

The University of Hull

**Women's Rights in Islam and Current Discourse of International Human Rights
Law**

being a Thesis Submitted for the Degree of PhD in Law
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by

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بِسْمِ اللَّهِ الرَّحْمَنِ الرَّحِيمِ

To my parents and my dear husband

Summary of Thesis Submitted for PhD degree

by

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On

Women's Rights in Islam and Current Discourse of International Human Rights Law

The international norm of non-discrimination on the basis of sex as reflected in the UN human rights instrument culminated in 1979 with the adoption of the UN Convention on the Elimination of All Forms of Discrimination Against Women. With the adoption of the Convention, the separate concepts of women's rights were recast in a global perspective, and supervisory machinery with terms of reference similar to those of existing human rights organs was provided for. Although the Convention is considered as the most important binding document for elimination of discrimination against women, it met with a large number of reservations by member states. The number of far reaching reservations entered to the Women's Convention has been the subject of a global debate and the Convention is seen as the most 'political' of all the human rights instruments. Muslim member states to the Convention have entered reservations to its substantive provisions based on Islamic Law and emphasise that the formulation and interpretation of these rights in *Sharia* is very different from the concept of human rights in international human rights instruments.

Reservations of Muslim state parties to the substantive provisions of the Women's Convention and present gender discriminatory laws in Muslim states based on some jurists' interpretation of a few verses in the *Qur'an* and the existence of a few *ahadith*, including *qawwāmun* (the superiority of male over female in marriage), divorce, guardianship and custody, women's testimony which is worth half that of a man in financial transactions; inheritance rights of women where women are entitled to half the share of a man in a comparable situation; polygamy and some issues in Islamic penal law which are undesirable from the perspective of women's human rights in international law have led to the belief that women in Islamic societies are second citizen and Islamic principles are an obstacle to eliminating discrimination against women. They also reinforce the view in the West that the concept of women's human rights in Islam is entirely irreconcilable with international human rights norms on the subject, such as those expressed in the Women's Convention.

By studying the origin of the religion and Islamic sources, the present author, however, seriously doubts the validity of the Western view and Muslim parties' reservations to substantive provisions of the Convention, based solely on their interpretation of the *Sharia*. Contrary to the common perception, the principles of Islamic law do not consist of an immutable, unchanging set of norms, but have an in-built dynamism that is sensitive and flexible so that Islamic law can remain up-to-date and respond to the questions and demands of people at different times and places.

This project, in the light of Islamic sources and interpretations of Islamic jurisprudence from both schools of thought, Sunni and Shi'a, is designed in four parts to discuss and explore the place of women's rights in Islam and the current discourse of women's human rights in modern international law in order to determine whether Islamic law is reconcilable with international women's human rights such as those expressed in the Women's Convention.

Table of Contents

List of Abbreviations	iv
Table of Cases	viii
Table of Treaties and International Agreements	x
Acknowledgments	xii
Introduction	1

Part I

The Development of Women's Human Rights through International Law

Chapter I

Woman's Rights in Traditional and Modern Times

1. Women's position in ancient Greece and Rome	12
2- Position of women in Christianity	15
3- Woman's position in secular thought	20
4. Women's position in the modern time	25
5- Women's position in the Covenant and United Nations	29
5.1. <i>The League Covenant</i>	30
5.2. <i>The United Nations</i>	30
5.3. <i>The Universal Declaration of Human Rights</i>	33
5.4 The Commission on the Status of Women	35

Chapter II

An Evaluation of the International Norm of Non-Discrimination on the Basis of Sex

1. The Preamble of the Women's Convention	39
2. States parties and their obligations	41
3. Political rights of women	48
4. Women and economic, social and cultural rights	51
5. Civil and family law	56
6. The Committee and its functions	59
7. The Optional Protocol to the Women's Convention	65
8. States' reservation to the Women's Convention	70
8.1. <i>Reservation and its application to human rights instruments</i>	71
8.2. <i>The most reserved articles of the Women's Convention</i>	74
8.3. <i>Objection to reservations</i>	83
9. Women's rights from Mexico to Beijing	88
Concluding remarks	93

Part II

Theoretical Framework of Women's Human Rights in Islam: Equality or Discrimination

Chapter III

Islam and the Question of Women's Human Rights

1. Sources of human rights in Islam	99
1.1. <i>The Qur'an</i>	99
1.2. <i>Sunna</i>	102
1.3. <i>Ijma</i>	105
1.4. <i>Qiyas</i>	106
1.5. <i>Aql</i> intellect or human reason	107
2. Women's human rights in Islam	109
3. <i>Qawwāmun</i> - the superiority of male over female	120

Chapter IV

Women's Human Rights in Islam and the Laws of Muslim States: Rhetoric or Reality?

1. <i>Qawwāmun</i> in the familial sphere	128
1.1 <i>Women and the question of guardianship</i>	138
1.2 <i>The scope of mother's authority in opening an account</i>	142
2. <i>Qawwāmun</i> and women's political rights	147
3. <i>Qawwāmun</i> and the right to work of women	153
Concluding remarks	163

Part III

Muslim Family Law and Implications for Women's Human Rights

Chapter V

Marriage in Islamic Law and the Law of Muslim States

1. The institution of marriage in Islam	169
1.1. <i>Dower</i>	178
1.2. <i>Maintenance</i>	181
2. Minimum age of marriage	184
3. The right to choose a husband in Islam	190
4. Polygamy	197

Chapter VI

Divorce in Islamic Law and the Law of Muslim States

1. Divorce in Islamic Law	203
2. Forms of divorce	205
3. Divorce at the request of the wife	209
3.1. <i>Divorce due to refusal or inability to pay maintenance</i>	210
3.2. <i>The husband's absence or imprisonment</i>	213
3.3. <i>Divorce based on harm or difficulty and hardship (asr va haraj)</i>	215
4. Divorce at the request of both of the parties	219
5. The delegated right to divorce	220
6. Annulment of a marriage (<i>faskh</i>)	222

Part IV**Women in Islamic Criminal Law and National Penal Law of Some Muslim States****Chapter VII****Islamic Penal Law in Theory and Practice**

1. Islamic Criminal Law	230
1.1 <i>Hudud</i>	232
1.2 <i>Qeusas</i>	233
1.3 <i>Diyya</i>	235
1.4 <i>Ta'zir</i>	236
2. Islamic criminal law in practice	237

Chapter VIII**Women's Place in Testimony, Retaliation and Compensation Laws of Islam**

1. Women and and the question of testimony law in Islam	248
1.1 <i>Testimony law in practice</i>	253
2. Retaliation in Islamic Law	255
2.1 <i>The Sunni view on qeusas</i>	259
2.2. <i>The Shia's view on qeusas</i>	260
2.3. <i>Retribution law in practice</i>	267
3. Women and the law of <i>Diyya</i> in Islam	269
3.1 <i>Diyya in Islamic sources</i>	273
4. Gender and the age of criminal responsibility in Islam	276
4.1 <i>Civil liability in Islamic law</i>	277
4.2. <i>Criminal liability in Islamic law</i>	278
4.3 <i>The age of criminal responsibility in practice</i>	282
Concluding remarks	285

Conclusion	287
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Appendix	296
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Glossary	302
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Bibliography	304
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List of Abbreviations

<i>AC</i>	Appeal Cases
<i>ACHR</i>	American Convention on Human Rights
<i>ACHPR</i>	African Charter of Human and Peoples' Rights
<i>AJACT</i>	Associate Judges at the Appeal Court of Tehran
<i>AJCL</i>	<i>American Journal of Comparative Law</i>
<i>AJIL</i>	<i>American Journal of International Law</i>
<i>AJISSie'</i>	<i>American Journal of Islamic Social Science</i>
<i>APSR</i>	<i>American Political Science Review</i>
<i>ARIEL</i>	<i>Austrian Review of International and European Law</i>
<i>ASILP</i>	<i>American Society of International Law Proceedings</i>
<i>AJICL</i>	<i>Arizona Journal of International and Comparative Law</i>
<i>APJHRL</i>	<i>Asia-Pacific Journal on Human Rights and the Law</i>
<i>Ara'SQ</i>	<i>Arab Studies Quarterly</i>
<i>ASIL</i>	<i>American Society of International Law</i>
<i>BJC</i>	<i>British Journal of Criminology</i>
<i>BJIL</i>	<i>Brooklyn Journal of International Law</i>
<i>BJMES</i>	<i>British Journal of Middle Eastern Studies</i>
<i>BYIL</i>	<i>British Yearbook of International Law</i>
<i>CADE</i>	Convention Against Discrimination in Education
<i>Cal. WILJ</i>	<i>California Western International Law Journal</i>
<i>CCERMWWEV</i>	Convention Concerning Equal Remuneration for Men and Women Workers for Work of Equal Value
<i>CCI</i>	Civil Code of Iran
<i>CCQRCNL</i>	Convention on Certain Questions Relating to the Conflict of Nationality Laws
<i>CCQRCNL</i>	Convention on Certain Questions Relating to the Conflict of Nationality Laws
<i>CEDAW</i>	Committee on the Elimination of All Forms of Discrimination Against Women

CERD	Convention on the Elimination of All Forms of Racial Discrimination
CIRI	Constitution of Islamic Republic of Iran
<i>Cornell Int'l LJ.</i>	<i>Cornell International Law Journal</i>
CPRW	Convention on the Political Rights of Women
CSTPEP	Convention for the Suppression of the Traffic in Persons and the Exploitation of the Prostitution of Others
CSW	Commission on the Status of women
DEDEAW	Declaration of All Forms of Discrimination Against Women
Doc.	Document
ECOSOC	Economic and Social Council
<i>EHRLR</i>	<i>European Human Rights Law Review</i>
EJCCLCJ	<i>European Journal of Crime, Criminal Law and Criminal Justice</i>
<i>EJIL</i>	<i>European Journal of International Law</i>
<i>EPL</i>	<i>European Public Law</i>
ESC	European Social Charter
FAO	Food and Agriculture Organization of the United Nations
FLS	Forward-Looking Strategies for Advancement of Women
GAOR	General Assembly Official Records
HCCIL	Hague Conference on Codification of International Law
<i>HHRJ</i>	<i>Harvard Human Rights Journal</i>
<i>HHRY</i>	<i>Harvard Human Rights Yearbook</i>
HRC	Human Rights Committee
<i>HRLJ</i>	<i>Human Rights Law Journal</i>
<i>HRLP</i>	<i>Human Rights Law and Practice</i>
<i>HRLR</i>	<i>Human Rights Law Review</i>
<i>ILR</i>	<i>International Law Review</i>
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic Social and Cultural Rights
ICJ	International Court of Justice
<i>ICLQ</i>	<i>International and Comparative Law Quarterly</i>
<i>Isla'CLQ</i>	<i>Islamic and Comparative Law Quarterly</i>
<i>IJCACJ</i>	<i>International Journal of Comparative and Applied Criminal Justice</i>

<i>IJLPF</i>	<i>International Journal of Law, Policy and the Family</i>
ILC	International Law Commission
ILD	Iran Legal Decision
ILM	International Legal Material
ILO	International Labour Organisation
ILR	International law Reports
IPCI	Islamic Punishment Code of Iran
<i>Is'Q</i>	<i>Islamic Quarterly</i>
<i>JAL</i>	<i>Journal of African Law</i>
<i>JFP</i>	<i>Journal of Foreign Policy</i>
<i>JLR</i>	<i>Journal of Law and Religion</i>
<i>JRAS</i>	<i>Journal of the Royal Asiatic Society</i>
<i>LNOJ</i>	<i>League of Nation Official Journal</i>
LNTS	League of Nations Treaty Series
<i>Mid'EJ</i>	<i>Middle East Journal</i>
<i>Mich'JIL</i>	<i>Michigan Journal of International Law</i>
<i>MLR</i>	<i>Malaya Law Review</i>
<i>NEAS</i>	<i>Near East African Studies</i>
NGO	Non-Governmental Organization
<i>NILR.</i>	<i>Netherlands International Law Review</i>
<i>NQHR</i>	<i>Netherlands Quarterly of Human Rights</i>
OIC	Organization of Islamic Conference
PLD	Pakistan Legal Decision
Rep.	Report
SCI	Supreme Court of Iran
SCOR	Security Council Official Records
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNCIO Doc.	Documents of the United Nations Conference on International Organization
UNDP	United Nations Development Programme
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNGA	United Nations General Assembly

UNHCR	United Nations High Commissioner for Refugees
UNICEF	United Nations Children's Fund
UNSG	United Nations Secretary General
UNTS	United Nations Treaty Series
<i>VJIL</i>	<i>Virginia Journal of International Law</i>
WHO	World Health Organization
<i>WLR</i>	<i>Whittier Law Review</i>
<i>WSIF</i>	<i>Women Studies International Forum</i>
WSPU	Women's Social and Political Union
<i>YIMEL</i>	<i>Yearbook of Islamic and Middle Eastern Law</i>
<i>YLIJ</i>	<i>Yale Law Journal of International Law</i>

Table of Cases

International Court of Justice

<i>Liechtenstine v. Guatemala in Nottebohm</i>	50
<i>Genocide Convention Case</i>	72, 86
<i>South West Africa Case</i>	109

European Court of Human Rights

<i>Ireland v. UK</i>	245
<i>Tyrer v. UK</i>	245

Human Rights Committee

<i>Bahamonde v. Equatorial Guinea Case</i>	249
<i>Lovelace Case</i>	46

Iran

<i>Ali-Reza v. Parvin Case, SCC Tehran</i>	183
<i>Bahram v. Mahin and Javad Case, SCC Tehran</i>	196
<i>Compensation for Physical and Moral Damages Case, SCC Tehran</i>	286
<i>Fariba v. Vahid Case, SCC Shiraz</i>	218
<i>Hanif v. Javad Case, FCCC Tehran</i>	268
<i>Homa v. Majid Case SCC Tehran</i>	136
<i>Laleh v. Hamed Case, SCC Isfahan</i>	215
<i>Mina v. Amir Case, SCC Tehran</i>	217
<i>Narges v. Parham Case, SCC Tehran</i>	130
<i>Nazi v. Hamid Case, SCC Tehran</i>	218
<i>Samira v Koorosh Case, SCC Tabriz</i>	215
<i>Shadi v Mehran Case, SCC Tehran</i>	218
<i>Shima v. Davood Case, SCC Tehran</i>	222
<i>Shirin v Mahmoud Case, SCC Tehran</i>	214, 215
<i>Shirin v. Davood Case, SCC Tehran</i>	222
<i>Vida v Ali Case, SCC Tehran</i>	215
<i>Yasaman v. Babak Case, SCC Mashad</i>	218
<i>Zahra v. Kaveh Case, SCC Tehran</i>	218
<i>Zeinab v Farhad Case, SCC Tabriz</i>	215

Pakistan

<i>Abul Waheed v. Asma Jahangir Case, PLD</i>	196, 197
<i>Ahma Ali v. Sabha Khantun Bibi, PLD</i>	183
<i>Ansar Burney v. Federation of Pakistan, PLD</i>	153, 286
<i>Atia Waris v. Sultan Ahamad Khan Case, PLD</i>	130
<i>Khurshi Bibi v. Muhammad Amir Case, PLD</i>	175, 219
<i>Moselle Gubbay v. Kwaja Ahmad Said</i>	130
<i>Muhama Bashir v. Ghulam Fatima Case, PLD</i>	130
<i>Rashid Ahmad Khan v. NasimAra Case, PLD</i>	212, 213
<i>Zefran Bibi Case, Feeral Sharia Court,</i>	243
<i>Zohra Begum v. Latif Ahmad Manawwar Case, PLD</i>	138

Morocco

<i>Huria Case,</i>	216
--------------------------	-----

Table of Treaties and International Agreements

1648	Treaty of Westphalia
1657	Treaty of Velau between Poland and Brandenburg
1660	Treaty of Peace among Poland and Brandenburg Austria and Sweden
1679	Treaty of Nijmegen between the Holy Roman Empire and France.
1689	Bill of Rights
1827	Treaty of Kutchuk Kainardgi between Turkey and Russia
1919	Covenant of the League of Nations
1930	Hague Conference on Codification of International Law
1942	Declaration of the United Nations
1945	United Nations Charter
1946	Economic and Social Council
1948	Universal Declaration on Human Rights
1949	Convention on the Prevention and Punishment of Genocide
1950	Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others
1951	ILO Convention
1952	Convention on the Political Rights of Women
1957	Convention on the Nationality of Married Women
1959	Convention on Certain Questions Relating to the Conflict of Nationality Laws
1960	Convention Against Discrimination in Education
1962	Convention on the Consent to Marriage, Minimum Age for Marriage and Registration of Marriages
1966	The International Covenant on Civil and Political Rights
1966	The International Covenant on Economic, Social and Cultural Rights
1967	Declaration on the Elimination of All Forms of Discrimination Against Women
1969	American Convention on Human Rights

- 1969 Vienna Convention on the Law of Treaties
- 1979 Convention on the Elimination of All Forms of Discrimination Against Women
- 1980 World Plan of Action and Programme for the United Nations Decade for Women
- 1980 Universal Islamic Declaration of Human Rights
- 1989 Cairo Declaration on Human Rights in Islam
- 1989 Optional Protocol 2 to the International Covenant on Civil and Political Rights
- 2000 Optional Protocol to the Convention on the Elimination Of All Forms of Discrimination Against Women
- 2001 Rome Declaration on Human Rights in Islam

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Introduction

Rights, powers, and privileges traditionally were exclusively enjoyed by men and women's condition was similar in almost all traditional societies. They were entirely under the power of men and lived in continual uncertainty as to what their destiny might be, and in some respects were analogous to slaves.¹ For example, under Roman law, the husband possessed his wife and a woman, like a slave, had no legal control over her person, money, land or children.² The only difference between the subjection of women and the subjection of slaves seems to stem from men's motive behind each type of subjugation. Women's subjugation is said to have its roots in men's chivalry, love, and a desire to protect, while slaves' subjugation was rooted in lust, war, and a desire to dominate.³ In early societies, women's main role was to bear and raise children, and look after the family, particularly the husband. In such societies, men's activities such as hunting and warfare gained prestige, and physical strength made all the difference. The assumption that women were naturally weaker and inferior to men was found in the teaching of many scholars including Plato, Aristotle, St Augustine and St Aquinas.⁴ Moreover, it continued until modern time, in the writings of Grotius, Locke, Rousseau, and Wollstonecraft.⁵ Later, in the light of

¹ See J. Donaldson, *Woman: Her Influence in Ancient Greece, Rome, and Among The Early Christians*, Garden Press, New York, 1973, p. 11. Amaum de Riencourt, *Sex and Power in History*, David Mckay Company, New York, 1974.

² See E.C. Stanton *et al*, *Women's Suffrage*, Fowler & Wells, New York, 1881, p. 13. See also R.A. Bauman, *Women and Politics in Ancient Rome*, T.J. Press, London, 1992; M.G. Fawsett, *Women's Suffrage: A Short History of a Great Movement*, Portrayer Publishers, 2002.

³ *Ibid.*, See also V. Zinserling, *Women in Greece and Rome*, Universe Books, New York, 1973, p. 22.

⁴ See Plato, *The Laws*, trans by T.J. Saunders, Penguin Books, Harmondsworth, 1970, 6-781; Aristotle, *The Politics*, trans by R. Robinson, Clarendon Press, Oxford, 1962, p. 1259b- 1260b; Aristotle, *Nichomachean Ethics* (1177b) trans by J.A.K. Thomson, rev by H. Tredennick, Penguin, 1976; W.D. Ross, *Aristotle: A Complete Exposition of this Works and Thought*, Meridian Books, New York, 1959; C. Thomasset, "The Nature of Women", in *A History of Women*, ed., by Klapisch-Zuber, trans by A. Goldshammer, The Pelknap Press of Harvard, London, 1992, p. 782.

⁵ See H. Grotios, *De Juri Belli ac Pacis Libri Tres*, or *On the Law of War and Peace*, trans by Francis W. Kelsey, Clarendon Press, Oxford, 1965; J. Lock, *Two Treaties of Government*, Guernsey Press, London, 1986; J.J. Rousseau, *The Social Contract and Discourse*, trans by G.D.H. Cole, Everyman's

the teaching of religions such as Judaism, Christianity, and Islam, the assumption was transformed into a religious belief in the light of various interpretations of the principles of those religions.⁶

By the end of the nineteenth century, women's movements had appeared and prospered in several countries. Admittedly, they were national movements, but they interacted and to some extent became internationalized.⁷ In this period, however, the principle of respect for human rights, including women's rights, was not recognised as a matter of international concern, nor did it become a generally recognised subject of international law until the end of the First World War. By the adoption of the Covenant of the League of Nations in 1919, limited principles on human rights were set out which represented an important development in the history of the international recognition of women's rights,⁸ even though the Covenant contained no comprehensive provision on human rights in general and women's rights in particular.⁹

The Second World War ushered in a new era in the history of international development of human rights, including women's rights. Through the scourge of war, people had come to realise more fully that human rights and fundamental freedoms in the national sphere were definitely linked to the attainment and maintenance of peace and security in the world. Therefore, protection of human rights, including women's

Library, London, 1073; M. Wollstonecraft, *A Vindication of the Right of Woman With Structures on Political and Moral Subjects*, London, 1792.

⁶ See J. La Porte, "The Role of Women in Early Christianity," in *Studies in Women and Religion*, Vol. 7, The Edwin Mellen Press, New York, 1982. See also J. Donaldson, *Op. cit.*: A.F. Scott and A.M Scott, *One Half of the People, The Fight for Women's Suffrage*, University of Illinois Press, London, 1975.

⁷ *The United Nations and the Status of Women*, 3(1964), p. 3.

⁸ For more details on the League of Nations see D.P. Myers, *Handbook of the League of Nations*, World Peace Foundation, Boston & New York, 1935, pp. 367-380. See also F. Northedge, *The League of Nations: Its Life and Times 1920-46*, Leicester University Press, Leicester, 1986; A.E. Hindmarsh, *Force in Peace, Force Short of War in International Relations*, Harvard University Press, Cambridge & Mass, 1933; G. Scott, *The Rise and Fall of the League of Nations*, Hutchinson, London, 1973.

⁹ *Ibid.*

rights, became a subject of prominence which attracted world attention when the plan for establishing a world organization, the United Nations (UN), was completed. The UN Charter, the keystone international legal document, makes clear the international community's basic commitment to equality.¹⁰ It furnishes a broad basis for elimination of sex-based discrimination and provides important general prohibitions of discrimination, which explicitly specify sex as among the impermissible grounds of differentiation.¹¹ The Charter also contains positive statements about the position of women and it was the first international treaty to spell out the principle of equality in specific terms.

The concept of non-discrimination on the basis of sex found further elaboration in the Universal Declaration of Human Rights (UDHR) by the United Nations General Assembly (UNGA). The Declaration found legal force through two Covenants, which are the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant of Economic, Social and Cultural Rights (ICESCR). It is widely treated as the "international Community's authoritative guide to the meaning of human rights",¹² although it is not legally binding in itself. The elaboration of the general norms contained in the UDHR in the two Covenants gave the UDHR a more concrete legal form.

¹⁰ See M.K. Ganji, *International Protection of Human Rights*, Minard Press, Paris, 1962. See also H. Kelsen, *Principles of International Law*, New York, 1996. H. Kelsen, *The Law of the United Nations*, Stevens & Sons, London, 1955.

¹¹ See S.S. Ali, *Gender and Human Rights in Islam and International Law: Equal Before Allah Unequal Before Men?* Kluwer Law International, The Hague, 2000, p. 199. See also J. Rehman, *International Human Rights Law: A Practical Approach*, Longman Publishers, London, 2003; S. Davidson, *Human Rights*, Open University Press, Buckingham, 1993.

¹² The UDHR found legal force through the both Covenants, ICCPR and ICESCR which emphatically forbid discrimination based on sex. They contain provisions against discrimination on grounds, among others of sex, race, colour, language, religion and other factors. Non-discrimination on grounds, among others of sex in general appears at several points in each of the two Covenants. See GA Res. 2200 (XXI), UN GOAR, 21st Sess., Supp. No. 16, at 52, UN Doc. A/6316 (1966), reprinted in 999 UNTS 171 and 6 ILM 368 (1967). GA Res. 2200 (XXI), UN GOAR, 21st Sess., Supp. No. 16, at 52, UN Doc. A/6316 (1966) reprinted in 993 UNTS 3 and 6 ILM 360 (1967). ICCPR in Article 2(1); ICESCR, in Article 2(2).

The Commission on the Status of Women (CSW) also was established by the (ECOSOC) in accordance with Article 68 of the UN Charter.¹³ The development of the international human rights law in the post-UN era has finally led to an acceptance by sovereign states of certain universal minimum standards of human rights, including women's rights. The international norm of non-discrimination on the basis of sex as reflected in the UN human rights instruments culminated in 1979 in the adoption of the UN Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW).¹⁴ With the adoption of the Convention, the separate concepts of women's rights were recast in a global perspective, and supervisory machinery with terms of reference similar to those of existing human rights organs was provided for.¹⁵

The ideal of the Women's Convention is to achieve a society throughout the world in which men and women have equal rights, a society in which traditions, habits, beliefs and value systems of the past and the present are questioned and new forms of egalitarianism are established based on the new thought. The exercise of its principles requires the following of the policies, programmes and legislation at national level. To what degree this idea is *per se* practical deserves due contemplation. Although the Convention is considered as the most important binding document for elimination of discrimination against women, it met with a large number of reservations by member

¹³ The CSW has two functions: firstly, to prepare recommendations and reports to ECOSOC on promoting women's rights in the political, economic, civil, social and educational fields. Secondly, to make recommendations to ECOSOC on urgent problems requiring immediate attention in the field of women's rights with the object of implementing the principle that men and women shall have equal rights and develop proposals to give effect to such recommendations. The CSW has enjoyed most success in the area of setting international standards of women's human rights. Also under CSW's sponsorship a number of international conventions have been formulated. These include the Convention for the Suppression of the Traffic in Persons of Exploitation of the Prostitution of Others in 1949 and the Convention on the Political Rights of Women in 1952. The preamble of the Convention proclaims that states parties desire "to implement the principle of equality of rights for men and women contained in the Charter of the United Nations" and "to equalize the status of women in the enjoyment and exercise of political rights." Indeed, the Convention is a major instrument in the campaign for the political rights of women.

¹⁴ GA Res. 34/180, 1249 UNTS 13. For more discussion of the process leading to the adoption of the Convention and provisions of the Convention in the light of states' reservations see part I, chapter II.

¹⁵ See R Cook, "The International Rights to Non-discrimination on the Basis of sex" 14 *YJIL*, 1989.

states. The number of far reaching reservations entered to the Women's Convention has been the subject of a global debate and the Convention is seen as the most 'political' of all the human rights instruments.¹⁶

Muslim states that became parties to the Women's Convention have entered reservations to its substantive provisions,¹⁷ based on Islamic Law¹⁸ or national law. This group of states, as well as a few Islamic states such as Iran which refused to sign the Convention, emphasise that the concept of human rights and dignity has a special place in *Sharia* and Islam affords many rights to women, but the formulation and interpretation of these rights is very different from the concept of human rights in international human rights instruments.¹⁹ To them, international human rights treaties are subordinate to the overriding supremacy of Islamic law, which is why they entered reservations declaring that position or refused to sign the Convention.²⁰

Reservations of Muslim state parties to the substantive provisions of the Women's Convention as well as discriminatory laws of Islamic states in many cases based on interpretation of a few verses in *Qur'an* and the existence of a few *ahadith*, include

¹⁶ See L.A. Rehof, *Guide to the Travaux Preparatoires of the United Nations Convention on the Elimination All Forms of Discrimination Against Women*, Kluwer Academic Publishers, Dordrecht, 1993, p. vii. See also C. Chinkin, "Reservations and Objections to the Convention on the Elimination of All Forms of Discrimination against Women" in *Human Rights as General Norms and a State's Rights to Opt Out. Reservations and Objections to Human Rights Conventions*, edited by J.P. Gardner, The British Institute of International and Comparative Law, London, 1997.

