

THE UNIVERSITY OF HULL

**Can Women's Rights, Universalism and Cultural
Relativism be Reconciled? Islamic and Saudi
Arabian Perspectives**

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Abstract

Saudi Arabia is a state which was founded on an agreement between Sheikh Mohammed bin Abdul Wahab and Imam Muhammad bin Saud on the basis that Islam is the law and constitution of the country. In the light of this, the Saudi state has so far adopted Islamic law; more specifically, it adheres to the doctrine of Imam Ahmad Ibn Hanbal.

Women in Saudi Arabia, however, are deprived of some of their rights. For instance, a guardian has the right to prevent a woman from marrying and also has the right to force her to marry. Women in Saudi Arabia do not have equal rights with men to take up leadership positions (a woman cannot be a judge, for instance) and, furthermore, women do not have the right to pass their nationality on to their children as men can. In fact, the fact that women are deprived of these rights is because of customs and tradition which have a great influence in the country. For instance, they are the reason that many women are excluded from education and work; they were also the reason that women were prevented from driving cars. Customs and traditions have contributed to the misinterpretation of Islamic texts, especially those regarding women's rights. Therefore, to reconcile women's rights in international law or, in particular, with the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), the Islamic texts must be reinterpreted in line with the spirit of Islamic law, which seeks to raise the status of women.

This study aims to build a bridge between Islamic law, especially as applied in Saudi Arabia, and CEDAW. The study employs a reconciliatory approach using an interpretive technique which focuses on a contextual interpretation of Islamic texts.

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Introduction

Themes of this study

The central theme of this research is to find out whether the concept of the universality of human rights, and especially the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW), can be reconciled with the concept of cultural relativism, especially Islamic cultural relativism, regarding women's rights and, more specifically, women's rights in Saudi Arabia.

This study seeks to highlight the common ground between women rights' law (CEDAW) and Islamic law but the focus remains on areas where conflict between the two systems is likely to occur. Efforts are made to offer mechanisms that might achieve greater reconciliation between the two systems. The study uses the Kingdom of Saudi Arabia as a case study.

After the preliminary study of the chosen topic, the main research objectives are as follows:

- To examine the rights of women in Islam, whether individual rights or personal status, in order to determine to what extent Islam guarantees women their rights;
- To examine the impact of Islam, on the one hand, and traditions on the other, on the rights of women in Saudi Arabia;
- To draw meaningful conclusions with respect to the possibility of reconciling CEDAW and Islamic law as practised in Saudi with regard to women's rights.

Research methodology

This study follows a qualitative research methodology by focusing on the primary and secondary sources of international human rights and Islamic law. Islamic law sources include the Qur'an and the Sunnah (the behaviour model of the Prophet Mohammed), and certain secondary resources, for instance, the work of prominent traditional scholars, such as Al Shafi, Abu-haneefah and Ibn-Taymiah, and prominent modern scholars, such as al Qaradawi. In addition, the study pays special attention to the Ahmad Ibn Hanbal School which was adopted by the Saudi Arabian government. The study also pays some attention to the primary and secondary sources of international human rights' law, especially to the 1979 Convention on the Elimination of all Forms of Discrimination against Women (CEDAW).

To explore and appreciate fully the relationship and compatibility of women rights' law and Islamic law, this study uses the Kingdom of Saudi Arabia as a case study. The case study is chosen for the following reasons. First, Saudi Arabia is considered as the birth place of Islam and the Muslim world regards it as its centre. Second, Saudi Arabia follows perhaps the most restrictive interpretation of Islamic law and it is helpful to see whether that particular interpretation is compatible with human rights' standards.

This study follows a reconciliatory approach using the interpretive technique developed by Niaz Shah in his 2006 study. Shah argues that greater compatibility may be achieved by following the interpretive approach which is based on contextual interpretation.

Context, for Shah, means three things: (1) historical context (7th century); (2) social context (Arab society); and (3) the Qur'anic context which, in turn, has two meanings: first, when and why was a verse revealed? and, second, what is the overall approach (intention) of the Qur'an towards a particular issue: e.g. human rights, and especially women's rights? Shah argues that the original intention and spirit of Islamic law must be recaptured through re-analysis of the pertinent verses of the Qur'an in their proper

context.¹

Merits of the interpretive approach

Firstly, this is an Islamist approach which stems from the Islamic religion; it is not imposed by any external party and therefore it would be acceptable to Muslims. In addition, any results thus derived should be feasible and practical. Secondly, the significance of this approach is that it supports cultural relativism and universalism at the same time. The interpretive approach supports the universality of human rights in an attempt to reconcile the Islamic culture with the universality of human rights. In return, it supports cultural relativism by respecting that each culture has its own system and uses the reform principle that belongs to the Islamic religion, known as *Ijtihad*. Thirdly, and most importantly, it is achievable because the interpretive approach uses an Islamic principle recognised by Muslims: that is, the principle of *Ijtihad*. Moreover, the interpretive approach supports women's rights as Muslim women tend to follow Islamic principles and therefore, it would not be suitable for them to follow human rights' principles imposed externally in this regard. Al-Hibri, cited in Shah, argues that:

“It is important to keep in mind that most women tend to be highly religious and would not want to act in contradiction to their faith.”²

Moreover, Al-Hibri stresses that:

“The majority of Muslim women who are attached to their religion will not be liberated through the use of a secular approach imposed from the outside by international bodies or from above by undemocratic governments. The only way to resolve the conflicts of these women and remove their fear of pursuing rich and fruitful lives is to build a solid Muslim feminist jurisprudential basis which clearly shows that Islam not only does not deprive them of their rights, but in fact demands

¹ Niaz A Shah, *Women, the Koran and international human rights law: the experience of Pakistan*, vol 4 (Martinus Nijhoff Publishers 2006) p.16

² Shah, *Women, the Koran and international human rights law: the experience of Pakistan* p.16

these rights for them.”³

The significance of the study and its contribution

This study will contribute to a better understanding of Islamic law, especially with regard to women’s rights and their compatibility with laws on such rights. It also aims to improve policy and law in the Kingdom of Saudi Arabia regarding the rights of women. The ultimate goal is to contribute to the enjoyment of women’s rights in the Muslim world, but more so in Saudi Arabia.

Chapter outlines

This research is divided into eight chapters:

Chapter 1 addresses the scholarly debate concerning the universalism of human rights, cultural relativism, and the reconciliation of the universalism of human rights with cultural relativism. This section addresses the challenges faced by Islamic law in being reconciled with universal law in the field of human rights.

Chapter 2 highlights international women’s rights and, more specifically, the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW), together with its strengths and weaknesses. The aim of the chapter is to examine the international convention’s view of women’s rights and, consequently, broach the possibility of reconciling international women’s rights with the rights of Islamic and Saudi women.

^{3 3} Shah, *Women, the Koran and international human rights law: the experience of Pakistan* p.16

Chapter 3 examines women's social rights by discussing issues such as the right to marry and divorce. The aim of this chapter is to clarify the social rights that are guaranteed to women by Islam.

Chapter 4 addresses women's individual rights in Islam. The chapter examines women's rights as individuals in Islam, such as the right to education, the right to work, and the right to take up leadership positions. The aim of this chapter is to show that Islam gives women rights as individuals although some interpretations of the Islamic law deny them such rights.

Chapter 5 shows that it may be difficult for the Saudi government to accept new laws to develop women's rights from those of outside parties to improve human rights and/or women's rights in the country. Therefore, *Ijtihad* may be the best solution for the development of women's rights in Saudi Arabia as it is a tool derived from Islam to develop and reinterpret Islamic texts in line with the needs of the age. Chapter Five explains in detail the importance of *Ijtihad* in developing human rights in general and women's rights in particular.

Chapter 6 discusses women's personal status in Saudi Arabia and covers areas such as the right to marry, women's right to dissolve the marriage contract, as well as discussing some controversial issues such as underage marriage, separation between spouses who are not deemed socially compatible, and the misuse of polygamy. The aim of this chapter is to clarify the role of culture and Islam in terms of women's personal status in Saudi Arabia.

Chapter 7 addresses women's individual rights in Saudi Arabia. It discusses issues such as women's right to education, their right to attend sports classes, and their right to work. The chapter also examines other controversial issues regarding women's individual rights, including the right to take up political and leadership positions, the right to pass their nationality onto their children, and the right to drive a car. Moreover, the chapter

highlights the misuse of guardianship in Saudi Arabia. The aim of the chapter is to examine the reasons why women are sometimes denied their rights as individuals.

Chapter 8 compares the laws with respect to women, of Saudi Arabia on the one hand, and international laws on the other. It also reviews similarities and disagreements. The goal of the chapter is to discover the possibility of reconciling women's rights in Saudi law with international conventions.

Part I: Women in Islam and International Law

Chapter 1: Universalism and Cultural Relativism

1.1 Introduction

In a world that is said to be increasingly globalised and where events thousands of miles away can be seen on real-time television or mobile phones, few areas remain obscure and unexplained. However, one such area is the continuing misunderstanding between what is commonly known as the West, and those states that enjoy the values and practices of an Islamic culture and society. The origins of human rights, and human rights' laws and treaties may be contestable; nevertheless, they all share a common goal: for all human beings to live in dignity and without discrimination. However, it would be fair to say that there is a pluralistic approach to human rights because different countries and cultures take their own approach in realising the objectives of human rights whilst at the same time enjoying commonality regarding the ideas. The issue of women's rights, however, is a prime example of misunderstanding, sometimes genuine and sometimes deliberate. Equally problematic for western liberal democracies are some principles of criminal law and freedom of expression in Islamic countries. What often arises, therefore, is that Saudi Arabia, in common with some other Islamic countries, finds itself the subject of diplomatic and ideological pressures which, rather than seeking a cultural understanding, serve to emphasise differences. Differences in culture and religion, and different concepts of human rights from state to state, are a reality which is challenging to adjust although it is possible, perhaps, to reconcile these differences with the universality of human rights.

This introductory chapter is divided into four sections. The first section sets out the research questions by presenting views concerning the universality of human rights and cultural relativism, as well as dealing with trends regarding compromise between the universality of human rights and cultural relativism. After this, it discusses human rights in Islam. The second section deals with the themes of this study and the research objectives. The third section presents the research methodology and the significance and contribution of the study. The fourth section deals with the chapter outlines of the thesis.

1.1.1 The universalism of human rights

Jack Donnelly defines universal human rights as those adopted by all human beings equally and inalienably.⁴ Supporters of universal human rights believe that there must be a uniform basis for human rights; they also hold that all human beings must obtain equal rights without distinction according to race, religion or nationality.⁵

On the other hand, it seems that it is difficult to persuade communities that belong to different cultures that they should abolish their own cultures and adhere to a unified universal one. Rhoda Howard-Hassmann (cited in Donnelly) describes this position as cultural absolutism. "Culture provides absolute standards of evaluation, whatever those standards so, if that culture believes something is right, it will be right for those in that culture".⁶ Howard may be right in this argument. Muslims, for example, due to their Islamic culture, have a deep belief that human rights' law in Islam is the most suitable for them. This is because it comes from God who created human beings and who therefore knows what is best for them; God is most familiar with the best ways for them to organise their lives.

⁴ Jack Donnelly, 'The relative universality of human rights' (2007) 29 Human Rights Quarterly 281 p.283

⁵ Ibid p.283

⁶ Ibid p.294

John Locke (cited in Donnelly) asserted that the American and French revolutions were used to build new political thought.⁷ Locke's observation is right to some extent in that the victors of the Second World War had a role in drafting the Universal Declaration of Human Rights according to their conception of human rights. This meant, unfortunately, that it comprised western liberal democracy, which excluded other cultures and religions.⁸ Although the UN Declaration of Human Rights has western characteristics, some philosophers nevertheless consider it may be a valid basis for human rights for the reason that most states have voted for it, most of its articles are reflected in national constitutions, and most of its articles have acquired the status of customary law. However, Federico Lenzerini does not classify it as a basis for global human rights, noting that some states have voted for the Universal Declaration of Human Rights for political reasons and not because they are convinced that these rights are a good basis for human rights in general.⁹

Article 1 of the UN Declaration of Human Rights states that "All human beings are born free and equal in dignity and rights".¹⁰ However, according to Abdullah al-Na'im, dignity is not a unified concept for human beings: for example, Hindus believe that the lower classes of people have no dignity¹¹ and therefore it is challenging to consider the Universal Declaration of Human Rights as universally valid.

Other scholars, such as Arthur Dyck and Hadley Arkes, (cited in Donnelly) believe that human rights should be universal and that they depend on human nature as a basis for human rights. They insist that all human beings have the same nature, regardless of their religion or their beliefs. In addition, they think that this foundation is the most convincing basis for universal human rights.¹² This notion draws its inspiration from the classical Greek philosophers such as Socrates, Aristotle and Plato who believed that any human

⁷ Donnelly, 'The relative universality of human rights' (2007) p.286

⁸ Joyce Appleby, Lynn Hunt and Margaret Jacob, *Telling the truth about history* (WW Norton & Company 2011)

⁹ Federico Lenzerini, *The culturalization of human rights law* (Oxford University Press 2014) p.60

¹⁰ United Nations (1948) Universal Declaration of Human Rights

¹¹ Abdullahi Ahmed An-Na'im, 'Toward an Islamic hermeneutics for human rights' (1995) Human rights and religious values: An uneasy relationship 233 p.ix

¹² Jack Donnelly, *Universal human rights in theory and practice* (Cornell University Press 2013) p.20

being should have rights simply because he/she is a human being.¹³ However, how can human nature alone be the basis for the development of human rights? It is true that human beings are born with the same nature but that nature is affected by the society into which the being is born and communities are influenced by religious and other cultural norms.¹⁴ For instance, in Saudi Arabia, women must marry with the approval of a guardian, as the guardian's consent is one of the pillars of marriage. In a situation where a woman is married without the consent of a male guardian, such a marriage is deemed invalid.¹⁵ This is in contrast to the Western world where this idea may be felt to be irrational as the most important thing in a marriage is the consent only of the both parties who are to be married; a guardian may not even know about the marriage.¹⁶ In another example, Muslim women in Saudi Arabia, in order to follow one of the principles of Islamic law, must wear a veil when they appear in front of men (with the exception of close relations) since, according to the faith of Muslim women, it is culpable to appear in front of men without a veil. In contrast, in the Western world, for instance, there is a different view regarding this issue since, for example, there is nothing to prevent women from wearing mini-skirts in front of men. Accordingly, Western and Saudi women share the same human nature but they do not enjoy the same human rights since both are influenced by the state, religion and culture that they belong to. In other words, it seems unreasonable to combine such contradictory concepts and place them under the umbrella of human nature as a foundation for human rights.

Donnelly argues that human nature is culturally relative. Also, he believes that human nature is not a sufficiently powerful foundation on which to base human rights, firstly, because human nature addresses individuals and not the societies to which they belong, and secondly, because the natural law does not acquire legality.¹⁷ Howard strongly rejects the so-called community of direction or the ideal of romantic communitarianism, which

¹³ Donnelly, *Universal human rights in theory and practice* p.294

¹⁴ *ibid* p.294

¹⁵ Mona Hamdan, 'Saudi women's rights: permitted and prohibited.' <<https://raseef22.com/life/2015/08/15/saudi-women-rights/>> accessed 14/12/2017

¹⁶ Guardian's consent is one of marriage conditions in Saudi Arabia which, based on AL- Hanbali school however; it is not a condition in all the Islamic states.

¹⁷ Jack Donnelly, 'Cultural relativism and universal human rights' (1984) *Human Rights Quarterly* 400 p.403

emphasises the cultural specificity of communities; in contrast, he stresses the liberal concept of individual human rights.¹⁸

John Rawls points out a different concept of human rights, which is that of overlapping consensus. This notion has the capacity to accommodate different cultures, leading to a new universal concept of human rights driven by a pluralist international society.¹⁹ John Rawls' concept may be the most sensible one in the field of universal human rights since, although he stresses the concept of universal human rights, he does not at the same time deny the importance of multiculturalism. Supporters of the universality of human rights have not been able to reach a consensus on a universal basis for human rights as they disagree with each other in this regard, while others have tried to find a new concept for the idea of universal human rights that will include culture. Consequently, although scholars who support the universality of human rights tend to agree that human rights should be universal, they differ with regard to what is the most feasible foundation on which to base universal human rights and what is the best.

1.1.2 Cultural relativism

Fernando Teson defines cultural relativism as "the position according to which local cultural traditions (including religious, political and legal practices) properly determine the existence and scope of civil and political rights enjoyed by individuals in a given society."²⁰

Jack Donnelly defines culture thus: "Cultural relativity is a fact: cultures differ, often dramatically, across time and space. Cultural relativism is a set of doctrines that imbue cultural relativity with prescriptive force."²¹

The supporters of relativism in human rights believe that human rights are not universal and can consist of rights that are offered to all humans without discrimination. They state that human rights have not managed to be universal but are seeking to be so while facing

¹⁸ Rhoda E Howard, 'Human rights and the search for community' (1995) *Journal of Peace Research* 1 p.329

¹⁹ John Rawls, 'The idea of an overlapping consensus' (1987) *Oxford journal of legal studies* 1

²⁰ Fernando R Teson, 'International Human Rights and Cultural Relativism' (1984) 25 *Va j Int'l L* 869 p.870

²¹ Donnelly, 'The relative universality of human rights' (2007) p.294

many challenges regarding culture.

Melville Herskovits (cited in Ann-Belinda) believes that it is impossible to evaluate different cultures using international standards, especially in the light of the domination one of these cultures which then imposes its lifestyle as being the best. Moreover, Herskovits emphasises the importance of mutual respect which stresses the value of every culture, while refusing to view any culture as primitive as or less sophisticated than another. Furthermore, Herskovits strongly rejects the central concept of an ethnic-based culture which places to the forefront one of the races as being superior.²²

Donnelly stresses that there is variation in cultures and cultural specificities in each region. He also considers culture to be the only source of the validity and legitimacy of any moral right.²³ Donnelly may be right in this because culture has a strong influence on moral values. Edmund Burke concluded:

“The restraints on men, as well as their liberties, are to be reckoned among their rights. However, as both liberties and restrictions vary with times and circumstances, and admit infinite modifications, they cannot be used to settle upon any abstract rule; and nothing is so foolish as to discuss them on that principle. At this point in the present investigation, it is certainly premature to take a position on whether *no* moral judgment is universally valid and, consequently, on whether *every* moral judgment is culturally relative. However, it is quite evident that *not every* moral judgment is universally valid and that *some* moral judgments are culturally relative.”²⁴

Burke, in his argument, focused on three significant points: the first is that liberties, values and restrictions vary with time and circumstances. Burke is right to consider this as, for instance, the Universal Declaration of Human Rights was adopted in 1948 after the Second World War which had a great influence on the drafting of it. After over fifty years, perhaps

²² Ann-Belinda S Preis, 'Human rights as cultural practice: An anthropological critique' (1996) 18 *ibid* 286 p.287

²³ Jack Donnelly, 'Human rights as natural rights' (1982) *ibid* 391

²⁴ Edmund Burke, *Reflections on the Revolution in France: and on the proceedings in certain societies in London relative to that event. In a letter intended to have been sent to a gentleman in Paris* (J. Dodsley 1790) p.89

it is now time to adjust some of the human rights' principles in the Declaration to fit in with contemporary circumstances.²⁵

The second point mentioned by Burke is that not all moral rights can be universal ones. For example, returning to Article 18 of the Universal Declaration, "Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance." However, in contrast, most Islamic schools prohibit individuals from changing their religion. To do this is called an act of apostasy and this act in Islam is punishable; it may even result in execution.²⁶

It could be concluded that not all moral rights are universal as freedom of religion is not a universal moral right. The third point Edmund Burke mentioned is that every moral judgment is culturally relative.²⁷ Burke might be right on this point. For instance, if we consider freedom of expression as a moral judgment, it is culturally relative. This is because, while freedom of expression is unlimited in the UK, for example, it is very limited in many other nations such as China and Russia.

Jack Donnelly divides cultures into strong and weak cultures.²⁸ In nations with strong cultural relativism, it is believed that culture is the basis for lending legitimacy to any moral right or moral rule; in addition, strong cultural relativism accepts only limited universal rights. However, weak cultural relativism believes that culture is important for the legislation of any moral right or moral rule. In addition, weak cultures are more receptive to the notion of universal human rights.²⁹ If the cases of Tunisia and Saudi Arabia are taken as examples, they are two states that both belong to the Islamic culture.

²⁵ Burke, *Reflections on the Revolution in France: and on the proceedings in certain societies in London relative to that event. In a letter intended to have been sent to a gentleman in Paris* p.89

²⁶ Ibid p.89

²⁷ Ibid p.89

²⁸ Donnelly, 'Cultural relativism and universal human rights'(1984) p.401

²⁹ Ibid p.401

However, although polygamy is mentioned in the Qur'an as being permissible in Islam, it is nonetheless forbidden in Tunisian law while it is allowed in Saudi law in line with the Islamic law. It might be argued that Saudi Arabia is a country with a strong Islamic culture and Tunisia is a country with a weak one. Consequently, in Saudi Arabia, the Islamic culture is the foundation for legitimising any moral right and possibly Saudi Arabia could accept a few more rules with regard to universal human rights. In contrast, Tunisia's Islamic culture may give rise to the idea that the Islamic culture is important in giving legitimacy to moral rights while Tunisia may be more receptive to the acceptance of rules concerning universal human rights.

1.1.3 Reconciling the universality of human rights with cultural relativism

The idea of reconciling the universality of human rights and cultural relativism might be possible, as almost all countries have voted in support of the Universal Declaration of Human Rights. As Jack Donnelly argues, perhaps the most striking fact about human rights in the contemporary world is the existing overlapping consensus on the Universal Declaration of Human Rights.³⁰

The following quotation from Article 13 of the Universal Declaration of Human Rights is important in this regard:

“Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits”.³¹

It is obvious that the Universal Declaration of Human Rights itself gives access to culture as a right and believes this can open the door to reconciliation. Michael Freeman believes that the world religions, cultures, traditions and beliefs indirectly benefit from the human

³⁰ Donnelly, *Universal human rights in theory and practice* p.104

³¹ United Nations (1948) Universal Declaration of Human Rights

right to freedom of religion and belief.³² It could be considered that the Universal Declaration of Human Rights has succeeded to a certain extent in reconciling the universalism of human rights with cultural relativism.³³ In addition, it is important to note that pivotal human rights' treaties receive broad, cross-cultural support from the international community. For example, 193 states are parties to the Convention on the Rights of the Child, 1989.³⁴ The Vienna Declaration of Human Rights (1993) was one of the first to use the term "universal human rights" but this Declaration stressed the importance of cultural and religious backgrounds, which means that universality and specificity are not necessarily contradictory; on the contrary, they may be complementary to each other.³⁵

Reconciliation could be possible as universalism tends, to some degree, to show some respect for cultural diversity and certainly does not ignore it. On the other hand, cultural relativism tends to assert the importance of cultural diversity in the Declaration of Human Rights. Furthermore, there is common ground between all states such as the right to life and dignity. Dunne, have proposed a solution to reconcile multiculturalism with universal human rights. This solution is that the international community should set more trust in mechanisms for interpretation than those which already exist.³⁶ Taylor developed an approach to obtain a universal consensus which meant considering universal consensus from a different perspective. Taylor's approach in this regard is based on that of John Rawls and his idea of overlapping consensus. Rawls stated: "Different groups, countries, religious communities and civilizations, although holding incompatible fundamental views on theology, metaphysics, human nature, and so on, would come to an agreement on certain norms that ought to govern human behavior."³⁷ Taylor believes that such consensus is possible. In addition, he emphasises the significance of recognising cultural

³² Michael Freeman, 'The philosophical foundations of human rights' (1994) *Human Rights Quarterly* 491 p.510

³³ Dianne Otto, 'Rethinking the Universality of Human Rights Law' (1997) 29 *Colum Hum Rts L Rev* 1 p.7

³⁴ Sarah Joseph, MA Baderin and M Ssenyonjo, *International Human Rights Law: Six Decades after the UDHR and Beyond* (Great Britain: Ashgate 2010) p.33

³⁵ Otto, 'Rethinking the Universality of Human Rights Law' (1997) p.12

³⁶ Tim Dunne and Nicholas J Wheeler, 'We the Peoples': Contending Discourses of Security in Human Rights Theory and Practice' (2004) 18 *International Relations* 9

³⁷ Charles Taylor, 'Conditions of an unforced consensus on human rights' (1999) *The politics of human rights* 101p.124

differences because this gives a better understanding of the issues involved and is more effective in terms of human rights. He also emphasises the need for religious and cultural dialogue where these dialogues can be a frame of reference for human rights.³⁸

James Nical (cited in Michael Freeman) believes that there is already sufficient consensus on human rights on certain issues, such as the rejection of the crime of rape and the condemnation of racial discrimination.³⁹ Mashood Baderin, on the other hand, as a solution to reconcile the universality of human rights with different cultures, suggests that international supervisors should give states the discretion to enact and enforce their laws through international treaties and bodies.⁴⁰ Niaz Shah proposes an interpretive approach to reconcile the universality of human rights with Islamic law. Shah's approach depends on the interpretation of Qur'anic verses to reach the greatest extent of reconciliation between the universality of human rights and Islamic law. This interpretative approach developed by Shah is based on three foundations: the historical and social aspects of the Qur'anic verses, when they were revealed, and what was the cause of the revelation.⁴¹

According to the above, reconciling the universality of human rights with cultural relativism could be possible for several reasons. The Universal Declaration of Human Rights, based on Article 13, allows different societies to practise their own culture while, on the other hand, many international treaties have already achieved global consensus. In addition, some scholars believe in the possibility of achieving reconciliation in the field of human rights, while other scholars, such as Dunne and Taylor, offer solutions to reconcile the universalism of human rights with cultural relativism.

³⁸ Michael G Barnhart, 'An overlapping consensus: A critique of two approaches' (2004)66 The Review of politics 257 p.25

³⁹ Freeman, 'The philosophical foundations of human rights'(1994) p.493

⁴⁰ Mashood A Baderin, *International human rights and Islamic law* (Oxford University Press 2003) p.231

⁴¹ Shah, *Women, the Koran and international human rights law: the experience of Pakistan* p.14

1.1.4 Human rights in Islam

Islamic law might be one of the most controversial areas in the field of human rights while the Islamic culture may be facing the toughest challenge in reconciling these laws with the universality of human rights, especially with regard to criminal law and women's rights. Jack Donnelly, for example, while being a supporter of human rights' relativism, completely rejects the sanctioning of amputation in Islam.⁴² Bassam al-Tibi, although arguing that human rights must have a cultural basis, also stresses that the law in Islam must be made compatible with human rights in western law.⁴³ Moreover, Mayer believes that the rules of jurisprudence in Islam are an abuse of women's rights and, for this reason, Islamic countries should follow international standards in the field of human rights.⁴⁴

Al-Na'im, on the other hand, attempts to find a compromise between the doctrine of the universality of human rights and the Islamic culture by eliminating some of the guiding principles of Islam commensurate with the universality of human rights.⁴⁵ However, Al-Na'im may not be right in this regard since to deny certain Islamic principles would be rejected by most Islamic countries. Therefore, it is not necessary to obliterate some principles of Islamic law to reconcile them with the universality of human rights; instead, it is surely better to find common ground between universal human rights and Islamic human rights' law.

Baderin, in contrast, considers that although there are significant differences between the universality of human rights and human rights in Islam, this does not mean that it is

⁴² Richard Pierre Claude and Burns H Weston, *Human rights in the world community: issues and action* (University of Pennsylvania Press 1992) p.7

⁴³ Bassam Tibi, 'The European Tradition of Human Rights and the Culture of Islam' (1990) *Human Rights in Africa*, Washington DC: The Brookings Institute p.285

⁴⁴ Ann Elizabeth Mayer, 'Universal versus Islamic Human Rights: A Clash of Cultures or Clash with a Construct' (1993) 15 *Mich J Int'l L* 307 p.402

⁴⁵ Abdullahi Ahmed An-Na'im, *Toward an Islamic reformation: Civil liberties, human rights, and international law* (Syracuse University Press 1996) p.171

impossible to reconcile them.⁴⁶ Baderin may be right in his judgement that it may be possible to reconcile the universality of human rights and culture relativism. At least, both the universality of human rights and Islamic law are seeking to protect human rights. Baderin, in this regard, offers an interesting solution to reconcile the universalism of human rights and human rights in Islam when he suggested using the Islamic legal concept of *maqasid al-sharia* (the overall objective of Shari'a) and *masla-hah* (public interest).⁴⁷ Niaz Shah found Baderin's proposal very effective as it uses Islamic law to develop human rights in Islam and to reconcile them with international standards rather than using external ones.⁴⁸

Rashid Ahmad Jullandhari (cited in Traer) notes: "Islam wants to create a society based on a deep sense of moral responsibility and justice in order to preserve human dignity accorded to man by God."⁴⁹ Rashid Jullandhari's pronouncement is similar to Article 1 of the UN Declaration of Human Rights: "All human beings are born free and equal in dignity and rights." Both Islam and the Universal Declaration of Human Rights seek to preserve the dignity of human beings. Article 2 of the UN Declaration of Human Rights states:

"Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status..."⁵⁰

This Article asserts that human beings are equal regardless of colour, race or nationality; for hundreds of years, the Islamic religion has affirmed the same principles. The Qur'an states: "O mankind, fear your Lord, who created you from one soul and created from it its mate and dispersed from both of them many men and women."⁵¹ Consequently, this is

⁴⁶ Baderin, *International human rights and Islamic law* p.231

⁴⁷ Ibid p.231

⁴⁸ Shah, *Women, the Koran and international human rights law: the experience of Pakistan* p.12

⁴⁹ Robert Traer, 'Human Rights in Islam' (1989)28 *Islamic Studies* 117 p.119

⁵⁰ United Nations (1948) *Universal Declaration of Human Rights*

⁵¹ 'The Holy Quran.'(2:1)

another common ground between Islamic law and the Universal Declaration of Human Rights since both affirm the principle of non-discrimination between human beings.

Additionally, both universal human rights and Islamic law emphasise the rights of women in spite of differences in what those rights are. For example, the Convention on the Elimination of all Forms of Discrimination against Women was adopted in 1979 by the UN General Assembly to eliminate all forms of discrimination against women. However, Islam also cares for women's rights. For example, the Prophet Mohammed said, "Act kindly towards women."⁵² Riffat Hassan concludes that the Qur'an protects women's rights and, in addition, stresses many other aspects since it covers women's rights as wives, mothers and daughters.⁵³

Although there is certainly common ground between universal human rights and Islamic law, there are also great challenges that could be obstacles to reconciliation. One of the most significant challenges is that the grounding of universal human rights depends on human nature and positive law, whereas human rights in the Islamic culture depend on the Qur'an and the Sunnah. The second challenge is that, although Muslims believe in the same Islamic principles, they vary, however, in their practice.⁵⁴

1.1.5 Women rights in Islam

Islamic law emphasises equality between men and women and the Qur'an says: "O mankind, fear your Lord, who created you from one soul and created from it its mate and dispersed from both of them many men and women."⁵⁵ Riffat Hassan (cited in Niaz)

⁵² Muslim bin al Hajjaj, *Sahih Muslim* (Darul Fikr, Beirut 2000) (1468) No.2323

⁵³ Riffat Hassan, 'Muslim women and post-patriarchal Islam' (1991) *After patriarchy: Feminist transformations of the world religions* 39

⁵⁴ Mayer, 'Universal versus Islamic Human Rights: A Clash of Cultures or Clash with a Construct' (1993) p.322

⁵⁵ , 'The Holy Quran.' (4;1)

argues that Islam strongly guarantees fundamental rights, whether for men or women, and affirms that those rights are inherent in human nature.⁵⁶

In terms of social rights, Islamic law gives women similar rights to men to enter into and to dissolve marriage (this is discussed in detail in Chapter Three) while, in terms of individual rights, Islamic law gives women similar rights to work, be educated, take part in sports, share leadership positions with men, and to participate in political activities. In this regard, the Qur'an states: "The believing men and believing women are allies of one another. They enjoin what is right and forbid what is wrong and establish prayer and give zakah and obey Allah and His Messenger."⁵⁷ Based on this verse, Mohammed Emarh argues that this confirms that women should take part in all spheres of life equally with men whether socially, politically or economically.⁵⁸ (This discussed in detail in Chapter Four.)

Al-Hibri (cited in Niaz) argues that Islamic law gives the life of men equal value to the life of women as Islam makes the punishment for the crime of killing a man equal to that for killing a woman.⁵⁹ Moreover, Islamic law confirms there should be justice among men and women as the Qur'an says: "Stand out firmly for Allah, as witness to fair dealing, and let not the hatred of others to you make you swerve to wrong and depart from justice."⁶⁰ Furthermore, Islamic law endorse that everyone, whether male or female, are equal before the law as it states in the Qur'an: "Stand out firmly for justice, as witness to Allah, even as against yourselves, or your parents, or your kin, and whether it be against rich or poor."⁶¹

From this standpoint, the idea of Islamic feminism emerged. Islamic feminists believe that that the suffering of Muslim women is due to ignorance of religion and the denial of women's rights guaranteed by Islamic law; this is due to the concepts and interpretations

⁵⁶ Shah, *Women, the Koran and international human rights law: the experience of Pakistan* p.46

⁵⁷ Ibid (9:71)

⁵⁸ Mohammad Emarah, *West and Islam: between right and wrong*. (Sunrise International Library. 2004) p.16

⁵⁹ Shah, *Women, the Koran and international human rights law: the experience of Pakistan* p.47

⁶⁰ , 'The Holy Quran.' (5:8)

⁶¹ Ibid (4:135)

that are largely influenced and affected by the superiority of men over women.⁶² The most significant goal of the Islamic feminists is to obtain women's rights from Islamic law, free from the misconceptions that have been influenced by cultural backgrounds; they wish simply for the application of the Islamic religion that treats men and women equally in order to eliminate all differences between them.⁶³ Therefore, misinterpretations of Islamic law should be challenged in order to reconcile women's rights in Islamic law with international law. (This is discussed in detail in Chapters Three and Four.)

1.1.6 Conclusion

This chapter addresses the scholarly debate concerning the universalism of human rights, cultural relativism, and the reconciliation of the universalism of human rights with cultural relativism. The chapter also discusses human rights in Islam and the obstacles facing attempts to reconcile these rights with the universalism of the human rights. The chapter finally discusses women's rights and equality between men and women in Islam.

⁶² Wafa'a Al-deresi, 'Islamic Feminism: Its Concerns and Limits'
 <<https://www.mominoun.com/articles/%D8%A7%D9%84%D9%86%D8%B3%D9%88%D9%8A%D8%A9-%D8%A7%D9%84%D8%A5%D8%B3%D9%84%D8%A7%D9%85%D9%8A%D8%A9-%D9%85%D8%B4%D8%A7%D8%BA%D9%84%D9%87%D8%A7-%D9%88%D8%AD%D8%AF%D9%88%D8%AF%D9%87%D8%A7-4256>> accessed 1/2/2020

⁶³ Ibid

Chapter 2: Women's Rights in International Law

2.1 Introduction

In recent decades, women have played a greater role in the international community than ever before, especially in 1975, the year described as 'Women's Year'. Nevertheless, it became clear that women needed much more than one year to solve all their problems adequately.⁶⁴ This chapter discusses women's human rights with special reference to the Convention on the Elimination of All Forms of Discrimination against Women 1979 (CEDAW).

To determine the possibility of building a bridge between international women's rights and women's rights under Saudi Arabian law it is important to examine international women's rights. This includes reviewing the most important conventions which mention women's human rights, such as the Convention of Civil and Political Rights 1966 (ICCPR) and the Covenant on Economic Social and Cultural Rights 1966 (ICESCR). In order to ascertain to what extent international law has succeeded in developing women's rights, in this chapter, the CEDAW convention is examined critically in terms of its strengths and weaknesses. In addition, the chapter examines the influence of culture on the application of CEDAW, as well as considering other documents, such as the Vienna Conference (1993), the Beijing Conference (1995) and the CEDAW Optional Protocol (1999), all of which have contributed to the evolution of women's human rights. The analytical study of women's human rights in this chapter is helpful in comparing international human rights' standards, especially CEDAW, with Islamic standards on women's rights on the one hand (this is discussed in Chapter Three) and Saudi standards with regard to women's rights on the other.

⁶⁴ Jo Lynn Southard, 'Protection of women's human rights under the Convention on the Elimination of All Forms of Discrimination Against Women' (1996) 8 Pace Int'l L Rev 1. P.16

2.2 Women's rights in the pre-CEDAW era

Equality between men and women was one of the most important and fundamental issues that was focused upon by the United Nations Charter since one of the main principles of the United Nations is to promote and support human rights and fundamental freedoms for all without distinction.⁶⁵ The doctrine of equality is also embedded in the International Bill of Human Rights, i.e. the Universal Declaration of Human Rights 1948 (UDHR), the ICCPR, and ICESCR.

The UDHR touches on women's rights in many ways. Article 16 states:

“Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution.”⁶⁶

The UDHR stresses equal rights between men and women in the case of entering into marriage or at the dissolution of the marriage, as well as rights during marriage. In addition, Article 25 of the UDHR stresses the protection of women's rights as mothers⁶⁷ as it states that: “Motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection.”

The ICCPR also pays attention to women in several places. For example, Article 2 states:

“Each State Party to the present Covenant undertakes to respect and ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”⁶⁸

⁶⁵ Laura Reanda, 'Human rights and women's rights: The United Nations approach' (1981) *Human Rights Quarterly* 11 p.2

⁶⁶ United Nations (1948) *Universal Declaration of Human Rights*

⁶⁷ Southard, 'Protection of women's human rights under the Convention on the Elimination of All Forms of Discrimination Against Women' (1996) p.12

⁶⁸ United Nations, (1966) *International Covenant on Civil and Political Rights*

Article 2 stipulates that all States Parties must undertake to ensure that the existing rights are honoured without any discrimination on grounds of sex. Article 23 is concerned with rights similar to those enshrined in the Universal Declaration of Human Rights but they have a binding role regarding equality between men and women in terms of the right to marry and found a family, in addition to their equal rights during marriage or its dissolution.

Moreover, Articles 24, 25 and 26 of the ICCPR address rights using the language of non-discrimination while both Articles 25 and 26 use language which makes clear that there should be no discrimination on the grounds of sex.⁶⁹

The Human Rights Committee, which monitors the extent of the application of the ICCPR in States Parties, has made some general comments that show interest in the status of women. One of the most important of these is General Comment 28 on Article 3 of the ICCPR which was adopted in 2000. This document examines each of the rights enshrined in the Covenant and comments on them in terms of the way that they might affect women. In addition, in 1989, the Human Rights Committee adopted 18 General Comments, which were also for women, where it clarified what constitutes discrimination against women.⁷⁰ In 1995, the Committee amended its reporting guidelines in order to request the provision of information from States Parties with regard to women.⁷¹ Furthermore, the Committee on some occasions included observations to stress the significance of women's lives. For example, the Committee commented on the final section of Peru's Act, 1996, which criminalised abortion, even in the case of rape. This resulted in "backyard" abortions which, in turn, had a serious impact on women's lives. The Commission suspended the law, stating that it was not only inhuman but it was also contrary to Article 3 of the ICCPR that states the right of men and women to equal enjoyment of the rights. It was also said to be incompatible with Article 6 "the right to life"

⁶⁹ United Nations, (1966) International Covenant on Civil and Political Rights

⁷⁰ Rebecca J Cook, *Human rights of women: National and international perspectives* (University of Pennsylvania Press 2012) p.12

⁷¹ Hasnaa Al-Kenaier, 'The arbitrary divorce' <<https://www.ontha.com/2012/09/%D8%A7%D9%84%D9%83%>> accessed 10/8/2017 p.9

and Article 7 “the right to be free from torture and cruel, degrading and inhuman treatment.”⁷²

The ICESCR was adopted by the general assembly in 1996.⁷³ States Parties are requested to provide information on the measures they have taken to meet their obligations regarding the Covenant; they are also requested to indicate any factors or difficulties which have affected the fulfilment of those commitments. In order to build on the reports provided by States, the Council's role is to study them and to make recommendations. The report guidelines, prepared by the Secretariat, demand that countries must provide information on the measures taken to eliminate discrimination on grounds of sex. Some countries called for the abolition of old customs and practices which might affect the enjoyment of certain rights guaranteed under the Covenant, such as freedom of choice in marriage.⁷⁴ While the ICESCR has played role in protecting women’s rights, this role is considered to be very small compared to that played by the Human Rights Committee which, under the ICCPR, has fulfilled a much more functional and significant role.⁷⁵

Although most human rights instruments provide for equality between men and women and, in addition, all the mechanisms and procedures for implementation are available for both men and women, there was still a need for a special human rights bill to protect women's rights.⁷⁶ The United Nations’ Fact Sheet No.22 (1993) gives two reasons for this. The first states,

“Additional means for protecting the human rights of women were seen as necessary because of the mere fact of their “humanity” has not been sufficient to guarantee women the protection of their rights. The preamble to the Convention on the Elimination of All Forms of Discrimination against Women explains that, despite the existence of other instruments, women still

⁷² Hilary Charlesworth, 'Not waving but drowning: Gender mainstreaming and human rights in the United Nations' (2005)18 Harv Hum Rts J 1 p.9

⁷³ Reanda, 'Human rights and women's rights: The United Nations approach'(1981) p.16

⁷⁴ Ibid p.17

⁷⁵ Shah, *Women, the Koran and international human rights law: the experience of Pakistan* p.170

⁷⁶ Ibid p.171,172

do not have equal rights with men. Discrimination against women continues to exist in every society.”⁷⁷

The second says that a Bill is necessary:

“To reinforce the provisions of existing international instruments designed to combat the continuing discrimination against women.”

It further claims:

“It [the Women’s Convention] identifies many specific areas where there has been notorious discrimination against women, for example, in regard to political rights, marriage and the family, and employment. In these and other areas the Convention spells out specific goals and measures that are to be taken to facilitate the creation of a global society in which women enjoy full equality with men and thus full realization of their guaranteed human rights” (United Nations, Fact Sheet No. 22, 1993).⁷⁸

Noreen Burrows, in comparing the preamble of CEDAW to the preambles of other international human rights instruments, argues that the preamble of international treaties usually expresses the reasons and objectives behind the treaty. For example, human rights’ treaties that are adopted by the United Nations always mention in their preamble that their purpose is to uphold human rights and to promote the inherited dignity of all human beings. However, CEDAW differs from those treaties as its central issue is the elimination of all forms of discrimination against women.⁷⁹

⁷⁷ United Nations (1993) *Fact Sheet No 22, 'Discrimination against Women: The Convention and the Committee.* <http://www.unhchr.ch/html/menu6/2/fs22.htm>.

⁷⁸ United Nations (1993) *Fact Sheet No 22, 'Discrimination against Women: The Convention and the Committee.* <http://www.unhchr.ch/html/menu6/2/fs22.htm>.

⁷⁹ Noreen Burrows, 'The 1979 convention on the elimination of all forms of discrimination against women' (1985)32 *Netherlands International Law Review* 419 p.423

2.3 The Convention on the Elimination of all Forms of Discrimination Against Women 1979 (CEDAW)

The Mexico Conference (1975) resulted in very significant steps for women's rights in terms of the work undertaken on the draft form of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW).⁸⁰

CEDAW was adopted by the United Nations' General Assembly in 1979 and came into force on 3 September 1981.⁸¹ This has been described as the most important convention in terms of the status of women and as "the most concise and useful document adopted during the Decade [for Women]."⁸² During the ten years after the Convention came into force, 110 countries signed it; after this, by 2018 number of States Parties had increased to 189. Currently, CEDAW is considered to be the second most important convention, after the Convention on the Rights of the Child, in terms of the number of signatories.⁸³

2.3.1 The definition of discrimination against women

CEDAW aims to achieve justice and grant women equal rights with men. As the elimination of discrimination against women is the most important objective of the Convention, Article 1 defines discrimination against women as:

"Any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field."⁸⁴

⁸⁰ Elizabeth Evatt, 'Finding a Voice for Women's Rights: The Early Days of CEDAW' (2002)34 Geo Wash Int'l L Rev 515 p.516

⁸¹ Ibid p.516

⁸² Bharathi Anandhi Venkatraman, 'Islamic states and the United Nations Convention on the elimination of all forms of discrimination against women: Are the Shari'a and the convention compatible' (1994)44 Am UL Rev 1949 p.1953

⁸³ Evatt, 'Finding a Voice for Women's Rights: The Early Days of CEDAW' (2002) p.516

⁸⁴ United Nations (1979) Convention on the Elimination of All Forms of Discrimination against Women

Indeed, CEDAW's definition includes any differentiation of treatment based on gender that: 1) harms women, 2) prevents the recognition of women's rights, whether in the domestic or public field, or 3) prevents women from exercising their rights or their fundamental freedoms.⁸⁵ Accordingly, treatment that includes these elements would be considered as discrimination against women, while any other differentiation in treatment would not be considered as discrimination against women and would therefore not be covered by the Convention.⁸⁶

2.3.2 Obligations of States Parties

One of the main objectives of the Convention in the legislative field is to embody the principle of non-discrimination between men and women in constitutions and in other legislation, as well as ensuring the practical implementation of this principle. In the non-legislative field, Fayeeza Kathree argues that the Convention obliges States Parties to take rectifying action. For instance, Article 2 states that States Parties should adopt the principle of refraining from discriminating against women, as well as ensuring that both institutions and public authorities similarly implement this principle. In addition, the Article states that all persons, organisations and institutions should take measures to eliminate discrimination by any persons, organisations or institutions.⁸⁷

In addition, unlike previous human rights conventions, CEDAW does not merely provide that States Parties should ensure equality and non-discrimination between men and women; it also imposes obligations on them to take steps to eliminate such discrimination.⁸⁸ For example, Article 2 states that States Parties should take all appropriate measures to adjust or eliminate "regulations, customs and practices that discriminate against women." As this point is very significant, it is repeated in Article 24,

⁸⁵ Rebecca L Hillock, 'Establishing the Rights of Women Globally: Has the United Nations Convention on the Elimination of all Forms of Discrimination against Women Made a Difference' (2004) 12 *Tulsa J Comp & Int'l L* 481 p.485

⁸⁶ *Ibid* p.486

⁸⁷ Fayeeza Kathree, 'Convention on the elimination of all forms of discrimination against women' (1995) 11 *S Afr J on Hum Rts* 421 p.423

⁸⁸ Andrew Byrnes and Jane Connors, 'Enforcing the human rights of women: A complaints procedure for the women's convention' (1995) 21 *Brook J Int'l L* 679

which states that: “State Parties must undertake to adopt all necessary measures at the national level aimed at achieving the full realization of the rights recognized in the present Convention.” Accordingly, by including certain specific obligations, Article 2 requires a States Parties to take “appropriate” steps towards their own ratification.⁸⁹ This means that the issue is not whether discrimination against women is eliminated, but whether steps are being taken to eliminate discrimination against women using appropriate methods.⁹⁰ It should be recognised that employing “appropriate” methods may be more difficult to assess than accurately confined rights for both a State Party and a supervisory body. This is because it may be more complex and challenging for a supervisory body to determine whether a State Party is using appropriate measures to eliminate discrimination against women. Conversely, it is not always easy for a State Party to evaluate whether it is applying appropriate measures to fulfil its obligation towards CEDAW.⁹¹

Due to the fact that Article 2 sets out several core principles and obliges signatory States Parties to take certain policy actions in order to eliminate any discrimination against women, Article 2 is arguably described as being at the heart of CEDAW.⁹² However, the language used in Article 2(a) is vague as it does not set standards for these measures. This has resulted in evaluating women’s equality using men’s standards and therefore, “the more a woman acts like a man, the more she will be treated equally.”⁹³ However, women need “appropriate” standards for them to achieve equality.

Despite the importance of Article 2, numerous States Parties have registered reservations about it; some of these have come from Muslim states, such as Nigeria, Malaysia, Bangladesh, Egypt, Libya and Algeria, and some from non-Islamic states. It appears that the reservations of Muslim states are based on the existence of the conflict between Article 2 and Islamic Shari’a law. Egypt, for example, is one of the Islamic states which

⁸⁹ Cook, *Human rights of women: National and international perspectives* p.106

⁹⁰ Ibid p.106

⁹¹ Byrnes and Connors, ‘Enforcing the human rights of women: A complaints procedure for the women's convention’(1995)

⁹² Michael L Buenger, ‘Human Rights Conventions and Reservations: An Examination of a Critical Deficit in the CEDAW’ (2013)20 Buff Hum Rts L Rev 67

⁹³ Southard, ‘Protection of women's human rights under the Convention on the Elimination of All Forms of Discrimination Against Women’(1996) p.39

entered a reservation to Article 2, stating that, “The Arab Republic of Egypt is willing to comply with the content of this article, provided that such compliance does not run counter to the Islamic Shari’a.”⁹⁴ Morocco, on the other hand, declared, with regard to this article, that:

“The Government of the Kingdom of Morocco expresses its readiness to apply the provisions of this article provided that: They are without prejudice to the constitutional requirement that regulates the rules of succession to the throne of the Kingdom of Morocco, and they do not conflict with the provisions of the Islamic Sharia. It should be noted that certain of the provisions contained in the Moroccan Code of Personal Status according women’s rights that differ from the rights conferred on men may not be infringed upon or abrogated because they derive primarily from the Islamic Sharia, which strives, among its other objectives, to strike a balance between the spouses in order to preserve the coherence of family life.”⁹⁵

2.3.3 Special and temporary measures

Article 3 requires States Parties “to ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on the basis of equality with men.” To achieve this, “State Parties shall take in all fields, in particular in the political, social, economic and cultural fields, all appropriate measures, including legislation.”

Meron considers that the phrase “all fields” extends the obligation of States Parties to involve interpersonal and familial activities, therefore addressing the same issues that

⁹⁴ UnitedNation, ‘Reservations to CEDAW’ <<http://www.un.org/womenwatch/daw/cedaw/reservations.htm>> accessed 18/10/2015

⁹⁵ UnitedNation, ‘Reservations to CEDAW’

were examined in Article 1. Accordingly, to some extent, Article 3 might be said to be pointless as it repeats principles that were stated in other provisions.⁹⁶ However, Article 3 confirms that the aim of CEDAW is not only to guarantee women substantive and formal equality, it also requires States Parties to take measures that advance women in certain spheres of life; this could be called transformative equality.⁹⁷

In fact, Articles 1, 2 and 3 require States Parties to act in order to change women's rights for the better, both legally and practically.⁹⁸ Moreover, in the interests of women, Article 4 of CEDAW encourages temporary measures that aim to facilitate achieving equality. For instance, it does not consider as discrimination any temporary special measures that aim to accelerate the creation of actual equality between men and women, as well as temporary special measures which aim to protect motherhood. Article 4, to some extent, respects women's nature by taking into account motherhood. For instance, it protects women from carrying out work that may require them to spend long periods of time at night away from their children. However, it might have been better to give clarification regarding motherhood so that this Article is not misinterpreted against women. In this regard, Meron argues that the adoption of special measures aimed at protecting maternity should not be seen as discrimination; he believes that such measures might be misused against women since CEDAW does not offer a definition of motherhood. For instance, in some countries, the roles of women are limited to pregnancy, giving birth and taking care of children which, in turn, may be an obstacle to them to entering certain forms of employment. Consequently, since CEDAW does not set out any evaluative procedures of the special measures provided in Article 4, each state is therefore the evaluator of its own measures.⁹⁹

⁹⁶ Christopher Greenwood, 'Human Rights Law-Making in the United Nations: A Critique of Instruments and Process. By Theodor Meron.[Oxford: Clarendon Press. 1986. xiii, 291,(Annexes) 50 and (Index) 9 pp. Hardback£ 35· 00 net.] Human Rights in Internal Strife: Their International Protection. By Theodor Meron.[Cambridge: Grotius Publications Ltd. 1987. xiii, 164 and (Index) 8 pp. Hardback£ 27· 00 net.]' (1987)46 The Cambridge Law Journal 554 p.66

⁹⁷ Marsha A Freeman, Christine Chinkin and Beate Rudolf, *The UN Convention on the Elimination of All Forms of Discrimination against Women: a commentary* (OUP Oxford 2012)

⁹⁸ Michele Brandt and Jeffrey A Kaplan, 'The tension between Women's rights and religious rights: reservations to Cedaw by Egypt, Bangladesh and Tunisia' (1995)12 Journal of Law and Religion 105 p.107

⁹⁹ Burrows, 'The 1979 convention on the elimination of all forms of discrimination against women'(1985) p.428

On the other hand, Article 4 may be viewed as recognition that, while CEDAW may give women equality in terms of the rule of law, it will not guarantee that they will be treated equally in reality. Therefore, while CEDAW allows special measures to accelerate equality, those measures nonetheless should not create discriminatory standards between men and women. In addition, such standards should be discontinued when the desired goals are reached.

2.3.4 Modification of social and cultural patterns

Article 5 of CEDAW adds further responsibilities to States Parties by providing that they shall take all appropriate measures:

(a) “To modify the social and cultural patterns of the conduct of men and women with a view to achieving the elimination of prejudices and customs and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or of stereotyped roles for men and women;

(b) To ensure that family education includes a proper understanding of maternity as a social function and the recognition of the common responsibility of men and women in the upbringing and development of their children, it being understood that the interest of the children is the primordial consideration in all cases.”¹⁰⁰

It could be considered that Article 5(a) encourages States Parties to confront any reason that could lead to discrimination between men and women. Nevertheless, the language used in this Article is both vague and broad at the same time: “Parties shall take all appropriate measures.” This might be interpreted as giving states the right, without restriction, to: 1- decrease privacy and the interests that associated with it; and 2- limit

¹⁰⁰ United Nations (1979) Convention on the Elimination of All Forms of Discrimination against Women

freedom of expression and opinion.¹⁰¹ As a result, this could lead to the treatment of women being modified in a particular ethnic or religious group that might, in turn, conflict with those principles which prohibit discrimination on the grounds of race or religion. In addition, paragraph (b) of Article 5 gives States Parties the power to determine “the proper understanding of motherhood” as a social function, which means giving States the right to guide the way their citizens think as well. Moreover, the Article also allows the States to intervene in the most important area in women's lives: motherhood. In addition, if motherhood is a social function the concept of which the State has the right to determine, this could lead to States’ intervention in determining the descendants of a population, as happened in China with regard to its birth control and sterilisation policy. This, in turn, may conflict with Article 16, which provides equal rights for men and women in determining the size of their family.¹⁰²

Article 5 is important in terms of assessing the norms and customs of a society. This is significant with regard to adjusting cultural behaviours and beliefs that may harm or cause violations of women's rights: for instance, “honour” killings committed by fathers or brothers in order to avoid shame after a girl has had a sexual relationship or has been raped.¹⁰³ Fayeeza Kathree describes Article 5 as the most significant in the Convention for the reason that it requires States Parties to confront the very grounds of discrimination. Moreover, this Article should play a significant role in improving women’s rights when women are denied many such rights because of customs such as the right to choose a spouse in Saudi Arabia.^{104 105} In this regard, Brandt and Kaplan argue that, in some circumstances, religion, customs and cultures may hinder the recognition of the women's rights that are stated in CEDAW. Therefore, to avoid these hurdles, CEDAW encourages States Parties to modify cultural patterns and eliminate practices that might hinder women from obtaining equality. In short, CEDAW does not accept that States Parties may

¹⁰¹ Greenwood, ‘Human Rights Law-Making in the United Nations: A Critique of Instruments and Process. By Theodor Meron.[Oxford: Clarendon Press. 1986. xiii, 291,(Annexes) 50 and (Index) 9 pp. Hardback£ 35· 00 net.] Human Rights in Internal Strife: Their International Protection. By Theodor Meron.[Cambridge: Grotius Publications Ltd. 1987. xiii, 164 and (Index) 8 pp. Hardback£ 27· 00 net.](1987) p.6

¹⁰² Shah, *Women, the Koran and international human rights law: the experience of Pakistan* p.132

¹⁰³ Frances Raday, *CULTURE, RELIGION, AND CEDAW'S ARTICLE 5 (A)* (na 2007)

¹⁰⁴ Kathree, ‘Convention on the elimination of all forms of discrimination against women’(1995) p.423,424

¹⁰⁵ This is discussed in detail in Chapter Six.

deny women's equality on the basis of customary practices. For this reason, Freeman believes that it is incorrect to describe Article 5 as soft law, since Article 5 plays an important role in determining domestic cases. Furthermore, it contributes to strengthening women's legal standing.¹⁰⁶

2.3.5 The trafficking of women and prostitution

Article 6 states that "State Parties shall take all appropriate measures, including legislation, to suppress all forms of trafficking of women, and of exploitation through the prostitution of women." Article 6 shows that it prohibits the trafficking of women and exploitation in the form of prostitution. Nonetheless, the Article does not offer any definition of "trafficking women"¹⁰⁷ and, although article mentions exploitation in terms of the prostitution of women, it does not, on the other hand, prohibit the practice of prostitution itself. This vagueness with regard to prostitution has led to strong reactions from Muslims since prostitution is incompatible with the rules of Shari'a.¹⁰⁸ In this regard, Burrows argues that the problem with Article 6 is that it castigates the exploitation of prostitution, not prostitution itself. For example, if a person earns money in an immoral manner from the prostitution of women, he will be subject to punishment under the phrase "the exploitation of prostitution" although the prostitute will not be punished. However, if the act of prostitution is illegal, the prostitutes will also be subject to legal liability.¹⁰⁹ Historically, international law has dealt only with the exploitation of prostitution and has never dealt with the act of prostitution itself. However, the wording

¹⁰⁶ Freeman, Chinkin and Rudolf, *The UN Convention on the Elimination of All Forms of Discrimination against Women: a commentary*

¹⁰⁷ Greenwood, 'Human Rights Law-Making in the United Nations: A Critique of Instruments and Process. By Theodor Meron.[Oxford: Clarendon Press. 1986. xiii, 291,(Annexes) 50 and (Index) 9 pp. Hardback£ 35· 00 net.] Human Rights in Internal Strife: Their International Protection. By Theodor Meron.[Cambridge: Grotius Publications Ltd. 1987. xiii, 164 and (Index) 8 pp. Hardback£ 27· 00 net.](1987) p.9

¹⁰⁸ Shah, *Women, the Koran and international human rights law: the experience of Pakistan* p.178

¹⁰⁹ Burrows, 'The 1979 convention on the elimination of all forms of discrimination against women'(1985) p. 430

of the World Plan of Action seems to offer hope that the issue of prostitution will be confronted in the future.¹¹⁰

In fact, Islamic countries should not face barriers in fulfilling this Article as any sexual relationship outside marriage is prohibited in Islam, whether for women or men. Therefore, all forms of trafficking of women and exploitation through the prostitution of women is prohibited as well.

Andrew Byrne argues that any States Parties that do not have legislation that classifies the trafficking and/or exploitation of women as criminal offences would be failing to fulfil its CEDAW obligations. In addition, if the States Parties took reasonable steps regarding the actual application of those laws but failed to take appropriate measures, it would be failing to fulfil its Article 6 obligation.¹¹¹ On the other hand, this Article is important as it recognises that the nature of women is different from that of men since it does not state that women should have equal rights with men in being free from being exploited in prostitution or being trafficked. However, it asserts that States Parties should eliminate these activities because they are harmful to women.¹¹²

2.3.6 Equality in political and public life

To achieve equality between men and women in both political and public life, Article 7 requires States Parties to take three significant steps. The first is that States should make sure that women vote in all elections and public referenda. Although the Article recognises that the right to vote is important for women, in contrast, the vote itself is not enough to ensure the real and effective participation of women in political life. Therefore, Article 7 requires, as a second step, that States Parties guarantee women the right to be elected to public office, as well as to hold other government posts and positions in non-

¹¹⁰ Burrows, 'The 1979 convention on the elimination of all forms of discrimination against women'(1985) p.431

¹¹¹ Byrnes and Connors, 'Enforcing the human rights of women: A complaints procedure for the women's convention'(1995)

¹¹² Marsha A Freeman, Beate Rudolf and Christine Chinkin, *The UN convention on the elimination of all forms of discrimination against women: A commentary* (Oxford University Press 2012)

governmental organisations as a third step. In sum, Article 7 requires States Parties to make sure that women are able “to participate in the formulation of government policy and the implementation thereof.”¹¹³ However, requiring States Parties to ensure equal rights with men in participating in policy making means that the Convention is using male standards in all legal and political organisations. This, in turn, could mean that women may be permitted to become government ministers or judges only if they can function like men. Accordingly, women could only take these positions if they were able to change the priority of their responsibilities, such as raising children. For this reason, it would be more effective if CEDAW required States Parties to adjust the structure of their governments to improve women’s rights in terms of policy making.¹¹⁴ In fact, as Saudi Arabia did not enter reservations concerning this Article, Article 7 should play an important role in the country where women are denied access to many positions that allow them to take part in decision-making. For instance, women cannot be ministers, judges or even university directors. (This is discussed in detail in Chapter Seven.)

It is worth noting that this area has already been discussed at an international convention, which was generated by the Commission on the Status of Women and adopted in 1952 by the General Assembly.¹¹⁵ It was also discussed at the 1975 World Conference of the International Women’s Year (1976-1985) which was held in Mexico.¹¹⁶ During a discussion on political rights at the Conference, it was pointed out that:

“Women are not involved in decision-making, and their views and needs are often overlooked in planning for development. As the majority of women do not participate in the formulation of development plans and programmes, they are frequently unaware of their implications and less inclined to support their implementation and the changes the programmes seek to bring about ... A major objective of this Plan is to ensure that women shall have, in law, and in fact, equal rights and opportunities with

¹¹³ Shah, *Women, the Koran and international human rights law: the experience of Pakistan* p.178

¹¹⁴ Southard, ‘Protection of women’s human rights under the Convention on the Elimination of All Forms of Discrimination Against Women’(1996) p.34

¹¹⁵ Burrows, ‘The 1979 convention on the elimination of all forms of discrimination against women’(1985) p.431

¹¹⁶ Ibid p.432

men to vote and to participate in public and political life at the national, local and community levels.”¹¹⁷

Consequently, the World Plan of Action places an objective for the period between 1975-80 in order to encourage women to participate in the political activities and to take part into public life.¹¹⁸

2.3.7 Equality in national legalisation

Article 8 requires States Parties to take all appropriate measures to ensure that women are equal to men and are treated without discrimination, allowing them opportunities to represent their governments at an international level and to participate in the work of international organisations. CEDAW (General Recommendation No. 8, 1988) recommended that States Parties should take temporary actions and use discrimination to benefit women (i.e. use positive discrimination), as envisaged in Article 4.

Indeed, assessing whether the States Parties have applied Article 8 involves an evaluation of the extent of women's participation in the international diplomatic corps and other international departments. In addition, it needs to be determined whether there is a formal guarantee to ensure that women have equivalent employment opportunities in these areas, as well as whether those guarantees are effective in practice. It also requires an evaluation of States Parties' records regarding nominating women to positions in international organisations. Indeed, matters of this kind should be addressed in national law.¹¹⁹ Southard argues that the States Parties, in order to fulfil their Article 8 duties, should allow women to travel alone when some communities restrict freedom of travel for women. For instance, in Saudi Arabia, women cannot travel without the approval of a guardian and therefore, if Saudi Arabia wishes to fulfil its obligation in terms of this

¹¹⁷ UN Doc. E/Conf. 66/34.

¹¹⁸ Burrows, 'The 1979 convention on the elimination of all forms of discrimination against women'(1985) p.432

¹¹⁹ Byrnes and Connors, 'Enforcing the human rights of women: A complaints procedure for the women's convention'(1995)

Article, it should first rescind the law requiring the consent of a guardian if a woman is to travel.¹²⁰

In addition, when a woman travels, she must deal with any violence against her, especially if she is alone or in an unfamiliar place. The Vienna Human Rights Conference (1993) recognised the existence of “gender violence, a universal phenomenon which takes many forms across culture, race and class.”¹²¹ Therefore, giving women diplomatic freedom without addressing the issue of violence against women is only a partial solution.¹²² While there are successful women in the civil and political arenas, this tiny group remains the exception to the rule.¹²³ It is interesting to note that, despite the importance given by the United Nations to the notion that women should participate in political life without discrimination alongside men, women are not, however, equally represented on United Nations’ bodies.¹²⁴ For instance, by 2015, of all the representatives of the UN, only 22 were women.¹²⁵

2.3.8 Equal rights in matters of nationality

According to Article 9 (1) of CEDAW, States Parties should guarantee equal rights between men and women regarding the status of their nationality. The second paragraph stipulates that States should ensure that men and women do have equal rights in terms of passing their nationality on to their children.¹²⁶

Regarding Article 9 (1), Noreen Burrows argues that nationality is not a matter to be determined according to a person's wishes as, when a child is born, his/her nationality is

¹²⁰ Southard, ‘Protection of women's human rights under the Convention on the Elimination of All Forms of Discrimination Against Women’ (1996) p.76

¹²¹ Southard, ‘Protection of women's human rights under the Convention on the Elimination of All Forms of Discrimination Against Women’ (1996) p.35

¹²² Ibid p.36

¹²³ Ibid p.36

¹²⁴ Shah, *Women, the Koran and international human rights law: the experience of Pakistan* p.178

¹²⁵ OURANIA S. YANCOPOULOS, ‘IS THE UN REALLY MOVING TOWARD GENDER EQUALITY?’

