With the exception of Turkey, launched by Ataturk into a radical, secular experiment, the first constituent assemblies in the Muslim countries all tried to reconcile Islam and modern legislation." [17]

A problem however that all Muslim jurisdictions are confronted with is the ideological hardening brought about by the Islamic 'revivalist' movements. These movements reject the validity of 'secular' constitutional documents as legitimate

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[15] An active network, Women Living Under Muslim Laws (WLUML), already exists since 1986 and is engaged in useful work on similar lines.

[16] See, for example the constitution of Pakistan and Bangladesh.

[17] M. Arkoun, "Human Rights" in M. Arkoun, *Rethinking Islam Common Questions, Uncommon Answers,* (1994) Boulder, CO: Westview Press, at p. 112. For some interesting views on the subject see, A. Linklater, "Liberal Democracy, Constitutionalism, and the New World order" in R. Leaver & J. L. Richardson (eds.,) *Charting the Post-Cold War Order* (1993) Boulder, CO: Westview pp. 29-38.

guidelines for Muslim States and seek to restore elements of the *sharia'* - utterly out of context and juxtaposed with legal codes borrowed from the West. The status of women suffers most, especially from legislation where intent diverges widely from effect, and where retrogressive laws relating to women are among the chosen few 'Islamic laws' that are particularly canvassed.

The question therefore remains as to how best to proceed with the struggle to achieve equal human rights for women in the Muslim world. Is it desirable to proceed to struggle within a framework of Islam, or should an attempt be made to work within a secular framework instead?[18] At a strategic level, an emancipatory struggle operating entirely within a secular framework would be extremely unlikely to succeed.[19] Islam is not only a religion, it is an all pervasive code of economic, social and political life. As such, it permeates all aspects of a Muslim's life. The secularisation of the women's rights movement would alienate and exclude many women.[20] Furthermore, the abandonment of a struggle within Islam would leave the path clear for extremist and restrictive arguments, thus endangering the status of women even more. In Iran, for example, the former Shah attempted to secularise laws affecting women including banning the *chadder* (the equivalent of the veil). As we all know, the Islamic revivalists and the *chadder* struck back with a vengeance![21] In Turkey, Kemal Attaturk declared a secular regime since 1926 but almost seventy years later, an Islamic Party has raised its head and the Rector of a University in Ankara has had to resign over demands to allow women students to cover their head on Campus.[22]

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[18] Which some women advocate out of sheer frustration at the intransigence of "Islamic revivalists."

[19] A. A. An-Naim, Toward an Islamic Reformation. Civil Liberties, Human Rights, and International Law (1990) Syracuse: Syracuse University Press is devoted to this theme.

[20] S. S. Ali and S. Mullally, "Women's Rights and Human Rights in Muslim Countries: A case study" in H. Hinds, A. Phoenix and J. Stacey (eds.,) *Working Out: New Directions for Women's Studies* (1992) London: Falmer at p. 119.

[21] *Ibid.*

[22] See A. Versi, "Conscientious objectors in 'democratic' Turkey" (26th June 1998) *The Muslim News* at p. 4; N. Sisman, "Muslim women and the public sphere in Turkey" (26th June 1998) *The Muslim News* at p. 4.

On a more theoretical level, a number of Muslim scholars have advocated the continuation of a struggle within Islam.[23] It is felt that the in-built dynamism in the basic sources of *Sharia'* - the *Quran* and the *Sunna* - renders it possible to evolve an interpretation of the sacred texts compatible with equality between the sexes. Last but not least, the struggle for equality in Muslim societies must come from within those societies if it is to be successful. Furthermore, any such struggle must be one which recognises the participation of women as a productive and creative force. The writings of many Muslim scholars pose a significant challenge which could be taken up by Muslim women in order to achieve the objectives of equal rights articulated in the international human rights instruments particularly the Women's Convention.[24] These human rights instruments can play a useful role, both as a political lever and as a point of reference, when attempting to articulate specific demands by women in Muslim societies.

In conclusion, the view may be presented that Islam, in common with other world religions, had as its primary mission, access to justice, equity, and equality for all, irrespective of distinctions. The effectiveness to implement these principles however, has always been limited either by their misuse at the hands of groups who have taken upon it upon themselves the sole interpreters of the religious text in Islam, or by weaknesses inherent in traditional cultural systems. The true impact of the Islamic teachings on the emancipation of human beings can only be evaluated in the light of the many cultures that modify, refine, diffuse, and apply these norms. What is important to recognise is, in the words of Arkoun that:

> "Religion, like language, is a collective force that governs the life of societies.. . . It is illusory and dangerous to ask of religions more than

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[23] The work of some of these writers has been discussed in the present study.

[24] Ali and Mullally, *op. cit.*, n. 20 at p. 122.

they can give. Only human beings, with their creativity and their innovative boldness, can constantly renew and augment opportunities for their own liberation."[25]

[25] Arkoun, *op. cit.*, n. 17 at p. 112.

APPENDIX 1

UNIVERSAL ISLAMIC DECLARATION OF HUMAN RIGHTS

21 Dhul Qaidah 1401 19 September 1981

Contents

This is a declaration for mankind, a guidance and instruction to those who fear God. (Al Qur'an, Al Imran 3:138)

Foreword

Islam gave to mankind an ideal code of human rights fourteen centuries ago. These rights aim at conferring honour and dignity on mankind and eliminating exploitation, oppression and injustice.

Human rights in Islam are firmly rooted in the belief that God, and God alone, is the Law Giver and the Source of all human rights. Due to their Divine origin, no

ruler, government, assembly or authority can curtail or violate in anyway the human rights conferred by God, nor can they be surrendered.

Human Rights in Islam are an integral part of the overall Islamic order and it is obligatory on all Muslim governments and organs of society to implement them in letter and in spirit within the framework of that order.

It is unfortunate that human rights are being trampled upon with impunity in many countries of the world, including some Muslim countries. Such violations are a matter of serious concern and are arousing the conscience of more and more people throughout the world.

I sincerely hope that this *Declaration of Human Rights* will give a powerful impetus to the Muslim peoples to stand firm and defend resolutely and courageously the rights conferred on them by God.

This *Declaration of Human Rights* is the second fundamental document proclaimed by the Islamic Council to mark the beginning of the 15th Century of the Islamic era, the first being the *Universal Islamic Declaration* announced at the International Conference on The Prophet Muhammad (peace and blessings be upon him) and his Message, held in London from 12 to 15 April 1980.

The *Universal Islamic Declaration of Human Rights* is based on the *Qur'an* and the *Sunnah* and has been compiled by eminent Muslim Scholars, jurists and representatives of Islamic movements and thought. May God reward them all for their efforts and guide us along the right path.