¹⁷ See Muslim reservation to Women's Convention at R.J. Cook, "Reservations to the Convention on the Elimination of All Forms of Discrimination Against Women", 30 *VJIL*, 1990, pp. 643-716. See also M. Coccia "Reservations to Multilateral Treaties on Human Rights" 15 *CWILJ*, 1985; M.A. Baderin, "A Macroscopic Analysis of the Practice of Muslim State Parties to International Human Rights Treaties: Conflict or Congruence?" 1 *HRLR*, 2001.

¹⁸ The Islamic law influences, one way or another, the way of life of more than one billion Muslim globally. More than 50 member states of the UN are Muslim states which apply *Sharia* either fully or partly as domestic law.

¹⁹ See J. Connors, "The Women's Convention in the Muslim World" in *Feminism in Islam. Legal and Literary Perspectives*, edited by M. Yemani, Ithaca Press, Reading, pp. 351-366; See also J.L. Esposito, *Women's in Muslim Family Law*, Syracuse University Press, Syracuse, 1982; C. Chinkin, *Op. cit.*

²⁰ See N. Mosafa, "International Rules for Women's Rights: A Challenge", in *Islamic Views on Human Rights*, edited by H. Salimi, Al-Hoda Publishers, London, 2001, pp. 193-194.

qawwāmun (the superiority of male over female in marriage), divorce, guardianship and custody,²¹ women's testimony which is worth half that of a man in financial transactions;²² inheritance rights of women where women are entitled to half the share of a man in a comparable situation;²³ polygamy²⁴ and some issues in Islamic penal law including *shahadat* (testimony) where women's evidence is rejected or worth half that of a man, *qeousas* (retaliation), *diyya* (compensation), and the age of criminal responsibility, which are undesirable not only according to the women's human rights in international law but also according to the conventions of the Islamic society today. All these have led to the belief that Islamic principles are an obstacle to eliminating discrimination against women. Therefore, terms such as "Islamic restrictions" are brought up without offering a clear definition or a proper understanding of them.²⁵ Such laws and practices also reinforce the view in the West that the concept of women's human rights in Islam is entirely irreconcilable with international human rights norms on the subject, such as those expressed in the Women's Convention.²⁶

By studying the origin of the religion, Islamic sources and the teachings of the Prophet Mohammad (peace be upon him)²⁷, the present author, however, seriously doubts the validity of the Western view and Muslim parties' reservations to substantive provisions of the Convention, based solely on their interpretation of the

²¹ *Qur'an*: 4:34. See also *Qur'an*: 4:129 & 130.

²² *Qur'an*: 2:282.

²³ *Qur'an*: 2:180 & 181; 4:7; 4:11 & 12.

²⁴ *Qur'an*: 4:3.

²⁵ See N. Musaffa, *Op. cit.*, p. 200.

²⁶ See V.P. Nanda, "Islam and International Human Rights Law: Selected Aspects", *ASILP*, 1993; E. Mayer, "Current Muslim Thinking on Human Rights", in *Human Rights in Africa, Cultural Perspective*, edited by An-Naimi and F. Deng, University of Pennsylvania Press, Philadelphia, 1990; F. Sabbah, *Women in the Muslim Unconscious*, Pergamon, New York, 1984; E. Mayer, "Universal Versus Islamic Human Rights: A Clash of Cultures or a Clash with a Construct?", 15 *MJIL*, 1994; L. Lijnzaad, *Reservations to UN-Human Rights Treaties: Ratify and Ruin?* Martinus Nijhoff, Dordrecht, 1995.

²⁷ Although the expression "peace be upon him" in this work should be understood as repeated after every occurrence of the Prophet's name, it will not be repeated after the first occurrence.

Sharia. This is because, contrary to the common perception, the principles of Islamic law do not consist of an immutable, unchanging set of norms, but have an in-built dynamism that is sensitive and flexible so that Islamic law can remain up-to-date and respond to the questions and demands of people at different times and places. Nonetheless, it is true to say that Muslim jurists ignore this advantage of Islamic law in the case of women's rights, which has resulted in denial or limitation of women's fundamental rights on various aspects of their lives, such as the familial, social and political rights in laws of different Muslim states.

This project in the light of Islamic sources and interpretations of Islamic jurisprudence from both schools of thought, Sunni²⁸ and Shi'a,²⁹ is designed to discuss and explore the place of women's rights in Islam and current discourse of women's human rights in modern international law in order to determine whether Islamic law is reconcilable with international women's human rights such as those expressed in the Women's Convention. In doing so, I will try to explore some discriminatory laws which affect various aspects of women's life, such as the familial, social and political rights, and their reflection in the laws and regulations of some Muslim states. It is essential to provide some concrete examples from various Islamic states adhering to both schools of thought regarding the factual position of Muslim women in order to demonstrate

²⁸ The Sunni school is divided into different sects; the main ones are Hanafi, Maliki, Shafi'i and Hanbali. The Hanafi school was founded by Abu Hanafiah ibn Thabit, who was Persian (80- 150 AH). He based his jurisprudence on *istihsan*. The Hanafi is particularly applied in the *Sharia* Law of Egypt. The Maliki school was found by Malik ibn Anas (95-179 AH) in Medina. Its jurisprudence is based on preservation of the *hadith* and it spread in the Hejaz, North Africa and some parts of Egypt. The Shafi'i school was found by Mohammad Idris al-Shafi'i who was born in Gaza (150-204 AH). He has two sets of opinions, the first originating during his earlier period in Iraq and the second developed later when he became established in Egypt and often amended his earlier views. The Hanbali school was founded by Abu Absullah Ahmad ibn Hanbal (164-241) who was one of Al Shafi'i students and followers in Baghdad. This school is applied in Saudi Arabia, Iraq , Jordan and Egypt. It is the most conservative of the sects in application of the primary sources, allows little *ijtihad* and does not use *qias*.

²⁹ The Shi'a school, also known as *ithna ashari* or "twelvers", take as the basis of their rulings the *Qur'an* and *Sunna*, *Ijam* and *Aql* Logical deduction. The school is applied in Iran, Iraq, Azerbaijan, Lebanon, Bahrain, and some parts of Pakistan, Yemen, Kuwait, Oman, Saudi Arabia and Afghanistan.

the divergence between theory and practice of Islamic law in these jurisdictions and determine how it is possible, in practice, to achieve equal human rights for women in Islamic societies.

The following part of this work is divided into two chapters and will contain an evaluation of women's human rights in international law, from a historical perspective. The first chapter is intended to elaborate on the development of women's rights in western civilization and its development in the modern time with the establishment of international instruments in the 20th century. In this regard, the position of women in ancient Greece and Rome, early Christianity, the Medieval period, the era of enlightenment, and modern times, and the role of the Covenant of the League of Nations, the UN Charter, and the UDHR and the Women's Convention and its provisions in the light of other international instruments will be examined. Major provisions of the Women's Convention, its implementation, the reservations of states parties, Optional Protocol to the Convention, and other development in women's human rights in last three decades are examined in the second chapter of this part.

The second part of this study, also divided into two chapters, provides a deep discussion on the theoretical framework of women's human rights in Islam, by studying Islamic sources from both schools of thought, then enters into the merits of human dignity in order to explore the place of gender in *Sharia* and the law of some Muslim states. In this regard, Chapter three examines the sources of human rights in Islam, namely, the *Qur'an*, *Sunna*, *Ijma*, *Qiyas*, and *Aql* and the Islamic perspective on international human rights. Chapter four discusses the superiority of right of the male over the female as one of the most important verses in *Qur'an* which is

interpreted in different ways to justify different kinds of gender discrimination in the law of Muslim states, including family, social and political rights. An in-depth discussion on the issue from the viewpoints of various Islamic jurists reveals the weakness of a broad interpretation of the verse which denies women fundamental rights.

Part three of this work is devoted to marriage and divorce in Islamic law and the law of some Muslim states, to explore how Islamic Law treats women during marriage and on its dissolution. By studying its origins and roots, my main intention here is to explore the reasoning behind the present discrimination in the current personal law of Muslim states, in the light of the arguments of Islamic jurists from both schools of thought, which reflect historical Islam and traditional jurisprudence. This part, therefore, consists of two chapters providing analysis and critique of different aspects of family law. Chapter five of this project discusses the law of marriage in Islam and its application to women. Chapter six examines the question of dissolution of marriage in Islamic law in the light of the present laws and regulations of some Muslim states.

The final part of this study, in chapters seven and eight, tries to explore and critically examine the present discrimination against women in Islamic Penal Law, as well as the current law of a few Muslim states, with reference to *shahadat*, *qeousas*, *diyya* and the age of criminal responsibility. The concept of “justice of Islam”, as it has re-emerged in the Islamic countries applying Islamic law in their criminal justice systems, notably Iran, where the revolution of 1979 brought with the idea of Islamization of laws and regulations and the judicial system, is also highlighted in this part.

Part I

The Development of Women's Human Rights through International Law

Nowadays, the concept of human rights influences every aspect of international relations and cuts across every aspect of contemporary international law. It is an important international objective that permeates all the other purposes of the UN. The protection of human rights has thus become a powerful tool of internationalism that pierces the 'sacred' veil of state sovereignty for the sake of human dignity. In this regard, some elements of international human rights law such as the prohibition of genocide, torture and the right to be free from slavery contained in the many Declarations, Covenants and Conventions have acquired a *jus cogens* character, yet it would not be valid to extend this principle to all areas of human rights such as women's human rights, and the international norm of non-discrimination on the basis of sex. This contention draws support from the vast number of reservations entered by state parties to the Women's Convention, the multi-lateral treaty encapsulating the international norm of non-discrimination on the basis of sex.

This part, in two chapters, contains an evaluation of women's human rights in international law, from a historical perspective to its development in the modern time with the establishment of international instruments in the 20th century. The first chapter is intended to elaborate aspects of the development of women's rights in western civilization and its development in modern times with the establishment of international instruments in the 20th century. In this regard, the position of women in ancient Greece and Rome, early Christianity, the Medieval period, the era of enlightenment, and modern times, and the role of the Covenant of the League, the UN

Charter, and the UDHR and two Covenants, ICESCR and ICCPR, CSW and the adoption of CEDAW will be examined. In the second chapter of this part, the major provisions of the Women's Convention and reservations of states parties to the Convention in general and Islamic parties to the Convention in particular will be examined.

Chapter I

Woman's Rights in Traditional and Modern Times

The chapter will elaborate different aspects of the development of women's rights in western civilization and its development in the modern time with the establishment of international instruments in the 20th century.

1. Women's position in ancient Greece and Rome

Ancient Greece was hostile to women, and deprived them of any political and public participation. They had no political rights and were excluded from participation in public life. Women's position was like that of slaves and children, and it was dominated by men.¹ The great Greek philosopher, Plato², in his work *The Laws* described women as secretive, crafty, and weak in body and soul and concluded that women's natural potential for virtue is inferior to that of men.³ He also said:

... women have got used to a life of obscurity and retirement, and any attempt to force them into the open will provoke tremendous resistance from them.⁴

It is pertinent to mention that Plato in his work *Republic* had assigned equality to women in his utopia, but, he pointed out that the difference between males and

¹ See J. Donaldson, *Woman: Her Influence in Ancient Greece, Rome, and Among the Early Christians*, Adamant Media Cooperation, London, 2004, p. 11. See also M. Kinnear, *Daughters of Time: Women in Western Tradition*, The University of Michigan, Michigan, 1982.

² Plato (427-347 B.C.) was a follower of Socrates who built a systematic view of nature, God, and man which led him to the formation of the metaphysical theory of Forms. To him, an unchangeable element of things is Form; the pattern or idea that gives everywhere its particular characteristics which are universal, eternal and perfect, and because they are fundamentally metaphysical only the mind can grasp them. Plato in his famous work *Laws* referred to natural law as natural justice which he held to be the foundation of legal and political justice. While natural justice is eternal and universal, legal justice is temporal and particular. Plato also stated that prior to the conventional laws, there lies the law of nature.

³ See Plato, *The Laws*, trans by T.J. Saunders, Penguin Books, Harmondsworth, 1970, 6-781.

⁴ *Ibid.*

females is that males are stronger and females weaker.⁵ He argued that both sexes could be divided by nature and abilities, but in each class, men would still be superior to women.⁶

Another famous Greek philosopher who paid attention to women was Plato's student, Aristotle, who held a similar opinion and in his work *The Politics* claimed that a natural political hierarchy existed, based on men's superiority over lower animals and women.⁷ He also argued that men are naturally superior to women in both body and mind and women should be submissive to men.⁸ Aristotle also argued that the union between male and female for the continuance of the species is similar to the union of natural ruler and natural subject for the sake of security.⁹ According to him, nature has various classes of rulers and ruled: "for the free rules the slave, the male the female, and the man the child in a different way."¹⁰ The husband's rule over the wife is part of household science.¹¹ In his view, women are subordinate, while men have the courage of command.¹² A quick look at his work has shown that women occupy an intermediate place between men and slaves in Aristotle's hierarchy, because men are considered to have the deliberative or intellectual virtue in full measure, while women have it but have no authority to use it, while a slave has not got the deliberative or

⁵ See Plato, *Republic*, trans by G.M.A. Grube, Hackett Publishing Company, Indianapolis, 1973.

⁶ *Ibid.*,

⁷ Aristotle (384-320 B.C.) who was Plato's student and considered the father of naturalistic philosophers argued on standards of value within the human nature. See Aristotle, *The Politics*, trans., by Richard Robinson, Clarendon Press, Oxford, 1962, p. 1259b-1260b. See also Aristotle, *Nicomachean Ethics* (1177b) trans by J. A. K. Thomson, rev by H. Tredennick, Penguin, 1976. See also Aristotle, *Nicomachean Ethics*, (1177b6), in *The Complete Works of Aristotle*, Vol. II. Princeton University Press, Princeton, p. 1861; W.D. Ross, *Aristotle: A Complete Exposition of His Works and Thought*, Meridian Books, New York, 1959.

⁸ *Ibid*

⁹ *Ibid.*, i, i, 2-5.

¹⁰ *Ibid.*, i, v, 5-8.

¹¹ *Ibid.*

¹² *Ibid.*

intellectual virtue in completeness at all.¹³ Therefore, while men attain their virtue through exercising power efficiently, women must attain theirs through executing orders correctly.¹⁴ Then Aristotle defines marriage as a relationship between unequal partners.¹⁵

In ancient Rome, similar to ancient Greece, women were totally excluded from public affairs and discriminated against in the private law called *patriapotestas*, or right of the father.¹⁶ The public life of women in ancient Roman was completely ignored and, indeed, Roman law did not recognise any rights for women, such as the right to vote or hold office, even though they were considered as citizens in Roman law.¹⁷ The position of women in political affairs in ancient Rome was well described by Ulpian as follows:

... women are barred from all civil and public functions. They may not be judges or jurors, or hold magistracies, or appear in court or intercede for others, or be agents.¹⁸

Total exclusion from public affairs and complete subjection to men in private law was the general norm that governed women's role in ancient Roman.¹⁹ In the family, the man had authority over his wife, called *manus*, granted at marriage.²⁰ This meant that a woman passed out of the control of her father to her husband. Marriage was arranged between the fathers of the parties and women's consent to marriage was not

¹³ *Ibid.*, i, v, 1-3.

¹⁴ *Ibid.*

¹⁵ *Ibid.*

¹⁶ See A. Zinserling, *Op. cit.*, pp. 20-22. See also R. Bauman, *Women and Politics in Ancient Rome*, Routledge, London, 1992.

¹⁷ See J. Donalson, *Op. cit.*

¹⁸ See Justinian, *The Digest of Justinian*, trans and edited by Alan Watson, University of Pennsylvania Press, Pennsylvania, 1985.

¹⁹ See E.A. Hecker, *A Short History of Women's Rights: From the Days of Augustus to the Present Time*, Putnam's Sons, New York, 1914, pp. 1-3.

²⁰ *Ibid.*, p. 2.

important.²¹ On marriage, a woman was subject to her husband and the husband acquired power over his wife and ownership of property in much the same way.²² He could dispose of her estate by will as he pleased. He even had power of life and death over his wife and children.²³ With the approval of the family, he had the right to inflict corporal punishment on his wife, including death.²⁴ It is recorded that a father or husband could call a family council and put his wife or daughter to death without public trial.²⁵ Women's situation, however, gradually changed in private law and in some respects women gained certain rights, such as the right of consent to marriage and the right to divorce.

2- Position of women in Christianity

The advent of Christianity did not bring with it much change to women's position. In the early Christian era, women were disqualified from any political and even religious rights. In regard to the natural submissiveness of women, St. Augustine²⁶ developed the doctrine of original sin.²⁷ According to the doctrine, since women had a natural alliance with the devil, and a general tendency towards evil, they were held

²¹ *Ibid.*

²² *Ibid.*, p.3.

²³ *Ibid.*

²⁴ *Ibid.*

²⁵ *Ibid.*

²⁶ St Augustine of Hippo (354-430) the first major Christian theologian to review Greek and Roman philosophy in regard to what was compatible with his Christian beliefs, which he endorsed, and what was at variance, which he rejected. Augustine in his famous work *The City of God* criticised philosophers because they did not throw over the worship of the heathen gods, although Plato was held in highest regard among all the philosophers because he conceived of God as not a bodily thing. He said: "Let Thales depart with his water, Anaximenes with the air, the Stoics with their fire, Epicurus with his atoms." For more information about Augustine see the biography of St. Augustine in *The Encyclopaedia of Philosophy*, Vol.1 and 2. Macmillan Publishing Co. & The Free Press, 1967, pp. 198-206. See also Augustine, *City of God*, trans by Marcus Dods, Modern Library, New York, 1950; Augustine, *City of God*. Vol.2 trans by Marcus Dods, Hafner Publishing Co., New York, 1948; Augustine, *City of God*, trans by Gerald Walsh, S. J., Demetrius Zema, S.J., Grace Monahan, O.S.U., and Daniel J. Honan edited by J. Bourke, New York. 1958.

²⁷ See E.C. Stanton, *et al*, *History of Women Suffrage*, Fowler & Wells, New York, 1881, pp. 756-758.

responsible for introducing sin into the world, and thus causing the fall of man.²⁸ As

Gage pointed out, this doctrine:

... exerted a most powerful and repressing influence upon woman, fastening upon her a bondage which the civilization of the nineteenth century has not been able to cast off.²⁹

It is submitted that there was a link between the idea of women's created inferiority and the doctrine of original sin, because the early Church believed that woman was created for man, and was not created equal with man. St. Paul's teaching confirmed this approach where he said "... the head of every man is Christ and the head of every woman is the man, and the head of Christ is God."³⁰ Women's submission to men was part of a hierarchy which governed relations between God, Christ, and people, and women's position was at the base of this hierarchy. St. Augustine described three forms of custody to which women are subject: submission to men, fear of the law, and fear of God.³¹ Under this thinking, women were deprived of the right of inheritance, and they had no right to give testimony to a court unless in issues specifically concerning themselves. In the old ecclesiastical discourse, property should go to "the worthiest of blood", which could not be a woman.³²

The Christian church had two opposing views in regard to the question of marriage.

The first view was represented by St. Chrysostom, who described women as follows:

²⁸ *Ibid.*

²⁹ *Ibid.*, p. 756.

³⁰ See Casagrande, "The Protected Women," in *A History of Women in the West, Silences of the Middle Ages*, trans by C. Botsford, edited by C.K. Zuber, Belknap Press of Harvard University Press, Massachusetts, 1992, p. 89.

³¹ Stanton, *Op. cit.*, p. 756.

³² The law that excluded women from inheritance was repealed in one of the Swiss Cantons in the late 19th century.

... a necessary evil, a natural fascination, a desirable calamity, a domestic peril, a deadly fascination, and a painted ill.³³

This view was based on the doctrine of original sin, and the idea that the Fall came through sex, so that marriage was a continuation of the evil which brought sin into the world in the first place. Chrysostom also believed that the subjection of a wife is her way to obey the Lord, and correcting one's wife, even by the stick as a last resort, is a real sign of love, which the wife should accept gracefully.³⁴ Under this concept of marriage, obedience was the wife's duty and guardianship was the husband's right.³⁵

The second view, supported by Clement of Alexandria, was that marriage was approved as necessary for the preservation of the human race.³⁶ Clement defines marriage as "the first conjunction of man and woman for the procreation of children,"³⁷ According to him, it is women's destiny to bear children and keep house.³⁸ St. Jerome respected marriage as mainly valuable for giving virgins to the church.³⁹ In St. Augustine's view, although celibacy and virginity were the highest virtue, in a lawful marriage, intercourse with the intention of begetting children was not sinful and was perfect.⁴⁰ Since begetting of children was the only justification for marriage and sex, the implication was that sex could be considered sinful if it was intended otherwise.⁴¹ Marriage under this approach was defined as an institution in which the woman was completely subordinate to her husband. La Porte, in her work

³³ Cited in Stanton, *Op. cit.*, p. 757.

³⁴ *Ibid.*

³⁵ *Ibid.*

³⁶ *Ibid.*, p. 758.

³⁷ *Ibid.*

³⁸ See Jean La Porte, "The Role of Women in Early Christianity", in *Women and Religion*, Vol. 7, The Edwin Mellen Press, New York, 1982, p. 23.

³⁹ *Ibid.*

⁴⁰ Stanton, *Op. cit.*

⁴¹ *Ibid.*

Women and Religion, described that *The Pauline Corpus*, and the *Ephesians* taught in the following manner:

... wives should be submissive to their husbands as if to the Lord because the husband is head of his wife just as Christ is the head of his body the Church.⁴²

During the medieval period, the position of women stated by the early leaders of the church was consolidated. The church was the single landowner and it had a low opinion of women. According to St. Thomas Aquinas,⁴³ a woman was:

... a *mass occasionatus*, a potential male prevented from achieving full development, a defective, incomplete, mutilated creature.⁴⁴

In the light of Aristotelian thought, he described women as men with something missing and referred to them as “defective and misbegotten.”⁴⁵ In his view, women were created for men in order to help them in the work of procreation, and were made subordinate to men.⁴⁶ He argued that there were two kinds of subjection; the first was slavery, in which the ruler manages the subjects for his own advantage, and in the second one, which was domestic or civil, he managed them for their benefit.⁴⁷ The subjection of women was considered to be of the second type.⁴⁸ In this regard, he referred to:

⁴² *Ibid.*

⁴³ St. Thomas Aquinas (1225-1274) who is acknowledged as the greatest representative of medieval scholastic philosophy expressed his natural law doctrine built on the foundations laid down by the Church Fathers. However, it is worth mentioning that he was fascinated with Aristotle rather than Plato – he not only followed Aristotle and wrote commentaries on his works, but persuaded the church to favour Aristotle’s system as the basis of Christian philosophy instead of Plato’s.

⁴⁴ See T. Aquinas, *Summa Theologiae*, Vol. XIII, McGraw Hill Book Company, New York, 1a, 92, 102. See also A. K, Wong, “Women in China: Past and Present”, in *Many Sisters*, edited by C.J. Matthiasson, The Free Press, New York, 1974, pp. 231-233.

⁴⁵ *Ibid.*

⁴⁶ *Ibid.*

⁴⁷ *Ibid.*, 1a, 92, 2.

⁴⁸ *Ibid.*

... the subjection in which woman is by nature subordinate to man, because the power of rational discernment is by nature stronger in man.⁴⁹

During the medieval period, canon law gained its greatest power in the family relations, especially marriage and divorce and inheritance. Canon law regulated relations between husband and wife and provided that:

It is a natural human order that the women should serve their husbands and the children their parents, for there is no justice where the greater serves the less ... woman was not made in God's image, ... it is plain enough from this that wives should be subject to their husbands and should be almost servants.⁵⁰

Under the ecclesiastical law, after marriage, the wife was required to give up her name, her property, her person and individuality, and to promise obedience to her husband in all things, at all times.⁵¹ He had the right to chastise her, and a wife's disobedience was not justified.⁵² If a woman left her husband, she was accused of stealing herself from her husband, and was considered like a runaway slave.⁵³ She was branded as a runaway who had left her master's "bed and board" and she was in the position of an outlaw.⁵⁴ According to law, anybody who harboured her, would be under penalty of the law.⁵⁵ In this period, for committing the same crimes, women were punished more severely than men.⁵⁶ It is true to say that women for a long time were treated in law as slaves. For instance, in England, a wife who murdered her

⁴⁹ *Ibid.*,

⁵⁰ Cited in B.S. Deckard, *The Women's Movement: Political, Social-economic and Psychological Issues*, Harper and Row Publishers, New York, 1977, p. 206.

⁵¹ See Claude Thomasset, "The Nature of Women", *Op. cit.*, p. 782.

⁵² *Ibid.*, pp. 771-772.

⁵³ *Ibid.*,

⁵⁴ *Ibid.*,

⁵⁵ See B.S. Deckard, *Op. cit.*, pp. 208-209

⁵⁶ *Ibid.*

husband could be burnt alive until the end of the 18th century- exactly the punishment of a slave who murdered his master.⁵⁷

3- Woman's position in secular thought

Secular thought did not bring immediate substantial change towards women during the reformation period, even though a tendency toward recognition of woman's equality by some writers started to appear from the sixteenth century.⁵⁸ In this section, the contributions of Grotius,⁵⁹ Locke,⁶⁰ Rousseau,⁶¹ and Wollstonecraft⁶² will be assessed very briefly.

⁵⁷ See M. Joslyn Cage, *Church and State: the Original Expose of the Male Collaboration Against the Female Sex*, Persephone Press, Watertown, 1980, p. 773.

⁵⁸ In the early part of 16th century a decided tendency toward a recognition of women's equality started to appear in the works of some writers, namely, Cornelius Agrippa (1509), Rucelli (1552), Anthony Gibson (1599) and Lucrezia Marinella (1599).

⁵⁹ In the seventeenth century Dutch Protestant Hugo de Groot, who is known by his Latin name, Grotius (1583-1645) and is acknowledged as the founder of the modern theory of natural law, wrote his doctrine of natural law in his famous work *De Juri Belli ac Pacis*, (translated as *On the Rights of War and Peace*) which was published in 1625 after his escape from Holland to France. The book was dedicated to King Louis X III of France during the period of the Thirty Years War in Europe, which ended with the 1648 Peace of Westphalia. In this work he laid down his doctrine of natural law, the law of nations and positive law. The important point of Grotius's doctrine of natural law is that he tried to free the doctrine of natural law from the grip of theology. He believed that natural law would maintain its validity even if God did not exist, and perceived as the point of departure for the secular natural law school of thought. He pointed out that, "What we have been saying would have a degree of validity even if we should concede that which cannot be conceded without the utmost wickedness, that there is no God." See *De Juri*, II, V,i,231 and V, vii, 234.

⁶⁰ John Locke (1632-1704) is acknowledged as the founder of philosophical liberalism and his influence on political philosophy and practice is immense and long lasting. He enjoyed extraordinary prestige as one of the liberators of the human mind. Hume rightly said that Locke: "began to put the science of man on a new footing." Also modern commentators seem agreed on Locke centrality to the liberal tradition. In this regard Russell described him as "the founder of empiricism", and Roper called him "the greatest of liberal philosophers". It is true to say that he even inspired the American Declaration of Independence and the French constitution that was adopted in 1871 was influenced by his political doctrine. The British constitution used to be based on his theory. He presented his political philosophy in a work entitled *Two Treaties of Civil Government*, which he wrote in 1688 just after the English Revolution, which resolved the conflict between the king and the Parliament, and registered a final victory for the parliament. Locke expressed his ideas on the law of nature in his work entitled, *An Essay Concerning the True Original, Extent and End of Civil Government*. According to Arblaster "Locke was closer to being a professional political propagandist, like Milton, than a scholarly recluse like Hobbes or Spinoza." See A. Arblaster, *The Rise and Decline of Western Liberalism*, Blackwell, Oxford, 1984. See also J. Locke, *An Essay Concerning Human Understanding*, Turner, London, 1702.