<<https://peaceoperationsreview.org/thematic-essays/is-the-un-really-moving-toward-gender-equality/>> accessed 5/10/2018

¹²⁶ Greenwood, ‘Human Rights Law-Making in the United Nations: A Critique of Instruments and Process. By Theodor Meron.[Oxford: Clarendon Press. 1986. xiii, 291,(Annexes) 50 and (Index) 9 pp. Hardback£ 35· 00 net.] Human Rights in Internal Strife: Their International Protection. By Theodor Meron.[Cambridge: Grotius Publications Ltd. 1987. xiii, 164 and (Index) 8 pp. Hardback£ 27· 00 net.](1987) p.69

determined by the country in which the birth took place.¹²⁷ For instance, some countries give their nationality to children born in their territory, even if they are foreigners. Normally, the father's nationality is taken, unless the child is illegal, and then his/her mother's nationality could be considered. In fact, guaranteeing equal rights for men and women in transferring their nationality to their children may not be in the best interest of the child as this may lead the child to have dual nationality.¹²⁸ For this reason, Egypt voiced a reservation with regard to Article 9, citing the text of Article 9, paragraph 2, concerning the granting to women equal rights with men with respect to the nationality of their children. This stated that a child born of a marriage should take the nationality of the father in order to prevent a child acquiring two nationalities in a case where the parents were of different nationalities since this might be prejudicial to his/her future. It is clear that a child's acquisition of the father's nationality is the procedure most suitable for the child and that this does not infringe 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 will take the father's nationality.

In addition, paragraph 2 of Article 9 may lead to a child not having a nationality at all if the parents do not agree which nationality he/she will hold. Therefore, the best interpretation of Article 9 (1) in the case of a lack of agreement about a child's nationality, is that parents should submit to a judicial proceeding to determine the matter; it should not mean the automatic transmission of the nationality of one of the parents. Therefore, decision makers should decide the child's nationality, taking into consideration the nationalities of both parents while keeping the child's best interest at heart.¹²⁹

Many Muslim countries, such as Iraq, Tunisia, Jordan, Morocco, Algeria, Malaysia, Lebanon and Kuwait, voiced reservations about this paragraph, and although most of reservations of these countries were based on it being contrary to Islam, none of them used Islamic Shari'a law as a justification for voicing their reservations. With regard to Article 9, there is nothing in Islamic Shari'a law which prohibits a woman from passing her

¹²⁷ Burrows, 'The 1979 convention on the elimination of all forms of discrimination against women' (1985) p.434

¹²⁸ Ibid p.10

¹²⁹ Ibid p.434

nationality on to her children. Saudi Arabia also voiced a reservation to this paragraph in Article 2 as, in Saudi Arabia, when a woman marries a man who is a non-Saudi, she does not have the right to pass her Saudi nationality on to her children. (This is discussed further in Chapter Seven.)

2.3.9 Equality in education

Article 10 of CEDAW confirms that, in order to empower women in all fields, whether in the workplace, in the family or in society, Member States must guarantee equality between men and women in education and, to achieve this, States Parties have three responsibilities: firstly, States Parties should provide equal access to education; secondly, they should eliminate any stereotypical roles for men and women in all levels of education; and, thirdly, States have a duty to eliminate any existing gap between men and women in all levels of education.¹³⁰

In fact, Article 10 includes both advantages and disadvantages. One disadvantage is the denial of discrimination as co-education should not be an objective in itself; instead, the objective should be to improve women's education and to develop education policies. The advantageous aspect is the encouragement to plan education to improve the status of women.¹³¹ However, Article 10 (1)(C) encourages mixing between men and women in education (co-education), which may conflict with religious freedom, especially if religious organisations provide education.¹³² For example, the principles in this paragraph may conflict with educational principles in Saudi Arabia as, in Saudi Arabia, co-education is prohibited, according to the Saudi interpretation of Islamic law. It is interesting to note that although Article 10, paragraph (g) requires States Parties to provide equal opportunities to participate actively in sports and educational facilities, it does not seem

¹³⁰ Shah, *Women, the Koran and international human rights law: the experience of Pakistan* p.179

¹³¹ Burrows, 'The 1979 convention on the elimination of all forms of discrimination against women' (1985) p.437

¹³² Greenwood, 'Human Rights Law-Making in the United Nations: A Critique of Instruments and Process. By Theodor Meron.[Oxford: Clarendon Press. 1986. xiii, 291,(Annexes) 50 and (Index) 9 pp. Hardback£ 35· 00 net.] Human Rights in Internal Strife: Their International Protection. By Theodor Meron.[Cambridge: Grotius Publications Ltd. 1987. xiii, 164 and (Index) 8 pp. Hardback£ 27· 00 net.](1987) p.72

that women have the right, however, to play with men in teams. In addition, Southard questions the reasons that have led to a greater number of girls than boys leaving education.¹³³ He considers that relevant factors could be teenage pregnancy and marriage as a result of co-education, as well as the stereotypical view that women should be good mothers rather than being educated.¹³⁴ Therefore, it would be better for CEDAW to include a provision requiring States Parties to provide to those women who drop out of education an opportunity to form their own programmes and self-help groups, as prescribed in Article 14 (e).¹³⁵

2.3.10 Equality in employment and labour laws

Article 11 requires States Parties to offer equal opportunities to men and women at work. It presents a set of requirements to ensure this right is achieved completely and effectively. For instance, States Parties should ensure that women have the same right to work, the same work opportunities, the same payment, and the same social security rights.

Indeed, Article 11, to a certain extent, takes into account women's nature as here male rights were not the standard. For instance, Article 11 obliges States Parties, in 1(f), to ensure the maintenance of health and safety in working conditions, including safeguarding of the function of reproduction. This means that extra care must be taken for women in some jobs that could negatively affect their reproduction. In addition, as women naturally can become pregnant, the Article protects them by obliging States Parties to guarantee that sanctions cannot be imposed nor women dismissed from work due to pregnancy or maternity leave. Moreover, the Article states that States Parties must take measures to facilitate parents combining family obligations with work responsibilities by giving them

¹³³ Southard, 'Protection of women's human rights under the Convention on the Elimination of All Forms of Discrimination Against Women' (1996) p.70

¹³⁴ Ibid p.70

¹³⁵ Ibid p.10

benefits such as paid maternity leave, equal promotion opportunities and access to child-care facilities. Furthermore, special care must be provided for pregnant women who are employed in a work place that could be harmful to them.¹³⁶

In this regard, Meron questions the effectiveness of Article 11 (b) in terms of guaranteeing the protection of women's rights at work. It sets out “the right to the same employment opportunities, including the application of the same criteria for selection in matters of employment.” It seems that the paragraph offers equivalent opportunities to women but this paragraph does not actually provide adequate protection for women in this area¹³⁷ for the reason that pregnancy or maternity cannot be applied as a shared criterion in the employment of men and women.¹³⁸ Meron, in addition, notes the possibility of using maternity as an excuse for gender discrimination in employment. Moreover, Article 11 (1) (c) requests States Parties to provide “the right to promotion, job security and all benefits and conditions of service” while Article 11 (2) (b) requires the introduction of “maternity leave with pay or with comparable social benefits without loss of former employment, seniority or social allowances.” Both paragraphs fail to provide sufficient protection against discrimination in the assignment of work or promotion during pregnancy or maternity leave. For instance, Article 11 (2)(b) focuses only on protecting seniority while it does not mention promotion during maternity leave and job assignment.¹³⁹ Furthermore, Article 11 (2) (d) requires the provision of “special protection to women during pregnancy in types of work proved to be harmful to them.” This paragraph might lead to subordinating “women's interests in job assignment to the asserted interest in safeguarding the reproductive and child-bearing capacity of women.”¹⁴⁰ Therefore, it

¹³⁶ Freeman, Rudolf and Chinkin, *The UN convention on the elimination of all forms of discrimination against women: A commentary*

¹³⁷ Greenwood, ‘Human Rights Law-Making in the United Nations: A Critique of Instruments and Process. By Theodor Meron.[Oxford: Clarendon Press. 1986. xiii, 291,(Annexes) 50 and (Index) 9 pp. Hardback£ 35· 00 net.] Human Rights in Internal Strife: Their International Protection. By Theodor Meron.[Cambridge: Grotius Publications Ltd. 1987. xiii, 164 and (Index) 8 pp. Hardback£ 27· 00 net.](1987) p.75,76

¹³⁸ Ibid p.75

¹³⁹ Ibid.75,76

¹⁴⁰ Ibid p.75

might be better for Article 11 to include clear prohibitions of discrimination in promotion and job assignment on the grounds of pregnancy or maternity leave.¹⁴¹

Additionally, Article 11 does not address the issue that the majority of women in the world are working but are not considered as workers. The reality is that most women are performing vital activities on a daily basis, such as raising children, looking after the family and maintaining the home; nevertheless, they are not deemed part of the labour force. Indeed, these services, carried out by women without an employment contract and without payment, allow men (who are considered as workers) to pursue their careers outside the home, as they are exempt from the household and child-rearing duties.¹⁴²

In reality, some States Parties do not fulfil their Article 11 obligations. In the case of *Canada v Stuart*, maternity was used as an excuse for gender discrimination. Bernadette Stuart requested unemployment insurance, as she was ill and her illness prevented her from working; under Canada's Unemployment Insurance Act, Stuart was eligible to receive unemployment insurance benefits regularly due to her illness. However, when she went to the hospital, she discovered she was pregnant and therefore, according to certain applications of the Act, she was not eligible for maternity benefits. She claimed that “to deny a pregnant person access to sickness benefits for non-pregnancy related illness on the ground that she is at a certain stage of her pregnancy, is contrary to the impact of Canada's international obligations.”¹⁴³ In this case, Canada denied its obligation in Article 11 (2)(b) of CEDAW. Regarding equal pay, the Convention may not even now have reached the desired goal, even in enlightened countries that are parties to the Convention. For example, in Austria, although the organisation of income in the public sector is carried out through legislation, there is still a difference in income between men and women of at

¹⁴¹ Greenwood, 'Human Rights Law-Making in the United Nations: A Critique of Instruments and Process. By Theodor Meron.[Oxford: Clarendon Press. 1986. xiii, 291,(Annexes) 50 and (Index) 9 pp. Hardback£ 35· 00 net.] Human Rights in Internal Strife: Their International Protection. By Theodor Meron.[Cambridge: Grotius Publications Ltd. 1987. xiii, 164 and (Index) 8 pp. Hardback£ 27· 00 net.](1987) p.75

¹⁴² Southard, 'Protection of women's human rights under the Convention on the Elimination of All Forms of Discrimination Against Women'(1996) p.52

¹⁴³ Rebecca J Cook, 'International Human Rights Law Concerning Women: Case Notes and Comments' (1990)23 Vand J Transnat'l L 779 p.816

least 19 percent in the public sector and of 40 percent in the private sector.¹⁴⁴ In Canada, women teachers earn only 62.7 percent of the sum earned by male teachers.¹⁴⁵

Article 11 in some cases has had a positive effect. For instance, in the case of *Aldridge v Booth*, the Federal Court of Australia upheld the provisions of the Commonwealth Act 1948, which prohibits sexual harassment in the workplace. This was in fulfilment of Australia's commitment to Article 11 of CEDAW which prohibits discrimination based on sex in the workplace, as sexual harassment in the workplace is considered a form of discrimination.¹⁴⁶

Finally, to achieve real equality between men and women in employment, measures should be taken to protect women from all kinds of violence in the workplace. To achieve this, CEDAW's General Recommendation No. 12, 1989 requested Member States to submit reports to the Commission to include information on legislation against sexual harassment.¹⁴⁷

2.3.11 Equal access to health facilities

Article 12 of CEDAW stresses the need for equality between men and women in one of the most important aspects of life, which is health. The first paragraph of Article 12 states that member countries should take all appropriate measures to eliminate discrimination between men and women in health care, including planning for a family, while the second paragraph of the Article encourages States Parties, with regard to the discrimination principle, to ensure that all appropriate services are provided for women during pregnancy, childbirth and post-delivery. In addition, Article 11 (1) emphasises that these

¹⁴⁴ John M Evans, 'Work/family reconciliation, gender wage equity and occupational segregation: the role of firms and public policy' (2002) Canadian Public Policy/Analyse de Politiques S187

¹⁴⁵ Greenwood, 'Human Rights Law-Making in the United Nations: A Critique of Instruments and Process. By Theodor Meron.[Oxford: Clarendon Press. 1986. xiii, 291,(Annexes) 50 and (Index) 9 pp. Hardback£ 35· 00 net.] Human Rights in Internal Strife: Their International Protection. By Theodor Meron.[Cambridge: Grotius Publications Ltd. 1987. xiii, 164 and (Index) 8 pp. Hardback£ 27· 00 net.](1987) p.77

¹⁴⁶ Cook, 'International Human Rights Law Concerning Women: Case Notes and Comments'(1990) p.718

¹⁴⁷ Shah, *Women, the Koran and international human rights law: the experience of Pakistan* p.180

services should be free of charge, if possible. As a matter of fact, Article 11 (1) mentions a very important point as pregnancy and childbirth affect the life of both the mother and the child and so it is both reasonable and significant to provide free services during pregnancy and childbirth to women who need them. Also, it is essential to provide adequate nutrition during pregnancy and lactation; this is also covered in this Article.¹⁴⁸ In reality, it is particularly important for Middle Eastern States Parties to apply this Article, as the number of mothers and foetuses who die during childbirth as a result of medical negligence is appalling. Moreover, for women to receive adequate health care during pregnancy and childbirth, they must pay large sums for those services.¹⁴⁹

It is interesting to note that, although abortion might be thought to be related to this Article since it could be said to be a form of family planning and because many women undergo abortions in many countries, the Convention does not cover this issue or abortion. In addition, the Convention restricts free services only to pregnancy and childbirth; it does not include abortion, which clearly shows that the Convention rejects abortion.¹⁵⁰

2.3.12 Equality in finance and social security

Article 13 of the Convention intends to eliminate discrimination against women and to make them equal to men in all spheres, whether economic, social or cultural. To achieve this, it requires States Parties to take positive steps to guarantee that women can gain advantage from family benefits. It also says that States Parties should ensure that women have the right to receive all forms of financial credit, such as loans and bank mortgages. Moreover, countries that have become parties to the Convention should guarantee women the right to participate in recreational activities and sports.

¹⁴⁸ Shah, *Women, the Koran and international human rights law: the experience of Pakistan* p.181

¹⁴⁹ Southard, 'Protection of women's human rights under the Convention on the Elimination of All Forms of Discrimination Against Women'(1996) p.49

¹⁵⁰ Greenwood, 'Human Rights Law-Making in the United Nations: A Critique of Instruments and Process. By Theodor Meron.[Oxford: Clarendon Press. 1986. xiii, 291,(Annexes) 50 and (Index) 9 pp. Hardback£ 35· 00 net.] Human Rights in Internal Strife: Their International Protection. By Theodor Meron.[Cambridge: Grotius Publications Ltd. 1987. xiii, 164 and (Index) 8 pp. Hardback£ 27· 00 net.](1987) p.72

Nonetheless, Article 13 did not address the fact that the “feminization of poverty has reached global proportions” which has reduced the possibilities of women accessing credit. While banks are not usually concerned about gender issues with regard to financial credit, they are concerned about a woman's ability to obtain credit. Consequently, it would be better if Article 13 provided opportunities for poor women to obtain financial credit and loans by changing the traditional conceptions of credit. For instance, the Bangladeshi's Grameen Bank is a good example as it has demonstrated notable success in changing the traditional concept of loans as it is making loans largely to poor rural customers.¹⁵¹

In fact, the Third Committee of the General Assembly added this Article to address all the other economic and social rights, which are not covered by the other articles in this part of the Convention. Therefore, this Article merely aims to resolve any omissions in the economic, social and cultural spheres.¹⁵²

2.3.13 Rights of women in rural areas

One third of the world's women live in rural areas, which means that these women are isolated from cultural, economic and political life; therefore, their communities should take positive steps, through the provision of services, to enable such women to have an adequate type of life.¹⁵³

Article 14 of CEDAW aims to deal with the problems facing women who live in rural areas as it encourages States Parties to guarantee women who live in rural regions the right to take part in development planning. In addition, the Article obliges States Parties to ensure that women who live in rural areas live better lives in adequate conditions.¹⁵⁴

¹⁵¹ Southard, 'Protection of women's human rights under the Convention on the Elimination of All Forms of Discrimination Against Women'(1996) p.49

¹⁵² Burrows, 'The 1979 convention on the elimination of all forms of discrimination against women'(1985) p.446

¹⁵³ Ibid p.446

¹⁵⁴ Ibid p.446

In fact, Article 14 of CEDAW is described as “a milestone in the development of legal provisions, which aim to improve the situation of the bulk of the world female population, as well as being the first time that an international legal instrument pays attention to the problems faced by women in rural areas in such detail as it goes beyond the basic rights such as education and health care to include rights to access electricity, communications infrastructure, sanitation and transport.”¹⁵⁵ In addition, the reduction of migration from rural to urban areas may be one of the objectives of Article 14 as, in the last half-century, almost 800 million people worldwide have moved from rural areas to urban areas in search of basic educational, economic and healthcare rights.¹⁵⁶ Moreover, Purritt argues that one of the objectives of Article 14 is to narrow the gap between the developing countries and the developed ones as 90 per cent of the world's rural population are from developing countries, which should give women in developing countries more advantages from the Article.¹⁵⁷ Although CEDAW focuses on gender equality, Article 14 reflects CEDAW’s emphasis on spatial equality as well, which means that CEDAW is not only concerned with providing equal rights among men and women, but it is also concerned that women in rural areas should obtain equal rights to those in urban areas.¹⁵⁸

Pruitt argues that Article 12 may be more comprehensive than Article 14 in terms of health care for women in rural areas, as Article 12 accords access to health care in all spheres. Article 14 (2)(b), however, states there should be: “access to adequate health care facilities, including information, counseling and services in family planning.” Indeed, the term “adequate” may be interpreted by States Parties as minimal standards of health care for women in rural areas.¹⁵⁹ Therefore, it might be better to cite the same standards as those in urban areas, rather than merely use the term “adequate” in order to ensure that women in rural areas receive better standards of health care. To sum up, the importance of Article 14 lies in the fact that the issue of rural women was never discussed before in international law. In addition, despite the fact that Article 14 is directed at

¹⁵⁵ Lisa R Pruitt, ‘Deconstructing CEDAW’s Article 14: Naming and explaining rural difference’ (2011)17 William & Mary Journal of Women and the Law 347 p.352

¹⁵⁶ Pruitt, ‘Deconstructing CEDAW’s Article 14: Naming and explaining rural difference’(2011) p.353

¹⁵⁷ Ibid p.354

¹⁵⁸ Ibid p.359

¹⁵⁹ Ibid p.359

developing countries, it is nevertheless significant for developed countries at the same time.¹⁶⁰

2.3.14 Equality in matters of civil law

Article 15 of the Convention concerns women who have been subjected to discrimination. In this framework, the Article focuses on four significant aspects. First of all, it affirms that States Parties must grant women equality with men before the law. Secondly, States Parties should guarantee women equality with men with regard to the civil law. This includes equality in terms of their legal capacity, as well as equal opportunities to exercise that capacity. More specifically, States Parties should make sure that women are equal to men in terms of contracting and administering property, as well as equal to men in all the procedures to do with courts and tribunals.¹⁶¹

Article 15 is important in some legal systems where a woman is not recognised as a legal person. For instance, it is fundamental for those women who cannot travel without their guardian's approval as this Article prevents such rulings.¹⁶² Article 15 (3) stresses that States Parties should agree that all contracts and other types of private instruments which restrict the legal capacity of women, should be declared null and invalid. Indeed, economically, women are not taking advantage of their ability to enter into contracts, as women receive only one-tenth of the world's income and own less than one percent of properties in the world, which makes women the weaker party in the contract system.¹⁶³ For this reason, it was important for CEDAW to offer effective ways to raise the economic position of women. Level of education also affects a woman's ability to conclude contracts as there are more than 130 million women around the world who cannot read or write

¹⁶⁰ Burrows, 'The 1979 convention on the elimination of all forms of discrimination against women' (1985) p.447,448

¹⁶¹ Ibid p.448

¹⁶² Ibid p.449

¹⁶³ Southard, 'Protection of women's human rights under the Convention on the Elimination of All Forms of Discrimination Against Women' (1996) p.38,39

and who therefore need someone to enter into contracts for them.¹⁶⁴ In addition, Article 15 (4) emphasises that States Parties should guarantee women the same rights as men with regard to the law that relates to the movement of persons and the freedom to choose a residence and domicile,¹⁶⁵ which may conflict with the ideas of Islamic countries. For example, at the twenty-sixth session, the Egyptian representative explained that, according to the law of the Qur'an, the husband must choose the marital home and the wife should live in her husband's house.¹⁶⁶ Also, in Saudi Arabia, a woman before marriage must live in the residence where her family lives while, after marriage, she must move from her family home to go to live in her husband's house.

2.3.15 Equality in family law

Article 16 addresses private matters by providing that States Parties should take measures "to eliminate discrimination against women in all matters relating to marriage and family relations." More specifically, they must guarantee the same rights to men and women in terms of: (a) entering into marriage; (b) freely choosing a spouse and not entering into marriage without free and full consent; (c) enjoying the same rights and responsibilities during marriage and at its dissolution (divorce or separation). In addition, Article 16 (d) requires States Parties to provide the same rights and responsibilities to mothers, regardless of marital status and in matters relating to children. Conversely, Article 16 (e) demands equal rights with men in deciding freely the number of children a woman has and the spacing of those children. However, biologically, in these responsibilities men and women cannot be treated equally because they do not share the same experience in terms of pregnancy and childbirth. Women cannot deny maternity and pregnancy and therefore, in reality, women bear the greatest responsibility for raising children. Indeed, CEDAW attempts to legislate for equality between men and women in these matters but

¹⁶⁴ Southard, 'Protection of women's human rights under the Convention on the Elimination of All Forms of Discrimination Against Women' (1996) p.38

¹⁶⁵ Ibid p.37

¹⁶⁶ UN Doc. E/CN.6/S.R. 650.

this is not possible since men are unable to become pregnant and women cannot ignore being pregnant.¹⁶⁷

Article 16 requires States Parties to provide: (f) the same rights and responsibilities with regard to the guardianship, wardship and adoption of children. In all cases the interests of the children must be paramount; (g) husband and wife should have the same personal rights, including the right to choose a family name or a profession; (h) the same rights for both husband and wife with regard to the ownership and possession of property. The second paragraph of Article 16 (2) goes further to prohibit the betrothal or marriage of children. Article 16 (2) lays a duty on States Parties to take all necessary measures, including legislation, to determine the age of marriage. However, the Convention offers no definition of a child.

Article 16 met with many reservations from States Parties, especially from Islamic states, as it conflicts with many of the provisions of Islamic law. Indeed, one of the most important obstacles for Muslim countries to implementing CEDAW is the Personal Status Law because of the different concepts of personal status between Islamic countries and the West. For instance, Islamic states prefer to use the notion of equity between men and women rather than equality. "Equity" is based on giving men and women different complimentary obligations and rights which are equally valued. For instance, Islamic law gives women half the inheritance of men while, in return, it obliges men to spend on women and the family; Islamic law does not require women to pay any maintenance.¹⁶⁸ Moreover, Islamic law requires a woman to wait after divorce or after her husband's death but does not oblige a man to do the same. Also, Islamic law does not give men and women equal rights in guardianship and wardship.¹⁶⁹ (This is discussed in detail in Chapter Three as these issues conflict with Article 16.)

On this basis, Egypt, Bangladesh, Algeria, Jordan, Tunisia, Turkey and Morocco made it clear that the reason for their reservation with regard to Article 16 was the incompatibility

¹⁶⁷ Southard, 'Protection of women's human rights under the Convention on the Elimination of All Forms of Discrimination Against Women' (1996) p.9,10

¹⁶⁸ This is discussed in detail in Chapter Four

¹⁶⁹ United Nations, 'Reservations to CEDAW'

of this Article with Islamic jurisprudence, which is the foundation of legislation in Islamic countries.¹⁷⁰ Bangladesh, in its reservation, stated: “The Government of the People's Republic of Bangladesh does not consider as binding upon itself the provisions of Article 2, [...] as they conflict with *Sharia* law based on the Holy Qur’an and Sunnah.”¹⁷¹ Egypt provided a more detailed reservation with respect to Article 16:

“Reservation to the text of Article 16 concerning the equality of men and women in all matters relating to marriage and family relations during the marriage and upon its dissolution, without prejudice to the Islamic *Sharia*’s provisions whereby women are accorded rights equivalent to those of their spouses so as to ensure a just balance between them. This is out of respect for the sacrosanct nature of the firm religious beliefs which govern marital relations in Egypt and which may not be called in question and in view of the fact that one of the most important bases of these relations is an equivalency of rights and duties so as to ensure complementary which guarantees true equality between the spouses. The provisions of the *Sharia* lay down that the husband shall pay bridal money to the wife and maintain her fully and shall also make a payment to her upon divorce, whereas the wife retains full rights over her property and is not obliged to spend anything on her keep. The *Sharia* therefore restricts the wife's rights to divorce by making it contingent on a judge's ruling, whereas no such restriction is laid down in the case of the husband.”¹⁷²

2.4 Strengths and weaknesses of CEDAW

CEDAW seeks to abolish all forms of discrimination against women, wherever and however they occur. The Convention also seeks to build communities throughout the world where women are treated equally with men. One of the main strengths of CEDAW is that it discusses principles regarding equal rights between men and

¹⁷⁰ Shah, *Women, the Koran and international human rights law: the experience of Pakistan* p.183

¹⁷¹ UnitedNation, ‘Reservations to CEDAW’

¹⁷² UnitedNation, ‘Reservations to CEDAW’

women in areas such as family relationships and the rights of rural women that had not previously been discussed in international laws. Another strength of CEDAW lies in the language of the Convention as it explains the need to protect the family at the expense of women. In addition, the Convention tends to include exemption clauses which permit States Parties to create exceptions to the principle of non-discrimination in, for example, education, work and family areas.¹⁷³ The power of the language in this regard is significant because the strength of its commitment.

On the other hand, CEDAW has weaknesses as well. The scope of its coverage is one of the problems in this regard. For example, the Convention pays no attention to some areas, such as abortion. Article 12 (1) requires States Parties to ensure “access to health care services, including those related to family planning” and the Convention in this Article focuses on providing health care services for women during pregnancy and childbirth, as well as providing good nutrition during pregnancy and post-delivery. However, it fails to take into account abortion, which could give an indication that the Convention is upset by abortion.

“Like all fundamental instruments written in general terms, [the Convention] leaves unanswered many questions which will be resolved only when concrete applications are attempted. For example, if men and women are to have ‘equality’ in deciding the spacing of children, may a man require his pregnant spouse to undergo, or may a father-to-be prohibit the woman who is pregnant by him from undergoing, an abortion?”¹⁷⁴

In order to protect women’s rights, the Convention allows States Parties to legislate and gives them wide discretion in this regard when such legislation may damage women’s rights or may even be used as a cover for some discriminatory acts against women.¹⁷⁵ Although allowing reservations was intended to encourage States to be party to the

¹⁷³ Burrows, ‘The 1979 convention on the elimination of all forms of discrimination against women’(1985) p.459

¹⁷⁴ Jack Greenberg, “Race, Sex and Religious Discrimination in International Law” (1984) Oxford: Clarendon Press p.330

¹⁷⁵ Sarah C Zearfoss, ‘Note, the Convention for the Elimination of All Forms of Discrimination against Women: Radical, Reasonable, or Reactionary’ (1990)12 Mich J Int’l L 903 p.915

Convention, this may have had a negative impact, as these reservations may be incompatible with the objectives and purposes of the Convention. Julie Minor argues that the purpose of CEDAW is to eliminate discrimination while the reservations are clearly hindering the essence of the Convention and may actually allow discrimination. Consequently, while the Convention obliges States Parties to move towards equality for women, at the same time, it recognises the intention of some States not to give women equality.¹⁷⁶

Another weakness of the Convention is that it largely provides general principles rather than specific commitments although there are some exceptions to this rule. For example, Article 16 (g) of the Convention states that a wife should have the same right as her husband to choose the family name while Article 13 of the Convention provides women with the right to obtain bank loans and mortgages. Nonetheless, the Convention mostly seeks to develop general guidance rather than make specific commitments.¹⁷⁷ This vagueness, in turn, might result in the articles being misinterpreted and end in discrimination against women. Finally, there is a problem with CEDAW in its vision of women's rights since it uses men's standards to measure the standards of women's human rights. Accordingly, as mentioned above, the more women act like men, the more they are treated equally. This means that CEDAW has failed to change the views of the international community in terms of women's equality.¹⁷⁸ Therefore, if the international community changes its vision towards women's rights, many of CEDAW's shortcomings will be addressed.

¹⁷⁶ Julie A Minor, 'Analysis of Structural Weaknesses in the Convention on the Elimination of All Forms of Discrimination against Women, An' (1994)24 Ga J Int'l & Comp L 137 p.145

¹⁷⁷ Burrows, 'The 1979 convention on the elimination of all forms of discrimination against women'(1985) p.459

¹⁷⁸ Southard, 'Protection of women's human rights under the Convention on the Elimination of All Forms of Discrimination Against Women'(1996) p.10

2.4.1 Weakness of CEDAW's monitoring and implementation procedures

The CEDAW Committee considers the progress made and the measures taken by States Parties to implement the provisions of the Convention. This Committee is composed of twenty-three members from different Member States and these members meet once a year for a period of four weeks to analyse the progress the Convention is making, to make recommendations to the States Parties, and to review the States Parties' reports. Article 18 of the Convention requires all Parties to submit reports within one year after the ratification of the Convention; after this, Member States must submit a report every four years or whenever the CEDAW Committee requests. Member States should guarantee they will not retreat to any great extent on the application of the Convention's standards, even though they have reservations about the Convention, as this could be considered to be a breach of the Treaty.¹⁷⁹

Although the reporting system under CEDAW seeks to encourage States Parties to adopt policies to raise the status of women, it has, however, failed to convince Member States to withdraw their reservations. In addition, the CEDAW Committee has limited power to enforce sentences under the Convention and, in particular, the CEDAW Committee lacks sufficient time and reliable information to make it function effectively. For example, Article 20 allows only two weeks for the Committee to consider the reports provided by States Parties while the majority of other Conventions do not have such restrictions. Accordingly, some commentators consider that these restrictions could prevent the Commission from examining States' reports thoroughly and meaningfully. Moreover, despite the fact that the reporting system takes three years or more to complete, many countries have failed to submit their reports on time, and even when States Parties do manage to complete the reports on time, there is no guarantee that the information in the reports is accurate.¹⁸⁰ Another weakness in CEDAW's procedures is that there is no right to petition, which would allow individuals to complain about violations, when such a

¹⁷⁹ Jennifer Riddle, 'Making CEDAW universal: A critique of CEDAW's reservation regime under Article 28 and the effectiveness of the reporting process' (2002) 34 Geo Wash Int'l L Rev 605

¹⁸⁰ Riddle, 'Making CEDAW universal: A critique of CEDAW's reservation regime under Article 28 and the effectiveness of the reporting process' (2002)

procedure is allowed in other conventions, such as the ICCPR, the Race Convention and the Torture Convention.¹⁸¹

Despite the long period of time since CEDAW came into force, the Convention has not resulted in any major changes in the area of women's rights. This may be due to defects in the documents themselves, which may have contributed to the Convention's limited success, or be due to the vagueness of the Convention's policies. Special attention should be given to the role of culture, which constitutes a major obstacle amongst member states, contributing to their failure to implement the provisions of the Convention.

2.4.2 CEDAW and cultural challenges

Culture plays an important role in human rights instruments as it is considered an obstacle to the application of many of the issues raised in human rights conventions, including CEDAW. Southard notes "the influence of culture and tradition on restricting women's enjoyment of their fundamental rights."¹⁸²

CEDAW realised how important the role of culture in human rights is, especially in women's rights, and therefore, in Article 5 paragraph (a) the Convention called upon States Parties to "modify the social and cultural patterns of conduct of men and women." However, on the other hand, it is not easy to get rid of stereotypes and cultural factors that affect women's rights. Cultural issues have a significant effect on States' reservations regarding CEDAW and can also lead to differences in the interpretation of the conventions, thus leading to different applications.¹⁸³ It is considered that CEDAW is one of the human rights' instruments that has received most reservations from both Islamic

¹⁸¹ Minor, 'Analysis of Structural Weaknesses in the Convention on the Elimination of All Forms of Discrimination against Women, An'(1994) p.150

¹⁸² Southard, 'Protection of women's human rights under the Convention on the Elimination of All Forms of Discrimination Against Women'(1996) p.23

¹⁸³ Christopher McCrudden, 'Why Do National Court Judges Refer to Human Rights Treaties? A Comparative International Law Analysis of CEDAW' (2015)109 American Journal of International Law 534

countries and some non-Islamic countries.¹⁸⁴

The Islamic culture may be one of the most misunderstood with regard to human rights, and especially women's rights. While 21 Arabic Islamic countries ratified CEDAW, 18 of them ratified it with reservations and most of these reservations were based on conflicts with Islamic Shari'a law. In addition, both Pakistan and Bangladesh also ratified CEDAW with reservations based on Islamic law.¹⁸⁵ Muslim states' reservations that are based on Islamic law concern many non-Islamic states. For example, Germany objected to all the reservations of Libya, Mauritania, Egypt, UAE, Bahrain, Bangladesh and Saudi Arabia,¹⁸⁶ asserting its concern that "with regard to the compatibility of CEDAW rules with Islamic law [the reservations raise] doubts as to the commitment of [those countries] to CEDAW."¹⁸⁷ In addition, with regard to the UAE's reservation, Germany argued that "the reservations . . . which give a specific legal system, the Islamic Sharia, precedence as a rule over the provisions of the Convention" make it "unclear to what extent the UAE feels bound by the obligations of the Convention."¹⁸⁸ Saudi Arabia was not far from criticism as a result of the Saudi "catch-all" reservation, which states: "in case of a contradiction between any term of the Convention and the norms of Islamic law, the Kingdom is not under obligation to observe the contradictory terms of the Convention." Austria considered that the Saudi reservation to CEDAW adversely affected its commitment to the provisions of the Convention.¹⁸⁹ With Muslim states insisting they link human rights with Islam, it seems that the reservations made by Muslim states that are based on Islamic Shari'a law are unjustified and unconvincing to Western countries.

In reality, reconciling cultures and CEDAW may be challenging but this might be possible. For instance, senior judges in national courts are usually the elders of their communities;

¹⁸⁴ Laboni Amina Hoq, 'Women's Convention and Its Optional Protocol: Empowering Women to Claim Their Internationally Protected Rights, The' (2000)32 Colum Hum Rts L Rev 677 p.689

¹⁸⁵ Anjali Sara Bonner, 'Muslim States' Reservations to CEDAW and Possibilities for the Reconciliation of Shariah Law with International Women's Rights Norms' (2009)3 HKJ Legal Stud 27 p.33

¹⁸⁶ Ibid p.36

¹⁸⁷ Objections of the Government of the Federal Republic of Germany to Saudi Arabian CEDAW Reservations, at [http://untreaty.un.org/humanrightsconvs/ChaptIV-8/objections/ Germany toSaudiArabipdf](http://untreaty.un.org/humanrightsconvs/ChaptIV-8/objections/Germany%20toSaudiArabipdf).

¹⁸⁸ Objections of the Government of the Federal Republic of Germany to Saudi Arabian CEDAW Reservations, at [http://untreaty.un.org/humanrightsconvs/ChaptIV-8/objections/ Germany toSaudiArabipdf](http://untreaty.un.org/humanrightsconvs/ChaptIV-8/objections/Germany%20toSaudiArabipdf).

¹⁸⁹ Bonner, 'Muslim States' Reservations to CEDAW and Possibilities for the Reconciliation of Shariah Law with International Women's Rights Norms'(2009) p.34

as such, they tend to apply the customs, traditions and values of previous judgments. It is therefore difficult for them to change the social and cultural patterns. However, in contrast, judges in Tanzania have played a leading role in changing the social and cultural patterns which discriminate against women. In *Ephraim v. Pastor*, the High Court of Tanzania faced conflict between Haya customary law and the Tanzanian Bill of Rights.¹⁹⁰ The Supreme Court in Tanzania invoked, in this case, the human rights instruments signed by Tanzania, such as CEDAW, the Convention of Civil and Political Rights, and the African Charter on Human Rights. The result was that the customary law has been amended to provide equal rights for men and women to inherit, own and sell land. In doing so, Tanzania has succeeded in changing one of the social and cultural patterns which allowed discrimination against women in line with Article 2 of CEDAW which had elicited a great many reservations.¹⁹¹

Moreover, Tunisia provided an encouraging model regarding the application of CEDAW. Despite the repressive government of Tunisia, the Tunisian CEDAW delegation (1995) reported:

“The first accomplishment after Tunisia's independence was the adoption of the Personal Status Code, which laid the foundations for a new organization of the family, based on the legal equality of men and women. Tunisia had a long history of women's emancipation, which led in 1936 to the creation of its first women's organization. The Tunisian leaders adopted a dynamic interpretation of Islam, and since 1956, Tunisian legislation had gradually been establishing the conditions necessary for women's equal status in the political, economic and social life. This new vision of society had been widely disseminated and had gradually been adopted by women. Equality of opportunity was beginning to emerge and was given considerable impetus through new women's

¹⁹⁰ Cook, *Human rights of women: National and international perspectives*

¹⁹¹ Ibid

organizations.”¹⁹²

It is important to note that the core principle of all human rights’ treaties, such as CEDAW, is the responsibility of States to ensure equal enjoyment of human rights and eliminate of all forms of discrimination. Since discrimination against women is governed in many cases by customs and cultural backgrounds, the principle of gender equality must therefore be based on respect for cultural diversity. In fact, “equality and non-discrimination not only imply that equal situations should be treated equally”; in some cases, “unequal situations should be treated unequally.”¹⁹³

2.5 Women’s rights post-CEDAW

CEDAW, as mentioned earlier, has not been sufficiently effective to raise the status of women. This is due to the many weaknesses of the Convention and, as a result, progress to develop women's rights has not stopped as several developments to the benefit of women have taken place post-CEDAW, seeking to remove weaknesses in CEDAW and attempting to reach an international consensus on the rights of women. There are three key developments that have played an active role in the women's rights’ movement; these are mentioned in the following section.¹⁹⁴

2.5.1 The 1993 UN World Conference on Human Rights (Vienna Conference)

The World Conference on Human Rights (the “Vienna Conference”), which was held in 1993, is one of the most significant events in the evolution of the human rights’ movement and, due to the special attention given by the Conference to women, the

¹⁹² CEDAW, *Concluding comments of the Committee on the Elimination of Discrimination against Women: Tunisia*, Supplement No 38 (A/50/38) (1995), at <http://secint24.un.org/womenwatch/daw/cedaw/cdromcedaw/EN/files/cedaw25years/content/english/CONCLUDINGCOMMENTSENGLISH/Tunisia/Tunisia%20CO-2.pdf>

¹⁹³ Yvonne Donders and Vincent Vleugel, ‘Universality, Diversity and Legal Certainty: Cultural Diversity in the Dialogue Between Cedaw and States Parties’ (2014) Forthcoming in: *The Rule of Law at the National and International Levels: Contestations and Deference*, Oxford: Hart Publishing (2015)

¹⁹⁴ Shah, *Women, the Koran and international human rights law: the experience of Pakistan* p.167

Vienna Conference was considered as a success for women's rights. One of the most prominent achievements of the World Conference on Human Rights is the recognition that women's rights are human rights, and also that the rights of women and of female children are “an inalienable, integral and indivisible part of universal human rights.”¹⁹⁵ In addition, the Conference stressed that women should participate fully and equally with men in political, civil, economic, social and cultural life at national, regional and international levels. Also, the Conference stressed the need to abolish all forms of discrimination against women. Moreover, the Vienna Conference also considered violence against women, stating that:

“All forms of sexual harassment and exploitation, including those resulting from cultural prejudice and international trafficking, are incompatible with the dignity and worth of the human person, and must be eliminated.”¹⁹⁶

Indeed, in certain points, the Conference endorsed the principles of CEDAW. For instance, the Conference requested the general assembly to adopt CEDAW.¹⁹⁷ In addition, the Conference encouraged the States to combat discrimination against women in accordance with the provisions of CEDAW.¹⁹⁸ However, on the other hand, the Conference had certain weaknesses. For example, it did not study methods to increase the effectiveness of the implementation of the economic, social and cultural rights of women, according to Friedman who stated:

“Appropriately gendered language was not found through the document, nor was there any mention of transcending the public/private dichotomy so as to make states accountable for all violations of women’s human rights. Finally, it

¹⁹⁵ United Nations Human Rights, 'Vienna Declaration and Programme of Action 1993 (Paragraph 18)' (*United Nations Human Rights*, 1969) <<http://www.ohchr.org/EN/ProfessionalInterest/Pages/Vienna.aspx>> accessed 10/December

¹⁹⁶ Rights, 'Vienna Declaration and Programme of Action 1993 (Paragraph 18)

¹⁹⁷ Donna J Sullivan, 'Women's Human Rights and the 1993 World Conference on Human Rights' (1994) *American Journal of International Law* 152

¹⁹⁸ Sullivan, 'Women's Human Rights and the 1993 World Conference on Human Rights'(1994)

[Declaration] did not sufficiently address the problem of ensuring compliance with recommendations.”¹⁹⁹

2.5.2 The 1995 Fourth UN Women’s Conference (Beijing Conference)

The Fourth Conference of Women was held in 1995 in Beijing; this was one of the most important and largest conferences in history. The Conference coincided with the adoption of the Beijing Declaration and Platform of Action. The main message of the Beijing Conference was to see the world through women’s eyes.²⁰⁰

The Beijing Declaration stated:

“The status of women has advanced in some important respects in the past decade but that progress has been uneven; inequalities between men and women have persisted and major obstacles remain.”²⁰¹

The Declaration called for the empowerment of women to participate in decision-making; it also considered that women should have equal opportunities, besides access to resources and the abolition of poverty. In addition, it stressed the right of women to control all aspects of their health, especially aspects of their fertility, and also made calls to eliminate all forms of violence and discrimination against women. Moreover, the Declaration (paragraph 8, 14) confirmed that men and women had equal rights and inherent dignity, further recognising that women’s rights are human rights.²⁰²

The most essential goal of the Beijing Conference was to eliminate inequality between men and women, especially in the areas of education, health, work, economic

¹⁹⁹ Elisabeth Friedman, ‘Women’s human rights: The emergence of a movement’ (1995) *Women’s rights, human rights: International feminist perspectives* 18 p.18.

²⁰⁰ Nicole Streeter, *Beijing and Beyond* (HeinOnline 1996)

²⁰¹ United Nations, ‘Beijing Declaration and Platform of Action’ (1995) <<http://www.un.org/womenwatch/daw/beijing/platform>> accessed 14December

²⁰² Shah, *Women, the Koran and international human rights law: the experience of Pakistan* p.191

participation, and poverty.²⁰³ Although the Conference had impressive goals and objectives, it also had some weak points. For instance, the platform avoided raising some significant issues, particularly in macro-economic areas. The platform considered that most women who live in poverty belonged to developing countries; however, it did not consider the negative effects on women of capitalism, which has caused income inequality between men and women.²⁰⁴

Moreover, women's diversities were considered in the Beijing Conference which repeated the language adopted in the 1993 Vienna Conference, stating that while States should protect all human rights, "cultural and religious backgrounds must be borne in mind."²⁰⁵ This consideration, however, was not adequate since the result was vague. The Beijing Conference should be clear in this regard, especially in controversial issues such as same-sex marriage, as some countries, especially Islamic ones, have strong reservations about such issues.²⁰⁶ For example, Majed Al-Ghamdi noted that the Beijing Conference acknowledges homosexuality and insert its rights within human rights; this includes the right to marry and have children by adoption or by surrogacy. In addition, the Conference called for a woman's right to exercise familiarity with whom and whenever she wished, despite the framework of legitimate marriage, also calling upon States to agree to this standard. In fact, the Conference did not take clearly into account the diverse situations of women, especially those from an Islamic culture which prohibits same-sex marriage in all its forms and where, therefore, there are no consequential rights to such a marriage. In addition, the Islamic Shari'a forbids any sexual relationship outside marriage; this was also not recognised by the Conference.²⁰⁷

In Saudi Arabia, the late Grand Mufti, Sheikh Abdul Aziz bin Baz, warned the Beijing Conference arguing that, as the Conference called for the elimination of any laws that discriminated between men and women on the basis of religion, and since it permitted

²⁰³ Charlotte Bunch and Susana Fried, 'Beijing'95: Moving women's human rights from margin to center' (1996) Signs 200

²⁰⁴ Janet Hunt, 'Reflections on Beijing' (1996)6 Australian Feminist Law Journal 39

²⁰⁵ United Nations, 'Beijing Declaration and Platform of Action' (1995) <<http://www.un.org/womenwatch/daw/beijing/platform>> accessed 15December

²⁰⁶ Dianne Otto, 'Lesbians-Not in My Country' (1995)20 Alternative LJ 288

²⁰⁷ Majid Al-Ghamdi, 'Beijing Conference .. step towards the global community decomposition' <<https://saaaid.net/female/m172.htm>> accessed 15/12/2015

permissiveness in the name of protected sexuality, as well as allowing the formation of families by individuals, Muslims had a responsibility to boycott the Beijing Conference. They should also take all appropriate measures to prevent the application of the Conference's judgments in Islamic countries.²⁰⁸

In spite of the many positive aspects of the Beijing Conference, it is clear that a failure to take into consideration cultural relativism might prevent completely the application of the Conference, including both its positive and negative aspects, especially in Muslim countries such as Saudi Arabia.

2.5.3 CEDAW's Optional Protocol (1999)

CEDAW's Optional Protocol is one of the major developments in terms of women's rights; it is also the most effective document concerning women in this regard at an international level. In the words of the Secretary-General of the United Nations,

“We can all take pride in the event we are marking today. I can think of no better way to celebrate this last Human Rights Day of a century which has seen great advances in women's rights, than by adding this important instrument to our tool-kit in ensuring women really do enjoy those rights.”²⁰⁹

The United Nations' General Assembly adopted the Optional Protocol on October 6 1999 which entered into force on 2 December 2000. The Optional Protocol has had a significant impact in terms of strengthening CEDAW as, according to Article 2 of the Protocol, individuals or a group could bring complaints to the Committee of the Women's Convention regarding the failure of their government to comply with CEDAW.²¹⁰

²⁰⁸ AbdulAziz binBaz, 'warning statement from the Beijing Women Conference' <<http://www.binbaz.org.sa/node/8653>> accessed 22/9/2017

²⁰⁹ United Nations, Secretary-General Says It Is Duty of All to Be 'Vigilant and Articulate Custodians' of Women's Anti-Discrimination Convention, <http://www.un.org/> accessed 15/12/2015

²¹⁰ Valerie A Dormady, 'Status of the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW) in 1998' (1999) *The International Lawyer* 637

Consequently, Article 8 of the Protocol gives the Committee the power to investigate systemic serious violations of human rights in the territories of States Parties. In addition, the Committee could allocate one or more of its members to investigate and report urgently to the Committee.²¹¹ In this regard, Andrew Byrnes has argued that the Optional Protocol is a step towards the survival of CEDAW.²¹²

Indeed, the many reservations that have been made regarding CEDAW have weakened it so, perhaps for this reason, Article 17 of the Optional Protocol does not allow States to make reservations to the Protocol. In other words, it does not allow States to become a member of the Optional Protocol unless they are serious in their duties towards women.²¹³ Although the Optional Protocol has played an important role in women's rights, it is not free from drawbacks. For instance, the Optional Protocol has weaknesses in its procedures as the role of its Committee is limited to providing only general recommendations after studying an individual's or group's complaints; these recommendations, in turn, may not necessarily be implemented by States Parties.²¹⁴

2.6 Conclusion

In recent decades, the United Nations has given women more consideration than ever before, although women have always been present at UN Conventions. CEDAW is perhaps, however, the only Convention that is prejudiced in favour of women, focusing on their situation from all angles, whether political, economic or social; neither does it disregard rural women. The international community did not stop at CEDAW as the situation of women was also at the forefront of the Beijing Conference, the Vienna Conference, and in CEDAW's Optional Protocol. Despite all the international efforts to obtain rights for women, they are still suffering from discrimination in many countries of

²¹¹ Andrew Byrnes, *Slow and Steady Wins the Race?: The Development of an Optional Protocol to the Women's Convention* (JSTOR 1997)

²¹² Ibid

²¹³ Heidi Gilchrist, 'Optional Protocol to the Women's Convention: An Argument for Ratification, The' (2000)39 Colum J Transnat'l L 763

²¹⁴ Gilchrist, 'Optional Protocol to the Women's Convention: An Argument for Ratification, The'(2000)

the world as cultures still express themselves forcefully. This is a clear obstacle to the elimination of discrimination against women. The Islamic culture is one of the most influential cultures in terms of women's rights as its law enters into all aspects of life in Muslim countries, including the lives of women.

The next chapter explains in detail women's rights in Islamic law in order to discuss the possibility of reconciling women's rights as laid out in CEDAW and Islamic law.

Chapter 3: Women's Social Rights in Islam

3.1 Introduction

Islam is not just a religion to be read in a book; rather, it sanctifies a whole way of life as it enters into people's clothing, food and drink. In the pre-Islamic society, nearly all women were bought and sold or inherited. Women were treated like commodities.²¹⁵ However, after the mission of the Prophet Mohammed, a new dawn began for women in which they were no longer treated like commodities but were respected as human beings. Islamic law granted women rights in all aspects of life as it gave them the right to choose a spouse, along with the right to separate. Last but not least, Islamic law values women as mothers, wives and daughters.²¹⁶

Islamic countries, specifically Saudi Arabia, apply Islam in terms of personal status which has caused some problems with regard to the application of international human rights' law in the country. Brandt and Kaplan argue that, in Islamic countries, the Personal Status Law is a major obstacle to reconciling Islamic law with international law, as personal status is strongly controlled by Islamic laws.²¹⁷ Noel Coulson argues that, historically:

"Family law ha[s] always been the stronghold of the Shari'a, and the reception of secular and Western laws in other spheres created a sharp dichotomy which resulted in a growing emphasis upon the religious and Islamic significance of the Shari'a and a strengthening of its influence in those matters which remained under its sway."²¹⁸

This chapter examines the role of Islam in raising the status of women and then it explores how Islam guaranteed women equal rights to men in term of personal status. The final goal of this chapter is to reach a conclusion as to whether this can be reconciled with international human rights' standards, especially with the UN Convention on the

²¹⁵ Yusuf al-Qaradawi, *Women Position in Islamic Life* (Wahba Library 2005) p.9

²¹⁶ Ibid p.9

²¹⁷ Brandt and Kaplan, 'The tension between Women's rights and religious rights: reservations to Cedaw by Egypt, Bangladesh and Tunisia'(1995) p.18

²¹⁸ Noel J. Coulson, *A History of Islamic Law* 149-162 (Edinburgh U Press, 1964) p.161

Elimination of All Forms of Discrimination Against Women, 1979 (CEDAW). This work examines the rights of women by discussing primary sources, such as the Qur'an²¹⁹ and the Sunnah,²²⁰ and secondary sources of Islamic law, such as *Ijtihad*,²²¹ *Ijma*,²²² *Qiyas*,²²³ and *Urf*²²⁴ of Muslims.

3.2. The Islamic law approach to equality between men and women

One of the most important features of Islamic law is the elimination of discrimination between men and women. In several places, the Qur'an confirms that men and women are equal: for instance, the Qur'an emphasises that both men and women share the same spiritual human nature when it says: "O mankind, fear your Lord, who created you from one soul and created from it its mate and dispersed from both of them many men and women."²²⁵ Moreover, in Islam, men and women are equal in their inherent dignity since God made both genders trustees of the earth collectively. The Qur'an states: "And We have certainly honored the children of Adam and carried them on the land and sea and provided for them of the good things and preferred them over much of what We have created, with [definite] preference."²²⁶ Furthermore, the Qur'an emphasises that both women and men have identical moral and religious responsibilities and duties. It says:

²¹⁹ For Muslims, the Qur'an is the eternal and indisputable word of God. The oldest and most sacred text of Islam, it is the cornerstone of every believer's faith and morality. But the Qur'an is also an earthly book, and its history is intimately connected to the life and history of an earthly community.

²²⁰ Since pre-Islamic times, the Arabic word *sunnah* has referred to a body of established customs and beliefs that make up a tradition. In Muslim legal and religious thought, the term became associated more specifically with the actions and sayings of the Prophet Muhammad. Inspired by God to act wisely and in accordance with his will, Muhammad provided an example that complements God's revelation as expressed in the Qur'an. His actions and sayings became a model for Muslim conduct as well as a primary source of Islamic law.

²²¹ *Ijtihad* is the secondary source of Islamic law. It is the interpretation of principles and provisions of Quran and hadith by faqeeh or imam. In this regard we can find four imams who formed different school of thought by interpreting the Quran and Sunnah by study and research. One school of thought believes that *Ijtihad* ended with the four pious caliphs while others believe that it is not ended.

²²² *Ijma* means the consensus among Islamic jurists on matters within the limits of Quran and Sunnah. For example, the institution of khilafat is established on the basis of *ijma* among the Islamic jurists.

²²³ *Qiyas* is also one of the secondary sources. It means to conclude general principle from Quraan and Sunnah to generalize the Versus or Hadith. For example from wine, the jurists concluded and generalized that all things causing unconsciousness are prohibited by Islam.

²²⁴ *Urf* is also a secondary source of Islamic law. *Urf* is the common practice among the Muslims as their common habit or *a'ada*.

²²⁵ 'The Holy Quran.'(4:1)

²²⁶ Ibid (17:70)

“And their Lord responded to them, ‘Never will I allow to be lost the work of [any] worker among you, whether male or female; you are of one another’.”²²⁷ Jamal Badawi argues that it is clear from the Islamic texts that men and women are equal in Islam, whether in terms of their humanity or their spirit. In addition, he argues that nowhere in the Islamic texts is there a mention of the superiority of one gender over the other. Thus, human misinterpretations of the Islamic texts, together with culture, are blamed for breaching Islamic teaching and in the creation of the notion of man’s superiority over women.²²⁸

In fact, full equality between men and women in Islam is beyond doubt. However, this equality is based on complementary roles for men and women. The Qur’an states: “By the night when it covers. And [by] the day when it appears. And [by] He who created the male and female (*allele*).”²²⁹ In another verse in the Qur’an it is stated: “And we created you in pairs. And made your sleep [a means for] rest. And made the night as clothing. And made the day for livelihood.”²³⁰

The verses emphasise the principle of complementarity between men and women in the universe, just as the night and day are different in nature, for instance. The daytime is infused with light, which makes it easier for people to work, while the night is infused with darkness, which makes it better for people to rest and sleep. If God had made the day continuous, it would be hard for people to find sufficient rest and sleep to start a new day. Similarly, if God had made it continually night, it would be difficult for people to work and move around. Therefore, as the day and night have complementary roles to each other, so do men and women.²³¹ God created men and women differently in nature since each of them has a different complementary role in life. Al Sharawi states that these roles given by God to men and women do not mean to discriminate between them; rather, the main job for a man is to earn money for his family. However, this does not mean that he does

²²⁷ ‘The Holy Quran.’ (3:195)

²²⁸ Jamal A Badawi, *Gender equity in Islam*, vol 2 (by IDM Publications 2002) p.10

²²⁹ ‘The Holy Quran.’(92:1,2,3)

²³⁰ Ibid (78;8)

²³¹ Mohammad Shaarawy, *Women in the Holy Quran* (Shaarawy Islamic Library 1998) p.15

not have an important role as a father and it does not mean that a woman does not have the right to work if she so wishes.²³²

Thus, equality between men and women in Islamic law is based on the concept of complementarity. This means that men and women have equal rights but in different ways. For instance, Islamic law gives both husband and wife the right to divorce equally but differently; moreover, it gives them both equal but different economic rights. Jamal Badawi argues that perhaps it is more accurate to say that Islam offers gender equity rather than gender equality: "The term "equity" is used instead of the more common expression "equality," which is sometimes misunderstood to mean absolute equality in each and every detailed item of comparison rather than overall equality. Equity is used here to mean justice and overall equality in the totality of rights and responsibilities of both genders and allows for the possibility of variations in specific items within the overall balance and equality."²³³

3.3. Women's social rights before Islam

In pre-Islamic Arab society, women had no rights as there was no specific number of divorces and no fixed number of wives that a man could have. In addition, women did not have the right to choose a husband; neither did they have any rights in marriage. Furthermore, women were inherited. For instance, if a man died and left a wife (or wives) and children, the eldest son inherited that wife (or wives) unless she was also his mother. If he wanted to marry any of them, he had to announce his desire to marry by placing a dress on the woman.²³⁴

Moreover, according to Aisha (the wife of the Prophet Mohammed), there were several practices which were offensive to women in pre-Islamic society. One of these practices

²³² Shaarawy, *Women in the Holy Quran* p.15

²³³ Badawi, *Gender equity in Islam* p.43

²³⁴ Mona Salous, *Women Educational Rights in Islam From Quran and Sunnah* (Universities publishing House. 2003) p.50

was where the husband sent his wife, after she had finished menstruating, to another man with whom to have sexual intercourse; she would remain away until she fell pregnant. After that, she could return to the husband. The purpose of that practise was based on the husband's desire to have a child. Another example of such a practice was where a group of men (fewer than ten) visited a woman to have sexual intercourse with her. If she conceived a child and gave birth, the woman would choose one of those men to be a father to the child; the chosen man could not refuse. Moreover, some women drew attention to themselves by hanging flags on their homes. They would be visited by a number of men for sexual intercourse and if they conceived a child and gave birth, the men who frequently visited would then decide who was the father through a physiognomist.²³⁵

In fact, since these practices in pre-Islamic Arab society reflected abuses of the rights of both women and children, when Islam emerged, it approved only of marriage and prohibited all those practices which insulted women.

Islam also forbids marriage with one's father's wife/wives. The Qur'an says: "And do not marry those [women] whom your fathers married, except what has already occurred. Indeed, it was an immorality and hateful [to Allah] and was evil as a way."²³⁶ Inheriting women is also forbidden: "Ye are forbidden to inherit women against their will."²³⁷ In addition, Islam forbids Shiggar marriages in which two men exchange their daughters or wards for marriage where each of them would be the dowry of the other.²³⁸ According to the Prophet Mohammed, narrated by Ibn 'Umar: "Allah's Apostle forbade Ash-Shiggar, which means that somebody marries his daughter to somebody else, and the latter marries his daughter to the former without paying Mahr."²³⁹

In addition, Islam forbids the marriage of mothers, grandmothers, aunts, nieces, sisters and daughters:

²³⁵ Hilmi Rashidi, *Sunnah Proofs of Marriage Rulings with Fatwas in Marriage by Ibn Taimya*. (Alaqeda house of publication and distribution. 2005) p.20

²³⁶ , 'The Holy Quran.'(4;22)

²³⁷ Ibid (4:19)

²³⁸ Salous, *Women Educational Rights in Islam From Quran and Sunnah* p.51

²³⁹ Mohammad Albukhari, *SAHIH BUKHARI* (854) No.47

“Prohibited to you (for marriage) are – your mothers, daughters, sisters, father’s sisters, mother’s sisters, brother’s daughters, sister’s daughters; foster mothers (who have suckled you), foster sisters; your wives’ mothers; your step-daughters under your guardianship, born of your wives to whom ye have gone in – no prohibition if ye have not gone in – (those who have been) wives to your sons emanating from your loins; and two sisters in wedlock at one and the same time.”²⁴⁰

Besides prohibiting abuses of women’s rights through these types of marriage, Islam gave rights to women for the first time in the history of the Arabian Peninsula. Umar bin al-Khattab, a Prophet confidant and contemporary of the pre-Islamic Arab society before he embraced Islam, stated: “In Arab society women were not given any value and we did not share with them of any of our matters. We did not even speak with them, and after the emergence of Islam the status of women raised and they have rights.”²⁴¹

3.4. Women’s social rights after Islam

The original intent of Islamic law was to act in the interests of people, to maintain those interests, and to address any harm that could affect those interests. The interests noted here are not of human vision, they are from the Shari’a. One of the interests that the Islamic Shari’a seeks to achieve is necessity and these necessities are the elements that people’s lives and a stable society depend on. In Islamic law there are five necessities that should be protected: religion, life, reason, offspring and property.²⁴² For instance, to protect human life, God has forbidden killing, and to protect offspring, Islamic Shari’a permits marriage.²⁴³

²⁴⁰ ‘The Holy Quran.’ (2:22)

²⁴¹ Salous, *Women Educational Rights in Islam From Quran and Sunnah* p.50

²⁴² Mohammed Bin- Uthaymeen, *Marriage in Islamic Sharia* (The Islamic library 1990) p.12

²⁴³ Rashidi, *Sunnah Proofs of Marriage Rulings with Fatwas in Marriage by Ibn Taimya*.p.7

In fact, Islamic law aims to build a healthy community along with a happy family, which is one of the main pillars of the community. For this reason, Islamic law cares about all elements of family life and protects its rights whether they concern husband or wife, mother or father, son or daughter; the only way to create such a family in Islam is through marriage. The definition of marriage in Islamic law is that it is a contract between a man and a woman who wish to enjoy each other and create a good family along with a healthy society.²⁴⁴

3.4.1 A woman's right to enter marriage

There are conditions in order for a marriage to be valid in Islam. The first condition of marriage in Islam is that both spouses must be able to be identified clearly, whether by giving their names or by description; the second condition is the consent of the spouses as a marriage would be void if one of the parties were forced.