Paris 21 Dhul Qaidah 1401 Salem Azzam
19th September 1981 *Secretary General*

O men! Behold, We have created you all out of a male and a female, and have made you into nations and tribes, so that you might come to know one another. Verily, the noblest of you in the sight of God is the one who is most deeply conscious of Him. Behold, God is all Knowing, all aware.
(Al Qur'an, Al-Hujurat 49:13

Preamble

WHEREAS the age-old human aspiration for a just world order wherein people could live, develop and prosper in an environment free from fear, oppression, exploitation and deprivation, remains largely unfulfilled;

WHEREAS the Divine Mercy unto mankind reflected in its having been endowed with super-abundant economic sustenance is being wasted, or unfairly or unjustly withheld from the inhabitants of the earth;

WHEREAS Allah (God) has given mankind through His revelations in the Holy *Qur'an* and the *Sunnah* of His Blessed Prophet Muhammad an abiding legal and moral framework within which to establish and regulate human institutions and relationships;

WHEREAS the human rights decreed by the Divine Law aim at conferring dignity and honour on mankind and are designed to eliminate oppression and injustice;

WHEREAS by virtue of their Divine source and sanction these rights can neither be curtailed, abrogated or disregarded by authorities, assemblies or other institutions, nor can they be surrendered or alienated;

Therefore we, as Muslims, who believe

a) in God, the Beneficient and the Merciful, the Creator, the Sustainer, the Sovereign, the sole Guide of mankind and the Source of all Law;

b) in the Vicegerency (*Khilafah*) of man who has been created to fulfil the Will of God on earth;

c) in the wisdom of Divine guidance brought by the Prophets, whose mission found its culmination in the final Divine message that was conveyed by the Prophet Muhammad (Peace be upon him) to all mankind;

d) that rationality by itself without the light of revelation from God can neither be a sure guide in the affairs of mankind nor provide spiritual nourishment to the human soul, and, knowing that the teachings of Islam represent the quintessence of Divine guidance in its final and perfect form, feel duty-bound to remind man of the high status and dignity bestowed on him by God;

e) in inviting all mankind to the message of Islam;

f) that by the terms of our primeval covenant with God our duties and obligations have priority over our rights, and that each one of us is under a bouden duty to spread the teachings of Islam by word, deed, and indeed in all gentle ways, and to make them effective not only in our individual lives but also in the society around us;

g) in our obligation to establish an Islamic order:

i) wherein all human beings shall be equal and none shall enjoy a privilege or suffer a disadvantage or discrimination by reason of race, colour, sex, origin or language;

ii) where in all human beings are born free;

iii) wherein slavery and forced labour are abhorred;

iv) wherein conditions shall be established such that the institution of family shall be preserved, protected and honoured as the basis of all social life;

v) wherein the rulers and the ruled alike are subject to, and equal before the Law;

vi) wherein obedience shall be rendered only to those commands that are in consonance with the Law;

vii) wherein all worldly power shall be considered as a sacred trust, to be exercised within the limits prescribed by the Law and in a manner approved by it, and with due regard for the priorities fixed by it;

viii) wherein all economic resources shall be treated as Divine blessings bestowed upon mankind, to be enjoyed by all in accordance with the rules and the values set out in the *Qur'an* and the *Sunnah*;

ix) wherein all public affairs shall be determined and conducted, and the authority to administer them shall be exercised after mutual consultation (*Shura*) between the believers qualified to contribute to a decision which would accord well with the Law and the public good;

x) wherein everyone shall undertake obligations proportionate to his capacity and shall be held responsible pro rata for his deeds;

xi) wherein everyone shall in case of an infringement of his rights, be assured of appropriate remedial measures in accordance with the Law;

xii) wherein no one shall be deprived of the rights assured to him by the Law except by its authority and to the extent permitted by it;

xiii) wherein every individual shall have the right to bring legal action against anyone who commits a crime against society as a whole or against any of its members;

xiv) wherein every effort shall be made to

(a) secure unto mankind deliverance from every type of exploitation, injustice and oppression,

(b) ensure to everyone security, dignity, and liberty in terms set out and by methods approved and within the limits set by the Law;

Do hereby, as servants of Allah and as member of the Universal Brotherhood of Islam, at the beginning of the Fifteen Century of the Islamic Era, affirm our commitment to uphold the following inviolable and inalienable human rights that we consider are enjoined by Islam.

I. Right to Life

a) Human life is sacred and inviolable and every effort shall be made to protect it. In particular no one shall be exposed to injury or death, except under the authority of the Law.

b) Just as in life, so also after death, the sanctity of a person's body shall be inviolable. It is the obligation of believers to see that a deceased person's body is handled with due solemnity.

II. Right to Freedom
a) Man is born free. No inroads shall be made on his right to liberty except under the authority and in due process of the Law.

b) Every individual and every people has the inalienable right to freedom in all its forms 3/4 physical, cultural, economic and political- and shall be entitled to struggle by all available means against any infringement or abrogation of his right; and every oppressed individual or people has a legitimate claim to the support of other individuals and/or peoples in such a struggle.

III. Right to Equality and Prohibition Against Impermissible Discrimination
a) All persons are equal before the Law and are entitled to equal opportunities and protection of the Law.

b) All persons shall be entitled to equal wage for equal work.

c) No person shall be denied the opportunity to work or be discriminated against in any manner or exposed to greater physical risk by reason of religious belief, colour, race, origin, sex or language.

IV. Right to Justice
a) Every person has the right to be treated in accordance with the Law, and only in accordance with the Law.

b) Every person has not only the right but also the obligation to protest against injustice; to recourse to remedies provided by the Law in respect of any unwarranted personal injury or loss; to self-defence against any charges that are preferred against him and to obtain fair adjudication before an independent judicial tribunal in any dispute with public authorities or any other person.

c) It is the right and duty of every person to defend the rights of any other person and the community in general *(Hisbah)*.

d) No person shall be discriminated against while seeking to defend private and public rights.

e) It is the right and duty of ever Muslim to refuse to obey any command which is contrary to the Law, no matter by whom it may be issued.

V. Right to Fair Trial
a) No person shall be adjudged guilty of an offence and made liable to punishment except after proof of his guilt before an independent judicial tribunal.

b) No person shall be adjudged guilty except after a fair trial and after reasonable opportunity for defence has been provided to him.

c) Punishment shall be awarded in accordance with the Law, in proportion to the seriousness of the offence and with due consideration of the circumstances under which it was committed.

d) No act shall be considered a crime unless it is stipulated as such in the clear wording of the Law.

e) Every individual is responsible for his actions. Responsibility for a crime cannot be vicariously extended to other members of his or group, who are not otherwise directly or indirectly involved in the commission of the crime in question.

VI. Right to Protection Against Abuse of Power

Every person has the right to protection against harassment by official agencies. He is liable to account for himself except for making a defence to the charges made against him or where he is found in a situation wherein a question regarding suspicion of his involvement in a crime could be *reasonably* raised.

VII. Right to Protection Against Torture

No person shall be subjected to torture in mind or body, or degraded, or threatened with injury either to himself or to anyone related to or held dear by him, or forcibly made to confess to the commission of a crime, or forced to consent to an act which is injurious to his interests.

VIII. Right to Protection of Honour and Reputation

Every person has the right to protect his honour and reputation against calumnies, groundless charges or deliberate attempts at defamation and blackmail.

IX. Right to Asylum

a) Every persecuted or oppressed person has the right to seek refuge and asylum. This right is guaranteed to every human being irrespective of race, religion, colour and sex.

b) Al Masjid Al Haram (the sacred house of Allah) in Mecca is a sanctuary for all Muslims.

X. Rights of Minorities

a) The *Qur'anic* principle "There is no compulsion in religion" shall govern the religious rights of non-Muslims minorities.

b) In a Muslim country religious minorities shall have the choice to be governed in respect of their civil and personal matters by Islamic Law, or by their own laws.