⁶¹ Jean Jacques Rousseau (1712-1778) is considered the father of the Romantic Movement which represented a revolt against the received ethical standards. Rousseau saw critical modern civilisation as

The great Dutch writer, Grotius, who is famous as the father of international law, argued that the difference in sex gives the husband superiority over the wife even in the state of nature. Grotius's position in regard to women's rights is contained in Blackstone's *Commentaries on the Laws of England*. It is observed that although in the laws of England, marriage was considered as a civil contract, which regulated the reciprocal rights and duties of husband and wife, the position of a woman in this contract was complete subservience to her husband.⁶³ The wife could not perform any action that would suppose her separate legal personality, because she had no separate existence.⁶⁴ Even if the law, for example, recognized the separate identity of woman, it considered her as inferior to man, acting by his compulsion, and therefore excused her in some crimes.⁶⁵ The law, on the other hand, gave to the husband the power to correct or chastise his wife.⁶⁶ Here the question is: What was the justification for such power? The justification was that, since the husband was the one who answered for his wife's misbehaviour, the law thought it reasonable to entrust him with the power of restraining her by domestic chastisement within reasonable bounds.

corrupting man's nature. His famous dictum 'man is naturally good, and only by institutions is he made bad' is an antithesis of the doctrine of original sin and salvation through Jesus Christ. His theory of natural law is presented in *The Discourse on Inequality* which was published in 1754, and his political theory is contained in *The Social Contract* which appeared in 1762. See J.J. Rousseau, *The Social Contract and Discourse*, trans by G.D.H. Cole, Everyman's Library, London, 1073.

⁶² See M. Wollstonecraft, *A Vindication of the Rights of Women With Strictures on Political and Moral Subjects*, London, 1972.

⁶³ Blackstone describes the legal status of the married woman as follows: "[b]y marriage, the husband and wife are one person in law: that is the very being or legal existence of woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband: under whose wing, protection and cover, she performs every thing". See S. W. Blackstone, *Commentaries on the Laws of England*, London, 1809, p. 144. See also A. Bentham, *A Comment on the Commentaries, A Criticism of W. Blackston's Commentaries on the Laws of England*, Oxford, 1928; V.C. Abbott, *The History of Women's Suffrage and the League of Women Voters in Cuyahoga County 1911-1945*, The William Feather Company, 1949.

⁶⁴ *Ibid.*

⁶⁵ *Ibid.*

⁶⁶ *Ibid.*

John Locke in his work, *Two Treatises*, attacked the political theory of patriarchy which were concerned and was built on king/subjects, master/slave, and man/woman, ruler-ruled relations by some writers such as Sir Filmer.⁶⁷ Locke's liberal theory sensed the inherent contradiction of a "liberalism," that would accord women no better position than that accorded to them by patriarchalism.⁶⁸ Locke also refuted Filmer's biblical argument that God gave Adam dominion over women, which he considered as a distortion of the truth of the scripture and argued that God gave dominion to both Adam and Eve, not to Adam over Eve.⁶⁹ In this regard he pointed out:

That this donation was not made in particular to Adam, appears evidently from the words of the text, it being made to more than one; for it was spoken in the plural number, God blessed them and said unto them, Have Dominion. God says unto Adam and Eve Have Dominion.⁷⁰

...[It would] I think have been a hard matter for any body, but our author, to have found out a grant of monarchical government to Adam in these words, which were neither spoke to, nor of him: neither will any one, I suppose by these words, think the weaker sex, as by a law, so subjected to the curse contained in them, that it is their duty not to endeavour to avoid it.... God, in

⁶⁷ See J. Locke, *Two Treatises of Civil Government*, Cambridge University Press, Cambridge, 1967, p. 280.

⁶⁸ Locke's theory of natural law was based on the refutation of two propositions which were upheld by his contemporaries. The first proposition which was championed by Sir Robert Filmer is in regard to hereditary power, which advocated the natural power of kings. Locke, in response to this proposition, affirmed that political power does not, as suggested by Filmer, originate in the authority of a father over his children, but in the free will of the people. The second proposition was Hobbes's claim regarding a state of nature in which all people have an absolute right or liberty to all things, and is therefore anarchic. In response he supposed that a state of nature which was governed by the law of nature existed, before humans created government. Men lived together according to reason in the state of nature without a common superior with authority to judge between them. Locke maintained that the state of nature is a state of freedom. He pointed out that in the state of nature men enjoy: "perfect freedom to order their actions, and dispose of their possessions and persons as they think fit, within the bounds of the law of nature; without asking leave, or depending upon the will of any other man." Indeed, in the state of nature equality is self-evident and people shared all the power and jurisdiction in a reciprocal manner. Locke stated that: "[T]here being nothing more evident than that creates of the same species and rank, promiscuously born to all the same advantages of nature, and the use of the same faculties, should also be equal one amongst another without subordination or subjection."

⁶⁹ *Ibid.*

⁷⁰ *Ibid.*

this text, gives not, that I see, any authority to Adam over Eve, or to men over their wives, but only foretells what should be the woman's lot.⁷¹

In regard to marriage, Locke also repudiated the proposition that the contractual element of marriage was simply the consent of both parties to a hierarchical relationship in which the man's role was that of head and governor, and the woman's role was that of obedient follower.⁷² He maintained that conjugal society was formed by a "voluntary compact between man and woman",⁷³ and if this was so, the terms of the contract, as well as whether or not to enter into it were negotiable.⁷⁴ In his view, nothing inherent in the contracting of marriage dictated women's subjugation to man.

Women's equality with men was not supported by the philosophers of the Enlightenment. For instance, Jean Jacques Rousseau argued that woman is by nature feeble both in body and in mind, and incapable of taking her ideas to any great extent.⁷⁵ Ideas, philosophy, abstractions, and genius are the sphere of man.⁷⁶ In his view, woman's role is to study man because "she is made to please and to be in subjection" to him.⁷⁷ According to Rousseau's philosophy, the unity of the sexes is one of ruler and subject.⁷⁸ He argued that the man should be strong and active while the woman should be weak and passive.⁷⁹ He added, "the one must have both the power and the will; it is enough that the other should offer little resistance. When this

⁷¹ *Ibid.*

⁷² *Ibid.* See also R. Eisler, "Human Rights: Towards an Integrated Theory for Action" 9 *HRQ*, 1987, p. 288-289.

⁷³ *Ibid.*

⁷⁴ *Ibid.*

⁷⁵ See J.J. Rousseau, *Op. cit.*, p. 972.

⁷⁶ *Ibid.*

⁷⁷ *Ibid.* See also R. Eisler, *Op. cit.*

⁷⁸ *Ibid.*

⁸¹ See J.J. Rousseau, *Emile: Or, on Education*, trans by Barbara Foxley, London, 1957, v, p. 322.

principle is admitted, it follows that woman is specially made for man's delight."⁸⁰

Therefore, education must be geared towards these ends.⁸¹ He pointed out:

The education of women should always be relative to that of man. To please Us, to be useful to Us, ...to educate Us when young, to care of Us when grown up, to advise Us, to console Us, to render Our lives easy and agreeable; these are the duties of women at all times and what they should be taught from their infancy.⁸²

Wollstonecraft, in her famous work *A Vindication of the Rights of Women*, in 1790 repudiated the prevailing ideas on women's role in life as professed by Rousseau.⁸³ In her view, these ideas, which did not differ from, or rather were based on, the early church's teaching that God created woman for the man, had contributed to render women more artificial, weak, and useless in society.⁸⁴ In addition, these ideas tended to degrade women by rendering them pleasing at the expense of every solid virtue.⁸⁵ Wollstonecraft argued that although men are superior to women in bodily strength, they are not so in reason or soul, and that bodily strength should not be allowed to give man natural superiority over woman.⁸⁶ She accused men of intellectual cowardice, demonstrated by their tendency to apply their reason to justify their prejudices, and to deprive other men and women of their natural rights.⁸⁷

⁸⁰ *Ibid.*

⁸¹ *Ibid.*

⁸² See S.M. Wyntjes, "Women in the Reformation Era", in *Becoming Visible: Women in European History*, edited by R. Bridenthal and C. Koonz, Houghton Co., 1977, pp. 165-167. See also Catt and Shuler, *Women's Suffrage*, *Op. cit.*, p. 8.

⁸³ See M. Wollstonecraft, *Op. cit.*, pp. 2-39.

⁸⁴ *Ibid.*, p. 8.

⁸⁵ *Ibid.*

⁸⁶ *Ibid.*, p. 12.

⁸⁷ *Ibid.*

Wollstonecraft also argued that Rousseau's notion concerning women's role was subversive to morality.⁸⁸ She added that the progress of knowledge and virtue would be stopped if women were prepared by education to become, not companions of men, but their toys.⁸⁹ Then, Wollstonecraft called for wider opportunities for women and demanded equality between the two sexes in everything, and appealed for men to rise above their narrow prejudice, and to see that although women may have different duties to fulfil, they are human beings, and, thus, their duties should be discharged by the same principles that govern the duties of man.⁹⁰ The rights of humanity, which have been confined to the male line from Adam downwards, should be extended to women. Later she raised women's demands for education, industry, political knowledge, and the right of representation.⁹¹

4. Women's position in the modern time

In the modern time, demands for women education and their rights to vote and get elected continued despite hostile public opinion. More robust change was seen throughout Western Europe by liberal and democratic institutions which gradually developed. The feudal system gave way to the rising capitalism and the industrial revolution gave birth to a waged labour force in which working women participated, were discriminated against and were exploited.

Serious attempts were made by some scholars and women at the time of the American Revolution to advance women's position. The women's rights movement in America

⁸⁸ *Ibid.*

⁸⁹ *Ibid.*

⁹⁰ *Ibid.*

⁹¹ *Ibid.*, p. 195.

is primarily concerned with achieving complete equality with men in all walks of life, and with securing legislative safeguards against discrimination on the basis of sex.⁹² The movement, indeed, has relentlessly pursued these ends for about two centuries. The American Revolution, which was based on inherent rights of men, gave rise to demands that they be extended to women and slaves.⁹³ Mercy Otis Warren suggested that the struggle for independence be based on the “inherent rights”, confirming that “inherent rights belong to all mankind, and had been conferred on all by the God of nations”.⁹⁴ Later, Abigail Smith Adams demanded women’s representation in the government and threatened rebellion if women’s right were overlooked.⁹⁵ Such demands, however, were often countered by men based on women’s natural frailty, the position allotted to them by God in the scheme of things, as well as the fact that in common law, husband and wife were one and that one the husband.⁹⁶

Following the women’s movement, in 20th July 1848 the first women’s rights convention in the history of women’s struggle for equality, called the Seneca Falls Convention, adopted eleven resolutions based on the law of nature. The objective of the convention was to discuss the social, civil, and religious condition and the rights of women. These resolutions were based on the law of nature as interpreted by

⁹² See A.P. Grimes, *The Puritan Ethics and Woman Suffrage*, Oxford University Press, New York, 1967.

⁹³ *Ibid.*

⁹⁴ See E.C. Stanton *et al*, *Op. cit.*, p. 31.

⁹⁵ In this regard Abigail Smith Adams in a letter to her husband John Adams, in 1776 said that: “If particular care and attention are not paid to the ladies, we are determined to foment a rebellion, and will not hold ourselves bound to obey any laws in which we have no voice or representation.” See *Ibid.*, pp. 32-33.

⁹⁶ See Saul. K.P. (ed) *Thomas Jefferson on Democracy*, Penguin Books Inc., Baltimore, 1946, p. 6. See also P. Julian, (ed) *The Papers of Thomas Jefferson*, Princeton, 1950.

Blackstone in his “Commentaries”.⁹⁷ The law of nature, according to Blackstone, is superior in obligation to any other laws, and binding all over the globe, at all times and in all places, and no human laws are of any validity if contrary to it, because it was dictated by God himself.⁹⁸ After establishing the ideological foundation for women’s rights, the Declaration of Sentiments simply diagnosed the problem and suggested the remedy. It protested against the entire framework of legal, political, moral, social and economic disabilities in which women lived, and demanded radical change in the role accorded to women by men in society. The document described the position of women in terms of subordination and equated their condition with that of slaves. Being denied the right to own property, even her own wages, and deprived of her right to have custody of her own children in divorce cases, a married woman was legally dead. The document pointed out the discrepancy that rights enjoyed even by the most degraded man were denied to even the finest woman.⁹⁹

In the UK, Mill,¹⁰⁰ a great British philosopher, in 1866 called for universal suffrage, arguing that there ought to be no pariahs in a civilized nation.¹⁰¹ According to Mill, it was an insult and personal injustice to withhold from anyone what he called:

... the ordinary privilege of having his voice reckoned in the disposal of affairs in which he has the same interest as other people.¹⁰²

⁹⁷ See W. Blackston, *Op. cit.*

⁹⁸ *Ibid.*

⁹⁹ It should be noted that following Seneca Falls, many other conventions were held in Ohio, Massachusetts, Indiana, Pennsylvania, and New York. The movement began to gain momentum.

¹⁰⁰ For more information about John Stuart Mill see S.S. Mill, *Public and Parliamentary Speeches 1850-1868*, University of Toronto Press, Toronto & Buffalo, 1988.

¹⁰¹ *Ibid.*

¹⁰² *Ibid.*

Mill argued that this applied naturally to women, because he took no account of difference of sex, which he considered as entirely irrelevant to political rights, “as difference of height or in the colour of the hair.”¹⁰³ If there was any difference, he argued, women required enfranchisement more than men.¹⁰⁴ Mill later presented a petition in Parliament calling for inclusion of women’s suffrage in the Reform bill.¹⁰⁵

He pointed out that there was:

... no reason why women of independent means should not possess the electoral franchise, in a country where they can preside in manorial courts and fill parish offices ... and the Throne.¹⁰⁶

In both the US¹⁰⁷ and the UK¹⁰⁸ the right to vote was demanded by the women’s movement and as result of their efforts the right to vote was recognised in 1918 in the UK and 1920 in the US. Some European countries granted women the right to vote in the early 20th century¹⁰⁹ while other nations in Europe needed another World War to enfranchise women.¹¹⁰

¹⁰³ *Ibid.*

¹⁰⁴ *Ibid.*

¹⁰⁵ *Ibid.*

¹⁰⁶ *Ibid.*

¹⁰⁷ In the US, after the Civil War, indeed, agitation by women for suffrage became increasingly vociferous. Susan Anthony submitted a proposed right-to-vote amendment to the constitution of the US in 1878. The women’s campaign organised massive parades and demonstrations were organised in all the major cities, and continued to disturb the peace of the ruling class until they finally won the day. The Susan Anthony amendment was finally ratified as the 19th Amendment and became law on 26 August 1920.

¹⁰⁸ In the UK, in 1903 with the formation of the Women’s Social and Political Union (WSPU) the women’s movement started to dictate events. The WSPU demanded the right to vote and mobilised women of all ages and classes, and demonstrated on a massive scale. These demonstrations met with severe reaction from the establishment. Women were locked out of their meeting places, and thrown down the steps of Parliament. The outbreak of the First World War in 1914 played a decisive role in effecting change in favour of women because the WSPU supported the war effort, and mobilized a great number of its members to volunteer in war industry and support services. The right to vote was recognised in 1918. The right was at first confined to those over the age of thirty and in 1928 the voting age was lowered to twenty-one years.

¹⁰⁹ The earliest country in Europe was Finland in 1906, followed by Norway in 1913, Denmark and Iceland in 1915, USSR in 1917, and Spain in 1931. It is notable that the Soviet Union in particular was the first country to take radical steps not only to enfranchise women but to give them the highest

5- Women's position in the Covenant and United Nations

It is true to say that during the 18th and 19th centuries, human rights in general and women rights in particular were not seen as a subject for legitimate international concern, even though by the end of the 19th century some writers had begun to argue that they ought to be. By that time, the state was sovereign in its own territory and the issue of human rights was considered as an internal issue. Following the mass violations of human rights against innocent people in some countries, the issue of protection of minorities living in a country, from mass human rights violations by oppressive governments, was considered by states and various treaties were undertaken in order to protect them. For example, various treaties undertaken for the protection of Catholic minorities living in states with Protestant majorities¹¹¹ (Treaty of Westphalia) and of Christians living in the Ottoman Empire,¹¹² gave signatories to the respective treaties the right to intervene, in concert or individually, in the affairs of the guaranteeing power, in response to the non-observance of the undertaking.¹¹³ The protection of these rights in practice, however, remained chiefly the concern of the

proportion in representation in their supreme legislative body in the world. Inside the Commission on Human Rights, it was noted that "the Soviet Union was proud of its record in the matter of the equality of men and women and ... often attacked the western countries for their 'backwardness'.

¹¹⁰ France, the motherland of the Declaration of the Rights of Man and the Citizen, waited until 1944 to consider women as citizens who have the right to vote. Belgium, Italy and Luxembourg followed two years later in 1946. The last of all was Switzerland, where women gained their right to vote in 1971.

¹¹¹ An important landmark for the protection of a religious minority living within the territory of other States was the Treaty of Westphalia in 1648 Parties undertook to protect the rights of their respective subjects forming religious minorities on party with the majority. Following the Treaty of Westphalia for protection of the religious minorities living in States with a majority, other treaties were established, such as the Treaty of Velau between Poland and Brandenburg in 1657, Treaty of Peace among Poland, Austria, Sweden and Brandenburg in 1660, and Treaty of Nijmegen between the Holy Roman Empire and France in 1679. See F.X. De Lima, *Intervention in International Law*, Uitgeverij Pax Nederland, 1971, pp. 104-106.

¹¹² The Treaty of Kutchuk-Kainardji between Turkey and Russia. The treaty gave Russia the right to intervene in the affairs of Turkey in the case of denial of the rights of Christians. The first collective intervention to protect a treaty right took place 1827 when the Turkey failed to protect the rights of Greek Orthodox Christians. Russia started the Crimean war under the terms of the treaty of Kutchuk-Kainardji. *Ibid.*, pp. 104-106.

¹¹³ See H. Rosting, "Protection of Minorities by the League of Nations", 17 *AJIL*, 1923, p. 641.

powerful states and when these states met at the crossroads of power, the main issue was mostly allowed to go into abeyance.

5.1. The League Covenant

In the League Covenant, the protection of human rights appeared in the provision regarding the mandate territories, which was a result of pre-League experience, such as the treaty rights obtained from Turkey to protect the rights of the Christians. The League of Nations, as evidenced, became the guarantor for the application of the terms of the minority treaties. In this sense the League replaced the powers that intervened to the protect minority rights,¹¹⁴ individually or collectively, as expediency demanded.¹¹⁵ Article 23 of the Covenant which spoke of labour conditions and what was called “the traffic of women and children” also showed some concern for human rights, even though it did not pay enough attention to human rights in general and women’s rights in particular.

5.2. The United Nations

A quick look at the history of the first half of the twentieth century shows that the human race has been fraught by two world wars which brought upon mankind unspeakable sufferings, deaths, destruction, and total disregard of human rights. Emerging from the Second World War was a terrified humanity that was crying for

¹¹⁴ For more details about protection of minorities at that time see M. K. Ganji, *International Protection of Human Rights*, Minard Press, Paris, 1962; H. Kelsen, *Principles of International Law*, Holt, Rinehart and Winston, New York, 1966.

¹¹⁵ See the Polish Treaty on 28 June 1919 in 17 *AJIL*. For the protection of minority rights, Article 12 of the Treaty states: “Poland agrees that the stipulations in the foregoing Articles, so far as they affect persons belonging to racial, religious, or linguistic minorities, constitute obligations of international concern and shall be placed under the guarantee of the League of Nations. ... any member of the Council of the League of Nations shall have a right to bring to the attention of the Council any infraction, or and danger of infraction of any of these obligations, ... the Council thereupon take such action and give such direction as it may deem proper and effective in the circumstances.”

safeguards to prevent the occurrence of such atrocities in the future. The establishment of the UN, indeed, was a response to the failure of states to respect human rights. Therefore, as we have seen, the protection of human rights has been keenly debated in the United Nations. The Charter has made considerable reference to the promotion of these rights on a universal scale and they are mentioned repeatedly throughout the Charter, unlike the League Covenant, where human rights were protected in the mandated territories only. The Preamble to the Charter affirms “the equal rights of men and women” and gives priority to human rights before the rights of states. Moreover, the goal of achieving equality between the sexes is reiterated in several Charter provisions. Article 1(3) provides for the co-operation of the members States to realise certain fundamental human rights. It refers to:

... promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction...

Article 55 (c) repeats the same principle in general terms and calls for:

... universal respect for, and observance of human rights and fundamental freedom for all without distinction as to race, sex, language, or religion.

Article 76(c) also emphasises this point and asserts an aim,

...to encourage respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion, and encourage recognition of the interdependence of the people of the world.

The UN Charter in the above provisions provides a legal basis for international co-operation among its members, including the elimination of discrimination on grounds of sex.¹¹⁶ There were, however, serious impediments to establishing a regime based

¹¹⁶ See A.S. Fraser, “Becoming Human: The Origins and Development of Women’s Human Rights”, *21HRQ*, 1999, p. 886.

on equality and non-discrimination, even though promotion and protection of human rights on the grounds of non-discrimination was one of the main objectives of the UN, because at that time, colonialism had not yet breathed its last, and in varying degrees religious and sex-based discrimination prevailed. In this regard, Renteln argues that the major powers had not been very supportive of sanctifying the cause of complete equality and non-discrimination.¹¹⁷ Reanda in her work, "The Commission on the Status of Women" also says that although at San Francisco a consensus was achieved on the principle of equality between the sexes in the Charter, there was no common understanding of its meaning, nor agreement on the concrete measures to be taken.¹¹⁸ The idea was supported by some writers,¹¹⁹ but there was argument among some delegates during the discussion on the Charter, on inclusion of Article 8 of the Charter, which expresses no restriction on the eligibility of women to participate in the UN affairs in any capacity.

The legally binding character of the provisions of the Charter on human rights is a controversial question among jurists. In this regard, various opinions among authorities on international law are observed, which can be divided into two categories. The first school of thought, represented by scholars such as Lauterpacht¹²⁰ and Jessup,¹²¹ is that the UN Charter provisions on the human rights issue have

¹¹⁷ See A.D. Renteln, *International Human Rights Universalism Versus Relativism*, Sage Publications, California, 1990, p. 219.

¹¹⁸ See L. Reanda, "The Commission on the Status of Women", in *The United Nations and Human Rights: A Critical Appraisal*, edited by P. Alston, Oxford University Press, Clarendon, 1992, p. 300.

¹¹⁹ Charlesworth, Chinkin and Wright in this regard say, "While there was no overt opposition to the concept of gender equality at the 1945 San Francisco Conference, which drafted the Charter, some delegates considered the provision superfluous and said that it would be "absurd" to put anything so "self-evident" into the Charter". For more information see Charlesworth, C. Chinkin & S. Wright, "Feminist Approaches to International Law," 85 *AJIL*, 1991, pp. 613-645.

¹²⁰ See H. Lauterpacht, *International and Human Rights*, Stevens & Sons, London, 1950, p. 148.

¹²¹ See P.C. Jessup, *A Modern Law of Nations*, 3rd edn., Macmillan Press, New York, 1949, pp. 87-92.

created “mandatory obligations” of a legally binding character. Lauterpacht emphasised the “mandatory obligations” and referred to Article 13 of the UN Charter, which provides that the Assembly shall make recommendations for the purpose of assisting in the realisation of human rights and freedoms.¹²² He also cited Article 55 (c) of the UN Charter which requires “universal respect for, and observance of human rights and fundamental freedoms” and Article 56 which states that “all members pledge themselves to take joint and separate action in co-operation with the organisation for the achievement of the purposes set forth in Article 55”.¹²³ On the other hand, Kelsen in his work, *The Law of the United Nations*,¹²⁴ rejects the “mandatory obligations”¹²⁵ and argues that Charter provisions are only in the nature of declarations and goals to be realised and are, at most, “imperfect obligations” without any binding force.¹²⁶ He argues that the Charter provisions do not impose upon the Members a strict obligation to grant to their subjects the rights and freedoms mentioned in the Preamble or the text of the Charter.¹²⁷

5.3. The Universal Declaration of Human Rights

More elaboration on the concept of non-discrimination on the basis of sex was found in the UDHR.¹²⁸ The preamble of the UDHR asserts the recognition of the inherent dignity and equality of all humanity, abhors disregard of the dignity, and legitimises resort to rebellion against tyranny. Then it solemnly declares that:

¹²² See H. Lauterpacht, *Ibid.*, p. 148.

¹²³ *Ibid.*

¹²⁴ See H. Kelsen, *The Law of the United Nations*, Stevens & Sons. London, 1950. See also H. Kelsen, “Collective Security and Collective Self-defence Under the Charter of the United Nations”, 42 *AJIL*, 1948.

¹²⁵ *Ibid.*, p. 29.

¹²⁶ *Ibid.*

¹²⁷ *Ibid.*

¹²⁸ It was adopted by the UN General Assembly on 10 December, 1948, GA Res. 217A(III), UN Doc. A/810, 1948.

The General Assembly proclaims this Universal Declaration of Human Rights as a common standard of achievement for all people and all nations, to the end that every individual and every organ of society, keeping this declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international to secure their universal and effective recognition and observance, both among the people of Member States themselves and among the people of territories under their jurisdiction.

Article 2 of the UDHR gives emphasis to entitlements to all rights and freedoms and states that:

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

In regard to the legally binding character of UDHR Cook rightly argues that although the Declaration is not legally binding in itself, it is widely treated as the international community's authoritative guide to the meaning of human rights.¹²⁹ The UDHR found legal force through two covenants, namely, the International Covenant on Civil and Political Rights (ICCPR)¹³⁰ and the International Covenant of Economic, Social and Cultural Rights (ICESCR).¹³¹ Both Covenants reiterate the norm of non-discrimination by stating that a state party undertakes to respect the individual's rights recognized in each Covenant "without distinction of any kind, such as race, colour, sex... or other status."¹³² Non-discrimination on grounds, among others of sex,

¹²⁹ See R.J. Cook, "Women", in *The United Nations and International Law*, edited by C.C. Joyner, Cambridge University Press, Cambridge, 1997, p. 182. See also A. Eide, *et al*, *The Universal Declaration of Human Rights A Commentary*, Scandinavian University Press, Oslo, 1992; H. Hannum, "Human Rights" in *The United Nations and International Law*, edited by C.C. Joyner, Cambridge University Press, Cambridge, 1997; J. Morsink, "Women's Human Rights in the Universal Declaration", 13 *HRQ*, 1991, p. 229-231.

¹³⁰ GA Res. 2200 (XXI), UN GOAR, 21st Sess., Supp. No. 16, at 52, UN Doc. A/6316 (1966), reprinted in 999 UNTS 171 and 6 ILM 368 (1967).

¹³¹ GA Res. 2200 (XXI), UN GOAR, 21st Sess., Supp. No. 16, at 52, UN Doc. A/6316 (1966), reprinted in 993 UNTS 3 and 6 ILM 360 (1967).

¹³² ICCPR in Article 2(1); ICESCR, in Article 2(2).

appears at several points in each of the two Covenants, in particular in Article 26 of the ICCPR requiring equality before the law and equal protection of the law¹³³.