According to the Hanbali, which was applied in Saudi Arabia, and the Al-Shafei and Malik schools, the second condition of Islamic marriage is to have a guardian. Indeed, this provision is based on the Prophet Mohammed's statement: "There is no (valid) marriage without a *wali* (guardian)."²⁴⁵ This condition is applied in many Arabic countries such as Egypt, Kuwait, the United Arab Emirates and Saudi Arabia. Consequently, in these countries, women cannot marry without a guardian, and if a woman is married without her guardian's permission, her marriage is invalid.²⁴⁶

The guardian (*wali*) is the man who is a blood relative to the woman on her father's side (*usbah*), such as her father, her paternal grandfather, her son or her paternal uncle. Therefore, a woman's relative from her mother's side, such as the maternal uncle, could not be her guardian in marriage as he would not be *usbah*.²⁴⁷ The father of the bride would have priority to be her guardian if he met all the required conditions. (This is

²⁴⁴ Rashidi, *Sunnah Proofs of Marriage Rulings with Fatwas in Marriage by Ibn Taimya*.p.7

²⁴⁵ MYAAA Ibn Majah, 'Sunan Ibn Majah' (2004) Translated by Muhammad Tufail Kazi Publications: Pakistan No. 1881

²⁴⁶ Uthaymeen, *Marriage in Islamic Sharia* p.14

²⁴⁷ Ibid p.13

discussed later in this section.) However, the guardian should not force his ward to marry a man she does not want to marry.²⁴⁸ According to Prophet Mohammed: “A non-virgin woman may not be married against her wish, and a virgin may not be married without her permission.”²⁴⁹ So, if a guardian forces his ward to marry someone she does not want to marry, the marriage will be invalid, according to Prophet Mohammed. “Once a virgin girl came to the Prophet and said that her father had married her to a man against her wishes. The Prophet gave her the right to repudiate the marriage.”²⁵⁰ However, if the woman would like to marry a man who is unsuitable, her guardian has the right to prevent her from marrying him.²⁵¹ In fact, this is in contrast to the situation before Islam where a woman's guardian could marry her to someone else without her consent. According to Khansa bint Khidam Al-Ansariya: “Her father gave her in marriage when she was a matron and she was unhappy in that marriage. So, she went to Allah's Apostle and he declared that marriage invalid.”²⁵²

Bin Uthaymeen believes that Islam has placed a great responsibility on the guardian towards his ward as he must not exploit his guardianship for personal gain.²⁵³ Al Qardawi believes that Islam places an obligation on the guardian towards the woman as he should support her and help her to choose the best life partner. In addition, the guardian's main concern, when choosing the husband, should be the husband's good character.²⁵⁴ The Prophet Mohammed said, “If someone comes to you (for marriage) and you are satisfied with his piety and character, then accept him as a bridegroom to your daughter. If you do not, there will be a *fitnah* on earth, and a big corruption.”²⁵⁵

Saleh Abdul-Hadi explained why the guardian is essential in marriage. He considered that the intention of Islam with regard to the requirement for a guardian is that the original purpose of marriage goes beyond the intimacy between a man and a woman. It extends to

²⁴⁸ Uthaymeen, *Marriage in Islamic Sharia*.p.72

²⁴⁹ Albukhari, *SAHIH BUKHARI* No. 5136

²⁵⁰ Ibn Majah, 'Sunan Ibn Majah'(2004) No1874

²⁵¹ Mustafa Sibai, *Woman between jurisprudence and law*. (Dar Al-Warraq for Publishing and Distribution 1999) p.56

²⁵² Albukhari, *SAHIH BUKHARI* No. 5138

²⁵³ Uthaymeen, *Marriage in Islamic Sharia* p.72

²⁵⁴ al-Qaradawi, *Women Position in Islamic Life* p.74

²⁵⁵ Abu'Isa Al-Tirmidhi, 'Sunan al-Tirmidhi' (1986) Beirut Lebanon: Dar Al-fikr Library No.1078

love, mercy, cooperation in life matters, maintaining humanity and the good upbringing of children, which are all essential ingredients for a successful marriage. As a result, not every man is capable of achieving these or capable of bearing this responsibility. Additionally, in marriage, the woman is not the only person affected by the outcomes of a marriage; her family will also share these outcomes. Consequently, if she marries a good man who makes her happy, her family will share her that happiness; equally, if she is married to man who makes her unhappy, her family will share her unhappiness.²⁵⁶ Moreover, Abdul-Hadi noted that the marriage decision affects the whole family. He believed that choosing a spouse is not easy. It requires experience, rationality and emotion at the same time and so, for this reason, he believed that both the guardian and the daughter are significant in making this decision.²⁵⁷

Accordingly, as the guardian has an influential role in a woman's life, certain conditions should be placed upon him so make sure he is qualified for the responsibility. First, the guardian should be a male,²⁵⁸ as the Prophet said: "No woman may conduct the marriage contract of another woman, and no woman can conduct the marriage contract on behalf of her own self."²⁵⁹ Second, he must be a free man (not a slave). Bin Uthemen considered that the reason for the requirement of the freedom of the guardian was because a slave is not free to manage his own personal affairs, let alone the affairs of others.²⁶⁰ The third condition is that the guardian must be an adult as a minor is unable to understand the value of marriage. The fourth condition is that the guardian should be of sound mind while the fifth is that the guardian must be mature and wise (*rushd*), which means he should be able to understand issues of compatibility and the interests of marriage.²⁶¹ The sixth condition is that the guardian should be of good character and that includes piety and the attitude (*adaalah*) of his conduct because if the guardian is not of good character, he may not pay sufficient attention to or give proper counsel concerning the woman's marital affairs. The seventh condition is that there must be unity of religion between the guardian

²⁵⁶ Saleh Abdul-Hadi, *Family rulings in the light of Fiqh schools and personal status law* (2012) p.198

²⁵⁷ Abdul-Hadi, *Family rulings in the light of Fiqh schools and personal status law* p.201

²⁵⁸ Adel Azzazi, *Marriage* (Qurtoba Institution. 2004) p.52

²⁵⁹ Ibn Majah, 'Sunan Ibn Majah'(2004) No. 1782

²⁶⁰ Uthaymeen, *Marriage in Islamic Sharia*.p.18

²⁶¹ Azzazi, *Marriage* p.56

and the bride. Therefore, the guardian should be Muslim, as must his ward.²⁶² In fact, it is clear that the scholars viewed the requirement for a guardian as a condition for a valid marriage as they assumed that, in most cases, the presence of the guardian was not a diminution of the rights of women; it was intended to support them. This is because, in most cases, a father is very close to his daughter and wishes the best for her. For this reason, if the father violated this rule or did not exercise it as it should be done, he would lose that guardianship. Mohammed Munajjid argued that, if a woman wished to marry someone who had good manners and her guardian refused to allow her to marry him, he would lose his guardianship.²⁶³ Moreover, there are many who believe that women in the past were different from women in the current age. For instance, women in the era of the Prophet Mohammed were even ashamed to give words of approval in support of their marriage. Aisha said that she asked the Prophet: ""In the case of a young girl whose parents marry her, should her permission be sought or not?" He replied, "Yes, she must give her permission." She then said, "But a virgin will be shy, O Allah's Messenger." He answered: "Her silence is [considered as] her permission.""²⁶⁴ However, in the present era, women are completely different and, for this reason, perhaps scholars should re-examine this issue. (See Chapter Four for further discussion.) Moreover, it is interesting to note that the scholars who stipulated that there must be a guardian for a woman in the marriage contract did not require a guardian for women in financial matters. However, a woman might be under age when she had a guardian so she could not involve herself in any financial dealings without his permission. Indeed, this may reinforce the argument that, by insisting on a guardian for a woman in a marriage contract, this is trying to protect her from making an emotional decision about marriage, not because she has poorer mental capabilities. Furthermore, although the main objective regarding the requirement for the guardian is the interest of the woman, there are, however, some cases in Saudi Arabia where the guardian has abused a woman's rights and has denied her the right to choose her spouse. (This is discussed in more detail in Chapter Six.) Therefore, in this

²⁶² Azzazi, *Marriage* p.58

²⁶³ Mohammad Al-Munjed, 'Inheritance law in Islam.' <<https://islamqa.info/ar/135065>> accessed 8/2/2016

²⁶⁴ Ibid

regard, it might be better for Saudi Arabia to follow another school, such as the Hanafi school, in the case of guardianship.

The Hanafi school disagreed with the other schools in terms of requiring a guardian for the marriage contract as this school believed that a woman has the right to marry,²⁶⁵ even without the permission of her guardian, if the groom is compatible with her. However, if a woman chooses to marry a man who is not compatible, the guardian has the right to object to the marriage.²⁶⁶ Hanafi's view is based on the following verses: "Do not prevent them from remarrying their [former] husbands if they agree among themselves on an acceptable basis."²⁶⁷ And when they have fulfilled their term, then there is no blame upon you for what they do with themselves in an acceptable manner."²⁶⁸ In addition, al Hanafi believed that, as the Qur'an gives women the right to establish a contract in financial matters without a guardian, women should also have the right to contract their own marriage without guardian.²⁶⁹

Consequently, the interpretation of the Ahmed, Al-Shafei and Malik schools is that guardianship is the responsibility of a man towards a woman; this should be based on love and concern for the woman's interests. In addition, it must be taken seriously and it must be ensured that the guardian is competent to bear this responsibility. In Hanafi's interpretation, however, when a woman becomes an adult, she does not need her guardian's support in marriage. In fact, both interpretations tend to protect women's rights in marriage but they use different methods.

²⁶⁵ al-Qaradawi, *Women Position in Islamic Life* p.87

²⁶⁶ Uthaymeen, *Marriage in Islamic Sharia* p.47

²⁶⁷ , 'The Holy Quran.'(2;232)

²⁶⁸ Ibid (2;234)

²⁶⁹ Azizah Al-Hibri, *Islam, law and custom: Redefining Muslim women's rights* (HeinOnline 1997) p.9

3.4.2 Dowries

As an estimate of the wife, Islam requires a man to pay a dowry for a woman as an announcement by him of his wish to marry her. The dowry is a gift from the husband to his wife, not a price for the wife or an exchange in return for her affections.²⁷⁰ The Holy Qur'an states: "And give the women [upon marriage] their [bridal] gifts graciously. But if they give up willingly to you anything of it, then take it in satisfaction and ease."²⁷¹

In addition, the husband should not take back the dowry if he divorces his wife. According to the Qur'an: "But if ye decide to take one wife in place of another, even if ye had given the latter a whole treasure for dower, take not the least bit of it back."²⁷²

3.4.3 A woman's rights during marriage

Islamic law guarantees a wife rights from her husband before the marriage, rights during the marriage, and even in the event of the marriage ending.

3.4.3.1 A wife's maintenance

In Islamic law, a woman has the right to work and earn money if she wishes to. However, there is no obligation on her to work and bear the responsibility of her family and so such a decision is optional and she may decide if she would like to work or not. In fact, in Islamic law, the man is responsible for providing food, clothing and housing for a woman without being extravagant or miserly; this is a basic Qur'anic principle that should be followed by the husband.²⁷³ The Qur'an provides: "Let a man of wealth spend from his wealth, and he whose provision is restricted – let him spend from what Allah has given him. Allah does not charge a soul except [according to] what He has given it."²⁷⁴

²⁷⁰ Abdul Latif Amer, *Family rulings in Islam* (2005) p.247

²⁷¹ 'The Holy Quran.' (4:4)

²⁷² Ibid (4:20)

²⁷³ Uthaymeen, *Marriage in Islamic Sharia* p.27

²⁷⁴ , 'The Holy Quran.' (65:4)

Moreover, in the event of a husband being miserly or refusing to spend on his wife and children, Islam permits a wife to take what she and her children need from her husband's wealth, without his knowledge if necessary.²⁷⁵ A woman came to Prophet Mohammed saying, "Abu Sufyan (her husband) is a miser. He does not give my children and me enough sustenance. Am I allowed to take from his money secretly?" The Prophet said to her, "You and your sons may take what is sufficient reasonably and fairly."²⁷⁶

Furthermore, according to Muslim scholars, if the wife requests to be separated from her husband because of his poverty or his refusal to pay alimony, the court can force him to divorce her, as Islamic law does not allow a woman to suffer hunger and need if her husband will not pay alimony. Therefore, Islam gives the woman the right to divorce him in such circumstances.²⁷⁷ Indeed, the right to maintenance does not depend on a woman's provision of home care as, in Islamic law, she is not required to carry out such work; instead, she has the right to maintenance as a wife. Furthermore, the husband must provide for his wife, even if she is wealthy. Al Fawzan argues that a wife has the right to alimony whether she is wealthy or poor and that the right to alimony is not dependent on the needs of the wife; rather, it is the obligation of the husband towards his wife.²⁷⁸ Indeed, the right to maintenance is guaranteed, even for women who decide not to work but stay at home and enjoy a comfortable life.

²⁷⁵ al-Qaradawi, *Women Position in Islamic Life* p.95

²⁷⁶ Albukhari, *SAHIH BUKHARI* No. 5359

²⁷⁷ al-Qaradawi, *Women Position in Islamic Life* p.100

²⁷⁸ Abdulaziz Fawzan, 'The expense of the wife in Islam' <<http://fiqh.islammessage.com/NewsDetails.aspx?id=4619>> accessed 20/3/2016

3.4.3.2 Good cohabitation

Good cohabitation with a wife means that the husband should treat his wife well in all aspects, in terms of both how he speaks to her and how he treats her.²⁷⁹ According to the Prophet Mohammed, “The most perfect in faith amongst believers is he who is best in manners and kindest to his wife.”²⁸⁰

In addition, according to the Qur’an: “And live with them in kindness. For if you dislike them – perhaps you dislike a thing and Allah makes therein much good.”²⁸¹

Bin Kather argues that good cohabitation means to speak in a kind way, act in a kind way, to look good for her, and to be as good to her as he would like her to be to him.²⁸² Al-Ghazali argues that good cohabitation means behaving with good morals towards one’s wife, not harming her, and being patient with her anger or with her recklessness.²⁸³ Moreover, Prophet Mohammed adds another meaning to good cohabitation as he prohibits offending one’s wife and scolds those who harm her, saying: “How could you treat them like animals in the day and then want to be intimate with them at night?”²⁸⁴

3.4.3.3 A woman’s right to separate

Although Islamic law permits divorce, it does not encourage it as divorce destroys the family, and so, in Islam, divorce is a permissible law that is hated by God. According to Prophet Mohammed, “Of all the lawful things, divorce is the most hated by Allah.”²⁸⁵

Consequently, if acrimony persists between the spouses and their problems do not respond to all possible solutions, divorce may be the only solution for them. According to the Qur’an, “Divorce is twice. Then, either keep [her] in an acceptable manner or release

²⁷⁹ Mohammad Hmid, *Islam’s mercy over women* (Dar Alhema 1995) p.50

²⁸⁰ Al-Tirmidhi, ‘Sunan al-Tirmidhi’(1986) No. 3895

²⁸¹ ‘The Holy Quran.’(4;19)

²⁸² Bin-Kather, ‘the Interpretation of “And live with them in kindness”

<<http://fatwa.islamweb.net/fatwa/index.php?page=showfatwa&Option=Fatwald&Id=136014>> accessed 3/3/2016

²⁸³ Abdul Rahman Al-Qmmash, *AL Hawi in the interpretation of the Quran* (2009) p.42

²⁸⁴ Saleh Al-Munajjid, ‘Marital relationship in Islam’

<<https://islamqa.info/ar/answers/158423/%D8%AF%D8%B1%D8%AC%D8%A9-%D8%AD>> accessed 22/11/2018

²⁸⁵ Imam Abu Dawud and Hasan Ahmad, *Sunan Abu Dawud* (Kitab Bhavan 1993) " No. 2177

[her] with good treatment.”²⁸⁶ Qaradawi argues that divorce in Islamic law is similar to a painful surgical procedure where a man or woman amputates part of his/her body in order to preserve the rest of it, and gets rid of the damage, which may be greater than the divorce itself.²⁸⁷ Accordingly, if the life of spouses becomes impossible and they cannot carry on their life together, Islamic law gives them both the right to take the decision to separate for a while and go their different ways. The next section discusses cases where separation is the decision of the women. After that, it discusses cases where separation is the decision of the men.

3.4.3.4 Separation between spouses as a decision of the wife

Riffat Hassan argues that one of the most significant rights granted by Islamic law to women is the right to dissolve a marriage as this right is not guaranteed to women in any other religion.²⁸⁸ According to the Qur’an: “And women shall have rights similar to the right against them, according to what is equitable.”²⁸⁹

In Islamic law, divorce occurs when the husband says the phrase “You are divorced” to his wife. Every time he says this phrase, he loses one of the permitted number of divorces, which is only three. On the other hand, if a wife is unhappy with her husband, whether by reason of his poor behaviour or because he does not fulfil her needs, or if the husband has financial or physical difficulties, Islamic law gives the woman the right to separate through two methods. Indeed, although Islamic law places many restrictions on a husband who would like divorce his wife, no such restrictions are set for the wife. (This is discussed later in the chapter in more detail.) The first method is *Khul’a*, which is where the wife initiates divorce proceedings on the condition that she returns her dowry to her husband. According to the Qur’an, “If it be that ye desire the life of this World, and its glitter, then

²⁸⁶ , ‘The Holy Quran.’(2:229)

²⁸⁷ al-Qaradawi, *Women Position in Islamic Life* p.100

²⁸⁸ Hassan, ‘Muslim women and post-patriarchal Islam’(1991)

²⁸⁹ , ‘The Holy Quran.’(2:228)

come! I will provide for your enjoyment and set you free in a handsome manner.”²⁹⁰ Prophet Mohammed stated that the wife of Thabit bin Qais bin Shammas came and said: “O Allah's Apostle! I do not blame Thabit for any defects in his character or his religion, but I am afraid that I (being a Muslim) may become unthankful for Allah's Blessings.” To that, Allah's Apostle said (to her), “Will you return his garden to him?” She said, “Yes.” So, she returned his garden to him and the Prophet told him to divorce her.”²⁹¹

According to the Hadith, the wife showed implicitly that she did not like her husband and was not blissful with him, by clarifying that she was afraid that her presence with him (*Thabit*) might lead her to be unthankful to God. Therefore, the wife asked the Prophet that she might be separated from her husband although there was no problem with his morals. In addition, the wife did not provide Prophet Mohammed with any other reason except that she hated him. The Prophet, however, accepted her request by asking her husband to divorce her. This meant that the wife could acquire a separation from her husband because she was not happy with him, even though she did not have a clear reason for such hatred. In fact, Barera's story is another case that confirms this principle in Islam. Barera was a wife who wished to leave her husband as she hated him for no other reason than she could not accept him as a husband. On the other hand, Mogheth (her husband) loved her and when he knew that she wanted to leave him, he was saddened and so asked Prophet Mohammed to reconcile them. So, the Prophet felt sorrow for him and, as a result, he went to Barera and asked her to return to her husband. She asked if he was ordering her to do so and he answered, “I am not ordering you, I am only interceding.” She said that she did not wish to return to him.²⁹² After that the Prophet commented on this case saying it was strange how much Mogheth loved Barera and how much Barera hated him.²⁹³ According to the Qur'an, “But if you fear that they will not keep [within] the limits of Allah, then there is no blame upon either of them concerning

²⁹⁰ , 'The Holy Quran.' (33:28)

²⁹¹ Albukhari, *SAHIH BUKHARI* No. 4867

²⁹² Amira Mashhour, 'Islamic law and gender equality: Could there be a common ground?: A study of divorce and polygamy in Sharia Law and contemporary legislation in Tunisia and Egypt' (2005)27 Human Rights Quarterly 562

²⁹³ Abu'Abd al Al-Nasa'i and Rahman Ahmad bin Syu'aib, 'Sunan al-Nasa'i' (1991) Riyadh: Maktab al-Tarbiyah al-'Arabi li-Duwal al-Khalij p.574

that by which she ransoms herself.”²⁹⁴

According to Al Tabari, the interpretation of this verse is that if any husband or wife cannot commit him/herself to the decrees of God, which are the duties of the husband and wife towards each other, such as good treatment and not harming each other, whether in word or deed and, as a result, if the wife cannot carry out her duties to her husband for any reason, she is allowed to separate herself from him.²⁹⁵ On the other hand, Islamic law forbids the husband to hurt his wife by refusing to carry out his duties towards her or by planning to get back his dowry by making her bored with him, thus leading her to divorce herself from him. The objective of such prohibition is that Shari’a law seeks to limit a husband’s manipulation, which could lead women to suffer the pain of divorce and the pain of financial hardship at the same time.²⁹⁶ According to the Qur’an:

“O you who have believed, it is not lawful for you to inherit women by compulsion. And do not make difficulties for them in order to take [back] part of what you gave them unless they commit a clear immorality. And live with them in kindness.”²⁹⁷

The second solution given to women by Shari’a law is to put a condition in the marriage contract that the wife may divorce if she wishes. In such cases, the husband should divorce her if she requests it, as a husband should not breach the marriage contract.²⁹⁸ The Qur’an states: “O you who have believed, fulfil [all] contracts.”²⁹⁹

The wife also has the right to request a divorce if the husband harms her as it is not permissible for a husband to harm his wife. If he harms her by beating her or stops supporting her financially, for example, she could ask the judge to divorce her, and then the judge must force the husband to divorce her.³⁰⁰ According to the Qur’an, “and do not

²⁹⁴ ‘The Holy Quran.’ (1;229)

²⁹⁵ Al-Tabari, ‘Interpretation of Al-Tabari’ (*Al-Islam.*, 2013) <<http://quran.al-islam.com/Page.aspx?pageid=221&BookID=13&Page=1>> accessed 4/2/2016

²⁹⁶ al-Qaradawi, *Women Position in Islamic Life* p.100,101

²⁹⁷ ‘The Holy Quran.’(4:19)

²⁹⁸ al-Qaradawi, *Women Position in Islamic Life* p.113

²⁹⁹ ‘The Holy Quran.’ (5:1).

³⁰⁰ al-Qaradawi, *Women Position in Islamic Life* p.113

keep them, intending harm, to transgress [against them]. And whoever does that has certainly wronged himself.”³⁰¹

In fact, Islamic law gives both husband and wife the right (although differently) to dissolve the marriage while it may appear that dissolving a marriage is easier for a man than for a woman. In this regard, however, it is interesting to note that, although Islamic law (as discussed before) places many conditions on the husband with regard to divorce which can only take place at certain times and under certain conditions, such restrictions are not placed upon a wife who wishes to separate from her husband.³⁰²

3.4.3.5 Separation between spouses as a decision of the husband

Islamic law encourages minimising divorce; in addition, it encourages couples to make divorce the last resort. For this reason, Islam inspires the husband who is considering divorcing his wife to be realistic as he should not expect perfection from her and should not only focus on her shortcomings; he should consider her attributes too. According to Prophet Mohammed, “If he dislikes one of her characteristics, he will be pleased with another.”³⁰³

Furthermore, Islamic law also encourages the husband, before he divorces his wife, to apply logic and reason. So, if he feels hatred towards his wife, he should not show such emotion.³⁰⁴ According to the Qur’an, “And live with them in kindness. For if you dislike them – perhaps you dislike a thing and Allah makes therein much good.”³⁰⁵

Moreover, Islamic law encourages the family to intervene, if problems between spouses are evident, by calling upon a reliable member of her family and his family. In short, a family council should be formulated to attempt to reform, reconcile and resolve the crisis

³⁰¹ , ‘The Holy Quran.’(2:226)

³⁰² Mashhour, ‘Islamic law and gender equality: Could there be a common ground?: A study of divorce and polygamy in Sharia Law and contemporary legislation in Tunisia and Egypt’(2005) p.576

³⁰³ Hajjaj, *Sahih Muslim* No.275

³⁰⁴ al-Qaradawi, *Women Position in Islamic Life* p.105

³⁰⁵ , ‘The Holy Quran.’(4:19)

between the couple.³⁰⁶ The Qur'an states: "And if you fear dissent between the two, send an arbitrator from his people and an arbitrator from her people. If they both desire reconciliation, Allah will cause it between them. Indeed, Allah is ever knowing and acquainted [with all things]."³⁰⁷

3.4.3 6 Cases where divorce occurs

Thus, if the previous solutions do not succeed in reconciling the spouses, the husband may insist on divorcing his wife. In Islamic law, divorce occurs upon the husband saying the phrase "You are divorced" to his wife. Every time he says this phrase, he loses one of the permitted number of divorces, which is only three. However, a husband does not have the right to divorce merely by word of mouth at any time and under any conditions as Islamic law places many limits and conditions before those words become effective. For example, a husband cannot divorce his wife at any time. For instance, it is not permissible for the husband to divorce his wife when she is menstruating. In addition, he should not divorce her during the clean period if he is having intercourse with her during this time.³⁰⁸ This is according to Abdullah bin 'Umar who, during the lifetime of Prophet Mohammed, divorced his wife while she was menstruating. Umar bin Al-Khattab asked Prophet Mohammed about this and the Prophet said, "Order him (your son) to take her back and keep her till she is clean and then to wait till she gets her next period and becomes clean again, whereupon, if he wishes to keep her, he can do so, and if he wishes to divorce her, he can divorce her before having sexual intercourse with her; and that is the prescribed period which Allah has fixed for the women to be divorced."³⁰⁹

Furthermore, divorce is not effective under any circumstances. For instance, a husband who wishes to divorce should be in a state of consciousness, be calm and capable of free

³⁰⁶ al-Qaradawi, *Women Position in Islamic Life* p.106

³⁰⁷ , 'The Holy Quran.' (4:35)

³⁰⁸ al-Qaradawi, *Women Position in Islamic Life* p.107

³⁰⁹ Albukhari, *SAHIH BUKHARI* No. 5333

choice. Subsequently, if the husband was unconscious or being forced to divorce, the divorce would not be valid. Also, if the husband was angry so that his anger caused him to pronounce the divorce when he did not fully intend to do so, the divorce would not be valid. Additionally, if the husband was drunk, the divorce would not be valid. According to Prophet Mohammed, “There is no divorce and no manumission in the event of *ighlaaq*.”³¹⁰ Most scholars believe *ighlaaq* represents the state of extreme anger or compulsion and therefore the husband who divorces should intend to divorce and be aware of his words and actions, otherwise the divorce will not take place.³¹¹ In fact, all these restrictions emphasise that the spirit of Islamic law seeks to minimise the number of divorce cases in Islamic society as it makes divorce subject to certain times and certain conditions.

Moreover, if a couple have not separated after the first and second divorces, this is considered in Islam as a retainable divorce. This means that the couple could return to each other and live together normally. However, if the husband divorces his wife three times, the divorce will be considered as a non-returnable divorce.³¹² Accordingly, Islamic law gives the spouses two chances to resolve the situation and to consider the result of the divorce. If these two chances do not work, the third divorce should be to end the marriage.³¹³

Indeed, although Islamic law has put in place many restrictions to reduce the number of divorces, in many Islamic states today, husbands misuse their right to divorce as many men divorce their wives without providing any justification. The spirit of Islamic law, however, attempts to minimise the number of divorces and protect wives from husbands’ misuse of divorce. In this era, there may be a need to put in place more restrictions with regard to the husband’s power of divorce. For instance, in Islamic law, divorce, as discussed before, should involve a rational decision. Therefore, it may be more

³¹⁰ Ibn Majah, ‘Sunan Ibn Majah’(2004) No. 2046

³¹¹ Mohammed Abdo, *Teaching Women Islamic Sharia - Marital Dissociations (Divorce - Abstentionism - Khul’ Divorce - Li’an (Cursing for Adultery) - Zihar (Injurious Assimilation of (Wife to Mother) - Custody (Dar al-Safa and al-Marwa for publication and distribution. 2007) p.81*

³¹² Amr Selim, *Fiqh of divorce from Quran and true sunnah* (Faith library for publication and distribution . 2012) p.47

³¹³ Selim, *Fiqh of divorce from Quran and true sunnah* p.48

appropriate for Islamic law today to make divorce effective only by going through the courts as the judge will make sure that a husband's decision to divorce is based on rational thinking.(See Chapter five for further discussion)

3.5 Controversial issues

There are some issues relating to family institutions in Islam that have been misinterpreted and these have led to misapplications. For example, in Saudi Arabia, the issue of polygamy has been misinterpreted and this has led some men to believe that they could be polygamous without any restrictions. (See Chapter Six for further discussion.) Also, there has been some misunderstanding with regard to the concept of a wife's obedience in Islam. In addition, there is misunderstanding of the concept of *Quamma*, as it gives a man, whether a husband, father or brother, the right to deny a woman many of her rights, whether this is her right to be educated, to work or to travel. (This is discussed in detail in Chapter Seven in the section on a wife's obedience in Islam.) The following sections discuss some controversial issues, which are sometimes misinterpreted in some Islamic countries such as Saudi Arabia.

3.5.1 Polygamy

A man in pre-Islamic society had the right to marry an unlimited number of women. As a first step in reforming this right, Islam determined that the maximum number of wives could be only four.³¹⁴ In fact, the issue of polygamy is a very controversial matter among Muslim jurists who have offered different interpretations; these are mentioned, in the following section. The following verse is the only verse in the Qur'an that mentions polygamy:

“And give to the orphans their properties and do not substitute the defective [of your own] for the good [of theirs]. And do not consume their properties into your own. Indeed, that is ever a great sin. And if you fear that you will not deal justly with the orphan girls, then marry those that please you of [other] women, two or three or four. But if you fear that you will not be just, then [marry only] one or those your

³¹⁴ Shah, *Women, the Koran and international human rights law: the experience of Pakistan* p.37

right hand possesses. That is more suitable that you may not incline [to injustice].”³¹⁵

If the verses are considered, it can be seen that they focus on orphans as the verses begin by ordering that the rights of orphans should be protected; they also prohibit taking their property unjustly. After that, the verses continue that, when there is a fear of not establishing justice among orphans, then it is permissible to marry two, three or four.³¹⁶ According to Aisha, the reason for the inclusion of this verse was that there was a man who was the guardian of an orphan woman. Then, he married her but did not treat her well as he refused to give to her her financial rights.³¹⁷ Therefore, the main object of the verses is to emphasise the right of orphans, not legalise polygamy.³¹⁸ In addition, it is clear from the verses that polygamy is permissible, not obligatory.³¹⁹ Furthermore, there is a significant condition, which should be met by a husband who would like to marry more than one woman: this is that the wives should be dealt with justly.³²⁰ Al Qardawi argues that “just dealing” means being fair in providing for the wives equally in terms of housing, alimony, food, drinks, and even clothes and gifts. Also, the husband should make sure that he treats them all equally well. For instance, it is not acceptable for a husband to live with one wife and forsake another.³²¹ The Qur’an states: “So do not incline completely [toward one] and leave another hanging.”³²² Moreover, it is not permissible for a man to marry another woman if he is not wealthy enough to establish houses for the other wife as he should guarantee that he could treat the wives fairly.³²³ The Qur’an notes: “But if you fear that you will not be just, then [marry only] one.”³²⁴

Many Islamic scholars believe that it is detestable for a man who is living a stable life with

³¹⁵ ‘The Holy Quran.’ (4:2,3)

³¹⁶ Asma Barlas, “*Believing Women in Islam: Unreading Patriarchal Interpretations of the Qur’an* (University of Texas Press 2002) p.191

³¹⁷ Albukhari, *SAHIH BUKHARI* No.4573

³¹⁸ Mohammed Munajjid, ‘the relationship between the orphans and polygamy.’ (*Islamqa*, 2010) <<https://islamqa.info/ar/147147>> accessed 10/8/2016

³¹⁹ al-Qaradawi, *Women Position in Islamic Life* p.118

³²⁰ Shaarawy, *Women in the Holy Quran* p.38

³²¹ Ibid p.45

³²² ‘The Holy Quran.’ (4:128)

³²³ islamweb.net, ‘The conditions of polygamy are the ability to alimony and doing justice between wives.’ (*Islam Web*, 2011) <<http://fatwa.islamweb.net/fatwa/index.php?page=showfatwa&Option=FatwaId&Id=162005>> accessed 2/8/2016

³²⁴ ‘The Holy Quran.’ (4:3)

his wife without serious problems to marry another woman since marrying another could lead him to commit a sin as he could not deal with them both fairly.³²⁵ Consequently, the following question may arise: for what reason is polygamy permissible? Al Qardawi believes that polygamy should be a protection of women's rights. For example, if a wife is seriously ill and is not able to fulfill her husband's needs, the best solution in this case might be to marry another woman and keep the sick wife so that she keeps her full rights as a wife rather than her husband divorcing her.³²⁶ In addition, polygamy could be a suitable solution if the first wife could not have children when her husband would like to have children of his own. Moreover, Al Qardawi argues that polygamy could be the best solution for the second wife if, for instance, the husband has sexual needs that cannot be satisfied by one wife. In such a case, it is better for society that a man marries another wife rather than having a concubine. Also, it is better for a woman and for her children to be a second wife having equal rights rather being a concubine who may find it very hard to obtain any rights for herself or for her children.³²⁷ On the other hand, it is perhaps better for men to be legally responsible for every relationship they enter into.³²⁸ Mustafa al Sibai states that polygamy is a system in which a man may increase his desire to a limited amount while it increases his responsibilities to an unlimited amount.³²⁹

Some Islamic interpreters believe that the verses regarding polygamy concern only certain cases, such as at times of war when men may be outnumbered by women, consequently leaving many widows and orphans. They consider that the verses regarding polygamy were revealed directly after the *Uhud* battle where 700 fighters died and many widows and orphans were left. Therefore, as a way of supporting these women and children physically and financially, the Qur'an allowed polygamy.³³⁰ In this regard, al Saharawi believes that polygamy should not exist unless women outnumber men in society as every

³²⁵ al-Qaradawi, *Women Position in Islamic Life* p.119

³²⁶ Ibid p.119

³²⁷ Ibid p.123

³²⁸ Ibid p.124

³²⁹ Sibai, *Woman between jurisprudence and law*. p.94

³³⁰ Zehra F Arat, 'Women's Rights in Islam: Revisiting Quranic Rights' (2000)69 *Human Rights: New Perspectives, New Realities*

woman has the right to have a husband, as was the case in *Uhud*.³³¹ Other Muslim scholars believe that the extract that permits polygamy is in fact intended to restrict indirectly the number of wives to four as, in pre-Islamic society, men were able to marry without limits.³³² In this regard, Engineer illustrates that “the Quranic spirit in permitting polygamy is very clear—to help widows and orphans, and not to satisfy men’s extra-sexual urges.”³³³

Indeed, it is clear that polygamy is not specifically a Qur’anic ideal. It is rather an exception to the ordinary case as the Qur’an offers an admonition to a man to marry only one woman: “But if you fear that you will not be just, then [marry only] one.”³³⁴ Moreover, the Qur’an emphasises that men cannot be just among their wives even if they are keen to be so. According to the Qur’an: “And you will never be able to be equal [in feeling] between wives, even if you should strive [to do so].”³³⁵ Some Islamic interpreters believe that if the verses are considered together, it should be clear that, firstly, if you cannot not apply justice among orphans, then it is permissible to marry up to four wives; secondly, if you cannot treat your wives equally, marry only one; thirdly, it is not possible to be completely just to all the wives. Consequently, the logical assumption is to marry only one.³³⁶ Other scholars reading the verses together suggest that they mean that a man should marry only one wife but see the verses taken together as a kind of strategy to limit gradually the number of wives. Therefore, as a first stage, the number of wives should be limited to four and then this is recommended to be one only as the second stage.³³⁷ In this regard, Amira Mashhour argues that the verse that permits polygamy also mentions women as slaves (“what your right hands possess”). However, even the most conservative Muslim jurists have reached a consensus that slavery is immoral and illegal, even though there is no clear

³³¹ Shaarawy, *Women in the Holy Quran* p.39

³³² Shah, *Women, the Koran and international human rights law: the experience of Pakistan* p.49

³³³ Asghar Ali Engineer, ‘The Right of Women in Islam, terj’ Farid Wajidi dan Cici Farkha Assegaf, (Jakarta: 2SPPA, 1994) p.157

³³⁴ , ‘The Holy Quran.’ (4:3)

³³⁵ Ibid (4:129)

³³⁶ Azizah Al-Hibri, *A study of Islamic herstory: Or how did we ever get into this mess?: To the memory of my mother, Yusra Midāni, who was an active, independent, and capable Muslim woman* (Elsevier 1982)

³³⁷ Shah, *Women, the Koran and international human rights law: the experience of Pakistan* p.49

verse which prohibits slavery.³³⁸ Indeed, this is because the Qur'an was working to eliminate slavery through "restricting its incidence and encouraging its termination."³³⁹ Applying the same logic to the case of polygamy by reading the two verses together, it could be concluded that, as slavery is currently illegal, Mashhour believes that polygamy should be illegal too.³⁴⁰

Arguably, it is not a justification for men to marry more than one woman by asserting that the Prophet Mohammed was polygamous during his lifetime. This is because the Qur'an states clearly that Prophet Mohammed and his wives were not like other men and women. For instance, the wives of Prophet Mohammed could not marry again after his death while he encouraged other women who were widows or divorcees to remarry.³⁴¹

To sum up, it seems that the Qur'an's intention is to make monogamy the norm while permitting polygamy in certain circumstances to protect women's right.

³³⁸ Mashhour, 'Islamic law and gender equality: Could there be a common ground?: A study of divorce and polygamy in Sharia Law and contemporary legislation in Tunisia and Egypt' (2005) p.569

³³⁹ An-Na'im, *Toward an Islamic reformation: Civil liberties, human rights, and international law* p.174

³⁴⁰ Mashhour, 'Islamic law and gender equality: Could there be a common ground?: A study of divorce and polygamy in Sharia Law and contemporary legislation in Tunisia and Egypt' (2005) p.569

³⁴¹ Ibid p.560

3.5.2 The concept of Al Quamma in Islam

“Men are in charge of women by [right of] what Allah has given one over the other and what they spend [for maintenance] from their wealth.”³⁴²

Indeed, the reason for the revelation in this verse is that women may argue about why a man is given a double share of any inheritance. Thus, the Qur’an offers a justification concerning the intention behind making men inherit more than women. Accordingly, Al Raze interprets this verse to mean that the Qur’an gives men the right to inherit a double portion of a legacy because they are in charge of maintaining women. In addition, men are expected to pay a dowry and spend their wealth on their wives and children.³⁴³

On the other hand, many Muslims interpret this verse to mean that the Qur’an makes men more privileged than women as the verse gives men the right to *Quamma*. For instance, one Saudi scholar believes that *Quamma* means that men are superior to women and, what is more, that they deserve to be because they have a stronger physical make-up and can control their emotions more. In addition, their mental abilities are better.³⁴⁴ However, some Saudi scholars interpret the concept of *Quamma* in such a way that they prevent women from taking positions leadership, arguing that women cannot be in positions, such as being a Minister or a judge, when men are superior to them.³⁴⁵ This is taking the verse out of its proper context as there is nothing in the Qur’an to suggest that men are better than women.³⁴⁶ In fact, the Qur’an says: “O mankind, fear your Lord, who created you from one soul and created from it its mate and dispersed from both of them many men and women.”³⁴⁷

³⁴² , ‘The Holy Quran.’ (4:34)

³⁴³ Fakhruddin Al-Razi, *Al tafsir Al kabir* (The House of Scientific books 2004)

³⁴⁴ Saleh Al-Munajjid, ‘Men’s authority over women: it’s concept and reasons’ <<https://islamqa.info/ar/269847>> accessed 3/5/2018

³⁴⁵ Ali Dagi, ‘The right of women to assume leadership positions.’ <<http://www.qaradaghi.com/chapterDetails.aspx?ID=624>> accessed 3/5/2018

³⁴⁶ Shaarawy, *Women in the Holy Quran* p.6

³⁴⁷ The Holy Quran (4:31)

In fact, this verse asserts the equality of men and women as it states that males and females are both created from one soul which means that they are equal in humanity and neither is more privileged than the other. Consequently, what is the meaning of *Quamma*? Al *Quamma* is an Arabic word meaning to protect something and its interests, as al Hibri argues when he states that *Quamma* in Arabic means the “protector” or the “maintainer”;³⁴⁸ it may even mean “guide”. Thus, *Quamma* is the responsibility of a husband towards his wife, requiring him to maintain her and protect her, not be a ruler over her.³⁴⁹ Mohammed Muqrin argues that *Quamma* is to honour a wife and this is the responsibility of the husband. The Qur’an obligates the husband to protect his wife, maintain her and provide things to delight her. So, if the husband does not spend on his wife or is not able to maintain her, she will have sufficient reason to separate from him.³⁵⁰

In fact, some Islamic interpreters believe that the responsibility for *Quamma* is given to men for two reasons: firstly, it is due to the inherent natural differences between the two sexes as men have greater strength than women. Nevertheless, this does not mean that women are weak. It means that men are physically more able to carry out heavy work. For example, women suffer certain weaknesses during periods such as pregnancy and menstruation.³⁵¹ Secondly, it is because men should carry out their financial duties towards women. In this regard, Al Wadud, al Hibiri and Riffat Hassan argue that the word *quawamun* means “breadwinners” or, in other words, “those who provide a means of support of livelihood”.³⁵² However, this does not mean that women cannot or should not provide for and maintain themselves. It simply means that women are not expected to be the breadwinners. Therefore, if these two reasons did not exist in the husband, *Quamma* would not exist.

Sayyid Qutb argues that, in order to balance society, the Qur’an gives a man, as a primary

³⁴⁸ Al-Hibri, *Islam, law and custom: Redefining Muslim women's rights* p.27

³⁴⁹ Mohammed Muqrin, 'Marital guardianship .. causes, conditions and its purpose.' <<http://www.saaaid.net/bahoth/68.htm>> accessed 25/7/2016

³⁵⁰ Ibid

³⁵¹ Shaarawy, *Women in the Holy Quran* p.67

³⁵² Hassan, 'Muslim women and post-patriarchal Islam'(1991) p.345

obligation, the duty to work and bring money to his wife and children, while women are given the right to raise their children comfortably. Conversely, giving this responsibility to men is not making them inherently superior to women nor suggesting that women are unable to work. Instead, the Qur'an intended not to accord women the burden of being the breadwinners.³⁵³ For example, according to another verse of the Qur'an, "the believers, men and women, are *"awliya"* of one another." *Awlyia* is an Arabic word meaning the protector or the guide, which is similar in meaning to the word *quammun*. Thus, if men are inherently superior to women, why would the Qur'an make women eligible to be *awliya* to men in this verse?³⁵⁴ This means that, in the *al Quamma* verse, the Qur'an intended to make bearing the financial burden the responsibility of men. In addition, the Qur'an emphasises that men are *qawwamun* in matters where God gave "some" of the men more than "some" of the women because men spend their wealth. This clearly means that men as a gender are not *qawwamun* over women as a gender.³⁵⁵

3.5.3 The concept of a wife's obedience in Islam

Al Quamma for a husband, as discussed above, is responsibility; this is offset by duties on the part of the wife at the same time. Tabari, cited in Shah, clarifies *al Quamma* as:

"Domestic relations between husband and wife legislating men's authority over their women ... The system is deemed equitable in that it sets out men's obligation to pay the dower for women, spend their wealth on them, and provide for them. Female obedience consists of marital fidelity, friendly behaviour towards the husband and his family."³⁵⁶

Many Muslims misuse the concept of obedience in Islam, which leads, in some cases, to

³⁵³ Sayyid Qutb, *Fi zilal al-Quran* (1986)

³⁵⁴ Shah, *Women, the Koran and international human rights law: the experience of Pakistan* p.65

³⁵⁵ Amina Wadud-Muhsin, *Quran and Women* (Charles Lurlzman, Liberal Islam: A source book, Oxford university press 1998) p.72

³⁵⁶ Shah, *Women, the Koran and international human rights law: the experience of Pakistan* p.63

wives being prevented from going out of the house, or being denied an education, or the right to work. In addition, some may be forced to care for the house, do the cooking and raise children; this is contrary to the concept of obedience in Islam.³⁵⁷ Mansour argues that such obedience is an anomaly, contrary to the respect that should be mutual between husband and wife, and contrary to the feelings and affection that must be fulfilled in the marital relationship.³⁵⁸

Hibri argues that the Prophet himself cut his meat, mended his clothes and did other household chores. In sum, the Prophet himself did not require obedience at home.³⁵⁹ Moreover, Islamic scholars such as Shafi'i, Hanbali and Maliki agree that it is not an obligation that the wife should serve her husband.³⁶⁰ Moreover, Al Qaradawi believes that a husband should not prevent his wife from doing ordinary things since Islam does not give the husband the right to ban things. For example, he should not prevent her from buying some things or visiting somebody unless he has a convincing reason. For example, he could prevent her from buying valuable things if he does not have enough money for them.³⁶¹ Additionally, a husband should not force his wife do things she does not want to do as this is contrary to the concept of affection and mercy that is mentioned in the Qur'an. The Qur'an says: "And of His signs is that He created for you from yourselves mates that you may find tranquillity in them; and He placed between you affection and mercy."³⁶² Furthermore, Al Qardawi believes that a husband should not force his wife to stay at home as staying at home is a kind of punishment in Islam for unmarried women who might become involved in adultery. In addition, it is not permissible for a husband to prevent his wife from getting an education as learning in Islam is the duty of every Muslim, whether male or female.³⁶³ The Qur'an states:

"So righteous women are devoutly *Qanetate*, guarding in [the husband's] absence

³⁵⁷ Mansour Obead, 'The satue of women in Islam' (2000) ASK ZAD p.53

³⁵⁸ Obead, 'The satue of women in Islam'(2000) p.54

³⁵⁹ Al-Hibri, *Islam, law and custom: Redefining Muslim women's rights* p.20

³⁶⁰ Salih Al-Munajjid, 'Does a woman have her husband's service?' (*islamqa*, 2016) <<https://islamqa.info/ar/119740>> accessed 12/8/2016

³⁶¹ al-Qaradawi, *Women Position in Islamic Life* p.95

³⁶² 'The Holy Quran.' (30:21)

³⁶³ al-Qaradawi, *Women Position in Islamic Life* p.142

what Allah would have them guard. But those [wives] from whom you fear arrogance “*Nushuz*”- [first] advise them.”³⁶⁴

In fact, the notion of a wife’s obedience comes from the interpretations of some Islamic scholars who believe that the word *Qanetate*, mentioned in the verses above, means being obedient and following the husband’s orders, while the word *Nushuz* means disobedience.³⁶⁵ However, this may not be the exact meaning of the verse. The word *Qanetate* is an Arabic word, translated as obedient. Nevertheless, Wadud argues that it is an error to translate it as obedience to the husband as this word is used for both male and females in several places in the Qur’an where it means a “characteristic or personality trait of believers toward Allah.”³⁶⁶ On the other hand, Sayid Qutub believes that the word *Qanetate* may be similar to “obedient” but that it does not have exactly the same meaning as following orders whether the subject is satisfied or not. *Qanetate* is actually the desire of the wife to follow her feelings towards her husband and to fulfil his needs. Therefore, the wife is following her emotions rather than following orders, which is the basis for the relationship between the spouses. Thus, the Qur’an did not use the word *Taiat* which has the exact same meaning as obedient. Instead, it uses *qunitat* which is more appropriate to the affection and warmth that should be present in a marital relationship.³⁶⁷

Indeed, the Qur’an does not place the husband in a position of privilege over the wife, nor does it give him the right to be a ruler or controller over her. Instead, it emphasises the wife treating the husband well, together with exhorting the husband to treat his wife well, “And live with them in kindness.”³⁶⁸

³⁶⁴ , ‘The Holy Quran.’ (4:34)

³⁶⁵ Wadud-Muhsin, *Quran and Women* p.74

³⁶⁶ Ibid p.74

³⁶⁷ Qutb, *Fi zilal al-Quran*

³⁶⁸ , ‘The Holy Quran.’(2:19)

3.5.4 The concept of *Nushuz* in Islam and its treatment

“But those [wives] from whom you fear arrogance “*Nushuz*”- [first] advise them; [then if they persist], forsake them in bed; and [finally], strike them. But if they obey you [once more], seek no means against them. Indeed, Allah is ever Exalted and Grand.”³⁶⁹

Some Islamic scholars believe that the word *Nushuz* means not following the husband's orders, which could give him the right to strike his wife.³⁷⁰ However, it seems that they have not interpreted the verse in its proper context. In fact, the word *Nushuz* is mentioned regarding husbands in other places where it is translated differently: “And if a woman fears from her husband contempt “*Nushuz*” or evasion, there is no sin upon them if they make terms of settlement between them - and settlement is best.”³⁷¹

Wadud argues that, because the word *Nushuz* is mentioned with regard to the husband as well, it cannot mean “disobedience to the husband”. Similarly, it does not make sense to define it as disobedience or not following orders on the part of the wife. The logical meaning of *Nushuz* when referring to both husband and wife in the Qur'an is the maltreatment of one of the spouses by the other, whether by word or deed.³⁷²

As the Islamic Shari'a attempts to avoid divorce, the Qur'an offers many ways in which a husband and wife can be reconciled. Therefore, if the wife offends her husband, the Qur'an offer three steps for the marital relationship to survive. The first step is verbal, where a husband must ask his wife wisely and kindly, for instance, not to destroy their marriage, reminding her that if they divorce their children will be affected. If the wife does not respond to the verbal argument, the husband should, as a second step, separate himself from the marital bed.³⁷³ Qutb argues that forsaking the marriage bed does not mean leaving the marital house nor leaving the marital room. However, it means that the

³⁶⁹ , 'The Holy Quran.' (4:34)

³⁷⁰ Wadud-Muhsin, *Quran and Women* p.75

³⁷¹ , 'The Holy Quran.'(2:128)

³⁷² Wadud-Muhsin, *Quran and Women* p.75,76

³⁷³ Barlas, " *Believing Women*" in *Islam: Unreading Patriarchal Interpretations of the Qur'an* p.188

husband turns his back on her and does not speak to her in the marital bed. This means that the dispute should not leave the bedroom so that children or strangers do not know about the dispute at this stage.³⁷⁴ In this regard, Wadud argues that “bed apart” is a cooling-off period, which could allow both the husband and wife to reconsider the problem separately.³⁷⁵

Finally, if the second step fails to reconcile the spouses, a “scourge” as a third step would be permitted. Indeed, a scourge in this verse is not intended to mean to strike the wife repeatedly or intensely.³⁷⁶ In addition, it is not intended to suggest physical abuse of the wife. It is merely a physical expression from the husband to his wife that the problem is getting serious.³⁷⁷ Ibn Abbas, one of the most significant interpreters of the Qur’an in Islamic history (he is called the scholar of the Islamic nation or the scholar of the Qur’an)³⁷⁸ argues that the husband should not exceed using the *Siwak*³⁷⁹ to beat his wife. This means that the beating should be painless. Based on Ibn Abbas’ interpretation, the consensus of Islamic scholars is that severe beating of wives is prohibited.³⁸⁰ Additionally, Islamic scholars also agree that a husband should follow the three steps and must not proceed to the third step immediately without first going through the first and second.³⁸¹ If the husband has made enough effort to follow sequentially the steps recommended in the Qur’an, it is likely the situation will be resolved before the final step is reached. Hence, even if the third step is reached, the “scourge” should not be delivered in a state of anger nor be accompanied by cursing because the Prophet forbade cursing wives in all cases. Furthermore, it should not end in any violence, harm or struggle between the spouses as this would be “un-Islamic”.³⁸²

³⁷⁴ Qutb, *Fi zilal al-Quran*

³⁷⁵ Wadud-Muhsin, *Quran and Women* p.75.76

³⁷⁶ Ibid p.76

³⁷⁷ Ibid p.76

³⁷⁸ Mansour Gadei, ‘The scholar of the Quran and the Islamic nation.’ (2014) <<http://www.tafsir.net/article/4630>> accessed 18/8/2016

³⁷⁹ A Siwak is a tool which is similar to a tooth brush which was used by Arabs to clean their teeth.

³⁸⁰ Mohammed Munajjid, ‘Wife-beating, types, its provisions, and its effects.’ (2016) <<https://islamqa.info/ar/150762>> accessed 8/9/2016

³⁸¹ Munajjid, ‘Wife-beating, types, its provisions, and its effects.’

³⁸² Wadud-Muhsin, *Quran and Women* p.75

Wadud argues that, in pre-Islamic Arab society, beating wives was one of the bad habits like the infanticide of daughters. Therefore, the verse was intended to limit the beating of wives rather than permitting it: "This not permission but severe restriction of existing practice."³⁸³ Wadud's argument may be right as, according to Aisha, the wife of the Prophet Mohammed, "Prophet Mohammed never struck a woman or a servant or an animal. He never beat anyone for any reason and he never hit anything unless he was defending himself in battle."³⁸⁴ The Qur'an itself says: "There has certainly been for you in the Messenger of Allah an excellent pattern for anyone whose hope is in Allah and the Last Day and [who] remembers Allah often." According to Bin Kather, the verse means that Muslims must make the Prophet a role model for them in their behaviour.³⁸⁵ So, because the Prophet never beat his wives, Muslim husbands should avoid it as well.

In fact, in the verse, the Qur'an uses the language of ordering to emphasise the significance of reconciling the spouses, not imposing disciplinary pressures against the wife unreasonably. Actually, the Qur'an always tends to suggest reconciliation between the spouses.³⁸⁶ For example, even if the abuse came from the husband, the Qur'an recommends reconciliation before any action is taken that could lead to divorce. The Qur'an says: "And if a woman fears from her husband contempt, *Nushuz* or evasion, there is no sin upon them if they make terms of settlement between them - and settlement is best."³⁸⁷

To sum up, the aim of the Qur'an is to seek to build strong families and pleasant marital relationships and, for this reason, it seeks to find resolutions between the parties before they divorce. Since beating was present in pre-Islamic Arabia, the Qur'an placed many restrictions and conditions upon it and, as a result, if a husband follows the Qur'an's instructions carefully, he will not beat his wife.

³⁸³ Wadud-Muhsin, *Quran and Women* p.76

³⁸⁴ Hajjaj, *Sahih Muslim* No.2328

³⁸⁵ Ismail Ibn Kathir, *Tafsir Ibn Kathir*. (Dar Taibah 2002)

³⁸⁶ Wadud-Muhsin, *Quran and Women* p.74

³⁸⁷ , 'The Holy Quran.' (4:128)

3.6 Conclusion

In a society where little girls were killed and where women were inherited, Islam appeared with a completely different concept for women. Islam values women and gives them rights. In fact, Islam guarantees rights for women in all aspects, making them participate hand in hand with men and without discrimination in all spheres of life. However, customs and traditions were and still are the greatest obstacle in the way of women achieving their ambitions and obtaining the rights that are guaranteed to them by Islamic law. Customs and traditions have negatively influenced interpretations of the Qur'an and the Sunnah, which have led to these texts being interpreted in ways that are not commensurate with the current requirements of the times, especially with regard to women's rights. To obtain women's rights, the Qur'an and the Sunnah must be re-interpreted in the proper context by using *Ijtihad*.

Chapter 4: Women's individual rights in Islam

4.1 Introduction

Just as Islamic law guarantees women their social rights, it also guarantees their rights as individuals. Islam gave women rights similar to those of men in terms of education, work, holding leadership positions, financial matters, and involving themselves in physical activities. However, some controversial issues have been misinterpreted and this has obstructed women's rights: for example, issues surrounding inheritance. Some scholars believe that the reason women are given half the share of men is because men are better than women. Moreover, the notion of women's testimony has also been misinterpreted, for instance, as some scholars believe that a woman's testimony has less value than that of a man in some circumstances, owing to her poorer understanding or her lack of reasoning.

This chapter discusses how Islamic law gives women equal rights with men as individuals, whether in education, work, or in economic and political spheres. The chapter also discusses some professions in the Muslim world, such as leaders or judges, for instance, which women find it difficult or even impossible to achieve. Moreover, the chapter discusses some of the controversial issues mentioned above, such as the testimony of men and women, and rights to inheritance, as some countries have wrongly applied Islamic principles. For instance, in Saudi Arabia, women do not have fully equal rights with men in education, neither do they have the right to take up certain positions of leadership. (This is discussed later in Chapter Six.) The overall aim of this chapter is to illustrate that, although Islamic law grants women equal rights with men in all spheres of life, certain interpretations of Islamic texts give rise to gender discrimination.

4.2 Women's right to education

Women in pre-Islamic Arab society did have some educational opportunities as there were some women writers and poets. However, Islam expanded opportunities for women in education which led women to compete with men in education at the beginning of the Islamic era. The following section shows how Islamic law stresses the importance of education. In addition, it gives both men and women equal rights to be educated.

Education has a central position in the Islamic religion and therefore the Qur'an and the Sunnah stress the importance of education on several occasions. For example, as the Prophet Mohammed was illiterate, the first word of the Qur'an revealed to him was "read" to emphasise the significance of learning. In addition, the Qur'an stresses the importance of knowledge: ³⁸⁸"God elevates by several degrees the ranks of those of you who believe and those who have knowledge."³⁸⁹ Al Munjed argues that this verse means that God promises to give educated people senior status whether in life or in the afterlife.³⁹⁰ Moreover, the Qur'an questions rhetorically thus in one passage: "Say, are those two equal: those who know and those who do not know?" ³⁹¹

The Qur'an states: "Those who conceal from people the clear Signs which we revealed and the Guidance, after we have made it clear to people in the Book [the Qur'an], shall be cursed by God and others who are entitled to curse."³⁹² Relating to this verse, many Islamic scholars have stressed the importance of education in Islam. Shafie, for example, believes that that if the population of a Muslim state agreed to abandon education, it would be an obligation of the ruler to force them to embrace it.³⁹³ Al Qibisi (cited in al Hibiri) argues that, if parents cannot not educate their children due to financial reasons, it

³⁸⁸ Ragheb El-Sergany, 'The importance of education in Islam.' <www.islamstory.com> accessed 12/9/2016

³⁸⁹ , 'The Holy Quran.' (58:11)

³⁹⁰ Mohammed Munajjid, 'Education in Islam ' (*Islamqa*, 2001) <<https://islamqa.info/ar/10471>> accessed 5/10/2016

³⁹¹ , 'The Holy Quran.' (39:9)

³⁹² Ibid (2:159)

³⁹³ El-Sergany, 'The importance of education in Islam.'

is the duty of the community to educate them.³⁹⁴ Muslim scholars have disagreed concerning the scope of the knowledge that Muslims should have. Some scholars limit the scope of knowledge to Religious Science which existed in the era of the Prophet and his companions, while the majority of Islamic scholars believe that point of view is not acceptable. For example, Abu Hanifah believes that Muslims should extend the scope of their education to distinguish between right and wrong.³⁹⁵ In addition, he believes that knowledge should not be limited to the era of the companions as they lived in a different time and society. Ibn Tamiya stresses the importance of openness and obtaining knowledge to serve the interests of Islamic society. He believes that education should include all fields, such as medicine, engineering and mathematics.³⁹⁶

Indeed, Islam always urges education for both genders as both Qur'anic verses and the statements of Prophet Mohammed never distinguished between men and women. Unfortunately, with regard to the current situation of many Muslims in the world, some believe that the right to education is an inalienable right for men only while the main function of women is to stay at home and raise children. In addition, some customs and traditions put pressure on women to leave their education to get married. However, this point of view is contrary to Islamic law.³⁹⁷

According to Prophet Mohammed, "pursuit of knowledge is the duty of every Muslim."³⁹⁸ Based on this statement of the Prophet and the Qur'anic verses quoted above, Islamic scholars agree that education is not an option or a luxury for Muslims. On the contrary, it is an obligation for every Muslim, whether male or female.³⁹⁹ In this regard, al Munjedd argues that parents must take care of the education of their children, whether boys or girls, up to university degree level because, in Islam, a father must teach his children a profession to help them earn their living when they grow up. Moreover, this profession must be appropriate for their social and financial standing. Therefore, in this era, the

³⁹⁴ Al-Hibri, *Islam, law and custom: Redefining Muslim women's rights* p.37

³⁹⁵ Ibid p.37

³⁹⁶ Ibid p.37

³⁹⁷ Salous, *Women Educational Rights in Islam From Quran and Sunnah* p.76

³⁹⁸ Ibn Majah, 'Sunan Ibn Majah' (2004) No.629

³⁹⁹ al-Qaradawi, *Women Position in Islamic Life* p.143

father must support his children to reach their Bachelor degree as any decent employment at this time requires at least a Bachelor's degree.⁴⁰⁰

According to the Qur'an, "The believing men and believing women are allies of one another. They enjoin what is right and forbid what is wrong."⁴⁰¹ Based on this verse, al Qardawi argues that the Qur'an gives women, along with men, one of the greatest responsibilities of the Islamic religion, which is to enjoin what is right and forbid what is wrong.⁴⁰² This responsibility in Islam should be carried on by educated people only which means that the Qur'an encourages both men and women to be educated and support each other in enjoining what is right and forbidding what is wrong.⁴⁰³ In fact, Islamic history has proved that, in many positions, women were equal to men in knowledge. For instance, as a dowry is a condition of marriage in Islam, Omar bin Al Khattab, the lord of the Muslims, tried to put an upper limit for dowries to make the marriage of young men easier. In other words, Omar bin Al Khattab was trying to end a woman's right to determine the size of her own dowry. Therefore, a woman stood saying: "How can you take what God has given us?" and to support her argument she used an appropriate verse from the Qur'an.⁴⁰⁴ Omar realised his mistake and replied, "The woman is right and Omar is wrong." In commenting on this story, al Hibiri argued that:

"This story is remarkable not only because it is an illustration of the participation of women in the religious activity of interpretation (*Ijtihad*), but also because it reveals the degree of democracy in the early days of the Islamic state. The woman was unknown, but through her Qur'anic knowledge, she successfully made the Khalifah withdraw his proposal."⁴⁰⁵

Indeed, although Islamic law does not place any particular limitation on women's education, Islamic scholars disagree about the scope of knowledge that women should

⁴⁰⁰ Mohammed Munajjid, 'Father must take care to teach his daughter until the university.' (*Islamqa*, 2012) <<https://islamqa.info/ar/187478>> accessed 3/9/2016

⁴⁰¹ , 'The Holy Quran.'(9:71)

⁴⁰² al-Qaradawi, *Women Position in Islamic Life* p.142

⁴⁰³ Ibid p.143

⁴⁰⁴ Al-Hibri, *Islam, law and custom: Redefining Muslim women's rights* p.40

⁴⁰⁵ Ibid p.40

acquire. For example, al-Qabisi argues that education is generally beneficial for women; however, women should only learn what is suitable for them.⁴⁰⁶ Conversely, other scholars argue that women have the right to be educated as long as they are not involved in co-education. For instance, some scholars prohibit women from being educated in non-Islamic states as they may study with men. Others do not prohibit co-education absolutely as, in some cases, co-education is the only option for women. Therefore, it is better for them to be educated while ensuring they wear a veil.⁴⁰⁷ Al Hibri asserts that these arguments spring from cultural values, not religious ones, and therefore, if the debate among the Islamic scholars is examined, it can be seen that it is not a debate about the appropriateness of education for women but a “cultural debate on the status and role of women (their circumstances and function) in society.”⁴⁰⁸ Al Hibri may be right as Islamic law does not mention any limitation of the scope of knowledge for women. In addition, there is nothing in Islamic law to prohibit co-education as the Prophet Mohammed himself set a day to teach women which could be said to be a kind of co-education.⁴⁰⁹

The Islamic community supports women’s education and also provides them with facilities. For example, the Prophet Mohammed himself set a day to give women religious lessons and commandments⁴¹⁰. In addition, there were many Islamic female scholars and figures during the era of the Prophet Mohammed. For instance, Al Shifaa bent Abdulla was a physician and, moreover, she taught Hfsah, the wife of Prophet Mohammed, to read and write.⁴¹¹ Aminah bint Quies, Om Senan, Kaaabh Assaad, Om Salim and Om Atyah were all physicians; Al Shiffa specialised in dermatology and Om Atyah specialised in surgery.⁴¹² Moreover, women at that time also worked in the field of nursing. For example, Rufaida Al-aslamia worked as a nurse in a tent erected during the Al-Khundaq battle. In addition, women in Islam have succeeded in the field of literature and poetry. For instance, Qtaylah bint Al Harith was popular for her mastery of lamentation poems while Khansa was one of

⁴⁰⁶ Al-Hibri, *Islam, law and custom: Redefining Muslim women's rights* p.37

⁴⁰⁷ Abdul-Aziz Binbaz, 'co-edcation in Islam ' <<http://www.binbaz.org.sa/article/86>> accessed 22/9/2016

⁴⁰⁸ Al-Hibri, *Islam, law and custom: Redefining Muslim women's rights* p.42

⁴⁰⁹ Salous, *Women Educational Rights in Islam From Quran and Sunnah* p.80

⁴¹⁰ Albukhari, *SAHIH BUKHARI* No.101

⁴¹¹ Salous, *Women Educational Rights in Islam From Quran and Sunnah* p. 83

⁴¹² Ibid p.83

the greatest poets in the Islamic era. The Prophet Mohammed admired her poems and asked her to deliver some of them.⁴¹³

In the early days of Islam, women played an important role in the religious sciences. For example, Aisha, the wife of the Prophet Mohammed, was a scholar in religion and, after the death of the Prophet, she becomes one of the most important sources of Sunnah; she also took part in many political activities.⁴¹⁴ Moreover, Karima Mrouzia was one the most important narrators of the Hadith that were collected by Al Bukhari. Hafiz ibn Hajar argues that there were 1552 feminist Islamic scholars who narrated Hadith which were used by the greatest Islamic scholars for the elicitation of Shari'a legislation. It is interesting to note that the grand-daughters of the Prophet Mohammed, Nafisa and Sukinah, were both Islamic scholars. Nafisa was also one of the Hadith narrators (Al Shafi learned some Hadith from her) while Sukinah was a scholar of literature.⁴¹⁵ Many of these women lived and learned in the era of the Prophet Mohammed and he never objected to the scope of their knowledge; also, he did not mention the need for gender separation in their regard.

In sum, Islam has imposed a duty on Muslims, whether men or women, to extend their knowledge and be educated. However, some cultures have restricted a woman's right to be educated while other cultures have contributed to denying women's right to education.