XI. Right and obligation to Participate in the Conduct and Management of Public Affairs

a) Subject to the Law, every individual in the community (*Ummah*) is entitled to assume public office.

b) Process of free consultation (*Shura*) is the basis of the administrative relationship between the government and the people. People also have the right to choose and remove their rulers in accordance with this principle.

XII. Right to Freedom of Belief, Thought and Speech

a) Every person has the right to express his thoughts and beliefs so long as he remains within the limits prescribed by the Law. No one, however, is entitled to disseminate falsehood or to circulate reports which may outrage public decency, or to indulge in slander, innuendo or to cast defamatory aspersions on other persons.

b) Pursuit of knowledge and search after truth is not only a right but a duty of every Muslim.

c) It is the right and duty of every Muslim to protest and strive (within the limits set out by the Law) against oppression even if it involves challenging the highest authority in the State.

d) There shall be no bar on the dissemination of information provided it does not endanger the security of the society or the State and is confined within the limits imposed by the Law.

e) No one shall hold in contempt or ridicule the religious beliefs of others or incite public hostility against them; respect for the religious feelings of others is obligatory on all Muslims.

XIII. Right to Freedom of Religion

Every person has the right to freedom of conscience and worship in accordance with his religious beliefs.

XIV. Right to Free Association

a) Every person is entitled to participate individually and collectively in the religious, social, cultural and political life of his community and to establish institutions and agencies meant to enjoin what is right *(ma'roof)* and to prevent what is wrong *(munkar)*.

b) Every person is entitled to strive for the establishment of institutions whereunder an enjoyment of these rights would be made possible. Collectively, the community is obliged to establish conditions so as to allow its members full development of their personalities.

XV. The Economic Order and the rights Evolving Therefrom

a) In their economic pursuits, all persons are entitled to the full benefits of nature and all its resources. These are blessings bestowed by God for the benefit of mankind as a whole.

b) All human beings are entitled to earn their living according to the Law.

c) Every person is entitled to own property individually or in association with others. State ownership of certain economic resources in the public interest is legitimate.

d) The poor have the right to a prescribed share in the wealth of the rich, as fixed by *Zakah*, levied and collected in accordance with the Law.

e) All means of production shall be utilised in the interest of the community (*Ummah*) as whole, and may not be neglected or misused.

f) In order to promote the development of a balanced economy and to protect society from exploitation, Islamic Law forbids monopolies, unreasonable restrictive trade practices, usury, the use of coercion in the making of contracts and the publication of misleading advertisements.

g) All economic activities are permitted provided they are not detrimental to the interests of the community (*Ummah*) and do not violate Islamic laws and values.

XVI. Right to Protection of Property
No property may be expropriated except in the public interest and on payment of fair and adequate compensation.

XVII. Status and Dignity of Workers
Islam honours work and the worker and enjoins Muslims not only to treat the worker justly but also generously. He is not only to be paid his earned wages promptly, but also entitled to adequate rest and leisure.

XVIII. Right to Social Security
Every person has the right to food, shelter, clothing, educating and medical care consistent with the resources of the community. This obligation of the community extends in particular to all individuals who cannot take care of themselves due to some temporary or permanent disability.

XIX. Right to Found a Family and Related Matters
a) Every person is entitled to marry, to found a family and to bring up children in conformity with his religion, traditions and culture. Every spouse is entitled to such rights and privileges and carries such obligations as are stipulated by the Law.

b) Each of the partners in marriage is entitled to respect and consideration from the other.

c) Every husband is obligated to maintain his wife and children according to his means.

d) Every child has the right to be maintained and properly brought up by its parents, it being forbidden that children are made to work at an early age or that any burden is put on them which would arrest or harm their natural development.

e) If parents are for some reason unable to discharge their obligations towards a child it becomes the responsibility of the community to fulfil these obligations at public expense.

f) Every person is entitled to material support, as well as care and protection, from his family during his childhood, old age, or incapacity. Parents are entitled to material support as well as care and protection from their children.

g) Motherhood is entitled top special respect, care and assistance on the part of the family and the public organs of the community (*Ummah*).

h) Within the family, men and women are to share in their obligations and responsibilities according to their sex, their natural endowments, talents and inclinations, bearing in mind their common responsibilities toward their progeny and their relatives.

i) No person may be married against his or her will, or loose or suffer diminution of legal personality on account of marriage.

XX. Rights of Married Women

Every married woman is entitled to:

a) live in the house in which her husband lives;

b) receive the means necessary for maintaining a standard of living which is not inferior to that of her spouse, and, in the event of divorce, receive during the statutory period of waiting (*iddah*) means of maintenance commensurate with her husband's resources, for herself as well as for the children she nurses or keeps, irrespective of her own financial status, earnings, or property that she may hold in her own rights;

c) seek and obtain dissolution of marriage (*Khul'a*) in accordance with the terms of the Law. This right is in addition to her right to seek divorce through the courts.

d) inherit from her husband, her parents, her children and other relatives according to the Law.

e) strict confidentiality from her spouse, or ex-spouse if divorced, with regard to any information that he may have obtained about her, the disclosure of which could prove detrimental to her interests. A similar responsibility rests upon her in respect of her spouse or ex-spouse.

XXI. Right to Education

a) Every person is entitled to receive education in accordance with his natural capabilities.

b) Every person is entitled to a free choice of profession and career and to the opportunity for the full development of his natural endowments.

XXII. Right of Privacy

Every person is entitled to the protection of his privacy.

XXIII. Right to Freedom of Movement and Residence

a) In view of the fact that the world of Islam is veritably *Ummah Islamia*, every Muslim shall have the right to freely move in and out of any Muslim country.

b) No one shall be forced to leave the country of his residence, or be arbitrarily deported therefrom without recourse to due process of Law.

Explanatory Notes

1) In the above formulation of Human Rights, unless the context provides otherwise:

a) the term 'person' refers to both the male and the female sexes.

b) the term 'Law' denotes the *Shari'ah*, i.e. the totality of ordinances derived from the *Qur'an* and the *Sunnah* and any other laws that are deduced from these two sources by methods considered valid in Islamic jurisprudence.

2) Each one of the Human Rights enunciated in this declaration carries a corresponding duty.

3) In the exercise and enjoyment of the rights referred to above, persons shall be subject only to such limitations as are enjoined by the Law for the purpose of securing the due recognition of, and respect for, the rights and the freedom of others and of meeting the just requirements of morality, public order and the freedom of others and of others and of meeting the just requirements of morality, public order and the general welfare of the Community *(Ummah)*.

The Arabic text of this *Declaration* is the original.

Glossary of Arabic Terms

SUNNAH-The example or way of life of the Prophet (peace be upon him), embracing what he said, did or agreed to.

KHALIFAH-The Vicegerency of man on earth or succession to the Prophet, translated into English as the Caliphate.

HISBAH-Public vigilance, an institution of the Islamic State enjoined to observe and facilitate the fulfilment of right norms of public behaviour. The "*Hisbah*" consists of public vigilance as well as an opportunity to private individuals to seek redress through it.

MA'ROOF-Good act

MUNKAR-Reprehensible deed.

ZAKAH-The 'purifying' tax on wealth, one of the five pillars of Islam obligatory on Muslims.

'IDDAH-The waiting period of a widowed or divorced woman during which she is not to re-marry.

KHUL'A-Divorce a woman obtains at her own requests.