5.4 The Commission on the Status of Women

Following the adoption of the UN Charter, establishment of a body with a mandate to study and prepare recommendation on the issues of special concern to women was proposed. Therefore the Commission on the Status of Women (CSW) in accordance with Article 68 of the UN Charter was established by the Economic and Social Council (ECOSOC) in 1946.¹³⁴ The commission has two functions: first, to prepare recommendations and reports to ECOSOC on promoting women's rights in political, economic, civil, social and educational fields, second, to make recommendations to ECOSOC on urgent problems requiring immediate attention in the field of women's rights with the object of implementing the principle that men and women shall have equal rights and to develop proposals to give effect to such recommendations.¹³⁵ Views on the degree of success of the CSW in advancing the international norm of non-discrimination on the basis of sex by placing it on the human rights agenda, are not uniform.¹³⁶ However great efforts have been made by the CSW in the area of

¹³³ Specific prohibition of discrimination appears in the ICCPR in Article 3 in regard to equal rights of men and women with respect to the rights set forth in the Covenant; Article 4 (measures derogating from the obligations cannot involve discrimination on grounds of ...sex); Article 14 (equality before the law); Article 23 (equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution); Article 24 (equal protection of the child irrespective of ...sex) and Article 25 (equal rights of citizens without distinction on grounds of ...sex with respect to voting, public service and public representation). See also ICESCR, in Article 3 (equal rights of men and women with respect to rights set forth in the Covenant) and Article 7 (equal pay for work of equal value).

¹³⁴ Article 68 of the UN Charter states that, "The Economic And Social Council shall set up Commissions in economic and social fields and for the promotion of human rights, and such other commissions as may be required for the performance of its functions."

¹³⁵ See R.J. Cook, "Women", *Op. cit.* pp. 186-187. See also S. Davidson, *Human Rights*, Open University Press, Buckingham, 1993, p. 72.

¹³⁶ Karl argues that while the purpose of establishing the CSW was to bring women's rights concern into focus, nevertheless this strategy has in itself been counter-productive. Reanda also in her work, in regard to adoption of separate instruments and the establishment of specialized machinery says:

setting international standards of women's human rights and a number of international conventions have been formulated with CSW's sponsorship, including the Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others in 1949,¹³⁷ the Convention on the Political Rights of Women in 1952,¹³⁸ the Convention on the Nationality of Married Women in 1957,¹³⁹ which constitutes a further step to establish, in the matter of married women's nationality, the principle of full equality between the sexes, and the Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages in 1962.¹⁴⁰

Moreover, the CSW has assisted a number of specialized UN agencies, for example, the International Labour Organization (ILO) and the United Nations Educational, Social and Cultural Organization (UNESCO) in developing international instruments to improve the conditions of women in employment, education and retirement.¹⁴¹ The ILO has a history predating the UN of setting standards for the specific protection of women in the workforce. These include matters such as maternity protection (1919) night work (1919), employment in underground mines (1935), and the Convention

“Failure to deal with specific women's rights has resulted in a narrowing of the global human rights perspective, in a ‘ghettoization’ of questions relating to women and their relegation to structures endowed with less power and resources than the general human rights structures.” See M. Karl, *Women and Empowerment, Participation and Decision Making*, Zed Books, London, 1995, p. 122. See also L. Reanda, “Human Rights and Women's Rights: The United Nations Approach”, 3 *HRQ*, 1981, p. 12.

¹³⁷ See 96 UNTS 272 (1950).

¹³⁸ It should be noted that the preamble of the Convention proclaims that states parties desire “to implement the principle of equality of rights for men and women contained in the Charter of the United Nations” and “to equalize the status of women in the enjoyment and exercise of political rights.” See 193 UNTS 135 (1953).

¹³⁹ See 309 UNTS 65 (1957). The text goes beyond the provisions of the Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws. League of Nations Treaty Series, League of Nations Publication, Geneva, 1933, p. 89.

¹⁴⁰ The final Convention requires that the parties to the marriage must give their consent and also requires the states parties to legislate a minimum age for marriage and set up a programme of official registration of marriage. See 521 UNTS 231 (1962).

¹⁴¹ 429 UNTS 93 (1960).

Concerning Equal Remuneration for Men and Women Workers for Work of Equal Value.¹⁴²

In sum, since 1945, many international legal instruments have been drafted which deal specifically with women's rights and reflect an international consensus on particular problems relating to women. The instruments provide a unique insight into the state of international consensus on the role of women in society, even though these instruments had little impact on the condition of women world-wide, because of their restricted scope and lack of provisions for enforcement.¹⁴³ Neither did they succeed in integrating women's human rights into the mainstream human rights framework. From the mid-1960s, dissatisfaction with the impact of existing instruments led to increasing efforts to develop international instruments providing a global conceptualisation of the human rights of women and containing concrete measures of implementation and supervision. Thus, these efforts led to the adoption of the Declaration on the Elimination of All Forms of Discrimination Against Women, in 1967¹⁴⁴, and culminated in the Convention on the Elimination of All Forms of Discrimination Against Women in 1979. The Convention is the definitive international legal instrument requiring respect for and observance of the human rights of women; it is universal in reach, comprehensive in scope and legally binding in character. The Convention is a major breakthrough in international human rights law since it recognizes the need to go beyond legal documents to address factors

¹⁴² 165 UNTS 303 (1951). In this convention, the ILO pioneered the principle of women's entitlement to equal pay for work of equal value to that performed by men.

¹⁴³ See S.S. Ali, *Gender Human Rights in Islam and International Law Equal Before Allah Unequal Before Man*, Kluwer Law International, The Hague, 2000, p. 203. See also N. Hevener, *International Law and Status of Women*, Westview Press, Boulder, 1983.

¹⁴⁴ GA Res. 2263 (XXII), Doc. A/6717 (1967).

which will help to eradicate *de facto* inequality between men and women. It is true to say that the Women's Convention is one of a series of treaties which inspired by a vision of the importance of protection of human rights through international law.¹⁴⁵

As Cook stated:

Human rights treaties of this nature are distinguishable from historic international treaties of trade, commerce and territorial transfer, which tend to be bilateral and are contractually finite in nature. These historic treaties create mutual privileges for states parties that are concluded in principle on a basis of reciprocity, and are interpreted on conservative grounds protective of state sovereignty and limited reduction of legal autonomy. Multilateral human rights treaties have universal legislative effect in international law with obligation *erga omnes*. Human rights treaties may also be regional for purposes of agreement and enforcement, but their regionalism is not an end in itself, but simply a means to the end of universal elevation and global maintenance of individual human rights and dignity.¹⁴⁶

Since the Women's Convention has played an important role in the status of women around the world, the Convention will be examined, in the light of reservations entered to its substantive provisions, which have been the subject of a global debate, in the following chapter.

¹⁴⁵ Accordingly the Women's Convention is historically proximate to the International Convention on the Elimination of All Forms of Racial Discrimination and to the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights which give effect to the Universal Declaration of Human Rights as jurisprudential partners.

¹⁴⁶ See R.J. Cook, "Reservation to the Convention on the Elimination of All Forms of Discrimination Against Women", 30 *VJIL*, 1990, p. 645.

Chapter II

An Evaluation of the International Norm of Non-Discrimination on the Basis of Sex

The Convention on the Elimination of All Forms of Discrimination Against Women was adopted by the General Assembly of the UN on 15 December 1979, and it entered into force on 3 September 1981 after ratification by the twentieth state party.¹ As of July 2007, 185 countries - over ninety percent of the members of the United Nations - are party to the Convention.² The Convention consists of six parts, with the first four parts comprising substantive provisions, part five containing provisions relating to monitoring and implementation mechanism and the final part of the Convention consisting of some general provisions. This chapter examines provisions of the Women's Convention, reservations of states parties to the Convention, Optional Protocol to the Convention and other development in women's human rights in last three decades from International Women's Year in 1975 to Beijing. In this regard the preamble of the Women's Convention, states parties' obligations, economic social cultural and political rights, civil and family law, and the Committee will be discussed.

1. The Preamble of the Women's Convention

The Preamble of the Convention is lengthy, expressing the reasons and purposes of the Convention.³ The central theme is the elimination of discrimination against

¹ Under Article 27(1) of the Women's Convention.

² Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 UNTS. 13 For more information about States Parties to the Convention see UN website at www.un.org/womenwatch/daw/cedaw/states.htm. Available in March 2006.

³ It is notable that different views were expressed during the discussion by representatives of states on the scope and length of the Preamble. The representative of the former Soviet Union, for example, suggested that the Preamble should emphasize the fact that development in all countries required the

women and the equal rights of men and women. The Preamble contains fifteen paragraphs and their provisions indicate that women's rights are part of human rights and the former are based on the latter. The fifth preamble paragraph provides that states parties take note also of "the resolutions, declarations and recommendation adopted by the United Nations and the specialised agencies promoting equality of rights of men and women."⁴

The Preamble makes clear that, in spite of many international legal instruments, extensive discrimination against women still exists and that "in situations of poverty women have the least access to food, health, education, training and opportunities for employment and other needs."⁵ States parties express concern about the conditions to which women are subjected. Discriminations against women are "by no means relics of the past, more historical curiosities, but continue to be 'a fact of life' in various communities around the world."⁶ Though some successes have been achieved in past efforts to achieve the equality between men and women, women in different parts of the world still face serious discrimination.⁷ The preamble states that such discrimination against women violates the principles of equality of rights and

creation of conditions that would enable women to play roles in all fields of activity and that it should stress: "...the contribution made by women to the establishment of the material and spiritual values of society, the social importance of motherhood and the role of women in the family, especially in bringing up children." This view was criticised by some governments, including the UK. The representative of the UK was strongly against a long preamble with paragraphs which were politically controversial and "had little, if any, relevance to the Convention." Nevertheless, these paragraphs were added to the convention in the General Assembly, although they were considered to be political statements. See N. Burrows, "The 1979 Convention on the Elimination of All Forms of Discrimination Against Women," 32 *NILR*, 1985, pp. 422-424.

⁴ Preamble to the Women's Convention. For the text of the Convention, see UN GAOR supp. No. 21; UNTS, 660, pp. 194-231.

⁵ *Ibid.*

⁶ *Ibid.*, See also L. Kanowitz, *Women and the Law: The Unfinished Revolution*, University of New Chicago Press, Alberquer, 1969, p. 1.

⁷ *Ibid.*, See also M.S. McDougal, *et al*, *Human Rights and World Public Order*, Yale University Press, London, 1980, pp. 612-623.

protection for human dignity, is an obstacle to the participation of women, on equal terms with men in the political, social, economic, and cultural life of their countries, hampers the growth of the prosperity of society and the family, and makes more difficult the full development of the potential of women in the service of their countries and humanity. The Preamble sets out conditions which will contribute significantly to the promotion of equality between men and women. The conditions are: the establishment of a new international economic order based on equality and justice; the eradication of apartheid, of all forms of racism, racial discrimination, colonialism, neo-colonialism, aggression, foreign occupation, and domination and interference in the internal affairs of states; the strengthening of international peace and security including nuclear disarmament.⁸

2. States Parties and their obligations

Part I of the Women's Convention outlines the obligations undertaken by states parties to the Convention. Article 1 defines "discrimination against women" and should be read with Article 4 which provides for the possibility of affirmative action aimed at accelerating *de facto* equality between men and women. Article 2 describes the means by which to fight discrimination against women and Article 3 is an acknowledgment that every means should be employed to promote the advancement of the women on the basis of equality with men in all fields. One of the most ambitious provisions of the convention is contained in Article 5, which obligates

⁸ The representative of Germany suggested a provision declaring that peace, security, the elimination of colonialism and apartheid, and other developments were vital in promoting the rights of women. This suggestion was accepted by the CSW. The third Committee of the GA adopted the Preamble, which, held that, although some aspects were considered political, it also contained elements that were closely linked to the whole question of the elimination of discrimination against women. Indeed the whole question had become linked with questions of development and peace, as illustrated by the theme of the International Year for Women and Decade for Women, namely, equality, development, and peace.

states parties to do no less than to modify the behaviour patterns of its citizens. The final article of this part requires states parties to take appropriate measures to suppress all form of traffic in women and exploitation or prostitution of women.⁹

Article 1 of the Women's Convention defined discrimination against women for the purposes of the Convention. The definition is in itself very important as it expressly addresses the traditional distinction between the public and private sphere.¹⁰ The development of the Women's declaration into the Women's Convention showed an intention to define discrimination against women for purposes of legal application.¹¹ There is a difference between Article 1 of the Convention and Article 1 of the Women's Declaration 1967, which does not offer a legal definition but simply declared:

...discrimination against women, denying or limiting as it does their equality of rights with men, is fundamentally unjust and constitutes an offence against human dignity.¹²

Discrimination against women is defined in Article 1 of the Women's Convention as:

⁹ Since the problem was deemed so important, several international conventions were adopted prior to the Women's Convention, relating to the traffic in persons and the slave trade. The most significant of these was the Convention for the Suppression of the Traffic in Persons and the Exploitation of the Prostitution of Others (CSTPEP) of 1949. This Convention, in the first article, provided for punishment of any person who "procures, entices or leads away for purpose of prostitution, another person, even with consent of that person". Moreover punishment for any person who keeps or manages, or knowingly finances or takes part in the financing of a brothel and knowingly lets or rents a building or other place or any part thereof for the purpose of the prostitution of others was provided for in Article 2. These articles furnished the basis of the relevant provisions of the Declaration 1967 and the Women's Convention. For the text of the CSTPER, see UNTS, 96, pp.271-289.

¹⁰ See N.A. Shah, *Women, the Koran and International Human Rights Law: the Experience of Pakistan*, Martinus Nijhoff Publishers, Leiden, 2006, p. 174. See also T. Meron, "Enhancing the Effectiveness of the Prohibiting of Discrimination Against Women," 84 *AJIL*, 1990; L. Kanowitz, *Op. cit.*

¹¹ See R.J. Cook, "Reservations to the Convention on the Elimination of All Forms of Discrimination Against Women," 30 *VJIL*, 1990, pp. 665-667. See also N. Burrows, "International Law and Human Rights: The Case of Women's Rights" in *Human Rights: From Rhetoric to Reality*, edited by Campbell *et al*, Basil Blackwell, Oxford, 1986, pp. 80-85.

¹² Article 1 of the Women's Declaration 1967. See UNGA Res. 2263, UN Doc. A/6716 (1967).

... 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.¹³

It seems the definition of discrimination was intended to liberate women to maximize their individual and collective potentialities, and not merely to be brought to the same level of protection of rights that men enjoy. This objective is reflected in the inclusion in the definition of discrimination of the provision that offensive conduct is that which distinguishes on the basis of sex and “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 ...”.¹⁴ Achieving the same status for married and unmarried women is a goal separate from that of securing equal developmental opportunities for

¹³ Article 1 of the Women’s Convention. It is notable that the Working Group to the CSW, the Commission itself, and the Working Group of the Third Committee applied elements of Article 1 of the Race Convention, to the definition of discrimination against women. According to the Article 1 of the Race Convention “racial discrimination” is defined as: “...any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, and social, cultural or any other field of public life.” However, there are some differences between the definition of discrimination in the Women’s Convention and the definition of “racial discrimination” in the Race Convention in 1965. The first is the omission of the word “preference” after “any distinction, exclusion, restriction” in the definition of “discrimination against women.” There was a long debate on the issue. The original draft Convention was modelled directly on the Race Convention, and included “preference” in its definition of discrimination, submitted to the CSW by the Philippines. However, in the subsequent draft proposed in collaboration with the former Soviet Union “preference” was omitted from the definition. This text was proposed to CSW with an alternative text of Article 1 that included “preference” in the definition of discrimination. Opinions were divided between the proposed and the alternative text, with a slight majority in favour of the latter. Some states favoured the alternative because of its inclusion of preference of men over women as constituting discrimination against women (Denmark and Portugal). Countries including Finland specified that because of its similarity to the Race Convention they favoured the alternative text. In order to advance agreement on a text, compromise was necessary. Finally the proposed text omitting “preference” was adopted by the Commission without a vote. Secondly the Women’s Convention adds “civil” to “the political, economic, social, cultural, or any other field of public life”, as provided in the Race Convention. Indeed, the Women’s Convention is not confined to governmental obligations regarding public life, but imposes obligations in the private or “civil” field. See R. Cook, *Op. cit.* pp. 665-670. See also E. Schwelb, “The International Convention on the Elimination of All Forms of Racial Discrimination”, 15 *ICLQ*, 1996. pp. 985-996.

¹⁴ Article 1 of the Women’s Convention.

women and men. This further confirms that the definition is concerned not simply with equalizing the sexes but with affording women maximum opportunities for growth in all areas.

Article 2 of the Convention is the general undertaking article that applies with respect to rights which recognized in Article 5-16 of the Convention.¹⁵ Under the article states parties are required to eliminate all forms of discrimination against women. It defines the potential sources of discrimination broadly to include any legally sanctioned activities that may be taken by “any person, organization or enterprise”¹⁶ and “to modify or abolish existing laws, regulations, customs and practices.”¹⁷ It emphasises the duty to embody principles of equality in national constitutions and legislation, “to adopt appropriate legislative and other measures, including sanctions”¹⁸ and to repeal national penal provisions that discriminate against women.¹⁹ In fact, the obligations contained in the article are twofold. On the one hand it requires state parties to condemn discrimination, on the other hand it requires positive enforcement action by state parties.²⁰ When state parties condemn discrimination, to satisfy the other part of the obligation they must give effect to the treaty undertaken by them in their municipal laws.²¹

¹⁵ See R.J. Cook, “Women”, in *The United Nations And International Law*, edited by C.C. Joyne, Cambridge University Press, Cambridge, 1997, p.194.

¹⁶ Article 2(e) of the Women’s Convention.

¹⁷ It can be said that analogies may be drawn to Article 2 of the International Covenant on Civil and Political Rights and Article 1 (1) of the American Convention on Human Rights, both of which require that states parties shall respect and ensure the rights recognized in those respective conventions.

¹⁸ Article 2(b) of the Women’s Convention.

¹⁹ Article 2(g) of the Women’s Convention.

²⁰ See N. Burrows, *Op. cit.*, p. 453.

²¹ See R. Wallace, *International Human Rights Text & Materials*, Sweet & Maxwell, London, p. 20. See also R.J. Cook, “State Accountability Under the Convention on the Elimination of All Forms of Discrimination Against Women” in *Human Rights of Women National and International Perspective*, edited by R.J. Cook, University of Pennsylvania Press, Philadelphia, 1994, pp. 231-232.

Article 3 of the Convention reinforces Article 2 by requiring that every means should be employed to promote the advancement of women on a basis of equality with men in all fields by states parties.²² In fact the article looks beyond penal and other laws and regulations to require that action be taken in all fields “to ensure the full development and advancement of women.” As Cook stated, “as a result, practices detrimental to women (e.g., lack of obstetric services) that are not addressed by the Article 1 definition of discrimination are prohibited by Article 3.”²³ The article also requires that states parties shall take appropriate measures in all fields which not only include political, social, economic, and cultural fields, but also personal and familial fields are included.

Under Article 4, adoption by state parties of temporary special measures aimed at accelerating *de facto* equality between men and women shall not be considered discrimination as defined in the present Convention, but shall in no way entail as a consequence the maintenance of unequal or separate standards; these measures shall be discontinued when the objectives of equality of opportunity and treatment have been achieved.²⁴ Article 4 recognizes that, even if women are given *de jure* equality, this does not automatically guarantee that they will in reality be treated equally (*de facto* equality). To accelerate women’s actual equality in society and in the workplace, states are permitted to use special remedial measures for as long as inequalities continue to exist. The Convention thus reaches beyond the narrow

²² See R.J. Cook, “Women”, *Op. cit.*, p. 194. See also J. Loranger, “Convention on the Elimination of All Forms Discrimination Against Women,” 20 *CYIL*, 1982, p. 349.

²³ *Ibid.*

²⁴ See W. Mckean, *Equality and Discrimination under International Law*, Clarendon Press, Oxford, 1983, p. 191.

concept of formal equality and sets its goals as equality of opportunity and equality of outcome. Positive measures are both lawful and necessary to achieve these goals.²⁵

The obligation of state parties in Article 5 moves from negative to affirmative action. They have the obligation to modify social and cultural patterns of conduct of men and women²⁶ and to ensure the proper direction of family education. The article is indeed one of the most ambitious provisions in the Women's Convention, in that it obligates states parties to do no less than to modify the behaviour patterns of their citizens. By this article, states parties are obliged to take all appropriate measures to modify social and cultural patterns of conduct based on "the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women," and to ensure that family education will contribute to parents and children gaining proper understanding of equality of the sexes within family.²⁷ Indeed, Article 5 recognizes that, even if women's legal equality is guaranteed and special measures are taken to promote their *de facto* equality, another level of change is necessary for women's true equality. States should strive to remove the social, cultural and traditional patterns which perpetuate gender-role stereotypes and to create an overall framework in society that

²⁵ A question has been raised as to whether Article 4 requires states parties to impose "reverse discrimination", that is "discrimination in favour of women." If so, then, that will give women special privileges and represent a departure from the principle of equality between men and women. However, though these measure may seem to be apparently discriminatory in nature, they are necessary to redress past practices which are discriminatory against women. Furthermore, it is generally recognized that the physical constitution of women requires special measures of protection in certain circumstances. Though such measures seem to put women on an unequal footing, they should not be considered discriminatory, as understood by the provisions of Article 4.

²⁶ It is worth mentioning that reservations made on grounds of culture are suspect in view of the decision of the HRC in the *Lovelace Case*. The HRC found that there had been violation of Mrs. Lovelace's protected rights to cultural identity and experience, and that any restrictions on an individual's enjoyment of his or her culture "must have both a reasonable and objective justification" under the Covenant. Reservations to the Women's Convention made in order to preserve the cultural values of a nation, region or people must be shown as necessary for that purpose by objective criteria. See *Lovelace v. Canada*, Communication No. R 6/24, 36 UN, GAOR Supp. (No. 40) at 166, UN Doc. A/36/40, reprinted in 2 *HRLJ*, 158 (1981).

²⁷ Article 5(a) of the Women's Convention.

promotes the realization of women's full rights.²⁸ The prevalence of gender-role stereotypes is seen most particularly in the traditional concept of women's role in the domestic sphere. The article also calls on state parties to ensure that education includes a proper understanding of the important role of maternity as a social function.²⁹ It also requires that states recognize the raising of children as a responsibility that should be shared by women and men, and not as a task that is borne by women alone. This may well require the development of social infrastructures (e.g. paternal leave schemes) which would make possible a sharing of parental duties.

Article 6 of the Convention deals with traffic in women and prostitution. The article urges states to take all appropriate measures to combat traffic in women and exploitative prostitution. In addressing these problems, it is essential for states to consider and act upon the conditions which are at the root of female prostitution: underdevelopment, poverty, drug abuse, illiteracy, and lack of training, education and employment opportunities. States parties should also provide women with alternatives to prostitution by creating opportunities through rehabilitation, job-training and job-referral programmes. States which tolerate the existence of exploitative prostitution, girl-child prostitution and pornography (which are always exploitative), and other slave-like practices are in clear violation of their obligations under this article. It is not enough to enact laws against such injustices; in order

²⁸ It is important because it seeks to solve the basic issues of equality of women with men by regulating "social and cultural patterns of conduct." However, it has raised some doubts that "patterns of conduct", when not well defined, could include "thought patterns", and that measures, when not well defined, could include measures which states parties might take to curtail, to an undefined extent, privacy and associational interests and freedom of opinion and expression. But such is not the case: the provision is explicitly confined to "patterns of conduct" which means that the measures to be taken should have as their objects prejudices against women and practice of discrimination against women. Undoubtedly, if there are ethnic or religious practices giving inferior status to women or discriminating against women, then, these practices would be contrary to the provision of this paragraph and should be eliminated by appropriate measures. See T. Meron, *Op. cit.*, p. 66.

²⁹ Article 5(b) of the Women's Convention.

adequately to discharge their responsibilities, state parties must ensure that all measures are taken to implement penal sanctions fully and effectively.

3. Political rights of women

Part II of the Convention (Articles 7-9) deals with the participation of women in political and public life, both nationally and internationally.³⁰ The Convention also addresses the obligations of states parties to grant men and women equal rights to acquire retain or change their nationality, including the nationality of children. According to Article 7 of Women's Convention states parties are obliged to take all appropriate measures to eliminate discrimination against women in the political and public life. Women's Declaration in Article 4 also paid special attention to the political rights of women, even though it did not address the issue as comprehensively as Article 7 of the Women's Convention. It took as its basis the provisions of the Convention on the Political Rights of Women³¹, but it expands the scope of political rights of women. All three instruments grant women the right to vote, the right to be eligible for election, and the right to hold public office. There are, however, some significant differences between them. Both the Declaration of 1967 and the Convention of 1979, for example, have added to the right to vote in all elections the phrase "in all referenda", which McDougal considers to be "a novel feature" of these

³⁰ It should be noted that the World Conference of International Women's Year in 1975 discussed the problem of ensuring women's political rights and emphasised the importance of encouraging women to enter political activities and take part in public life.

³¹ It is notable that before adoption of the convention, the Convention on the Political Rights of Women in 1952 (CPRW) was considered essential to the realisation of the principle of equal rights of men and women. The 1952 convention, indeed, was one of the earliest international legal instruments concerning women's rights and provided that women should be entitled to vote in all elections and to hold public office and to exercise all public functions and that they should be eligible for election to all publicly elected bodies on equal terms with men, without any discrimination. For the text of the Convention see UNTS, Vol. 193, 1954, pp. 135-143.

two documents.³² However, the Convention of 1979 goes even further: women are granted the right “to participate in the formulation of government policy and the implementation thereof.” Women have the right not only to hold public office and to perform public functions at all levels of governments which cover all offices and functions of government, legislative, executive and judicial, but also to participate in the formulation of governmental policy, which means women would share power with men by being included in the decision-making process.³³

The article grants women the right “to participate in non-governmental organisation and associations concerned with the public and political life of the country”.³⁴ Indeed, the provision extends the scope of women’s rights to participate in political and public life and also the right so provided may have some effect on the right of association in general. The right is further expanded by Article 7 which provides that: “states parties shall take 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 participate in the work of international organisation.”

Article 9 of the Convention deals with the thorny problem of nationality of women, which has long attracted international attention. Indeed women’s capacity to possess citizenship and nationality separate from their husbands’ affects both their capacity to be represented by state subjects of international law and their ability legally to

³² See McDougal, *et al*, *Op. cit.*, p. 638.

³³ See N. Burrows, *Op. cit.*, p. 432. See also A. Byrnes, “The Convention on the Elimination of All Forms of Discrimination Against Women”, in *Human Rights of Women International and African Perspectives*, edited by W. Renteln, *et al*, Zed Books, London, 1998.

³⁴ Article 7(c) of the Women’s Convention.

transmit such capacity to their children.³⁵ This matter was discussed at the Hague Conference on Codification of International Law in 1930 (HCCIL), resulting in the Convention on Certain Questions Relating to the Conflict of Nationality Laws (CCQRCNL).³⁶ UDHR also paid attention to this issue when it proclaimed that everyone has the right of the nationality and that no one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality.³⁷ The CSW discussed the question of the nationality of married women at an early stage of its work and prepared the draft Convention on the Nationality of Married Women in 1955, which was adopted two years later by the GA.³⁸ The independence of the nationality of the wife was emphasised by the document and states parties were asked to accept that celebration or dissolution of a marriage or a change of nationality by the husband would not automatically affect the nationality of the wife. In this regard, they undertake to establish special naturalisation procedures to allow a wife to acquire the nationality of her husband if she so desires. Therefore, the article requires state parties to grant equal rights to women with men to acquire, change, or retain their nationality and also “ensure in particular that neither marriage to an alien nor change of nationality by the husband during marriage shall automatically change the nationality of the wife” The second paragraph of Article 9 also provides that “state parties shall grant women equal rights with men with respect to nationality of their children”.

³⁵ See *Liechtenstein v. Guatemala in Nottebohm Case* in 1955. ICJ 4, 22.

³⁶ *League of Nations Treaty Series*, League of Nations Publication, Geneva, 1933, p. 89.

³⁷ Article 15 of UDHR. For more details see also N. K. Henever, *International Law and the Status of Women*, Westview Press, Colorado, 1983, p. 215.

³⁸ See UNTS. 65, (1957).