4.3 Women's right to participate in physical activities

Studies have shown that sport is important to the balance of life. In addition, it is vital to have a healthy and strong body. Moreover, physical activity has a significant role in improving the mental health of individuals. Islam as a way of life strongly encourages both men and women to lead healthy lives, mentally, physically and spiritually.

According to Prophet Mohammed: "Your own self has a right on you, your lord has a right

⁴¹³ Salous, *Women Educational Rights in Islam From Quran and Sunnah* p.79

⁴¹⁴ Al-Hibri, *Islam, law and custom: Redefining Muslim women's rights* p.20

⁴¹⁵ Salous, *Women Educational Rights in Islam From Quran and Sunnah* p.84

on you, and your family has a right on you; so you should give the rights of all those who have rights on you.”⁴¹⁶ In this statement of the Prophet “your own self” means that every person, whether male or female, is responsible for taking care of all his/her personal needs to live a healthy, balanced life.⁴¹⁷ In addition, Prophet Mohammed stressed that one of a child’s rights from their parents is to be taught writing, swimming and archery while the Lord of the Islamic State, Omar bin al Khattab, stated: teach your children swimming, archery and horse riding.⁴¹⁸

Islamic law did not exclude women from physical activity as the Prophet himself encouraged physical activity for women.⁴¹⁹ For example, when the Prophet Mohammed was newly married to Aisha they raced together and she won. After a several years, Aisha gained some weight and, when they raced again, the Prophet Mohammed won. This time he said to her jokingly: “Now we are equal.”⁴²⁰

In addition, the Prophet was willing to participate with Nusaiba bin Kap in many battles. Nusaiba was one of the Islamic heroines as she was powerful in her fighting and her strength frightened the warriors. Commenting on her performance in the Uhud battle, the Prophet Mohammed said, “Wherever I looked I saw her fighting before me.”⁴²¹

In fact, culture may be an obstacle to women participating in physical activities. For example, some Islamic scholars prohibit physical activities for females.⁴²² For instance, Abdul Karim Al-Khudair believes that sports might negatively affect girls' modesty⁴²³ and, to strengthen his argument, Al-Kudair uses a verse of the Qur’an that states: “O you who have believed, do not follow the footsteps of Satan. And whoever follows the footsteps of Satan-Indeed, he enjoins immorality and wrongdoing.”⁴²⁴ In addition, he believes that only men are required to strengthen their bodies while women must work to raise their

⁴¹⁶ Albukhari, *SAHIH BUKHARI* No. 452

⁴¹⁷ Bader Hmash, ‘Islam and sportsmanship’ <<http://www.saaaid.net/Doat/hamesabadr/19.htm>> accessed 22/9/2016

⁴¹⁸ Ibid

⁴¹⁹ Mohammad Younis Khan and others, ‘Female Students Opinion about Women's Participation in Sports’ (2012)2 International Journal of Academic Research in Business and Social Sciences 275 p.277

⁴²⁰ Ibid p.277

⁴²¹ Tansin Benn, Gertrud Pfister and Haifaa Jawad, *Muslim women and sport* (Routledge 2010) p.32

⁴²² Benn, Pfister and Jawad, *Muslim women and sport* p.32

⁴²³ Mohammed Munajjid, ‘Sport Conditions for women ’ <<https://islamqa.info/ar/115676>> accessed 23/9/2016

⁴²⁴ , ‘The Holy Quran.’ (24:21)

children.⁴²⁵ In fact, Al Kudair's prohibition of female sports is based on culture, not on Islam, as there is nothing on the Qur'an or Sunnah that forbids women participating in sport. On the other hand, there are many statements in the Qur'an and Sunnah which encourage it.⁴²⁶ Moreover, the verse that he used to strengthen his argument is not relevant to female sport while it is obvious, however, that his cultural background may affect his interpretation of the Qur'anic verse.

On the other hand, other Islamic scholars, such as Mohammed Alarifi, argue that there is no doubt that sport is desirable in Islam, whether for men or women. Nevertheless, Islamic law has made regulations for everything as there are regulations for eating and drinking, regulations for speaking, and even regulations for worship. For example, it is not right for a Muslim to spend his life in prayer and to neglect his family and his work. In addition, it is not right for a Muslim to donate all his money to charity and forget his family. Consequently, Alarifi argues that Islam encourages sport, whether for a man or a woman. However, it must have regulations. For instance, women should ensure modesty and should not mix with men during exercise. Therefore, it is best for females to play sports in places especially for women.⁴²⁷

Indeed, the issues of modesty and gender segregation are a challenge for Muslim women participating in public activities or in competitions such as the Olympiad. While it should not be, culture plays a significant role in these issues. For example, modesty is not only required for women, it is required for both men and women. The Qur'an states, regarding men⁴²⁸: "Say to the believing men that they should lower their gaze and guard their modesty: that will make for greater purity for them: and God is well acquainted with all that they do."⁴²⁹ For women, it states: "And say to the believing women that they should lower their gaze and guard their modesty; that they should not display their beauty and ornaments except what (must ordinarily) appear thereof; that they should draw their veils over their bosoms and not display their beauty except to their husbands, their fathers,

⁴²⁵ Munajjid, 'Sport Conditions for women '

⁴²⁶ Khan and others, 'Female Students Opinion about Women's Participation in Sports'(2012) p.277

⁴²⁷ Mohammed Alarifi, *Women's participation in the Olympics* (3refe.com 2011)

⁴²⁸ Benn, Pfister and Jawad, *Muslim women and sport* p.33

⁴²⁹ , 'The Holy Quran.'(24:30)

their husband's fathers, their sons...”⁴³⁰

Although the Qur'an mentions modesty for both men and women, Islamic scholars mostly mention only women. It is very rare to find an Islamic scholar who prohibits men from participating in the Olympiad when they too should make sure of their modesty while, in contrast, they prevent women. This underlines the extent to which masculine culture affects Islamic scholars' interpretation of the Qur'anic verses.⁴³¹

Gender segregation is the other issue, which is always mentioned by Islamic scholars to prevent women from participating in the Olympiad.⁴³² As a matter of fact, there is nothing in the Qur'an or in the Sunnah that explicitly requires strict segregation between the two sexes.⁴³³ In addition, if Muslim women should avoid being in a mixed-sex space, how could the Prophet Mohammed himself allow Nusaiba bin Kap to take part in battles with men and fight alongside or against them? Haifaa Jawad argues that the combination of conservative interpretations of Islamic statements and culture continues to restrict women or even prevent them from participating in many spheres of life, including physical activities.⁴³⁴

In spite of the significance of physical activity to people's health, many Islamic societies ignore it, especially for women, as they classify it as a non-serious or luxury activity. For instance, in Saudi Arabia, some scholars have strongly rejected women participating in physical activities. (This is discussed in detail in Chapter Seven.)

Conversely, sport should be taken more seriously in the Islamic states, whether for men or women, as it helps to maintain their health, as well as meeting their religious responsibilities toward themselves: “your own self has a right on you.”⁴³⁵

Indeed, there are some inspirational examples in Islam which encourage females, as well

⁴³⁰ 'The Holy Quran.'(24:31)

⁴³¹ Khan and others, 'Female Students Opinion about Women's Participation in Sports'(2012) p.277

⁴³² Benn, Pfister and Jawad, *Muslim women and sport* p.35

⁴³³ Ibid p.32

⁴³⁴ Benn, Pfister and Jawad, *Muslim women and sport* p.33

⁴³⁵ Albukhari, *SAHIH BUKHARI* No.451

as males, to participate in physical activities. For instance, unlike other Gulf states, Bahrain supports women in this regard, encouraging them to participate in sporting activities and today, Bahraini women have an impressive record in the Arab states of achievements in athletics, archery, bowling, volleyball, sports for the disabled and martial games, along with a series of achievements by women's teams in both individual or collective sports. In addition, at the level of sporting achievements, Bahrain is beholden to a woman for the greatest achievement in Bahraini sport after runner Mariem Jamal achieved second place and the silver medal in the 1500 metres at the 2012 London Olympics, thus winning the first Olympic medal in the history of the Kingdom of Bahrain.⁴³⁶ In Jordan, where the Jordanian government actively supports sport for women, they enjoy an exceptional position in terms of participating in sporting activities. As a result, in Jordan, there are special teams so that women can play football, for example. In addition, Jordan was the first Arab state to participate in the Olympics in 1980.⁴³⁷

4.4 Women's economic rights in Islam

In Islamic law, women have equal rights to men in financial transactions. They have the right to sell, buy or donate as, according to the Qur'an, "For men is a share of what they have earned, and for women is a share of what they have earned."⁴³⁸ Based on this, all the money that a woman gains, whether from work, inheritance or trade, is owned by her, whether she is a mother, sister or wife, just as it is the duty of a man to support her financially whether he is the father, husband, son or brother. On the other hand, this does not mean that's a woman's identity disappears on her marriage as she retains her name and surname, as well as her legal capacity. As a result, according to Islamic law, women do not lose their eligibility to enter into contracts, administrate property, and buy or sell, which makes them financially independent of their husbands. As a husband is not

⁴³⁶ Mohammad Toq, 'Bahraini women, the first in Gulf in team of sporting activities.' <<http://www.alwasatnews.com/news/1136782.html>> accessed 17/2/2017

⁴³⁷ Mona Hamor, 'The achievements of Jordanian women.' <<http://www.alghad.com/articles/924813>> accessed 22/2/2017

⁴³⁸ , 'The Holy Quran.'(4:32)

entitled to merge a wife's wealth with his own money, he does not have the right to administer his wife's wealth. Moreover, a woman has the right to dispose of her own property without permission from her husband. On the other hand, the burden of providing for the woman and the children remains the husband's obligation,⁴³⁹ even if she is wealthy enough to maintain herself. In fact, this may justify why men are accorded twice the share of women. (This is discussed in more detail later in this chapter).

⁴³⁹ al-Qaradawi, *Women Position in Islamic Life* p.90

4.5 Women's right to work in Islam

4.5.1 Women's right to work in public and social life

Women's work is one of the most controversial issues among Islamic scholars with scholars maintaining different views on the importance of women's work. Some scholars argue that women's work is as important as men's, while others believe that the priority for women should be to stay at home and raise their children. Moreover, while some Islamic scholars believe that women should work in any field, others believe that women should work only in selected areas.⁴⁴⁰

The Qur'an says: "And abide in your houses and do not display yourselves as [was] the display of the former times of ignorance."⁴⁴¹ Based on this verse, Sharawi and other Islamic scholars argue that women should not work unless they need to, such as if they have financial problems, for example. In addition, Sharawi believes that women should give priority to their husbands and children.⁴⁴²

On the other hand, Mohammad Al-Awa argues that this verse is a part of a speech to the Prophet's wives.⁴⁴³ The beginning of the speech starts with: "O wives of the Prophet, whoever of you should commit a clear immorality - for her the punishment would be doubled two-fold, and ever is that, for Allah, easy."⁴⁴⁴ According to the verses, it is clear that the wives of the Prophet were treated differently as, for example, God doubled their punishment for an immoral action. Consequently, it is not correct that this verse "And abide in your houses" prevents women from going out or to work since this verse is part of a speech concerning only the Prophet's wives; it does not include all Muslim women. Mohammad Al-Awa believes that the "staying at home" argument is based on culture

⁴⁴⁰ Ibrahim Hashem, *Muslim Women in Charge of Public Jobs between Opposings and Supportings* (Wahba Library 2007) p.212

⁴⁴¹ , 'The Holy Quran.' (33:33)

⁴⁴² Shaarawy, *Women in the Holy Quran* p.118

⁴⁴³ Mohammed Al-Awa, *Women and public work from an Islamic perspective* (The Egyptian Center for Women's Rights 2001) p.44

⁴⁴⁴ , 'The Holy Quran.' (33:30)

which gives women the role of staying at home and raising children when the Qur'an and Sunnah do not mention this.⁴⁴⁵

Ibn Jibreen believes that it is not permissible for a woman to take a job that requires her to deal or mix with men. Therefore, women must take jobs that are commensurate with their nature. For example, they could be doctors for women or could teach girls.⁴⁴⁶ On the other hand, Emarah believes that women should take part in and work in all spheres of life since the Qur'an states: "The believing men and believing women are allies of one another. They enjoin what is right and forbid what is wrong and establish prayer and give zakah and obey Allah and His Messenger."⁴⁴⁷ Moreover, Emarah argues that, from the perspective of Islam, promoting good and forbidding evil is a primary Islamic obligation for both men and women, requiring them to participate in all spheres of life whether these are social, moral, economic or political.⁴⁴⁸

In the early days of Islam, women worked in all spheres of life: in trade, for example. The Qur'an states: "Allah has permitted trade and has forbidden interest."⁴⁴⁹ Mohammad Al Monjed asserts that this verse indicates that it is permissible for both men and women to work in trade⁴⁵⁰ and there are many examples of women who worked in trade in early Muslim society. Khadija, the Prophet's wife, was a businesswoman and the Prophet never objected to her work.⁴⁵¹ According to Qilla Alanamarah, (cited in Mohammed Al-Awa) a woman came to the Prophet Mohammed to ask him about the legality of a certain trick she was employing in her buying and selling; she was told by the Prophet not to do this. The Prophet did not ask her if she was mixing with men as part of her work or if she needed that work; he simply said she was not to employ that trick.⁴⁵² Abu Shiq'a (cited in

⁴⁴⁵ Al-Awa, *Women and public work from an Islamic perspective* p.45

⁴⁴⁶ Abdullah Ibn Jibreen., *Legitimacy of mixing at work*. (Ftawa Ibn Jibreen 2008)

⁴⁴⁷ 'The Holy Quran.'(9:71)

⁴⁴⁸ Mohamed Emarah, *the Islamic liberation for women* (The renaissance of Egypt for printing and publishing. 2003) p,16

⁴⁴⁹ 'The Holy Quran.'(2:275)

⁴⁵⁰ Mohammed Munajjid, 'The work of Muslim women in the trade.' <<https://islamqa.info/ar/72861>> accessed 22/9/2016

⁴⁵¹ Howaida al-Fayez, 'Hazrat Khadija work' <<http://www.almoslim.net/node/138529>> accessed 2/10/2016

⁴⁵² Hashem, *Muslim Women in Charge of Public Jobs between Opposings and Supportings* p.225

Mohammed Al-Awa) argues that there are over three hundred statements from the Qur'an or the Sunnah which confirm the necessity of participating in social life.⁴⁵³

4.5.2 Women's participation in political activities

Just as women participated in trade from the early days of Islam, they also participated in political activities. For example, women joined the Prophet Mohammed on his migration and, in addition, Asmaa Bint-Abu Bakr played a pivotal political role in the planning and implementation of this migration.⁴⁵⁴ The migration was from Mecca to Medina and it had a great impact on Islamic history and the establishment of the Islamic state. Furthermore, both men and women participated in pledging themselves to the Prophet Mohammed.⁴⁵⁵ The Qur'an says: "O Prophet, when the believing women come to you pledging to you that they will not associate anything with Allah, nor will they steal, nor will they commit unlawful sexual intercourse, nor will they kill their children, nor will they bring forth a slander they have invented between their arms and legs, nor will they disobey you in what is right - then accept their pledge and ask forgiveness for them of Allah."⁴⁵⁶

Mohammad Emarah argues that women's participation in the pledge was very significant as it was like being part of a General Assembly for the establishment of the Islamic state.⁴⁵⁷ Salim Al-Awa asserts that women pledging themselves to the Prophet Mohammed was a religious and political activity as it was required for them to accept the Prophet as their leader. In addition, he argues, based on this verse, that women in Islam should have equal rights with men to vote in elections. In this regard, Al-Awa criticised Kuwait for not allowing women to vote in municipal councils, describing it as "un-Islamic". Moreover, in the era of the Prophet, women were involved in political consultation. For

⁴⁵³ Al-Awa, *Women and public work from an Islamic perspective* p.29

⁴⁵⁴ Emara, *the Islamic liberation for women* p.20

⁴⁵⁵ Ibid p.21

⁴⁵⁶ 'The Holy Quran.'(60:12)

⁴⁵⁷ Emara, *the Islamic liberation for women* p.22

example, the Prophet consulted his wife, Umm Salamah, concerning an issue on the Hudaibiah Treaty; furthermore, he followed her advice.⁴⁵⁸ Moreover, women in Islam were involved in one of the most challenging and dangerous activities as they participated in battles. For instance, ten women participated alongside men in the Khyber battle; they also fought with men in the Hanen battle. In addition, Aisha, the wife of Prophet Mohammed, was involved in the Jmal battle as she intended to retaliate against the killers of the Lord of the Islamic state, Othman bin Affan.⁴⁵⁹

The Qur'an is written in Arabic and Arabic, like English, uses the male pronoun to address both genders. In this regard, Nusibah Bint-Kap came to the Prophet Mohammed and objected that the Qur'an addressed men only, while both men and women had similar duties and obligations.⁴⁶⁰ As a response, a verse in the Qur'an states:

“Indeed, the Muslim men and Muslim women, the believing men and believing women, the obedient men and obedient women, the truthful men and truthful women, the patient men and patient women, the humble men and humble women, the charitable men and charitable women, the fasting men and fasting women, the men who guard their private parts and the women who do so, and the men who remember Allah often and the women who do so - for them Allah has prepared forgiveness and a great reward.”⁴⁶¹

As a comment on this, Al Hibri argues that here women in Islam used a feminist critique of the language and that the Qur'an responded to it positively. This is similar to the criticisms made by the women's movement in the United States although the Qur'an responded fourteen hundred years earlier!⁴⁶² More interestingly, one of the Qur'an's stories is entitled “The woman who argued”. This tells the story of the Surah where a woman came to Prophet Mohammed to argue against one of the divorce provisions as she was trying to change it. The Prophet did not accept this but, as a response to the woman's

⁴⁵⁸ Al-Awa, *Women and public work from an Islamic perspective* p.24,25

⁴⁵⁹ Ibid p. 32

⁴⁶⁰ Mohammed Qurtubi, *Interpretation of Al-Qurtubi* (Dar Al-feker 1980) (33:35)

⁴⁶¹ 'The Holy Quran.'(33:35)

⁴⁶² Al-Hibri, *Islam, law and custom: Redefining Muslim women's rights* p.39

argument, a verse was revealed by God to the Prophet accepting her argument and the divorce provision that the woman had asked for was changed. In fact, the woman's argument could be said to be another feminist political activity as the woman argued against the Prophet who was the legislative power.⁴⁶³

4.5.3 Women's right to take up leadership positions

Some Islamic scholars believe that women should not take any position that requires them to be a leader over men as men should lead women. Their argument is based on the verse that states: "Men are in charge of women by [right of] what Allah has given one over the other and what they spend [for maintenance] from their wealth."⁴⁶⁴

As mentioned earlier, this verse relates to the marital relationship and indicates that the husband is responsible for the protection and maintenance of his wife under certain conditions. It does not mean that men as a class are in charge of or responsible for women as a class. Therefore, the verse is irrelevant for use in preventing women from taking positions as leaders.⁴⁶⁵ The Prophet Mohammed gave an important political role to his wife, Umm Salamah, as she had a role similar to what is called today "Chief Advisor to the Head of State".⁴⁶⁶ In addition, Omar bin al Khattab, who was the Lord of the Islamic state, gave Al-Sheffa bin Abdulla the leadership position of being the chief inspector of markets. In addition, Al Khattab made Samarra Al Acadia a chief inspector as well and gave her a whip with which to strike violators.⁴⁶⁷

On the other hand, other Islamic scholars believe that women can take up leadership positions although they cannot not be a head of state or ruler. Their arguments are based on Prophet Mohammed's statement: "No people who appoint a woman as their leader

⁴⁶³ Al-Hibri, *Islam, law and custom: Redefining Muslim women's rights* p.39

⁴⁶⁴ 'The Holy Quran.'(2:34)

⁴⁶⁵ Al-Awa, *Women and public work from an Islamic perspective* p.43

⁴⁶⁶ Badawi, *Gender equity in Islam* p.31

⁴⁶⁷ Ibid p.31,32

will ever prosper.”⁴⁶⁸ In fact, the whole story is that Prophet Mohammed sent a letter to the King of Persia and, when the letter arrived, the King tore it up. This led the Prophet to ask God to take revenge. God responded to the messenger and caused the King and all his male sons to be killed so, after that, Persia was forced to make Kesra, a daughter, the ruler. When the Prophet Mohammed was informed about what had happened, he replied, “No people who appoint a woman as their leader will ever prosper.”⁴⁶⁹

Khalid Mohammad argues that the Prophet’s statement should not be taken as a religious proof that prevents women from being rulers as the Prophet’s statement came as a divine message that the Persians would not prosper. This is similar to the Qur’anic divination that states: “The Byzantines have been defeated in the nearest land. But they, after their defeat, will overcome.” In addition, the Prophet’s statement refers only to Boran, the Queen of Persia’s daughter, Kesra.⁴⁷⁰ Ibrahim Hashem argues that the circumstances and the context of the story confirm that the Prophet’s statement is political prophecy reflecting that the rule of Persia would end. This came to be as the Persian kingdom collapsed after several years. Therefore, the Prophet’s statement was expected and should not be taken as legislation.⁴⁷¹ Al Qasaimi argues that one of the most important conditions, known among Islamic scholars in interpreting Islamic texts, is that there are cases where certain factors can determine the interpretation. For example, the particular occasion of the Islamic text must be observed and not just the “generality of its wording”.⁴⁷² Abdullah bin Abbas stressed the importance of taking into account the causes behind the revelation of the Islamic text since ignoring these might lead to confusion, misinterpretation and a failure to understand it clearly.⁴⁷³ Moreover, Jamal Badawi argued that there is no clear statement in the Qur’an or the Sunnah that excluded women from being a head of state.⁴⁷⁴ Abu Yala Al Farra, famous for writing about the political system in

⁴⁶⁸ Albukhari, *SAHIH BUKHARI* No. (4425)

⁴⁶⁹ Ibid No. (1353)

⁴⁷⁰ Khalid Mohammed, *Ever democracy* (Dar Al Arab Book 1974) p.225

⁴⁷¹ Hashem, *Muslim Women in Charge of Public Jobs between Opposings and Supportings* p.241

⁴⁷² Badawi, *Gender equity in Islam* p.39

⁴⁷³ Ibid p.14

⁴⁷⁴ Badawi, *Gender equity in Islam* p.30

Islam, never considered that a head of state could only be male.⁴⁷⁵

On the other hand, the Qur'anic verses mention the insight of the Queen of Sheba who rescued her country from losing a battle.⁴⁷⁶ The Qur'an says: "Indeed, I found [there] a woman ruling them, and she has been given of all things, and she has a great throne."⁴⁷⁷ In addition, the Qur'an mentions the wisdom of the Queen as she did not issue an order until she had consulted others. The Qur'an says: "She said, "O eminent ones, advise me in my affair. I would not decide a matter until you witness [for] me."⁴⁷⁸ Furthermore, there is nothing in the verses which criticise the Queen of Sheba as a "woman queen" and in the whole of the Qur'an it is never mentioned that women should not be rulers. In this regard, al Gazali (cited in Al-Awa) argues that taking up a leader's position in Islam is not a matter of masculinity or femininity, it is a matter of capabilities and qualifications which may rest with women and not with men.⁴⁷⁹ In fact, in the Arab world, some states have given women positions in ministries. Perhaps the best example is the state of Mauritania where nine out of the 28 ministers are women; also, in the United Arab Emirates, seven ministers are female. In Morocco, six women have been appointed as ministers while, on the other hand, only the Deputy Minister of Education in Saudi Arabia, appointed in 2009,⁴⁸⁰ is a woman. In other Muslim countries, such as Pakistan, women have achieved the position of Prime Minister twice.⁴⁸¹ However, in Saudi Arabia, for example, a woman cannot become a minister for reasons to do with customs and because of misinterpretation of the Islamic texts. (This is discussed in more detail in Chapter Seven.)

To sum up, Islam gives women equal rights with men in terms of various professions and employment. However, as Salim Al-Awa argues, in the name of religion, traditional rules restrict women's right to work.

⁴⁷⁵ Badawi, *Gender equity in Islam* p.30

⁴⁷⁶ Al-Awa, *Women and public work from an Islamic perspective* p.40

⁴⁷⁷ 'The Holy Quran.' (27:23)

⁴⁷⁸ Ibid (27:32)

⁴⁷⁹ Al-Awa, *Women and public work from an Islamic perspective* p.45

⁴⁸⁰ Khaled Al-ghale, 'The Arab female ministers' <<http://www.irfaasawtak.com/a/%D9%83%D9%85-%D9%88%D8%B2%D9%8A%D8%B1%D8%A9-%D9%81%D9%8A-%D8%A7%D9%84%D8%AD%D9%83%D9%88%D9%85%D8%A7%D8%AA-%D8%A7%D9%84%D8%B9%D8%B1%D8%A8%D9%8A%D8%A9%D8%9F/329815.html>> accessed 17/3/2017

⁴⁸¹ Shah, *Women, the Koran and international human rights law: the experience of Pakistan*

4.5.4 Women as judges in Islam

If the Islamic texts are considered, there is nothing to prohibit women from becoming judges. For this reason, Islamic scholars differ in their opinions regarding this matter. The Hanbali school has leant towards prohibiting women from becoming judges in all cases while the Abu Hanifa School, however, believes that it is permissible for a woman to take up a judicial position in cases where her testimony is permissible. This means it is not allowed for women to be judges in criminal procedures as their testimony is not accepted in such cases.⁴⁸² Other groups in the Hanafi school, such as Mohamed Al-Shaibani, however, allow women to be judges in criminal cases. The Shafei School is divided into two groups: the first group tends to prohibit women in all cases while the other group allows a woman to be a judge only in cases of necessity: for instance, only in the event of there being no qualified men to take up such a judicial position.⁴⁸³ The Maliki school is also divided into two groups: the first group completely prohibits women from being judges while the other group believes that women could be judges in all cases.⁴⁸⁴ Indeed, the scholars who believe that women must be prohibited from taking judicial positions base their decision on the same texts that prohibit women from taking many other positions. This includes the text which states: “Men are in charge of women by [right of] what Allah has given one over the other and what they spend [for maintenance] from their wealth.”⁴⁸⁵ As discussed above, this verse is directed at marital relationships. The other Islamic text is the Prophet Mohammed’s statement, which says: “No people who appoint a woman as their leader will ever prosper”⁴⁸⁶ which, as discussed earlier, referred to particular circumstances. In fact, in both texts there is nothing which specifically mentions women as judges. Moreover, the traditional scholars who have banned women from being judges believe that women are not eligible for such a position as it requires a great

⁴⁸² Hashem, *Muslim Women in Charge of Public Jobs between Opposings and Supportings* p.225

⁴⁸³ Ibid p.255

⁴⁸⁴ Ibid p.254

⁴⁸⁵ ‘The Holy Quran.’(2:34)

⁴⁸⁶ Albukhari, *SAHIH BUKHARI* No. (1353)

deal of experience in life which is rarely available to women.⁴⁸⁷ In addition, they argue that being a judge is a critical position as the fates of many people rest on their decisions. However, many women today are learned and have worked and are therefore more experienced than a great many men. Moreover, Islamic law allowed women to be *mujtahids*. For instance, the Prophet Mohammed's wife, Aisha, was a *mujtahid* and being a *mujtahid* is a more important position than that of a judge as the interpretations and provisions of the *mujtahid* can guide people, including judges, in their lives.⁴⁸⁸

Mohammad Amara argues that the provisions of traditional Islamic scholars which prevent women from taking up positions in the judiciary are based on the customs of an era when women never became judges. Furthermore, these are juristic opinions only; they are not Islamic texts. Therefore, in this era, fresh interpretations should be offered to women regarding becoming judges as there is no consensus among traditional scholars that deny the ability of women to be judges.⁴⁸⁹

Many modern scholars, such as al Qardawi, Abdul Karim Zidane, Ramadan Al-Bouti and Abdel-Halim Abu Shiqah, think it is permissible for women to be judges without restrictions while many Islamic women are already working as judges in many Islamic states, such as Pakistan, Morocco and Sudan. Furthermore, in Algeria and Tunisia, women judges account for up to 32% and 25.5% respectively of all judges. In addition, a female Tunisian judge was nominated for membership of the Hague Tribunal which tried war criminals. However, many Islamic states, such as Saudi Arabia, Kuwait and Egypt, do not accept women as judges.⁴⁹⁰ In this regard, Jamal Badawi argues that one of the main obstacles faced by Muslims today in interpreting the texts of Islam is the fear of stepping away from traditional interpretations since today's scholars are afraid of re-interpreting the texts, worrying about the reaction of other scholars or worrying about the reaction of the community. Nonetheless, Islamic scholars should know that it is not their duty to

⁴⁸⁷ Abdel-Halim Abu Shiqah, *The liberation of women in the era of the message*. (Dar-AlQalam 1999) p.54

⁴⁸⁸ Hashem, *Muslim Women in Charge of Public Jobs between Opposings and Supportings* p.253

⁴⁸⁹ Emarah Mhammed, *Islam and the future*. (Dar-Al Shoroq 2010) p.209

⁴⁹⁰ Abdul Latif Radi, 'Women's right to be a judge.' <<http://www.omanlegal.net/vb/showthread.php?t=4446>> accessed 24/2/2017

please others and do what they expect; it is their duty to adapt the traditional views to meet the needs of the current time and to provide answers to contemporary issues and problems.⁴⁹¹

To sum up, to enable women to practise in judicial professions or take up other leadership roles, Muslim scholars need to move away from traditional interpretations of the Islamic texts and find new ones which are valid and which apply to women in this age.

4.6 Controversial issues

There are some controversial issues that affect women's rights as individuals in some Islamic countries: one example is the case of women's testimony. Some Muslim countries have misinterpreted the Islamic texts in this regard. For instance, in Saudi Arabia, some jurists argue that the reason for giving a woman's testimony less value than that of a man, is that men have "better minds" than women. On this issue, Salih al-Majd argues that the reason why Islam gives a woman's testimony less value is that the mind of a man equals the mind of two women. However, his interpretation is far removed from the spirit of Islam.⁴⁹² On the other hand, concerning the issue of inheritance, many argue that giving women a lesser share than men is, in fact, an abuse of women's economic rights when Islamic law considers women's equality in terms of their economic rights quite differently. The next sections discuss issues regarding women as witnesses and women's inheritance from an Islamic perspective.

⁴⁹¹ Badawi, *Gender equity in Islam* p.35

⁴⁹² Shaarawy, *Women in the Holy Quran* p.104

4.6.1 Women as witnesses

4.6.1.1 Women as witnesses in financial matters

“O you who have believed, when you contract a debt for a specified term, write it down. And let a scribe write [it] between you in justice. Let no scribe refuse to write as Allah has taught him. So let him write and let the one who has the obligation dictate. And let him fear Allah, his Lord, and not leave anything out of it. But if the one who has the obligation is of limited understanding or weak or unable to dictate himself, then let his guardian dictate in justice. And bring to witness two witnesses from among your men. And if there are not two men [available], then a man and two women from those whom you accept as witnesses – so that if one of the women errs, then the other can remind her.”⁴⁹³

Many of those who demand equality between men and women believe that, in this verse, there is a distinction between men and women where a male witness is equivalent to two women. On the other hand, if this verse is considered, it offers a procedure for the protection of financial rights. The verse starts by giving instructions to document the debt and then continues to give further instructions: that there should be witnesses and that these witnesses should be two men, or a man and two women. It could be concluded that the witnesses mentioned in this verse are one of the means used to protect financial rights, not the type of witnesses used in making judicial decisions. In addition, the importance of the presence of another woman to testify is only to remind the first witness if she forgets something.⁴⁹⁴

Ibn Taymiyyah considers that the purpose of the requirement for two women is clear in the verse as being that, if one of them errs, the other one can remind her.⁴⁹⁵ Muslim scholars disagree as to why a woman might err in such cases and might need another

⁴⁹³ , 'The Holy Quran.' (2:181)

⁴⁹⁴ Shaarawy, *Women in the Holy Quran* p.90

⁴⁹⁵ Emarah, *West and Islam: between right and wrong*. p.181

woman to remind her. Some argue that women usually do not take an interest in financial matters, which include numerous very accurate details that may be ignored or forgotten by the woman, and for this reason she may need another woman to remind her.⁴⁹⁶ Others argue that the reason behind the dissimilarity between men and women in the witnessing of financial matters concerns a woman's nature: that is, that psychological factors, such as hormonal changes and mood disorders, might affect her testimony.⁴⁹⁷

Wadud argues that this verse might concern certain circumstances, particularly in the 7th century, where financial transactions depended only on men, while women had limited or no experience in these matters. In addition, in that society, it was possible for men to press women into denying their testimony.⁴⁹⁸ So, Wadud concludes that requiring the testimony of two women in financial matters was due to the lack of experience of women or the possibility at that time of women being coerced. Fazlur Rahman, cited in Niaz's argument, asserts that the lower value given to a woman's testimony was due to her lack of experience in such circumstances in the 7th century. These days, on the other hand, the testimonies of women and men should be accorded equal weight as women in the Muslim world have become well educated. In a similar argument, some Arab scholars have questioned how the testimony of a woman who is a doctor can weigh half of that of a non-educated man.⁴⁹⁹ Al Sharawi comments that testimony depends on watching things and then passing on information honestly, if required to do so and it does not necessitate a good education to do this. In addition, women are still more emotional, even if they are educated, while men are more rational, even if they are not educated. In sum, education does not change the inherent nature of men and women. He adds that, in the matter of testimony in Islam, the issue is to try to avoid emotion as much as possible.⁵⁰⁰

On the other hand, Muslim scholars agree that the mental abilities of women are irrelevant in making a man's testimony equal to that of two women for three reasons. First, if a woman had less mental ability than a man, her testimony would never be

⁴⁹⁶ Sibai, *Woman between jurisprudence and law*. p.28

⁴⁹⁷ Mohammed Biltaji, *The status of women in the Qur'an and Sunnah*. (Youth Library 1996) p.44

⁴⁹⁸ Wadud-Muhsin, *Quran and Women* p.86

⁴⁹⁹ Shah, *Women, the Koran and international human rights law: the experience of Pakistan*

⁵⁰⁰ Shaarawy, *Women in the Holy Quran* p.91

accepted whether there was one woman or two.⁵⁰¹ Second, the same verse that requires two women in financial matters requires a guardian for persons with mental problems or who are weak while the verse does not require a guardian for women.⁵⁰² Third, al Dawalibi (cited in Ali Gomaa) considers that Qur'anic verses always tend to reinforce the witnesses, even for a man, as in financial matters two men are required to witness and yet the presence of another man is not considered as an understatement of men's dignity.⁵⁰³

4.6.1.2 Women as witnesses in criminal matters

The Hanbali, Maliki Shafi'i and Hanafi schools agreed that a woman's testimony in criminal matters should not be accepted. According to al Shaarawy, the reason for not accepting women as witnesses in criminal matters, such as in murder or robbery, is that women by nature cannot tolerate scenes of violence as they tend to be fearful and avoid such scenes. Also, it is difficult for women to look at bodies or describe their condition. These issues require control over emotions which a woman cannot do in such cases. As a result, even for men, if it is proved to the judge that a male witness is weak or sensitive, the judge can refuse to accept his testimony.⁵⁰⁴ Zidane (cited in Mahmoud Shaltout) considers that a woman may feel pity when she sees an offender in prison who has been sentenced to the death penalty and she may be reluctant to testify or may change her testimony in his favour.⁵⁰⁵ However, this does not mean that a woman's testimony will not be accepted in all cases. As Shailout argues, a woman's testimony in criminal matters would be accepted if the woman was the only witness: for instance, if the crime took place in the woman's bathroom.⁵⁰⁶ On the other hand, al Gazali questions why Islamic scholars do not accept women as witnesses in criminal cases as he believes it is not logical that a woman might watch a relative killed but then find that her testimony is not accepted.⁵⁰⁷ In this

⁵⁰¹ Mahmoud Shaltout, *Islam is a religion and the law*. (Sunrise Library 1980) p.43

⁵⁰² Shah, *Women, the Koran and international human rights law: the experience of Pakistan*

⁵⁰³ Ali Gomaa, *Women in the Islamic civilization* (Dar Al-Salaam 2007) p.23

⁵⁰⁴ Shaarawy, *Women in the Holy Quran* p.117

⁵⁰⁵ Shaltout, *Islam is a religion and the law*. p.45

⁵⁰⁶ Shaltout, *Islam is a religion and the law*. p.45

⁵⁰⁷ Mohammed al-Ghazali, *Sunnah among the jurists*. (The house of Egyptian book 2011) p.61

regard, Niaz Shah argues that if the Qur'anic verse is interpreted in the right context, then women's testimony should be accepted in (*hadd*) cases. He argues that, according to the Prophet Yousef and the story of Zulekhah that is mentioned in the Qur'an, women's and men's testimonies should be given equal weight. In the story, Zulekha accused the Prophet Yousef of seducing her and then asked her husband, the king of the kingdom where Yusuf was living, to punish him for the attack. Yusuf rejected Zulekha's charge and the King decided to give Zulekha's and Yusuf's testimonies equal weight. To resolve the case on the grounds of evidence, it was decided bring out the shirt that Yusuf was wearing at that time and if the shirt was torn from the back, Zulekha would be guilty, while if the shirt was torn from the front, he would be guilty. The shirt was found to be torn from the back which acquitted the Prophet Yusuf. In this case the testimony of the man and the woman was given equal weight and the case was resolved on the grounds of circumstantial evidence. Therefore, Niaz argues that, if the Qur'an considers a woman's testimony to be of lesser value than that of a man, then that would have been mentioned clearly in this case which, in turn, would have led to the case being resolved in a different way.⁵⁰⁸ In fact, women witnesses in Islam carry equal weight to men if they are opponents in a case. In the previous example, Zulekha was the opponent in the case. For this reason, her testimony was given equal weight to that of Yousef. So, for example, if a man rapes a woman, the judge will give equal value to the testimonies of both the man and the woman.⁵⁰⁹ However, on the other hand, if the woman was not a direct party in a *hadd* or criminal case (i.e., being a witness for someone else), then, according to Islamic scholars, her testimony will not be accepted.⁵¹⁰ It seems that the reason for not accepting a woman as a witness in such matters is because Islamic Shari'a law tends to avoid emotions as far as possible in such serious matters. For this reason, Islamic scholars have reached a consensus that a father's witness for his son is not accepted and, vice versa, the son's witness for his father is not accepted.⁵¹¹ Moreover, a husband's witness for his wife is not accepted and a wife's witness for her husband is not accepted either. Furthermore,

⁵⁰⁸ Shah, *Women, the Koran and international human rights law: the experience of Pakistan* p.62

⁵⁰⁹ al-Qaradawi, *Women Position in Islamic Life* p.18

⁵¹⁰ al-Qaradawi, *Women Position in Islamic Life* p.18

⁵¹¹ Mohammed Munajjid, 'The legislation of son testimony to his father and father testimony to his son.' (*Islamqa*, 2016) <islamqa.info/ar/183045> accessed 1/8/2016

bearing witness is not acceptable among all other close relatives as the emotions between relatives could affect the testimonies being given.⁵¹²

4.6.1.3 Women as witnesses in other matters

Not accepting women as witnesses in criminal cases, and making a man as a witness equal to two women witnesses in financial cases, does not mean that women have less mental ability than men. Sometimes women witnesses are equal to men. According to the Qur'an, "And thus we have made you a just community that you will be witnesses over the people and the Messenger will be a witness over you."⁵¹³

According to Ibn al-Qayyim, the meaning of the verse is that men and women are equivalent as witnesses in Islamic Shari'a: that is, they are equivalent in terms of reporting and narrating the Hadith of the Prophet Mohammed in this regard. In all, it is considered that Islam has given both men and women equal rights as witnesses with regard to one of the most significant sources of Islamic law, which is the Hadith, as the Hadith of Prophet Mohammed is like a guide for Muslims from which they take their Shari'a rules.⁵¹⁴

In addition, in *lian* procedures, Qur'anic verses give men and women equal status as witnesses. The *lian* is when the husband accuses his wife of adultery to end the marriage with no evidence and no witnesses. Therefore, the husband will be his own witness and the wife will be her own witness. As a result, the husband should state on oath four times that he is telling the truth. In contrast, the wife should state on oath four times that her husband is not telling the truth.⁵¹⁵ According to the Qur'an, "And those who accuse their wives [of adultery] and have no witnesses except themselves – then the witness of one of them [shall be] four testimonies [swearing] by Allah that indeed, he is of the truthful."⁵¹⁶ Accordingly, the verses treat the spouses' testimonies equally, as four oaths by the wife

⁵¹² Ibn al-Qayyim Jawzi, *Elam AL moqen An rab Al Alameen* (The house of scientific books. 1991)

⁵¹³ , 'The Holy Quran.' (2;143)

⁵¹⁴ Emarah, *West and Islam: between right and wrong*.p.182

⁵¹⁵ al-Qaradawi, *Women Position in Islamic Life* p.22

⁵¹⁶ , 'The Holy Quran.' (24:6)

are equal to four oaths by the husband. This case, in fact, is similar to that of Yusuf and Zulekha mentioned before, as the women in both cases were direct parties.

In addition, in some cases, only women witnesses are accepted. According to Ibn Qudamah, women's testimonies are given priority in cases where women are more experienced, such as in issues relating to childbirth, breastfeeding, menstruation, the waiting period and virginity, where a man's testimony is not acceptable.⁵¹⁷ According to Uqba bin Al-Harith, "I married a woman and later on a woman came and said, 'I suckled you both.'" So, I went to the Prophet (to ask him about it). He said, "How can you (keep her as a wife) when it has been said (that you were foster brother and sister)? Leave (divorce) her".⁵¹⁸ In this case the woman was her own witness that she breastfed the spouse which meant that they were brother and sister and could not be husband and wife in Shari'a law. Although there were no other witnesses, the Prophet decided to separate the spouses based on the woman's testimony.

Moreover, in some cases, a woman's testimony outweighs that of a man. After considering two witnesses, for instance, in Islamic law, each spouse is entitled to request the dissolution of the marriage contract in the case of an infectious or repellant disease such as leprosy. As a result, if the husband wishes to dissolve the marriage contract claiming that such a defect exists in his wife but she denies it, a trusted woman should be called as a witness to consider the defect. If the witness' testimony is in favour of the woman, then the husband would not be allowed to dissolve the marriage contract.⁵¹⁹

It can be concluded that the notion of witnesses in Islamic Shari'a law is irrelevant in terms of the superiority of one gender over the other because the importance lies in the witness helping to achieve justice, ascertain the reality and avoid doubt, not to decide on the competency of the witness. Second, any distinction made between a man and a woman as a witness is due to the inherent natural differences between men and women. Therefore, a woman's testimony is superior to a man's in subject areas where she is inherently more

⁵¹⁷ Ibn Qudamah Almaqdesi, *Almoghnee* (The world of books. 1997)

⁵¹⁸ Albukhari, *SAHIH BUKHARI* No. 3296

⁵¹⁹ Gomaa, *Women in the Islamic civilization* p.26

capable than him while, on the other hand, a man's testimony is superior to a woman's in matters where he is inherently more capable than her.

4.7. Women's right to inheritance

Before Islam, in Arab society, women did not have the right to inherit as inheritance was a right limited to men. In fact, inheritance was a right given only to an eldest son who was fighting with the tribe. Therefore, women and younger sons were denied inheritance. In addition, some laws gave the testator the right to dispose of his estate as he so wished. For instance, he had the right to leave property to one of his sons and deny the others. He could also exclude all his sons from an inheritance.⁵²⁰ On the other hand, in Islamic law, both women and men should inherit. In addition, Islamic law places a limitation on the amount that could be inherited as the testator could not exceed this amount. As a result, if the testator willed more than one third of his heritage, the judge had the right to cancel the exceeded amount to limit it to one third and then distribute the other two thirds to the heirs.⁵²¹

“Allah instructs you concerning your children: for the male, what is equal to the share of two females. But if there are [only] daughters, two or more, for them is two thirds of one's estate. And if there is only one, for her is half. And for one's parents, to each one of them is a sixth of his estate if he left children. But if he had no children and the parents [alone] inherit from him, then for his mother is one third. And if he had brothers [or sisters], for his mother is a sixth, after any bequest he [may have] made or debt. Your parents or your children – you know not which of them are nearest to you in benefit. [These shares are] an obligation [imposed] by Allah. Indeed, Allah is ever Knowing and Wise.

⁵²⁰ Shawky Al-Sahi, *Inheritance across civilizations and divine legislations in Islamic sharia* (Marital relations Library. 2007) p.60

⁵²¹ Salem Bahnasawi, *Woman between Islam and World Legislations* (Dar-Alqalam 1986) p.166

And for you is half of what your wives leave if they have no child. But if they have a child, for you is one fourth of what they leave, after any bequest they [may have] made or debt. And for the wives is one fourth if you leave no child. But if you leave a child, then for them is an eighth of what you leave, after any bequest you [may have] made or debt. And if a man or woman leaves neither ascendants nor descendants but has a brother or a sister, then for each one of them is a sixth. But if they are more than two, they share a third, after any bequest which was made or debt, as long as there is no detriment [caused]. [This is] an ordinance from Allah, and Allah is Knowing and Forbearing.”⁵²²

In Islamic law, there are four cases where males inherit twice what females inherit. The first case is where someone dies and leaves a daughter and a son. In such a case, the son will receive twice the inheritance of the daughter. The second case is where someone who is not unmarried and has no sons or daughters dies and leaves a mother and father. In this case, the mother would be entitled to one third of the inheritance and the father two thirds. The third case is where a person dies and leaves a male sibling and a woman sibling, or leaves a male brother from their father’s side and a female sister from their father’s side, then the brother would be entitled to twice that of the sister. The fourth case is where a wife dies and leaves a husband and children. In such a case, the husband will inherit one quarter while, if she did not have children, he would inherit one half of her estate. On the other hand, if a husband dies and leaves a wife and children, she would be entitled to one eighth of the inheritance, while if he did not have children, she would inherit one quarter of his estate.⁵²³

Al Shaarawy believes that, according to the Islamic economic scale, a legacy moves money from a dead person’s income to increase the income of a living person where the significance of the income lies in the expenses that are needed. In Islam, expenses vary between men and women, as women in Islam are not expected to support themselves. Therefore, if a woman is a daughter, her father has the responsibility to support her

⁵²² , ‘The Holy Quran.’ (4’12)

⁵²³ Sibai, *Woman between jurisprudence and law*. p.29,30

financially, while if the woman is a wife, her husband will have that responsibility, and if the woman is a widow, her sons will be responsible.⁵²⁴

According to the previous quotation, a sister would inherit half of her brother's estate. It would be likely that the brother would have more financial commitments than his sister (for instance, if he had to support his mother) or, in the event that he married, he would have other financial obligations such as the payment of a dowry, and then the cost of supporting his wife and his children. In contrast, the sister would not have any of these financial commitments as, if she was married, her husband would be responsible for supporting her. Consequently, according to Islamic scholars, the reason for giving the brother a larger proportion of the inheritance is due to the greater financial obligations that he bears.⁵²⁵ However, in some cases men do not bear the financial responsibility. For example, if a man dies and leaves a widow, a son and a daughter, and the daughter is the one who financially supports her family, then, in this case, why should the son inherit twice that of his sister?⁵²⁶ In this case, Wadud argues that the Qur'an does not deal with all the possibilities and combinations and, for this reason, the Qur'an offers the freedom to deal with such cases using discretion while dispensing one-third of the wealth.⁵²⁷ It could also be argued that, in this case, although the son was not supporting his family, this might be due to financial problems and that while he still had an obligation to support his mother, inheriting double the amount accorded to his sister might make him wealthy enough to support his mother as he has priority over his sister in supporting his mother. Therefore, it might still be logical for the son to inherit more than his sister.

Indeed, men do not inherit double what women do in all cases. In some cases, women inherit equally to men. For instance, if someone dies and leaves a son, mother and father, both the father and mother will inherit one sixth while the son will inherit the remainder.⁵²⁸

⁵²⁴ Mohammad Shaarawy, *woman and man* (DAR EL -NADWA 1995) p.101

⁵²⁵ Shaarawy, *woman and man* p.101

⁵²⁶ Wadud-Muhsin, *Quran and Women* p.87

⁵²⁷ Ibid p.87

⁵²⁸ Bahnasawi, *Woman between Islam and World Legislations* p.166

Another case where women and men inherit equally is when someone dies and leaves a brother and sister. They would inherit equally as, according to Shari'a law, brothers and sisters from the mother's side should inherit equally. In addition, in some cases, women inherit more than men. For example, if a woman dies and leaves a husband and two daughters, the husband's share of the estate would be one quarter while each daughter would inherit one third. The other case where women would inherit more than men is where a woman dies and leaves a husband and one daughter. The husband would take one quarter and the daughter would take one half and the remainder of the estate.⁵²⁹

Moreover, in some cases, women inherit while men do not. For example, if a woman dies and leaves a husband, father, mother, daughter and grand-daughter from her son, the grand-daughter from the son will receive one sixth of the estate; however, if that grand-daughter were a grandson, he would not inherit anything.⁵³⁰

In fact, these cases emphasise that gender is irrelevant in the legacy system in Islam as it actually focuses on the degree of kinship and an heir's circumstances. As a result, when a brother inherits more than his sister, Shari'a views the brother, not as a male, but as a husband and father who has greater financial responsibilities.

4.8 Conclusion

Islamic law gave women rights in all spheres of life, whether social, political or economic. It gave them the right to be educated and to work, and it gave them similar rights as men to participate in sporting activities. Nonetheless, in reality, some interpretations of the Islamic texts deny women some of their rights, such as the right to be a judge, take up a position as a leader, or to participate in political life. This may seem to be discriminatory against women but such interpretations fitted women's situations at a particular time and in a particular place, while Islamic law is valid at any time and place because it cares about

⁵²⁹ Bahnasawi, *Woman between Islam and World Legislations* p167

⁵³⁰ Al-Munjed, 'Inheritance law in Islam.'

the interests of Muslims in every era. Therefore, modern interpretations must adequately address the new reality of the Islamic world. The next chapter discusses this topic in more detail.

Chapter 5: The significance of *Ijtihad* in promoting women's rights

5.1 Introduction

Many developments have taken place in the world, whether in the political, economic or technological spheres. Because of these developments, many of the traditional Islamic norms, such as those of Ahmad bin Hanbal, may no longer be valid as these norms were developed in different circumstances. However, many governments in Muslim countries, such as Saudi Arabia, the United Arab Emirates and Kuwait, are still applying these traditional interpretations of the Islamic law. On the other hand, human rights in the post 1945 era have advanced more than ever before, especially with the adoption of international covenants, such as the International Covenant on Civil and Political Rights 1966 or the International Covenant on Economic, Social and Cultural Rights 1966. Moreover, women's rights have become increasingly important, especially since the 1979 Convention on the Elimination of All Forms of Discrimination against Women (CEDAW).

In spite of this, Muslim women have been unable to enjoy many of the rights that were guaranteed in human rights instruments such as CEDAW when such rights might better suit their modern lives. This is due to an insistence by many Muslim states that traditional interpretations of Islamic texts are followed. This puts Muslim women in the difficult position of choosing between complying with the traditional regulations of Islamic law or guiltily obtaining the rights that suit their contemporary lives.

Indeed, Islamic law is valid for any time, which means that Islamic law should meet human rights requirements while societies keep evolving. Therefore, in the twenty-first century, it is reasonable to re-interpret the Qur'an and the Sunnah using *Ijtihad* to promote women's rights in the light of our age and its requirements. For instance, women in Saudi Arabia are not able to enjoy certain rights guaranteed by CEDAW: for example, they do not have the right to marry without the permission of a guardian. In this situation, Saudi women can

embrace this right without feeling guilty about their religious responsibilities. Thus, it is better for them to have this law, which derives from the spirit of Islam but is also in accordance with CEDAW.

This chapter aims to highlight the significance of *Ijtihad* in promoting Muslim women's rights in the twenty-first century. To achieve this aim, it discusses how the Prophet Mohammed himself was encouraged to practice *Ijtihad*. After this, the chapter examines *Ijtihad* after the death of Prophet Mohammed to show the practice of Muslim leaders and rulers with regard to how they ensured that Islamic law met the requirements of Muslims in their days. Then, the chapter analyses the manner and the influences that affect *Ijtihad*, after that, it will focus on the leaders of the traditional Islamic scholars who are the four most famous imams among Muslims: Ahmad Ibn Hanbal (780_855 AD/164-241 Hijrah), Muhammed ibn Idris, al-shafi'i (767_819 AD/150-204 Hijrah), Malik ibn Anas al-Asbahi (711_795 AD/93-179 Hijrah) and Abu Hanifah, al-Numan ibn Thabit ibn Zuta (699_767 AD/80_150 Hijrah). This is to show the independence of those scholars as each had a different way of interpreting the Islamic texts, depending on the time and the requirements of where they were. Subsequently, the chapter analyses the significance of *Ijtihad* in advancing and maintaining Islamic law in contemporary life.

Afterwards, the chapter provides an important analysis of the principle of *ijtihad* and highlight its significant for advancing women right's. *ijtihad* can be used for to re-interpret existing laws and develop new ones then, The chapter will argues the significance of *Ijtihad* in advancing women's rights by offering re-interpretations of the primary sources of Islamic law, as well as correcting certain misinterpretations resulting in women's rights being denied. Finally, the chapter offers some suggestions regarding specific times in Muslim women 's lives where *Ijtihad* is needed.

5.2 What is *Ijtihad*?

Ijtihad is an Arabic word derived from *juhd* which means to make an effort, so *Ijtihad* means that a jurist should make the maximum effort to reach an Islamic legal provision by using deduction. More specifically, *Ijtihad* is “a juristic tool - a process of reasoning used to interpret the Basic Code, that is, the Qur'an and the Sunnah. In both meanings, *Ijtihad* assures that *fiqh* will continue to meet the needs of Muslim communities across the world and across time, solving their social, economic and political problems.”⁵³¹ In another meaning it is an Islamic legal term meaning “independent reasoning,” as opposed to *taqlid* (imitation), one of four sources of Sunni law utilised where the Qur'an and Sunnah (the first two sources) are silent. It requires a thorough knowledge of theology, revealed texts, and legal theory (*usul al-fiqh*), a sophisticated capacity for legal reasoning, and a thorough knowledge of Arabic. It is considered a required religious duty for those qualified to perform it. It should be practised by means of analogical or syllogistic reasoning (*qiyas*). Its results may not contradict the Qur'an, and it may not be used in cases where consensus (*ijma*) has been reached, according to many scholars. Sunnis believe *Ijtihad* is fallible since more than one interpretation of a legal issue is possible. Islamic reformers call for a revitalization of *Ijtihad* in the modern world.”⁵³²

In this regard, some conditions should be available to scholars who practise *Ijtihad*. Firstly, they should have knowledge of the Qur'an. For instance, they should know the reason behind the revealed Qur'anic text and, secondly, they should have knowledge of the Sunnah, which means they should know what was narrated by the Prophet Mohammad, especially those pronouncements related to provision. Thirdly, the scholars who practise *Ijtihad* should have solid knowledge of Arabic and its grammar as both the Qur'an and the Sunnah were written in Arabic. Fourthly, scholars should be familiar with the position of traditional scholars. For instance, traditional scholars reached a consensus that it is

⁵³¹ Ali Khan, 'The reopening of the Islamic Code: the second era of *ijtihad*' (2003) 1 University of St Thomas Law Journal 341 p.345

⁵³² John L Esposito, *The oxford dictionary of Islam* (Oxford University Press 2004) p.134

permitted for women to wear gold.⁵³³

5.3 Prophet Mohammed's encouragement to embrace *Ijtihad*

In his lifetime, the Prophet Mohammed encouraged Muslims to exercise *Ijtihad*⁵³⁴ and one of the most remarkable examples was when the Prophet ordered his companions to go to Qurayza, saying: "Do not pray your afternoon prayer until you reach Qurayza." On the way to Qurayza, the time came for afternoon prayer which divided the views of the Muslims. The first group was of the opinion that, when the Prophet said they should not say the afternoon prayer until they reached Qurayza, it meant that he was encouraging them to go faster to reach Qurayza. In other words, he was saying "You should be in Qurayza by the afternoon."⁵³⁵ Therefore, this group preferred not to delay the afternoon prayer and they prayed in the road. On the other hand, the other group took the command of the Prophet literally and therefore they delayed the afternoon prayer until they arrived in Qurayza. When the Prophet learned of what the two groups had done, he did not find fault with either of them.⁵³⁶ Indeed, it is clear from that story that Prophet Mohammed did not object to those who carried out his order literally, not thinking of the reason for his order. In contrast, neither did he object to the group who had thought about the reason for his order. Therefore, this means two things: first, the Prophet was encouraging the Muslims to exercise *Ijtihad* and, secondly, because he did not favour one view over the other means that he was willing to accept different opinions.⁵³⁷ In addition, the Prophet gave his approval to Omar Ibn al-Aas when he was the Imam of the Muslims and he did not wash for prayer from the *janaabah* which is a "state of major ritual impurity caused by any contact with semen." The state of *janaabah* renders Muslims unfit for the performance of ritual duties, such as prayer, until they purify themselves through

⁵³³ Yusuf al-Qaradawi, *Ijtihad in Islamic law* (Dar Al-Qalam for publication and distribution 1996) p.23,24

⁵³⁴ In Sunni Islam, the title is reserved for the founders of the four official schools of Islamic law, although modern Islamic reformers call for the revival of *ijtihad* as a means of accommodating new ideas and conditions

⁵³⁵ al-Qaradawi, *Ijtihad in Islamic law* p.40

⁵³⁶ Muhyiddin Afifi, 'Mohammed Shaltout Structural Ijtihad' (2015) The Ministry of the Religious Affairs

⁵³⁷ al-Qaradawi, *Ijtihad in Islamic law* p.41

complete ablution (*ghusl*),⁵³⁸ preferring the *tayammum* which is “used In the absence of water (when) ablutions might be performed by rubbing one's hands against clay or sand and passing them over the face and arms.”⁵³⁹ When the Prophet was informed of his behaviour, he asked Omar Ibn al-Aas about it. Omar replied that the weather was too cold for washing and he quoted a verse from the Qur'an which said: “And do not kill yourselves [or one another]. Indeed, Allah is to you ever Merciful.”⁵⁴⁰ The Prophet smiled in reply and did not oppose his *Ijtihad*.⁵⁴¹

Moreover, the Prophet Mohammed encouraged the practice of *Ijtihad* even if the *mujtahid*⁵⁴² made a mistake as, according to the Prophet, “If a judge makes a ruling, striving to apply his reasoning (*Ijtihad*) and he is correct, then he will have two rewards. If a judge makes a ruling, striving to apply his reasoning and he is mistaken, then he will have one reward.”⁵⁴³

Furthermore, the Prophet Mohammed emphasised the significance of using *Ijtihad*, especially in the case of the absence of clear provisions in the Qur'an or Sunnah. “When the Messenger of Allah intended to send Mu'adh ibn Jabal to the Yemen, he asked: “How will you judge when the occasion of deciding a case arises?” He replied: “I shall judge in accordance with Allah's Book.” He asked: “(What will you do) if you do not find any guidance in Allah's Book?” He replied: “(I shall act) in accordance with the Sunnah of the Messenger of Allah.” He asked: “(What will you do) if you do not find any guidance in the Sunnah of the Messenger of Allah and in Allah's Book?” He replied: “I shall do my best to form an opinion and I shall spare no effort.” The Messenger of Allah then patted him on the breast and said: “Praise be to Allah who has helped the messenger of the Messenger of Allah to find something which pleases the Messenger of Allah.”⁵⁴⁴

⁵³⁸ Esposito, *The oxford dictionary of Islam* p.158

⁵³⁹ Ibid p.341

⁵⁴⁰ , ‘The Holy Quran.’ (4:29)

⁵⁴¹ al-Qaradawi, *ijtihad in Islamic law* p.40

⁵⁴² One who exercises independent reasoning (*Ijtihad*) in the interpretation of Islamic law. Qualifications include training in recognized schools of Islamic law and extensive knowledge of the Quran and hadith)

⁵⁴³ Albukhari, *SAHIH BUKHARI* No.6919

⁵⁴⁴ Dawud and Ahmad, *Sunan Abu Dawud* No.3592

Additionally, the Qur'an encourages *Ijtihad* as it says: "and whose affair is [determined by] consultation among themselves."⁵⁴⁵ Muhyiddin Afifii argues that this verse concerning counselling means searching for the right thing in contemporary matters using the Qur'an and the Sunnah; in other words, "practising *Ijtihad*".⁵⁴⁶ Kamali argues that the Qur'an encourages people who have knowledge to understand the Qur'anic verses in order to elicit provisions; this should be a tool to applying truth and justice.⁵⁴⁷ The Qur'an states: "Will they not meditate on the Qur'an, or do they have locks on their hearts?"⁵⁴⁸ On the other hand, Kamali argues that the Qur'an encourages people who do not have knowledge to ask people who do have knowledge in order to obtain the correct answer and avoid mistakes in interpreting the Qur'anic texts.⁵⁴⁹ It says: "Then ask those who have knowledge if yourselves do not know."⁵⁵⁰

To sum up, the Prophet Mohammed, whose exemplary behaviour is a source of law, encouraged Muslims to use *Ijtihad* while also encouraging them not always to take the texts of Islam literally but to explore further. Finally, the Prophet inspired Muslims to embrace *Ijtihad* even with the possibility of error. The next section looks at the notion of *Ijtihad* after the death of Prophet Mohammed.

⁵⁴⁵ , 'The Holy Quran.'(42:32)

⁵⁴⁶ Afifi, 'Mohammed Shaltout Structural Ijtihad'(2015) p.34

⁵⁴⁷ Mohammad Hashim Kamali, *Principles of Islamic jurisprudence* (The Islamic Text Society 2003)

⁵⁴⁸ , 'The Holy Quran.'(47:24)

⁵⁴⁹ Kamali, *Principles of Islamic jurisprudence*

⁵⁵⁰ , 'The Holy Quran.' (16:24)

5.4 *Ijtihad* after the death of Prophet Mohammed

The rule of Omar bin al-Khattab was a new era where the Islamic state expanded and overlapped with many cultures; many regions were subjected to the rule of the Islamic state and this led Omar to face many issues that no Muslims had faced before. For this reason, Omar bin al-Khattab was remarkable in using *Ijtihad* as he was not only using *Ijtihad* concerning matters that did not exist in the Qur'an and Sunnah, he was also using *Ijtihad* even in matters that were mentioned in Islamic texts. In this, he was looking beyond the text to consider the intention and purpose of the text or, in other words, he was examining the spirit of Islamic law. There are many examples of Omar bin al-Khattab using *Ijtihad*.⁵⁵¹ One of these examples is that, although the Qur'an ordered that the hands of thieves should be cut off when it says: "[As for] the thief, the male and the female, amputate their hands in recompense for what they committed as a deterrent [punishment] from Allah",⁵⁵² Omar decided to stop cutting off the hands of thieves in the Alrmadh year as, in that year, famine spread throughout the Islamic state and people began to steal food to combat their hunger. Omar, in this matter, thought beyond the Qur'anic text to the Islamic spirit as he said that the Qur'an's intention behind such a punishment for theft was not to deter thieves but to maintain a safe and healthy community. In this case, Omar found that, to mete out such a severe punishment to those who stole because they were hungry, was contrary to the spirit of Islamic Law and so decided to halt the punishment for that year.⁵⁵³

Furthermore, in another example, which shows how Muslims' rights were protected, Omar thought beyond the Qur'anic text. According to the Qur'an, "*Zakah*"⁵⁵⁴ expenditures are only for the poor and for the needy and for those employed to collect *Zakah* and for

⁵⁵¹ Kamali, *Principles of Islamic jurisprudence*

⁵⁵² The Holy Quran (5:38)

⁵⁵³ Afifi, 'Mohammed Shaltout Structural Ijtihad'(2015) p.40

⁵⁵⁴ Payment made annually under Islamic law on certain kinds of property and used for charitable and religious purposes, one of the Five Pillars of Islam

bringing hearts together [for Islam].”⁵⁵⁵ This verse allows those who bring hearts together for Islam the right to receive *Zakah*. However, Caliph Omar refused to give such people the *Zakah*. However, during his rule, the Islamic state had already become stronger and more stable than before and there was no longer any need to encourage new converts to Islam. Therefore, he decided that, owing to the situation at that time, giving the *Zakah* to this group would be contrary to the public welfare.⁵⁵⁶ Moreover, although Islamic texts assert that four-fifths of any booty should be divided among the conquerors, Caliph Omar, when his forces invaded Iraq and the Levant, decided only to divide the moveable property among the conquerors while he refused to divide the lands. Omar argued thus: “If I distribute the lands, how can I spend on the poor people of Iraq and the Levant? And how I can spend on stationed armies who are supposed to protect the new border?” In this case, Omar “preferred the general benefit of the Muslims to that of the individuals.”⁵⁵⁷ This was because he placed the interests of the people of Iraq and the Levant over those of their conquerors. Likewise, Omar felt that the interests of Muslim women outweighed the interests of Huzaifa ibn al-Yaman even though the Qur’an allows men to marry women who belong to another religion, saying: “And [lawful in marriage are] chaste women from among the believers and chaste women from among those who were given the Scripture before you.”⁵⁵⁸ However, Caliph Omar, when he was informed that a companion, Huzaifa ibn al-Yaman, was married to a woman from another religion, he sent a letter to him asking him to divorce her. Al-Yaman replied, asking, “Is that unlawful in Islam?” The Caliph responded that it was not unlawful in Islam but told him, however: “I’m afraid that Muslim men, following you as a model and marrying non-Muslim women for their beauty, could harm Muslim women.” Therefore, for the general interest of the Islamic state, Al-Yaman was convinced by Omar’s point of view and he divorced her.⁵⁵⁹ It is obvious from Caliph Omar’s *Ijtihad* that he was not only complying with religious texts, he was applying juristic reasoning to consider the interests of contemporary reality and the public welfare. In this regard, Amira Mashhour argues that

⁵⁵⁵ , ‘The Holy Quran.’(9:60)

⁵⁵⁶ Shah, *Women, the Koran and international human rights law: the experience of Pakistan* p.80

⁵⁵⁷ Ahmad Hasan, *The early development of Islamic jurisprudence*, vol 17 (Adam Publishers 1994) p.121

⁵⁵⁸ , ‘The Holy Quran.’(5:5)

⁵⁵⁹ Afifi, ‘Mohammed Shaltout Structural Ijtihad’(2015) p.42

Caliph Omar was flexible enough to change social conditions in less than ten years after the death of the Prophet Mohammed so “how can we not be equally flexible about social change after 1400 years?”⁵⁶⁰

Thus, *Ijtihad* did not cease after the death of the Prophet and companions of the Prophet, such as Caliph Omar, who carried the banner of Islam after the Prophet, and was one of the people to apply Islamic law most carefully; he expanded the use of *Ijtihad*.