UMMAH ISLAMIA-World Muslim Community.

SHARI'AH-Islamic law.

Source: http://www.alhewar.com/ISLAMDECL.html

APPENDIX 2

RESOLUTION NO. 49/19-P
ON THE
CAIRO DECLARATION ON HUMAN RIGHTS
IN ISLAM.

The Nineteenth Islamic Conference of Foreign Ministers (Session of Peace, Interdependence and Development), held in Cairo, Arab Republic of Egypt, from 9-14 Muharram 1411H (31 July to 5 August 1990),

Keenly aware of the place of mankind in Islam as Vicegerent of Allah on Earth;

Recognising the importance of issuing a Document on Human Rights in Islam that will serve as a guide for member States in all aspects of life;

Having examined the stages through which the preparation of this draft Document has, so far, passed and the relevant report of the Secretary General;

Having examined the report of the Meeting of the Committee of Legal Experts held in Tehran from 26 to 28 December, 1989;

1- Agrees to issue the Cairo Declaration on Human Rights in Islam which will serve as a general guidance for Member States in the field of human rights.

ANNEX TO
RES NO 49/19-P

THE CAIRO DECLARATION
ON
HUMAN RIGHTS IN ISLAM

The Member States of the Organisation of the Islamic Conference,

Reaffirming the civilising and historical role of the Islamic Ummah which God made the best nation that has given mankind a universal and well established civilisation in which harmony is established between this life and the hereafter and knowledge is combined with faith; and the role that this Ummah should play to guide a humanity confused by competing trends and ideologies and to provide solutions to the chronic problems of this materialistic civilisation.

Wishing to contribute to the efforts of mankind to assert human rights, to protect man from exploitation and persecution, and to affirm his freedom and right to a dignified life in accordance with the Islamic Shari'ah.

Convinced that mankind which has reached an advanced stage in materialistic science is still, and shall remain, in dire need of faith to support its civilisation and of a self motivating force to guard its rights;

Believing that fundamental rights and universal freedoms in Islam are an integral part of the Islamic religion and that no one as a matter of principle has the right to suspend them in whole or in part or violate or ignore them in as much as they are binding divine commandments, which are contained in the Revealed Books of God and were sent through the last of His Prophets to complete the preceding divine messages thereby making their observance an act of worship and their neglect or violation an abominable sin, and accordingly every person is individually responsible- and the Ummah collectively responsible- for their safeguard.

Proceeding from the above-mentioned principles,
Declare the following:

ARTICLE I:
(a) All human beings form one family whose members are united by submission to God and descent from Adam. All men are equal in terms of basic human dignity and basic obligations and responsibilities, without any discrimination on the grounds of race, colour, language, sex, religious belief, political affiliation, social status or other considerations. True faith is the guarantee for enhancing such dignity along the path to human perfection.

(b) All human beings are God's subjects, and the most loved by Him are those who are most useful to the rest of His subjects, and no one has superiority over another except on the basis of piety and good deeds.

ARTICLE 2:
(a) Life is a God-given gift and the right to life is guaranteed to every human being. It is the duty of individuals, societies and states to protect this right from any violation, and it is prohibited to take away life except for a Shari'ah prescribed reason.

(b) It is forbidden to resort to such means as may result in the genocidal annihilation of mankind.

(c) The preservation of human life throughout the term of time willed by God is a duty prescribed by Shari'ah.

(d) Safety from bodily harm is a guaranteed right. It is the duty of the State to safeguard it, and it is prohibited to breach it without a Sharia-prescribed reason.

ARTICLE 3:
(a) In the event of the use of force and in case of armed conflict, it is not permissible to kill non-belligerents such as old men, women and children. The wounded and the

sick shall have the right to be fed, sheltered and clothed. It is prohibited to mutilate dead bodies. It is a duty to exchange prisoners of war and to arrange visits or reunions of the families separated by the circumstances of war.

(b) It is prohibited to fell trees, to damage crops or livestock, and to destroy the enemy's civilian buildings and installations by shelling, blasting or any other means.

ARTICLE 4:
Every human being is entitled to inviolability and the protection of his good name and honour during his life and after his death. The state and society shall protect his remains and burial place.

ARTICLE 5:
(a) The family is the foundation of society, and marriage is the basis of its formation. Men and women have the right to marriage, and no restrictions stemming from race, colour or nationality shall prevent them from enjoying this right.

(b) Society and the state shall remove all obstacles to marriage and shall facilitate marital procedure. They shall ensure family protection and welfare.

ARTICLE 6:
(a) Woman is equal to man in human dignity, and has rights to enjoy as well as duties to perform; she has her own civil entity and financial independence, and the right to retain her name and lineage.

(b) The husband is responsible for the support and welfare of the family.

ARTICLE 7:
(a) As of the moment of birth, every child has rights due from the parents, society and the state to be accorded proper nursing, education and material, hygienic and moral care. Both the foetus and the mother must be protected and accorded special care.

(b) Parents and those in such like capacity have the right to choose and the type of education they desire for their children, provided they take into consideration the interest and future of the children in accordance with ethical values and the principles of the Shari'ah.

(c) Both parents are entitled to certain rights from their children, and relatives are entitled to rights from their kin, in accordance with the tenets of the Shari'ah.

ARTICLE 8:
Every human being has the right to enjoy his legal capacity in terms of both obligation and commitment, should this capacity be lost or impaired, he shall be represented by his guardian.

ARTICLE 9:
(a) The question for knowledge is an obligation and the provision of education is a duty for society and the State. The State shall ensure the availability of ways and means to acquire education and shall guarantee educational diversity in the interest of

society so as to enable man to be acquainted with the religion of Islam and the facts of the Universe for the benefit of mankind.

(b) Every human being has the right to receive both religious and worldly education from the various institutions of, education and guidance, including the family, the school, the university, the media, etc., and in such an integrated and balanced manner as to develop his personality, strengthen his faith in God and promote his respect for and defence of both rights and obligations.

ARTICLE 10:
Islam is the religion of unspoiled nature. It is prohibited to exercise any form of compulsion on man or to exploit his poverty or ignorance in order to convert him to another religion or to atheism.

ARTICLE 11:
(a) Human beings are born free, and no one has the right to enslave, humiliate, oppress or exploit them, and there can be no subjugation but to God the Most-High.

(b) Colonialism of all types being one of the most evil forms of enslavement is totally prohibited. Peoples suffering from colonialism have the full right to freedom and self-determination. It is the duty of all States and peoples to support the struggle of colonised peoples for the liquidation of all forms of colonialism and occupation, and all States and peoples have the right to preserve their independent identity and exercise control over their wealth and natural resources.

ARTICLE 12:
Every man shall have right, within the frame work of Shari'ah, to free movement and to select his place of residence whether inside or outside his country and if persecuted, is entitled to seek asylum in another country. The country of refuge shall ensure his protection until he reaches safety, unless asylum is motivated by an act which Shari'ah regards as a crime.

ARTICLE 13:
Work is a right guaranteed by the State and Society for each person able to work. Everyone shall be free to choose the work that suits him best and which serves his interests and those of the society. The employee shall have the right to safety and security as well as to all other social guarantees. He may neither be assigned work beyond his capacity nor be subjected to compulsion or exploited or harmed in any way. He shall be entitled-without any discrimination between males and females- to fair wages for his work without delay, as well as to the holidays allowances and promotions which he deserves. For his part, he shall be required to be dedicated and meticulous in his work. Should workers and employers disagree on any matter, the State shall intervene to settle the dispute and have the grievances redressed, the rights confirmed and justice enforced without bias.