Article 9 of the Women's Convention figures among its most reserved provisions. In regard to justification of reservation to the article it has been argued that children are assumed to acquire their father's nationality, and married women that of their husband. Traditionally, family solidarity is served by the family having the same nationality, which should be that of the father of the family. Since residency frequently depends upon nationality, or on immigration laws, the wife is presumed to follow her husband and live in his place of nationality.³⁹ This is for the prevention of statelessness, which would arise when a woman's original national law attributes to her on marriage her husband's nationality, and does not extend its nationality to her.⁴⁰

4. Women and economic, social and cultural rights

Part III of the Women's Convention (Articles 10-14), covers the rights of women in the economic, social and cultural spheres. The articles deal with equality in the field of education, equality in the field of employment, equality in the field of health care, other aspects of economic and social life, and special problems of rural women - the first time that an international legal instrument had dealt with the problems facing such women.⁴¹

Education is the basis for improving the status of women in all societies. The importance of education of women is well expressed by Burrows in the following manner:

... the right to equality of treatment in the educational sphere is perhaps the most important of all the cultural rights afforded to women because without it

³⁹ See R.J. Cook, "Reservations to the Convention ...", *Op. cit.*, p. 694.

⁴⁰ See C. Chinkin, *Op. cit.*, p. 72.

⁴¹ See N. Burrows, "The 1979 ...", *Op. cit.*, p. 434.

women are unable to make use of their rights in work, in public life, or in the home.⁴²

Prior to the 1979 Convention, the importance of education for women was emphasised by some international instruments, namely UDHR, the Convention Against Discrimination in Education (CADE) in 1960,⁴³ the ICESCR,⁴⁴ and the Women's Declaration.⁴⁵ In addition, there were more elaborate provisions in the World Plan of Action and Programme for the United Nations Decade for Women.⁴⁶ All these provisions furnish the background to the provisions of the Convention of 1979 relating to women's rights in education. Article 10 of the Convention adopts in part Article 9 of the Declaration of 1967. However it uses the word "same" instead of "equivalent", as used in the CADE in order to emphasise the same standards for men and women in all aspects of educational facilities. Moreover, the Women's Convention contains provisions that were not included in the Declaration of 1967 which are: the elimination of 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; the reduction of female student drop-out rates and the organization of programmes for girls and women who have left school prematurely; and the same

⁴² *Ibid.*

⁴³ See 429 UNTS. 93, (1960). The CADE prohibits discrimination in education on a number of bases, including sex, and calls on states parties to eliminate discrimination in various phases of education.

⁴⁴ The ICESCR demands "the equal right of men and women to the enjoyment of all economic, social, cultural rights set forth in the present Covenant", and it then recognizes the right of everyone to education.

⁴⁵ See UNGA Res. 2263 (XXII), UN Doc. A/6716 (1967). The DEDAW states as a general principle that "girls and women, married or unmarried", have "equal rights with men in education at all levels"; it then sets forth particular rights relating to equal conditions of access to all educational institutions of all types; the same choice of curricula, the same examinations, teaching staff with the same qualifications, premises and equipment of the same standard; equal opportunity for scholarships and grants; equal opportunities for access to programmes of continuing education; and access to education and information to help in ensuring the health and well being of families. In this regard the UDHR made clear that "everyone has the right to education".

⁴⁶ See *Declaration of Mexico: Plans of Action*, United Nations, New York, 1975. See also A. Fraser, *The UN Decade for Women*, Westview Press, London, 1987, pp. 33-54.

opportunities for girls and boys to participate in sports and physical education. These provisions indicate that state parties are obliged not only to ensure women and men equal rights to the same type of education but also to establish a system of education that would eliminate sex-discrimination.⁴⁷ They emphasise the need to change attitudes about women's rights and roles in society in order to change socio-cultural patterns.⁴⁸

Article 11 of the Convention concerning state responsibilities towards women in employment, addresses rights to equal remuneration as well as rights to the promotion opportunities and job security that men enjoy.⁴⁹ The article consists of three paragraphs including the rights of women in employment, measures to be taken in order to prevent discrimination on grounds on marriage or maternity⁵⁰ and to ensure the effective right to work and related to protective legislation.⁵¹

⁴⁷ Stumpt, *Op. cit.*, p. 394.

⁴⁸ Another important issue is that paragraph (c) of the article does not require the introduction of coeducation, but encourages it, and thus, states parties are not obliged to make co-education an obligatory system of education. And in paragraph h "including information and advice on family planning", which were absent in the Declaration of 1967. Indeed, at the time of the adoption of the Declaration, family planning was not considered a proper subject to be included in the document. Family planning's appearance in the Women's Convention is said to be "the first ... even though very indirect... reference to certain aspects of family planning in an international instrument." See United Nations, *Equal Rights for Women: A Call for Action*, United Nations Publications, New York, 1973, p. 16. See also McDougal, *et al*, *Op. cit.*, p. 640.

⁴⁹ This provision echoes that of the UDHR and ICESCR. According to the provisions of the latter two instruments, the right to work includes the right to free choice of employment, the right to just and favourable conditions of work, and the right to protection against unemployment. In the words of the ICESCR, "it includes the right of everyone to the opportunity to gain his living by work which he freely chooses and accepts." The Convention Concerning Discrimination in Respect of Employment and Occupation of 1960 also make it clear that the right to work includes the right to freely choose and gain jobs. In view of the influence of these international legal instruments, it is natural that Paragraph 1 (a) of Article 11, which declares the right to work to be an inalienable right of all human beings, should be followed by "the right to free choice of profession and employment", which is specially provided for in Paragraph 1 (c).

⁵⁰ The object of para 2 (d) is the protection of pregnant woman. It cannot be interpreted, as some have suggested, to mean that the interest of women in job assignment may be subordinate "to the asserted interest in safeguarding the reproductive and child bearing capacity of women."

⁵¹ The article concerns the impact of technical changes on protective legislation. This is a new provision which did not appear in the DEDAW. Technologies are changing constantly. It is, therefore,

Article 12 of the Convention comprises two paragraphs. The first paragraph of the article deals with the obligation of states and requires states parties to take all appropriate measures “to eliminate discrimination against women in the field of health care.”⁵² Health care services, indeed, are guaranteed to women, and family planning, which is related to the provision of Article 16 (e), is specifically mentioned. Paragraph 2 requires that state 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.”⁵³

Elimination of discrimination against women in other areas of economic and social life is the aim of Article 13, in order to ensure that women enjoy the same rights as men on the basis of equality. The article provides rights such as: the right to family benefits, the right to bank loans, mortgages and other forms of financial credit, and the right to participate in recreational activities, sports, and all aspects of cultural life.⁵⁴

Women in rural areas may face particular problems, which are considered in Article 14 of the Convention. The article was a proper response of the international

necessary that measures for the protection of woman be reviewed periodically and revised, repealed or extended to meet the changes.

⁵² It is notable that the World Conference of the International Women’s Year in 1975, for the first time, discussed discrimination against women in access to health facilities. The World Plan passed by the Conference dealt with “Health and Nutrition” in section II and three resolutions including Resolution 5 on Women and Health; Resolution 9 on the Protection of Maternal and Child Health; and Resolution 15 on Family Planning. The basis of the Article 12 of the Women’s Convention came from those provisions. See UN Doc. E/Conf. 66/34 (1976). See also N. Burrows, *Op. cit.*, p. 445.

⁵³ Article 12 para 2.

⁵⁴ See T. Meron, *Op. cit.*, p. 71. See also A. Byrnes and J. Connors, “Enforcing the Human Rights of women: A Complaints Process for the Women’s Convention? 21 *BJIL*, 1996.

community to the suffering of women in rural areas.⁵⁵ The article indicates that there are particular problems faced by women in rural areas and that women play significant roles in the economic survival of their families, including their work in the non-monetized sectors of the economy.⁵⁶ It also obliges state parties to take appropriate measures to ensure the application of the provisions of the Convention to women in rural areas. Rights provided for in the Convention attach to both rural and urban women, but as rural women have particular problems, which should be treated specially, specific provisions should be made for them. The article requires state parties to take appropriate measures to eliminate discrimination against women in this area and ensure specific rights for women. It is submitted that the article is important because it focuses the attention of state parties on rural women, especially rural women in developing countries, where a significant percentage of the population is engaged in agricultural work, work that is largely performed by women. There is no doubt that the recognition of legal rights for rural women is a milestone in the

⁵⁵ It is submitted that the problem of rural women has been recognized as urgent and it has been linked with the problem of development. In 1975, the GA passed a resolution on women in rural areas. See UNGA Res. 3523(XXX) 1975. However, most significant is Article 14 of the Women's Convention which was the first time that the problem of rural women had been dealt with by an international convention. See also resolution adopted by UNGA on Improvement of the Situation of Women in Rural Areas in 1999. See UN Doc. A/54/598.

⁵⁶ Most provisions in Article 14 are already covered by other provisions of Part II, which apply to both rural and urban women, especially Article 13, which deals with the rights of women "in other areas of economic and social life". However, the article contains specific provisions on the particular problems of rural women. The right to participate in the elaboration and implementation of development planning at all levels is a right complementary to political rights, the right to participate in policy-making and the process of implementing policy. This right is important to women in rural areas. The right to organise self-help groups and cooperatives and the right "to have access to agricultural credit and loans, marketing facilities, appropriate technology" is special to rural women, who need these specific provisions to guarantee their economic independence, especially in developing countries. Lastly, the right "to enjoy adequate living conditions, particularly in relation to housing, sanitation, electricity and water supply, transport and communication" gives "adequate" treatment to women in rural areas. The right does not mean privileged treatment, but it does mean that women in rural areas are assured the same treatment as men. See N. Burrows, *Op. cit.*, p. 447.

development of legal provisions which aim at improving the situation of the bulk of the world's female population.

5. Civil and family law

Part III of the Convention consists of Articles 15 and 16. Article 15 relates to civil rights of women and Article 16 discusses marriage and family relations. Article 15 of the Convention⁵⁷ aims to create legal equality of men and women when it states, "... shall accord to women equality with men before the law"⁵⁸, and "states parties shall accord to women in civil matters, a legal capacity identical to that of men and the opportunities to exercise that capacity."⁵⁹ It is also provided that women still have "equal rights to conclude contracts and to administer property" and that they are to be "treated equally in all stages of procedure on courts" in order to make the legal capacity of women more precise. It is worth mentioning that, here, the right to administer property is cited, though this provision does not include the right to own property. The right to own property, however, is clearly implied, because Article 16 (1) (h) assures the same rights for both spouses in respect of the ownership of property. The right of women to conclude contracts is emphasised in paragraph 3 of the article which provides: "all contracts and other private instruments of any kind with a legal effect which is directed at restricting the legal capacity of women shall be deemed null and void". It is submitted that this is a negative provision, to reinforce the provision in paragraph 2 relating to equal rights to conclude contracts. It is a

⁵⁷ Article 15 of the Convention is similar to one in the Declaration of 1967, except that the Declaration refers to civil law, while there is no such reference in Article 15 of the Women's Convention. It is clear that the Convention would not include such a provision because the term "civil law" or "civil rights" is a broad one, which is difficult to define. This can be illustrated by the provisions of the ICCPR where civil rights are closely connected with political rights. As a consequence, the provisions in Article 15 represent a general statement to be followed by national legislation.

⁵⁸ Article 15(1) of the Women's Convention.

⁵⁹ Article 15(2) of the Women's Convention.

significant obligation of state parties, by which women, especially those in rural areas, will be benefited. Contracts entered into by a woman surrendering her legal capacity would be null and under this provision. Paragraph 4 of the article provides for freedom of movement of persons and freedom to choose residence and domicile.⁶⁰

Article 16 of the Convention is the principal provision of the Women's Convention requiring state parties to eliminate discrimination against women in matters affecting marriage and family relations. It concerns issues of family law in general, and the right to choose a spouse and enter into marriage, and equal rights and responsibilities for the parenting of their children, in particular.⁶¹ The inclusion of provisions on family law, even in the most general terms, represents a step forward, transcending the traditional public and private dichotomies of international human rights law. Paragraph 1 of the article provides that state parties shall take measures to eliminate discrimination in all matters relating to marriage and family relations. It also obliges state parties to ensure, on the basis of equality of men and women, the same rights: to

⁶⁰ In the Declaration of 1967, where equal right of men and women in the field of civil law are provided, a stipulation appears to the effect that this would be "without prejudice to the safeguard of the unity and harmony of the family", a stipulation that weakens the force of the provisions granting the same rights to women. Article 15(4) of the Convention has no such stipulation.

⁶¹ It is worth discussing two conventions relating to marriage and family relations, and the Declaration 1967 very briefly. The Supplementary Convention on the Abolition of Slavery, was adopted in 1956. It abolished debt bondage and serfdom, and prohibited: "... any institution or practices whereby (i) a woman, without the right to refuse, is promised or given in marriage on payment of a consideration in money or in kind ... or (ii) the husband of a woman, his family, or his clan, has the right to transfer her to another person for value received or otherwise, or (iii) a woman on the death of her husband is liable to be inherited by another person." According to other provisions of the Convention, States Parties are obliged to prescribe a suitable minimum age of marriage, "encourage the use of facilities whereby the consent of both parties to a marriage may be freely expressed", and encourage the registration of marriage. The second convention was the Convention on Consent to Marriage, Minimum Age for Marriage, and Registration, of 1962. It paid more attention to marriage and family relations and confirmed the principle of free consent of both parties in marriage and registration of marriage, but did not specify a minimum age for marriage. See UNGA Res. 17635 (XVII) 1962. Five years later, the Declaration also paid attention to these rights. It reiterated the principle of free consent and further provided that women shall have equal rights with men during marriage and on its dissolution, that parents shall have equal rights and duties in matters relating to their children, and that child marriage and the betrothal of young girls before puberty should be prohibited.

enter into marriage; to freely choose a spouse and to enter into marriage with their full and free consent; during marriage and at its dissolution; as parents, irrespective of their marital status, in matters in relation to their children; to decide on the number and spacing of their children and to have access to information, education, and the means to enable them to exercise these rights, with regard to guardianship, wardship, trusteeship and adoption of children, of a personal nature, as husband and wife, including the right to choose a family name, a profession, and an occupation; and for both spouses in respect of property. Paragraph 2 of Article 16 refers to current problems in many countries, which cause untold damage to children, and requires state parties to take measures, including national legislation, in the matter of marriage and family relations. The paragraph emphasises that all necessary action, including legislation, shall be taken in order to specify a minimum age for marriage and “to make the registration of marriage in an official registry compulsory.” According to this paragraph “the betrothal and the marriage of a child shall have no legal effect”.

In fact, Article 16 addresses the problem of discrimination against women in the private sphere, including discrimination in the area of family law.⁶² This area of discrimination is usually based on long-standing cultural or religious practices; it is thus one of the most difficult areas to penetrate and one of the most resistant to change. Yet the drafters of the Convention realized that change in this area is essential in order for women to attain full equality. To bring about this change, states

⁶² Much discrimination against women takes place in their own homes by their husbands, their families and their communities. In some societies, young women or girls are forced into arranged marriages. In many areas of the world, married women are not permitted to participate equally in deciding how many children they will bear, how these children will be brought up, and when and whether or not they themselves should work. Even in countries where women enjoy a greater say in their family life, deeply ingrained stereotypes regarding the “proper” role of women as being that of housewife and homemaker may prevent them from pursuing outside careers or taking part in important decision-making with their husbands.

parties must first take all appropriate measures to eliminate or amend existing laws or instruments relating to marriage and the family which discriminate against women. Such laws would include, for example, those which do not give women the same legal rights to divorce and remarriage as men; laws which do not allow women full property-ownership rights; and laws which do not grant them equal rights regarding the care and custody of children, whether in marriage or following divorce. Secondly, state parties must take steps actively to ensure that women are able to exercise the same rights as men, including the right freely to enter into marriage and to choose a spouse. In keeping with the freedom of a woman to choose when and whom she should marry, a minimum age for marriage should be guaranteed by law.

6. The Committee and its functions

Implementation is always a difficult problem in the international law of human rights, and it is apparent that the lack of enforcement of international human rights standards has been a major obstacle to a wider enjoyment of human rights. The effort to eliminate discrimination against women has forced the same problem. Several devices have been attempted to resolve this problem, but they are not adequate. This can be seen from the different provisions in various international legal instruments concerning the rights of women. It has been suggested that, in international legal instruments concerning human rights, there are, in the main, four different mechanisms used to ensure that states parties comply with the obligations provided in the instruments concerned. They are: interstate complaints; individual complaints;

public criticism by state parties; and a reporting system.⁶³ The Women's Convention has adopted two of the four mechanisms, that is, interstate complaints and a reporting system.⁶⁴ The Committee on the Elimination of Discrimination Against Women (CEDAW) was established in accordance with Article 17-22 of the Convention.⁶⁵

Article 17 called for the establishment of a committee of eighteen experts to be elected at the time of entry into force of the Convention and of twenty-three experts after the thirty-fifth ratification or accession.⁶⁶ Since thirty-eight state parties had ratified the Convention within six months of its entry into force, the election of the

⁶³ See P. Alston, "Out of the Abyss: The Challenges Confronting the New United Nations Committee on the Economic, Social and Cultural Rights", 9 *HRQ*, 1987, p. 332.

⁶⁴ See T. Meron, *Op. cit.*, pp. 80-82.

⁶⁵ The original draft which was prepared by the working Group and submitted to the Commission on the Status of Women did not envisage the establishment of the kind of Committee that was ultimately provided for by the Convention. The original idea was that reports on the implementation of the Convention would be discussed by the Commission itself, which in turn would report to the ECOSOC. But different proposals were submitted in this regard. One proposal suggested that a committee of experts be established, consisting of persons of high moral standing and impartiality, preferably members of the Commission on the Status of Women, elected by secret ballot on the nomination of states parties. Another proposal, made by Belgium, suggested the establishment of a committee of experts, also to be elected from among the members of the Commission on the Status of Women (CSW). Also during the debates in regard to the nature of the committee, different opinions were expressed on whether an independent committee of experts should be established or the Committee should be put on ad hoc basis under the commission on the Status of Women. The idea of establishment of a committee of independent experts was supported by several delegations. They argued that such a committee would be independent in nature, in contrast to the Commission on the Status of Women, which was composed of government representatives and so could not adopt an impartial stand. Also, the Commission, already burdened with work, was unable to give sufficient attention to the reports. When the Third Committee of the GA appointed a working group to consider the proposals submitted by the CSW, the working group could not agree on which proposal to recommend to the Third Committee. It presented the Third Committee with three proposals regarding the establishment of a Committee: first an ad hoc committee of the CSW; second an independent committee of experts; third an ad hoc Committee of the ESC. The Third Committee rejected the proposal to establish an ad hoc committee to report to the Commission on the Status of Women or to the ECOSOC; it also rejected the idea of choosing the members of the Committee from among the members of the Commission on the Status of Women. See UN Doc. E/CN. 6/519; UN Doc. E/CN. 6/591; UN Doc. E/CN. 6/608 (1975); Report of the Third Committee, Draft Resolution and Annex, UN Doc. A/34/830 (1979).

⁶⁶ Article 17 of the Convention stated that: For the purpose of considering the progress made in the implementation of the present Convention, there shall be established a Committee on the Elimination of Discrimination Against Women...consisting...of twenty-three experts of high moral standing and competence in the field covered by the Convention. The experts shall be elected by States Parties from among their nationals and shall serve in their personal capacity..." See M.E. Galey, "International Enforcement of Women's Rights", 6 *HRQ*, 1984, pp. 477-478.

full membership of the committee, which is twenty-three experts, took place at the first meeting of state parties on 16 April 1982.⁶⁷

The functions of the committee are set out in Articles 17, 18 and 21. Article 17 provides that the committee is established “for the purpose of considering the progress made in the implementation of the present Convention.” More explicitly, it is provided in Article 18 that state parties undertake to submit reports to the UN Secretary-General for consideration by the Committee.⁶⁸ A state party must submit its first report within one year after it has ratified or acceded to the Convention; subsequent reports must be submitted at least every four years or whenever the Committee so requests.⁶⁹ Under Article 21 the Committee shall, through the

⁶⁷ Article 17(2) provides that state parties shall elect the members of the Committee by secret ballot from a list of persons nominated by state parties. Each state party may nominate one person from among its own nationals. This procedure has been followed from the outset. In accordance with Article 17(3) the first election was held six months after the entry into force of the Convention. At least three months before the date of each election, the UN Secretary-General must address a letter to the state parties inviting them to submit their nominations; he must also prepare a list of persons thus nominated and submit that list to state parties. Article 17 (4) provides that elections of the members of the Committee shall be held at a meeting convened by Secretary-General at UN Headquarters. Two thirds of the state parties constitute a quorum. Those obtaining the highest number of votes and an absolute majority of the votes of the representatives of state parties present and voting are elected. Article 17(5) provides that “the members of the Committee shall be elected for a term of four years”. Article 17(8) provides that the members of the Committee “shall, with the approval of the GA, receive emoluments from UN resources on such terms and conditions as the Assembly may decide, having regard to the importance of the Committee’s responsibilities”, and that Article 17(9) further provides that “the Secretary-General of the United Nations shall provide the necessary staff and facilities for the effective performance of the functions of the Committee under the present Convention.”

⁶⁸ Under Article 18 the report to be submitted by state parties shall be “on the legislative, judicial, administrative or other measures which they have adopted to give effect to the provisions of the present Convention and on the progress made in this respect.” However, there is no explicit reference to the content of the report; it is only provided that “reports may indicate factors and difficulties affecting the degree of fulfilment of obligations under the present Convention.”

⁶⁹ The Secretary-General must notify the Committee of the non-receipt of any report required from a state party and in turn the Committee may send reminders through the Secretary-General. Many states, however, have failed to discharge this obligation. Whatever the reason for this failure, the end result is a large number of overdue reports and a significant proportion of incomplete or inadequate ones. It is true to say that the Committee cannot effectively address all difficulties which may arise in the reporting process. However, it has adopted guidelines to help state parties to prepare these reports. According to these guidelines, the initial report is intended to be a detailed and comprehensive description of the position of women in that country at the time of submission and it should be no more than 100 pages long. It must deal specifically with every article of the Convention. Periodic reports

ECOSOC report annually to the UNGA⁷⁰. Indeed, the Committee acts as a monitoring system to oversee the implementation of the Convention by those states, which have ratified or acceded to it by examining reports which submitted by them. The Committee considers these reports and makes suggestions and recommendations based on their consideration.⁷¹ It may also invite UN specialized agencies to submit reports⁷² for consideration and may receive information from non-governmental organizations.⁷³ In regard to non-governmental organizations, the Committee also

should be no more than 70 pages long and generally should focus on the period between the consideration of the previous report and the current report, using the concluding comments on the previous report as their starting point and highlighting developments. In other words, second and subsequent national reports are intended to update the previous report, detailing significant developments that have occurred over the last four years and identifying obstacles to the full achievement of the Convention. Initial reports are considered by the Committee in the presence of a representative of the reporting country, who may make a supplementary presentation. In this regard individual members are free to ask for clarification or elaboration of any issue related to the report, the presentation, or to CEDAW's goals. The country representative usually returns a day or so later to respond to those questions. Answers or supporting material are often presented in writing. Since 1990, second and subsequent reports have been reviewed by a pre-session working group of five Committee members. The working group draws up questions to guide the full Committee's examination of the report. These questions are submitted to the country's representative in advance. The representative then meets with the Committee to respond to these questions and any others that members may wish to ask.

⁷⁰ The reports of the Committee submitted to the GA generally have the following content: Introduction, including sessions of the Committee, Organization of Work, including working groups and their recommendations; Action taken by the GA; Consideration of Reports submitted by State Parties; Ways and Means of Implementing Article 21 of the Convention, Decisions adopted by the Committee; and, Adoption of the Reports. In the Annexes, there are lists of State Parties; submission of reports by State parties, membership of the Committee. Significantly, a list of the number of reminders sent to each State Party that has failed to submit its reports is not included.

⁷¹ It is notable that suggestions are usually directed at the UN system, and general recommendations to state parties. See M.R. Bustelo, "The Committee on The Elimination of Discrimination Against Women at The Crossroads" in *The Future of UN Human Rights Treaty Monitoring*, edited by P. Alston and J. Crawford, Cambridge University Press, Cambridge, 2000, p. 80.

⁷² Article 22 of the Convention provides that the Committee may invite specialized agencies of the United Nations to submit reports for consideration by the Committee on the implementation of the Convention in areas falling within the scope of their activities. This is a useful opportunity for the Committee to receive detailed information on the implementation of the Convention in specific areas. A number of specialized agencies and other United Nations bodies, including the Food and Agriculture Organization of the United Nations (FAO), the United Nations Development Programme (UNDP), the Office of the United Nations High Commissioner for Refugees (UNHCR) and the United Nations Children's Fund (UNICEF), are directly involved in issues which affect the human rights of women. To date, only the International Labour Organization (ILO), the World Health Organization (WHO) and the United Nations Educational, Scientific and Cultural Organization (UNESCO) have submitted reports to the Committee.

⁷³ It is notable that the Committee reports annually on its activities to the GA through the ECOSOC, and the Council transmits these reports to the CSW for information. The Committee meets for two

recommends that the state parties consult national non-governmental organizations in the preparation of their reports. It also requests that reports of state parties describe the situation of non-governmental organizations and women's associations and their participation in the implementation of the convention and the preparation of the report.

Under Article 20, in order to consider the reports submitted by state parties, the Committee shall normally meet for a period of not more than two weeks annually⁷⁴ and it is serviced by the United Nations Division for the Advancement of Women which moved from Vienna to New York in 1993. According to Article 19 of the Convention, the Committee has adopted its own rules of procedure.⁷⁵ These rules have established that the meetings of the Committee are generally held in public.

Unlike the Race Convention, no provision is made for one state to complain of a violation of the Convention carried out by another state. There is also no provision for an individual who claims to have suffered a violation of the Convention to submit a complaint against a state party.⁷⁶ The approach taken to enforcement of the Convention is one of progressive implementation rather than a requirement of immediate action on part of state parties. As a result, countries remain party to the

weeks each year. This is the shortest meeting time of any Committee established under a human rights treaty.

⁷⁴ It should be noted that the rapid rate of ratification proved that expansion of the meeting time was necessary. So, a pre-sessional working group of the Committee from 1990 started meeting to review periodic reports and shortly afterwards the GA started to allow the Committee to meet on an exceptional basis for an extra week per annum. In May 1995 the states parties adopted an amendment to Article 20 in order to eliminate the need for such continuous exceptions. According to the amendment the CEDAW Committee shall normally meet annually but subject to the approval of the GA the duration of its meeting would be determined by a meeting of state parties. Its entry into force is subject to its acceptance by a two-thirds majority of State parties. See M.R. Bustelo, *Op. cit.*, pp. 70-74.

⁷⁵ The Committee elects a chairperson, three vice-chairpersons and a rapporteur from among its members. These persons hold office for a period of two years.

⁷⁶ See A. Byrnes and J. Connors, *Op. cit.*, pp. 682-797.

Convention, and are not alienated within that system, neither do they feel under any immediate pressure to implement and conform to the requirements of the Convention.

Various types of mechanism exist for protecting human rights at the international level including periodical reports, individual complaints, inter-state complaints, and inquiry procedures. However, the protection mechanisms for women's rights established by CEDAW are much weaker than those included in other international human rights treaties such as Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. As we discussed earlier, CEDAW only provides for the periodical reports mechanism, which provides all responsibility falls primarily on the state to submit information.⁷⁷ Meron in this regard argues that the CEDAW has become a second-class instrument within the family of United Nations human rights treaties.⁷⁸

As a result of weak mechanism the power of the Committee are quite limited and the Committee never formally pronounces a state to be in violation of the Convention, but instead points out the state's shortcomings through a series of questions and comments. However, this approach also means that the Committee does not put itself in a position to exert strong pressure on states who are in outright violation of the Convention to change their policies and legislation. Since the beginning of the 1990s, the significant weakness in the protection mechanisms for women's rights established by the CEDAW has motivated an increasingly insistent demand for the expansion of these mechanisms. The CSW created a Working Group for the purpose of finding solutions to strengthen these mechanisms. As a result, the Optional Protocol to the

⁷⁷ See Article 21 of Women's Convention.