⁵⁶⁰ Mashhour, 'Islamic law and gender equality: Could there be a common ground?: A study of divorce and polygamy in Sharia Law and contemporary legislation in Tunisia and Egypt'(2005) p.591

5.5 The *Ijtihad* of the four Islamic schools

In the second century, the Islamic state expanded more and more as countries such as Iraq and the Levant, and Egypt, joined the Islamic state and overlapped with many other civilisations such as the Roman civilisations where the Islamic state was included among a variety of different customs and cultures. As a result of that expansion, jurisprudential efforts also expanded since they faced a variety of subjects and issues where what challenged a jurist in one region was different from what challenged another in a different area. For example, Muslims in Iraq were influenced by the culture of the Persians and consequently, the ideology of an Iraqi jurist differed from that of a jurist in the Levant who was influenced by the Roman civilisation. These facts contributed to the emergence of the four schools since each school emerged from a different region of the Islamic state; moreover, each school had a different method of exercising *Ijtihad*.⁵⁶¹

The first school to emerge in the Islamic state was the Hanifi School, which belonged to Abu Hanifa, al-Numan ibn Thabit ibn Zuta (699_767 AD/80_150 Hijrah). Abu Hanifa was born and lived in Iraq and therefore his school was influenced by the situation there. For example, there were many who referred to the Hadith in Iraq while Abu Hanifa adhered strictly to the Sunnah; as a result, he examined the Hadith very carefully.⁵⁶² Moreover, as Iraq was one of the most urbanised regions in the Islamic state, as well as one which most overlapped with other cultures, Abu Hanifa exercised *Ijtihad* with regard to new issues in Islam as he expanded more than the other schools in using *Istihsan*.⁵⁶³ Furthermore, Abu Hanifa was the first Islamic scholar in the history of Islam who predicted issues before they occurred and made jurisprudence provision for them in case they ever happened.⁵⁶⁴ One of the main advantages of the Abu Hanifa school is that it takes care of personal interests since Abu Hanifa believed that wasting one's personal freedom was more

⁵⁶¹ Abul-Rahman Adawi, *Al-Fiqh al-Ijtihady wa aemat al-alam (discretionary fiqh (and its prominent imams* (AL-Mohammedia Printing House 1996) p.13

⁵⁶² Diab Omar, *Researches in discretion* (Dar AL-Nadah AL-Arabia 1995) p.144

⁵⁶³ A method whereby a jurist may prefer one interpretation over another) and analogy

⁵⁶⁴ Adawi, *Al-Fiqh al-Ijtihady wa aemat al-alam (discretionary fiqh (and its prominent imams* p.13

harmful than the damage which was intended to protect. For instance, he believed that if an adult woman married herself to someone who was not her equal, this would be less harmful than wasting her personal freedom by stipulating that her guardian should organise her marriage.⁵⁶⁵ For this reason, unlike other schools, the Abu Hanifa School concluded that it is permissible for a woman to marry without her guardian's permission. Due to its flexibility, the Hanifa School has spread into many regions of different races in the Islamic world where it is distinguished by its ability to cope with new conditions.⁵⁶⁶

Maliki, established by Maliki ibn Anas al-Asbahi (711_795 AD/93-179 Hijrah), was the second school to emerge in the Islamic world. Maliki was born in Al Medina and this school largely depends on the Sunnah and the elicitations of the Companions for its form of jurisprudence. In addition, unlike Abu Hanifa, Maliki uses reasoning to only a small degree while the Abu Hanifa School largely uses reasoning. In fact, this may be due to the different regions that the scholars came from as Abu Hanifa came from Iraq where overlapping cultures led him to face issues requiring him to expand his reasoning. Maliki, on the other hand, came from Al Medina where the situation had not much changed from the era of the Companions.⁵⁶⁷

The third Islamic school is the Al Shafei School, established by Muhammed ibn Idris, Al Shafei (767_819 AD/150-204 Hijrah). Al Shafei was born in the Levant and later travelled a great deal through Mecca, Egypt and Iraq. Al Shafei was the first Islamic scholar who gave a role to *Ijtihad*. This was called "assets of jurisprudence" and was intended as a guide for Muslims in exercising *Ijtihad*. In addition, it is interesting to note that although Al Shafei was one of Maliki's students and respected him, Al Shafei, however, used an independent method and independent *Ijtihad* as he did not imitate the school of Maliki. For example, Maliki believed that *Istihsan* was nine-tenths of Islamic science while, in contrast, Al Shafei

⁵⁶⁵ Adawi, *Al-Fiqh al-Ijtihady wa aemat al-alam (discretionary fiqh (and its prominent imams* p.78

⁵⁶⁶ Ibid p.78

⁵⁶⁷ Asghar Ali Engineer, 'Islam, Women, and Gender Justice' (2001) What Men Owe to Women: Men's Voices from World Religions 109

did not believe in *Istihsan*.⁵⁶⁸ In fact, Al Shafei stated that he had two schools of thought: the ancient and the modern. The ancient school took precedence when Al Shafei was living in Iraq; however, when he moved to Egypt, he devised a new school and adjusted many of the provisions he had put forward in the old school. The creation of Al Shafei's modern school stemmed from his collaboration with Egyptian scholars. He also experienced civilisations, cultures and social habits different from those in Iraq and Mecca.⁵⁶⁹ Indeed, Al Shafei did not copy Maliki, although he was one of his pupils, and so should be a model for contemporary scholars as many Islamic scholars today insist on copying traditional scholars. In addition, Al Shafei was flexible and adjusted many of his provisions when he faced a different reality in Egypt.⁵⁷⁰

Ahmad Ibn Hanbal (780_855 AD/164-241 Hijrah) is the established fourth Islamic school. Ibn Hanbal was born in Bagdad in Iraq and, during his life, the Islamic nation suffered a great affliction when a group of people tried to change the rules of Islamic law, as well as attempting to introduce fallacious concepts regarding these laws. As Ibn Hanbal was a well-known scholar, the ruler, Al-Mamoon, who was convinced by the concepts of that group, tried to force Ibn Hanbal to declare that the Qur'an was not a revelation from God but was merely a creation. Ibn Hanbal refused make such a declaration and, as a result, the ruler put him in prison and tortured him in an attempt to force him to declare that the Qur'an was devised by man; however, Ibn Hanbal refused to assert this.⁵⁷¹ From the position of Ibn Hanbal, it could be concluded that one of the most important precepts that the *mujtahid* should adhere to is not to allow their thoughts to be swayed by political issues and not to support the religious views of rulers if they are incorrect. The conflicts in the era of Ahmad Ibn Hanbal may have affected his interpretations of the Qur'an and the Sunnah as he used *Istihsan* and analogy rarely, perhaps because he was trying to avoid making his *Ijtihad* overlap with the thoughts of his abusers. However, the thoughts of Ibn Hanbal were conservative as he believed that, in any Islamic era, it is prohibited not to

⁵⁶⁸ Adawi, *Al-Fiqh al-Ijtihady wa aemat al-alam (discretionary fiqh (and its prominent imams* p.98

⁵⁶⁹ Ibid p.99

⁵⁷⁰ Ibid p.101

⁵⁷¹ Ibid p.106

have *mujtahid*.⁵⁷² Indeed, Ibn Hanbal was aware that each Islamic era will experience different circumstances and diverse realities so, therefore, there must be *mujtahid* who understand these circumstances and who will then assess the Islamic provisions in the light of them.

To sum up, the four Islamic scholars, whose works still serve as guiding principles for Muslims up until now, all came from a different era and lived in different situations. Therefore, each of them had an independent interpretation of the Qur'an and the Sunnah and, while none of them adopted another tradition, they worked hard to make provisions in the spirit of Islamic law which would suit the ages and situations in which they lived.

The practice and spirit of *Ijtihad* was unfortunately not followed in later years as some Muslim scholars believed that the gate of *Ijtihad* was closed and they decided to follow the four schools: i.e., they started *taqlid*.⁵⁷³

5.6 *Ijtihad* and *taqlid*

Many Islamic scholars still believe that the *Ijtihad* gate has closed and Muslims no longer need it. In addition, some Islamic scholars believe that every issue can be resolved by reference to the views and analyses of traditional scholars such as Ahmad ibn Hanbal or Abu Hanifa. Conversely, others believe that *Ijtihad* should be only applied to new issues which did not exist in the era of the traditional scholars; therefore, for example, there is no provision regarding drugs which were never covered by the traditional scholars.⁵⁷⁴ However, these arguments ignore contemporary reality as each era has its own conditions, problems and needs. Jamal Badawi argues that Muslim scholars today should avoid *taqlid*.⁵⁷⁵ Moreover, he asserts: "They should realize that even the greatest of jurists

⁵⁷² al-Qaradawi, *ijtihad in Islamic law* p.44

⁵⁷³ Imitation. Conformity to legal precedent, traditional behavior, and doctrines. Often juxtaposed by reformers with *ijtihad*, independent reasoning based on revelation. Traditionally, legal precedent is considered binding in Islamic law, but *taqlid* has acquired a negative connotation among modern reformers, who use the term to refer to cultural and intellectual stagnation and unwillingness to experiment with new ideas.

⁵⁷⁴ Wael B Hallaq, 'Was the gate of *ijtihad* closed?' (1984)16 International Journal of Middle East Studies 3 p.16

⁵⁷⁵ Badawi, *Gender equity in Islam* p.35

are fallible humans, whose interpretations have been affected by the culture and circumstances under which they have lived.”⁵⁷⁶ Furthermore, Badawi believes that Muslims today need a fresh interpretation of the Islamic texts as many of the interpretations of the traditional scholars are no longer suitable for our lives.⁵⁷⁷

Amna Arshad states that *taqlid* remains the dominant approach today among most Islamic scholars, effectively "closing of the door of *ijtihad*".⁵⁷⁸ In this regard, Ahmad ibn Hanbal himself criticised those who practised *taqlid*, arguing that they should not copy him or copy Maliki or any other scholar, but should take their provisions from where they (i.e. Maliki and Hanbal) took theirs.⁵⁷⁹ Imam Maliki argued that everyone's words can be accepted or not, except those of the Prophet Mohammed whose words must be accepted.⁵⁸⁰ In his argument, Maliki was meaning that Muslims should not copy any Islamic provision without thinking, even if that provision comes from a remarkable scholar. In addition, a principle of one of the most significant traditional scholars was that Islamic provisions should be changed according to the era, the place and the time.⁵⁸¹

Omar Al Qadi argues that leaving *Ijtihad* and keeping *taqlid* is contrary to Islamic law. In addition, he asserts that resorting to the traditional religious provisions, without constantly thinking about differences in the time and circumstances, will lead to inappropriate Islamic law.⁵⁸² Moreover, Al Qadi argues that many of the modern Islamic scholars, if asked about a specific issue, will, as a first step, review the judgements of traditional scholars. However, the traditional doctrine is a collection of advisory opinions to resolve problems at a particular place and at a particular time so much of this advice may not applicable in the current era.⁵⁸³

⁵⁷⁶ Badawi, *Gender equity in Islam* p.35

⁵⁷⁷ Ibid p.35

⁵⁷⁸ Amna Arshad, 'Ijtihad as a Tool for Islamic Legal Reform: Advancing Women's Rights in Morocco' (2006)16 Kan JL & Pub Pol'y 129 p.134

⁵⁷⁹ Ibn al-Qayyim, *Aalam almuaqqiein* (The House of scientific books. 1991) p.54

⁵⁸⁰ Arshad, 'Ijtihad as a Tool for Islamic Legal Reform: Advancing Women's Rights in Morocco' (2006) p.134

⁵⁸¹ Ibid p.134

⁵⁸² Omar AL-Qadi, *Reviving discretion in the islamic culture* (Dar Al Nahda Al Arabiah 1993) p.94

⁵⁸³ Ibid p.94

Al Qadi argues that, for a true revival of *Ijtihad*, Islamic scholars should examine the problems of contemporary life in the light of the Qur'an and the Sunnah. At the same time, they should set aside the traditional doctrine, which is now a kind of valuable heritage with consultative significance; nevertheless, it must be non-mandatory.⁵⁸⁴

In fact, if contemporary Islamic scholars insist on keeping hold of *taqlid*, this will be an obstacle to the development of Islamic law and an obstacle to evaluating human rights in Islam, particularly with regard to women's rights. The subsequent section argues in detail the significance of *Ijtihad* in evaluating Islamic law.

5.7 The significance of *Ijtihad* in contemporary life

If *Ijtihad* was necessary in each Islamic era, nowadays *Ijtihad* may be more significant than ever before owing to the massive changes in lifestyles, along with the technological and industrial revolutions going on in the world. Al Qardawi argues that it is ignoring reality if we claim we are able to find solutions in the traditional Islamic schools to our modern-day problems.⁵⁸⁵ Rachel Code argues that, "without *Ijtihad*, the striving to interpret the Quran and Sunna in the light of today's societal needs will leave the Quran and the essential message of Islam in the past with little or nothing to say to guide today's Muslims."⁵⁸⁶ An-Naim also argues that the application of traditional law in the present era, especially in the field of public law, will cause severe difficulties. Therefore, there must be a fresh vision, as well as a modern concept of Islamic law, which stems from the same Islamic sources.⁵⁸⁷ Knut S. Vikor argues that *Ijtihad* is a "prerequisite for the survival of Islam in a modern world"⁵⁸⁸ while Abdul-Haq Himmich asserts that Islamic law, whose application is valid for Muslims anywhere and at any time, is flexible enough to accommodate contemporary changes and therefore jurists should make an adequate effort to cope with those

⁵⁸⁴ AL-Qadi, *Reviving discretion in the islamic culture* p.95

⁵⁸⁵ al-Qaradawi, *ijtihad in Islamic law* p.194

⁵⁸⁶ Rachel Anne Codd, 'A critical analysis of the role of ijtihad in legal reforms in the Muslim world' (1999)14 Arab law quarterly 112 p.115

⁵⁸⁷ Codd, 'A critical analysis of the role of ijtihad in legal reforms in the Muslim world'(1999) p.113

⁵⁸⁸ Knut S Vikør, *The development of ijtihad and Islamic reform, 1750-1850* (1995) p.2

changes.⁵⁸⁹ Mohammad Abdu (cited in Codd) asserts that that *Ijtihad* is the only way to adapt Islamic principles to the needs of societies in the current era.⁵⁹⁰

Al Qardawi states that the *Ijtihad* that we need today should be divided into two: *Ijtihad* and creative *Ijtihad*. Selective *Ijtihad* searches for provisions regarding a particular issue by studying the traditional scholars and different studies on that issue, afterwards selecting and applying the most appropriate while taking into account the requirements of the time.⁵⁹¹ For instance, as mentioned before in Chapter Three, traditional scholars differed with regard to the possibility of women choosing for themselves who and when to marry when they became adults. Maliki, Hanbali and Shafei all believed that this could not happen as a woman needed her guardian's consent whereas Hanafi considered that a woman, once an adult, could marry without the consent of her guardian. In this regard, this could be seen as selective *Ijtihad*.⁵⁹² In addition, the Egyptian parliament used selective *Ijtihad* in the 1970s on the codification of transactions law; advice was collected selectively from the four traditional schools.⁵⁹³

Al Qardawi asserts that modern times and modern social conditions have given women a chance to learn, work and be more aware than ever before. Therefore, Hanafi's view concerning this issue may be the most applicable for modern times.⁵⁹⁴ Many modern Islamic scholars believe that selective *Ijtihad* is only copying the provisions and thoughts of traditional scholars while, in the modern era, we rather need the creative form of *Ijtihad*. Al Qardawi believes in the significance of creative *Ijtihad* as there are many issues which never occurred in the eras of the traditional scholars and yet these issues need provisions to be made. For example, Muslims need provisions regarding organ transplants. Moreover, Muslims need provisions using creative *Ijtihad* for dealing with bank transactions. Accordingly, creative *Ijtihad* means studying a new issue or incident and

⁵⁸⁹ Abdul-Haq Himmich, 'Contemporary Fiqh issues' (2003) Sharia and Islamic Studies p.14

⁵⁹⁰ Codd, 'A critical analysis of the role of ijthad in legal reforms in the Muslim world'(1999) p.122

⁵⁹¹ al-Qaradawi, *ijtihad in Islamic law* p.69

⁵⁹² Ibid p.70

⁵⁹³ AL-Qadi, *Reviving discretion in the islamic culture* p.176

⁵⁹⁴ al-Qaradawi, *ijtihad in Islamic law* p.75

trying to make a provision for it when the issue was never encountered by traditional scholars. In addition, creative *Ijtihad* could involve re-visiting an issue because of changes in circumstances from those that existed when traditional scholars made their provision for it.⁵⁹⁵ For example, traditional scholars made the provision that it was prohibited for women to travel without a *mahram*⁵⁹⁶ while, using creative *ijtihad*, Al Qardawi offers a different provision as he believes that women in this age should not be forbidden from travelling alone, something which was forbidden by the traditional scholars. This was originally forbidden as it was not safe for women to travel as travelling at that time took days, months and sometimes years. In addition, there were often dangerous bandits so women at that time needed a *mahram* to protect them. Today, conditions have changed and travelling has become very safe and so it is no longer forbidden for women today to travel without a *mahram*.⁵⁹⁷ Furthermore, many scholars exercised creative *Ijtihad* with regard to the issue of pilgrimage. One of the pilgrimage protocols is to throw pebbles in a certain place and at certain times. The time should be in the afternoon but, the enormous numbers of Muslims throwing the pebbles in the afternoon would cause overcrowding and stampedes which would harm many other Muslims. In this regard, Abdullah al-Mahmoud (cited in al-Qardawi) stated that Muslims on a pilgrimage could throw the pebbles before the afternoon, arguing that the Islamic religion aims to make life easier for Muslims, not to harm them, and, since throwing the pebbles in the afternoon might harm them, they could throw them before the afternoon began.⁵⁹⁸ Furthermore, Saudi Arabia exercised creative *Ijtihad* in setting the penalty for the crime of rape, a penalty that did not exist in the era of the traditional scholars. Therefore, if someone abducts a woman and rapes her, in Saudi criminal law, he deserves a death sentence.⁵⁹⁹

Indeed, most Islamic scholars today exercise selective *Ijtihad* but rarely use its creative form perhaps because modern scholars may fear that their creative *Ijtihad* will not be

⁵⁹⁵ al-Qaradawi, *ijtihad in Islamic law* p.80

⁵⁹⁶ maharim, is used to refer to a man's close female relatives. In Islamic law, mahram connotes a state of consanguinity precluding marriage.

⁵⁹⁷ Yusuf al-Qaradawi, *Islamic law is valid on every time and place*. (The House of Sahwa for publication and distribution. 1993) p.108,109

⁵⁹⁸ al-Qaradawi, *ijtihad in Islamic law* p.74

⁵⁹⁹ Yusuf al-Qaradawi, *Reasons of changing provisions on our time*, vol France (The commission of writings and translations. 2016) p.57

accepted by Muslims. Muslims may not accept the creative form of *Ijtihad* for two reasons: first, many Muslims are not yet prepared to receive new interpretations of the traditional schools and, secondly, a lack of the ability to persuade may cause creative *Ijtihad* to be rejected by Muslims as not every scholar of the Qur'an and the Sunnah is eligible to practise *Ijtihad* although any scholar who does exercise *Ijtihad* should be capable of persuasion. In addition, the *mujtahid* must have sufficient experience and knowledge of the conditions of the people and their needs.⁶⁰⁰

However, there are still many scholars who have had sufficient courage and have been able, through their *Ijtihad*, to change some regulations in their countries. For example, in Egypt, Islamic scholars have been successful in using creative *Ijtihad* as they changed one of the provisions of inheritance law. The traditional law stated that no inheritance could be granted for orphaned grandchildren if the deceased had a surviving son. Egyptian scholars reformed this provision so that the grandchildren of a deceased person could inherit the share to which their parent would have been entitled if he/she was alive, whether or not there was a surviving son of the grandfather or unless the grandfather had already allocated an amount of the heritage as a gift or bequest to the grandchildren (ARAB). More examples are offered in the section on *Ijtihad* as a tool in advancing women's rights.

5.8 The flexibility of *Ijtihad*

This section discusses the extent to which Islamic law keeps abreast of the changes in different situations and different times. This part seeks to assert that Islamic law is flexible enough to keep abreast of developments in human rights, and especially in women's rights. This section first defines the Islamic texts that can be subject to *Ijtihad* as well as those texts where it is impossible to exercise *Ijtihad*. After this, the section presents examples to show the flexibility of the Islamic provisions in responding to different

⁶⁰⁰ AL-Qadi, *Reviving discretion in the islamic culture* p.209

conditions, time, places and customs.

Islamic texts divide into two texts that have a definite inference and those that have no definite inference. For instance, the verse that states: ⁶⁰¹“Prohibited to you [for marriage] are your mothers, your daughters, your sisters” has a definite inference and means it is prohibited for men to marry their mothers, etc.; therefore, *Ijtihad* with regard to this verse is not possible. However, the overwhelming majority of Islamic texts do not have a definite inference as Islamic law gives Islamic societies the flexibility to interpret according to time, place and circumstances, on the condition that the principles and objectives of Islamic law are not deviated from.⁶⁰² One notable example of a text that does not have a definite inference is the verse that states: “And when you divorce women and they have fulfilled their term, do not prevent them from remarrying their [former] husbands if they agree among themselves on an acceptable basis.” Traditional scholars differ in their explanation of this verse with Abu Hanifa offering a provision that a woman could marry without the permission of her guardian when she became an adult. Other scholars, however, such as Ibn Hanbal, interpreted this verse as meaning: “Do not prevent divorced women from returning to their husbands if they are reconciled.” In this regard, some contemporary scholars believe that the interpretation of Abu Hanifa may more suitable for current times. Moreover, scholars differ on the exact meaning of the period mentioned in the verse: “Divorced women remain in waiting for three periods.”⁶⁰³ Some Islamic scholars conclude that the period mentioned in this verse means a month while others suggest that it means menstruation.⁶⁰⁴

Many Islamic scholars believe that *Ijtihad* should only be with regard to new issues that are not mentioned directly in the texts of the Qur'an or the Sunnah: for instance, using *Ijtihad* in the prohibiting of drugs. However, Al Qardawi believes that it should also include reinterpreting the Islamic texts in line with modern requirements which had previously been interpreted by traditional scholars. Moreover, Al Naim suggests that it is the duty of

⁶⁰¹ Mustafa Fayad, *The importance of jurisprudence in the modern era*. (Al Azhar university 2000) p.45

⁶⁰² al-Qaradawi, *Islamic law is valid on every time and place*. p.76

⁶⁰³ 'The Holy Quran.' (2:228)

⁶⁰⁴ Ibid (2:275)

a Muslim scholar today to exercise *Ijtihad*, even regarding clear injunctions in the Islamic text, as long as it does not tamper with the Islamic message.⁶⁰⁵ For instance, although the traditional scholars prohibited usurious loans based on the verse that states: “But Allah has permitted trade and has forbidden interest”,⁶⁰⁶ the European Council for Fatwa permitted Muslims to use such loans if they wished to buy a residence. Permission for this is built on the basis of Islamic legitimacy which states that “Necessities permit the forbidden.” Therefore, the Council recognised the necessity for Muslims to own houses rather than keep paying rent and being under pressure with the possibility of eviction if the rent was not paid.⁶⁰⁷

Moreover, changing situations, time, places, customs and information all are logical reasons for changing the Islamic provisions. As an example, although the traditional scholars stated that a judge should not accept a testimony from anyone who was eating on the road or who habitually revealed his head or his beard, this provision was made in the era of the traditional scholars when it was the custom of the people to consider such behaviour irresponsible.⁶⁰⁸

Different situations may be another reason for adjusting Islamic provisions. For instance, a man came to Ibn Abbas and asked him if God forgave murderers. Ibn Abbas answered him that God did not forgive such a crime. When the man left, the friends of Ibn Abbas turned to him and said, “You gave a different provision previously.” Ibn Abbas’s response to them was: “When I looked at the man, he looked so angry I believe he intended to kill somebody and therefore I was trying to prevent him.”⁶⁰⁹ Ibn Abbas, in his provision to the man, was in conflict with the Qur’an as the Qur’an says, “O My servants who have transgressed against themselves [by sinning], do not despair of the mercy of Allah. Indeed, Allah forgives all sins. Indeed, it is He who is the Forgiving, the Merciful.”⁶¹⁰ In fact, Ibn

⁶⁰⁵ An-Na’im, *Toward an Islamic reformation: Civil liberties, human rights, and international law*

⁶⁰⁶ , ‘The Holy Quran.’ (2:275)

⁶⁰⁷ al-Qaradawi, *Reasons of changing provisions on our time* p.86

⁶⁰⁸ al-Qaradawi, *Islamic law is valid on every time and place*.p.126

⁶⁰⁹ al-Qaradawi, *Reasons of changing provisions on our time* p.63

⁶¹⁰ , ‘The Holy Quran.’ (39:53)

Abbas here offered a good example of *Ijtihad* as he knew that the spirit of the Islamic law was to protect the human soul. Hence, he wisely prevented the man from committing murder. However, if another man had murdered someone and came to Ibn Abbas afterwards to ask if God would forgive the murder, Ibn Abbas would have answered yes. Consequently, Ibn Abbas gave a different provision when the situation changed. Furthermore, the Prophet Mohammed said: “Do not sell something you do not have.”⁶¹¹ This means that a trader should not sell something that he does not own at the time of the sale. Therefore, although there is a clear text from the Prophet Mohammed, Islamic scholars decided to allow traders to sell something they did not own at the time of the sale, arguing that, during the era of the Prophet Mohammed, some sellers tended to buy fruits out of season and before they had grown, while sometimes there were problems and the crops never grew. Indeed, this caused many disputes among traders and customers. However, in contemporary times, similar problems rarely occur because there are a great many safeguards. Consequently, as this situation has changed from the era of the Prophet Mohammed, scholars have given a different judgement.⁶¹²

Changes in political and social factors could be another reason for changing interpretations of the Islamic texts. For instance, some traditional scholars made the provision that Muslims should fight non-Muslims to show their strength and to maintain their own countries. This was based on the verse, which says: “And fight against the disbelievers collectively as they fight against you collectively. And know that Allah is with the righteous [who fear Him].”⁶¹³ However, this interpretation is no longer valid today, especially given the existence of international laws and conventions. Indeed, it is more suitable to the situation today to take the interpretation of Al Shafei who interpreted that verse as saying that Muslim countries should dispense adequate military force in the land, air and sea to deter enemies, and to be capable of defending themselves when necessary.

⁶¹¹ Al-Nasa'i and bin Syu'aib, 'Sunan al-Nasa'i' (1991) No. 4613

⁶¹² AL-Qadi, *Reviving discretion in the islamic culture* p.96

⁶¹³ , 'The Holy Quran.' (9:36)

Changing information may be another reason for adjusting provisions. For instance, previously Islamic scholars differed on the provision regarding smoking in Islam. Some believed it is permissible while others believed that it is detestable. However, studies have shown that smoking is one of the main causes of cancer, which could lead to death. This information has led Islamic scholars almost to reach a consensus that smoking is forbidden as the Qur'an states: "And do not kill yourselves [or one another]. Indeed, Allah is to you ever Merciful."⁶¹⁴ Consequently, this new information made scholars change their provision.⁶¹⁵ Ibn al-Qayyim argues that the basis of Islamic law is the interests of the people as Islamic law intends to fill their lives with justice, mercy and benefits. Therefore, if any issue does not concern justice, mercy or benefits, it will be not be Islamic.⁶¹⁶

To sum up, as discussed above, on many occasions, scholars have offered different provisions due to differences in times, conditions, situations or customs. Indeed, as Al Qardawi argues, the main objective of Islamic law is to protect people's interests and thus it is flexible enough to make provisions on new issues or to make changes to previous ones to better those interests and advance human rights, particularly women's rights.⁶¹⁷ Consequently, the task of Muslim scholars is to make appropriate provisions which are derived from the spirit of Islamic law but which are also suitable for the prevailing time and conditions. The section which follows discusses the significance of *Ijtihad* in promoting and developing women's rights in Islamic law.

5.9 *Ijtihad* as a tool to advance women's rights

As discussed before, changing times, conditions, information or customs are all good reasons to adjust the Islamic provisions in terms of women's rights and many things have indeed been changed since the time of the traditional scholars. However, the provisions regarding women's rights have not been greatly adjusted by many governments, such as

⁶¹⁴ 'The Holy Quran.' (4:29)

⁶¹⁵ al-Qaradawi, *Reasons of changing provisions on our time* p.78

⁶¹⁶ al-Qayyim, *Aalam almuaqqiein* p.45

⁶¹⁷ Ibid p.48

in Saudi Arabia, since that time. Consequently, women face many difficulties in their lives. The sections which follow discuss how *Ijtihad* is a vital tool in evaluating women's rights.

It is important to note that most Muslim women tend to be religious and therefore they prefer not to contradict the provisions of Islam. However, at the same time, they would like to obtain and enjoy their rights although most Muslim women will not accept rights which involve a secular approach imposed by an international body separating them from their religion.⁶¹⁸ Therefore, to advance women's rights in Islam, and to allow women obtain their rights without feeling fear or guilt, women need *Ijtihad*. Indeed, women today need a fresh interpretation of Islamic texts to get rid of the interpretations that abused women's rights. For instance, the word of *quammah* or *wilayah*⁶¹⁹ is misused by some interpretations of the Qur'an and is used to discriminate against women and to permit inequities between the two genders.⁶²⁰ Another misinterpretation of the word *quammah* in Islam is one of the main reasons that has created the myth which claims that women are inferior to men, are guardians and are superior. Moreover, this misinterpretation of the Islamic text led to Tunisian law, until 1993, placing pressure on women to obey their husbands.⁶²¹

In addition, Egypt, for example, misuses the word "modesty" in the Qur'an which has led to so-called "honour crimes" being committed against women while other interpretations of the Islamic text have denied women the opportunity to take up leadership positions. These interpretations are indeed more a case of adapting religion to fit inherited cultures and values.⁶²² Zainah Anwar argues that:

⁶¹⁸ Al-Hibri, *Islam, law and custom: Redefining Muslim women's rights* p.3

⁶¹⁹ The concept of guardianship (*wilayah*). In Islamic law, the term refers to guardianship of minors. For minors or the mentally ill, the father serves as legal guardian in most systems of Islamic law. In Maliki, Hanbali, and Shafii Islamic law, a guardian has the legal authority to contract marriage on behalf of a previously unmarried Muslim woman. Hanafis and the Shii Jafaris permit the interference of a guardian only if the bride's dowry is insufficient or in the event she wishes to marry someone who is not her equal according to law.

⁶²⁰ Al-Razi, *Al tafsir Al kabir*

⁶²¹ Mashhour, 'Islamic law and gender equality: Could there be a common ground?: A study of divorce and polygamy in Sharia Law and contemporary legislation in Tunisia and Egypt' (2005) p.592

⁶²² *Ibid* p.594

“We felt the urgent need to read the Qur’an for ourselves and to find out if the text actually supported the oppression and ill-treatment of women. This process Sisters went through was the most liberating and spiritually uplifting experience for all of us. We took the path of Iqraa (“Read,” the first word revealed to Prophet Mohammad) and it opened a world of Islam that we could recognise, a world for women that was filled with love and mercy and with equality and justice. We need not look any further to validate our struggle. Women’s rights were rooted in our tradition, in our faith. We were more convinced than ever that it is not Islam that oppresses women, but interpretations of the Qur’an influenced by cultural practices and values of a patriarchal society, which regards women as inferior and subordinate to men.”⁶²³

Al Qardawi argues that if traditional scholars lived in this age, they might change many of their provisions. In fact, Al Qardawi may be right as if traditional scholars Islamic lived in this era they might well change many of their provisions regarding women as women today are very different from women in the past, and what previously did not violate women’s rights, could violate them today. Therefore, in contemporary reality, in order to maintain women’s rights, Islamic scholars should use *Ijtihad* to re-interpret many of the Islamic texts to be compatible with the position of women today.⁶²⁴ For instance, polygamy in the era of the Prophet Mohammed and the traditional scholars may not have been hurtful to women as Islam limited this to four wives only. In a society where polygamy had previously been unlimited, it was victory for women, therefore, when Islam stated the maximum number of wives a man could have.⁶²⁵ However, in many cases today, husbands who marry more than once are rarely just to their wives and rarely follow the Islamic principle regarding polygamy. Consequently, women are often victims of polygamy, which is contrary to the spirit of the Islamic law. For this reason, it was necessary for Islamic scholars to exercise *Ijtihad* to guarantee that women’s rights were

⁶²³ Mashhour, ‘Islamic law and gender equality: Could there be a common ground?: A study of divorce and polygamy in Sharia Law and contemporary legislation in Tunisia and Egypt’(2005) p.594

⁶²⁴ al-Qaradawi, *ijtihad in Islamic law* p.70

⁶²⁵ Wadud-Muhsin, *Quran and Women* p.83

not violated in cases of polygamy. Syrian Muslim scholars were successful in using creative *Ijtihad* to amend the Law of Syrian Personal Status (1953⁴²) regarding polygamy. According to the Qur'an, if a man is afraid of not treating his wives justly, he should marry only one. Using *Ijtihad*, Syrian scholars used this verse in the Qur'an as a legal formula and so now, in Syrian law, a judge has the right to prevent a husband from marrying for a second time if he is not wealthy enough to maintain both wives.⁶²⁶ In this regard, Tunisia took a similar step and, following the *Ijtihad* of Mohammad Mohammad Abdu, Tunisia created a law that prevents a husband from undertaking a polygamous marriage if he is not in a position to deal equitably among his wives. After that bold step, Tunisian scholars realised that, given the present social and economic conditions, it is impossible to ensure equity among wives and therefore decided to abolish polygamy altogether.⁶²⁷ Although Tunisia took a courageous step in exercising *Ijtihad*, it did not consider, for instance, a case where a woman might be ill and where her disease might prevent her from having children. In such a case, it might be better for her if her husband married a second wife rather than divorce her to re-marry in order to have children. Moreover, Morocco found a compromise approach using *Ijtihad* to protect women from the misuse of polygamy. In this regard, Moroccan Personal Status Law issued strong limitations on polygamy so that, if a husband wished to take another wife, he had to provide the judge with a convincing justification to gain his approval; in addition, he would need his first wife's approval.⁶²⁸ The new law introduced by Morocco is based on a fresh interpretation of the Qur'an. The Moroccan Jurists reached a decision, based on the Qur'an, that polygamy should be an exceptional practice, not a standard, as the Qur'an suggests that the standard is monogamy. Moreover, another example of *Ijtihad* in Moroccan Family Law is that a husband no longer has the right to divorce his wife merely by oral means. Therefore, a husband or wife who seeks a divorce must submit an application to the court and the court will then consider the request and reply in this regard. Amna Arshad argues that advanced divorce law in Morocco reflects the attempts of Moroccan jurists to restore

⁶²⁶ Codd, 'A critical analysis of the role of *ijtihad* in legal reforms in the Muslim world'(1999) p.123,124

⁶²⁷ Ibid p.124

⁶²⁸ Arshad, 'Ijtihad as a Tool for Islamic Legal Reform: Advancing Women's Rights in Morocco'(2006) p.139

Islamic principles while minimising divorces in the country since the Prophet Mohammed said that, of all lawful things, divorce was the most hateful to God.⁶²⁹ By using *Ijtihad*, in 1993, Egypt succeeded in modifying some articles of the Personal Status Code and the advanced version of this no longer requires a woman to obey her husband.⁶³⁰

In the modern era, medical technology has evolved and doctors today are able to reveal foetal abnormalities at an early stage in pregnancy. Therefore, in certain conditions, many mothers may prefer abortion. Traditional scholars differed as to the extent of the legality of abortion in Islam. The Maliki school argued that abortion is not permissible as he believed that this is killing a human being, which is forbidden in Islam. The Hanafi school said that abortion might be justified, with two conditions: if there was a reasonable cause, and also if the pregnancy had not exceeded four months as he asserted that, after four months, the foetus would be a living being while before that it would not yet be a human life. This judgement was linked to his belief that the beginning of life for a foetus was 40 days. However, science has proved that the foetal heartbeat starts on the sixth or seventh week and therefore, that period determined by the Hanafi school may not be valid today. The Hanbali school argued that it is permissible to abort a foetus if it has not completed 40 days as it was believed that, before this time, the foetus would not yet be a living creature and it would therefore not be considered as killing a human being. In this regard, the Fatwa Committee in Kuwait used both selective and creative *Ijtihad* to prevent doctors from carrying out an abortion on a woman whose pregnancy had gone beyond 120 days. However, such an operation would be permitted if the pregnancy had not exceeded 40 days, as long as both spouses consented. Moreover, the Commission approved abortion in two cases even if the pregnancy exceeded 120 days: first, if the pregnancy could pose a serious threat to the mother's life and, second, if the foetus was suffering from an incurable disease.⁶³¹ Exercising creative *Ijtihad*, Salih Al-Munajjid argued that it should be permissible for a woman who became pregnant as a consequence of rape to have an

⁶²⁹ Arshad, 'Ijtihad as a Tool for Islamic Legal Reform: Advancing Women's Rights in Morocco'(2006) p.139

⁶³⁰ Mashhour, 'Islamic law and gender equality: Could there be a common ground?: A study of divorce and polygamy in Sharia Law and contemporary legislation in Tunisia and Egypt'(2005) p.586,587

⁶³¹ al-Qaradawi, *ijtihad in Islamic law* p.87

abortion, as the existence of such a child would make the mother miserable. However, she should miscarry the foetus as soon as she discovered the pregnancy to avoid killing a living creature.⁶³²

Today, women are often negatively affected by a husband's misuse of his right to divorce his wife by word of mouth as often a husband divorces his wife in a moment of anger which leads to undesirable outcomes for them both. In Pakistan, in order to reduce these incidents, *Ijtihad* has been exercised by which, under the Muslim Family Law Ordinance, 1961, Article 7, if a husband intends to separate from his wife, he should first inform the Council of his repudiation. The Council will then allocate arbiters who will try to reconcile the couple but, if the reconciliation fails, the partner should wait 90 days until the divorce becomes effective. If the husband does not comply with these procedures, he will be punished by a fine, imprisonment, or both.⁶³³ Indeed, Pakistan's *Ijtihad* comes from the spirit of Islam as the Qur'an says, "And if you fear dissension between the two, send an arbitrator from his people and an arbitrator from her people. If they both desire reconciliation, Allah will cause it between them."⁶³⁴ As discussed in Chapter Two, Islam attempts to minimise divorce and, for this reason, the Qur'an suggests that if a dispute occurs between a couple, it is better for a third party to attempt to reconcile them. Pakistan transformed the moral instruction in the Qur'an and applied it to legal procedures.

With regard to transforming Islam's moral instruction and relating this to legal procedures, Bangladesh, in the case of *Rahman v. Begum* and others, offers a good example of *Ijtihad*.⁶³⁵ The judge of the High Court determined that a husband should not stop maintaining his divorced wife by the end of the *Iddah* period as he considered the Qur'anic verse which says: "And for divorced women is a provision according to what is acceptable - a duty upon the righteous."⁶³⁶ The traditional translation of this verse says

⁶³² Mohammed Munajjid, 'Abortions caused by rape' <<https://islamqa.info/ar/13317>> accessed 20/11/2016

⁶³³ Codd, 'A critical analysis of the role of ijtiḥād in legal reforms in the Muslim world'(1999) p.125

⁶³⁴ , 'The Holy Quran.'(4:35)

⁶³⁵ Codd, 'A critical analysis of the role of ijtiḥād in legal reforms in the Muslim world'(1999) p.125

⁶³⁶ , 'The Holy Quran.' (2:241)

that the husband should maintain his divorced wife during the *Iddah* period. This includes the provision of housing, goods, appliances and other goods, and that this should be done in an “acceptable way”. The judge noted, as the verse mentions, the amount of maintenance, which should be “acceptable”, while it does not mention the period of maintenance. Therefore, he decided that the husband should maintain his divorced wife until she remarried. In Pakistan, in the case of Begum v. Din, Judge Mohammad Shafei supported the judge in the case above, asserting that: “Reading and understanding the Quran implies the interpretation of it and the interpretation in its turn includes the application of it which must be in the light of the existing circumstances and the changing needs of the world.”⁶³⁷

Judge Mohammad Shafei recognised that *Ijtihad* should have a vital role in modern life as it is important to give vitality to Islamic law. Moreover, it is essential for the Islamic message to remain applicable to changes in societies through the ages. Furthermore, Shafei strongly opposed limiting *Ijtihad* to the interpretations of traditional scholars of Qur’anic and Hadith texts as he believed that this would lead to stagnancy in Islamic law. The judge called for Muslims to “awake out of their slumber”,⁶³⁸ saying they must interpret the Qur’anic verses and Hadith intelligently to draw from them general provisions that are applicable to where and when Muslims are living.⁶³⁹ Finally, the judge asserted that Muslims should read, understand and interpret the Qur’an apart from *taqlid*.

To sum up, in order to advance women’s rights through *Ijtihad* women need to: first, dispose of those interpretations that are affected by culture, and secondly, to come up with fresh interpretations that are more compatible with the position of women today.

⁶³⁷ Codd, ‘A critical analysis of the role of *ijtihad* in legal reforms in the Muslim world’(1999) p.112

⁶³⁸ Ibid p.126

⁶³⁹ Ibid p.126

5.10 More to be done

In the modern era, many more women have had educational opportunities and a lot of women have become more well qualified and better educated than men whereas most women in the era of the traditional scholars were housewives and raised children. Therefore, it is perhaps time to use creative *Ijtihad* in order to give men and women equal rights as witnesses in financial matters. As discussed earlier in Chapter Three, in the procedures to protect financial rights, Islamic law requires two male witnesses or a man and two women; this means that the witness of one man is equal to that of two women. Indeed, as discussed before, many scholars argue that making two women as witnesses equal to one man refers to the lack of experience in financial matters among women at that time.⁶⁴⁰ However, many women today are interested in financial matters as they are working in accounting, economics and finance, while many others work in banks, some of them succeeding in becoming a director of a company or a bank manager. For this reason, it does not make sense today that women are not given equal status as witnesses alongside men in financial matters. Therefore, creative *Ijtihad* should be exercised with regard to this issue. Indeed, it was only because women were more experienced about such issues as childbirth and virginity that their witness was accepted.⁶⁴¹ However, in this era, many men have become medical specialists in gynaecology and, for this reason, contemporary Islamic scholars assert that the witness of these doctors should be accepted in matters relating to pregnancy or childbirth. This is because they realise that accepting only women to bear witness to issues where men also have experience does not make sense. Thus, why is there delay in making the witness of women equal to that of men in financial matters when professional women exist in these areas? In fact, this may be due to male customs and traditions, the main reason for the discrimination between men and women in some Islamic states.

⁶⁴⁰ Sibai, *Woman between jurisprudence and law*. p.27,28

⁶⁴¹ Almaqdesi, *Almoghnee*

Indeed, *Ijtihad* should play a vital role in eliminating customs and traditions that abuse women and deny them many of their rights. In addition, some of the customs and traditions have led to interpretations of many of the Islamic texts out of their proper context.⁶⁴² For instance, as discussed in Chapter Three, it was masculine customs and traditions that led to the misinterpretation of the verse that states: “Men are in charge of women by [right of] what Allah has given one over the other and what they spend [for maintenance] from their wealth.”⁶⁴³ Although the verse refers specifically to the marital relationship, on the basis of the masculine interpretation of this, in many Muslim countries, women are deprived of their right to take up positions of leadership.⁶⁴⁴ Therefore, creative *Ijtihad* needs to be used with regard to this issue legally to give women equal opportunities to men in taking up any position.

Moreover, creative *Ijtihad* should be exercised in the matter of inheritance law in Islam regarding women. As discussed earlier in Chapter Three, the matter of masculinity or femininity is irrelevant in inheritance law in Islam while it is relevant to the financial circumstances of men and women. For instance, because of the greater responsibilities placed on males by Islamic law, it gives a man double the share of a woman. Traditional scholars assume that, in most cases, women will marry and their husbands will then carry the Islamic obligation to maintain them.⁶⁴⁵ However, some cases may not be covered by traditional scholars: for example, if a father dies and leaves a man and a woman where the woman is not married. In such cases, Al Sharwi argues, for instance, that it will be the fate of the woman to marry one day so it is reasonable to give her a half share as, in Islam, her husband will be financially responsible for her.⁶⁴⁶ However, what if this woman does not want to marry? What if she is ill and her illness prevents her marrying? Or what if she is a widow? These cases may need creative *Ijtihad* from the contemporary jurists as, in such cases, it may be more compatible with the spirit of Islamic law to give these women and men equal shares.

⁶⁴² Al-Hibri, *Islam, law and custom: Redefining Muslim women's rights* p.7

⁶⁴³ ‘The Holy Quran.’(4:34)

⁶⁴⁴ Shaarawy, *Women in the Holy Quran* p.123

⁶⁴⁵ al-Qaradawi, *Women Position in Islamic Life* p.23

⁶⁴⁶ Shaarawy, *Women in the Holy Quran* p.80

Today, diabetes and obesity-related diseases have spread while studies have shown the importance of sport in reducing obesity along with many other health benefits. In addition, it is a necessity for diabetics. As discussed before in Chapter Three, Islam encourages both men and women to take part in physical activities.⁶⁴⁷ However, many Islamic states only encourage men (without women) to do sport. For example, in Saudi Arabia, as a part of their study, men are required to take part in some physical activity classes while it is not a requirement for female students. In fact, this is due to culture as most of society in Saudi Arabia believes that only males need to strengthen their bodies by doing sports while women do not. This issue needs the exercise of *Ijtihad* by Islamic scholars. For instance, *Ijtihad* could emphasise the moral Islamic principle, which is to encourage physical activity, to make it a legal requirement for all schools for females to offer them physical activities.⁶⁴⁸

Finally, it is important to note that, although Islamic law encourages both men and women to be educated (as noted before in Chapter Three) and *Ijtihad* is one of the most important Shari'a sciences, the overwhelming majority of *mujtahid* in the Islamic world are men. This means that most of the Islamic law regulations are affected by the masculine point of view when some of these views are unwarranted and contrary to the spirit of Islamic law. For this reason, there is an urgent need in the Muslim world for women to engage in understanding Islamic law, Islamic jurisprudence and its interpretations, especially with regard to the jurisprudential issues that relate to women's affairs. There are some role models of such female scholars: for example, Aisha, the wife of Prophet Mohammed, was a guide to some traditional scholars. In addition, Amina Wadud, Azizah Al-Hibri, Laila Ahmad, Riffat Hassan, Fatima Mernissi and Nazira Zein El-Din

⁶⁴⁷ rBenn, Pfister and Jawad, *Muslim women and sport* p.33

⁶⁴⁸ Khalid Al Shaya, 'Sports in girls' schools ... Beginning and the End' <<http://www.saaaid.net/manahej/30.htm>> accessed 21/12/2016

are all good examples of such scholars who have participated in women's *Ijtihad*. However, this needs to expand.⁶⁴⁹

5.11 Conclusion

Ijtihad is one of the main foundations of Islamic law and is most significant as it ensures its maintenance and stability. For this reason, the Prophet encouraged the use of *Ijtihad* in several situations. *Ijtihad* continued in the era of the Companions while Omar Ibn al-Khattab used *Ijtihad* in accordance with the interests of Muslims. The four traditional scholars, who are still the guides of the Islamic nations, expanded the use of *Ijtihad* in line with developments that took place in their time. Although the four scholars lived at much the same time, each of them had an independent approach to using *Ijtihad* and they did not copy each other, unlike modern scholars, many of whom tend to copy the provisions of the traditional jurists, rather than using *Ijtihad* independently to make provisions commensurate with the urgent requirements of modern times. In fact, Islamic law is flexible enough to extract provisions over time in line with the interests of Muslim nations. Muslim women need *Ijtihad* to be able to enjoy the rights which they are guaranteed by international law without breaching Islamic law and, although there are a number of interpretations which advance women's rights in Islam, Muslim women still need a great deal more to be done.

⁶⁴⁹ Mashhour, 'Islamic law and gender equality: Could there be a common ground?: A study of divorce and polygamy in Sharia Law and contemporary legislation in Tunisia and Egypt' (2005) p.594

Part II: Women's Rights in Saudi Arabia

Chapter 6: Women's rights in Saudi Arabia

6.1 Introduction

In the third chapter, the rights of women in Islam were discussed in the field of personal status law with regard to aspects such as marriage or divorce. In addition, the rights of women as individuals, such as their right to education or work, were also covered while, in the fifth chapter, it was shown that the spirit of Islamic law seeks to protect the rights of women whereas, in contrast, misinterpretations deprive women of their rights. Saudi Arabia has adopted Islamic law, based on the interpretation of the Hanbali School, as the constitution of the state. Therefore, Islamic law affects all matters regarding life in Saudi Arabia and this, in turn, has given Saudi Arabian clerics and religious scholars a powerful authority. In this way, it is ensured that their voices are always heard and although this approach has many drawbacks.

With regard to women, Article 8 of the Saudi Basic Law (1991) provides for the equality of all citizens and prohibits discrimination on the basis of gender. However, such equality has not yet been achieved as women are suffering from gender inequality in many areas due to cultural reasons.

This chapter firstly considers whether the Kingdom of Saudi Arabia (KSA) protects women's rights and, in addition, discusses whether women enjoy equal rights with men in terms of their personal status along with their individual rights. To this end, this chapter firstly offers a background to Saudi Arabia and a history of the Wahabi school of thought.

6.2 Background information

6.2.1 A brief history of Saudi Arabia: the establishment of the Emirate of Dir'iyyah (the First Saudi State)

The Kingdom of Saudi Arabia has passed through three significant stages throughout its history, starting with the establishment of the first Saudi state, which was known as the Emirate of Dir'iyyah, until the establishment of the Kingdom of Saudi Arabia in the early 20th century.

In the eighteenth century AD, the political and social situation in the Arabian Peninsula was characterised by disintegration and insecurity, which created chaos and political instability. In addition, many negative tribal customs, which were pre-Islamic, had returned. This situation paved the way for the historic meeting between the Protector of Dir'ia, Prince Muhammad Bin Saud, and Sheikh Muhammed bin Abdul Wahab.⁶⁵⁰

In 1139 AH / 1727 AD, Imam Muhammad bin Saud assumed position as the Emirate of Diriyah after the death of its previous Emir, Zaid bin Mirkhan bin Watban. Bin Saud established the Emirate of Dir'iyyah; this became the centre of the foundation of the first Saudi state. In 1157 AH / 1744 AD, a significant meeting took place regarding Al Dir'iyyah between Sheikh Muhammed bin Abdul Wahab and Imam Muhammed bin Saud. Sheikh Muhammed bin Abdul Wahab was an Islamic scholar. Although he was born in Najd, he spent a long time travelling to Mecca, Medina and Basra to learn Islamic principles from the scholars. When Sheikh Muhammed bin Abdul Wahab returned to Najd, he was shocked that the people of Njad were behaving in ways far from the teachings of the Islamic religion as they had returned to the bad tribal customs which had existed before Islam. Abdul Wahab worked hard to eradicate these tribal customs and to renew Islam in the region; however, it was difficult for him do this alone.⁶⁵¹

⁶⁵⁰ Badr Al - Halawani, *Modern and contemporary Saudi history*. (First Edition edn, King Fahad National Library 2000) p.30

⁶⁵¹ Halawani, *Modern and contemporary Saudi history*. p.31

The agreement of Dir'iyyah between Imam Muhammed bin Saud and Abdul Wahab contributed to strengthening the two parties as Muhammed bin Abdul Wahab called for scholars in the region to support Imam Muhammed bin Saud in his efforts to strengthen the state, unify Najd and establish the first Saudi state. In exchange, the two parties agreed that Islam would be the basis for rule in this Saudi state and, in order to achieve this, Muhammed bin Saud provided military support to Abdul Wahab in the drive to renew Islamic principles. This agreement was the beginning of a complete transformation in the history of Najd as it was a preparation for a new future by reorganising and creating the first Saudi state. Despite the ending of the first Saudi state, the Wahhabi religious foundation remained the basis of the founding of the second Saudi state and also of the third Saudi state to date.⁶⁵²

6.2.2 Saudi Arabia and Islam

Since the first establishment of the Saudi state and the agreement between Muhammed bin Saud and Muhammed bin Abdul Wahhab, Islam has had a special relationship with the Saudi state in its three stages. In the third (i.e. the current) stage, King Abdul Aziz, the founder of the third Saudi state, espoused a political ideology based on Islam and therefore the Saudi state is based on Islam as a doctrine and lifestyle. Moreover, Islamic principles directly, and at a fundamental level, affect the choice of the State's internal and external policies.⁶⁵³

The rulers of Saudi Arabia have made Islam the source of legislation in the state, as well as making the Qur'an part of the nation's constitution. Furthermore, Saudi kings have been keen to emphasise these principles. For instance, King Abdul Aziz was intent on recalling

⁶⁵² Islam al-Zubun, 'The history of establishment of the Saudi state'

<http://mawdoo3.com/%D8%AA%D8%A7%D8%B1%D9%8A%D8%AE_%D9%82%D9%8A> accessed 15/3/2018

⁶⁵³ Abdallah Mohamed, 'The Islamic Dimension in Saudi Political Thought'

<<http://www.kingkhalid.org.sa/Gallery/Text/ViewBooks.aspx?View=Page&PageID=34&BookID=149>> accessed 20/3/2018

these principles and, for example, on April 30, 1930, he stated: "We are proud of the Islamic religion and stress the significance of sticking to it."⁶⁵⁴

In the era of King Fahad, and on the occasion of the issue of the Basic Law of Governance, he addressed the Saudi people, arguing that the Saudi state is based on a clear political approach and that this approach is Islam, which is the religion that the Saudi state has been built upon. On another occasion, King Fahad stressed that the Kingdom of Saudi Arabia is a holy place for Muslims, the place of pilgrimage and of their history, so it has its own place in the hearts of all Muslims. Moreover, he argued that Islam in Saudi Arabia is not just a religion, it is also a way of life, and therefore, Saudi rulers, officials and the Saudi people must abide by Islamic principles.⁶⁵⁵

The interest of Saudi rulers in the Islamic religion is translated into the Constitution and Saudi regulations. For example, Article One of the Saudi Constitution states that "Saudi Arabia is a fully sovereign Arab Islamic state; its religion is Islam and its constitution is a book (the holy Qur'an) and the Sunnah of His Messenger; its language is the Arabic language while the capital of the country is the city of Riyadh." Article Seven also stresses that "the ruling of the country derives its power from the Qur'an and Sunnah They are the rulers of this regime and all other state systems." Furthermore, Article 23 states: "The State shall protect the doctrine of Islam, apply its law, enjoin what is good and end what is vice, and undertake the call of duty towards God."⁶⁵⁶

In the Saudi Arabian education system, studying Islamic subjects begins from the very first stages in school until university so religious study is an integral part of the education system since Saudi students study at least four subjects, all related to the Qur'an and the Sunnah.⁶⁵⁷ In addition, the regulations in Saudi Arabia force all shops and restaurants to close at times of prayer in order to pay respect to the prayers themselves and to give

⁶⁵⁴ Mohamed, 'The Islamic Dimension in Saudi Political Thought'

⁶⁵⁵ Ibid

⁶⁵⁶ Ibid

⁶⁵⁷ Mohamed, 'The Islamic Dimension in Saudi Political Thought'

Muslim workers the opportunity to perform their prayers on time. This means that shops are closed five times a day. Also, during Ramadan, which is the month of fasting, regulations state that penalties (which may extend to the lash or imprisonment) are issued to anyone who eats or drinks in public during the hours of fasting.⁶⁵⁸ Through its Criminal Code, the State strictly applies Shari'a law. For example, despite international pressure, Saudi Arabia still insists on the death penalty and punitive measures if stated conditions are met. For example, a judge in the Dawadmi court in Saudi Arabia sentenced a Sri Lankan worker to death for killing a baby who was only four months old. The judge stated that the worker who had committed the premeditated murder of the child had, at 17 years of age, reached the legal age to bear criminal responsibility which, according to Islamic law, is 15 years.⁶⁵⁹ In this case, in spite of objections from the Secretary-General of the United Nations, the Vice-President of the European Commission, a spokesman for the United Nations High Commissioner for Human Rights, and a number of foreign bodies, Saudi Arabia did not respond to these objections.⁶⁶⁰

The importance of the Islamic religion is not only emphasised by the government; Saudi society also accords great importance to Islam. For instance, it is very rare to find a woman in Saudi Arabia who is not veiled since women are convinced that wearing the veil is a religious duty towards God. Moreover, despite the large number of mosques in Saudi Arabia, as in some cities there is a mosque in each neighbourhood and often numerous mosques in large cities, it is very rare to find a mosque without people praying in it. Saudi people are keen not to take an important step without first making sure that such a step does not violate Islamic principles.⁶⁶¹ As a result, Saudi jurists are always busy answering people's questions. For example, they often receive questions such as: Is investing in

⁶⁵⁸ Ibrahim Ahmed, 'The punishment for eating and drinking during the day in Ramadaan.' <<https://www.maghress.com/akhbarona/80555>> accessed 18/3/2018

⁶⁵⁹ Maya mohammad, 'Rizana's execution between the application of Saudi Arabia and international criticism.' <<https://www.nawaret.com/tag/%D8%B1%D9%8A%D8%B2%D8%A7%D9%86%D8%A7-%D9%86%D8%A7%D9%81%D9%8A%D9%83>> accessed 1/4/2018

⁶⁶⁰ Ibid

⁶⁶¹ Anmar Mohammad, 'The role of religion in Saudi society.' <<https://www.okaz.com.sa/article/1005738/>> accessed 19/3/2018

stocks permissible in Islam? Does God forgive the sin of adultery? or What is the expiation for eating during the day in Ramadan?⁶⁶²

Accordingly, in Saudi Arabia, the government nor society may not easily accept any law or regulation that is not compatible with Islamic law and it is for this reason that Saudi Arabia has had reservations about certain articles in some international conventions. For instance, Saudi Arabia has certain general reservations on the Convention on the Rights of the Child, as well as the Convention on the Elimination of All Forms of Discrimination against Women; these reservations include anything that is contrary to the provisions of Islamic law.

6.2.3 The principle of *sad althraaeh*

Since the establishment of the third Saudi state (i.e., the present state), the relationship between the ruling Saudi family and the Muslim jurists has remained strong. Therefore, religious opinion in Saudi Arabia is highly respected while Wahabi thought has had a major impact on religious pronouncements in the Kingdom. Therefore, in an attempt to preserve this, Saudi religious scholars are conservative when applying the teachings of the Islamic religion and this has led to the wide application of the principle of *sad althraaeh* which means the prohibition of all means that may lead to evil or a fall into sin.⁶⁶³ In fact, the exaggerated use of the principle of *sad althraaeh* has resulted in many challenges in Saudi Arabia; it has also held the country back in many ways. For instance, when the bicycle first appeared in the country, scholars prohibited its use, arguing that a bicycle was a tool only for fun and might therefore distract a Muslim from worshipping God. Later, the bicycle was allowed on the condition that any would-be owner must provide a certificate from the Sheikh of the neighbourhood mosque confirming his persistence in prayer and

⁶⁶² Mohammad, 'The role of religion in Saudi society.'

⁶⁶³ Saleh Al-Munajjid, 'The principle of sad althraaeh ' <islamqa.info/ar/235778> accessed 12/3/2018

worship. After later debate on the issue, all the restrictions with regard to owning a bicycle disappeared.⁶⁶⁴

In term of technology, the sending of cables was first prohibited as this, it was argued, might lead a user to fall into practices that were taboo. Moreover, the TV was banned in the country on the basis that it might display evil content. Furthermore, in the 1990s, Sheikh Abdul Aziz bin Baz, the former grand Mufti of Saudi Arabia, issued a statement which said that satellite devices were taboo, explaining that satellites were a great source of corruption as they could display images of women without veils, of people drinking alcohol, and all kinds of corruption and evil; this could result in the spread of sin among Muslims. Thus, the use of such devices in houses or in other places was prohibited; it was also forbidden to sell or even manufacture them in the country.⁶⁶⁵ At the beginning of the new millennium, the current Mufti of the Kingdom, Sheikh Abdul Aziz al-Sheikh, issued a ban on the use of mobile phones with cameras, arguing that these could be exploited to violate the sanctity and privacy of people, as well as spreading obscenities among Muslims; this ban lead to delays in Saudi Arabia's development for a number of years. Moreover, using the Internet or taking photographs were also banned in the country for similar reasons.⁶⁶⁶

In this regard, Majed Ibrahim argued that, after the prohibitions which included television, radio, mobile phones and satellites, the scholars eventually realised that evil or harm does not lie within the devices themselves; it is to do with the way they are used. As a result, the prohibitions were later deemed unjustified and the same jurists who prohibited the use of these devices featured daily on television and radio, took photographs and owned phones with cameras.⁶⁶⁷ The former judge, Al Jazlani, (cited in Majed Ibrahim) pointed out

⁶⁶⁴ Tharwat Al Batawi, 'The trend of the prohibition of all new issues'

<<https://raseef22.com/life/2017/04/15/%D9%85%D9%86->> accessed 10/3/2018

⁶⁶⁵ Abdul Aziz bin Baz, 'Using satellite is a great sin.' <<https://www.binbaz.org.sa/article/220>> accessed 13/3/2018

⁶⁶⁶ Mustafa Al - Ansari, 'The prohibition of camera phone.'