ARTICLE 14:
Everyone shall have the right to legitimate gains without monopolisation, deceit or harm to oneself or to others. Usury (riba) is absolutely prohibited.

ARTICLE 15:
(a) Everyone shall have the right to own property acquired in a legitimate way, and shall be entitled to the rights of ownership, without prejudice to oneself, others or to society in general. Expropriation is not permissible except for the requirements of public interest and upon payment of immediate and fair compensation.

(b) Confiscation and seizure of property is prohibited except for a necessity dictated by law.

ARTICLE 16:
Everyone shall have the right to enjoy the fruits of his scientific, literary, artistic or technical production and the right to protect the moral and material interests stemming therefrom , provided that such production is not contrary to the principles of Shari'ah.

ARTICLE 17:
(a) Everyone shall have the right to live in a clean environment, away from vice and moral corruption an environment that would foster his self-development and it is incumbent upon the State and society in general to afford that right.

(b) Everyone shall have the right to medical and social care, and to all public amenities provided by society and the State within the limits of their available resources.

(c) The State shall ensure the right of the individual to a decent living which will enable him to meet all his requirements and those of his dependants, including food, clothing, housing, education, medical care and all other basic needs.

ARTICLE 18:
(a) Everyone shall have the right to live in security for himself, his religion, his dependants, his honour and his property.

(b) Everyone shall have the right to privacy in the conduct of his private affairs, in his home, among his family, with regard to his property and his relationships. It is not permitted to spy on him, to place him under surveillance or to besmirch his good name. The State shall protect him from arbitrary interference.

(c) A private residence is inviolable in all cases. It will not be entered without permission from its inhabitants or in any unlawful manner, nor shall it be demolished or confiscated and its dwellers evicted.

ARTICLE 19:
(a) All individuals are equal before the law, without distinction between the ruler and the ruled.

(b) The right to resort to justice is guaranteed to everyone.

(c) Liability is in essence personal.

(d) There shall be no crime or punishment except as provided for in the Shari'ah.

(e) A defendant is innocent until his guilt is proven in a fair trial in which he shall be given all the guarantees of defence.

ARTICLE 20:
It is not permitted without legitimate reason to arrest an individual, or restrict his freedom, to exile or to punish him. It is not permitted to subject him to physical or psychological torture or to any form of humiliation, cruelty or indignity. Nor is it permitted to subject an individual to medical or scientific experimentation without his consent or at the risk of his health or of his life. Nor is it permitted to promulgate emergency laws that would provide executive authority for such actions.

ARTICLE 21:
Taking hostages under any form or any purpose is expressly forbidden.

ARTICLE 22:
(a) Everyone shall have the right to express his opinion freely in such manner as would not be contrary to the principles of the Shari'ah.

(b) Everyone shall have the right to advocate what is right, and propagate what is good, and warn against what is wrong and evil according to the norms of Islamic Shari'ah.

(c) Information is a vital necessity to society. It may not be exploited or misused in such a way as may violate sanctities and the dignity of Prophets, undermine moral and ethical values or disintegrate, corrupt or harm society or weaken its faith.

(d) It is not permitted to arouse nationalistic or doctrinal hatred or to do anything that may be an incitement to any form or racial discrimination.

ARTICLE 23:
(a) Authority is a trust; and abuse or malicious exploitation thereof is absolutely prohibited, so that fundamental human rights may be guaranteed.

(b) Everyone shall have the right to participate, directly or indirectly in the administration of his country's public affairs. He shall also have the right to assume public office in accordance with the provisions of Shari'ah.

ARTICLE 24:
All the rights and freedoms stipulated in this Declaration are subject to the Islamic Shari'ah.

ARTICLE 25:
The Islamic Shari'ah is the only source of reference for the explanation or clarification of any of the articles of this Declaration.

Cairo, 14 Muharram 1411H
5 August 1990

APPENDIX 3

RECOMMENDATIONS OF THE SYMPOSIUM OF EXPERTS ON THE ROLE OF WOMEN IN THE DEVELOPMENT OF ISLAMIC SOCIETY TO THE TWENTY-THIRD ISLAMIC CONFERENCE OF FOREIGN MINISTERS

The OIC Symposium of Experts on the Role of Women in the Development of Islamic Society, held in Tehran, Islamic Republic of Iran, From 17 to 19 Zul Qaidah 1415H, corresponding to 17-19 April, in accordance with Resolution 10/7-C (I.S), adopted by the Seventh Islamic Summit Conference.

Having thoroughly examined the issue in light of the report of the Secretariat of the OIC, proposals and papers presented by experts and views expressed by various delegations;

Reiterating the commitment of Member States to the principles and objectives of the United Nations Charter and the Charter of the Organisation of the Islamic Conference and to the safeguarding of the exalted worth, dignity and status of women in Islamic societies;

Convinced that the noble Islamic religion presents comprehensive solutions for all aspects of human and social life and endeavours;

Conscious of the growing need for Muslims throughout the world to promote revival of Islamic values and principles and to create societies based on Islamic principles of peace, justice, tolerance, progress, equity and equality for all human beings;

Convinced that these noble objectives can only be achieved through the participation of all Muslims, including the full, active and effective participation of Muslim women who constitute half of the Islamic Ummah;

Underlining the Divine principles and teachings of Islam concerning the promotion and protection of the rights and exalted status of women in various spheres of personal, family, economic, political, cultural and social life;

Emphasising the instrumental role of women in the development of Islamic societies;

Reiterating the necessity of co-operation and co-ordination among Muslim countries to promote comprehensive and equitable development of all segments of the Islamic Ummah;

Committed to presenting the correct image of the noble Islamic religion and of the role and status of Muslim women and combating all attempts to project a distorted image of Islamic teachings and of Muslim women in the world;

*1. **Recommends*** to the Twenty-Third Islamic Conference of Foreign Ministers to adopt the following measures:

1.1. Recognition and promotion of the prominent role provided by Islamic teachings to the women in Islamic society, and adoption of positive policies to empower women to participate actively, effectively and constructively in various levels and spheres of economic, political, cultural and social life;

1.2. Presentation and promotion of the true Islamic image of women and their real role, dignity and status in Islamic society, particularly through the mass media and text books and to make all attempts to portray Islamic women in a positive light in keeping with the true Islamic thought and away from distorted images and superstitious traditions which are alien to Islamic thought and teachings;

1.3. Opening the way for Muslim women to participate in interpretation and "Ijtihad" in a manner compatible with Islamic principles;

1.4. Creation of a favourable spiritual, ethical, cultural, social and political environment and conditions, in accordance with Islamic teachings, conducive to the advancement and development of the personality and character of Muslim women, and rejection of adverse cultural encroachments which are detrimental to the identity and personality of Islamic societies in particular Muslim women;

1.5. Extension of every effort to ensure respect for fundamental human rights of Muslim minorities and communities, particularly Muslim women minorities including their right to practice their religion;

1.6. Conduct of research on and eradication of all forms of violence and exploitation of women, including domestic violence, sexual exploitation, pornography, prostitution, trafficking in women, sexual harassment, genital mutilation and other negative traditional and cultural practices as well as violence against women caused by armed conflicts;

1.7. Promotion of general awareness among women and men about the teachings of true Islam concerning the role and status of women and their rights and responsibilities in Islamic Shariah;

1.8. Creation of awareness among women and men about their individual, family and societal rights, responsibilities and duties under Islamic Shariah, and provision of the necessary environment for full attainment and practice of their rights and responsibilities; request relevant authorities to provide the necessary conditions and facilities to effectively meet the requirements of women and encourage their participation in public life thus enabling them to reconcile their family and professional responsibilities with their political rights and participation in decision-making.