⁷⁸ See T. Meron, *Op. cit.*, p. 213.

Convention on the Elimination Of All Forms of Discrimination Against Women was developed and opened for ratification in October 1999.⁷⁹

7. The Optional Protocol to the Women's Convention

Following three years of negotiations, the Optional Protocol to the Women's Convention was adopted by the UN General Assembly through Resolution 54/4 on October 6, 1999 and came into force on 22 December 2000, after the ratification of the 10th state party to the Women's Convention.⁸⁰ The protocol to the Convention has significantly enriched the mechanisms for protection of women's rights at international level.⁸¹

The Optional Protocol was created to strengthen the Convention by providing a means for individuals and groups of people to bring complaints of violations of the Convention to the Committee on the Elimination of Discrimination Against Women. In other words, the competence of the Committee on the Elimination of Discrimination against Women – the body that monitors states parties' compliance with the Convention – to receive and consider complaints from individuals or groups within its jurisdiction is recognised by states.⁸²

⁷⁹ See A. Byrnes, "Slow and Steady Wins the Race? The Development of an Optional Protocol to Women's Convention", *Proceeding of the 1st Annual Meeting of the American Society of International Law*, 1997, pp. 383-389. See also F. Gomez Isa, "The Optional Protocol for the Convention on the Elimination of All Forms of Discrimination Against Women: Strengthening the Protection Mechanisms of Women's Human Rights", 20 *AJICL*, 2003, pp. 291-321.

⁸⁰ See *Optional Protocol to the Convention on the Elimination of all Forms of Discrimination Against Women*, GA Res. 4, UN GAOR, 54th Sess., Supp. No 49, UN Doc. A/RES/54/4 (1999). The text also available at <http://www.un.org/womenwatch/daw/cedaw/protocol/op.pdf>.

⁸¹ See F. Gomez Isa, *Op. cit.* p. 310.

⁸² See M. Roche "The Proposed Optional Protocol to the Convention on the Elimination of all Forms of Discrimination Against Women," 3 *HRLP*, 1993, pp. 268-270. See also A. Worgetter, "The Draft Optional Protocol to the Law on the Elimination of all Forms of Discrimination against Women", 2 *ARIEL*, 1997, pp. 261-266.

Here the most important issue is who has standing to make a complaint to Women's Convention under the Optional Protocol? The decision on this issue will determine who has access to a remedy for violations of their rights and whether or not the Protocol text is relevant to women's experience of discrimination. In this regard a number of issues have to be propounded. The first issue is whether groups - either groups of individuals or organisations - have standing just like individual complainants when their rights are violated. The second question is whether or not other parties - individuals, groups or organisations - may make a complaint when not directly victims of violations of the Convention if they have a sufficient interest in the matter. A quick look at international and regional human rights law shows that there is precedent for extending standing to individuals, groups of individuals and organisations. For example, Article 25 of the European Convention for the Protection of Human Rights and Fundamental Freedoms entitles the European Commission of Human Rights to receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation. Article 44 of the American Convention on Human Rights also allows petitions to be lodged by any person or group of persons, or any non-governmental entity legally recognized in one or more member States of the Organisation. Article 14(1) of the Convention on Racial Discrimination extends standing to groups of individuals as well as to individuals. The Protocol deals with this issue in Article 2, where it provides for communications to be submitted by an individual, group or organisation claiming to have suffered from a violation of any of the rights in the Convention or claiming to be directly affected by the failure of a state party to comply with its obligations under the Convention. It also provides for claims by an individual, group or organisation that a state party has violated any of the rights set forth in the Convention or has failed

to comply with its obligations under the Convention, if in the opinion of the Committee this person, group or organisation has ‘sufficient interest’⁸³ in the matter. Therefore, individuals or groups of people, on their own or another’s behalf, may present communications. This means that a woman, or group of women, whose rights have been violated by a state party to the Optional Protocol to the Women’s Convention can submit a communication, either for themselves, or through another person or organisation acting on their behalf. The person, group, or organisation that presents the communication, either for herself or on behalf of another, must be under the jurisdiction of the accused state. Article 2 states this provision in a somewhat confusing manner. If the communication is presented on behalf of a victim, “this shall be with their consent unless the author can justify acting on their behalf without such consent.”⁸⁴ Therefore, consent will be essential in submitting a communication to the Committee on someone’s behalf. This requirement is not as progressive as other international human rights instruments, which make no specific mention of the need for consent.⁸⁵

Another problematic issue in the context of the procedure for individual communication is the concept of “justiciability”. The question here is which of the rights included in the Convention are eligible for individual communication? Since all human rights are considered, to a greater or lesser extent, justiciable, most governments agreed that all of the Convention’s substantive provisions should be

⁸³ The concept of ‘sufficient interest’ is an obstacle that women may face in seeking remedies, alongside danger of reprisals, low levels of literacy and legal literacy and resource constraints.

⁸⁴ Article 2 of the Optional Protocol to the Women’s Convention.

⁸⁵ It should be noted that many of the delegations were not prepared to compromise on the issue of consent. For the sake of consensus, accepting the inclusion of the need for consent into the Protocol’s text instead of into the Committee’s rules of procedure was necessary.

justiciable. Therefore, communications may be presented when there is an alleged violation of “any of the rights set forth in the Convention”. In other words, only provisions of the Convention that include rights, as established by Article 2 of the Protocol, may be defended before the Committee.

The Optional Protocol to the Women’s Convention contains two procedures as follows:

- A communications procedure allows individual women, or groups of women, to submit claims of violations of rights protected under the Convention to the Committee.⁸⁶ A number of criteria including those domestic remedies must have been exhausted in order for individual communications to be admitted for consideration by the Committee.⁸⁷
- The Protocol provides an inquiry procedure enabling the Committee to initiate inquiries into situations of grave or systematic violations of women’s rights.⁸⁸ Indeed, the inquiry procedure allows CEDAW to focus attention on widespread practices affecting women, such as lack of equal opportunities in education, politics or the work place, sexual exploitation, or abuses that cross borders and involve multiple governments, such as trafficking or violence against women in situations of armed conflict. It provides for an in-depth examination of the underlying causes of discrimination against women and can focus on abuses that would not normally be submitted to CEDAW.

⁸⁶ Article 2 of the Optional Protocol to the Women’s Convention.

⁸⁷ Article 4 of the Optional Protocol to the Women’s Convention.

⁸⁸ Article 8,9 and 10 of the Optional Protocol to the Women’s Convention.

In either case, states must be party to the Convention and the Protocol. The Protocol includes an “opt-out clause”, allowing states upon ratification or accession to declare that they do not accept the inquiry procedure.

Another important provision of the Optional Protocol to Women’s Convention is Article 17 which is considered as the most positive aspect of the Protocol for future development in International Human Rights Law. According to the article, “no reservations to this Protocol shall be permitted.”⁸⁹ One of the main reasons for this article in the Protocol was the great number of reservations of the states parties to the Convention which resulted in poor efficacy of the Women’s Convention. In many cases, these reservations, indeed, work against the object and purpose of the Convention itself. The article, however, met with a large number of interpretative statements. On the one hand, representatives of some governments such as Spain argued it was essential that the Protocol, given its fundamentally procedural character, not allow for the possibility of including reservation.⁹⁰ In their view, allowing reservation could seriously weaken the Protocol and would be contrary to its aim of increasing the efficacy of the Women’s Convention.⁹¹ Therefore, they argued, it would be desirable to include an article that would expressly prohibit parties from establishing reservations at the moment of its ratification. On the other hand, representatives of some governments such as Algeria, China, Egypt, and India expressed that the prohibition against reservations to the Protocol should not become a precedent to either the VCLT or customary International law, impeding adherence to

⁸⁹ Article 17 of the Optional Protocol to the Women’s Convention.

⁹⁰ Commission on the Status of Women Report on the 42d Session, UN. ESCOR, 42d Sess., Annex 2, Supp. No. 7, at 78, UN Doc. E/CN.6/12, 1998.

⁹¹ *Ibid.*

international agreements.⁹² They emphasised that they accepted Article 17 of the Protocol simply because this action is optional, of a procedural nature and because they did not want to break the consensus.⁹³ Furthermore they argued that the prohibition of reservations established by Article 27 of the Optional Protocol should not be considered as a precedent for future documents and for the development of International Human Rights Law.⁹⁴

In sum, the Optional Protocol to the Women's Convention is an optional instrument, as its name implies. Thus, the effectiveness the protection mechanisms of women's rights depends on ratification by state parties to Women's Convention. Once the GA of the UN adopted the text of the Protocol in 1999, the process of ratification was swift and the Protocol came into force on 22 December 2000. As of June 2007, eighty-eight states have ratified the Optional Protocol to the Women's Convention. No doubt, ratification of the Optional Protocol by other state parties will strengthen the protection mechanisms of women's rights and will place the Convention alongside the most important human rights treaties adopted by the UN.

8. States' reservation to the Women's Convention

The vast number of reservations and declarations entered by state parties to the provisions of the Convention with the aim and the effect of securing the domestic legal order of countries or their cultural and religious values is one of the serious problems encountered in effective implementation of the Women's Convention.⁹⁵

⁹² See *Interpretative Statements* UN.ESCOR, 43 Sess., Annex 2, Supp.No. 7 at 60, E/CN. 6/10/Annex2, 1999, p. 59.

⁹³ *Ibid.* See also p. 61 and 71.

⁹⁴ *Ibid.*

⁹⁵ See L. Lijnzaad, *Reservation to UN-Human Rights Treaties Ratify and Ruin?* Martinus Nijhoff Publishers, Dordrecht, 1995, p. v.

Before discussing member states' reservations to the provisions of the Women's Convention, it is necessary very briefly to examine the regime of reservations to multilateral treaties and its application to human rights instruments under contemporary international law.

8.1. Reservation and its application to human rights instruments

One of the most controversial subjects of contemporary international law is the question of reservations. This controversy is particularly discernible when dealing with reservations to human rights instruments which are not mutually and reciprocally advantageous for states and which impede their effective implementation.⁹⁶ A reservation according to Vienna Convention on Law of Treaties 1969 (VCLT), is:

A unilateral statement, however phrased or named, made by a state, when signing, ratifying, accepting, approving, or acceding to a treaty, whereby it purports to exclude or modify the legal effect of certain provisions of the treaty in their application to that state.⁹⁷

Traditionally, the integrity of the treaty was very important. Indeed, reservations made subsequent to the conclusion of a treaty required the unanimous acceptance of all other treaty parties, before a reserving state could be considered a party to the treaty. The Western European approach, based on the concept of absolute integrity of the treaty, was adopted until about 1950. Thus, if a party to a treaty objected to a reservation made by another state, the reserving state could not be considered a party to the treaty. On the other hand, since 1938, members of the Pan American Union (later the Organization of American States OAS) have followed a more flexible

⁹⁶ See C. Redgwell, "Reservations to Treaties and Human Rights Committee General Comment No. 24(52)", *ICLQ*, 1997, pp. 390-412. See also G. Fitzmaurice, "Reservations to Multilateral Conventions", 2 *ICLQ*, 1953, p. 1; J.K. Gamble, "Reservation to Multilateral Treaties: Macroscopic View of State Practice", 74 *AJIL*, 1980.

⁹⁷ Article 2 of VCLT.

approach with the major aim being maximum participation to a treaty.⁹⁸ Indeed, in the name of the universality of the treaty, a reserving state was permitted to become a party in relation to the non-objecting states.

Eastern European countries claimed that the right to make reservations was vested in the sovereignty of states, and reservations would consequently not require acceptance.⁹⁹ The former Soviet Union (SU) also has always argued for complete freedom of states to make reservations, and it was the Soviet bloc's reservations to the Genocide Convention of 1948 that eventually led to the Advisory Opinion of the International Court of Justice (ICJ) on Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide.¹⁰⁰ The Reservations to the Genocide Convention, marks the first major departure from the unanimity rule and thus an important juncture in the development of contemporary theory on reservations to multilateral treaties. The Advisory Opinion of ICJ declared that, "an objection to a minor reservation"¹⁰¹ should not have the effect of invalidating the ratification.¹⁰² The Court's principal ruling also held that a state that had made a reservation objected to by some parties to that Convention was to be regarded as being party to it if the reservation was compatible with the object and purpose of the Convention. This rule along with other legal principles concerning the effect of reservations was later codified in the VCLT.¹⁰³

⁹⁸ See R.L. Bledsoe and B.A. Boczek, *The International Law*, Santa Barbara, California, 1987, pp. 264-267.

⁹⁹ See M. Akehurst, *A Modern Introduction to International Law*, Routledge Press, London, 1993.

¹⁰⁰ See *Advisory Opinion on Reservation to the Genocide Convention*, ICJ Rep. 1951, p. 15.

¹⁰¹ *Genocide Case*, p. 15.

¹⁰² *Ibid.*

¹⁰³ Articles 19-23 of VCLT.

Allowing reservations to multilateral treaties, which is a well-accepted practice in international law, encourages ratification, because it is possible for a state to avoid assuming obligations in conflict with certain aspects of its internal legislation and states know that they may generally accept an instrument without binding themselves to every single provision. The chairpersons of UN treaty bodies have also recognized at their 1992 meeting that “there is an important and legitimate role for reservations to treaties.”¹⁰⁴

It needs to be considered, however, that the purpose of human rights treaties is protection of individuals and not the interest of states, while the purpose of multilateral treaties is to determine interstate relations which embody mutual privileges for the member states. The question that may arise here, therefore, is whether the same treaty regime that applies with regard to reservations for other multilateral treaties is adequate for human rights treaties. There are appearing distinct views among some writers on the subject, that reservations to human rights treaties should not be possible. For example Coccia pointed out that, “... the terms ‘reservation’ and ‘human rights’ appear to contradict one another.”¹⁰⁵ The widespread use of reservations in human rights treaties has frequently been criticised for weakening the overall effectiveness of the proposed norms which, by and large, are expressed as minimum standards. However, there is a concern that the increase in the number of member states to each treaty, adds its universal validity, and states should therefore be encouraged to join it, even with reservations. The World Conference on Human Rights held in Vienna in 1993, on the one hand encouraged the

¹⁰⁴ Effective Implementation of International Instruments on Human Rights, Including Reporting Obligations Under International Instruments on Human Rights, UN Doc. A/47/628, section 60 (1992).

¹⁰⁵ See M. Coccia, “Reservations to Multilateral Treaties on Human Rights”, 15 *Cal. WILJ*, 1985, p. 16.

states to become parties to the convention even with reservation and on the other hand, urged the states to withdraw reservations that are contrary to the object and purpose of the Convention or which are otherwise incompatible with international treaty law.¹⁰⁶

In general, two types of reservations, general reservations and specific reservations, can be identified in respect to treaties, including the Women's Convention. In the former, special articles of the treaty are not usually taken into account and reservations are usually justified on the ground of the religion, the legal system of a country or cultural practice. These reservations are considered the most controversial to negating any treaty obligation undertaken. Reservations to the Women's Convention have been entered by Muslim states, citing *Sharia* as the motivating force behind. Egypt, Kuwait, Libya, Malaysia, Bangladesh, Iraq and Morocco, are among Muslim states that have entered reservations to the Convention on the basis of conflict with *Sharia*. In the latter, state parties enter reservations to specific articles of the treaty. These are sometimes considered less objectionable than general reservations. However, this kind of reservation may target a number of articles of a treaty and hence may have a cumulative effect of impairing a treaty beyond redemption. Muslim states have entered reservations to various articles of the Convention, including Articles: 2, 5, 7, 9, 11, 13, 15, 16 and 29(1).

8.2 The most reserved articles of the Women's Convention

The four articles of the Women's Convention attracting most reservations by Muslim and non-Muslim states are Articles 2, 9, 15 and 16. Article 2 is one of the basic

¹⁰⁶ Para 39, *Vienna Declaration and Programme of Action*, adopted following the "United Nations World Conference on Human Rights", Vienna June 1993,

provisions of the Women's Convention and contains the actual framework for the implementation of the Convention. Pursuant to this provision states parties agree to "pursue by all appropriate means and without delay to a policy of eliminating discrimination against women." Despite the fundamental importance of this article, reservations and declarations have been made by states parties.¹⁰⁷

Countries from Muslim states and also non-Muslim states such as Nigeria¹⁰⁸, Malaysia,¹⁰⁹ Bangladesh,¹¹⁰ Egypt,¹¹¹ Libya,¹¹² Algeria,¹¹³ Democratic People's Republic of Korea,¹¹⁴ Lesotho,¹¹⁵ and New Zealand entered reservations to Article 2 of the

¹⁰⁷ See D. Bowett, Reservations to non-Restricted Multilateral Treaties, 48 *BYIL*, 1976; J. Koh, "Reservations to Multilateral Treaties: How International Legal Doctrine Reflects World Vision," 23 *HILJ*, 1982; O. Schachter, M. Nawaz and J. Fried, *Toward Acceptance of United Nations Treaties*, United Nations Publication New York, 1971; T.Y. Wang, "The Third World and International Law", in *The Structure and Process of International Law*, edited by J. Macdonald and M. John, Nijhoff Publishers, The Hague, 1983; C. Redgewell, "Universality or Integrity? Some Reflections on Reservations to General Multilateral Treaties", 64 *BYIL*, 1993.

¹⁰⁸ Nigeria entered a reservation to Article 2 and stated that: "The Government of the Republic of the Niger expresses reservations with regard to Article 2, paragraphs (d) and (f), concerning the taking of all appropriate measures to abolish all customs and practices which constitute discrimination against women, particularly in respect of succession." See *Multilateral Treaties Deposited with the Secretary-General*, UN Doc. ST/LEG/SER.E/15. For more information and details of reservations and declarations and objections of states members to the Women's Convention also see www.un.org/womenwatch/daw/cedaw/states.htm.

¹⁰⁹ The Government of Malaysia declares that Malaysia's accession is subject to the understanding that the provisions of the Convention do not conflict with the provisions of the Islamic *Sharia* law and the Federal Constitution of Malaysia. With regard thereto, further, the Government of Malaysia does not consider itself bound by the provisions of articles 2 (f) *Ibid.*, pp. 173-174.

¹¹⁰ *Ibid.*, p. 170.

¹¹¹ *Ibid.*, p. 171.

¹¹² *Ibid.*, Libya Arab Jamahiriya has filed a general reservation stating that: "Article 2 of the Convention shall be implemented with due regard for the peremptory norms of the Islamic *Sharia* relating to determination of the inheritance portions of the estate of a deceased person, whether female or male." *Ibid.*, p. 173.

¹¹³ The Algerian government, like Iraq, entered a reservation to Article 2 without mentioning *Sharia* as the reason for reservation. In regard to Article 2 the Algerian Government stated that: "The Government of the People's Democratic Republic of Algeria declares that it is prepared to apply the provisions of this article on condition that they do not conflict with the provisions of the Algerian Family Code." *Ibid.*, p. 169.

¹¹⁴ *Ibid.*, Democratic People's Republic of Korea in its reservation and declaration stated that: "The Government of the Democratic People's Republic of Korea does not consider itself bound by the provisions of paragraph (f) of article 2 ..."

¹¹⁵ *Ibid.*, Lesotho regarding this article declared that: "The Government of the Kingdom of Lesotho declares that it does not consider itself bound by Article 2 to the extent that it conflicts with Lesotho's constitutional stipulations relative to succession to the throne of the Kingdom of Lesotho and law

Convention.¹¹⁶ It can be said that by reserving to this article it becomes uncertain what obligation state parties are undertaking.¹¹⁷ In other words, these state parties to the Convention appear to adopt a policy of making reservations because no change at all in existing domestic law is desired. Bangladesh, in making a reservation on Article 2 declared that:

The government of the People's Republic of Bangladesh does not consider as binding upon itself provisions of article 2 ... as they conflict with *Sharia* law based on Holy *Qur'an* and *Sunna*.¹¹⁸

Iraq also reserved on Article 2 Paragraphs f and g without explanation of its reason for doing so and stated that:

Approval of and accession to this Convention shall not mean that the Republic of Iraq is bound by the provisions of article 2, paragraphs (f) and (g)¹¹⁹

Egypt, which has made a number of reservations to the Convention, in regard to Article 2 declared that it: "... is willing to comply with the content of this article, provided that such compliance does not run counter to the Islamic *Sharia*."¹²⁰

Morocco's declaration on the article is quite detailed and presents a combination of religious and other reasons for reservation.¹²¹ It is worded as follows:

relating to succession to chieftainship. The Lesotho Government's ratification is subject to the understanding that none of its obligations under the Convention especially in article 2 (e), shall be treated as extending to the affairs of religious denominations. Furthermore, the Lesotho Government declares it shall not take any legislative measures under the Convention where those measures would be incompatible with the Constitution of Lesotho."

¹¹⁶ See P.H. Jambert, "Reservations and Human Rights Conventions," 6 *HRR*, 1981, pp. 34-35. See also C. Chinkin and Others, "Human Rights As General Norms And A State's Right to Opt Out: Reservations and Objections to Human Rights Conventions", *BIICL*, 1997, pp. 67-69; M. Coccia, *Op. cit.*, pp. 17-18.

¹¹⁷ See R.J. Cook, *Op. cit.*, pp. 691-692. See also B. Clark, "The Vienna Convention Reservations Regime and the Convention on the Elimination of All Forms of Discrimination Against Women", 85 *AJIL*, 1991, p. 281.

¹¹⁸ *Multilateral Treaties, Op. cit.*, p. 170. See also www.un.org/womenwatch/daw/cedaw/states.htm.

¹¹⁹ *Ibid.*, p. 172.

¹²⁰ *Ibid.*, p. 171.

¹²¹ *Ibid.*, p.172.

The Government of the Kingdom of Morocco express its readiness to apply the provisions of this article provided that: They are without prejudice to the constitutional requirements that regulate the rules of succession to the throne of the Kingdom of Morocco; 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 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.¹²²

The Singapore government also declared that:

In the context of Singapore's multi-racial and multi-religious society and the need to respect the freedom of minorities to practise their religious and personal laws, the Republic of Singapore reserves the right not to apply the provisions of articles 2 ... where compliance with these provisions would be contrary to their religious or personal laws.¹²³

New Zealand, on behalf of the Cook Islands, made a reservation to this article in the following words:

The Government of the Cook Islands reserves the right not to apply article 2 (f) and article 5 (a) to the extent that the customs governing the inheritance of certain Cook Islands chief titles may be inconsistent with those provisions.¹²⁴

Article 9 of the Convention also figures among the substantive provisions most reserved by Muslim states. It lays down that women shall be granted equal rights with men to acquire, change or retain their nationality, and have equal rights with men in respect to the nationality of their children.

In regard to justification of reservation to the article it has been argued that children are assumed to acquire their father's nationality, and married women that of their husband. Traditionally, family solidarity is served by the family having the same

¹²² *Ibid.*

¹²³ *Ibid.*

¹²⁴ *Ibid.*

nationality, which should be that of the father of the family. Since residency frequently depends upon nationality, or on immigration laws, the wife is presumed to follow her husband and live in his place of nationality.¹²⁵ This is for the prevention of statelessness, which would arise when a woman's original national law attributes to her on marriage her husband's nationality, and does not extend its nationality to her.¹²⁶ Among states parties to the Convention, which entered reservations to this article, most of them are Muslim states and none of them has cited Islamic law as justification for entering the reservation. Countries such as Iraq,¹²⁷ Tunisia¹²⁸, Saudi Arabia¹²⁹ and Jordan¹³⁰ Morocco¹³¹, Malaysia,¹³² Lebanon,¹³³ Kuwait¹³⁴ Egypt¹³⁵ and Algeria¹³⁶ entered reservations to the article. In this regard Iraq stated:

¹²⁵ See R. J. Cook, "Reservations to the Convention ...", *Op. cit.*, p. 694.

¹²⁶ See C. Chinkin, *Op. cit.*, p. 72.

¹²⁷ *Multilateral Treaties, Op. cit.*, p. 172.

¹²⁸ The Tunisian government states that: "The Tunisian Government expresses its reservation with regard to the provisions in article 9, paragraph 2 of the Convention, which must not conflict with the provisions of chapter VI of the Tunisian Nationality Code." *Ibid.*, p. 176. See also www.un.org/womenwatch/daw/cedaw/states.htm.

¹²⁹ Saudi Arabia stated that: "The Kingdom does not consider itself bound by paragraph 2 of article 9 of the Convention." See www.un.org/womenwatch/daw/cedaw/states.htm.

¹³⁰ *Ibid.*, p. 173.

¹³¹ The Government of Morocco made a reservation with regard to this article and stated that this was: "... in view of the fact that the Law of Moroccan Nationality permits a child to bear the nationality of its mother only in the cases where it is born to an unknown father, regardless of place of birth, or to a stateless father, when born in Morocco, and it does so in order to guarantee to each child its right to a nationality. Further, a child born in Morocco of a Moroccan mother and a foreign father may acquire the nationality of its mother by declaring, within two years of reaching the age of majority, its desire to acquire that nationality, provided that, on making such declaration, its customary and regular residence is in Morocco." *Ibid.*, p. 184. See also www.un.org/womenwatch/daw/cedaw/states.htm.

¹³² *Ibid.*, p. 176.

¹³³ Cited in www.un.org/womenwatch/daw/cedaw/states.htm.

¹³⁴ In this regard the Government of Kuwait stated that it: "... reserves its right not to implement the provision contained in article 9, paragraph 2, of the Convention, inasmuch as it runs counter to the Kuwaiti Nationality Act, which stipulates that a child's nationality shall be determined by that of his father." *Ibid.*, p. 173. See also www.un.org/womenwatch/daw/cedaw/states.htm. I

¹³⁵ *Ibid.*, p. 171.

¹³⁶ Algeria formulated its reservation to this article in the following words: "...Algeria wishes to express its reservations concerning the provisions of article 9, paragraph 2, which are incompatible with the provisions of the Algerian Nationality Code and the Algerian Family Code. The Algerian Nationality code allows a child to take the nationality of the mother only when: the father is either unknown or stateless; the child is born in Algeria to an Algerian mother and a foreign father who was

Approval of and accession to this Convention shall not mean that the Republic of Iraq is bound by the provisions of ... Article 9 ...of the Convention.¹³⁷

Turkey formulated its declaration to Article 9 in the following manner:

Article 9, paragraph 1 of the Convention is not in conflict with the provisions of Article 5, paragraph 1, and Articles 15 and 17 of the Turkish Law on Nationality, relating to the acquisition of citizenship, since the intent of those provisions regulating acquisition of citizenship through marriage is to prevent statelessness.¹³⁸

The government of Egypt also declared a:

Reservation to the text of Article 9, paragraph 2, concerning the granting to women of equal rights with men with respect to the nationality of their children, without prejudice to the acquisition by a child born of a marriage of the nationality of his father. This is in order to prevent a child's acquisition of two nationalities where his parents are of different nationalities, since this may be prejudicial to his future: It is clear that the child's acquisition of his father's nationality is the procedure most suitable for the child and that this does not infringe upon the principle of equality between men and women, since it is customary for a woman to agree, upon marrying an alien, that her children shall be of the father's nationality.¹³⁹

Article 15 of the Convention aims to create legal equality of men and women. It obligates state parties to treat men and women equally before law.¹⁴⁰ Specifically in relation to civil matters, it provides, "states parties shall accord to women in civil matters, a legal capacity identical to that of men and the opportunities to exercise that capacity."¹⁴¹ It is also provides that women still have equal rights to conclude contracts and to administer property, and should be treated equally in all stages of

born in Algeria; moreover, a child born in Algeria to an Algerian mother and a foreign father who was not born on Algerian territory may, under Article 26 of the Algerian Nationality Code, acquire the nationality of the mother providing the Ministry of Justice does not object. Article 41 of the Algerian Family Code states that a child is affiliated to its father through legal marriage. Article 43 of that Code states that 'the child is affiliated to its father if it is born in the 10 months following the date of separation or death.' *Ibid.*, p. 169. See also www.un.org/womenwatch/daw/cedaw/states.htm.