<http://daharchives.alhayat.com/issue_archive/Hayat%20INT/2004/10/1/%D9%85%D9%81%D8%AA%D9%8A-%D8%A7%D9%84%D8%B3%D8%B9%D9%88%D8%AF%D9%8A%D8%A9-%D9%8A> accessed 18/3/2018

⁶⁶⁷ Majed Ibrahim, 'The Exaggeration of prohibition fatwas ' <<https://www.alarabiya.net/ar/saudi-today/2013/03/17/%D9%85%D8%B1%D8%A7%D8%AC%D8%B9%D8%A9->>

that prohibiting the permissible is itself one of the greatest evils and is a danger to the whole of society. In addition, he argued that those things to which people were denied access in the beginning were not banned because they were worthy of being prohibited: they were banned because they were new or unusual. Therefore, scholars should take a lesson from the past and not reject every new thing by forbidding its use before it has been scrutinised and analysed because only after proper examination and thought can an appropriate judgment be made.⁶⁶⁸

6.2.4 Between Islamic principles and customs

Saudi society is divided into two: tribal parts, the populations of which are mostly in the country; and non-tribal, people who originally came from Egypt, India, Pakistan and Indonesia, etc.; these usually live in the Hijaz area of Mecca, Medina or Taif. Indeed, because most of the country is tribal, tribal customs and traditions have had a great influence in Saudi Arabia. Moreover, in many cases, these customs contradict principles of Islamic law. For instance, Islam encourages work, even if it is simple work, and most prophets were engaged in simple work, such as shepherding, etc. However, in tribal customs, simple work is seen as a disgrace and a person who works, for example, as a plumber or carpenter is ostracised in tribal society. As a consequence, it is rare to find a person working in such a field who belongs to a tribe. Instead, Saudi Arabia has brought in thousands of workers from abroad to carry out such employment and this has contributed to the existence of major economic problems in Saudi Arabia.⁶⁶⁹

In the area of women's rights, tribal customs have had a significant impact. For instance, although Islam granted women the right to inherit (as discussed in Chapter Three), in many areas of the country, tribal customs prohibit a woman from inheriting and instead

⁶⁶⁸ Ibid

⁶⁶⁹ Yasin al - Jaafari, 'Customs and traditions and economic development.' <<http://www.al-madina.com/article/404731/>> accessed 5/4/2018

cause her share to be distributed among her brothers or among male children. This is because tribal customs consider it is a shame for a woman to inherit; they believe women should not have money since men in the tribe are responsible for the maintenance of females.⁶⁷⁰ One of the most famous cases is that of Shahra and Mahrah, two sisters who filed a lawsuit against their brothers in the court of the Sarra Obaida district in the east of Asir. Shahra and Mahrah claimed that their brothers deprived them of the inheritance of their father, which was estimated at millions of riyals.⁶⁷¹ The number of sessions concerning this case reached 15, while it took more than 10 years for the women to be able to obtain their right to the inheritance. In addition, the two women had to escape to another city for fear of their brothers. In this regard, Om Khalid (cited in Al-Qarni) pointed out that, in many tribes, if a woman demands her right to inherit, a dispute will break out in the tribe and all her family, as well as all members of the tribe, will become involved. They will cut off all connections with her, which gives the woman the choice between her right to inherit, and her family and social life. Om Khalid herself related that, when her father died, he left millions of riyals but her brothers took possession of all the money and forced her and her sisters to waive their rights. In this regard, Muhammad bin Abdullah, a member of the Shura Council, said that Islamic law gives women all their rights. Nevertheless, some tribes deny them rights, such as their right to inheritance, for example, while it is unacceptable to return to the pre-Islamic era or the era of ignorance which once existed in the Arabian Peninsula.⁶⁷² Ghithan al-Jaris stated that denying women's right to inheritance raises many questions.⁶⁷³ For instance, some people who work in the courts in these areas often endorse documents that prevent women from inheriting and, in doing so, they are supporting tribal customs when they should be supporting Islamic principles.⁶⁷⁴ Suhaila Zine Al Abidine (cited in Al-Qarni) argued that, in order to reduce these problems, Saudi women, especially women belonging to tribes, should be educated and should learn what rights Islamic law has given them. Indeed, to

⁶⁷⁰ Abdul Rahman Al-Qarni, 'Tribal norms and women's denial of the right of inheritance that guaranteed to her by Islam.' <<http://www.al-madina.com/article/276545/>> accessed 16/3/2018

⁶⁷¹ Ibid

⁶⁷² Ibid

⁶⁷³ Ibid

⁶⁷⁴ Ibid

solve the problem, officials must verify, when they certify documents in which a woman has waived her right to an inheritance, whether she has waived the right to her inheritance because of pressure from male relatives; if this is so, these men must be punished. In addition, in areas where these bad habits are prevalent, judges who do not belong to certain tribes should be employed in order to ensure that they rule according to Islamic principles and are not influenced by the pressures of tribal customs.⁶⁷⁵

Furthermore, another principle of Islam, which is ignored by some Saudi families and even some Saudi judges, concerns a phenomenon that is widespread in Saudi Arabia: this is separation between spouses because they are socially incompatible. (This is discussed in detail in Chapter Six.) So, some judges in Saudi Arabia have accepted cases where the brother of a woman decides to separate her from her husband as he believes that their family is not compatible with the family of the husband. In many cases, the spouses have been separated against their own wishes while, in some instances, the spouses have been able to return to each other after great pressure in terms of public opinion has been brought to bear.

To sum up, after the historic agreement between Muhammed bin Abdul Wahab and Muhammed bin Saud, Islam became the foundation of the establishment of the Saudi state and has remained so into the continuation of the second state and then the third. Therefore, the rulers of Saudi Arabia, as well as Saudi society, have accorded Islam great importance as they have made this the foundation of their way of life. However, some of conservative jurists, as well as some customs, have influenced the application of Islamic principles, which has, in turn, contributed to delaying the progress of human rights in general and women's rights in particular. This is explained in detail in Chapters Six and Seven.

⁶⁷⁵ Al-Qarni, 'Tribal norms and women's denial of the right of inheritance that guaranteed to her by Islam.'

6.3 The right to marry

As discussed earlier in Chapter Three, women in Islamic law have similar rights with regard to marriage. However, although Saudi Arabia applies a specific version of Islamic law, there are two issues facing women with regard to their right to enter into marriage. The first issue involves a woman being forced by her father to marry someone she does not want to marry and the other concerns being prevented by a guardian from marrying whom she chooses.

According to the interpretation of the Hanbali doctrine, the consent of both the guardian and the daughter is essential for a valid marriage contract. As discussed previously, most women, whether during the time of the Prophet or the age of the four jurists, worked within their homes and raised their children so relationships outside the home were very limited.⁶⁷⁶ In this case, perhaps the approval of the guardian as a condition for the completion of the marriage contract was designed to ensure that the best decision was taken with regard to marriage. However, in the current era in Saudi Arabia when women are now educated and have entered the labour market, it is perhaps time to abolish the requirement for a guardian's approval for a woman to enter into marriage, especially since there is no consensus on it. For example, as discussed earlier, the Hanafi doctrine believes that when a woman is 18 years old, she is entitled to marry without the approval of her guardian. However, in this regard, the Saudi Arabia government tends not to take into consideration this other doctrine and, moreover, Saudi Islamic scholars seem disinclined to re-examine the issue in order to meet the requirements of the new era in which women live.

Fawzia Bashtah argues that the issue of marriage in the Kingdom of Saudi Arabia is based on two aspects, one religious and the other cultural, but the cultural element is stronger. In some cases, this has led to some social assumptions affecting the interpretation of jurists and jurisprudence, with the result that many religious provisions have been made

⁶⁷⁶ Fawzia Bashtah, *Saudi women between jurisprudence and society* (the first edn, Madarek Publishing House 2011) p.328

on a cultural basis. Moreover, this culture has imposed a common pattern on family relations.⁶⁷⁷ For example, the masculine pattern that prevails has often harmed women and society as a whole, giving society a strong authority that is

often far removed from democracy which is called for by Islam. For instance, in Saudi Arabia, if a couple wishes to marry, the father or the groom brings a marriage official who completes the marriage contract for the couple and, in most cases, this official does not ask the bride for her approval while others do not complete the contract until they have received the approval of the bride. This still depends on the procedure employed by each marriage official as there is no legislation which obliges the authorised person to follow certain procedures to complete the marriage contract.⁶⁷⁸

To be fair, in most cases, in the family domain, the role of the father is only advisory in the marriage of a daughter while the consent of the daughter is given the greatest weight. However, within the legal framework, the greatest weight is accorded to the consent of the father and there are many cases where a woman is oppressed because she is at the mercy of her father. For instance, a father can complete his daughter's marriage contract without her acceptance, or even without her knowledge, and while this power is given only to a father as a guardian, if he dies, this power can sometimes pass to the grandfather from the father's side while no other guardian is accorded this power.

Most religious scholars in the country believe that a marriage contract without the approval of the bride would be wrong. For instance, Abdul Aziz bin Baz argues that marriage is a serious issue for both husband and wife and it should not go ahead without the approval of the wife.⁶⁷⁹ Al Munjidd believes that it is not permissible in Islam for a father to force his daughter to marry without her consent.⁶⁸⁰ Saudi Arabian law also seems to condemn this kind of marriage as, if such a marriage occurs, Saudi law gives the

⁶⁷⁷ Bashtah, *Saudi women between jurisprudence and society* p.326

⁶⁷⁸ Ibid

⁶⁷⁹ Abdul Aziz bin Baz, 'The legality of marriage without the consent of women in Islam' <<http://www.binbaz.org.sa/noor/10554>> accessed 13/6/2017

⁶⁸⁰ Mohammed Al-Munajjid, 'When is the guardian considered as adel ?' <<https://islamqa.info/ar/171588>> accessed 8/6/2017

wife the right to dissolve the union.⁶⁸¹ On the other hand, there is no legal basis or regulation that prevents these marriages from occurring as Saudi Arabian law leaves the matter to the conscience of the father and the extent of his adherence to the principles of Islam. Thus, if a father does not adhere to the principles of Islam or is simply ignorant, the daughter will be subjected to an injustice as, in such cases, Saudi law would recognise the marriage and the only way for the wife to extricate herself from it would be to attempt to dissolve it through the courts where, in most cases, they are successful.⁶⁸²

For example, in Onizah, one of the villages in Saudi Arabia, a woman filed a lawsuit against her father, claiming that he had married her to a man without her consent. She explained to the judge that she had not expressed her consent in any way during the marriage contract and afterwards had tried to nullify the marriage by asking her husband to divorce her. He refused to do so and the woman finally escaped from the husband's house after eleven years. When the judge questioned the defendant, he said it was true that his daughter had been married for eleven years but that she had agreed to this marriage. Since the plaintiff failed to provide any evidence to support his claim, the judge summoned the two witnesses who had testified to the marriage contract to ask them for details and to explain what they had seen. The first witness confirmed that the bride was not happy with the marriage and she was not asked to agree to it while the second witness, who was the plaintiff's brother, stated that it is common in Saudi Arabia to marry women without their consent. In this regard, the judge stated that Islam gives a woman the right to choose her husband and then he quoted Prophet Mohammed's Hadith:

“A previously-married woman should not be married without being consulted, and a virgin should not be married without asking her permission.”

He also quoted bin Abbas's story that a young virgin woman once came to the Prophet and mentioned to Him that her father had married her off to a man against her will, and

⁶⁸¹ Bashtah, *Saudi women between jurisprudence and society* p.334

⁶⁸² Ibid

the Prophet gave her the choice to stay with him or to leave him. The judge then dissolved her marriage.⁶⁸³

In this case, there is a good precedent so the judge tried to apply Islamic law by dissolving the marriage as it was not with the consent of the wife. However, from a negative point of view, although it was proved to the judge that the father had forced his daughter to marry against her will, he was not punished in any way and was not even prevented from being a guardian to any daughter again. Furthermore, in some cases, customs and traditions can be an obstacle that prevent a woman from bringing a case against her guardian if she is forced to marry. For instance, a father forced his 20-year-old daughter to marry his 45-year-old friend as an exchange for paying off his debt of three-hundred-thousand Saudi Riyals (approximately 50,000 pounds) and, in this case, the daughter decided not to file a lawsuit against her father.⁶⁸⁴ In this regard, Fawzia Bashtah argues that it should be the legislative authorities in the country who consider the nullification of the marriage contract if the consent of the woman is not confirmed, without the need to raise the case in the courts.⁶⁸⁵ Indeed, a marriage taking place without the woman's consent is contrary to Islamic principles and therefore Saudi Arabia should create a strict law that forbids such marriages before they occur.

The second issue facing women in Saudi Arabia regarding their right to enter into marriage involves preventing a woman from marrying according to her own wishes. In Saudi Arabia, this is called *Adul* and, according to Ibn Qudaamah, (cited in Abdul Qudous al-Samarrai) the definition of *Adul* is where a guardian prevents a sane adult woman from marrying a suitable person who does not have any serious problems.⁶⁸⁶

Many Islamic scholars in Saudi Arabia believe that *Adul* is forbidden in Islam. It has serious consequences for the family and for society as, according to the Prophet Mohammed, "No

⁶⁸³ Unaizah Court; Case no. 8/1257, dated 4/5/1407 AH /5/1/1987.

⁶⁸⁴ Kholoud Ghannam, 'Effects of Adil .. Insanity and escape' *Sabq* <<https://sabq.org/gfQo5d>> accessed 19/7/2017

⁶⁸⁵ Bashtah, *Saudi women between jurisprudence and society* p.325

⁶⁸⁶ Abdul Qudous al-Samarrai, *The effects of Adil on women* (The Islamic Affairs House 2011)

previously-married woman should be married off without being consulted, and no virgin should be married off without asking her permission.” They said: “O Messenger of Allah, what is her permission?” He said: “If she remains silent.”⁶⁸⁷

In addition, many scholars believe it is not *Adul* if the guardian prevents his daughter from marrying someone who is not suitable for her: for instance, if he is a drug addict. However, in such cases, the father (who is most often the guardian) must do the duty which is imposed on him by Islam and must forbid his daughter from marrying someone who might make her miserable. On the other hand, it would be wrong for a guardian to prevent his daughter from marrying in order to benefit from her salary or to keep her at home to service him; these cases would be considered as *Adul*. Also, not giving realistic reasons for refusing the marriage would be considered as *Adul*.⁶⁸⁸

For instance, in Riyadh, a woman filed a lawsuit against her father who refused to allow her to marry several times. The woman said to the judge: “I am a twenty-eight-year-old woman. My mother died and my father married another woman. Now I live alone and my father refused to allow me to marry the man who asked me to marry him. The man looks suitable for me yet my father keeps refusing him but offers no convincing reasons.” The judge asked the father to come forward and asked him to give the reasons why he refused the man. The father gave the judge two reasons. He said, “I am refusing that man as a husband to my daughter for two reasons: firstly, he did not ask for her hand in an appropriate way and secondly, he is socially not compatible with my daughter.” The judge called the man in question and investigated the case. He found that the man was very suitable for marriage to any girl as he had a good job and moreover, was of good conduct and was socially compatible⁶⁸⁹ with the daughter. He therefore decided that the woman’s

⁶⁸⁷ Albukhari, *SAHIH BUKHARI* No.4843

⁶⁸⁸ al-Samarrai, *The effects of Adil on women*

⁶⁸⁹ unreasonably, some tribes in Saudi Arabia believe that they are better than other tribes, for example some tribes think they are more rooted in the Arabian Peninsula or because they are the largest number.

father was an *Adul* guardian and consequently, the judge decided to allow her to marry the man.⁶⁹⁰

Indeed, judges in such cases ought to consider punishing the father, perhaps by imposing a financial penalty to the benefit of the daughter in return for the damage the father has caused her. For instance, the Human Rights Commission issued a punishment of up to 15 years in prison, plus a fine of up to one million Saudi riyals (approximately 20,000 pounds), for an *Adul* guardian.⁶⁹¹ However, judges are not bound to administer this punishment. Moreover, Al Morafait al Shariaeah,⁶⁹² Article 33, paragraph 4, states that a judge may dismiss the guardianship of a guardian if necessary although judges are still not bound by this either, even though Al Morafait al Shariaeah and the Human Rights Commission seek to limit the occurrence of *Adul* guardians. However, judges in Saudi Arabia do not apply these punishments. Instead, they attempt to satisfy women by allowing them to marry which will not lead the occurrence of *Adul* being reduced in the Kingdom.⁶⁹³

Furthermore, according to the Saudi Arabian interpretation of Islamic law, a woman can never marry entirely of her own accord as, if it is proved that the father is *Adul*, the guardianship passes to the closest male in her family, such as the woman's brother or uncle, or even her son. Then, if she has no other male relative or they all become *Adul*, the guardianship will pass to the judge who will then be responsible for her marriage. Thus, this interpretation in many cases brings only sorrow for women.

For instance, a young woman filed a lawsuit against her uncle who became her guardian after the death of her father. The uncle of the girl refused to allow her to marry, although there were many suitors who offered to marry her, because he wished to benefit from her

⁶⁹⁰ Al-Adl Journal, A Quarterly refereed Journal concerned with juristic and legal issues, Ministry of Justice, Saudi Arabia, Issue 14/6/1427 AH/November 2006, p. 378

⁶⁹¹ Ghannam, 'Effects of Adil .. Insanity and escape'

⁶⁹² Al Morafait al Shariaeah is one of the systems that regulates the judiciary and the conduct of all its affairs, it defines the jurisdiction of the courts, the procedures to be followed before it, and also regulates the rules for the judiciary, the public prosecution, and all the employees in the courts, including clerks, lecturers, and so on. It also sets out procedures for litigation and how to proceed with the case from its inception until its completion.

⁶⁹³ Ghannam, 'Effects of Adil .. Insanity and escape'

high salary. The judge called the uncle before him to ask him for details and the uncle said that all those who had asked for her hand were not suitable for her. The judge summoned the last man who had approached her and found that the man was of good conduct and looked suitable and therefore the judge decided to marry her to the man who last asked her.⁶⁹⁴

In this regard, Fawzia Bashtah argues that giving categories to guardianship is not mentioned in the Qur'an or even in the Sunnah. For this reason, she believes it is reasonable for an adult woman who does not have a father to marry according to her own wishes. In addition, she believes that Saudi Arabia would be better to adopt Abu Hanifa's interpretation regarding the marriage contract, especially if the woman is at the legal age; this is significant in order to protect women from guardians abusing their rights.⁶⁹⁵

In another case, in the general court in Taif city, a woman raised a lawsuit against her father who refused to allow her to marry a man who had asked for her hand although she had agreed to marry him because he was a man with good morals. The father explained that he would not agree to let his daughter marry this man because he knew nothing about him and instead planned to marry her to one of his friends in Riyadh. However, the plaintiff refused to marry her father's friend and moreover brought to the court two men of good character, who had previously asked for her hand, as witnesses to the judge. After that, the judge asked the plaintiff's brother who was in the court if he would agree to be her guardian instead of her father and the brother was willing to accept that duty. Accordingly, the judge ruled that the guardianship would be transferred from the father to the brother. The judge issued his ruling on several grounds: he stated that the father had committed a crime (*Adul*) towards his daughter. Moreover, he mentioned the statement of Muslim jurists that, in a case where a daughter chose a husband for herself while the guardian chose another, she should marry the one that he chose. Furthermore, the judge stated that, in Islam, the guardian is supposed to protect the interests of his daughter and

⁶⁹⁴ Ahmed Al-Jarwan, 'Adul cases in Saudi Arabia' <<http://www.mbc.net/articales>> accessed 12/6/2017

⁶⁹⁵ Bashtah, *Saudi women between jurisprudence and society* p.336

should help her to choose her future spouse. In this case, the father's behaviour was against the interests of his daughter and was also contrary to Islamic principles.⁶⁹⁶

This case shows that, even though the interpretation in Saudi Arabia requires a guardian for a woman to marry, it does mean that a guardian should never go against the woman's wishes or cause her harm as this is prohibited in Islam. In addition, the case shows that, although it was proven to the judge that the father was *Adul*, he passed the guardianship to her brother while still not giving her the right to marry of her own volition. Finally, as in the previous cases, the judge applied his own interpretation of the Islamic text and did not rely on any article in Saudi law. This is a significant challenge in Saudi Arabia in terms of the lack of personal law in the Kingdom which means that the fate of many women who initiate lawsuits will rest on the interpretations of judges.

For instance, in a case in the general court in Al Medina, a doctor at the age of 43 filed a lawsuit against her father who had refused to allow her to marry during all those years. The doctor asked the judge to remove the guardianship from her father as he refused to let her marry anyone; he also used violence against her which made her leave home. The judge refused her request and he ruled that she must return to her father's home, stating that it was immoral for a daughter to file a lawsuit against her father and that being immoral to one's parents is forbidden in Islam. The daughter's lawyer objected to the ruling and wrote in the appeal that the father had prevented his daughter from marrying. Moreover, he had also prevented her three sisters from marrying, all of whom were over the age of thirty. In the Cassation Court in Saudi Arabia, which consists of three judges, one of the judges found that the initial judgment was prejudiced as one of the primary rights of daughters is to marry. However, the other two judges agreed with the initial judgment and therefore, the Cassation Court approved the ruling of the judge in Al Medina by a majority. They wrote notes to the judge in Al Medina and said that he should

⁶⁹⁶ General Court of Ta'if; Case no. 6/131 dated 29/6/1422 AH 17 /9/2001.

try to resolve the dispute between the father and his daughter; consequently, the ruling became definitive.⁶⁹⁷

In this case, the daughter fell victim to the injustice of her father and, since there is no strict law in Saudi Arabia that limits this type of violation, the daughter was at the mercy of the judge who misinterpreted the Islamic texts.

In fact, in Saudi Arabia, *Adul* is practised in many families as, according to scholars from the Ministry of Justice, there were no less than 120 cases of *Adul* in 2016 and the numbers are increasing year after year.⁶⁹⁸ Badria Abdul Rahman (cited in Abdullah Aldani) argues that the issue of *Adul* is a social challenge that prevents women from choosing what they want.⁶⁹⁹ This issue occurred in pre-Islamic society, "the society of ignorance", and Islam came to correct these concepts. In spite of this, in some areas in Saudi Arabia, especially in the central areas, such as Najd and Hail where tribal communities dominate and tribal culture is unfortunately more influential than Islamic principles, such practices continue. Abdul Rahman believes that if there is no severe legal penalty for such cases, the suffering of women in many Saudi families will continue.⁷⁰⁰

There are several kinds of *Adul* in Saudi Arabia, which have resulted from a male-dominated society. For instance, many guardians still cling to tribalism, as many of the parents who belong to tribes insist on marrying their daughters to men from the same tribe and, in many cases, daughters reach over forty and no one in same tribe asks them to marry. Furthermore, there often exist cases where a father promises his daughter in marriage to her cousin and then forces her to wait for her cousin to marry her; later, the cousin may decide to not marry her. In addition, in some cases, wealthy fathers prevent their daughters from marrying someone whom they consider is not rich enough.⁷⁰¹ In fact

⁶⁹⁷ Nasreen Najmuddin, 'The case of Adil '

<http://www.alwatan.com.sa/nation/news_detail.aspx?articleid=38472&categoryid=3> accessed 15/6/2017

⁶⁹⁸ Ghannam, 'Effects of Adil .. Insanity and escape'

⁶⁹⁹ Abdullah Aldani, 'The issue of Adil ' <<http://www.okaz.com.sa/article/296860/>> accessed 20/7/2017

⁷⁰⁰ Aldani, 'The issue of Adil '

⁷⁰¹ Ibrahim al-Hawqail, 'The prohibition of Adil ' <<http://www.alukah.net/sharia/0/35662/>> accessed 21/7/2017

this is contrary to Islamic principles as, according to Prophet Mohammed, "When someone whose religion and character you are pleased with comes to you, then marry (her to) him. If you do not do so, then there will be turmoil (*fitnah*) in the land and discord (*fasad*)."⁷⁰²

Abdullah al-Qusair argues that tribal customs encourage a guardian to promise his daughter to a cousin so that sometimes he may force a good daughter to marry her cousin even if he is a drug addict. In addition, the father sometimes promises his 20-year-old daughter to a cousin who is under 10.⁷⁰³ This problem of "reserving" daughters has left many women over the age of forty-five unmarried. Saleh Al-Rumaih (cited in Al-Jarwan), argues that the issue of *Adul* is a social disease which is perpetuated by guardians to the detriment of their daughters; they may prevent their daughters from marrying by making unreasonable and illogical excuses in order to seize their salaries. Suleiman al-Akil (cited in Al-Jarwan) looks at the issue from a different angle as he believes that the many cases of *Adul* could be seen as a positive sign since it indicates that Saudi women now are more aware of their rights as, in the past, women did not dare to bring a lawsuit against their guardian.⁷⁰⁴

Islamic law guarantees women the choice of a husband, as well as forbidding guardians to force or prevent their daughters from marrying. Nevertheless, customs and traditions have caused Islamic principles to be misinterpreted which leads to abuses of women's rights. Therefore, Saudi Arabia must have stringent laws which are strictly applied by the courts to limit the number of cases of *Adul* and the number of cases where women are forced to marry against their will.

⁷⁰² Ibn Majah, 'Sunan Ibn Majah' (2004) (1967)

⁷⁰³ Abdullah al-Qusair, 'Marriage problems in Saudi Arabia.' <<http://www.okaz.com.sa/article/242179>> accessed 22/7/2017

⁷⁰⁴ Al-Jarwan, 'Adul cases in Saudi Arabia'

6.4 Underage marriage

There is no doubt that underage marriage is a social phenomenon that is very detrimental to young brides. The marriage of girls who are still minors involves a law that was developed by tribal societies without taking into account the age of such girls who may not even have completed their schooling.

Indeed, many religious scholars in Saudi Arabia agree that it is permissible for a guardian to marry off a daughter who is under age. For example, one of the most influential religious scholars, the Grand Mufti Abdul Aziz Al-Sheikh, states that it is permissible for a guardian to marry off a daughter who is under fifteen.⁷⁰⁵ Moreover, other Saudi scholars believe that, while a guardian should not force an adult woman under his guardianship to marry, he may force a girl who is under age.⁷⁰⁶ These scholars base their argument on the fact that the Prophet Mohammed married Aisha bint Abu Baker when she was nine years old. In addition, they believe that it is not accurate to describe as underage a female who has started to menstruate or who is capable of pregnancy and giving birth even if she is only ten or nine years old.⁷⁰⁷ They base their arguments on the Qur'anic text that states:

“And those who no longer expect menstruation among your women - if you doubt, then their period is three months, and [also for] those who have not menstruated. And for those who are pregnant, their term is until they give birth. And whoever fears Allah - He will make for him of his matter ease.”⁷⁰⁸

A supporter of marriage for minors interpreted this verse as confirming female minors could marry even though if they had not yet started to menstruate as the verse

⁷⁰⁵ Khaled Alshaya, 'Marriage of minors from the elderly in Saudi Arabia' <www.alaraby.co.uk/society/2016/3/28/> accessed 19/7/2017

⁷⁰⁶ Ibid

⁷⁰⁷ Sabri khalil, 'Marriage of minors between prevention and openness.' <<https://drsabrikhalil.wordpress.com/2013/01/07/>> accessed 2/8/2017

⁷⁰⁸ , 'The Holy Quran.'(65:4)

mentioned a waiting period of three months for those “who have not menstruated”. This means that the Qur’an recognises marriage for female minors even if they have not yet menstruated. However, this verse is intended to determine the waiting period for divorced women; it is not to permit the marriage of minors.⁷⁰⁹ Moreover, some scholars believe that the reference to those “who have not menstruated” may refer to women who may have problems, perhaps hormonal ones, which could lead to irregular menstrual cycles, indicating that the menstrual cycle is not a valid standard to calculate the waiting period. For this reason, for women who had such problems, their waiting period would be three months.⁷¹⁰

On the other hand, many other Islamic scholars, such as Sheikh Muhammad Ibn Uthaymin, Al Qardawi and Mohammad Albanian, strongly criticise the marriage of minors, believing that this type of marriage is contrary to the spirit of Islamic law⁷¹¹ since the Qur’an states: “And test the orphans [in their abilities] until they reach marriageable age. Then if you perceive in them sound judgement, release their property to them.”⁷¹²

The reason for the revelation in this verse is that a man came to the Prophet Mohammed and told him that his brother had passed away and left a son and he wished to know when he could give his orphan nephew his legacy. The interpretation of the verse is that the guardians of orphans should not give the orphans their money until they are sure that they are sensible enough to manage their finances well or until they reach the age of marriage.⁷¹³ This means that the Qur’an declares that, when someone reaches the age of marriage, he/she must be mature and sensible enough to manage money properly. The opponents of underage marriage conclude that this is an indication that the age of marriage in Islamic law is when the individual is rational enough to manage his/her money properly as only adults, and not underage people, can do this.⁷¹⁴

⁷⁰⁹ Khalil, ‘Marriage of minors between prevention and openness.’

⁷¹⁰ Ibid

⁷¹¹ Ibid

⁷¹² , ‘The Holy Quran.’(4:6)

⁷¹³ Kathir, *Tafsir Ibn Kathir*.

⁷¹⁴ Alaa Al - Din Al - Kasani Hanafi, *Badai As-Sanai* (The second edition edn, Dar al-kotob al-ilmiyah 1986)

Moreover, there should be love and mercy in a marital relationship as, according to the Qur'an: "And among His signs is this: that He created for you mates from among yourselves, that you may dwell in tranquillity with them, and He has put love and mercy between your [hearts]: verily in that are signs for those who reflect."⁷¹⁵ Therefore, how can love and mercy exist between a girl who is a minor and man as female minors are not yet emotionally mature? Furthermore, Sheikh Muhammad Ibn Uthaymin, who is a former member of the Saudi Council of Senior Scholars, argues that underage marriage is illegal in Islam as the Prophet Mohammed stated that: "A virgin should not be married off until her consent is obtained." This means that virgin women should not marry until they reach an age when their consent can be obtained.⁷¹⁶

Moreover, even the Prophet himself did not agree with marriage for female minors. For instance, when Abu Baker and Omar bin Al Khattab, who were the closest companions of the Prophet, asked for the hand of the daughter of the Prophet Asmaa, he refused, telling them she was still a minor.⁷¹⁷ In addition, to permit underage marriage on the basis that Prophet Mohammed married Aisha when she was a minor is incorrect for many reasons. For instance, the Prophet was not like other men as only he was allowed to marry nine wives and this is not permitted for other men. Moreover, Aisha was not like other women⁷¹⁸ as the Qur'an states: "O wives of the Prophet, you are not like anyone among women."⁷¹⁹ In addition, on many occasions, there was a definite purpose beyond the Prophet's marriages. For instance, when he married Aisha, he was aware of her childhood as he made her dolls to play with and he made her play with children of her age; in short, he treated her like a child, not like a wife, when she was a minor. So, perhaps the entry of Aisha into the Prophet Mohammed's home at this young age made her observe his words and deeds closely. As a result, Aisha spent her life with Prophet Mohammed, learning

⁷¹⁵ , 'The Holy Quran.'(30:21)

⁷¹⁶ Muhammad ibn Salih ibn Muhammad Al-Uthaymin, *Ash-Sharh Al-Mumtī Ala Zad Al-Mustaqni*, vol 15 (Dar Ibn Al-Jawzi 1995)

⁷¹⁷ Khalil, 'Marriage of minors between prevention and openness.'

⁷¹⁸ Ibid

⁷¹⁹ , 'The Holy Quran.'(33:32)

from him, as she narrated more than two thousand Hadiths. After the death of the Prophet Mohammed, Aisha was a great reference for the Companions, especially in the matter of the Prophet's attitudes and words.⁷²⁰

In fact, most Arab countries have established a legal age for marriage. For instance, in Yemen, after the widespread practice of marrying minors, Yemen's parliament passed a law setting the age of marriage at 17 years or above. In addition, it set a penalty of no more than one year's imprisonment and a fine of no more 100,000 Yemeni riyals for anyone who offended in this way. However, in Saudi Arabia, there is still no law restricting the marriage of minors. Moreover, despite the large number of marriages of minors, there are still no accurate statistics to monitor the number of underage marriages.⁷²¹

For instance, in a poor neighbourhood of Jeddah, a fourteen-year-old girl called Umm Asil married a twenty-four-year-old man. Umm Asil faced difficulties in pregnancy and childbirth and the doctor who supervised her during her pregnancy stated that Umm Asil was a small mother and said that her internal organs might not bear the burden of pregnancy and childbirth, which could lead to her death. On the other hand, Umm Asil was not treated well by her husband who behaved as if she were a servant, not a wife. After a long period of physical and psychological torment, Umm Asil was able to obtain a divorce from her husband and promised herself that she would not marry again.⁷²²

Malak, from the city of Jubail, was a 35-year-old divorced woman who had a very unsuccessful and painful marriage as she was still suffering the effects of being raped when she was a minor. She stated that, when she was twelve years old, she was helping her mother to wash the dishes when suddenly, her mother took her into one room in the house where there was a man from her family tribe who was in his thirties. Her mother said to her, "This is your husband," and then she left the room and locked the door. Malak

⁷²⁰ Atef Al Fayoumi, 'The virtues of Umm Al moamnen Aisha ' <<http://www.alukah.net/sharia/0/25487/>> accessed 15/7/2017

⁷²¹ Sahar Khan, 'The marriage of minors in Saudi Arabia, is rape of children.' <<http://www.qassimnews.com/news-action-show-id-4222.htm>> accessed 14/7/2017

⁷²² Khan, 'The marriage of minors in Saudi Arabia, is rape of children.'

described that all she could remember after that was the sound of the ambulance that took her to the hospital and that she was covered in blood. Malak became pregnant and gave birth prematurely to an infant with a hole in his heart, a condition which led to his death after a few days. Malak is now suffering from anxiety, insomnia, obsessive-compulsive disorder and depression and, while receiving treatment from a psychologist, Malak described how she feels terror when she sees any bride.⁷²³

There are many reasons for the marriage of minors in Saudi Arabia but among the most important reasons are tribal customs and the ignorance of parents who believe that it is better for a girl to marry as early as possible so she does not risk being a spinster. Sometimes, it is the existence of economic problems that push a father to marry off his underage daughter to get rid of the expense of keeping her.⁷²⁴

For instance, in another case in the Abu Arish Court in Jazan, a fifty-eight-year-old man filed a lawsuit against his wife who was fifteen years old. The husband asked the judge that the father of his wife should return the ninety thousand riyals (approximately fifteen thousand pounds) which he paid as a dowry for the girl as the girl did not permit him to have intercourse with her. When the judge summoned the father, he found that the father had suffered from psychological problems. Therefore, the judge decided to annul the marriage contract and ordered that the money should be returned to the husband. He also referred the marriage authoriser to the disciplinary committee of the Ministry of Justice as he said that the father was not qualified to be a guardian.⁷²⁵

As a matter of fact, the girl in this case was fortunate that her husband decided to file a lawsuit against her as most of these issues are never brought to the courts. In addition, it is clear that the judge decided to annul the marriage contract, not because the girl was too young, but because he found that the father who married off his daughter did not

⁷²³ Khan, 'The marriage of minors in Saudi Arabia, is rape of children.'

⁷²⁴ Adel Abdul Al jabbar, 'Marriage of minors between religion and customs.'
<<http://www.feqhup.com/uploads/1366578547851.pdf>> accessed 21/7/2017

⁷²⁵ Alshaya, 'Marriage of minors from the elderly in Saudi Arabia'

have the attributes that qualified him to be a guardian to his daughter. Indeed, according to the interpretation held by the Saudi Arabian government, the approval of both the guardian and the daughter is important in the marriage contract. Nevertheless, the judge seemed to give the father's approval more value when he decided to end the marriage as the father was not qualified to give his approval when the daughter was not qualified to give her approval either as she was only fifteen years old; the judge did not mention this.

In this regard, one Saudi Islamic scholar, Abdul Mohsen al-Obeikan, argues that marriage authorisers should refuse to complete the contract marriage of minors to prevent the abuse of young girls by their guardians and to protect the interests of society, as well as the interests of female minors.⁷²⁶ For years, jurists and social researchers have demanded the enactment of a law banning the marriage of young girls. For instance, Alia Al Shehri argues that the marriage of minors is a humanitarian crime in Saudi Arabia that must end. The marriage of minors deprives girls of their childhood and of their right to education. In addition, it forces them to bear the responsibility of raising children when they are unable to do this. This affects them and affects their children at the same time.⁷²⁷ Indeed, since 2013, the Ministry of Justice has been studying the issue of underage marriage and is attempting to establish a mechanism which forbids marriage for girls under seventeen years of age, as well as preventing marriage authorisers from making marriage contracts for any girl under this age and punishing violators. The project, however, would allow a girl who is seventeen or under to marry with three conditions. First, the daughter's guardian should submit a request to the court that he wishes his daughter to be an exception.⁷²⁸ Secondly, the girl's guardian should bring a report from a specialist committee consisting of a gynaecologist, a psychologist and a social worker to confirm that the girl is physically, mentally and psychologically ready for marriage. Thirdly, and most importantly, the guardian should bring proof to the court that the girl and her mother consent to this marriage. These proposals were presented to the Council of Senior

⁷²⁶ Khalil, 'Marriage of minors between prevention and openness.'

⁷²⁷ Monerah Al Matrook, 'Weddings, or tragedies' <<http://www.okaz.com.sa/article/333642/>> accessed 5/6/2017

⁷²⁸ Asmahan al-Ghamdi, 'Determining the marriage of minors and the body of senior jurists.' <<http://www.alriyadh.com/1005581>> accessed 12/5/2017

Scholars over three years ago but the Council obstructed its implementation as the Grand Mufti of Saudi Arabia, Sheikh Abdul Aziz Al-Sheikh, who is the head of the Senior Scholars' Council authorised this type of marriage, stressing that "marriage of minors is permissible and there is nothing in it [i.e. wrong with it]."⁷²⁹

Indeed, although the proposals of the Ministry of Justice may significantly reduce the number of marriages of minors, they nevertheless still allow it when the marriage of minors should be prohibited in all cases. Moreover, these conditions are not sufficient as the legal age for marriage should be raised to eighteen as women at this age are fully mature mentally and physically; it is also the minimum age at which a girl is able to manage her family's life. On the other hand, the Senior Scholars' Council should apply *Ijtihad* and re-interpret the Islamic texts in accordance with the spirit of Islamic law and the protection of women's interests.⁷³⁰ Therefore, rather than allow the marriage of minors, based on the marriage of Prophet Mohammed to Aisha, it would be better to prevent such marriages in accordance with the Islamic legal rule that states: "*la dharara wa la dharar*" which translates as: "There must be neither harming (*dharar*) nor responding harm." This means that anything that might cause harm to others is forbidden in Islam and therefore, as the marriage of minors is harmful for females as it deprives young girls of their childhood and their right to education, it is also harmful to society as it exposes young girls to the burden of raising children.

Consequently, as Islamic principles forbid anything that is harmful to people, in addition, it also stresses love, mercy and free consent between spouses. Thus, the marriage of minors conflicts with Islamic principles and should be prohibited.⁷³¹

⁷²⁹ al-Ghamdi, 'Determining the marriage of minors and the body of senior jurists.'

⁷³⁰ Suheila Zain Al Abidine, 'Women's eligibility' <<https://manal-alsharif.com/2013/07/05/%D8%A3%D9%87%D9%84%D9%8A%D8%A9-%D8%A7%D9%84%D9%85%D8%B1%D8%A3%D8%A9-%D9%88%D9%88%D9%84%D8%A7%D9%8A%D8%AA%D9%87%D8%A7/>> accessed 10/6/2017

⁷³¹ Abdulal Al-Rashidi, 'La Darr wala Derrar' <<http://www.alukah.net/sharia/0/105491/>> accessed 16/8/2017

6.5 Women's right to dissolve marriage contracts in Saudi Arabia

As discussed earlier in Chapter Three, Islamic law gives women similar rights to those of men regarding divorce but in a different way. In Saudi Arabia, if a woman wishes to divorce, she should ask her husband to divorce her; if he refuses, she must file a lawsuit against her husband to dissolve the marriage. However, as with cases regarding issues of personal status, divorce cases are subject to the judge's discretion which, in turn, depends on his own interpretation of Islamic law. Therefore, sometimes, judges make decisions that are in the interests of women; but sometimes, they do not.

There are many reasons that give women the right to seek to dissolve a marriage contract. For instance, a woman can seek to dissolve her marriage contract if she does not like her husband. As an example, in a case at the general court in Riyadh, a woman filed a lawsuit against her husband and stated that she wanted to dissolve the marriage contract. She said that she hated her husband and did not want to live with him any more because, although she had been married to him for a year, she had spent most of the year in her family home. The judge summoned the accused and he confirmed that his wife was seeking to divorce him but he had refused as he loved her. When the judge had listened to both parties, he decided to reconcile them by advising the wife about the negative aspects of dissolving the marriage. However, after that, the wife still insisted on separation so then the judge decided to summon an arbitrator from the wife's family and an arbitrator from the husband's to try to reconcile them. However, after the efforts of the arbitrators, the wife still insisted on separation. As a result, the judge stated that love is supposed to exist on the part of both the husband and the wife but since the wife hated her husband and said she could not live with him anymore, the judge decided to separate them, with the wife returning the dowry of fifteen thousand riyals (approximately ten thousand

pounds) that he had given her.⁷³²

From this case, it could be concluded the judge was trying to follow carefully Islamic principles by seeking to reduce the number of cases of separation and attempting to reconcile the spouses as he did not respond immediately to the wife's request for separation. However, these steps of reconciliation are taken only if it is the wife who desires separation. If it is the husband who wishes to separate from his wife, it is much easier. For instance, in the previous case, the judge called for the husband to attend but, if a husband wishes to divorce his wife, there is no requirement for the wife to attend. Thus, on some occasions, a wife can be divorced without even knowing. In addition, in cases where a husband wishes to divorce his wife, most judges do not require there to be arbitrators from the spouses. This leads, in many cases, to a wife becoming a victim of her husband's misuse of the words "I divorce you". For instance, a husband put this case to a Saudi jurist: "Say I was very angry with one of my friends and said if I talked to him again, my wife would be divorced. Then, if I talked to my friend again later and my anger had disappeared, would what I had said still be considered as a divorce?" The jurist replied, "Yes, it would be considered as one divorce."⁷³³

Ahmed Al-Saqeeh, a former judge on the Saudi Board of Grievances, argues that the divorce cases that come from a husband go through easily and take place in a very short space of time. However, in the separation cases that are brought by women, the procedures sometimes exceed one year with the women living in suspense throughout this period.⁷³⁴ Indeed, Islamic law, as discussed before in Chapter Three, recommends that attempts are made to reduce the number of cases of separation by reconciling the spouses whether the separation resolution is taken by the husband or by the wife. The Qur'an states:

⁷³² Al-Adl Journal, A Quarterly refereed Journal concerned with juristic and legal issues, Ministry of Justice, Saudi Arabia, Issue 28/10/1426 AH/November 2005, p. 28.

⁷³³ Bashtah, *Saudi women between jurisprudence and society* p.351

⁷³⁴ Abdullah Al-Ghaith, 'The divorced women rights ' <<http://www.alarabiya.net/articles/2010/07/16/114040.html>> accessed 22/7/2017

“And if you fear dissension between the two, send an arbitrator from his people and an arbitrator from her people. If they both desire reconciliation, Allah will cause it between them. Indeed, Allah is ever Knowing and Acquainted [with all things].”⁷³⁵

Furthermore, if a wife wishes to dissolve her marriage without logical reasons, she should pay back the dowry to her husband⁷³⁶ while, if the husband is seeking divorce from his wife with no reasonable cause, nothing is required of him. This is, in fact, contrary to the spirit of Islamic law, which says (as discussed in Chapter Three), if a husband wishes to divorce his wife without proper reason, he should pay a divorce settlement. Hasnaa Al-Kenaier argues that there should be a legal rule in Saudi Arabia to give financial compensation to women who have been divorced, especially in a case where a wife has spent her life out of employment in order to devote herself to the service of her husband and children.⁷³⁷

Therefore, it could be considered unfair that the separation procedures for a man take a very short period of time, even if the reasons he gives are trifling, while the same procedures for a woman take considerably longer even if she has suffered badly at her husband's hands.

For instance, in a case dated 16/9/2005 in the Aflaj Court, a woman filed a lawsuit against her husband to dissolve her marriage contract. The woman stated that that she had been married for five years and that her husband was addicted to drugs; neither did he pray nor fast. Moreover, he hit her and did not treat her well. The judge asked the defendant, who was present, about the validity of the allegations against him. The defendant stated that that they had indeed been married for five years but argued that the allegations that he

⁷³⁵ , 'The Holy Quran.' (4;35)

⁷³⁶ Ali Babeker, *Divorce cases, custody, alimony and visit in accordance with the system of legal proceedings* (Second Edition edn, Dewan Al mohammen library 2015)

⁷³⁷ Al-Kenaier, 'The arbitrary divorce'

was addicted to drugs, hit her and did not pray nor fast were all incorrect. He added that he would not divorce her until she returned the dowry which he had given her which he said was one hundred and fifty thousand riyals (approximately 25,000 pounds). The judge asked the wife if she had any evidence for her claims and she said that she would try to find some. After that, the wife returned to the court and said that she had found it hard to produce any evidence, especially since all of the witnesses were from his family. After a long period, with the availability of a medical report, and because the father of the defendant admitted that his son was a drug addict, it was proved that the defendant was indeed addicted to drugs. The judge then requested that the plaintiff should swear that her husband was a drug addict and did not treat her well. The plaintiff agreed and swore that all these claims were true. Consequently, the judge stated that, as drugs harm the human mind and as the plaintiff had sworn her claims were true, in addition to the existence of the evidence which confirmed that the defendant was a drug addict, the judge decided on 19/2/2006 to dissolve the marriage contract.⁷³⁸

Although the plaintiff was affected by the marriage as her husband was drug addict, the procedures were not easy since the defendant had to attend the court. In addition, the wife was under pressure to prove that her husband was addicted to drugs. Furthermore, although evidence was available, the judge still requested her to swear that her husband was addicted and that he did not treat her well. However, if the husband had wanted to divorce his wife for whatever reason, it would be enough to say to his wife “you are divorced”⁷³⁹ and then he would just have to go to the court to confirm that she was no longer his wife.

In the Aflaj case, the judge was perhaps trying to ascertain whether or not the plaintiff had serious reasons for divorce as, according to the Saudi application of Islamic law, if the plaintiff had no serious reasons for dissolving the marriage, she still could divorce her

⁷³⁸ Al-Adl Journal, A Quarterly refereed Journal concerned with juristic and legal issues, Ministry of Justice, Saudi Arabia, Issue 13/8/1426 AH/16/9/2005 AD P.60

⁷³⁹ The divorce explained in detail in Chapter Three

husband but she would have to return the dowry to him. On the other hand, if the wife had a serious reason for asking for the marriage to be dissolved (if, for instance, her husband beat her, was addicted to drugs or did not treat her well), the judge could break the marriage contract without requiring her to return the dowry. In this case, the wife succeeded in proving to the judge that her husband was addicted to drugs and therefore she was able to dissolve her marriage without returning the dowry.

In some cases, a wife may not be able to prove to the judiciary that her husband is beating her or not treating her well. Consequently, in such cases, the affected wife has two options: firstly, trying her best to prove that her husband is not treating her well so she can dissolve her marriage without returning the dowry or, secondly, returning the dowry to him without the necessity to prove anything.⁷⁴⁰

For instance, in a case in Jeddah, a woman filed a lawsuit against her husband, stating that her husband beat her and did not treat her well. He also spent most of his time outside the home and so she left her husband and was living in her father's home. She added that she had asked her husband for maintenance for her son during the litigation proceedings but he refused to pay anything. Therefore, the wife requested that the marriage contract should be dissolved and that she should be given maintenance for her son. The judge first decided that the father should pay five hundred riyals (approximately 50 pounds) as maintenance for his son throughout the litigation proceedings. After that, the judge asked the wife if she had any evidence that her husband beat her; she said no. The judge summoned the husband and asked him about his wife's claims. The husband stated that it was not true that he was beating his wife and not treating her well. The judge decided that the spouses should bring two arbitrators, one from his side and one from hers, in order to reconcile them. After the spouses had stayed alone with the arbitrators, they both still insisted that what they said was true. Consequently, the judge stated that because there were no clear and serious reasons for divorce beyond the request of the

⁷⁴⁰ Babeker, *Divorce cases, custody, alimony and visit in accordance with the system of legal proceedings*

plaintiff, he decided not to dissolve the marriage contract and said that the wife should return to her husband's house; if she did not, the husband would not be required to pay her maintenance.⁷⁴¹

In this case, the judge was trying to reconcile the couple but when he could not, he decided to return the wife to her husband's home when it might have been true that the wife was being beaten by the husband although she was not able to prove it. On the other hand, the wife might not have the financial ability to pay back the dowry. This meant that the second option, which would have enabled her to dissolve her marriage even if she did not have proof, might not be available to her. The question may be asked in such issues: what are women supposed to do? Indeed, it is with regard to such issues that the Saudi courts should establish a specialist committee to verify the claims of the spouses so that the judge, after reading the investigative report, could make a more equitable judgment. This committee could benefit those women who are not able to find evidence so choose to pay back their dowry to their husband in order to dissolve the marriage; it could also support women who do not have sufficient evidence nor enough money to return the dowry to their husband. Such a committee could protect women from suffering or from being imprisoned.

Moreover, the Saudi system needs to have personal status law as it is an important requirement for the application of justice and the protection of the family. It is also important to achieve equality between men and women, as well as to reduce the disparity of judicial rulings. For instance, in another divorce case, a wife filed a lawsuit against her husband in the Daier Bani Malik Governorate Court, claiming that she was suffering from ill-treatment and that the husband was cursing her and beating her severely. When she asked him for a divorce he refused, and he said, "I will not let you go even if you suffer from mental illness as a result of my beatings and insults." The wife added that she had escaped to her mother's where her family convinced her to return to her husband's

⁷⁴¹ General Court of Jeddah; Case no. 373048388 dated 5/11/1437 AH 5/8/2016 AD

house. However, after she returned to him, his treatment became worse. Accordingly, the plaintiff requested the judge firstly, to dissolve the marriage, and secondly, to require the husband to support his children. When the judge questioned the defendant, he denied that he insulted his wife or hit her. The husband also refused his wife's request to dissolve the marriage and refused to divorce her. The judge asked the plaintiff if she had evidence that her husband hit and insulted her. She replied that she did not so the judge asked her to swear by God that he was beating and cursing her; she did so. After that, the judge asked them to summon an arbitrator from his family and an arbitrator from her family. After the arbitrators, who tried to reconcile the spouses, had attended the couple, the wife asked for three months to think again. Three months later, the wife still insisted on dissolving the marriage. Accordingly, the judge agreed to dissolve the marriage because of the impossibility of them continuing marital life; he also ruled that the husband was obliged to support the children.⁷⁴²

Indeed, if these two previous cases are compared, it can be seen that, although they are similar, the judges, however, issued two contradictory judgments. The judge in the first case did not annul the marriage for the wife, although she was negatively affected by the husband, while, in the second case, the judge decided to dissolve the marriage contract.

In this regard, Ahmed El Gamaa argued that, despite the fact that the Ministry of Justice has sought to develop courts of personal status, this is still not enough as it is more important to adopt a system for these courts to follow in coordination with the judges. In addition, El Gamaa argued that the signing of Saudi agreements on the rights of women should be instigated in order to protect the family.⁷⁴³ Sarah Al-Qasim argued that the lack of conviction of some specialists with regard to developing a law of personal status is due to their belief that fixing rules concerning personal status will reduce judges' discretion. In other words, it may erode judges' use of *Ijtihad* when judges should practise it. However,

⁷⁴² Al-Adl Journal, A Quarterly refereed Journal concerned with juristic and legal issues, Ministry of Justice, Saudi Arabia, Issue 13/8/1426 AH/16/9/2005 AD P.307

⁷⁴³ Nawal Al - Rashed, 'The importance of the personal status system to achieve justice.' <<http://www.alriyadh.com/828651>> accessed 15/6/2018

Ijtihad is not in conflict with the establishment of a personal status law. On the contrary, it may improve *Ijtihad* as it may speed up litigation procedures and thus give judges more time to consider diligently the new issues that are raised in the cases.⁷⁴⁴ Faisal Al-Mashuh said that Islamic principles should be used when making provisions. However, giving judges full authority to decide upon such provisions will mean that similar cases will receive a variety of judgements. Moreover, the absence of a personal status law will, to a great extent, mean that judges' interpretations of Islamic principles will generally be followed, even if their provisions and applications may not always be in the interest of the family. This is because some judges are excellent in terms of making provisions based on the Qur'an and Sunnah while, on the other hand, there are also weak judges in this regard. Furthermore, in many cases, judges offer different evaluations of cases. For instance, in divorce cases, there are judges who prefer speed, as they wish to end the case as soon as possible, while other judges prefer to give time to cases and attempt to reconcile spouses before deciding to annul the marriage.⁷⁴⁵

To sum up, some steps should be taken to improve the systems for dissolving marriage in Saudi Arabia. Firstly, courts should follow carefully the principles of Islamic law regarding the dissolving of marriages whether the desire to end the marriage comes from the husband or from the wife. Secondly, separation procedures for wives should be made easier, especially if they have been damaged by the marriage. Thirdly, Saudi Arabia must have clear and strict personal status laws so that cases involving the dissolution of marriages should not be subject only to the judge's discretion.

6.6 The misuse of polygamy

As mentioned in Chapter Three, according to Islamic principles, polygamy is not ideal; it is an exception to the ordinary case. This is because the Qur'an encourages men to marry only one woman and says: "But if you fear that you will not be just, then [marry only]

⁷⁴⁴ Rashed, 'The importance of the personal status system to achieve justice.'

⁷⁴⁵ Ibid

one.”⁷⁴⁶ Therefore, many Islamic scholars believe that if a husband is to live a stable life with his wife, he should marry only one. In fact, in Saudi Arabia, if a man would like to marry for a second, third or even fourth time, there are no restrictions or conditions that regulate it. For instance, a husband could marry another woman even if he had financial problems. The absence of regulations with regard to polygamy has led, in many cases, to Saudi husbands misusing the right to polygamy. For instance, a man married a second wife and said that both wives treated him well; both of them had a child by him. Nevertheless, after a period of time, he felt that his feelings were stronger towards one than the other and these feelings were reflected in his actions. Hence, he began to treat one better than the other. The husband was then afraid of doing something that was prohibited as, according to Islam, it is forbidden to be unjust and inequitable between wives. He then asked a Saudi jurist if he could divorce one of them to avoid being unjust and the jurist replied that this was permissible. Consequently, he decided to divorce the first wife.⁷⁴⁷

In this case, the misuse of polygamy and divorce by the husband damaged the first family. It was clear that the husband was not having any problems with his first wife as he stated that both wives treated him well. Furthermore, both wives had a child by him. Indeed, divorcing the first wife without a reason affected her more than being a wife who was treated unfairly when compared with the other wife. If this wife were to raise a lawsuit against her husband, she would obtain nothing as no penalty exists for the misuse of divorce or polygamy since Saudi legislation recognises that polygamy is an absolute right for men.⁷⁴⁸

Hasnaa Al-Kenaier argues that it should be recognised that the question of polygamy for many Muslims is no longer linked to religious teachings but more to the personal desires of the men who practise it. Moreover, she argues that placing no conditions on the practice of polygamy has resulted in a lack of responsibility among husbands. It is strange that, in Saudi society, there are husbands who decide to marry a second or third wife

⁷⁴⁶ , ‘The Holy Quran.’(4;3)

⁷⁴⁷ Bashtah, *Saudi women between jurisprudence and society* p.351, 352

⁷⁴⁸ Ibid p.351,352

when they do not have sufficient material capacity; this leads them to suffer poverty as a result of their big family.⁷⁴⁹ Furthermore, the lack of conditions that would limit polygamy has caused a cheapening of the marriage contract which is decreed by the Qur'an as "a solemn covenant".⁷⁵⁰ For instance, a husband can proudly announce to the media that he has exchanged sixteen wives and when twelve of them are divorced, he is still married to four of them.⁷⁵¹ In fact, the only condition that Saudi legislation requires of the husband is not to marry more than four wives and to treat all his wives equitably.

As an example, in Al - Ahsa Court, a woman filed a lawsuit against her husband, stating that her husband was also married to another wife and that he was not treating them equitably. He was spending most of the days in the other wife's house and taking his other wife on holidays without taking the first wife. Moreover, he was not financially maintaining her and their son. When the judge asked the husband (the defendant) about this, he replied that what the wife said about taking the other wife on holidays without her and about staying most of the time at the second wife's house was true. However, he had told his first wife before that his salary did not exceed three thousand riyals per month (approximately five hundred pounds) which was not enough for two wives, especially since the second wife had eight children while the son from the first wife was now twenty years old and could now spend money on himself and his mother. Consequently, the judge decided that, according to Islamic principles, both spouses should treat each other well and, secondly, the husband should treat the two wives equally. In addition, he should not take one wife on holidays without the other unless he took them on holidays alternately. Moreover, as the wife decided to give up the alimony, the judge did not oblige the husband to pay it.⁷⁵²

⁷⁴⁹ Hasnaa Al-Kenaier, 'Polygamy is injustice and darkness.' <<http://www.alriyadh.com/383253>> accessed 14/7/2017 Al-Kenaier, 'Polygamy is injustice and darkness.'

⁷⁵⁰ 'The Holy Quran.'(4:21)

⁷⁵¹ Al-Kenaier, 'Polygamy is injustice and darkness.' Al-Kenaier, 'Polygamy is injustice and darkness.'

⁷⁵² Al-Adl Journal, A Quarterly refereed Journal concerned with juristic and legal issues, Ministry of Justice, Saudi Arabia, Issue 20/1/1419 AH/16/9/2005 AD P.76

From this case, it is clear that the husband did not consider the verse: “If you fear that you will not be just, then [marry only] one.”⁷⁵³ As his salary was only three thousand riyals, which is definitely not enough to support two families, he should have known that he could not be just and equitable from a financial point of view. However, he took the decision to marry a second wife. Indeed, in Saudi Arabia, such cases should not be left to the husband’s decision as there should be a regulation which limits this kind of marriage. It should also be made clear that polygamy is not a pleasure for men; it is rather the addition of a great many responsibilities. This might minimise the occurrence of polygamy and limit it to real need: for example, if a husband has a wife who cannot bear children, it is perhaps better for both spouses that the husband takes another wife.

In another example, a husband described the following case to a jurist. He explained that when he married his first wife, he was poor. His wife lived with him in his family's home and she was patient with him in his hard life. They shared both joys and sorrows but now the man owned millions and felt this would enable him to be just to more than one wife and stated that he would like to marry another wife. He asked if it could be considered as unfair to marry another wife while the first wife was still good to him. The jurist answered him by saying that it is not considered unfair to marry another wife in such conditions but that he must guarantee being equitable to both wives. Saleh Al-Munjed, who is a well-known jurist in Saudi Arabia, stated that marrying another wife should never be considered as unfair to the first wife, and marrying a third wife should be never considered unfair to the second wife as the Qur’an permitted marrying up to four wives.

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Indeed, Saleh Al-Munjed seemed to encourage the husband to marry another wife without reminding him that deciding to marry another is a great responsibility. Furthermore, the justice and equality between wives that is required by Islam does not only involve financial issues; there should be equality in all other areas as the Qur’an says:

⁷⁵³ ‘The Holy Quran.’(4;3)

⁷⁵⁴ Mohammed Al-Munajjid, ‘ marrying another wife’ <<https://islamqa.info/ar/149047>> accessed 15/8/2017

“And you will never be able to be equal [in feeling] between wives, even if you should strive [to do so].”⁷⁵⁵ Moreover, if a husband does not accomplish such justice, he is violating Islamic law. Saleh Al-Munjed’s advice does, in fact, express Saudi society’s view of polygamy as it believes that this is an absolute right for men while the restrictions noted by Islam are left to the discretion of the husband. In addition, the idea of legislation with regard to polygamy in Saudi Arabia has been strongly criticised by Saudi scholars who argue about how to place limitations on something that is permitted in Islam. On the other hand, polygamy is only permitted under strict conditions in Islam; it is not an Islamic obligation.

In the public interest, Saudi Arabia has already established some limitations to what is permitted in Islam. For instance, although Islam permitted men to marry women of any nationality, Saudi Arabia has placed severe limitations on Saudi men who would like to marry non-Saudi women. In this regard, any Saudi man who wishes to marry a non-Saudi woman must submit a request for this to the Interior Minister who will ensure that the requisite conditions are met. There is punishment for those who violate the conditions and marry a foreigner without going through the proper channels.⁷⁵⁶

Therefore, in the public interest, and also to prevent men from abusing polygamy, Saudi Arabia should place severe limitations on husbands who wish to take another wife. For instance, a man who would like to marry another wife should submit a request to the court and then should prove, by providing a medical report, that his wife, for example, has a disease that prevents her from having children or prevents him from cohabiting with her. Moreover, he must show he has sufficient financial means to pay for two houses. Only after this should the court consider his request and then approve or reject it.

To sum up, in many cases in Saudi Arabia, polygamy causes complex issues leading to injustice and a denial of their rights for the wives on the one hand, and instability for the

⁷⁵⁵ ‘The Holy Quran.’(4:129)

⁷⁵⁶ (List of marriage of Saudi Arabia to non -Saudi) Ministerial Resolution No. 4786 dated 2/12/1422 AH

children on the other. The injustice to women is contrary to the principles of Islamic law and therefore polygamy should be codified, rather than being left to a husband's discretion, especially since polygamy is not a religious obligation and is only permissible under strict conditions. Therefore, these strict conditions should be transferred into strict laws by Saudi regulatory bodies.

6.7 Social incompatibility as a reason for spouses to separate

The Qur'an states: "O mankind, indeed We have created you from male and female and made you peoples and tribes that you may know one another. Indeed, the most noble of you in the sight of Allah is the most righteous of you. Indeed, Allah is Knowing and Acquainted."⁷⁵⁷

This verse clearly states that the Qur'an confirms the equality of all human beings whether in terms of gender, race or colour. The separation of spouses in Saudi Arabia is a social phenomenon and the number of cases is increasing every day.

The first case that occurred in Saudi Arabia was that of Mansoor Al Taymani and Fatimah Azaz. Mansoor asked for Fatimah's hand from her father who agreed to the marriage. After years of marriage and having two children, Fatimah's brothers discovered that Mansoor was not accurate about his tribal origins when he asked for Fatimah's hand and therefore the brothers decided to raise a lawsuit in the Al Jawf court although Fatimah did not agree with her brothers' behaviour and did not approve of their action. The judge decided to separate the spouses despite their desire to stay together as he decided they were not socially compatible.⁷⁵⁸

The judge stated that marriage which is socially unequal could lead to conflict among relatives, which is forbidden in Islam, and, as Fatimah's tribe would not accept this marriage, it could lead to her family being hated by the rest of the tribe. Therefore, he

⁷⁵⁷ , 'The Holy Quran.' (49:13)

⁷⁵⁸ Khaled Alshaya, 'Social equivalence and separation between spouses.'

<<https://www.alaraby.co.uk/society/2015/4/23/%D8%AA%D9%81%D8%B1%D9%8A%D9%82->> accessed 19/8/2017

decided that the spouses separating would be the best solution. On the other hand, both Fatimah and Mansoor did not agree with the judge and so they decided to appeal against the judgment; however, the Court of Cassation approved it.⁷⁵⁹

In fact, the judge's decision went against Islamic principles. In addition, he also misinterpreted some principles as he mentioned that discord among relatives is forbidden in Islam and yet used it as a justification to separate the spouses. Discord among relatives is forbidden in Islam if this happens without good and logical reasons and yet the judge did not consider that tribal racism is also forbidden.

Usually, the only cases that reach the Saudi Supreme Court are those that involve *hudd* and *qassas* cases: i.e. those where hands are cut off or where a murder has been committed. Moreover, the decisions of the Supreme Court are final only if they receive the support of the King.⁷⁶⁰ Due to public pressure, Mansoor and Fatimah's case managed to reach the Supreme Court. Finally, after about five years of family disruption, the Supreme Court in Riyadh allowed the couple to reunite and return to each other⁷⁶¹.

Indeed, Mansoor and Fatimah were lucky that their case attracted public attention and this helped them a great deal in returning to each other. However, in many other cases, spouses can never get together again. For instance, in the Al Ayniah court, the uncles of a wife raised a suit demanding a separation between the daughter of their brother and her husband because he was socially incompatible with them. After the judge investigated the case, he found that the wife's tribe was of a higher class than the tribe of the husband and, for this reason, although the wife and husband were happy together, the judge decided to accept the uncles' demand and he separated the spouses.⁷⁶²

⁷⁵⁹ Alshaya, 'Social equivalence and separation between spouses.'