1.9. Dissemination of public awareness and respect for the economic and financial rights and privileges recognised for women under Islamic Shariah, in particular those pertaining to private ownership, earnings and inheritance;

1.10. Encouragement of appropriate planning and allocation of the necessary resources in national development programs and budgets for the advancement of women in all fields;

1.11. Creation of the appropriate environment and the necessary facilities for the full development of all potential and capabilities of women in various fields in harmony with the pivotal role of Muslim women in social and family life;

1.12. Establishment and support of literacy centres and vocational training facilities as well as creation and development of job opportunities compatible with modern life and with Islamic Shariah;

1.13. Support of legal and social mechanisms for enabling women to carry out their tasks, such as paid maternity leaves, flexible working hours and child care facilities;

1.14. Promotion and encouragement of traditional and advanced income-generating employment opportunities for women in Islamic societies, which would reinforce their role in the development and growth of Islamic societies, through appropriate and equitable planning to generate productive employment and augment social security and welfare for all;

1.15. Provision of necessary financial and social support and protection and empowerment of women heads of household and other women requiring social help and assistance;

1.16. Encouragement of national and international planning and co-operation for eradication of poverty, which primarily affects women and other vulnerable segments of society.

1.17. Proper emphasis on the important role of rural women in production and development, facilitating their access, to the necessary resources including land, easy credit, ensured prices and marketing and supporting rural and urban women associations and groups as mechanisms for their social, economic and cultural progress;

1.18. Facilitating and enhancing women's full access to appropriate, readily available, and free quality health care and related services and facilities, including family planning, reproductive and maternal and infant health in the context of Islamic principles;

1.19. Support and encouragement of various collective social, scientific, economic, cultural, sports and charitable activities of Muslim women;

1.20. Conducting appropriate research and study projects on the theoretical and practical aspects of advancement of women in different spheres of personal, and social life and identification of the prevailing obstacles as well as measures to overcome them;

1.21. Adoption of common measures and exchange of expertise among Islamic countries for the advancement of women and their development in various levels and fields;

1.22. Promotion of co-operation and exchange of views and experience among Muslim women in different societies;

1.23. Establishment and strengthening of appropriate mechanisms for better co-ordination and implementation of programs and policies for the advancement of women and world-wide dissemination of objective information about their role in Islamic teaching and in the development of Islamic societies, including, *inter alia*, finalization, as soon as possible, preferably before the Twenty-Fourth ICFM, of consultations concerning the establishment of an International Islamic Women's Organisation within the framework of the OIC and in accordance with its regulations.

2. ***Requests*** the Secretary General to present these recommendations to the Twenty-Third ICFM;

3. ***Recommends*** that Islamic countries continue to co-ordinate their positions in international forum and meetings on the role of women, particularly the forthcoming Fourth World Conference on Women to be held in Beijing in September 1995;

4. ***Requests*** the General Secretariat of the Organisation to organise and facilitate regular and orderly consultations for co-ordination of positions among Islamic delegations attending international conferences of women, particularly the forthcoming Fourth World Conference on Women to be held in September 1995.

DRAFT TEHRAN DECLARATION ON THE ROLE OF WOMEN IN THE DEVELOPMENT OF ISLAMIC SOCIETY

We, the representatives of Member States of the Organisation of the Islamic Conference, meeting in Tehran, capital of the Islamic Republic of Iran, from 17 to 19 Dhul Qa'dah 1415H (17-19 April, 1995) in a Symposium, at expert level, on the Role of Women in the Development of Islamic Society, in accordance with the resolutions of the Sixth and Seventh Islamic Summit Conferences held respectively in Dakar (Republic of Senegal) and Casablanca (Kingdom of Morocco) in 1411H and 1415H.

Confirming the historical role of the Muslim Ummah which has provided mankind with a balanced global civilisation linking this world with the hereafter, science with faith and the matter with the spirit; and confirming also the civilizational role expected of this Ummah today in guiding a bewildered mankind across competing currents and schools and in offering appropriate solutions to the chronic problems of materialistic civilisation;

Declare the following:

FIRST: One of the objectives of Islam is to build a society in which both man and woman have a complementary role to play in the building and development process. Islam is the first religion to have given the woman her full rights in harmony with her personality, her potentials, her aspirations and her essential role in life. In the Islamic concept, society constitutes one complete unit in which man and woman are dealt with comprehensively. The Holy Quran affirms the unity of the Muslim Ummah in which women and man alike, as the two vital constituents of the Ummah, both have their own personality and their own Standing in Islamic society.

SECOND: Islam considers the family, in the concept accepted by the Divine religions, to be the cornerstone in the sound social edifice and rejects any other deviated visions of the family and any alternative sexual relationship outside this framework. Women have, by virtue of their motherhood and other characteristics, the principal role in the stability and welfare of this sacred family edifice.

THIRD: Motherhood is one of the natural functions of the woman in her life and she cannot discharge this noble mission in the optimal manner for better raising future generations unless she is provided with proper opportunities to exercise all her rights and play an active role in the other spheres of life.

FOURTH: The woman and man are equal in human dignity; the woman has rights equitable with her duties in accordance with Allah's Word: "And women shall with justice have their rights similar to those exercised against them," (The Quran, verse 2:228). Men and women, while having distinct and different natural characteristics, fully complement each other in the family and social responsibilities and women have an independent, civil, personality and is entitled to civil, political, economic social and cultural rights and responsibilities.

FIFTH: The contribution of the woman - at our present time - in the speeding-up of the renaissance and revival of the Muslim Ummah, is essential and the woman must be provided with all the moral and material resources necessary for performing her important her important role in the cultural, social, economic and political fields.

SIXTH: The woman is a basic agent in and beneficiary of the economic and social development process which confirms her right to assume different functions, have access to necessary resources and decision-making process and thus realise the principles of equality and social balance in accordance with Islamic principles.

SEVENTH: Organisational arrangements should be provided of the Muslim Women so that they may decide on the definition of the issues and tasks pertaining to their role and adopt appropriate measures to achieve the expected objectives on the basis of Islamic principles and values so as to preserve women's dignity and personality and to arrive at practical results for highlighting her role in the development of Islamic society.

EIGHTH: Institutionalisation, promotion and encouragement of continued contact between various Women's institutions and organisations in Islamic States with the objective of benefiting from each other's experience should be actively pursued.

NINTH: Call for respect of woman in all fields; rejection of violence against her including domestic violence, sexual exploitation, pornography, prostitution, trafficking in women, sexual harassment, genital mutilation, as well as the practices observed in certain societies which degrade the woman and her dignity and deny her legitimate rights and which are alien and totally unrelated to Islam.

TENTH: Promotion of the positive role of women by mass media and rejection of all forms of exploitation of women in the media and advertisements which are detrimental to the moral values and virtues, as such an exploitation is a degradation of her personality and a debasement of her dignity.