¹³⁷ *Ibid.*, p. 172.

¹³⁸ *Ibid.*, p. 176.

¹³⁹ *Ibid.*, p. 171.

¹⁴⁰ Article 15(1) of the Women's Convention.

¹⁴¹ Article 15(2) of the Women's Convention.

procedure in the courts. In addition, the article provides for freedom of movement of persons and freedom to choose residence and domicile.¹⁴² This article has also attracted a number of reservations. Muslim states such as Algeria,¹⁴³ Jordan,¹⁴⁴ Morocco,¹⁴⁵ Tunisia¹⁴⁶ and Turkey¹⁴⁷ have cited the domestic laws of their respective jurisdictions as the motivating force behind reservations to this article. Thus, the Algerian reservation mentioned the Algerian Family Code, Morocco mentioned the Moroccan Code of Personal Status, while the Jordanian reservation with respect to Article 15(4) states briefly that a wife's residence is with her husband. Turkey made reservations to Paragraph 2 and 4 in so far as they are incompatible with provisions of the Turkish on family relations.¹⁴⁸ The Tunisian declaration to Article 15(4) of the Convention reads as follows:

In accordance with the provisions of the Vienna Convention on the Law of Treaties, dated 23 May 1969, the Tunisian Government emphasizes that the requirements of article 15, paragraph 4, of the Convention on the Elimination of All forms of Discrimination against Women, and particularly that part relating to the right of women to choose their residence and domicile, must not be interpreted in a manner which conflicts with the provisions of the Personal Status Code on this subject, as set forth in chapters 23 and 61 of the Code.¹⁴⁹

Among non-Muslim states, countries like Thailand reserved to Article 15(3) on women's capacity regarding contracts and other private instruments by simply

¹⁴² In the Declaration of 1967, where equal right of men and women in the field of civil law are provided, a stipulation appears to the effect that this would be "without prejudice to the safeguard of the unity and harmony of the family", a stipulation that weakens the force of the provisions granting the same rights to women. Article 15(4) of the Convention has no such stipulation.

¹⁴³ *Multilateral Treaties, Op. cit.*, p. 169. See also www.un.org/womenwatch/daw/cedaw/states.htm,

¹⁴⁴ *Ibid.*, p. 173.

¹⁴⁵ *Ibid.*, p. 174.

¹⁴⁶ *Ibid.*, p. 176.

¹⁴⁷ *Ibid.*, p. 176.

¹⁴⁸ The reservation reads thus: "Reservations of the Government of the Republic of Turkey with regard to the Articles of the Convention dealing with family relations which are not completely compatible with the provisions of the Turkish Civil Code, in particular, article 15, paragraphs 2 and 4" *Ibid.*, p. 176.

¹⁴⁹ *Ibid.*, p. 176.

stating that: “the Royal Thai Government does not consider itself bound by the provisions of Article 15, paragraph 3 ...”¹⁵⁰ Brazil reserved its obligations under paragraph 4 on freedom of movement and choice of residence and domicile.¹⁵¹

Article 16 of the Convention is the principal provision of the Women’s Convention requiring state parties to eliminate discrimination against women in matters affecting marriage and family relations. It concerns issues of family law in general, and the right to choose a spouse and enter into marriage, and at dissolution, equal rights and responsibilities for the parenting of their children, in particular. Various member states to the Women’s Convention entered reservations to Article 16 of the Convention. Some countries such as Brazil¹⁵² and Republic of Korea¹⁵³ reserved without explanation. Cook in this regard stated that:

This is a key provision in view of the intention of the Convention to address discrimination in private as well as public interactions and which *de facto* as well as *de jure*. A state party that purposes not to be bound by this provision would seem to leave its women in jeopardy of suffering discrimination in the most personal and pervasive aspects of their lives. Accordingly, an unexplained reservation seems to strike at the heart of the Convention’s purpose.¹⁵⁴

Muslim states party to the Convention also have entered reservations to Article 16 based on *Sharia*.¹⁵⁵ The reservations entered to the article are the most detailed and a strong manifestation of the belief that these are being entered in the light of

¹⁵⁰ See www.un.org/womenwatch/daw/cedaw/states.htm,

¹⁵¹ *Ibid.*

¹⁵² Brazil’s government in regard to the article without explanation declares that: “... government of the Federal Republic of Brazil hereby expresses its reservations to ... article 16, paragraphs 1 (a), (c), (g) and (h) of the Convention ...” *Ibid.*

¹⁵³ The Republic of Korea stated, for instance, without explanation that: “The Government of the Republic of Korea, having examined the said Convention, hereby ratifies the Convention considering itself not bound by the provisions... [(c), (d), (f) and (g)] of paragraph 1 of article 16 of the Convention.” *Ibid.*

¹⁵⁴ See R. Cook, “Reservations to the Convention ...” *Op. cit.*, p. 703.

¹⁵⁵ The reserving countries include Egypt, Iraq, Algeria, Bangladesh, Jordan, Libya, Lebanon, Malaysia, Morocco, Tunisia and Turkey.

conflicting Islamic law. Algeria,¹⁵⁶ Jordan,¹⁵⁷ Tunisia¹⁵⁸ and Turkey¹⁵⁹ declared domestic law which originated from the Islamic jurisprudence as the reason for reservation. The remaining Muslim states mentioned Islamic law as their justification for entering reservations. For example Bangladesh addressed the provisions, with the statement that:

... Bangladesh does not consider as binding upon itself the provisions of articles ...16(1)(c) and (f) as they conflict with *Sharia* law based on Holy *Qur'an* and *Sunna*.¹⁶⁰

Morocco entered reservation to the article with more detailed explanation. It stated that:

The Government of the Kingdom of Morocco makes a reservation with regard to the provisions of this article, particularly those relating to the equality of men and women, in respect of rights and responsibilities on entry into and at dissolution of marriage. Equality of this kind is considered incompatible with the Islamic *Sharia*, which guarantees to each of the spouses rights and responsibilities within a framework of equilibrium and complementarily in order to preserve the sacred bond of matrimony. The provisions of the Islamic *Sharia* oblige the husband to provide a nuptial gift upon marriage and to support his family, while the wife is not required by law to support the family. Further, at dissolution of marriage, the husband is obliged to pay maintenance. In contrast, the wife enjoys complete freedom of disposition of her property during the marriage and upon its dissolution without supervision by the husband, the husband having no jurisdiction over his wife's property. For these reasons, the Islamic *Sharia* confers the right of divorce on a woman only by decision of a *Sharia* judge.¹⁶¹

Egypt also entered a reservation to Article 16 as follows:

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

¹⁵⁶ *Multilateral Treaties, Op. cit.*, p. 169.

¹⁵⁷ *Ibid.*, p. 169.

¹⁵⁸ *Ibid.*

¹⁵⁹ *Ibid.*, p. 170.

¹⁶⁰ *Ibid.*

¹⁶¹ *Ibid.*, p. 176.

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 complementarity which guarantees true equality between the spouses. The provisions of the *Sharia* lay down that the husband shall pay bridal money to the wife and maintain her fully and shall also make a payment to her upon divorce, whereas the wife retains full rights over her property and is not obliged to spend anything on her keep. The *Sharia* therefore restricts the wife's 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.¹⁶²

8.3 *Objection to reservations*

States' reservations towards the Women's Convention have attracted objections by a few states, which argue that these reservations are incompatible with the "object and purpose" of the Women's Convention as required by its Article 28 and Article 19 of the VCLT.¹⁶³ They argue that those reservations undermined the Convention's universal application and did not advance the welfare of women.¹⁶⁴ For example, Germany considered that the reservations to which it objected "are incompatible with the object and purpose of the Convention."¹⁶⁵ A representative of Mexico in this regard pointed out:

... they should be considered invalid in the light of Article 28, para 2 of the Convention, because they are incompatible with the object and purpose.¹⁶⁶

A representative of the Swedish Government also declared that:

¹⁶² *Ibid.*, pp. 172-173. See also www.un.org/womenwatch/daw/cedaw/states.htm,

¹⁶³ For example Finland objected to the reservations made by the Libya and stated that: "The Government of Finland has examined the contents of the reservation made by the Libyan Arab Jamahiriya and considers the said reservation as being incompatible with the object and purpose of the Convention." See Multilateral Treaties, *Op. cit.*, p. 178.

¹⁶⁴ See argument of representative of Nigeria at <http://www.un.org/News/Press/docs/1996/19961029.gash3369.html>.

¹⁶⁵ Multilateral Treaties, *Op. cit.*, p. 170.

¹⁶⁶ *Ibid.*

... the reason why reservations incompatible with the object and purpose of a treaty are not acceptable is precisely that otherwise they would render a basic international obligation of a contractual nature meaningless. Incompatible reservations made in respect of the Convention on the Elimination of All Forms of Discrimination Against Women not only cast doubts on the commitment of the reserving states to the objects and purpose of this Convention, but also contribute to undermine the basis of international contractual law. It is in the common interest of state that treaties to which they have chosen to become parties also are respected, as to object and purpose, by other parties.¹⁶⁷

An assessment of the Women's Convention shows that there is no provision for objections to reservations in it. The VCLT, however, contains provisions for the acceptance of reservations and it admits objections and provides for the withdrawal of objections to reservations. In regard to the Women's Convention, very few state parties,¹⁶⁸ indeed, have exercised the option that is provided under the Vienna Convention to object to the reservations made by other states, including Muslim states. Therefore, the effect of objections raised by one state party to the reservations made by another state party is debatable. It may be that, if a state party objects to the reservation made by another state party, the objecting state party is not in a legal relationship under the Convention with the reserving state. Thus, the reserving state should not be a party to the Convention, at least as far as its relations with the objecting state party are concerned. This rule, however, seems to be too rigid to meet the needs of the practical application of the Women's Convention.¹⁶⁹ The general tendency is to try to broaden the scope of multilateral conventions and to have as many state parties as possible to ratify. It is therefore desirable to soften the rule. The

¹⁶⁷ *Ibid.*

¹⁶⁸ A few, countries such as Finland, Germany, Mexico, Netherlands, Norway and Sweden, have raised objections to reservations made by other state parties on the grounds of incompatibility with the object and purpose of the Convention.

¹⁶⁹ See I. Brownlie, *Principles of Public International Law*, Clarendon Press, Oxford, 1979, p. 608.

present rule of international law in regard to the effect of objections to reservations is expressed in VCLT, which provides that:

... an objection by another contracting state to a reservation does not preclude the entry into force of the treaty as between the objecting and reserving state unless a contrary intention is definitely expressed by the objecting state.¹⁷⁰

In other words, if an objecting state party does not make an explicit declaration that its objection to the reservation renders the Convention not in force between itself and the reserving state, the Convention will be in force between them in spite of the objection raised. The Vienna Convention further provides:

When a state objecting to a reservation has not opposed the entry into force of the treaty between itself and the reserving state, the provisions to which the reservation relates do not apply as between the two states to the extent of the reservation.¹⁷¹

In the case of the Women's Convention, Germany and Mexico have made it clear that their objection should not be interpreted as an impediment to the implementation of the Convention between the reserving state and their state.¹⁷² Sweden has made no statement to this effect in its objections.¹⁷³ However, according to the rule stipulated in Article 20 (4)(f) of the VCLT 1969, since Sweden has not definitely expressed "a contrary intention", the Convention is to be in force between Sweden and the reserving state parties. For all these objecting states the result is that the Convention is in force between them and the reserving state parties; the only provisions which are affected are those which are reserved, which means that those provisions have no effect for either the objecting or reserving state parties.

¹⁷⁰ Article 20(4) (b) of VCLT.

¹⁷¹ Article 20 of VCLT.

¹⁷² *Multilateral Treaties, Op. cit.*, p. 170.

¹⁷³ *Ibid.*

When objections are raised to reservations made by other state parties, although state parties are not required to specify the grounds for their objection, the grounds relied on are often related to an alleged incompatibility with the object and purpose of the treaty. The criteria upon which the validity of the reservations are tested is that of compatibility with the perceived object and purpose of the treaty, a criterion that has superseded the former rule of unanimous consent of the state parties. The Women's Convention in this regard provides that:

A reservation incompatible with the object and purpose of the present convention shall not be permitted.¹⁷⁴

All the above objecting states parties have made their objections to any of the reservations on the grounds of incompatibility with the object and purpose of the Convention. The concept of "incompatibility" with the object and purpose of a treaty is one that has been well established and widely used in the law of treaties. It has particular application to the problem of reservations to a multilateral treaty. VCLT provides that:

A state may when signing, ratifying, accepting, approving or acceding to a treaty formulated a reservation unless: a) the reservation is prohibited by the treaty; b) the treaty provides that only specified reservations, which do not include the reservation in question, may be made; or c) in cases not falling under sub-paragraphs a) and b), the reservation is incompatible with the object and purpose of the treaty.¹⁷⁵

As stated earlier, this concept has its origin in the Advisory Opinion of the ICJ in the reservation to the *Genocide Convention Case* in 1951.¹⁷⁶ Regarding the Genocide Convention the General Assembly requested opinions from the ICJ on three

¹⁷⁴ Article 28(2) of Women's Convention.

¹⁷⁵ Article 19 of VCLT.

¹⁷⁶ ICJ Rep. 1951, p. 29.

questions: One of those was whether a reserving state to the Genocide Convention could be regarded as a party to the Convention while still maintaining its reservation. The court advised that, in the circumstances of the Convention, the reserving state could be regarded as being a party to the Convention only if the reservation was compatible with the object and purpose of the Convention.¹⁷⁷ In other words, reservations incompatible with the object and purpose of a treaty are not permitted and in those circumstances the reserving state will not be considered as a party to the treaty. It is submitted that the difficulty lies in ascertaining the meaning of incompatibility with the object and purpose of the treaty. Neither the Vienna Convention itself nor the Women's Convention provides a definition of the term "incompatibility". It has been suggested that various factors might be relevant to determine "incompatibility" under the latter convention.¹⁷⁸ They include whether the reservation applies to one of the general articles of the Convention, or to the particular crucial aspect of equality between men and women, to an article that affects many women in a significant way, to an article in total, or to a very specific aspect of an article. The above suggestion has been criticised as lacking a basis of definite criteria. What remains is to deal with this problem on the basis of a procedural approach, in which a "collegiate" system may be adopted. According to this system, the reserving state will become a party only if its reservations are accepted by a given proportion of other state parties. In other words, the validity of the reservation will depend on its acceptance by a number of state parties.¹⁷⁹ The VCLT, however, favours a more

¹⁷⁷ *Ibid.*

¹⁷⁸ *Ibid.*

¹⁷⁹ For example, Article 20(1) of the Convention on the Elimination of All Forms of Racial Discrimination of 1985 provides that "A reservation shall be considered incompatible or inhibitive if at

flexible system, leaving each state party to decide whether to accept a reservation as compatible with the object and purpose of the treaty and to regard the reserving state as a party to the treaty, without indicating how to determine whether a reservation is compatible with the object and purpose of the treaty. It seems that there is no alternative to the system in which each state party decides for itself whether another state party's reservations are permissible in the sense that they are compatible with the object and purpose of the treaty. As the Women's Convention has no express provision regarding this problem, it leaves the determination to each state party. The result is that a reservation to the Convention may be considered by the reserving state as compatible with the object and purpose of the Convention, while other state parties may disagree.

9. Women's rights from Mexico to Beijing

A new era of women's human rights has been seen in the past three decades. As Karl argues, the catalyst was the International Women's Year in 1975, where joint initiatives of the UN and the women's movement interacted with each other and had a transformative effect on the perception of women's rights as human rights in international human rights discourse.¹⁸⁰ To mark the International Women's Year, the first World Conference on the Status of Women was held in Mexico City in 1975 with representatives from 134 countries. A World Plan of Action was observed to remind the international community that discrimination against women continued to be a

least two thirds of state parties to the Convention object to it." For more information see D.W. Bowett, *Op. cit.*, pp. 85-86.

¹⁸⁰ See M. Karl, *Op. cit.*, pp. 147-148.

persistent problem in much of the world.¹⁸¹ The Conference also proposed actions and set targets for a ten-year period in a wide range of areas, including political participation, education, health services, housing, nutrition, family planning and employment.¹⁸² The GA of the UN approved the plan and declared 1976-1985 the UN Decade for Women, with sub-themes of Equality, Development and Peace. Although the Mexico Conference was considered a success, its impact was not immediately visible. Women's issues continued to be largely ignored in both national and international decision making.

Five years later, in 1980, the second World Conference on Women was held in Copenhagen, where 145 member state representatives met in order to review and appraise the 1975 World Plan of Action, as well as to develop it further for the second half of the decade.¹⁸³ Representatives of member states discussed various issues such as women and development, health, employment, as well as issues relating to working with the UN. The Copenhagen Conference also recognised that, despite the progress made by the Women's Convention, signs of disparity were beginning to emerge between rights secured and women's ability to exercise these rights.¹⁸⁴ The

¹⁸¹ *Declaration of Mexico: Plans of Action*, United Nations, New York, 1975.

¹⁸² For the implementation of the objectives of International Women's Year, the World Plan of Action proposed national action in various areas including: international co-operation and strengthening international peace; political participation, education and training, employment and related economic roles; health and nutrition; the family in modern society; population; housing and related facilities; social services. Action on both national and international levels was proposed in the areas of research, data collection and analysis; mass media; participation of women in the United Nations bodies; and international exchange of information. See M. Karl, *Women and Empowerment. Participation and Decision Making*, Zed Books, London, 1995, p. 126.

¹⁸³ See United Nations, *Report of the World Conference of the United Nations Decade for Women: Equality-Development-Peace, Copenhagen*, United Nations, New York, 1980.

¹⁸⁴ See H. Pietila & J. Vickers, *Making Women Matter. The Role of the United Nations*, Zed Book, London, 1994, p. 78.

Copenhagen Conference, however, reflected the approaches of the traditional political blocs and failed to consider issues from a feminist perspective.¹⁸⁵

Another conference on women was held in Nairobi in 1985.¹⁸⁶ The main object of the Nairobi Conference was to review and appraise the achievements of the UN Decade for Women, including equality, development and peace.¹⁸⁷ The Conference was also given a mandate to seek new ways to overcome the obstacles to achieving the Decade's goals. By consensus, governments participating in Nairobi adopted Forward-Looking Strategies for Advancement of Women to the Year 2000 (FLS).¹⁸⁸ The FLS, like the World Plan of Action, is an intergovernmental document which was the result of a long process of preparation and government negotiation in the CSW. Indeed, FLS looked at the obstacles facing women and presented basic strategies to overcome these and identified measures for implementation.¹⁸⁹ It broke new ground as it declared all issues to be women's issues. Women's participation in decision-making and the handling of all human affairs was recognised not only as their legitimate right but as a social and political necessity that would have to be incorporated in all institutions of society.¹⁹⁰ However, at the heart of the document was a series of measures for achieving equality at the national level. Governments were to set their own priorities, based on their development policies and resource capabilities. Three basic categories of measures were identified: constitutional and legal steps, equality in social participation, and equality in political participation and

¹⁸⁵ For more discussion about the Copenhagen Conference see M. Karl, *Op. cit.*, p. 130.

¹⁸⁶ See <http://www.iisd.org/women/nairobi.htm>.

¹⁸⁷ *Ibid.*

¹⁸⁸ United Nations, *The Nairobi Forward-looking Strategies for the Advancement of Women*, United Nations, New York, 1985.

¹⁸⁹ *Ibid.*

¹⁹⁰ See R. Wallace, *Op. cit.*, pp. 46-47.

decision-making. In keeping with the view that all issues were women's issues, the measures recommended by the Nairobi FLS covered a wide range of subjects, from employment, health, education and social services, to industry, science, communications and the environment. In addition, guidelines for national measures to promote women's participation in efforts to promote peace, as well as to assist women in special situations of distress, were proposed.

An important success for the women's human rights movement came at the World Conference on Human Rights, held in Vienna in June 1993. The Conference emphasised that "the human rights of women and of the girl child are an inalienable, integral and indivisible part of universal human rights. The full and equal participation of women in political, civil, economic, social and cultural life, at the national, regional and international levels, and eradication of all forms of discrimination on grounds of sex are priority objectives of the international community."¹⁹¹ The Vienna Conference also addressed the issue of the violence against women and made clear 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." The Conference brought to the fore the issue of violence against women as a human rights violation and urged the UN General Assembly to adopt the Declaration on the Elimination of Violence Against Women.¹⁹² In February 1994, the UN General Assembly adopted Resolution 48/104.¹⁹³

¹⁹¹ Para 18 of Vienna Declaration and Programme of Action 1993.

¹⁹² See D. Sullivan, "Women's Human Rights and the 1993 World Conference on Human Rights", 88 *AJIL*, 1994, p. 164.

¹⁹³ UNGA Res. 48/104, 1994.

The Fourth World Conference on Women, held in Beijing in September 1995, culminated with the adoption of the Beijing Declaration and Platform for Action.¹⁹⁴ The Declaration secured the commitment of governments to work towards implementing - before the end of the twentieth century - the strategies agreed on in Nairobi in 1985, and to mobilize resources to achieve the goals set by the platform. The Beijing Platform for Action is the most thorough document ever produced by a UN conference on the subject of women's rights, as it incorporates the accomplishments of prior conferences and treaties, such as the UDHR, Women's Convention and the Vienna Declaration.¹⁹⁵ It also reaffirms the definitions set out in Cairo,¹⁹⁶ and adds a paragraph on Human Rights in general. The main objectives of the Beijing Platform for Action were eliminating discrimination against women, eradicating poverty, eliminate inequality in education, the right of women to all aspects of their health, particularly their fertility, employment and economic participation, adopting measures towards placing a decisive number of women in key positions, and promoting women human rights and eliminating violence against women.¹⁹⁷ The language of rights in the Platform recognises the fact that women in many parts of the world live under poverty, inequality in education, health and employment. However, the weakness of the Platform of Action is its inability to criticise the root causes of women living in poverty.

¹⁹⁴ A/ CONF. 177/20, 17 October 1995.

¹⁹⁵ See D. Otto, "A Post-Beijing Reflection on the Limitations and Potential of Human Rights Discourse for Women", in *Women and International Human Rights Law*, edited by Askin and Keoing, Transnational Publishers, New York, p. 128.

¹⁹⁶ The International Conference on Population and Development (ICPD) was held in Cairo in September 1994, raising sensitive and crucial issues relating to reproductive rights of women and men's shared responsibility, including family planning, child-rearing and house work.

¹⁹⁷ See N. Streeter, "Beijing and Beyond", 11 *BerWLJ*, 1996, p. 200.

Concluding remarks

For centuries, women, who represent half of the world's population, suffered discrimination and were denied equal rights with men. As a result of social developments combined with persistent struggle against inequality and discrimination, the status of women has gradually improved since World War I and II. Despite these developments, however, women remained in a subordinate position. The continuing existence of widespread discrimination against women throughout the world makes apparent and urgent the need for further efforts to attain equality between men and women. With the object of establishing equality between the sexes and eliminating of all discrimination against women, a series of international legal instruments has been adopted. The most significant was the Women's Convention in 1979. It covers not only subjects dealt with in previous international conventions and other international legal instruments concerning the status of women, but also matters which were not dealt with prior to the Women's Convention. The convention has been described as the international Bill of Rights for woman. In spite of positive features of the Convention, however, not only does it suffer, from significant substantive and procedural weaknesses but also it fails to address some of the more fundamental issues, such as the right to freedom of religion, violence against women, and eradication of practice of prostitution. The right to freedom of religion is recognized by international instruments, including UDHR,¹⁹⁸ ICCPR¹⁹⁹ and the Declaration on the Elimination of all Forms of Intolerance and of Discrimination based on Religion or Belief.

¹⁹⁸ Article 18 UDHR.

¹⁹⁹ Article 18 of ICCPR. See also B. Tahzib, *Freedom of Religion or Belief: Insuring Effective International Legal Protection*, 1996, pp. 64-65.

A few provisions of the Women's Convention, however, may conflict with the right of freedom of religion which is recognized by the above international instruments.²⁰⁰

The Women's Convention calls on state parties to eradicate religious and cultural norms which are detrimental to women. Hence, there is a contradiction between the obligations included the Women's Convention and the principle of religious freedom, which is amongst the fundamental freedoms of mankind. Another area which is not addressed by the Women's Convention but which women face every day of their lives in every part of the world, is the horrible trauma of violence, whether physical, psychological or sexual. The absence from the Convention, of a specific provision condemning violence in the light of the prevalence of violence against women is a serious omission. This major weakness of the Convention was covered by the adoption of the Declaration on the Elimination of the Violence Against Women by the UN General Assembly in 1993.²⁰¹ The Declaration, in Article 2, provides a comprehensive definition of the term 'violence against women', including physical, sexual and psychological violence occurring in the family.²⁰² Another sad omission has been seen in Article 6 of the Women's Convention, where it is stated that "state

²⁰⁰ For comprehensive discussion on Articles 5, 15 and 16 of the Women's Convention and its effect on the right to freedom of religion see N.A. Shah, *Women, the Koran and International Human Rights Law: The Experience of Pakistan*, Martinus Nijhoff Publishers, Leiden, 2006, pp. 186-188.

²⁰¹ See GA Res. 48/104 1993. See also S. Subedi, "Protection of the Women Against Domestic Violence: The Response of the International Law", 2 *EHRLR*, 1997, pp. 592-595.

²⁰² Article 2(a) of Declaration on the Elimination of Violence Against Women provides that 'any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life.' The article in paragraph b and c in elaboration upon the meaning of violence provides examples such as physical, sexual and psychological violence occurring in the family, including battering, sexual abuse of female children in the household, dowry-related violence, marital rape, female genital mutilation and other traditional practices harmful to women, non-spousal violence and violence related to exploitation, physical, sexual and psychological violence occurring within the general community, including rape, sexual abuse, sexual harassment and intimidation at work, in educational institutions and elsewhere, trafficking in women and forced prostitution, and physical, sexual and psychological violence perpetrated or condoned by the state, wherever it occurs.

parties shall take all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women.”²⁰³ Throughout the years women have always been victims of sexual exploitation, but in recent times, young girls as well as boys are consistently abused. Nowadays, the incidence of sexual exploitation of women is on the rise, and attracts world-wide attention. The article does not define the term “traffic” and instead of prohibiting the practice of prostitution, just seeks that states prohibit the exploitation of prostitution. It seems to me that the Convention should oblige state parties to take all appropriate national, bilateral, as well as multilateral measures to eradicate and prevent the practice of prostitution, as well as trafficking for any purpose or in any form. To achieve this aim, state parties must urged not only to implement measures at the national level, but also to enter into arrangements with other states to implement measures to eradicate and prevent the practice of prostitution.

Apart from the above issue, the Convention also met with a large number of reservations by member states, which in some aspects undermine the goal of the Convention and have created two classes of states parties: those that have undertaken an obligation to eliminate all forms of discrimination against women and those that have not. Indeed, the vast number of reservations and declarations entered by state parties to the provisions of the Convention, with the aim and the effect of securing the domestic legal order of countries or their cultural and religious values, is one of the serious problems encountered in effective implementation of the Women’s Convention. However, it is true to say that the increase in the number of member

²⁰³ Article 6 of the Women’s Convention.

states to the Women's Convention adds to its universal validity. Therefore, it is desirable to encourage the non-state parties to join, ratify or acceding even with reservations. The reactions of Muslim states to the Women's Convention have been various. On the one hand, a few countries, particularly Iran, based on conflict with *Sharia* law, reject the Convention completely and a few Iranian authorities who fear international obligations have also claimed that the Women's Convention is colonialist and its provisions are entirely against the Islamic Code. On the other hand, the majority of Muslim states joined the Women's Convention with strong reservations because they are distinctive in identifying *Sharia* as the main justificatory logic for their action. To them, international human rights treaties, including the Women's Convention, are subordinate to the overriding supremacy of Islamic law; hence, they entered reservations declaring that position.