⁷⁶⁰ Ministry of Justice, 'Supreme court' (*Saudi Ministry of Justice*, 2015) <<https://www.moj.gov.sa/ar-sa/Courts/Pages2/HighCourt.aspx>> accessed 22/8/2017

⁷⁶¹ Fatima al-Salmi, 'Social inequality cases in Saudi courts' *Alamal* (Saudi Arabia) <<http://alamalnews.org/619/%D8%A3%D8%A8%D8%B1%D8%B2->>> accessed 8/9/2017

⁷⁶² Nouf Al Anzi, 'Social inequality as a reason for separation between spouses, between religion and custom.' <<http://3alyoum.com/article/101544/>> accessed 18/9/2017

The separation of spouses on the grounds that they are socially incompatible is a tribal habit far removed from Islamic principles for many reasons. Firstly, one of the most important goals of the Islamic religion was to eliminate harmful tribal habits, such as female infanticide. The separation of spouses because they are socially incompatible is also a harmful tribal habit and is in conflict with Islamic goals. Secondly, Prophet Mohammed emphasised that all people are equal before God when he said: "All of you are descended from Adam and Adam was created from dust. In the sight of God, the most noble of you is the most pious." However, the separation of spouses on the grounds that they are socially incompatible promotes the opposite concept, as well encouraging division among people. Thirdly, and most importantly, Islam, as discussed above, gives a woman the right to choose her spouse so separating her from her husband without her acceptance is an abuse of her rights.

Amro Abualfadl argues that separating spouses on the grounds that they are socially incompatible is contrary to the principles of Islam. He also stresses that Islam arrived to contradict what existed in the age of ignorance when corrupt habits were widespread. Thus, Islam came to correct many of the misconceptions and the injustices regarding women, giving them the right to choose their husbands or to separate from them.⁷⁶³ Ageel Al ageel believes that these provisions, as outlined above, are a crime against women and have no basis in Islam. Moreover, he sees these as tampering with and manipulating God's judgments.⁷⁶⁴ Abdullah Ragab argues that there is no legal justification for such separation of spouses but unfortunately, some judges prefer to issue similar rulings, fearing that such situations might develop into murder as, in some cases, the uncles or brothers of the wife kill her husband as they believe he is not socially compatible with them; in this, they go against Islamic law even more. Abdullah Ragab believes that such separations should be considered as a crime against the wife and the children. Fahd Al Majid considers that divorce cases on the grounds of unequal status are

⁷⁶³ Amr Abu ALFadl, 'Islam guarantees women the right to choose a husband and terminate the marital relationship.'
<<http://www.alittihad.ae/details.php?id=14614&y=2009>> accessed 18/9/2017

⁷⁶⁴ Alshaya, 'Social equivalence and separation between spouses.'

often motivated by tribal reasons and, in addition, he considers that the separation of spouses does serious psychological damage, especially to the wife and children. Moreover, he believes that judges in Saudi Arabia should address this problem by not accepting such cases from the beginning.⁷⁶⁵

Indeed, the Saudi judiciary agreeing to consider such cases may indicate the extent of the power and influence of customs and traditions on the laws of Saudi Arabia where, in some cases, the role of customs and traditions is more influential than Islamic principles. In addition, in some cases, like that of Fatimah and Mansoor, it leads some Saudi judges to misinterpret Islamic principles to obtain rulings that conform to tribal customs.

6.8 Conclusion

As discussed in Chapter Three, Islam gives men and women equal social rights. For instance, it gives women similar rights to men to marry or to dissolve a marriage. In Saudi Arabia, customs and traditions have influenced women's right to marry and other issues negatively affect women, such as the guardian of a woman forcing her to marry or depriving her of the right to marriage (*Adul*). In addition, although Islam gave similar rights in terms of separation to both men and women, in Saudi Arabia, however, separation process is much easier for men than it is for women. So, in many cases, when a woman wishes to be separated from her husband for serious reasons, some judges allow the case to take a long time and lengthy procedures are often involved; in some cases, she is not able to gain a separation at all.

Moreover, customs and traditions are often found to be at the heart of certain issues: the separation of spouses because they are deemed socially incompatible or the abuse of polygamy and underage marriage; all of these are incompatible with the spirit of Islamic law. In order for women in Saudi Arabia to attain the rights guaranteed by Islam, the

⁷⁶⁵ Anzi, 'Social inequality as a reason for separation between spouses, between religion and custom.'

impact of negative customs and traditions must be eradicated. Furthermore, a personal status law should be created to prevent inconsistencies in judges' rulings in similar cases.

Chapter 7: Women's Rights as Individuals in Saudi Arabia

7.1 Introduction

Saudi Arabia is one of the most significant Islamic countries regarding its importance for Muslims. In addition, it may be considered to be one of the most radical countries in terms of its application of Islamic law in the Kingdom. Traditions have played a major role in the current discriminatory laws and practices which exist between men and women.

This chapter discusses the rights of women as individuals in Saudi Arabia and first examines women's right to education. In this regard, it considers the obstacles which face women in fulfilling their right to education, as well as the developments that have taken place which have worked in their favour. Secondly, the chapter argues for the right of Saudi women to have sports classes and, thirdly, it discusses the stages that women's right to work have passed through. Fourthly, the chapter examines the right of Saudi women to gain positions in politics and as leaders, while, fifthly, the difficulties facing women in transferring their nationality to their children is considered. Sixthly, it outlines the obstacles that faced women in being allowed to drive. Finally, the chapter argues the misuse of the concept of guardianship and pinpoints its negative effects.

7.2 Women's right to education in Saudi Arabia

In Saudi Arabia in the past, women were not able to go to school as there were no schools for females and the only roles for women were to marry and raise their children. Education for women began in 1960 by a royal order from King Faisal, who was the ruler of the country; this occurred after strong objections from conservative scholars.

Nonetheless, education for females began thirty years later than for males. In fact, despite the importance of education in Islam for both men and women, as discussed in Chapter Four, conservative Saudi scholars played a major role in delaying education for women as their interpretations of the Islamic principles were largely influenced by the stereotypical role of women at that time, a role which was limited to marriage, reproduction and raising children.⁷⁶⁶ For this reason, while the education of males was supervised by the Ministry of Education, women's education at all stages, whether primary, intermediate, secondary or at a university level, was supervised by the Department of Religious Guidance until 2002. This, it was said, was to ensure that education should be compatible with the nature of women and was to prepare them for this, as it was thought at the time that women could only be mothers and wives, or that they could have jobs that were not contrary to their female nature. Such jobs included nursing or teaching; it was very challenging to obtain any other kind of work.⁷⁶⁷ In 2002, a serious fire took place in one of the intermediate schools in Mecca. This resulted in the death of fifteen girls and the press reported that the presence of the Committee for the Promotion of Virtue and the Prevention of Vice (or the religious police) had contributed significantly to the increase in the number of the dead as they prevented firefighters from entering the building because some of the teachers and girls might not have been veiled. Moreover, in hindsight, the Department of Religious Guidance was deemed not to be satisfactory as safety measures in girls' schools were found to be inadequate; furthermore, the education of females was given a smaller budget than that given for male education. After the wave of public anger which followed that accident, in 2002, the Ministry of Education took over the supervision of education for females as it already had for the education of males.⁷⁶⁸

Indeed, it was challenging to develop women's education as this conflicted with many of the customs and traditions in Saudi Arabia; this, in turn, led to delays but, after pressure in terms of public opinion after the fire incident, females were able, to some extent, to gain

⁷⁶⁶ Fahd Al Jadeed, 'The beginning of femals' education in Saudi Arabia' <<http://www.saaaid.net/female/0247.htm>> accessed 22/9/2017.

⁷⁶⁷ Amani Hamdan, 'Women and Education in Saudi Arabia: Challenges and Achievements' (2005)6 International Education Journal 42.

⁷⁶⁸ Ibid

similar rights to males in the field of education when hundreds of schools were created for females at all stages. Many colleges especially for women were also opened. However, in spite of these developments, women still are not able to enjoy equal rights with males in the sphere of education since culture remains a strong influence on women's education. For instance, men receive a better quality of learning in universities than women, as male teachers are usually better trained than their female counterparts. Most male teachers in the universities hold doctoral degrees while this not the case for female teachers. In fact, this is largely owing to the lack of opportunities for both males and females to study for doctoral degrees in the country as Saudi universities are unable to awards such degrees. As a result, the government tends to give scholarships for students to gain this type of qualification. In this regard, however, strict conditions are placed on women who wish to benefit from such scholarships as they need to have a male guardian.⁷⁶⁹ In addition, more than 200 libraries in Saudi Arabia have restricted opening times and women's libraries are usually very small and poorly equipped; therefore, women in Saudi Arabia often find it challenging to conduct research.⁷⁷⁰

Moreover, culture has influenced the specialisations that are available for women as many disciplines, such as the departments of politics, law, accounting, business and administration, were reserved for males only and while these have recently become open to women, it is still impossible for women to study subjects such as aviation or engineering, or to attend marine or military colleges. This is due to the stereotype that suggests women are not able to carry out such hard work⁷⁷¹ and are more prepared to be housewives. In contrast, there are specialties in the universities that are available only to women, such as housekeeping, where women learn the best way to be perfect wives and mothers.⁷⁷² Indeed, making such departments only for women may promote the stereotype when men also need to learn how to become good fathers and husbands.

⁷⁶⁹ Hamdan, 'Women and Education in Saudi Arabia: Challenges and Achievements'(2005)

⁷⁷⁰ Ibid

⁷⁷¹ Abdullah Almaliki, 'Saudi Women: Education and Work: Challenges Presented.'
<<http://www.arabou.edu.kw/index.php/ar/>> accessed 1/10/2017

⁷⁷² Samiha Khalifa, 'Specializations for males and specializations for females.'
<<http://mawdoo3.com/%D8%A3%D9%81%D8%B6%D9%84>> accessed 5/10/2017

In fact, one of the most serious obstacles facing Saudi women regarding education is that they have to gain their guardian's approval to study from intermediate school until higher education despite the fact that the Ministry of the Interior stressed the need for education from the age of six. This is because it is generally believed that women tend to be emotional and therefore always need a male guardian to make decisions for them.⁷⁷³ Nonetheless, if a guardian decides to make his daughter stay at home, there is nothing in Saudi law which prevents him from doing so. For instance, in Asir city, a father who had three daughters decided to deny them the opportunity to study for over twenty years even though their divorced mother tried to raise a lawsuit against their father. The judge rejected the lawsuit, stressing that one of the daughters should have raised the lawsuit. The mother claimed that the daughters could not go anywhere without their father's approval and if they did, he might kill them. In addition, the mother tried to reach a solution through the Saudi Human Rights Commission but they were unable to make any positive steps on her behalf.⁷⁷⁴

The powers that guardians have in Saudi Arabia contribute to the fact that many females, especially those in Saudi villages and in rural settings, remain uneducated as their families, who are usually tribal, believe that women do not need education at all; all women need to do is to marry. This leads many girls to leave school in the early stages, whether from intermediate or high schools, since guardians, in many cases, decide to marry off a daughter instead of educating her. This is one of the main reasons for the increasing rate of illiteracy among females, which has reached more than 30%, compared to males (about 3% in 2013⁷⁷⁵) in Saudi Arabia. Moreover, guardians in Saudi Arabia have the power to interfere with daughters' educational choices. For instance, some guardians prevent their daughters from enrolling in some specialties such as medicine because, owing to certain tribal customs and traditions, many guardians believe that it is inappropriate for their

⁷⁷³ Almaliki, 'Saudi Women: Education and Work: Challenges Presented.'

⁷⁷⁴ Naim Hakim, 'Deprivation of female from education.' <<http://www.alsharq.net.sa/2012/05/05/260036>> accessed 18/9/2017.

⁷⁷⁵ Ahd Al-Otaibi, 'Illiteracy in Saudi Arabia' <<http://www.sayidaty.net/node/339711/%D>> accessed 20/9/2017

daughters to be doctors. Furthermore, conservative scholars in Saudi Arabia believe that a husband has the right to prevent his wife from pursuing her education unless that education is related to learning about religious matters when, in fact, there is nothing in the Islamic law which gives a husband the right to deny his wife an education.⁷⁷⁶

Flahid argues that there are many families in rural Saudi Arabia who are depriving their children, especially girls, of education by making them work in farming or domestic services, or by making them marry at a very young age.⁷⁷⁷ Mansur al-Askar stresses that depriving girls of education is a pervasive phenomenon in the villages of Saudi Arabia due to the customs and cultures of the inhabitants of these areas who do not understand the importance of education. Therefore, there must be regulations and controls in the Kingdom that confront this phenomenon and force parents to enrol their daughters in school.⁷⁷⁸ Al Dakhil argues that the directives of the Ministry of Interior, which require education from the age of six, may be clear but they are insufficient since strict penalties must be imposed on any guardian who prevents a daughter from having an education.⁷⁷⁹

Mobility is another obstacle facing a woman with regard to education, especially in higher education, as a male relative must get her to the school or to the university. Also, sometimes a woman cannot find a place at the university in the city where she lives and, in many cases, a male relative cannot get her to another university which can sometimes lead her to give up her studies.⁷⁸⁰

In 2004, Saudi Arabia launched a scholarship project, which allowed both males and females to study different specialties abroad. However, a special condition exists for women who would like to take up such a scholarship: a guardian must be available or they

⁷⁷⁶ Hamza Bo Fahid, 'Children deprived of education in Saudi Arabia.' <<http://www.alyaum.com/article/1334762>> accessed 3/10/2017

⁷⁷⁷ Ibid

⁷⁷⁸ Ibid

⁷⁷⁹ Turki Al-Dakhil, 'The crime of preventing education.' <<http://www.alwatan.com.sa/Articles/Detail.aspx?ArticleId=10770>> accessed 18/9/2017

⁷⁸⁰ Abdul Aziz Ibrahim, 'Problems of women's transportation in Saudi Arabia' <<http://www.alyaum.com/article/2730325>> accessed 30/9/2017

are not able to obtain it. Indeed, this condition has led to great difficulties for many women in Saudi Arabia as many who were eligible for the scholarship could not get one as they did not have guardian who could travel to the country where the scholarship was available and stay with them during their studies. Many women have husbands who are tied to jobs in Saudi Arabia so, to be able to accompany their wives, they would need to quit their jobs or take unpaid leave, which is available for no more than a year; this is not enough for a wife to finish her studies.⁷⁸¹ Therefore, many female students decided to end their scholarship as it was not possible to have a guardian for the length of time that the scholarship lasted. Ibtisam Al Omri argues that the requirement of a guardian for female students leads to disappointment for many of them as many have met all the conditions that qualified them for a scholarship apart from the availability of a guardian. For this reason, Saudi Arabia should find other solutions for those who do not have a guardian as this condition places the dreams and fates of female students within the hands of the guardian.⁷⁸² Maha Al Eid was a student who had a scholarship alongside her brother. However, after two years of study, her brother, due to urgent circumstances, had to return to Saudi Arabia. After this, the government stopped paying her tuition fees, which meant she had to give up her scholarship, as no other guardian was able to be with her during this time.⁷⁸³ Suhaila zin Al abiden (cited in Noura Al Atawi) argues that other solutions should be available for those females who do not have a guardian available to stay with them in the place where they are studying.⁷⁸⁴ Indeed, the Saudi emphasis on the importance of the guardian stems from the Islamic religion, which prohibits women from travelling without a guardian. However, as discussed previously in Chapter Five, this matter should be reinterpreted, especially since travelling abroad is no longer dangerous as it once was. Therefore, *Ijtihad* is necessary with regard to this issue. However, the Saudi Arabian culture may be an obstacle to employing *Ijtihad* in this matter, especially because of the influence of the stereotype that suggests women always need men.

⁷⁸¹ Noura Al Atawi, 'The condition of a guardian is an obstacle for overseas female students' <<http://www.alriyadh.com/613880>> accessed 5/10/2017

⁷⁸² Khaled Redhaq, 'Scholarship is a dream in the grip of the guardian.' <<http://www.okaz.com.sa/article/900502/>> accessed 12/10/2017

⁷⁸³ Ibid

⁷⁸⁴ Atawi, 'The condition of a guardian is an obstacle for overseas female students'

Although Islamic principles stress the significance of education for both males and females,⁷⁸⁵ customs and traditions have held back female education for decades in Saudi Arabia. In addition, these customs and traditions have prevented women from taking up many disciplines in the Kingdom and they are still an obstacle to women enjoying the same educational opportunities as men. In the field of education, the Saudi Arabian government has been able to subdue the conservative scholars with regard to the necessity for education for females as it approved education for women in spite of strong opposition from these scholars.

For this reason, the Saudi government may be able to undermine any culture that prevents women from enjoying the same opportunities as men in the field of education.

7.3. The right to attend physical activities

As discussed before in Chapter Four, Islam promotes sport for both men and women. For over a decade in Saudi Arabia, the introduction of sports classes for women has been highly controversial as conservative religious movements strongly oppose the existence of women's sports classes. This is because they believe that sport is a source of corruption for women; moreover, they believe that creating sports classes for females is a western idea that should not be applied in Islamic countries. For example, Abdullah Al-Manea, a scholar who condemns sport for females, stated that it is not desirable for Muslim females to practise sports as they may harm the modesty that must exist in Muslim women. Saleh Al-Fozan argued that it is not permissible in Islam to teach sports to girls while asking what the benefit is of sport for girls.

⁷⁸⁵ Atawi, 'The condition of a guardian is an obstacle for overseas female students'

The Secretary General of the Association of Muslim Scholars, Nasser bin Suleiman Al-Omar, argued that female students need to be educated about healthy life styles without the need to include sports classes in their education, and without the need to insert such a subject into the curriculum, thus burdening the educational process.⁷⁸⁶ Abdul karim al-Khudair, who is a member of the Supreme Council of Scholars, argued that the inclusion of sports for women is a corruption that should not be accepted by any wise Muslim; he also argued that women should be busy taking care of their homes and raising their children.⁷⁸⁷ Moreover, he mentioned from the Qur'an: "O you who have believed, do not follow the footsteps of Satan. And whoever follows the footsteps of Satan - indeed, he enjoins immorality and wrongdoing."⁷⁸⁸ He considered that women practising physical activities is indeed following in Satan's footsteps as, at the start, women may only practise physical activities but, after this, it may lead them to abandon their modesty and wear revealing clothes.⁷⁸⁹ Other opponents base their arguments prohibiting sport for women on the notion that: "There is no woman who removes her clothes in a place other than her husband's house but she has removed the screen between her and her Lord."⁷⁹⁰ They believe that, when a woman wishes to take part in a sporting activity, she will need to change her clothes. However, this does not seem to be the correct interpretation of this Hadith as it is being interpreted out of its proper context. Hasnaa al-Kenayr argues that this Hadith has been so interpreted to deny women the opportunity of taking part in physical activities although it does not mention physical activities but a deeper, and more serious subject, which is adultery. This Hadith emphasises the seriousness of adultery being committed by a wife and so exhorts her to avoid it.⁷⁹¹ In addition, al-Kenayr argues that those who object to women's sports are confusingly citing Islamic texts which are not related to sport in order to prevent women from taking part in sporting activities. In doing

⁷⁸⁶ Khaled Alshaya, 'Women sport in Saudi Arabia .. between the necessity and the great spoiler' <<https://www.alarabiya.net/articles/2011/01/13/133336.html>> accessed 11/10/2017

⁷⁸⁷ Mohamed Lafi, 'The direction of women's sport in Saudi Arabia.'

<<http://alwatan.com.sa/Articles/Detail.aspx?ArticleId=21789>> accessed 22/9/2017

⁷⁸⁸ , 'The Holy Quran.'(24:21)

⁷⁸⁹ Khaled Alshaya, 'The of practice sport in Saudi Arabia girls schools.' <raseef22.com/life/2017/07/12> accessed 11/10/2017

⁷⁹⁰ Mohammed Al Albani, *Alrad Almothem* (the Islamic Library 2001) p.73

⁷⁹¹ Hasnaa al-Kenayr, 'Women's Sports' <<http://www.alriyadh.com/237888>> accessed 18/7/2018

so, they are reinforcing the customs and traditions that condemn women only to staying at home and carrying out their traditional tasks.⁷⁹²

In fact, although all the opponents of sport for women are well-known Muslim scholars, their point of view, however, is incompatible with the Islamic spirit. For instance, they do not mention any clear text from the Qur'an or Sunnah that confirm the prohibition of sport for girls. In addition, as discussed before in Chapter Four, Islam inspires all Muslims, whether male or female, to take care of their bodies and their health. Moreover, the Prophet Mohammed himself encouraged both males and females to practise sport as he emphasised that one of a child's rights from their parents is to be taught writing, swimming and archery.⁷⁹³ Consequently, the notions of opponents may not be related to Islamic law but may be more related to the culture of the country and the stereotype of women there.

On the other hand, some other scholars believe that women practising sport is not contrary to Islamic principles. For instance, the former great Islamic scholar of the Kingdom of Saudi Arabia, Abdul Aziz bin Baz, stressed that sport for women is not prohibited in Islam. Salman al-Awdah is another scholar who believes that females should be encouraged to take part in exercise and physical activities. The Head of the Committee for the Promotion of Virtue and Prevention of Vice in Mecca, Ahmed Al-Ghamdi, argued that there is nothing in Islam which prevents females from practising sport and therefore, there is nothing to prevent the inclusion of sports classes for girls. Moreover, he stressed that scholars who believe that sport is prohibited in Islam are confused between Saudi traditions and Islam.⁷⁹⁴

In fact, although the opinions of scholars are divided regarding sport, sports have been banned for years in girls' schools. Over eleven years ago, the Consultative Council issued a

⁷⁹² al-Kenayr, 'Women's Sports'

⁷⁹³ Hmash, 'Islam and sportsmanship'

⁷⁹⁴ Alshaya, 'The of practice sport in Saudi Arabia girls schools.'

recommendation which stressed the need for the introduction of physical education into girls' schools at all levels of study. However, this recommendation conflicted with the views of conservative scholars which then became an obstacle to applying the proposal.⁷⁹⁵

Mohammad Al Oteeqi argues that conservative scholars have for years prevented girls from indulging in sport as they claimed that sport has a great corrupting influence. However, they could not provide even one proof of this from Islamic principles. In addition, Al Oteeqi asserts that it is illogical to oppose something that is healthy and important for women, such as sport, while many other specialists believe that the practice of sport by women is self-evident and not worthy of all the controversy. Hattoun al-Fassi believes that the practice of sport for females is an axiom and that there are no religious justifications for preventing women from taking part in sports. On the contrary, the Islamic religion encouraged such activities so it is obvious that sports classes should be included in girls' schools as they are in boys';⁷⁹⁶ this should be mandatory to help maintain the health of girls. Indeed, denying sport classes for females is not related to Islamic principles. However, it is related to the Saudi culture which limits females to house-keeping only as it believes that women do not need to be stronger as they should spend most of their time at home. Consequently, although sports classes exist for male students in school, there are none for females. Instead, there are special classes, called "house-keeping", for females. Suad Mousa states that Islam does not prohibit women from practising sport and that many of those who are considered conservative in Saudi society have an objection to this issue from the perspective of society's customs and traditions.⁷⁹⁷

In fact, religious trends in Saudi Arabia consistently tend to prohibit anything regarding women's rights as they are always expanding the circle of prohibition and narrowing the circle of what is permissible, even in the absence of Islamic texts that support their

⁷⁹⁵ Abdul Rahman Al Rashed, 'Women's sport in Saudi Arabia between permissibility and prohibition.'
<<https://aawsat.com/home/article/705776>> accessed 10/9/2017

⁷⁹⁶ Alshaya, 'Women sport in Saudi Arabia .. between the necessity and the great spoiler'

⁷⁹⁷ Ibid

arguments.⁷⁹⁸ Unfortunately, in many cases, they prohibit what Islam states is permissible and argue that they are merely trying to avoid evils, without ever explaining what these evils are. For instance, Suhaila Zain Al Abdeen asks what is evil about females practising sport. On the contrary, if there are evils connected to women practising sport, why are there no evils for males when they are doing the same thing? She stresses that such arguments are not Islamic. Furthermore, she argues that Saudi women suffer from diabetes and osteoporosis because they do not walk and do not expose themselves to the sun as there are no places for them to practise sports. They are also increasingly suffering from obesity and its risks and therefore attention must be paid to these issues and women must be provided with everything that can maintain their health.⁷⁹⁹

In 2017, the Minister of Education issued a decision to include physical activity classes in school for females; this was to take effect the following year. Nevertheless, the Minister's decision included two conditions: that physical activities for girls should be commensurate with principles of Islamic law and secondly that the activities should be commensurate with the nature of females.⁸⁰⁰ The Minister's conditions seem ambiguous as no such conditions are in place in schools for males. These conditions may also preclude women from practising certain kinds of sporting activities or they may be an attempt by the Minister to appeal to the religious conservatives who have refused to countenance sports classes for females. Nonetheless, the Minister of Education's decision was a clear announcement by the Saudi Arabian government that it approved of women taking part in sport. However, before that decision was made, there were many signs from the government indicating their tacit approval of women in sport. For instance, in 2016, the Council of Ministers appointed Princess Rima Bin Bandar Al-Saud as Deputy General Secretary of the Sports Department for the Women's Section while, also in 2016, no overt sporting activities were approved by the government.⁸⁰¹ Moreover, Saudi females participated in international sporting events as four Saudi women joined the Olympic

⁷⁹⁸ Rashed, 'Women's sport in Saudi Arabia between permissibility and prohibition.'

⁷⁹⁹ Alshaya, 'Women sport in Saudi Arabia .. between the necessity and the great spoiler'

⁸⁰⁰ Abdullah Nooh, 'Obstacles to exercise for Saudi women.' <<https://www.alaraby.co.uk/society/2014/10/10/>> accessed 22/9/2017

⁸⁰¹ Ibid

games in Rio de Janeiro, Brazil. For instance, Sara Attar participated in this competition as well as being a former participant in the London Olympics. Lubna Omar took part in the fencing while Rima Abu Al-Jadayel participated in the 100 metres contest. Finally, Judd Fahmi participated in judo. The participation of these females without being prohibited by the government indicated the approval of the government for their participation although they did not announce this, perhaps fearing a strong reaction from conservative scholars.⁸⁰²

The decision of the Minister of Education was perhaps the first step towards obtaining equal rights with males in terms of participating in physical activities. However, there are still many obstacles that prevent women from obtaining full rights in this respect: for instance, Saudi women were not allowed to enter sports venues as spectators. In this regard, Sarah Fahed argued that preventing women from entering stadia is a painful decision, especially for those interested in sports. In addition, it is an arbitrary decision resulting from poor regulations that do not take into account the importance of sport for women. Moreover, there are serious obstacles with regard to establishing gyms for females and, as a result, some traders have set up unlicensed clubs attached to their homes because of the lack of licensed gyms. The existing licensed gyms are very expensive which means that only rich women can use them. In contrast, however, there are a great many men's clubs which are easily affordable and which contain all the available sports equipment.⁸⁰³

The Minister's decision has opened a door of hope that Saudi women might have the opportunity to practise sporting activities. However, obtaining full equal rights with males in this regard may be challenging if officials fail to overcome the obstacle of tradition.

⁸⁰² Shorouk Hisham, 'Saudi women and sport.' <<http://www.hiamag.com/516751>> accessed 12/9/2017

⁸⁰³ Ibrahim Nafi, 'Saudi Arabia's rejection of women's practice of sport.' <http://www.huffpostarabi.com/2016/02/25/story_n_9319086.html> accessed 18/9/2017

7.4 The right to work

Women working in Saudi Arabia is one of the controversial issues that results in confrontation between a conservative movement that is against women going out and working in public spaces, and opponents who believe there is a need to integrate women into the labour market. The official religious view constantly intervenes to reject women working.⁸⁰⁴

This situation meant that, for years, women in Saudi Arabia were only able to work in the education sector in girls' schools which, in turn, resulted in large numbers of unemployed women while thousands demanded for women to participate other areas. A former Saudi Minister of Labour, Ghazi al-Gosaibi, was one of the most prominent supporters of those wishing to open new areas of work for Saudi women. He suggested that Saudi women should be allowed to work in retail stores selling women's supplies instead of men who occupied the jobs in this field. However, a storm of religious fatwas in opposition led the government to put a stop to the project.⁸⁰⁵ For example, the Grand Mufti of Saudi Arabia, Abdul Aziz al-Sheikh, stated that every official should know that any system that might expose women to the possibility of violating Islamic law, such as mixing with men in a work place, was dangerous as it could violate Islamic principles.⁸⁰⁶

In fact, the main problem regarding the issue of women working in Saudi Arabia lies in the rejection by society and clerics of all careers that allow females to mix with males. Indeed, even Saudi labour law has been influenced by tradition and by conservative clergy. For instance, Article 160 stated that: "it is not permissible, in any case, for women to mix with men in the work place." However, this article has been repealed in the new Labour Law, which may indicate that the Saudi government is not paying as much attention to the issue of mixing as it did before.⁸⁰⁷ In 2004, the Council of Ministers decided, in its

⁸⁰⁴ Turki Abdel Hay, 'Women work in Saudi Arabia' <<http://www.dw.com/ar/%D8%B9%D9%85%D9%84->>

⁸⁰⁵ Hay, 'Women work in Saudi Arabia'

⁸⁰⁶ Ibid

⁸⁰⁷ Omar al - Haddadi, 'Working Woman Rights' <<https://www.alyaum.com/article/4151671>> accessed 15/12/2017

Resolution No. 120, that it is no longer permissible for men to work in shops that specialise in the sale of women's supplies, such as clothes, perfume, makeup, etc.; this has opened the doors to thousands of jobs for Saudi women.⁸⁰⁸ Also, in this regard, the former Chancellor of the Shura Council, Abdulrahman Al-Hammad, confirmed that the “feminisation” of shops has brought with it great economic and social benefits, paving the way for Saudi women to enter new sectors of work, such as business ownership, or as employees and workers.⁸⁰⁹

In fact, the Saudi Labour Law contains many features for the benefit of women. For example, Article 3 of the Saudi Labour Law stipulates: "work is a right of citizens, and citizens are equal in the right to work," while Article 149 stipulates that "women shall work in all fields that are compatible with their nature and it is prohibited to employ them in dangerous or harmful work, while the Minister of Labour must identify what is harmful to health or those jobs that may expose women to risk. Then special conditions and special restrictions must be set."⁸¹⁰

It can be understood from these articles that women have similar rights to men in all fields of work, except work that may dangerous for women. This is to the benefit of women as females may not be able to do jobs that require great physical effort or it may be hard for women to work in jobs that require exposure to chemicals, especially if a woman is pregnant or breastfeeding, as these types of work could be dangerous for the mothers and babies at the same time. Although some advocates of women's rights in Saudi Arabia have opposed this article, it is in the interest of women because it is better for women to obtain the rights that suit them as women since it is not always reasonable for women to take men's rights as a standard for women's rights.⁸¹¹

⁸⁰⁸ Haddadi, 'Working Woman Rights'

⁸⁰⁹ Ali Shehab, 'Work in women's clothing stores.'

<<http://makkahnewspaper.com/article/616121/%D8%A3%D8%B9%D9%85%D8%A7%D9%84/%D9%85%D8%AD%D9%84%D8%A7%D8%AA-%D8%A7%D9%84>> accessed 18/12/2017

⁸¹⁰ Mohammed al-Fawzan, *Women work in Saudi Arabia*. (First Edition edn, Law and Economics Library. 2012)

⁸¹¹ Hamdan, 'Saudi women's rights: permitted and prohibited.'

Ministerial decrees have been issued in this regard. For instance, women are prohibited from working in mines or quarries. In addition, they should not work in jobs that require minerals to be extracted from the ground and cannot work in manufacturing industries which deal with energy conversion. Moreover, they are not able to work in the field of sanitation or gas installation, and in the distribution of petroleum products.⁸¹²

Article 151 of the Saudi Labour Law states that women should not be required to work in the evening period, which would be after 11 pm, except in the case of the existence of a ministerial decision. The ministerial decision offers some explanation regarding this article. Firstly, women are allowed to work at night if they work in the health sector or where their work is educational or voluntary. Secondly, women may work in a “force majeure” situation or a state of emergency and, thirdly, they may work at night if this work is necessary to prevent the rapid damage of materials. Fourthly, women can work at night if the institution employs only family members. However, in all cases, employers must obtain a licence to employ women at night. In addition, they should provide all the necessary guarantees to protect their female employees.⁸¹³

Determining if and when women can work at night has given rise to different views in Saudi Arabia between supporters and opponents. The opposition, which discussed restricting women's work in the evening, stresses the traditional role of women in caring for their home and children when men should participate in this role as well. On the other hand, supporters argue that determining the evening period for women's work is not emphasising women's traditional roles. For example, Omar Hadadi states that the new Saudi labour system seeks to provide suitable and comfortable environments for women in work. Moreover, the fact that mothers are more concerned about their children cannot be ignored and it may be difficult for them to spend most of the night away from them, especially if a mother is breastfeeding. Therefore, including strict conditions regarding

⁸¹² Haddadi, 'Working Woman Rights'

⁸¹³ al-Fawzan, *Women work in Saudi Arabia*.

women working at night is not discrimination against women, as this is primarily for their benefit.⁸¹⁴

Saudi Labour law attempts to protect the rights of women as mothers. For instance, Article 153 states that “The employer must provide medical care for the working woman during pregnancy and childbirth.”⁸¹⁵ Also, according to Article 151, women workers are entitled to four weeks’ leave before the birth of a child and six weeks’ leave afterwards. In addition, women are prohibited from working for six weeks following the birth. Moreover, Article 151 states that an employer shall pay to the working woman the equivalent of her full wage during her maternity leave.⁸¹⁶

This Article includes amendments to make it more beneficial for women compared to the Article before the amendment. For example, previously, women were entitled to only half their wage during maternity leave if they had served one year or more with the employer, and they were not entitled to the full wage unless their period of service was three years or more. Moreover, women were not paid a salary during their annual leave if they had been paid for maternity leave in the same year. These rules were amended and women are currently entitled to full pay during their annual leave, even if they received paid maternity leave in the same year. Furthermore, Article 155 of the Labour Code stipulates that an employer may not dismiss or warn a female employee during the period of her maternity leave, nor dismiss her during any period of illness resulting from pregnancy or childbirth. In fact, the amendments to this article in favour of women reflect strongly the interest that the Saudi labour system has in offering the best conditions to women both during a pregnancy or after it.⁸¹⁷

Although the Saudi labour system seeks to give women equal rights with men, the reality is that women have not yet achieved equality with their male counterparts, as most of the

⁸¹⁴ Haddadi, ‘Working Woman Rights’

⁸¹⁵ Saudi labour law Act 2005

⁸¹⁶ al-Fawzan, *Women work in Saudi Arabia*.

⁸¹⁷ Saudi labour law Act 2005

unemployed in Saudi Arabia are women. Shijen Al-Qahtani asserts that the figures regarding women's unemployment in Saudi Arabia are frightening as there are more than 400,000 unemployed females, 73% of whom are university graduates and 4000 of whom hold a Master's degree. Indeed, there are many reasons for these numbers: firstly, the lack of justice in employment opportunities between women and men as most of the job opportunities available to women are still confined to the health and education sectors. Also, women's salaries are low compared to those of men. For instance, as a customer service worker in a company, a male employee will receive 6,000 Saudi Riyals per month (approx. £1200) while a woman will receive 4,500 Saudi Riyals per month or less (approx. £900). A study undertaken by the King Khalid Foundation revealed that the wage gap between men and women increased by 332% in two years as it reached 1077 SR (approx. £215) in 2016 while it was 324 SR (approx. £71) in 2014.⁸¹⁸ Another problem that contributes to the high level of women's unemployment is the lack of child nurseries in Saudi Arabia in general. This prompts women to stay at home because there is no one to care for their children. To solve this problem, the Labour Law states, in Article 159, that: "Every employer employing 50 or more female workers shall create a suitable place where there should be a sufficient number of nannies to take care of the children who are less than six years old."⁸¹⁹ However, in reality, very few employers have applied this article as most employers do not provide nurseries.⁸²⁰

A further obstacle facing Saudi women and preventing them from taking up employment is the absence of a harassment law. Where the workplace is mixed between men and women, many women hesitate to take such jobs out of fear of being harassed. In addition, customs and traditions also play a major role in women's unemployment since male logic is the norm for many employers. For example, many employers require a guardian's consent and some careers require women to travel when they cannot travel without the consent of a guardian. Moreover, most employers do not believe in the capabilities of

⁸¹⁸ Shajan Al Qahtani, 'Women's unemployment and inequitable opportunities and salaries.'

<<https://ajel.sa/opinions/1896441?comments>> accessed 10/11/2017

⁸¹⁹ Saudi labour law Act 2005

⁸²⁰ al-Fawzan, *Women work in Saudi Arabia*.

women and do not give them opportunities in positions of leadership. Thus, there is no equality of opportunity between men and women in most areas of employment which frustrates women and impedes their progress in the working arena.⁸²¹

Khalid al-Fakhri, a member of the National Assembly, argued that the language of the Saudi Labour Law is always rather general as it was drafted without distinguishing between the genders, except for those articles which were drafted specifically for certain categories: for instance, the articles relating to childbirth and maternity leave. Much discrimination against women at work is due to the abuse of laws by some employers for several reasons. Firstly, there is ignorance of some articles in the labour system, which means that those articles are not applied. Secondly, some women employees are ignorant of their rights and the obligations that the system has granted to them while, thirdly, some employers mistakenly misinterpret certain laws and regulations against women's interests, as well as falsely interpreting some concepts, such as guardianship. This prevents adult women from taking some actions without their guardians' approval.⁸²²

In order to allow more women to work, the Council for Economic Affairs and Development must attempt to enable women to obtain their rights that are guaranteed in the labour system by addressing imbalances and shortcomings. For example, every employer, whether in the private or governmental sectors, should employ women based on a certain percentage. Also, those who deserve it should be given leadership positions in accordance with their scientific qualifications and experience. In addition, women in the community should be enlightened by intensifying educational campaigns and offering seminars in order to raise their awareness of the importance of working as a human social right, together with their role in achieving women's material and moral independence, and in supporting the national economy.⁸²³

⁸²¹ Mashael Al - Rasheed, 'Unemployment of women' <<http://www.maaal.com/archives/20161228/84838>> accessed 22/11/2017

⁸²² Hiam Almfleh, 'Reasons for unequal opportunities between the sexes in the Saudi labor sector.' <<http://www.alriyadh.com/596774>> accessed 29/11/2017

⁸²³ Rasheed, 'Unemployment of women'

7.5 The right to take up political and leadership positions

Although women's education in Saudi Arabia began decades ago, and although Saudi universities have graduated thousands of women in management specialties, Saudi women have not been able to take up positions as leaders as men have. This has led to poor participation by women in strategic planning, as well as poor communication with male leaders.⁸²⁴

In fact, there are several factors that prevent women from obtaining leadership positions. Some of these factors are socio-cultural while others are political. For instance, Islamic scholars in the country are strongly opposed to women taking positions as leaders. The Standing Committee for Issuing Fatwas has argued that women occupying such positions is denied by Islamic law because women are known to be swayed by the power of their feelings which leads to weakness in thinking.⁸²⁵ In addition, they assert that taking positions as leaders could require them to travel frequently and to mix with men, which is, they say, in conflict with women's nature. Indeed, like many other issues regarding women in Saudi Arabia, the Commission has misinterpreted the Islamic texts as the interpretations of Saudi scholars are largely influenced by tribal traditions and customs.⁸²⁶

Dushti argued that, in Saudi Arabia, society sees women from a cultural or tribal perspective while the political system has not settled to take up a clear view. Sometimes, it takes a stand regarding women's positions and demands to activate the equality of women. However, sometimes it takes a conservative line which means that it is rare for government and quasi-governmental bodies to have a female presence in positions of

⁸²⁴ Hanan Abed, 'Challenges facing Saudi women in taking leadership positions.' <<http://www.al-madina.com/article/414356/>> accessed 5/10/2017

⁸²⁵ Noura Hawiti, 'The importance of supporting Saudi women to reach' <<http://www.alriyadh.com/414599>> accessed 21/10/2017

leadership and, when women do participate, their participation remains very low-key and is far from any decision-making.⁸²⁷

There is a strong link between the political participation of women and the economic growth of the country. For example, Saudi Arabia needs the active participation of women in educational decision-making in order to solve the problems of education and development, such as women's unemployment issues. For instance, about 60 percent of female college graduates are not in employment, which is a major economic problem, since the state is spending huge sums of money to educate women and then cannot benefit from the outputs of this education.⁸²⁸ Bungee mentions that, in order to empower women in leadership positions, public awareness must be reshaped in Saudi Arabia by emphasising the importance of women's status in society. Fakhro, in this regard, stresses that *Ijtihad* in Saudi Arabia must be revived, which means that religious texts should be reinterpreted to suit the requirements of modern times.⁸²⁹

In 2012, King Abdullah announced that Saudi women could join the Consultation Council and, in 2015, Saudi women joined this Council which, when it was created by King Fahd, did not allow women to participate. Although there are 150 members of this Consultation Council, nevertheless, until 2017, there were only six female members. All the same, while female representation is low, it could be considered to be a positive step towards empowering women in leadership positions.⁸³⁰ Suleiman Al-Enezi argued that we cannot ignore the fact that the participation of women in the Shura Council is a positive development regarding women's rights. However, it is a minor development since members of the Shura Council are only supposed to make recommendations, not

⁸²⁷ Faten Bundakji, 'Political participation of women in the Gulf States' <<http://carnegieendowment.org/sada/20595>> accessed 11/10/2017

⁸²⁸ Bundakji, 'Political participation of women in the Gulf States'

⁸²⁹ Ibid

⁸³⁰ Mohammed Al - Tahaim, 'Saudi women in the Shura Council.' <<https://www.alarabiya.net/articles/2013/01/11/259877.html>> accessed 3/11/2017

decisions, when we would like to see women in Saudi Arabia being able to take decisions.⁸³¹

There are other positions that women are able to fill which could give some hope regarding leadership positions for females. For instance, in the private sector, Sarah Al-Suhaimi was appointed as the first woman to head the Board of Directors of the Saudi Stock Exchange (Tadawul). Rania Nashar was the first Saudi woman to become the Chief Executive Officer of Samba Financial Group while, in the government sector in 2012, Noura Al Fayez was the first woman to be appointed as Deputy Minister of Education. However, this appointment was only with regard to female issues.⁸³²

Nevertheless, there are many leadership positions which are impossible for Saudi women to aspire to, such as being a minister, a university director (except in Noura University which is a special university for women), or a judge.⁸³³ Suheila Zine El Abidine, who is a member of the National Society for Human Rights, argues that denying women in Saudi Arabia the right to become a judge is unreasonable and wrong, asserting that the Islamic religion equated men and women in terms of civil rights. Nevertheless, jurists who deprive women of their right to be a judge base this ruling on misconceptions of the Islamic law; this view indeed stems from custom and traditions. Moreover, Abidine stresses that there is no text in the Qur'an or in the Sunnah which precludes women from becoming judges.⁸³⁴ Furthermore, she points out that, in cases of alimony and divorce, many male judges side with husbands against wives; this has caused many of the problems that have been experienced in the National Society for Human Rights and suggests that having women as judges might do much to reduce the occurrence of these problems as such cases would also be addressed from a female perspective. Furthermore, Abidine notes

⁸³¹ Suleiman Al Anzi, 'Political participation of women in Saudi Arabia' <http://www.alwatan.com.sa/Nation/News_Detail.aspx?ArticleID=277123&CategoryID=3> accessed 15/10/2017

⁸³² Abdullah Al-Hakami, 'Leading positions for women in Saudi Arabia' <<https://www.alaraby.co.uk/economy/2017/3/10/%D8%A7%D9%84%D9%85%D9%86%D8%A7%D8%B5%D8%A8->>> accessed 15/10/2017

⁸³³ Mohammed Al-Anqari, 'The reasons for the delay of Saudi women in obtaining leadership positions.' <<http://alasfouranews.org/2017/03/10/%D8%AE%D8%A8%D8%B1%D8%A7%D8%A1-%D8%AA%D9%88%D9%84%D9%8A-%D8%A7>>> accessed 16/10/2017

⁸³⁴ Naim Hakim, 'The extent the needs of Saudi of woman as a judge.' <<http://www.alsharq.net.sa/2012/05/25/305013>> accessed 18/10/2017

that there are many other scholars who have permitted women to work as judges in nations such as Egypt, the UAE and others. Accordingly, it has to be asked why Saudi scholars insist on preventing women from becoming judges despite the need for them in this field.⁸³⁵ Amani Hamdan argues that there is a lack of confidence on the part of Saudi society in women in any position of leadership; this holds women in Saudi Arabia always under the umbrella of men. In addition, Hamdan asserts that culture plays great role in this view and that, consequently, as culture is associated with local communities, it is associated with the workplace as well.⁸³⁶ Shahine (cited in Amani Hamdan) argues that, despite the growth in leadership positions that are being given to women in Saudi Arabia, women's effectiveness and their ability to succeed in these positions remain questionable as a result of traditional beliefs that always link the capacity for leadership with men, rather than with women. As a result, the number of females in leadership positions remains very low compared with that of males.⁸³⁷

7.6 The right to pass nationality onto children

According to the Saudi citizenship system, in the case of a male married to a non-Saudi woman, Saudi citizenship will automatically move to a child while his nationality will pass to his wife on the condition that they have two children. However, if a Saudi woman marries a non-Saudi man, Saudi nationality will not automatically be transferred to the children as certain conditions must exist before citizenship is accorded to them.⁸³⁸ According to the Saudi Nationality System, Article 7: a child “would be considered as a Saudi who was born in Saudi Arabia or abroad to a Saudi father, or to a Saudi mother if the father’s nationality is unknown or if the father has no nationality.” Article 8 states that: “Saudi Arabian nationality may be granted by a decision of the Minister of the

⁸³⁵ Hakim, 'The extent the needs of Saudi of woman as a judge.'

⁸³⁶ Hamdan, 'Women and Education in Saudi Arabia: Challenges and Achievements'(2005)

⁸³⁷ Al-Anqari, 'The reasons for the delay of Saudi women in obtaining leadership positions.'

⁸³⁸ Asmahan al-Ghamdi, 'The case of Sons of Saudi women' <<http://www.alriyadh.com/869179>> accessed 4/11/2017

Interior to an alien who is born in the Kingdom of a foreign father and a Saudi mother if he/she meets the following conditions:

- a. He/she must have the status of a permanent resident in the Kingdom of Saudi Arabia at the age of majority.
- b. He/she must have demonstrated good conduct and have never been sentenced by a criminal judgment or received a prison sentence for a moral offence for more than six months.
- c. He/she must be fluent in Arabic.
- d. He/she must submit a request for Saudi nationality the year after reaching the age of majority.”⁸³⁹

In addition, a foreigner who is born in Saudi Arabia from a Saudi mother can ask for Saudi nationality by collecting at least seven points. So, if the son or daughter of a Saudi women resides permanently in the Kingdom, this is worth one point and if he/she holds at least secondary qualifications, this is also worth one point. Moreover, if his mother, father and the grandfather from the father’s side are Saudis, he/she will gain six points, while if only the grandfather is Saudi, this is worth only two points. Furthermore, if the applicant has Saudi sisters or brothers, it will be worth two points.⁸⁴⁰

If the applicant succeeds in collecting seven points, the application will be considered. However, this does not mean that citizenship will be accorded automatically. On the other hand, the application will not be considered if the applicant fails to collect seven points.⁸⁴¹

Suhaila Zine El Abidine argues that granting Saudi nationality to the sons of a Saudi man married to a foreign woman, without granting it to the son of a Saudi woman married to a foreigner, is one of the most important forms of discrimination between men and women in Saudi Arabia. Moreover, nationality is a legal and political link between the individual

⁸³⁹ ‘The Saudi Arabian Nationality System’

<[https://www.moi.gov.sa/wps/wcm/connect/316362004d4bb7c28e05dfbed7ca8368/AR_saudi_nationality_system.pdf](https://www.moi.gov.sa/wps/wcm/connect/316362004d4bb7c28e05dfbed7ca8368/AR_saudi_nationality_system.pdf?MOD=AJPERES&CACHEID=ROOTWORKSPACE-316362004d4bb7c28e05dfbed7ca8368-IDGnel)
MOD=AJPERES&CACHEID=ROOTWORKSPACE-316362004d4bb7c28e05dfbed7ca8368-IDGnel.> accessed 11/10/2017

⁸⁴⁰ Ibid

⁸⁴¹ Maryam Al-Suqair, ‘The importance of granting citizenship to Saudi women children’
<<http://www.okaz.com.sa/article/1506118/>> accessed 12/10/2017

and his/her state and therefore citizens should have the same rights to pass on to their children whether male or female.⁸⁴²

Some of the Arab countries give females similar rights to males in terms of transferring nationality to children. For instance, in Yemen, according to Article 18 of Chapter II of the Yemeni Nationality Law, "it is required, for granting Yemeni nationality, to anyone who was born in Yemen if his/her mother held Yemeni nationality at the time of his/her birth" while Algerian law Article 6 states: "Anyone who is born of an Algerian father or an Algerian mother, is Algerian."⁸⁴³ In Egypt, in accordance with Article 3 of Law 154 in 2004, it states: "the children of an Egyptian mother and a foreign father who are born on 15/7/2004 or afterwards, are considered to be Egyptian by force of law."⁸⁴⁴ The United Arab Emirates announced on 30 November 2011 that it would grant Emirati citizenship to the children, when they reached the age of 18 years, of Emirati females who married foreigners. Indeed, although the Emirates give children the right to be Emirati when they reach the age of 18, this still does not give a mother equal rights to a father in granting Emirati nationality as, for fathers, nationality will be guaranteed automatically to their children as soon as they are born while nationality is granted to a child born of an Emirati mother only when he/she is 18.⁸⁴⁵ In Saudi Arabia, it is a challenge to obtain Saudi nationality for a child from a foreign father and a Saudi mother, even when he/she turns 18.⁸⁴⁶

Some scholars argue that it is logical to deny women the right to transfer nationality to their children as the father is the one who has the strongest role in ensuring the loyalty of his children towards the homeland. Therefore, giving the mother the right to transfer nationality to her children may lead to the presence of many Saudis who have no affiliation towards Saudi Arabia. However, this argument may conflict with Articles 9, 14

⁸⁴² Suhaila Zain Al Abdeen, 'Women in the Nationality System.' <<http://www.al-madina.com/article/260717/>> accessed 15/10/2017

⁸⁴³ Algerian Nationality Law Act.1970

⁸⁴⁴ Law No. 26 of 1975 Amended by Law 154 Concerning Egyptian Nationality Act 2014

⁸⁴⁵ Federal Law No. 17 on Nationality and Passport Act (1972)

⁸⁴⁶ Abdeen, 'Women in the Nationality System.'

and 15 which allow foreigners, as well as their children, wives and mothers, to obtain Saudi nationality if it is proved they are keeping them and on the condition that they must have been living in the country for ten consecutive years; furthermore, they do not need to collect points. Consequently, the question is: will a foreign father raise his sons to show loyalty to the homeland when he has lived in Saudi Arabia for only for ten years? while it is assumed that a Saudi mother cannot instill loyalty into her children.⁸⁴⁷

Other scholars argue that giving a woman the right to transfer her nationality to her husband and children, as a man is able to do, may have serious consequences for the Kingdom as many foreigners may take advantage of the situation of widows, spinsters and divorced women, marrying them only because their main goal is to gain Saudi citizenship since Saudi Arabia is a rich country with a strong economy and this may make Saudi nationality attractive to many foreigners.⁸⁴⁸ However, Saudi males marrying foreigners may also have certain disadvantages as allowing Saudis to marry foreign women and giving them the right to pass their nationality on to their children may lead to an increase in the number of Saudi males who are married to foreign women; this may contribute to an increase in the numbers of spinsters. So, although there are some restrictions with regard to marrying foreign women, these are not strict enough and then many men could circumvent the restrictions and find it easy to marry foreign women.⁸⁴⁹ Latifa Al Shaalan argues that it is necessary to review the regulations and laws concerning Saudi Arabia's naturalisation system which has not been modified for a long period (about sixty years) when many things have changed in the Kingdom. In addition, there is an increasing number of Saudi women who are married to non-Saudis and therefore it is necessary to ensure that the sons of Saudi women are given nationality to protect the social fabric from discrimination in terms of rights and duties.⁸⁵⁰

⁸⁴⁷ Abdeen, 'Women in the Nationality System.'

⁸⁴⁸ Mu'adh al-Amri, 'Difficult conditions for marriage of Saudi women from foreigners.'
<<http://www.lahamag.com/article/35523-%D8%B2%D9%88%D8%A7%D8%AC->> accessed 15/10/2017

⁸⁴⁹ Fatima Al-Debis, 'Shura Council's proposals for the naturalization of the Saudi women sons '
<<http://www.okaz.com.sa/article/1524042/>> accessed 3/10/2017

⁸⁵⁰ Al-Debis, 'Shura Council's proposals for the naturalization of the Saudi women sons '

Samar al-Hasouni asserts that it is the right of every mother to feel that her children are safe and, for this reason, the Saudi regime always seeks to take maternity into account. For example, the Minister of Justice stressed the importance of giving the mother priority in the custody of her children but this is not the case if the children of the mother do not hold her nationality. In this regard, there have been many occasions when a foreign father was able to escape with his children to his homeland after a divorce.⁸⁵¹ Thus, to avoid such problems, the Saudi Nationality System should seriously consider the issue of the naturalisation of the children of Saudi women.⁸⁵²

The President of the Saudi Human Rights Society, Mufleh Al-Qahtani, argued that the Saudi system emphasises the importance of family unity and the importance of support for families to ensure their stability. Nevertheless, the rigid procedures in place to give Saudi women the right to pass on their nationality threatens the stability of the family. In addition, most the children of Saudi women are integrated into Saudi society and most do not know much about their home countries; even their fathers are sometimes far from their homelands. Furthermore, many children are seriously affected after the death of their Saudi mother as then they are complete foreigners. Therefore, it may be necessary to give the children of Saudi women the right to gain Saudi nationality in order to avoid many of these problems.⁸⁵³

Indeed, Saudi Arabia is suffering from an increase in the number of spinsters as about four million females have reached beyond the age of marriage. Therefore, many scholars have tried to encourage men to become polygamous, believing that this is in the interest of women as it may solve this social problem and help women marry and find a partner for life. On the other hand, perhaps facilitating marriage procedures for non-Saudi men might be a better solution than pluralism to reduce spinsterhood as many Saudi women refuse

⁸⁵¹ Samar al-Hasouni, 'Giving the nationality to sons of Saudi women' <<http://www.al-madina.com/article/547024/%D9%83%D8%AA%D8%A7%D8%A8/%D8%AA>> accessed 10/11/2017

⁸⁵² al-Hasouni, 'Giving the nationality to sons of Saudi women'

⁸⁵³ Mufleh Al Qahtani, 'The issue of naturalization of Saudi women female sons' <<https://akhbaar24.argaam.com/article/listbytags/4702/%D8%A7%D8%A8/%D8%AA>> accessed 2/10/2017

to marry a foreigner because they do not want to have children who do not enjoy the same rights as Saudis.⁸⁵⁴

In October 2016, three members of the Consultative Council, Atta al-Sabti, Latifa al-Shaalan and Haya al-Manie, submitted a proposal to amend the Saudi citizenship system in order to allow Saudi women to pass their nationality on to their children. They demanded an amendment to the relevant articles (Articles 7 and 8). Moreover, the Consultative Council is currently examining the possibility of naturalisation for foreigners who marry Saudi women which may be possible if they have children and if their marriage lasts for many years. In addition, it should be proved that the husband has good intentions and treats his wife well.⁸⁵⁵

7.7 The right to drive

The issue of women being allowed to drive has been controversial for a long time in Saudi Arabia where Saudi women have always been banned from driving cars. The government's ban was based on an official fatwa issued by the Former Mufti of Saudi Arabia, Abdul Aziz bin Baz.

He stated that: "It is not permissible for women to drive a car and those who do so must be punished." Moreover, he argued that the decision to prevent women from driving is aimed to protect society from evil. The current Mufti, Abdulaziz Al-Sheikh, stated in 2016 that a woman driving a car "might open the doors of evil, so we must not acknowledge it, because it is dangerous and may expose women to evil."⁸⁵⁶ Bin Baz put forward the idea that allowing women to drive might expose them to mixing with men. This, he argues, would lead to them leaving off the hijab and indulging in forbidden relations with men. So, it would be best for women for them to stay at home. Most other Islamic scholars were in

⁸⁵⁴ Abdallah Mohamed, 'The importance of polygamy in Saudi Arabia.' <<https://www.alarabiya.net/ar/saudi-today/2017/01/07>> accessed 2/11/2017

⁸⁵⁵ Al-Debis, 'Shura Council's proposals for the naturalization of the Saudi women sons '

⁸⁵⁶ Abdul Hakim Al Share, 'Mufti of Saudi Arabia, and women driving' <<https://sabq.org/%D9%81%D9%8A%D8%AF%D9%8A%D9%88->> accessed 18/11/2017

support of the opinion of the Mufti. For instance, Saleh al-Fawzan, who is a member of the Saudi Senior Scholars Council of Islamic Scholars, argued that women driving cars is not permissible in Islam as it has significant disadvantages for the whole of society. Moreover, he stated that it is harmful for a woman to drive because then she would be able to go out at any time of night or day as she would have her key and her car with her. As a result, she could go anywhere she liked, without supervision, and would then be exposed to evil men who might harm her. Conversely, if she was not allowed to drive, she would be under the protection of her guardian who would certainly keep her from harm.⁸⁵⁷ However, it may not be reasonable to prevent women from driving and from mixing with men, as mixing may occur in many other places and time. For example, mixing occurs in the Holy Mosque so should the women be forbidden to go to the Holy Mosque in order to avoid mixing with men?

Moreover, it was rather confusing that Saudi Arabian scholars were against women driving cars when there is no text in the Qur'an or the Sunnah to prohibit this. In addition, no other Islamic country has prevented women from driving cars using Islam as a basis for the decision. For instance, Egypt, Qatar, Kuwait and Jordan are all Islamic countries yet none of them prevents women from driving cars. Therefore, it may be that the Saudi culture has significantly affected the interpretation made by the Saudi Islamic scholars, such as Al-Sheikh, Bin Baz and al-Fawzan. Walid Fiteihi stated that, in the era of the Prophet, cars did not exist although mules and donkeys were then used as means of transportation. At this time, women in the era of the Prophet rode these for transport and He did not prevent them from doing so. Moreover, Fiteihi asked if all the Muslim countries that allow women to drive cars are wrongly interpreting the Islamic text and further argued that, to prohibit women from driving without any reinforcement from an Islamic text shows that this decision stems from customs and traditions; there is no other justification.⁸⁵⁸

⁸⁵⁷ Saleh Al-Fawzan, 'The disadvantages of women driving.' <<http://www.alfawzan.af.org.sa/ar/node/15015>> accessed 10/11/2017

⁸⁵⁸ Walid Fiteihi, 'woman driving between the reality and the exaggeration of clerics.' <<http://www.okaz.com.sa/article/401793/>> accessed 19/10/2017

Apart from the opinions of Islamic scholars, views in the literature of the country can be divided into three positions. The first agrees with the Islamic scholars and is completely against women driving cars. For instance, Isa bin Mana argued that women driving cars is not an important issue in Saudi society and can be ignored, especially with the existence of hired drivers. Moreover, he stressed that women driving cars is harmful for society and emphasised his point of view through a study confirming that the amount of adultery in a society in which women drive is higher than in those societies where women do not drive. In addition, the rate of rape in a society where women drive is higher than in others. Furthermore, the percentage of illegitimate children is higher in those societies in which women drive when compared to others. Finally, the percentage of family disintegration and divorce in communities where women drive cars is higher than in other communities.⁸⁵⁹

This study may be not accurate as Saudi Arabia may be the only country in the world where women do not drive cars and therefore there may be other factors that make the rates of adultery, divorce or rape lower in Saudi Arabia than in other countries. Consequently, it is likely that there is no relationship between women driving cars and these ratios as many scholars in Saudi Arabia, when they adopt a certain point of view, tend to put forward practical evidence to convince the community of their assertions; often, unfortunately, this evidence is far from logical. For instance, Saleh bin Saad al-Luhaidan, who is a judicial adviser, argued that physiological and medical science has carried out studies which suggest that women driving cars can automatically affect the ovaries, pushing the pelvis upward, so most women who drive cars continuously may have children born with a type of differential clinical dysfunction.⁸⁶⁰ Al-Luhaidan's arguments provoked many scholars and sources of literature in Saudi Arabia to announce that there is no scientific study that confirms the validity of his statement that driving a car harms

⁸⁵⁹ Issa bin Mana, 'Justifications for not allowing women to drive' <<http://www.saa'id.net/female/0138.htm>> accessed 21/10/2017

860 Saleh Al-Luhaidan, 'Women's driving negatively affects the ovaries.' <<http://alghad.com/articles/575288-%D8%B1%D8%AC%D9%84-%D8%AF%D9%8A%D9%86->> accessed 8/10/2017

the ovaries and women's health. Therefore, scholars must sometimes exercise their authority, provide proof and quote studies when they put forward such arguments; or, they should simply refrain from distorting scientific facts that might negatively affect the interests of society.⁸⁶¹ Moreover, the parties concerned should play a role in raising the awareness of society and should confront any statements which are both unacceptable to thinking people and which do not conform to the spirit of Islamic law.⁸⁶² Those who object to women driving cars further argue that this may cause corruption in society as women have to mix with men which is not compatible with the principles of Islamic law. In addition, it may cause the number of cars on the streets to increase when those streets are already overcrowded. Moreover, it may cause a woman to rebel against her husband and her husband's family while it is also claimed the chances of accidents may increase because the nature of women does not fare well in critical situations. In addition, allowing women to drive may encourage them to spend more time out of their homes.⁸⁶³

It is obvious that these arguments are based on traditions and customs which focus on the stereotypes of women in Saudi Arabia, stereotypes which suggest women should stay at home to raise their children and take care of their husbands. Moreover, it is clear, unfortunately, that Saudi society does not trust the capabilities of Saudi women as women throughout the world are driving cars so why assume that Saudi women will not be able to do what other women do. This may stem from the fact that society still cannot accept women in other roles as it does not see many women who have roles outside those of wives and mothers. In addition, to argue that women driving will increase the traffic on the roads is not logical as most women who need to go outside the home hire a driver to help them. In any case, there are far better solutions to ease street traffic than to prevent women from driving so it should not be necessary to solve problems that go against women's interests. Finally, to argue that women driving cars may cause them to mix with men is not reasonable since, as discussed before in Chapter Three, there is nothing in the

⁸⁶¹ Hessah Sheikh, 'Women driving .. Science secrets and jurists mistakes ' <<http://www.alriyadh.com/874509>> accessed 25/10/2017

⁸⁶² Ahmad Alassaf, 'Controversy of riving or leading the controversy?' <<http://www.saaaid.net/Doat/assaf/19.htm>> accessed 18/11/2017

⁸⁶³ Suleiman Al - Kharashi, 'Disadvantages of driving a car' <<http://www.saaaid.net/female/0138.htm>> accessed 22/11/2017

Qur'an or Sunnah to prevent mixing. Moreover, while many scholars believe that mixing is forbidden, they only require women to avoid it; no one requires men to stay at home to avoid mixing.