ELEVENTH: All efforts should be made to alleviate the suffering of women and other vulnerable groups, particularly Muslims, who continue to be major victims of armed conflicts, foreign or alien occupation, poverty and imposed external economic pressures and blockade.

TWELFTH: Comprehensive and sustainable development cannot be achieved except within a framework of religious and moral values. We therefore declare our rejection of the attempts to impose alien cultural and social concepts upon others and our condemnation of the continuous attacks launched by some quarters against the Islamic concepts and prescriptions relating to women.

THIRTEENTH: Islamic Shariah in the context of its fundamental sources, is the sole reference for the interpretation of clarification of any article of this Declaration.

FOURTEENTH: This Draft Declaration is to be submitted to the Twenty-Third Islamic Conference of Foreign Ministers for consideration and appropriate decision.

Source: *A Collection of Papers and Report Presented at The First OIC Symposium on Women's Role in Islamic Society* (1995) Tehran: Women's Solidarity Association of Iran pp. 249-268.

APPENDIX 4

ISLAMABAD DECLARATION ON THE ROLE OF MUSLIM WOMEN PARLIAMENTARIANS IN THE PROMOTION OF PEACE, PROGRESS AND DEVELOPMENTS OF ISLAMIC SOCIETIES

We, the Muslim Women Parliamentarians, meeting in Islamabad, Capital of the Islamic Republic of Pakistan, from 3rd to 5th Rabble Awl 1416H (1 to 3 August 1995) in the first International Conference of Women Parliamentarians from Muslim countries, inspired by our belief that Islam is the religion of tolerance, justice and equality:

Confirming that Islam is a universal religion which provides mankind with a balanced and enlightened civilisation and reiterating that it offers solutions to the problems of the contemporary society.

Convinced that equality and elimination of discrimination in all spheres of life based on justice constitute the essence of democracy and guarantee the happiness and prosperity of the entire society, including men and women.

Aware of the participate, egalitarian, just and progressive society envisioned by the immutable precepts of Islam.

Cognisant of the role, the respect, the rights and the responsibility which Islam assigns to women in society.

Inspired by the invaluable and effective contributions of Muslim women in the development and progress of human civilisation.

Recognising that Muslim women have always risen to the occasion, whether in confronting aggression or as freedom fighters in a liberation struggle as well as for their own rights.

Conscious of the need to dispel the deliberate misrepresentation and misperception of the status and rights granted by Islam to women.

Determined to ensure that women in Islamic societies are able to pay their due and rightful role in all sectors of national life.

Determined also to combat the discrimination and the injustice which women continue to encounter in all walks of life and to eliminate all kinds of violence against women.

Convinced that no society can achieve optimal progress and development without the participation of women in public life and nation building.

Conscious of the need to promote awareness of women's rights in the economic, social, political and professional fields at all levels.

Recognising that woman, as enshrined in the Quran and Sunnah, is the centre of the family which is the basic unit of society and hence the cornerstone of the edifice of a stable, peaceful and prosperous polity.

Acknowledging that women parliamentarians have a role in directing the efforts of our respective countries and of the world Muslim organisations in promoting Islam as a religion of peace, progress and development of the Muslim Ummah and humanity at large.

Recognising the importance of inspiring a new generation of women and men to work together for sustainable development, prosperity and peace.

Recognising the role of Muslim Women Parliamentarians in directing their countries for justice, freedom and democracy as a contribution to human progress at large.

To promote the role of women and to ensure their rightful place in society, we the Parliamentarians from the Muslim Countries, resolve as follows:

a) To promote and protect the human rights of women at all stages of their life cycle in the true spirit of Islam.

b) To strive to eradicate illiteracy in Islamic societies of women in particular.

c) To work in our respective countries for the promulgation of laws supportive of women's positive role and rights in society. We will make special efforts to abrogate discriminatory laws, as well as cultural and customary practices so that our society can advance on an egalitarian and just basis.

d) To strive to promote an Islamic identity, values and culture and to protect Muslims from corrupt and negative influences by strengthening the family as enjoined by Islam.

e) To make sustained efforts to end suppression, discrimination and violence against women in all forms especially domestic violence. To this end to strengthen the legal and judicial institutions and to ensure women's effective participation in formulating national policies by all appropriate means.

f) To promote greater awareness of women's rights from the platform of Parliament and to enjoin our government to promote participation of women in the executive, legislative and judicial branches of government by giving them a fair share in all decision-making process. We will fight all tendencies to deprive women of their basic rights because of their gender.

g) To promote the implementation, as appropriate, of the provisions of international conventions on the rights of women and urge all countries to adhere to these conventions.

h) To mobilise women's forums to persuade the private sector to encourage greater participation of women in commerce and industry, including through training.

i) To work for the creation of greater facilities for women in the social field particularly health and all round education at all levels.

j) To encourage the media to promote awareness of women's rights in the society. We shall endeavour to remove hurdles which prevent women from playing a fuller role in the media.

k) To set up the committees in our respective Parliaments to monitor progress towards the full integration of women in national development.

l) To encourage the representation of Muslim women parliaments in the delegations of their respective countries to the meetings of the International Parliamentary Union.

m) To spare no effort to alleviate the suffering of Muslim women who are victims of armed conflicts, alien domination, genocide or foreign occupation and to promote all necessary measures for the release of women and children imprisoned and taken hostages in zones of armed conflict. In this context we express our complete solidarity with the Muslim women of Azerbaijan, Bosnia-Hezergovina, Jammu and Kashmir, Kosovo, Palestine, and other regions where our sisters are being subjected to violence, genocide, occupation and aggression. While condemning these acts, we call for the liberation of all territories occupied by force.

n) To urge the international community for the implementation of UN resolutions calling for with drawal of Israel from occupied Arab territories and to allow for the right to return and self-determination and the establishment of an independent homeland of the Palestinian people with Al-Quds as its capital and to upon Israel to stop the Judaization of Al-Quds Al Sharif.

o) To promote and encourage interaction amongst women's institutions and organisations in the Islamic countries. We will use every opportunity to benefit from each other's experience.

p) To provide relief and assistance to Muslim countries which have been subjected to unfair economic sanctions that particularly affect women and children and call for the lifting of the sanctions against Iraq and Libya.

q) To formulate a practical programme of action for addressing the problems of women, especially in the Muslim countries to be presented at the next conference of Muslim Women parliamentarians.

r) To encounter terrorism in all its forms in Islamic societies and to promote harmony and tolerance amongst the believers of various religious. To strengthen the principles of justice and equality among nations and to support human freedom everywhere.

This historic conference has opened up important opportunities for institutionalising the process of interaction amongst the women parliamentarians of the Muslim countries. This opportunity should not be lost. We have, therefore, decided to:

i) Convene the second meeting of the Women Parliamentarians from Muslim countries within one year.

ii) Set up a Follow-up Committee of 10 Women Parliamentarians, 3 each from the Asian African and the Middle East regions and one from Europe to meet within six months from this conference.

iii) Set up a nucleus Secretariat in Islamabad to co-ordinate interaction amongst the women parliamentarians of the Islamic countries and to organise the above meetings. The secretariat will co-ordinate the positions of the Muslim countries at the Fourth World Conference on Women to be held in Beijing to reflect the true image of Islam, preserve the cultural particularities and to promote the principles of equality and freedom of women.

iv) To provide country reports highlighting the progress achieved in the implementation of the above decisions to the Secretariat. A consolidated report to be presented by the Secretariat to the Follow-up Committee and the Second Conference of Women Parliamentarians from Muslim countries to be held in 1996.

Source: NEWSHEET, vol. VII. No 3 1995.
Shirkat Gah.

GLOSSARY

'Adala High moral probity

Adal Badal Exchange marriage in NWFP (a brother and sister getting married to another brother and sister)

Addo Baddo Exchange marriage in Sindh

Adhan Call to prayer

As-Siyar Islamic International Law

Athna Asharia, Zaidya, and Ismailya Schools of Shia juristic thought

Azl Cotus interruptus

Bulugh Puberty

Batil Void

Bay'a Oath of Allegiance

Bidda (*Biddat*) innovation

Chadar aur Chardiwari Women veiled and within the four walls of the house

Chadder Veil/Shawl

Din way of life. It is said that Islam is not only a religion it is a *din*, i.e., a complete way of life.

Diyat Blood money

Ejab-o-qabool Proposal and acceptance

Faraid Duties (singular *fard*)

Fasid Irregular

Fatwa authoritative pronouncement on a question of law by a person qualified to make such pronouncement

Fiasle jo sangh Women as peace offering in feuds in Sindh

Fiqh Jurisprudence

Hadd (plural *Hudood*) limit/s prescribed. The term is used in Islamic Jurisprudence to denote that punishment which has been prescribed in the *Quran* for a particular offence and is therefore deemed the maximum punishment awardable

Hadith (plural *Ahadith*) the traditions of the Prophet Muhammad, compiled as records of his words and deeds

Halala Intervening marriage

Hanafi, Shafei, Maliki, and Hanbali Schools of Sunni juristic thought

Haq Bakhswana A symbolic 'marriage' to the *Quran* where the woman foregoes her right to marry

Haqq (*Huq*, Plural *Huqooq*) a right

Haram Forbidden, unlawful

Hizanat Custody (or care of minors)

Hujra A place where (male) guests are entertained, a meeting place for men in a village

Huqooq Allah Rights of God

Huqoq Adam Rights of man

Huquq-ul-ibad Rights of humanity

Ibadaat Devotional acts

Iblis Satan

Iddat Period after death/divorce during which a woman cannot contract another marriage

Ijma Consensus of opinion

Ijtihad Exercising independent juristic reasoning

Ila A form of divorce in which the wife is allowed to approach the *qazi*/courts for dissolution of marriage when her husband abstains from sexual intercourse with her for a period of at least 4 months, pursuant to a vow

Imama Religious leadership

Iqama Second call to prayer

Izzat Honour

Jab'r Guardianship in Marriage

Jahilliya Days of ignorance, referring to the days before Islam

Jirgas Informal alternate dispute resolution forum of the Pukhtun and Baluch people in Pakistan and Afghanistan

Kabair Major sins

Khaza da da kor da ya da gor A Pushto saying that a woman's place is either at home or in the grave

Khiyar-ul-Bulugh Option of Puberty

Khula Dissolution of the marriage on the initiative of the wife by offering compensation to the husband

Kifalah Looking after, taking care of (a child); a concept akin to adoption or fostering

Kitabi A man belonging to one of the revealed religions i.e., Judaism and Christianity

Kitabia A woman belonging to one of the revealed religions i.e., Judaism and Christianity

Lakhkar The tribal army

Lian False accusation

Madhab School of jurisprudence

Mahr (*mehr*) Dower; a sum of money or other property which a wife is entitled to receive from the husband in consideration of the marriage

Mahr Mithl Proper Divorce

Mahram A man, either the husband or any other male relative including father, brother, son, etc. with whom a woman may not lawfully contract marriage

Majlis-e-Shoora Parliament

Makruh An action which is disliked and disapproved by *Sharia'* but it is not under penalty

Maliki Chiefship or head of a tribe

Marz-ul maut Terminal illness

Miraas Property/Belongings

Miraat A person who does not have a male issue

Muamalaat Dealings with others

Mubarat Dissolution of marriage by mutual consent of the husband and wife

Muhr, Sudak, nuhlah, akr Different names for dower/*mehr*

Mujtahid A person qualified to carry out *ijtihad*

Mundub or *Mustahab* An action which is rewarded but the omission is not punished

Muta marriage Temporary marriage

Nashiz Disobedient

Naskh Abrogation or repeal of the legal efficacy of certain verses of the *Quran* in favour of other verses

Nikahnama Marriage contract or certificate

Panchayat A gathering of village elders, usually five in number, for the purpose of arriving at decisions (*Panch* means five)

Pet likhi ni A pregnant woman agreeing to give the child in her womb in marriage to the party concerned

Purdah Segregation. Meaning also the outer garment or covering that women wear when leaving the house

Qandhori sache sardarji mani The Prophet Mohammad's dinner

Qasabgar Messenger

Qawwamun protector, provider, maintainer, guide, manager

Qazhf (*Qadfh*) False testimony

Qazi Judge or arbitrator

Qisas Retribution

Qiyas Analogical deduction

Quran The primary source of Islamic law believed by Muslims to be the word of God revealed to the Prophet Muhammad

Rahdari A permit for removing restricted/prohibited goods from the jurisdiction of the state.

Riba Interest

Riwaj Customary law/Custom

Sahabi (plural *Sahaba/Ashaab*) Companion of the Prophet Muhammad

Sahih Valid

Sar paisey Bride Price

Sha'a'ir Religious rites

Sharia' Principles of Islamic Law

Shia a sect of Islam

Sunna (*Sunnah*) The words and deeds of the Prophet Muhammad

Sunni a sect of Islam to which the pre-dominant majority of Muslims belong

Sura A chapter of the *Quran*

Swara Women as peace offering in feuds

Tafsir Exegesis

Takbirat-al-tashriq Certain rites during the Pilgrimage

Talaq Dissolution of marriage at the instance of the husband

Talaq-i-tafwid Delegated right of divorce given to the wife in the contract of marriage.

Tarboor Nearest male agnate/s

Tawallin Assuming of responsibility

Tazir Discretionary punishment. Any punishment other than, but not necessarily less than *hadd*

Tazkia-al-Shuhood The mode of enquiry adopted by a court to satisfy the credibility of a witness

Ulama Persons learned in religious knowledge

Umma (*Ummah*) Community of Muslims

Ummahat-al Mu'minin Mothers of the believers

Wajib compulsory

Wakil/Vakil Representative/Lawyer

Walee Bayeed A guardian of a more distant degree than a woman's father, grandfather, uncle, brother

Wali Guardian

Walwar The sum paid to the male relatives of the bride in Baluchistan province

Waqf A religious endowment of property/land, usually for charitable purposes

Watta Satta Exchange marriage in Punjab

Wilaya Guardianship

Zairey Money or gift given to a person bringing good news

Zakat (*Zakah*) The poor-rates payable on wealth during one *hijra* year.

Zantalaq A man who has divorced his wife-An abuse in Pukhto

Zenana Women's part of the household

Zihar Form of automatic divorce prevalent in pre-Islamic Arabia where the husband compares his wife to his mother or another female with whom he may not lawfully contract a marriage

Zina The offence of fornication or adultery

Zina-bil-jabr rape

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