In this regard, Lubna Al-Ansari argued that the driving of cars has long been banned for women because Saudi scholars claimed that it leads to great evils such as forgery and mixing. However, the scholars may have forgotten that the origin of issues in Islam to be preassemble, especially with regard to matters for which there is no definitive evidence in the Qur'an or Sunnah. Therefore, it is obvious that this ban stems from the customs and traditions that prevail in society, not from Islam. For this reason, the former King of Saudi Arabia, King Abdullah, stated that allowing women to drive is a social decision while the role of the state is to provide the climate for any decision that society believes is appropriate; he did not mention Islam as a basis for the ban.⁸⁶⁴

For years, women have been prisoners owing to the decision to ban driving and it has placed women for years at the mercy of drivers who are often brought in from abroad at great expense to drive their cars in their name. Such women must pay premiums and expenses and yet, in return, they are unable to drive themselves to their place of work. In addition, drivers often decide to leave their work and thus leave a female employee in a difficult position.⁸⁶⁵ Sohaila Zine El Abidine stated that it was unreasonable to stop women from driving cars while, at the same time, allowing them to take up employment in remote places. She asked why the laws insisted on making women live at the mercy of their drivers who sometimes suffered from a moral or psychological defect but, in spite of this, some women were forced to deal with such issues as they needed someone to get them to work.⁸⁶⁶ Moreover, Islam gave women the right to freedom of movement as then

⁸⁶⁴ Lubna Al Ansari, 'Women driving : hard labor and unforgettable lessons ' <<https://aawsat.com/home/article/1040926/%D8%AF-%D9%84%D8%A8%D9%86%D9%89->> accessed 24/10/2017

⁸⁶⁵ Ibid

⁸⁶⁶ Hiam Almfleh, 'women car driving car how to start?' <<http://www.alriyadh.com/516066>> accessed 19/11/2017

some women had female companions and used the means of transport available at that time, namely horses, camels and donkeys; these are matched by cars in our time.⁸⁶⁷

In 2017, the King of Saudi Arabia, King Salman, issued a royal order that allowed women to drive cars. In addition, he commanded the Minister of the Interior to form a high-level committee consisting of the Ministries of the Interior, Finance, and Labour and Social Development to study the necessary arrangements to allow women to drive cars; the implementation of this will be effective by the twenty third of June in accordance with the regulations.⁸⁶⁸ The reaction of senior Islamic scholars was surprising to Saudi society as, although they were against women driving cars in the beginning, they then encouragingly greeted King Salman's decision. For instance, Abdullah Al-Manea stated that it should be permissible for women to drive cars since there is no Islamic text that prohibits this.⁸⁶⁹ Indeed, the case regarding women driving cars may be similar to the situation regarding women's education, as discussed earlier. Education was prohibited for women as the religious scholars ruled against it but, after the royal order, they gradually accepted it and then it became commonplace in Saudi Arabia. Mohammad Al-Shekh argued that conservative Islamic scholars have always stood in the way of modernity and have always linked their "fossilised positions" to the Islamic religion. In addition, they considered those who were in favour of women driving as violators of Islamic principles. In fact, such scholars have always been on the side of customs and traditions while having, unfortunately, a view of women as inferiors. Therefore, every Islamic scholar should, before preventing or permitting something, provide evidence from the Qur'an or the Sunnah so that he does not put himself in a confusing position, as Saudi Islamic scholars did when they spoke out against women driving cars.⁸⁷⁰ The scholars may continue to be not totally accepting of women driving cars but, in Islam, however, everyone should

⁸⁶⁷ Abdul Rahman Al Rashed, 'Women Driving '

<<http://archive.aawsat.com/leader.asp?article=571214&issueno=11502#.WoclXOiFiCR>> accessed 23/11/2017

⁸⁶⁸ Nayef Al Rasheed, 'The historic decision of women'

<<https://aawsat.com/home/article/1035296/%D9%82%D8%B1%D8%A7%D8%B1-%D8%AA%D8%A7%D8%B1%D9%8A>> accessed 21/12/2017

⁸⁶⁹ Abdullah Al-Manea, 'Women's driving of car does not contradict Islamic texts.'

<<http://makkahnewspaper.com/article/614235>> accessed 13/12/2017

⁸⁷⁰ Muhammad Al-Sheikh, 'About women driving.' <<https://al-marsd.com/160190.html>> accessed 25/11/2017

respect the orders of the ruler, especially when they do not violate judgements that clearly exist in the Qur'an or Sunnah. This shows that scholars did not prevent women from driving because it was prohibited in Islam, they opposed it because they believed that it might lead to violations of Islamic principles. However, when the King made the order permitting women to drive, they expected the King to take any necessary measures to ensure that women driving cars would not lead to any violations of Islamic principles.

To sum up, for years, women have been banned from driving. While opponents have offered religious reasons, the King of Saudi Arabia certainly does not want to violate religion and does not want to cause harm to women. Therefore, the King's decision to allow women to drive confirms that preventing women from driving all those years was due to custom.

7.8 The misuse of guardianship

As previously discussed, guardianship in Islam means caring for the family and meeting a woman's needs, whether she is a wife, mother or daughter; it does not mean controlling her activities and her life. However, misinterpretations of Islamic texts, such as the Qur'anic verse: "Men are in charge of women by [right of] what Allah has given one over the other and what they spend [for maintenance] from their wealth"⁸⁷¹ have been applied in many Muslim countries and these are far from the spirit of Islamic law. This, in turn, has contributed to give men rights they do not deserve, such as the right to stop women from being educated, from working or from travelling.⁸⁷²

Some Arab countries have succeeded in overcoming such misconceptions. For instance, in 2000, the Egyptian Constitutional Court issued a decision to annul Article 3 of Decree No. 3937 which required the consent of the husband to allow the wife to obtain a passport or to travel. In addition, on 20/10/2009, the Constitutional Court of Kuwait issued a decision

⁸⁷¹ 'The Holy Quran.'(4;34)

⁸⁷² Suhaila Zainabdeen, 'The guardianship' <<http://www.al-madina.com/article/370125/>> accessed 24/11/2017

granting women the right to obtain a passport and the right to travel without the prior consent of the husband. In this regard, the Court stated that gaining the husband's consent to grant his wife permission to travel was a violation of the woman's freedom, as well as violating equality between the sexes which should be guaranteed by the Constitution.⁸⁷³ Furthermore, Egypt, Morocco and Algeria have followed the approach of the Abu Hanifa School in allowing women to make their own choice about marrying without the approval of a guardian.⁸⁷⁴

As discussed before, in Saudi Arabia, women are deprived of many rights due to customs and traditions while, in return, men are given rights they do not deserve. For example, a man who is a guardian, such as a woman's husband, father or even a brother, can deprive her of education and so, a large percentage of women in Saudi Arabia are still illiterate. Until recently, women were also unable to carry out any governmental action and they could not apply for any job, either in the private or government sectors, without the consent of their guardian. In addition, they could not even undergo surgery without the consent of their guardian. In 2017, a royal order was issued stating that women should not be required to obtain the approval of a guardian to obtain services or to action their own government procedures; this royal order was addressed to all government agencies without exception.⁸⁷⁵ Indeed, this royal order indicates that the Saudi government has cancelled some of the customary requirements that were demanded from women by some agencies. It indicates that the Saudi government recognises the problems surrounding the power of guardians over women and has therefore started to adopt measures to correct this in certain areas.⁸⁷⁶ In fact, this was clear in the Saudi report which was submitted to the CEDAW committee. This report stated that male guardians

⁸⁷³ Suheila Zainalabdin, 'Guardianship (3)' <[http://www.al-madina.com/article/371555/%D9%83%D8%AAD9%84%D8%A7%D9%8A%D8%A9-\(3\)>](http://www.al-madina.com/article/371555/%D9%83%D8%AAD9%84%D8%A7%D9%8A%D8%A9-(3)>) accessed 23/11/2017

⁸⁷⁴ Ibid

⁸⁷⁵ Abdallah Mohamed, 'The consequences of the royal order on Saudi women' <<https://raseef22.com/life/2017/05/06/%D9%83%D9%8A%D9%81-%D9%8A%D8%A4%D8%AB%D8%B1-%D8%A7>> accessed 4/2/2018

⁸⁷⁶ Ibid

should protect and maintain women and that individual cases where such guardianship is abused are wrong and, as a result, Saudi Arabia is making great efforts to abolish it.⁸⁷⁷

In this regard, Suheila Zain Al abdin argues that this royal order has given women certain rights as it was not reasonable for the fate of women to depend on the consent of men for so many things. However, despite the importance of this royal order, which seeks to give women freedom and equality with men, it unfortunately includes some exceptions. For example, it does not include abandoning the need for a male guardian's approval for women's travel so, in order to obtain freedom for women, men's guardianship should be abolished.⁸⁷⁸

The Saudi royal order did not include allowing women to travel abroad without the approval of a guardian so a woman cannot go abroad without her guardian's consent. Such restrictions on women's freedom to travel has made them face many problems.⁸⁷⁹ For instance, many have not been able to complete their studies abroad as not all women have a guardian who is available. Moreover, requiring a guardian for travelling means that many women cannot take a job that requires them to travel.⁸⁸⁰

Abd al-Muhsen al-Obeikan, a Saudi religious scholar, applied *Ijtihad* and stated that it is permissible for a woman to travel without a guardian. In this way, he contradicted the consensus of the Saudi Supreme Council of Scholars who forbade women to travel without a guardian. In addition, he argued that the Prophet's women travelled to pilgrimages without a guardian and, moreover, the wife of Prophet Mohammed, Aisha, travelled without a guardian. When Abu Said al-Khudri asked her about this, she replied: "Can all women find an available guardian?" This means that, even at a time when women

⁸⁷⁷ UN Committee on the Elimination of Discrimination Against Women (CEDAW), UN Committee on the Elimination of Discrimination against Women: Combined third and fourth Periodic Reports of States Parties, Saudi Arabia, 23 August 2013, CEDAW/C/SAU/3-4.

⁸⁷⁸ Noura Al Atawi, 'Women and guardian' <<http://www.alriyadh.com/1592521>> accessed 17/1/2017

⁸⁷⁹ there is a discussion on this issue and it is likely that women would be allowed to travel. it will yet to be seen that whether this proposed will be implemented fully

⁸⁸⁰ Suheila Zainalabdin, 'Women traveling without a guardian' <<http://www.al-madina.com/article/107161/>> accessed 19/11/2017

might face difficulties travelling, it was permissible for them to travel alone under certain conditions. Al-Obeikan further argued that it is not possible to compare a time when women were crossing deserts and were travelling when dangerous animals were abroad to a time when travelling in airplanes and trains is now safe. Consequently, it should not now be forbidden for women to travel alone.⁸⁸¹

Suhila zain Al-abideen argued that it would be unreasonable for a widow who might be sixty years old to request permission to travel from her son, who might not exceed eighteen years old. Therefore, if society has not enough confidence in such a woman to decide to travel and says that she must have permission from her son, then why, at the same time, does society have confidence in her to raise her children? In addition, many women have been blackmailed by their guardians who have asked for money in order to give them permission to travel. One of the paradoxes here is that, while it is not permitted for women in Saudi society to travel abroad without the permission of their guardian, they are allowed to work in remote places where women are exposed to many dangers on the way to work. There have been dozens of incidents in which women have died on the way to remote workplaces. This may raise the question of whether this ruling, which prevents women from travelling without a guardian, is really concerned with their safety or is more to do customs and traditions.⁸⁸²

7.9 Conclusion

Saudi Arabia is influenced by male domination concepts which are far from the Islamic religion; these are more related to tradition. Moreover, tradition has negatively affected women's rights and has contributed to denying women's rights in education and in delaying the resolution which has allowed them to drive. In addition, traditions have caused great challenges to women in the field of work and in obtaining leadership

⁸⁸¹ Zainalabdin, 'Women traveling without a guardian'

⁸⁸² Suheila Zainalabdin, 'The reality of women life between customs and religion.'
<<http://www.ahewar.org/debat/show.art.asp?aid=29957>> accessed 28/11/2017

positions. Moreover, traditions have delayed the application of *Ijtihad* to women's issues, even though *Ijtihad*, created so that the application of the Shari'a could keep up with the requirements of different times, is one of the most important Islamic principles. In order to make women in Saudi Arabia enjoy similar rights to those of men, the negative effects of customs should first be abolished. Secondly, the principle of *Ijtihad* should be revived in issues that concern women.

Part III: Comparison and Conclusion

Chapter 8: Comparison

8.1 Introduction

In the previous chapters, the objections in Islamic law to raising the status of women and give them equal rights to men have been discussed. Islamic law, as has been illustrated, gives women social rights. For instance, it gives them the right to marry with their full consent, the right to separate from a husband; it also accords women with individual rights, such as the right to be educated, the right to work and the right to take up positions of leadership.

CEDAW was devised with a similar objective: that is, to achieve equality between men and women and raise the status of women. Saudi Arabia is a country that applies Islamic law where it is the constitution of the country; it has also ratified CEDAW. Nonetheless, women in Saudi Arabia do not enjoy full equality with men. For instance, they still cannot obtain leadership positions, they cannot travel without a guardian's approval and, sometimes, they are married without their full consent; all these are contrary to the spirit of Islamic law. The main reason for denying women many of their rights is to do with culture and traditions which have a great influence in the country and, in many cases, prevent women from receiving their rights. They also affect the interpretation of Islamic law and hinder the application of *Ijtihad* regarding women issues when *Ijtihad* has a significant role to play in order to reinterpret women's issues to make them commensurate with the requirements of the times. This chapter compares women's rights in Islamic and international law, especially with regard to CEDAW, as well as women's rights as experienced by Saudi women in everyday life.

8.2 Equality between men and women

Article 2 of CEDAW states that States Parties should take all appropriate measures to adjust or eliminate “regulations, customs and practices that discriminate against women” while Islamic law raised the status of women, giving them equal rights with men, and also eliminated the tribal traditions that abused women (see Chapter two).

The Qur’an states: “O mankind, fear your Lord, who created you from one soul and created from it its mate and dispersed from both of them many men and women.”⁸⁸³ It also says: “And we have certainly honoured the children of Adam and carried them on the land and sea and provided for them of the good things and preferred them over much of what We have created, with [definite] preference.”⁸⁸⁴

In 2009, Saudi Arabia ratified The Arab Charter for Human Rights which emphasises the significance of equality between men and women. For instance, Article 3 (1) states that “Each State party to the present Charter undertakes to ensure to all individuals subject to its jurisdiction the right to enjoy the rights and freedoms set forth herein, without distinction on grounds of race, colour, sex, language, religious belief, opinion, thought, national or social origin, wealth, birth or physical or mental disability.” Also, Article 3 (2) states that “The State parties to the present Charter shall take the requisite measures to guarantee effective equality in the enjoyment of all the rights and freedoms enshrined in the present Charter in order to ensure protection against all forms of discrimination based on any of the grounds mentioned in the preceding paragraph.”⁸⁸⁵

To some extent, women in Saudi Arabia have equal rights with men as they have the right to an education, the right to work, and have access to health care. This was emphasised

⁸⁸³ , ‘The Holy Quran.’(4:1)

⁸⁸⁴ Ibid (17:70)

⁸⁸⁵ The Arab Charter for Human Rights

in the 2030⁸⁸⁶ vision as one of this vision's objectives is to empower women by reducing illiteracy and supporting them in education. In addition, it aims to raise the participation rates of women in the workforce. Perhaps one of the most significant outcomes of the 2030 vision is to give women freedom to move around by allowing them to drive.⁸⁸⁷ In addition, Saudi Arabia submitted a report to the UN CEDAW committee stating that the Kingdom is applying Islamic law using the concept of complementarity between men and women; that Saudi is applying this concept could be seen as a positive advance.⁸⁸⁸

However, in order to become fully equal with men, women need much more. For instance, they need to be able to marry without a male guardian's permission, and they should be able to participate alongside men in positions of leadership.

⁸⁸⁶ 2030 is a vision developed during the reign of King Salman, dated the 25th April 2016. The primary goal of the vision is to develop the Saudi economy and reduce its dependence on oil.

⁸⁸⁷ Naglaa Najm, 'woman in 2030 Vision' <<http://www.alriyadh.com/1715121>> accessed 4/2/2020

⁸⁸⁸ UN Committee on the Elimination of Discrimination Against Women (CEDAW), UN Committee on the Elimination of Discrimination against Women: Combined third and fourth Periodic Reports of States Parties, Saudi Arabia, 23 August 2013, CEDAW/C/SAU/3-4.

8.3 Social patterns

As discussed in Chapter Two, Article 5 of CEDAW states that States Parties shall modify the social and cultural patterns of the conduct of men and women with a view to achieving the elimination of prejudice, customs and all other practices which are based on an idea of the inferiority or superiority of either sex or on stereotyped roles for men and women. As Fayeeza Kathree notes, Article 5 is probably the most significant article in CEDAW as it requires States Parties to address the roots of discrimination (see Chapter Two).⁸⁸⁹ Indeed, Article 5 is compatible with Islamic principles as the spirit of Islam aims to improve the status of women and abolish customs and traditions that were abusive in the era of ignorance. For example, Islam forbade marriage without a woman's consent. In addition, it refuted Shighaar marriages, a marriage in which two men exchange their daughters for marriage so that each would be the dowry of the other. It also forbade a woman to be considered as a heritage after the death of her husband, as well as eliminating female infanticide (see Chapter Three).

In Saudi Arabia, social patterns affected women and denied them rights, such as the right to education as it was socially forbidden for women to go to school. This was because it was believed that women do not need to be educated as their main job is to be a housewife and raise children. In addition, social norms contributed to forbidding women to drive car for many years until it was recently allowed in 2017. The ban was based on the official fatwa issued by Abdul Aziz Bib Baz as he asserted that it was forbidden for women to drive as it could lead to them abandoning the hijab, mixing with men and becoming involved with other evils when it was best for women to stay at home.⁸⁹⁰ On the other hand, there are no texts in the Qur'an or the Sunnah that prevent women from using any means of transportation.⁸⁹¹ On the

⁸⁸⁹ Kathree, 'Convention on the elimination of all forms of discrimination against women' (1995)

⁸⁹⁰ Share, 'Mufti of Saudi Arabia, and women driving'

⁸⁹¹ Share, 'Mufti of Saudi Arabia, and women driving'

contrary, women in the era of Prophet Mohammed were free to use the transportation available in that era as they used horses and camels as means of transportation. In this regard, Walid Fiteihi argued that, forbidding women to drive cars with no texts from the Qur'an or Sunnah to reinforce the ruling, showed the impact of customs and traditions on decision-making in the country.⁸⁹² (See Chapter Seven.)

Indeed, such patterns still affect women's rights. One of the most important examples that emphasises that social patterns may sometimes affect them concerns the dissolution of a relationship between spouses when they are socially incompatible as, despite its violation of Islamic principles, judges have found justifications for it by misinterpreting some Islamic principles in order to follow the tribal culture. For instance, consider the case of Mansoor Al Taymani and Fatimah Azaz. The judge who separated them claimed that Mansoor and Fatimah's marriage might lead to a dispute among relatives, which is forbidden in Islam. However, he ignored the fact that tribal racism is also forbidden in Islam.⁸⁹³ (See Chapter Six.)

Social patterns have also contributed to many cases of misinterpretation of the Islamic texts. One example of this is polygamy. For instance, according to the Qur'an: "And give to the orphans their properties and do not substitute the defective [of your own] for the good [of theirs]. And do not consume their properties into your own. Indeed, that is ever a great sin. And if you fear that you will not deal justly with the orphan girls, then marry those that please you of [other] women, two or three or four. But if you fear that you will not be just, then [marry only] one or those your right hand possesses. That is more suitable that you may not incline [to injustice]." ⁸⁹⁴As discussed in Chapter Three, this was revealed to protect orphans' rights, not to encourage men to marry more than one wife. So, although polygamy was permitted, this was only under strict conditions and certain

⁸⁹² Fiteihi, 'woman driving between the reality and the exaggeration of clerics.'

⁸⁹³ Alshaya, 'Social equivalence and separation between spouses.'

⁸⁹⁴ , 'The Holy Quran.' (4:3)

circumstances. Furthermore, it is obvious that it actually encourages men to marry only one wife: “But if you fear that you will not be just, then [marry only] one.”⁸⁹⁵ However, Saudi scholars have tended to encourage men to take more than one wife (see Chapter Six), rather than reminding them of the great responsibility and strict conditions placed upon them by Islam in cases of polygamy (see Chapter Three). The encouragement of polygamy derives from the cultural belief that men in the country have the absolute right, without conditions, to marry more than one woman, even though this is contrary to the spirit of Islamic law. Social norms also affect the interpretation of *Quamma* and guardianship as, according to the Qur’an, “Men are in charge of women by [right of] what Allah has given one over the other and what they spend [for maintenance] from their wealth.”⁸⁹⁶ The interpretation of this verse in the Qur’an is that men are responsible for the maintenance of women in the marital relationship only (see Chapter Three). However, in Saudi Arabia, the verse been interpreted contrary to the Islamic spirit and so, based on this verse, some scholars in the country believe that men are superior to women as women are weaker physically and mentally than men and therefore men should control them in case they make wrong decisions. For this reason, women should have their husbands’ permission to be educated, to work. (See Chapter Seven.)

In addition, such social patterns play a major role in hindering *Ijtihad* in Saudi Arabia. As discussed before in Chapter Six, scholars in Saudi Arabia consider polygamy as an absolute right for men. For instance, if a poor man wishes to marry more than one wife, there is no law that prevents him in Saudi Arabia, even if his financial difficulties will negatively affect his application of justice among the wives, which is contrary to the spirit of Islamic law. (See Chapter Six.) As although Islam allows a man to have more than one wife, it suggests marrying only one as the Qur’an says, “If you fear that you will not be just, then [marry only] one.”

⁸⁹⁵ ‘The Holy Quran.’(4:3)

⁸⁹⁶ Ibid (4:34)

Based on this principle, Morocco took a positive step in *Ijtihad* to limit the misuse of polygamy. So, if a man wished to marry another wife, he had to submit a request to the court where a judge evaluated his request and then replied with an acceptance or rejection. Moreover, Tunisia used *Ijtihad* when Tunisian scholars discussed this issue, agreeing that, as most of the men could not guarantee to do justice among their wives, polygamy should be eliminated in the country. (See Chapter Five.)

The doctrine of Abu Hanifa gives women the right to decide to marry without a guardian whereas Saudi Arabia adheres to the Hanbali doctrine which prevents women from marrying without the permission of a male guardian. This insistence, which stems from culture, owes itself to the fact that scholars in the country believe that women need a man when taking important steps as female emotions may dominate their decisions. On this same basis, women are denied other rights, such as the right to travel without a guardian's approval.

Indeed, CEDAW'S Committee is concerned about social patterns in Saudi Arabia as it states that: "The Committee notes with concern that the concept of male guardianship over women (mehrem), although it may not be legally prescribed, seems to be widely accepted; it severely limits women's exercise of their rights under the Convention, in particular with regard to their legal capacity and in relation to issues of personal status, including marriage, divorce."⁸⁹⁷ As a solution, the Committee requested Saudi Arabia thus: "The Committee urges the State party to take immediate steps to end the practice of male guardianship over women, including by awareness-raising campaigns. It calls upon the State party to be proactive and to put into place without delay a comprehensive strategy, including clear goals and timetables, to modify or eliminate negative cultural practices and stereotypes that are harmful to and discriminate against women and to promote

⁸⁹⁷ UN Committee on the Elimination of Discrimination Against Women (CEDAW), *Concluding comments of the Committee on the Elimination of Discrimination against Women : Saudi Arabia*, 8 April 2008, CEDAW/C/SAU/CO/2 p.3

women's full enjoyment of their human rights, in conformity with Articles 2 (f) and 5 (a) of the Convention.”⁸⁹⁸

To sum up, Saudi Arabia, in order to better comply with the spirit of Islamic law on the one hand and with CEDAW on the other, should be abolish negative social patterns.

8.4 The right to marriage

As discussed before in Chapter Two, Article 16 of CEDAW stipulates that there should be equality between men and women in family matters. For instance, it states that men and women should enjoy equal rights: (a) on entering into marriage; (b) in freely choosing a spouse and not entering into marriage without the free and full consent of each; (c) in terms of enjoying the same rights and responsibilities during marriage and at its dissolution. Islam stresses that men and women equally should enjoy the same rights and responsibilities during marriage as, according to the Qur'an, “And women shall have rights similar to the right against them, according to what is equitable.”⁸⁹⁹

Moreover, one of the most important conditions of a marriage contract is the spouses' consent, making a marriage invalid if one of the spouses was forced to marry. The Prophet Mohammed stated that “A non-virgin woman may not be married against her wish, and a virgin may not be married without her permission”.⁹⁰⁰ Indeed, both Islamic law and CEDAW stress the importance of the consent of women in marriage. However, although Saudi Arabia applies Islamic law, nevertheless, as discussed in Chapter Six, some obstacles face Saudi women with

⁸⁹⁸ UN Committee on the Elimination of Discrimination Against Women (CEDAW), *Concluding comments of the Committee on the Elimination of Discrimination against Women: Saudi Arabia*, 8 April 2008, CEDAW/C/SAU/CO/2 p.4

⁸⁹⁹ , 'The Holy Quran.' (2:228)

⁹⁰⁰ Albukhari, *SAHIH BUKHARI* (5136)

regard to their right to marry with their full consent as a guardian could force his daughter to marry as there are no regulations to prevent this; this is contrary to both Islamic law and CEDAW.

In addition, as a guardian is able to force his daughter to marry, he is also able to prevent her from marrying on the grounds of a single word: “*Adul*”. For instance, some fathers prevent a daughter from marrying to gain the benefit of her salary, and the only way to marry in the case of *Adul* is to appeal to the judiciary. (See Chapter Six.) Therefore, it might be better for Saudi Arabia to use *Ijtihad* to create regulations that prevent a guardian from forcing or preventing a woman from marrying. Also, there should be a penalty for a guardian who violates such regulations as, according to the Hanbali school, guardianship is a great responsibility on the part of the guardian towards a daughter. For this reason, strict conditions should be placed on guardians. Their role should be limited to supporting daughters when they do not give their full consent to a marriage. Neither should they force a daughter to marry against her will as this is contrary to the spirit of Islamic law.

Underage marriage is another phenomenon that negatively affects women’s rights to choose a spouse as, in most cases, the female is not asked for her consent while, in some cases, her consent is forced. Moreover, the consent of underage girls should not be taken as read in such a serious decision like marriage, according to Sheikh Muhammad Ibn Uthaymin. Underage marriage is not allowed in Islam as the Prophet Mohammed stated that: “A virgin should not be married off until her consent is obtained.”⁹⁰¹ Therefore, a female should reach the age that her consent can be obtained. Other scholars state that the spirit of Islam encourages love and mercy between husband and wife: “And among His signs is this: that He created for you mates from among yourselves, that you may dwell in tranquility with them, and He has put love and mercy between your [hearts]: verily in that are signs for those who reflect.” It might be asked, how can love and mercy exist between a little girl

⁹⁰¹ Albukhari, *SAHIH BUKHARI* No. 5136

and a husband? Furthermore, underage marriage is contrary to CEDAW, Article 16 (2) which states that: “The betrothal and the marriage of a child shall have no legal effect, and all necessary action, including legislation, shall be taken to specify a minimum age for marriage and to make the registration of marriages in an official registry compulsory.” Consequently, in Saudi Arabia, in order to comply with the spirit of Islamic law and CEDAW, underage marriage should be prohibited.

In fact, as a solution to the problems of forcing daughters to marry, cases of *Adul* or underage marriages, the edicts of the Hanafi school might be considered in Saudi Arabia as this school does not require a guardian’s approval in the marriage contract so a woman could make the decision herself to marry when she became eighteen. The Hanbali school also considers a marriage contract to be invalid without a guardian’s approval. CEDAW and Islam both stress that the rights of women should be equal with men in entering marriage so Saudi Arabia, in order to comply with the spirit of Islamic law and to comply with Article 16, should abolish any action that might affect women’s consent to enter into marriage.

8.5 The right to separate

Article 16 (c) from CEDAW states that men and women should enjoy the same rights and responsibilities during a marriage and at its dissolution. On the hand, Islam seeks to reduce divorce cases as it gives both women and men a similar right to dissolve their marriage. (See Chapter Three.)

In Saudi Arabia, whether or not a woman receives her rights depends on the judge who rules on her case. For instance, while all judges apply Islamic law in making their judgements, they make, however, different interpretations of the Islamic texts. For instance, there are judges who easily dissolve the marriages of wives who have suffered at the hands of a husband who has beaten them or who are drug addicts. Conversely, other

judges make the procedures very long, which negatively affect the wife (see Chapter Six). In addition, as discussed in Chapter Three, a wife can separate from her husband by *Khula* as she may separate from him by returning the dowry that he paid or, if she has a serious problem with him, she can resort to the judiciary where a judge will evaluate her case. However, in some cases, if the wife fails to prove that her husband has a serious problem in such a way that makes life with him impossible (for instance, if he beats her, or is an alcoholic or a drug addict), or if she does not have enough money to return his dowry and use *Khula*, in such a situation, the wife may be forced to return to her husband's house. On the other hand, in Islam, a husband may divorce simply by saying "I divorce you" to his wife. However, this right has recently been misused which has contributed to raising the number of divorces occurring for trivial reasons, adversely affecting both women and society.

Moreover, to comply with the Islamic spirit which has the intention of minimising the number of divorce cases, *Ijtihad* may be needed. For instance, it may be reasonable to make a divorce legitimate by making a request to the court. For instance, in the Pakistan Muslim Family Law Ordinance, 1961, Article 7, a husband who wishes to divorce his wife should firstly notify the Council of his repudiation and the Council will appoint an arbiter who will try to reconcile the spouses and, only if the reconciliation fails will the divorce be effective after 90 days. If a husband does not follow this law, he will be punished (see Chapter Five). Indeed, Pakistan has dealt neatly with the Islamic spirit as, according to the Qur'an: "And if you fear dissension between the two, send an arbitrator from his people and an arbitrator from her people. If they both desire reconciliation, Allah will cause it between them."⁹⁰² In this regard, Morocco took a positive step by abolishing oral divorce and now a husband should make a request to the court whereupon a judge will look at the case and then decide to make the divorce effective or not. Amna Arshad argued that Morocco has succeeded in extracting the Islamic spirit that aims to minimise divorce as,

⁹⁰² , 'The Holy Quran.'(4;35)

according to the Prophet Mohammed,⁹⁰³ “of all lawful things, divorce is the most hateful to God.”⁹⁰⁴ (See Chapter Five.)

Therefore, in order to guarantee the application of equal rights for Saudi women who separate, a strict personal status law should be established and then followed by all the judges in the country. Also, *Ijtihad* may be required to reduce the number of divorce cases that are caused by certain husbands abusing their rights. It is also needed to find solutions for wives who are negatively affected by their husbands but who cannot prove this to the judiciary and who cannot use their right of *Khula*.

8.6 Nationality

Article 9 of CEDAW states that States Parties should ensure that women have equal rights with men in terms of transferring their nationality to their children. In fact, Saudi Arabia has implicitly recognised that Islamic law cannot be referred to in this instance as there is nothing in Islam which indicates whether or not a woman can transfer her nationality to her children. Saudi Arabia has a general reservation with regard to CEDAW that states that if an occasion arises where provisions of the Convention and the norms of Islamic law are in conflict, Saudi Arabia will be under no obligation to observe those particular terms of the Convention. However, Saudi Arabia has entered another reservation to Article 9 which states that Saudi laws do not grant nationality to children from a Saudi mother and a foreign husband. In this regard, Suhila Zain Al-abideen argues that allowing men who marry foreign women to transfer their nationality to their children, while not giving the same right to women, is one of the most significant forms of discrimination against women.⁹⁰⁵ Latifa Al Shaalan notes that the number of Saudi women marrying foreigners is increasing and therefore it is necessary to consider giving the children of Saudi women who marry foreigners Saudi nationality in order to protect society from dissemination in

⁹⁰³ Arshad, 'Ijtihad as a Tool for Islamic Legal Reform: Advancing Women's Rights in Morocco' (2006)

⁹⁰⁴ Dawud and Ahmad, *Sunan Abu Dawud* No. 1863

⁹⁰⁵ Abdeen, 'Women in the Nationality System.'

terms of duties and rights. In addition, it may be useful to give women the right to transfer citizenship to their children as this might encourage them to marry foreigners, especially with the high proportion of women in Saudi Arabia.⁹⁰⁶(See Chapter Seven.)

As previously discussed, Saudi Arabia has changed many of their regulations to the benefit of women: for instance, allowing them to drive. Therefore, in order to guarantee women equal rights with men, a woman should be able to pass her nationality on to her children if she marries a foreign husband.

8.7 The right to education

Article 10 of CEDAW requires States Parties to guarantee equal rights for men and women in terms of education. Islam, on the other hand, encouraged education without discrimination between men and women. Prophet Mohammed stated that the “pursuit of knowledge is the duty of every Muslim.”⁹⁰⁷ As well, the Qur’an states: “God elevates by several degrees the ranks of those of you who believe and those who have knowledge.”⁹⁰⁸ In Saudi Arabia, as discussed before, for cultural reasons, education for women has been delayed for thirty years as conservative scholars believed that women do not need education; they should stay at home and be good wives and mothers. After King Faisal’s royal order, however, education for women began in 1960. (See Chapter Seven.)

Although women receive good quality education, there are still some challenges to reaching full equality with men in this area as it is still believed that women should only study fields that are thought to tally with their nature as women. For this reason, men receive a better-quality education than women. For example, in universities, male teachers are better trained than the female teachers. In addition, not all disciplines are

⁹⁰⁶ Al-Debis, ‘Shura Council’s proposals for the naturalization of the Saudi women sons ’

⁹⁰⁷ ‘The Holy Quran.’ (4:1)

⁹⁰⁸ Ibid (58:11)

available for females as women cannot study aviation, marine or military disciplines, or even engineering, as it is believed that women should only study what is thought to be appropriate for them. For instance, al-Qabisi argues that education is useful for women but they should study only the subjects that are suitable for them, such as nursing and teaching in females' schools. Indeed, this could be contrary to Article 10 (c) which states that States Parties should eliminate "any stereotyped concept of the roles of men and women at all levels and in all forms of education by encouraging coeducation and other types of education which will help to achieve this aim and, in particular, by the revision of textbooks and school programmes and the adaptation of teaching methods."⁹⁰⁹

Moreover, the Saudi education system may be in conflict with Article 10 which states that States Parties should guarantee: (d) "The same opportunities to benefit from scholarships and other study grants" as, if women wish to take up a scholarship abroad, as a strict condition, they must have a male relative with them during the whole period of their scholarship.

Furthermore, a woman has to gain her guardian's approval if she wishes to study either in Saudi Arabia or abroad. In addition, conservative scholars believe that a husband has the right to prevent a woman from continuing her education which, in turn, has contributed to raising the rate of illiteracy among women compared to men (see Chapter Seven). This may also be contrary to Article 10 (f) that states that States Parties have an obligation with regard to "The reduction of female student drop-out rates and the organization of programmes for girls and women who have left school prematurely." The power of a guardian, whether that guardian is a father, brother or husband, has contributed to denying many females their right to education as many of them are forced to drop out of school in order to marry. (See Chapter Seven.)

⁹⁰⁹ Al-Hibri, *Islam, law and custom: Redefining Muslim women's rights* p.37

Hence, if Saudi Arabia wishes to comply with the spirit of Islamic law on the one hand, and its commitment to CEDAW on the other, women must have equal rights with men in the field of education. Furthermore, although it was decided to introduce sports into females' schools as it is in those for males, this decision has not yet come into force.

8.8 Work and economic rights

Article 11 of CEDAW states that States Parties should guarantee men and women equal rights at work while Article 13 requires States Parties to guarantee men and women equal rights in all spheres of life; this includes their economic rights. Islamic law gives both men and women the right to work as the Qur'an says: "For men is a share of what they have earned, and for women is a share of what they have earned."⁹¹⁰ As discussed in Chapter Four, Islamic law gives both men and women the same right to work, as the verse confirms. It also accords them equal rights in dealing with their property and with their money, meaning that women can own their property, as well as buy or sell it freely. In this regard, Emarah notes that the Qur'an states: "The believing men and believing women are allies of one another. They enjoin what is right and forbid what is wrong and establish prayer and give zakah and obey Allah and His Messenger."⁹¹¹ This means that it is an obligation for both men and women to encourage good and forbid evil, and to do this, women should participate with men in all spheres of life, whether social, economic or political.⁹¹² (See Chapter Seven.)

Article 3 of the Saudi Labour Law stipulates: "Work is a right of citizens, and citizens are equal in the right to work." In addition, in its report that was submitted to the CEDAW Committee, Saudi Arabia confirmed that women have the right to work; they are also

⁹¹⁰ , 'The Holy Quran.'(4:32)

⁹¹¹ Ibid (9:71)

⁹¹² Emara, *the Islamic liberation for women* p,16

⁹¹² , 'The Holy Quran.'(2:275)

eligible to conclude contracts and dispose of their property in accordance with Islamic law and regulations that are applied in Saudi Arabia.⁹¹³

In reality, however, Saudi Arabian women face certain obstacles in terms of gaining their right to work; for instance, they do not get equal pay for doing the same work as men. For instance, although Saudi labour law stresses the importance of providing nurseries (for children who are less than six years old) in the workplaces where the number of female employees is more than 50, most employers, however, do not conform with this article. Moreover, although a royal order in 2017 asserted that a woman should no longer require a guardian's approval to apply for a job, no punishment is given to a violator of this order. For this reason, many employers still demand a guardian's approval in order to employ a woman. These factors have affected the rise in unemployment among women in Saudi Arabia and, according to Shijen Al-Qahtani, the numbers of unemployed women are increasing, especially among those who hold Bachelor degrees.⁹¹⁴ (See Chapter Seven.)

On the other hand, there are some compatible points in Saudi labour law with CEDAW that work for the benefit of women. For instance, Article 155 of the Saudi Labour Code states that "an employer may not dismiss or warn a female employee during the period of her maternity leave, nor dismiss her during any period of illness resulting from pregnancy or childbirth." This article is compatible with CEDAW's Article 11 (2) (a): "To prohibit, subject to the imposition of sanctions, dismissal on the grounds of pregnancy or of maternity leave and discrimination in dismissals on the basis of marital status." In addition, Article 11 (f) states there must be "The right to protection of health and to safety in working conditions, including the safeguarding of the function of reproduction." This is compatible with Saudi Labour Law, Article 149 which states that "women shall work in all fields that are compatible with their nature and it is prohibited to employ them in dangerous or harmful work." Moreover, CEDAW Article 11 (2) (b) also says that States

⁹¹³ UN Committee on the Elimination of Discrimination Against Women (CEDAW), UN Committee on the Elimination of Discrimination against Women: Combined third and fourth Periodic Reports of States Parties, Saudi Arabia, 23 August 2013, CEDAW/C/SAU/3-4.

⁹¹⁴ Qahtani, 'Women's unemployment and inequitable opportunities and salaries.'

Parties should: “Introduce maternity leave with pay or with comparable social benefits without loss of former employment, seniority or social allowances.” This is compatible with Article 151 of the Saudi Labour Code which states that an employer shall pay to the working woman the equivalent of her full wage during her maternity leave. (See Chapter Seven.)

8.9 Political activities and leadership positions

Article 8 states that States Parties shall ensure that women have equal opportunities with men to represent their government at an international level, while Article 7 states that equality between men and women must be guaranteed in the formulation of government policy. In Islam, as discussed in Chapter Four, women participated in the most important political events of that era. For instance, women participated in pledging themselves to the Prophet Mohammed; they also played an important role in the formulation of policy. For example, the Prophet took his wife to consultations at Umm Salamah regarding the Hudaibiah Treaty and he also followed her recommendations. Moreover, Asmaa Bint-Abu Baker played important role in planning the Islamic immigration from Mecca to Medina which played a major role in establishing the Islamic state. Furthermore, Omar bin al Khattab has given a leadership position to a woman by making Al-Sheffa bin Abdulla chief inspector of markets, as well as making Samarra Al Acadia a chief inspector. (See Chapter Four.)

In Saudi Arabia, it is still challenging for women to participate in political activities and leadership as they do not have equal opportunities in terms of taking up many leadership positions; for instance, until now, no Saudi women have become judges. As discussed in Chapter Seven, this refusal is based on the notion of some scholars who believe that a woman’s nature prevents her from participating in political activities. In addition, they assert that women taking positions of leadership is in conflict with Islamic principles,

basing their argument on the following statement of Prophet Mohammed: “No people who appoint a woman as their leader will ever prosper.”⁹¹⁵ This statement, however, was a political prophecy which reflected that the rule of Persia would end. In this regard, Ibrahim Hashim argues that the content of the Prophet’s statement and its circumstances confirmed that it was a future expectation of the Prophet and should not be taken as a regulation. (See Chapter Four.)

Indeed, taking this statement as evidence to forbid women from taking up leadership positions may reflect the impact of culture on the interpretations of Saudi scholars that come from their belief that the main obligation of women is to stay at home and raise children. In this regard, Suhila Zain Al-abideen argues that Islam gave men and women similar civil rights and therefore, denying women the opportunity to take up positions of leadership, stems from cultural beliefs.⁹¹⁶ Amani Hamdan stresses that culture has played a major role in preventing women from being leaders, as well as a lack of community confidence in the ability of women to fulfil these positions successfully. (See Chapter Seven.)⁹¹⁷

Despite the failure of Saudi scholars to accept women in leadership positions, women have been able to achieve some of them. For example, the first woman in the country has become the Chief Executive Officer of the Samba Financial Group. In addition, in 2012, King Abdullah gave some seats to women in the Shura Council which is a group created to develop women’s rights in Saudi Arabia. However, as Suleiman Al-Enezi argues, although the participation of women in the Shura Council is a development in the field of women's rights that cannot be ignored, their role is merely consultative when women must also participate in decision-making. For instance, they should have equal opportunities with men to become ministers or judges.⁹¹⁸ As a matter of fact, Saudi Arabia needs women to participate in decision making which will contribute to the growth of the country; their

⁹¹⁵ Albukhari, *SAHIH BUKHARI* No.(4425)

⁹¹⁶ Hakim, ‘The extent the needs of Saudi of woman as a judge.’

⁹¹⁷ Hamdan, ‘Women and Education in Saudi Arabia: Challenges and Achievements’(2005)

⁹¹⁸ Suleiman Al Anzi, ‘Political participation of women in Saudi Arabia’

<http://www.alwatan.com.sa/Nation/News_Detail.aspx?ArticleID=277123&CategoryID=3> accessed 15/10/2017

participation would also be significant in solving the problems concerning education for women. Furthermore, it is important with regard to solving women's unemployment as nearly 60 percent of females who hold Bachelor degrees are unemployed.⁹¹⁹ Suheila Zine Al -Abidine argues that women participating decision making is very important in order to solve certain issues from a female perspective. For instance, women working in the judiciary could help to reduce many of the problems, especially in alimony and divorce cases, as such cases would be addressed from a female, instead of a male, perspective. In addition, she stresses that, forbidding women from being judges is not reasonable as there is nothing in Islam to prevent women from taking up leadership positions.⁹²⁰ (See Chapter Seven.) Indeed, the lack of women participating in decision making was a concern for CEDAW's Committee with the Committee stating that: "the number of women who are represented in public and political life, at the local, national and international levels and in particular in decision-making positions, is very low."⁹²¹

Therefore, Saudi Arabia, in order to be compatible with Islamic law and CEDAW, should eliminate the influence of culture on the interpretations of Islamic texts. In addition, they should also revive *Ijtihad* to allow provisions to be made to suit the requirements of the current era.

8.10 Equality in access to health care

Article 12 (1) of CEDAW states that: "State Parties shall take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services, including those related to family planning."

⁹¹⁹ Anzi, 'Political participation of women in Saudi Arabia'

⁹²⁰ Hakim, 'The extent the needs of Saudi of woman as a judge.'

⁹²¹ UN Committee on the Elimination of Discrimination Against Women (CEDAW), *Concluding comments of the Committee on the Elimination of Discrimination against Women : Saudi Arabia*, 8 April 2008, CEDAW/C/SAU/CO/2 p.6

In fact, caring about health, whether this is for men or women, is one of the most central pillars of Islam which considers the health of all people in all its aspects as of primary importance. For instance, Islam cares about psychological and mental health by prohibiting anything that could affect it, such as drugs or alcohol. The Qur'an states: "O you who have believed, indeed, intoxicants, gambling, [sacrificing on] stone alters [to other than Allah], and divining arrows are but defilement from the work of Satan, so avoid it that you may be successful."⁹²² Moreover, Islam cares about people's hygiene as the Qur'an says: "Indeed, Allah loves those who are constantly repentant and loves those who purify themselves."⁹²³ As well, Islam encourages people to be moderate and not eat or drink to excess, as the Qur'an says: "And eat and drink, but be not excessive. Indeed, He likes not those who commit excess."⁹²⁴

Furthermore, Islam cares about infant health care and encourages the great benefit of breast-feeding with the Holy Qur'an advising that a mother should breastfeed her children for two full years. The Qur'an states: "Mothers may breastfeed their children two complete years for whoever wishes to complete the nursing [period]."⁹²⁵ Moreover, human life, whether male or female, is of high value in Islam which describes the killing of one person to be as bad as killing all human beings, while contributing to the preservation of the life of even one person is as good as reviving all people. According to the Qur'an: "whoever kills a soul unless for a soul or for corruption [done] in the land - it is as if he had slain mankind entirely. And whoever saves one - it is as if he had saved mankind entirely."⁹²⁶ In Saudi Arabia, whether men or women obtain equality in health care without discrimination, healthcare needs to improve for both genders.⁹²⁷

⁹²² , 'The Holy Quran.' (5:90)

⁹²³ Ibid (2; 222)

⁹²⁴ Ibid (7:31)

⁹²⁵ Ibid (2; 233)

⁹²⁶ Ibid (5:32)

⁹²⁷ Genie Ahmed, 'Childbirth treatment problems in Saudi Arabia' <https://www.lahamag.com/article/30081-%D9%81%D9%8A_%D8%A7%D9%84%D8%B3%D8%B9%D9%88%D8%AF%D9%8A%D8%A9%3A_70%25> accessed 12/7/2018

Article 12 (2) states: “Notwithstanding the provisions of paragraph 1 of this article, States Parties shall ensure to women appropriate services in connection with pregnancy, confinement and the post-natal period, granting free services where necessary, as well as adequate nutrition during pregnancy and lactation”.

In Saudi Arabia women suffer from problems in maternity hospitals. Pregnant women in the country have a choice between giving birth in a government free hospital where doctors and nurses frequently treat women harshly. In addition, services are poor. For instance, sometimes more than one woman gives birth in the same room, being separated only by curtains. This allows them to hear the labour pains or screams of other women during the delivery process.⁹²⁸ In contrast, in private hospitals, women pay thousands of riyals (sometimes up to ten thousand pounds) to get better treatment from nurses and doctors, making pregnant women just an investment for private clinics. For instance, doctors in the private hospitals, in order to make money, sometimes trick pregnant women and convince them that they need a Caesarean section when this is unnecessary; Caesarean births, of course, are much more expensive than natural childbirth.⁹²⁹ In fact, although Saudi Arabia seems to be compliant with paragraph (1) of Article 12, it is not compliant with paragraph (2). Therefore, in order to comply fully on the one hand with Article 12 concerning human health, and with the spirit of Islam on the other, Saudi Arabia should pay more attention to providing pregnant women with free, high-quality health services.

8.11 The trafficking of women

Article 6 of CEDAW states that: “State Parties shall take all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women.” As discussed in Chapter Three, Islam raises the status of women

⁹²⁸ Ahmed, ‘Childbirth treatment problems in Saudi Arabia’

⁹²⁹ Noir Al Shammari, ‘Causes of increased caesarean sections in Saudi Arabia.’
<http://www.aleqt.com/2013/01/22/article_726559.html> accessed 22/8/2018

as it forbids practices that offend women, such as Shigaar marriages or considering women as possessions as was the case in the era of ignorance. In addition, in the age of ignorance (before the advent of Islam) there were sexual practices which were insulting to women. According to the Prophet's wife, Aisha, certain such sexual practices existed then. For example, a husband could send his wife to another man so that that man could have intercourse with her and, if she became pregnant, the woman could go back to her husband. In addition, another immoral practice involved a group of men (usually fewer than ten) visiting a woman's house to have intercourse with her. If this woman became pregnant, she would choose one of the men to be her child's father. (See Chapter Three.) After the advent of Islam, Islam considered all these, and adultery, as insults to women and, for this reason, Islam strictly prohibits such practices. Therefore, Islam forbids any sexual relations between men and women outside marriage and the Qur'an says: "And do not approach unlawful sexual intercourse. Indeed, it is ever an immorality and is evil as a way."⁹³⁰

As the trafficking of women involves sexual intercourse outside of marriage, it is also an insult to women and is therefore contrary to the spirit of Islamic law. Consequently, the trafficking of women should be forbidden in Islam. In this regard, Saudi Arabia closely follows Islamic principles as any sexual relationship outside of marriage is forbidden and is not be acceptable in society. Hence, Saudi Arabia faces no problems in satisfying Article 6.⁹³¹

8.12 Women in rural areas

Article 14 of the Convention encourages States Parties to take care of rural women, solve their problems, and ensure that they have the right to access education, work and

⁹³⁰ , 'The Holy Quran.'(17:32)

healthcare. As discussed in Chapters Three and Four, Islam gives men and women similar rights both socially or individually.

In Saudi Arabia, women in rural areas are those most affected by culture and tradition and so higher percentages of women who are denied their rights live in rural areas. For instance, many such women are forced to marry, often as children, and many of these women do not attend school. Furthermore, they are denied the right to inherit. In this regard, Ghazi al-Shammari argued that, in such areas, women are often deprived of the rights guaranteed to them by Islam, such as the right to an education or the right to separate from a husband, or even the right to inherit. Therefore, a quality of life should be ensured for rural women similar to that enjoyed by women in Saudi cities.⁹³² Education should also be encouraged in such areas for both men and women. This would contribute significantly to reducing the impact of customs, as well as raising awareness of the rights given to women by Islam. Fahid argues that many girls in rural areas are denied their right to learn as their families tend to make them leave school and work in domestic services. Mansur al-Askar points out that girls dropping out of school in rural areas is a widespread phenomenon as people in such areas do not realise the importance of education.⁹³³

8.13 Universalism, Islam and cultural relativism in Saudi Arabia

Islam was the foundation of the establishment of Saudi Arabia and is still at its heart. It also plays a huge role in the country as it would not be acceptable to apply any foreign law, which is contrary to Islamic law. As discussed previously in Chapter One, Saudi Arabia must be considered as a country with a strong Islamic culture, which means that the Kingdom resists any other culture that is contrary to the laws of Islam. This is clear in Saudi Arabia's general reservations on CEDAW which state that: "In case of contradiction between any term of the Convention and the norms of Islamic law, the Kingdom is not

⁹³² Almaliki, 'Saudi Women: Education and Work: Challenges Presented.'

⁹³³ Fahid, 'Children deprived of education in Saudi Arabia.'

under obligation to observe the contradictory terms of the Convention. However, the CEDAW Committee was concerned about Saudi's general reservation, stating that it was contrary to the object and purpose of the Convention, especially since the Convention did not contradict the essence of Islamic law. Therefore, the Committee requested Saudi Arabia to withdraw its general reservation although it did not do so. This may confirm that Saudi insists on its interpretations of Islamic law.

in spite of Saudi's reservations with regard to CEDAW, Saudi Arabia has taken steps towards reconciling international law concerning women's rights with Saudi laws while, on the other hand, stating that it is not obliged to adhere to any article that is contrary to the principles of Islamic law. So, because of the application Islamic law in Saudi Arabia, it could be said that the Kingdom is under no obligation to conform with Article 16 (b) which states that States Parties should guarantee equally for both men and women the right "freely to choose a spouse and to enter into marriage only with their free and full consent" as Saudi Arabia does not give women the right to marry without a guardian's approval. It will also be challenging for the nation to comply with Article 16 (2) which states: "The betrothal and the marriage of a child shall have no legal effect, and all necessary action, including legislation, shall be taken to specify a minimum age for marriage and to make the registration of marriages in an official registry compulsory." This is because it is believed in the country that since Islam does not prohibit marriage at any age, child marriage is therefore allowed.

The question that may arise is how can these strict laws that stem from strong cultural practices be reconciled with articles in CEDAW which appear to be in conflict with the Islamic application of rules in Saudi Arabia? In fact, consider the case of women being allowed to drive in the country. This was previously prohibited based on Islamic law as Saudi conservative scholars were convinced that for women to drive cars was forbidden in Islam (see Chapter Seven) but then it was allowed, also based on Islamic law. This is the

case with most issues, such as women's right to education, work, etc., where conservative scholars prevented a right based on Islam and then allowed it, also based on Islam.

Indeed, according to Saudi Arabia's interpretation of Islamic law, women cannot have equal rights with men in terms of taking up positions of leadership. For instance, women cannot become ministers. Consequently, according to the Saudi reservation which states that Saudi has no commitment to any item in the Convention that is contrary Islamic law, it has no obligation, for instance, to conform to Article 8 which states that "State Parties shall take all appropriate measures to ensure to women, on equal terms with men and without any discrimination, the opportunity to represent their Governments at the international level and to participate in the work of international organizations".

On the other hand, Saudi Arabia may be obliged to accept this Article as it states "Islamic law" in the reservation and not "the Saudi interpretation of Islamic law", especially since there are other Islamic countries that have interpreted Islamic law differently: for example, women in Pakistan have had the opportunity to become Prime Minister twice (see Chapter Four). Austria considered Saudi Arabia's reservation to have a negative impact on compliance with the provisions of the Convention (see Chapter Two). However, the Saudi reservation should not affect its obligations to CEDAW as it mentions "Islamic law" and Islamic law is, to a great extent, compatible with CEDAW. However, Saudi's interpretation of Islamic law is affected by cultural issues as some cases are not, in fact, related to Islamic law even though some scholars believe they are. An example of this is the separation of spouses when they are socially incompatible. This issue stems from tribal customs which are against the spirit of Islamic law. Nevertheless, some Saudi scholars and judges misuse an Islamic base in order to legislate; this violates the Islamic law on which they say they base their judgment.

In fact, there may be two indications that some Saudi scholars are not following the spirit of Islamic law and that their provisions are affected by their cultural background. The first

indication is when they prevent something using Islam as a basis and then later allow it. This has happened several times: for instance, preventing women from having an education or preventing them from taking part in physical activities / sports. This indicates that the scholars were prohibiting these rights due to cultural reasons. A second indication is when Saudi Arabia stood alone among the Islamic countries in preventing women from driving cars. Since Saudi Arabia was alone in prohibiting this, it showed clearly that the scholars prevented women from driving for cultural reasons, not Islamic ones. Moreover, not allowing women to travel without a guardian's approval occurs only in Saudi Arabia which suggests that this rule stems from culture.

On the other hand, there are some issues that are based on Islamic law but where *Ijtihad* in these areas is being hindered because of cultural reasons. For instance, the Prophet Mohammed stated: "A woman must not travel alone without a mahram".⁹³⁴ However, travelling now is completely different to travel in the Prophet Mohammed's time as it is now much easier, faster and safer. Thus, many countries have applied *Ijtihad* so that women can travel without a guardian's approval. For instance, Egypt abolished Article (3) of Decree No. 3937 that said a guardian's approval was necessary for a woman to travel. In addition, Kuwait released a resolution that granted women the right to travel without a guardian's approval. Nonetheless, in Saudi Arabia, the government has not invoked *Ijtihad* in this regard. Suhila Zain Al-abideen argued that Saudi society has no confidence in women to take a simple decision to travel and it is not reasonable to make a woman sometimes need her son's permission to travel, even when he may not be over eighteen years old (see Chapter Seven). Consequently, although other Islamic countries have applied *Ijtihad* in order to allow women to travel without a guardian's approval, Saudi Arabia has not applied *Ijtihad* in this case. This is because Saudi society does not trust a woman's ability to take such a simple decision and this stems from the culture where it is believed that women cannot make serious decisions, such as to travel or to marry.

⁹³⁴ Maharam means male guardian

Another example, as discussed before, concerns polygamy, which is permissible in Islam under certain conditions and circumstances. However, some countries, such as Tunisia, realised that many men abused polygamy, which is contrary to Islamic law; therefore, they abolished it. In Morocco, a man who would like to marry another wife must submit a request to the court where a judge evaluates his request and decides if he needs the marriage; he then decides if this is or is not just. In Saudi Arabia, such *Ijtihad* is not an option for Saudi scholars as they believe that polygamy is an absolute right for a man and he may evaluate himself the need for this marriage and whether he can apply justice among his wives. (See Chapter Seven.)

Indeed, in order to change any rules in Saudi Arabia, this would need to be done on the basis of Islamic law and, for this reason, *Ijtihad* may be vital to give women many other of their rights, such as the right to travel without a guardian's approval, the right to marry without a guardian's permission, and having the same right as men to take up a leadership position. Consequently, if *Ijtihad* were used to give women equal rights with men, this could bridge the gap between CEDAW and women's rights in Saudi Arabia would become more obtainable. For instance, to reduce the marriage of minors, the extent of the use of *Ijtihad* would be substantial. On the other hand, *Ijtihad* might be employed to amend the Saudi application of Islamic rules to make them more compatible with the requirements of the modern era (see Chapter Five). Moreover, *Ijtihad* might be important in removing the influence of custom on interpretations of Islamic texts, especially with regard to women, since these interpretations have often contributed to denying women many of their rights (see Chapters Six and Seven). Consequently, in order actively to employ *Ijtihad* in the field of women's rights, decision-makers must recognise the importance of the role of women in society and emphasise their right to enjoy similar rights to men.

8.14 Conclusion

One of the most important goals of Islam is to raise the status of women as Islam guarantees rights to women similar to those of men, whether these are individual or social rights, and CEDAW's objectives are compatible with this. However, although Saudi Arabia is a country that considers itself one that follows Islamic principles, it is clear that culture has a great impact on interpretations of Islamic texts and, for this reason, these interpretations have negatively affected women's rights. In order to give women the rights that are guaranteed to them by the spirit of Islamic law, and to fulfill its obligations to CEDAW, Saudi Arabia should revive *Ijtihad*.

This is a compatibility study between CEDAW and Islamic law and its aim was to find common ground between Islamic law, CEDAW and the Saudi application of Islamic law. It has found that both Islamic law and CEDAW aim to raise the status of women and give them equal rights with men. However, Saudi Arabia, a country that adheres to Islamic law, interprets it in such a way, in some cases, that goes against women's rights.

At the time of the advent of Islam, women had no value and no rights. They did not have the right to consent to marriage or the right to divorce; they did not have the right to inherit. In short, women in that age had no social or individual rights. They were considered as the property of men and, after the death of a husband, a woman would have to move on to be "owned" by one of her husband's heirs. In that age, there was also no specific number of wives a man could take; he was able to marry as many women as he wished. Islam brought enlightened views and, when it began, a new era emerged for women. Islam declared that males and females were equal as they were created from one soul. The Qur'an says: "O mankind, fear your Lord, who created you from one soul and created from it its mate and dispersed from both of them many men and women."⁹³⁵

⁹³⁵ , 'The Holy Quran.'(4:1)

Islam gave women social rights, such as the right to consent to marriage. It also placed responsibilities upon a husband during a marriage: he had to maintain his wife and treat her well. Furthermore, the only way he could have relations with her was to ask for her hand in marriage, which prevented the occurrence of any other sexual practices that might degrade the value of women. Moreover, Islam gave women the right to separate from their husbands if they were not happy with them.

As well as social rights, Islamic law also gives women individual rights. It gives them the right to work, be educated, have a share in political life with men, take up leadership positions, and join with men in building a better society as, according to the Qur'an: "The believing men and believing women are allies of one another. They enjoin what is right and forbid what is wrong."⁹³⁶ CEDAW had a similar concept for women as it aimed to give them equal rights with men and the right to take care of all their own affairs, whether social, economic or political.

Saudi Arabia is a state that was founded on the basis of Islam from an agreement between Mohammed bin Abdul Wahab and Mohammed bin Saud; Islam remained the basis of the state until the third Saudi state (i.e., the current one). As the state was founded on Islam, its constitution and basic law is therefore based on the Qur'an and Sunnah. As mentioned in Chapter 4, Salim Al-Awa argues that, in the name of religion, traditions rule and restrict women's right to work. In Saudi Arabia, in the name of religion, women have been deprived of their right to education and to work and today they are deprived of their right to have opportunities equal to those enjoyed by men in terms of occupying positions of leadership and of being able to travel without the approval of a guardian. Customs and traditions may be the most serious threats to the rights of women in Saudi Arabia as they play a major role in the misinterpretation and application of Islamic principles. For instance, polygamy is allowed only in exceptional situations and this was developed to preserve women's rights. However, this has been misinterpreted and has become an

⁹³⁶ , 'The Holy Quran.'(9:71)

absolute right of men. In addition, although guardianship is the responsibility of men towards women, this role has been misinterpreted so that the duty of a guardian is viewed as giving men the right to control women by preventing them from travelling or marrying.

Because of culture, there are many issues that negatively affect women in the country, many of which are not related to Islam and some of which are even contrary to Islamic law. For instance, women have been denied the opportunity to receive an education, to work or to drive cars, all of which are contrary to the spirit of Islamic law. However, after many years, it has finally been acknowledged that denying these opportunities does not derive from Islamic law; instead, such prohibitions stem from a culture that has affected the interpretations of Islamic law regarding these issues. However, issues remain that negatively affect women's rights and the belief persists that these judgments relate to Islamic law even though they are more related to culture. For instance, denying women equal rights with men in taking up leadership positions, the misuse of guardianship, the misuse of polygamy, and separating spouses when they are thought to be socially incompatible, are all related to culture. Culture has also contributed to the delay in employing *Ijtihad* with regard to some issues relating to women's rights, such as being able to travel and being able to marry without a guardian's approval. *Ijtihad* might also be used with regard to oral divorce in order to reduce the number of divorce cases, as well as to address polygamy and make it acceptable only in certain cases.

As a matter of fact, Saudi Arabia has made a good attempt to reconcile CEDAW with Saudi law by ratifying CEDAW. However, the reservation made by Saudi Arabia may lead to women being deprived of many of their rights as the Saudi reservation could be considered as a "catch-all". Therefore, Saudi Arabia should adhere to the spirit Islamic law that aims to raise the status women and not apply interpretations that negatively affect women's rights. CEDAW, on the other hand, shows respect for cultures as it allows reservations such as the Saudi reservation, for instance, which states that the country has

no obligation to fulfil any terms of the Convention that contradicts the norms of Islamic law.

To reach greater reconciliation between women's rights in Saudi Arabia and those propounded by CEDAW, *Ijtihad* should play vital role as this is an Islamic technique. The Qur'an and Prophet Mohammed encouraged Muslims to practise *Ijtihad*. In addition, Ahmed bin Hanbal, the founder of the Hanbali school adopted by Saudi Arabia, stressed that it is prohibited for any era to be free from *mujtahid*. In addition, he stressed that each age had its various issues and its circumstances so the duty of the *mujtahid* is to understand these issues and circumstances and to make provisions accordingly. *Ijtihad* will be very important in advancing women's rights in the country since Saudi Arabia tends to use Islam as a justification for most of its prohibitions, even if most of these pronouncements stem from culture and tradition. For instance, separating spouses if they are socially incompatible has certainly arisen from tribal traditions and yet judges and scholars in the country have used Islam as a justification to allow it to happen. They argue that, since a socially unequal marriage may cause tension and division among relatives, it is necessary to separate spouses who are deemed to be socially incompatible as conflict between relatives is forbidden in Islam. Thus, the use of *Ijtihad* would be significant in this case as it uses the spirit of Islamic teachings to change pronouncements in order to meet the requirements of the current era. Tunis, for example, used *Ijtihad* to abolish polygamy; Pakistan used *Ijtihad* to abolish the oral divorces made by men in order to reduce the number of divorce cases; and Kuwait used *Ijtihad* to abolish the requirement to gain a guardian's approval for a woman to travel. Moreover, Saudi Arabia should develop a personal status law in order to prevent certain issues being left to the complete discretion of judges. A personal status law would be also be significant in reducing cases such as *Adul* or where women are made to marry against their will.

On the other hand, to make greater improvements to women's rights, whether internationally or in Saudi Arabia, CEDAW should address some weaknesses in its

application. For instance, it should extend the scope of its coverage to include abortion. Additionally, CEDAW does not address the majority of women who stay at home in order to maintain their families and raise their children as they do not count as part of the labour force. The role of these women should indeed be considered. Furthermore, CEDAW should improve its monitoring and implementation procedures. For instance, there should be a committee to verify the accuracy of the information provided by States Parties in the reports. In addition, although CEDAW's Optional Protocol addresses one of its weaknesses by allowing individuals or groups to bring complaints to the CEDAW Committee, this procedure is insufficient as it is limited merely to studying the complaints of an individual or group and then providing recommendations; there is nothing that compels States Parties to implement these recommendations. Finally, more attention should be given to culture as it plays a notable role in women's rights.

It may be seen unfair that, in the name of Islam, women's rights were addressed more than 1400 years ago while now, also in the name of Islam, women in Saudi Arabia are denied some of their rights. For this reason, Saudi Arabia should follow the spirit of Islamic law, which aims to value women, and give them similar rights to men, by eliminating customs and traditions that violate women's rights.

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