Since the most extensive conflicts between past interpretations of Islamic requirements and international human rights norms lie in the area of women's rights and that conservative interpretation of the requirements of Islamic law may result in many disadvantages for women, especially in the enjoyment of civil and political rights, the following chapters of this study will be devoted to the place of women under Islamic law, particularly those specific areas of difference included in the Women's Convention. The question also will be highlighted whether these reservations are indicative of a wider ideological conflict between women's human rights in the Islamic tradition, and in the human rights instruments. Is the concept of human rights in Islam irreconcilable with international human rights norms on the subject, such as those expressed in the Women's Convention?

Part II

Theoretical Framework of Women's Human Rights in Islam: Equality or Discrimination

Nowadays the concept of human rights influences every aspect of contemporary international law. However, in spite of its popular acceptance, opinions still differ considerably about the conceptual interpretation and scope of human rights. It has been argued that there is widespread acceptance of the principle of human rights on the domestic and international plane, but this is not to say that there is complete agreement about the nature of such rights or their substantive scope.¹ In the Islamic legal perspective traditionally, a number of difficulties confront the discourse of human rights in general and women's rights in particular.² Although there may be some areas of conceptual differences between Islamic law and international human rights law, this does not make them irreconcilable. Respect for justice, protection of human life and dignity, are central principles inherent in Islamic law which no differences of opinion can exclude. Protection and enhancement of the dignity of human beings has always been a principle of Islamic legal theory. The objective of human rights is the protection of individuals against the misuse of state authority and the enhancement of human dignity, and in the principles of Islamic teaching, the protection and enhancement of the human being's dignity has always been an important issue.

¹ See B. Weston, "Human Rights" in *New Encyclopaedia Britannica*, 15th ed, Vol. 20, p. 713-714. See also J.S. Watson, *Theory & Reality in the International Protection of Human Rights*, Transnational Publishers, New York, 1999; K. Dwyer, *Arab Voices: The Human Rights Debate in the Middle East*, University of California Press, Berkeley, 1991; J. Donnelly, *Universal Human Rights in Theory and Practice*, 1989; M. Milne, *Human Rights and Human Diversity*, 1986, M. Mutua, "The Ideology of Human Rights", 36 *VJIL*.

² The human rights debate in Islam is a very important issue because Islamic law influences in one way or another the way of life of more than one billion Muslims globally and many member states apply Islamic law either fully or partly as domestic law. See M. A. Baderin, "Dialogue Among Civilisations as a Paradigm for Achieving Universalism in International Human Rights: A Case Study with Islamic Law" 2 *APJHRL*, 2001; M. H. Kamali, "Have We Neglected the Shari'ah Doctrine of Maslahah? 27 *Islamic Studies*, 1988.

According to Islamic law, inherent dignity is a right guaranteed to all human beings. They are considered members of one family, sharing a common bond by virtue of being descended from the same father and mother (Adam and Eve) and serving the one God.³ As such, all people are endowed with inherent dignity and share an equal footing in rights and obligations without any distinctions on the basis of race, colour, sex, religion or language.⁴ This issue is also mentioned in Article 1 of the UDHR.⁵

Although Islam recognizes the equality of men and women as human beings, it does not advocate absolute equality of roles between them in various dimensions including in the family relationship and criminal law. The principle of “equal but not equivalent” creates instances of differentiation in gender roles under the Islamic law that may amount to discrimination by the standards of international human rights law and result in many disadvantages for women in respect of their civil and political rights. For a better understanding of the rights of Muslim women within Islamic law this part is divided into two chapters. The first chapter examines the sources of human rights in Islam and the Islamic perspective on international human rights. The second chapter of this part discusses *qawwāmūn* (the superiority of right of the male over the female) as one of the most important verses in *Qur’an* which is interpreted in different ways to justify different kinds of gender discrimination in the law of Muslim states, including family, social and political rights.

³ *Qur’an*: 39:6.

⁴ See M. T. Jafari, *A Comparative Study of the Two Systems of Universal Human Rights*, Al-Hoda International Publisher, London, 1999, pp. 19-21. See also S. Rahman, *Islamic Law: Its Scope and Equity*, 1970; H. Bielefeldt, “Muslim Voices in the Human Rights Debate” 17 *HRQ*, 1995.

⁵ Article 1 of UDHR states that, “All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.”

Chapter III

Islam and the Question of Women's Human Rights

Before an inquiry can be made into the extent to which there is a human rights tradition in Islam and how it is applied to women, a basic understanding of the sources of the *Sharia* (principles of Islamic law) is essential. This inquiry is necessitated due to the fact that the concept of human rights in the Islamic tradition is firmly grounded in its sources and accompanying juristic techniques, namely the *Qur'an*, *Hadith*, *Ijma*, *Qias*, *Ijtehad* and *Aql*. The issues of whether the *Sharia* is static and immutable, or receptive to concepts such as human rights, may be addressed by analysing these sources and how they are applied within the Islamic legal tradition. The first section of this chapter examines Islamic sources from both schools of thought, Sunni and Shi'a, then enters into the merits of human dignity in order to explore the place of gender in *Sharia* and the law of some Muslim states.

1. Sources of human rights in Islam

1.1 *The Qur'an*

The *Qur'an*,¹ which is the principal source of Islamic law, is believed by Muslims to be the absolute and final word to be revealed from God to Prophet Mohammad. It is therefore immutable and considered to be the first and most important source of legislation.² To Muslims, it is the backbone of the *fiqh*, the ultimate reference, and

¹ See A. Abdullah, *The Holy Qur'an, Text, Translation and Commentary*, Publication of Islamic Education Centre, Saudi Arabia, 1946. See also A. Ahmed, *Al-Qur'an, a Contemporary Translation*, Princeton, New Jersey, 1984.

² See A.R. Doi, *Sharia: The Islamic Law*, Taha Publishers, London, 1984, pp. 21-22. See also Vesey-Fitzgerald, "Nature and Sources of the *Sharia*" in *Law in the Middle East*, edited by M. Khadduri and H.J. Liebesny, The Middle East Institute, Washington DC, 1955, p. 87; J. Rehman, "The *Sharia*, Islamic Family Laws and International Human Rights Law: Examining the Theory and Practice of Polygamy and Talaq", 21 *IJLPF*, 2007, pp. 110-111; A. Hasan, *The Early Development of Islamic*

the whole of *Sharia*.³ Muslims treat the *Qur'an* not only as a source of law, but also as the main director of human life and any human rights regime must conform to those rights and duties, privileges and obligations enjoined upon believers in the *Qur'anic* verses.⁴ Tabatabai argued that the book has no other object than to guide people to happiness.⁵ Using instructive explanations, it teaches the right beliefs, sound character, and right actions that are the foundation of human individual and social happiness.⁶ For Muslims, the *Qur'an*, indeed, is the methodology of ascent to God, but it is not a mere devotional or personal pietistic text.⁷ It has had a practical and political application from the time of its revelation.⁸

In answer to the needs of human society,⁹ the *Qur'an* was revealed through divine inspiration to Prophet Mohammad in a piecemeal fashion over a span of twenty-three years in the two main locations of Mecca and Medina. The main purpose of the Meccan verses of the *Qur'an* is ethical and purports primarily to regulate the relationship of men with God, while the Medinese verses contain some legislative provisions.¹⁰ Out of 6666 verses of the *Qur'an*, which cover both the spiritual and

Jurisprudence, Islamic Research Institute, Pakistan, 1970. For more information see also <http://islam.about.com/od/law/a/sources.htm>

³ *Qur'an* in 16:89 says: "We reveal a Book to you that explains all things."

⁴ See S. Ramadan, *Islamic Law: Its Scope and Equity*, Macmillan, London, 1970, pp. 42-43.

⁵ See S.M.H. Tabatabai, *Basic Teachings of Islam*, 2nd edn., International Publishing Co, Tehran, 2002, p. 98.

⁶ *Ibid.*

⁷ See Tabatabai, *Op. cit.*, p. 94. See also M.B. Al-Sadr, *The Principles of Islamic Jurisprudence: According to Shi'i Law*, trans by A. Husain, Islamic College for Advanced Studies Press, 2004; M. Izzi Dien, *Islamic Law: From Historical Foundations To Contemporary Practice*, Edinburgh University Press, 2004.

⁸ *Ibid.*, Asma Barlas in this regard also argued that, "The *Qur'an's* teachings are concerned with socioeconomic justice and essential egalitarianism and are undoubtedly for action in this world". Barlas' view is cited in "*Believing Women*" in *Islam: Un-reading Patriarchal Interpretation of the Qur'an*, University of Texas Press, Austin, 2002, p. 32.

⁹ The *Qur'an* says, "We have revealed the Book to you so that you might clarify the matters over which they differ." *Qur'an*: 16: 64

¹⁰ Muslims are in agreement that the Medinese part of the *Qur'an* is different from the Meccan in form and content. The historical event connected to this difference is the Prophet's migration from Mecca to Medina which is known in the history of Islam as the *hijra*. The significance of the *hijra* in the history of Islam emanates from the fact that it marked the watershed of two different phases which are reflected by two different and contrasting discourses in the *Qur'an*. The *hijra* was not only a change of

temporal aspects of life, about eighty verses deal with legal topics in the strict sense of the term and approximately four hundred have a legal element, which deal with ritual law.¹¹

The text of the book is divine, but its application has been through human interpretation since the revelation.¹² Therefore interpretation of each *ayah* is very important and verses can be interpreted differently, because like other texts, the *Qur'an* also is open to variant readings. For example the single phrase *bismilah ar-rahman ar-rahim*¹³ has been rendered in six different ways by six exegetes. The Prophet's Companions also are said to have had differences in understanding of some *ayat* and the Prophet is reputed to have known about them.¹⁴ It is difficult to read the *Qur'an* conclusively because the *Qur'an* itself refers to its clear *ayat* and its allegorical *ayat*. It has been argued that if it is difficult to "fix" the *Qur'an*'s meanings in Arabic, it is even harder to fix them in its translations, which is why many Muslim writers generally view the *Qur'an* translated as not truly the *Qur'an*.¹⁵ In this regard, interpretive communities assume that in spite of prior exegetical successes additional discernment is always possible; the activity of discerning the divine discourse is forever incomplete.¹⁶

place followed by dramatic boost in the number and strength of the Muslim community, it was a change in the substance and content of the message itself as contained in the *Qur'an*.

¹¹ See N.J. Coulson, *A History of Islamic Law*, Edinburgh University Press, Edinburgh, 1964, p. 12. See also H. Liebesny, "Stability & Change in Islamic Law," 21 *MEJ*, 1967, pp. 17-18; A.A. An-Naim, *Towards an Islamic Reformation: Civil Liberties, Human Rights, and International Law*, Syracuse University Press, Syracuse, 1990, p. 20; G.M. Badr, "Islamic Law: Its Relations to Other Legal Systems", 26 *AJCL*, 1978, p. 189.

¹² See R. Nettler, "A Modern Islamic Confession of Faith and Conception of Religion: Sayyid Qutb's Introduction to the *Tafsir, Fi Zilal Al-Qur'an*" 21 *BJMES*, 1994, pp.102-105.

¹³ It occurs at the beginning of every Chapter *Surah* except one.

¹⁴ See S.M.H. Tabatabai, *Op. cit.*, p. 113. See also F. Rahman, *Islam*, 2nd edn., University of Chicago Press, London, 1979, p. 69.

¹⁵ *Ibid.*

¹⁶ See J.L. Esposito, *Women in Muslim Family Law*, Syracuse University Press, Syracuse, 1982, pp. 106-108.

The other important point in the *Qur'an* is the principle of abrogation or *naskh* (a replacement of an earlier rule or commandment by a later enactment).¹⁷ Therefore, there are evidently entirely contradictory verses in the *Qur'an* - the content of some of the later verses appears to contradict that of the earlier ones.¹⁸ The important question that may be raised here is, what is the legal validity of every verse if the later *Qur'anic* verse abrogates an earlier one? Has every verse of the *Qur'an* absolute authority and validity? As I indicated earlier, the *Qur'an* was gradually revealed over twenty-three years of the Prophet's mission, in answer to the needs of human society. Therefore a few verses are repealed by others. According to most Islamic jurists, the injunction of the *Qur'anic* verse may have been repealed, but its words would still be regarded as part of the *Qur'an*.¹⁹ Indeed, *naskh* does not eliminate the text of the verse but rather stops the rule contained in that text.

1.2. *Sunna*

Sunna in Arabic means "way" or "custom". *Sunna* is defined by Sunni Muslims as the deeds, sayings and approvals of the Prophet Mohammad,²⁰ while in the belief of Shi'a Muslims, *Sunna* means the deeds, sayings and approvals of Prophet Mohammad and his descendants (the twelve Imams) who were chosen by God to

¹⁷ It is notable that according to Abu Zahra it was al-Shafi'i who first laid down the foundations of the theory of *naskh* (abrogation).

¹⁸ Among the best known examples of abrogation is *qibla* (the direction towards which Muslims position themselves when they come to pray). The *qibla* used to be towards Bayt al-Maqdis (Jerusalem) but sixteen months later it was changed to be towards Mecca.

¹⁹ See A. Rahim, *Muhammadan Jurisprudence*, Mansoor Book House, Lahore, 1995, p. 94. See also M.H. Kamali, *Principles of Islamic Jurisprudence*, Islamic Texts Society, Cambridge, 1991.

²⁰ It has been argued that just as the Common law is to be culled from the decisions of the judges recorded in the yearbooks and law reports, so, the Common Law of Islam, the *Sunna*, is to be culled from the traditions, which are for this purpose the Law Reports of early Islam. See S.G. Vesey, Fitzgerald, *Op. cit.*, pp. 87-89. See also F.M. Denny, *An Introduction to Islam*, Macmillan Publishing Company, New York, 1994; J. Rehman, *Islamic State Practices, International Laws and the Threat from Terrorism: A Critique of the 'Clash of Civilizations' in the New World Order*, Hart Publishing, Oxford, 2005.

succeed the Prophet and to lead mankind in every aspect of life.²¹ To both schools of thought, *Sunna* as a second source of Islamic law consists of the Prophet's lifetime sayings, deeds and tacit approvals on different issues, both spiritual and temporal.²² The *Sunna* developed from the need for elucidation, by the Prophet, of some *Qur'anic* verses, supply of details to some general provisions of the *Qur'an* and instruction on some other aspects of life not expressly covered by the *Qur'anic* texts.²³ It has been argued that the role of *Sunna* as a source of law is supported in the *Qur'an*.²⁴

The traditions of the Prophet, which record his actions, saying, deeds and tacit approvals on different issues are called a *hadith*.²⁵ In other words, while the *ahadith* indicate the mere speeches reported from the prophet, the *Sunna* denotes these same speeches as translated into a normative behaviour.²⁶ Although the second source of Islamic law has elements of divine inspiration in Muslim belief, not every report is authentic. In regard to women's place and situation, it is true to say that there are some *ahadith* which are contrary to the general principles of the *Qur'an* or to other reliable *ahadith*. Some argue that the emergence of fabricated statements and distorted traditions attributed to the Prophet occurred largely in the reign of

²¹ See R.W.J. Austin, "The Prophet of Islam" in *The Challenge of Islam*, edited by A. Gauhar, Islamic Council of Europe, London, 1978, pp. 68-81. The position of leadership in religious and civil matters in the Islamic society is known as the Imamate, and its holder is known as the Imam. The Shi'a refer to a verse of the Qur'an, "God wishes to cleanse the people of the house *ahlol bayt* of impurities" and also to a precept of the Prophet to the effect, "I am leaving among you two sheet anchors, if you hold by them, you will not go wrong, the Book and my descendants." It is the belief of Shi'a Muslims that God designated the twelve Imams to uphold the culture and laws of the religion and to guide people in the way of truth. See S.M.H. Tabatabai, *Op. cit.*, p. 118.

²² See A.J. Wesinck, "The Importance of Tradition for the Study of Islam", 11 *The Moslem World*, p. 239-240. See also S.M.H. Tabatabai, *Ibid.*, pp. 111-112; W.W. Montgomery, *Mohammad at Medina*, Oxford University Press, Oxford, 1953; M.H. Haykal, *The Life of Muhammad*, trans., by I. Al-Faruqi, American Trust Publication, Indianapolis, 1976; C.G. Weeramantry, *Islamic Jurisprudence: An International Perspective*, Macmillan Press, London, 1988.

²³ See W.W. Montgomery, *Mohammad at Mecca*, Oxford University, Oxford, 1956, pp. 44-48.

²⁴ See *Qur'an*: 3:31 and 33:21.

²⁵ It has been argued that these records began to be compiled over a century after his death and were not completed until three hundred or more years later. About six works are taken as canonical by various Muslim sects and, as a corpus, they are a part of the official history of Islam and of the literature that established the normative practice of Islamic society.

²⁶ See J. Scacht, *An Introduction to Islamic Law*, Oxford University Press, Oxford, 1964, pp. 17-18.

Mu'awiyah in the middle of the first century of Islam.²⁷ Therefore, *ahadith* are classified according to their status, in relation to their texts, *matn*, and their chain of transmitters, *isnad*. It has been argued that as a result of desire to furnish certain rulings with the authority of the Prophet, many *ahadith* were falsely ascribed to him. Therefore, scholars of *ahadith* have studied the *Sunna* in terms of their context, *matn*,²⁸ as well as from their transmitters, *isnad*, in order to establish what is true and what is false from these *ahadith*.²⁹ Nowadays, *ahadith* are classified according to the quality of the *isnad* into three groups:

- *Sahih* or reliable, due to the scrupulousness of their transmitters and the historical authenticity of their content;
- *Hassan* or less reliable, due to the “forgetfulness” of some of the narrators;
- *Zaif* or weak, because they do not fulfil either of the criteria of integrity of the narrators or authenticity of the content.³⁰

Ahadith are also classified based on the number of *isnad*, into two groups, *mutawatir* and *ahad*. *Mutawatir* refers to those *ahadith* that have so many *isnad* that fabrication is considered inconceivable, hence their postulated authenticity. It is notable that such

²⁷ See M.T. Jafari, *A Comparative Study of the Two Systems of Universal Human Rights*, Al-Hoda International Publisher, London, 1999, p. 94.

²⁸ *Ahadith* are divided into three categories on the basis of their *matn*: those that record the Prophet's *Sunna 'amaliya*, or praxis; those that record his *Sunna qawliyah*, or sayings on ethical issues; and those that record his *Sunna al-taqiririah*, or tacit approval of deeds he knew about. See A. Barlas, *Op. cit.* pp. 46-50.

²⁹ *Ibid.* See also J. Schacht “A Revaluation of Islamic Traditions”, *JRAS*, 1949, pp. 146-148. The methodology employed by these scholars was to examine the chain of people who transmitted the text or the behaviour of the prophet. The transmitted prophetic texts, acts, or acquiescence of certain deeds or rulings of others in his presence are called the *matn*, text of the *hadith*. The chain of the transmitters is called the *isnad*, which means those over whose lips the *hadith* had passed.

³⁰ See A. Barlas, *Op. cit.*, p. 44.

ahadith are few and there are hardly any on legal issues. *Ahad*, are those *ahadith* which have only one or a few *isnad*.³¹

Apart from the *Qur'an* and *Sunna* as primary sources of Islamic law, there are other juristic techniques such as *ijma*, *qiyas*, and *aql* which are accepted as its secondary sources by both schools of thought.

1.3. *Ijma*

Ijma is an Arabic word which means juristic consensus.³² It refers ideally to the consensus of the *ummah*, the community of Muslims, or followers of Islam.³³ In other words, *ijma* or consensus of opinion means agreement among the Muslim jurists in a particular age on a question of law.³⁴ Its authority as a source of laws rests on certain *Qur'anic* verses.³⁵ A famous *hadith* from Prophet Mohammad, cited as support for the validity of *ijma*, states, "My community will never agree upon an error."³⁶ *Ijma* in the classical theory of *fiqh* indicates the agreement of the qualified jurists on one or a number of issues in a given generation.³⁷ It also describes the universal acceptance and the collective expression of all Muslims of the fundamental tenets of their religion.

³¹ *Ibid.*

³² See B. Lewis *et al*, *The Encyclopaedia of Islam*, E.J. Brill, London, 1960.

³³ *Ibid.*

³⁴ See Rahim's, *Op. cit.*, p. 97. See also J. Schacht, *The Origins of Muhammadan Jurisprudence*, Oxford University Press, Oxford, 1950; G.F. Hourani, "The Basis of Authority of Consensus in Sunnite Islam", 21 *Studia Islamica*, 1964, pp. 13-60; Z. E. Shaban, *Fundamentals of Islamic Jurisprudence*, 1979; B.K. Freamon, "Slavery, Freedom, and the Doctrine of Consensus in Islamic Jurisprudence", 11 *HHRJ*, 1998.

³⁵ In this regard the following *Qur'anic* verses are cited:

"Today we have completed your religion."

"Obey God and obey the Prophet and those amongst you who have authority."

"If yourself do not know, then question those who do".

³⁶ See *Uddi's Commentary*, Vol. II, p. 34.

³⁷ See Rahim's, *Op. cit.*, pp. 97-98. See also A.A. Qadri, *Islamic Jurisprudence in the Modern World*, Taj Company, New Delhi, 1986, p. 199.

The *Qur'an*, *Sunna* and *ijma* are endorsed by both schools of thought, Sunni and Shi'a, as Islamic sources. Indeed, they share *Qur'anic* interpretation, the *Sunna*, and *ijma* as sources of Islamic law.³⁸ However, the two sects disagree in regard to the fourth source; the former school uses *qiyas* (legal analogy) as the fourth source, and the latter uses *aql* (intellect). The fourth source of laws in both schools of thought is subordinate and subsidiary to the *Qur'an*, *Sunna*, and *ijma*.

1.4 Qiyas

Islamic jurisprudence in the Sunni school accepts *qiyas* as analogical reasoning from a known injunction, *nass*, to a new injunction.³⁹ It is defined as the process of deduction by which the law of a text is applied to cases, which, though not covered by the language, are governed by the reason of the text. To the Hanafi who distinguish themselves as the chief advocates of *qiyas*, it is an extension of law from the original text to which the process is applied to a particular case by means of a common *illa* or effective cause, which cannot be ascertained merely by interpretation of the language of the text.⁴⁰ To the Malikis, *qiyas* is the accord of a deduction with the original text in respect of the *illa* or effective cause of its law.⁴¹

Jurists apply this technique to reach a conclusion on a new problem by using a given principle embodied in a similar precedent. The common feature underlying the

³⁸ It should be noted that the two sects differ significantly with regard to the manner in which they use these sources.

³⁹ See J.R. Wegner, "Islamic and Talmudic Jurisprudence: The Four Roots of Islamic Law and Their Counterparts" in *Islamic Law and Legal Theory*, edited by I. Edge, Dartmouth, Aldershot, 1996, pp. 54-55. See also J. Schacht, *Op. cit.*, pp. 116-118; D.S. Margoliouth, *Early Development of Muhammedanism*, New York, 1914; J. Makhdisi, "Legal Logic and Equity in Islamic Law" 33 *AJCL*, 1985, pp. 63-92; M.H. Kamali, *Op. cit.*

⁴⁰ See M. Khadduri, "Nature and Sources of Islamic Law", in *Islamic Law and Legal Theory*, edited by I. Edge, Dartmouth, Aldershot, 1996, p. 96. See also; A. Al-Baghdadi, *Majma al-Dimanah fi Mahdhab al-Imam al-a'zam Abi Hanafah*, Al-Azhar, Cairo, 1308; W. B. Halaq, "Non-Analogical Argument in Sunni Judicial *Qias*" in *Islamic Law and Legal Theory*, edited by I. Edge, Dartmouth, Aldershot, 1996, pp. 206-225.

⁴¹ See A.R. Doi, *Op. cit.* pp. 70-73. See also A. Al-Dardir, *Al-Sharh al-Saghir ala Aqrab al-Masalik li Madhab al-Imam Malik*, Cairo, ND.

similarities between the two cases is called *illa*. Wherever a direct, clear and unequivocal ruling on a problem is not found in the *Qur'an* and the *Sunna*, the jurist takes a certain verse in the *Qur'an* or a general principle derived from a specific case in the *Sunna* and establishes his ruling concerning that problem on their authority.⁴² In his justification the jurist shows the points of similarities between the precedent and the new case.

1.5. Aql intellect or human reason

Human reason is the last source in the Shi'a school of thought.⁴³ On its definition, they have stated that a reasonable decree is that which appears to be correct and justified and its justification can be explored with an insight into *Sharia* stipulations and know-how.⁴⁴ In other words, reasonable understanding in the light of religious decrees and stipulations can form a true background for a suitable and jurisprudential new religious decree. A well known and famous rule on this very subject states that whatever appears to be reasonable and stands to reason should be considered a religious decree issued by the Islamic jurists, and so similarly it should be noted that whatever is dictated by the Islamic jurists must be considered reasonable, wise and possessing of ability to stand to reason.⁴⁵ On the interpretation of this ruling it is stated that whenever extraction of *Sharia* decrees from the existing sources is not possible, one can refer to his / her own access to the sea of human reason and reasonable way of thinking, and do whatever her / his human reason and understanding dictates to him/her, for whatever comes from a reasonable and wise

⁴² *Ibid.*

⁴³ See A. Mohammadi, *Mabani Estenbate Huquq Islami ya Usul Fiqh*, Tehran University Press, Tehran, 1991, pp. 260-261. See also N. Calder, *Studies in Early Muslim Jurisprudence*, Clarendon Press, Oxford, 1993.

⁴⁴ *Ibid.*

⁴⁵ See A. Mohazab, *Usul Fiqh*, Vol.1, Tehran University Press, Tehran, 1992, p. 157. See also J. Sobhani, *Doctrines of Shi'i Islam: A Compendium of Imami Beliefs and Practices*, trans by R.S. Kazemi, I.B. Tauris & Co Ltd., London, 2001.

mind is and can be considered a *Sharia* religious decree.⁴⁶ If an action stands to reason, religion too believes it to be necessary and unavoidable from a religious standpoint, and if reason says that an action or inaction is inappropriate and dangerous, religion (religious jurisprudence) will accept it as such too.⁴⁷

Decisions for issuing religious decrees follow this order to things and are divided into two categories: the first category is indicative of pertaining to reason and the second is reasonable prerequisites.⁴⁸ “Pertaining to reason” refers to the use of human reason without a reference to religious authorities; it is independent decision making, with no dependence on religious sources whatever; e.g. committing crimes against others is condemned by all.⁴⁹ “Prerequisites” are those conditions and instructions which indicate the requirement of other conditions and necessities for their realisation, with which human reason, too, agrees, as there appears to be no other solution.⁵⁰

Some Shi’a jurists also distinguish real and true decrees from those which appear to be religious decrees, by means of their goodness and benefits to mankind or their wickedness and deficiency. They argue that a real and true religious decree is one which stands to reason and can be understood by a reasonable mind as beneficial and good for the improvement of society and the lot of the flock or mass of people, e.g. decrees that prevent oppression and tyrannical and despotic acts.⁵¹ Lacking in understanding of the real and true *Sharia* jurisprudence, in this situation, relying on human reason, the act is legitimatised, e.g. smoking cigarettes.⁵²

⁴⁶ *Ibid.*

⁴⁷ *Ibid.*

⁴⁸ See F. Meqdad, *Sharh Bab Hadishr*, Khonsari, Qum, 1989, pp. 6-10.

⁴⁹ *Ibid.*

⁵⁰ *Ibid.*

⁵¹ *Ibid.*

⁵² *Ibid.*

2. Women's human rights in Islam

Equality and non-discrimination are fundamental principles of human rights. Usually both principles are taken as equivalent to each other. Equality and non-discrimination indicate a positive and negative means of ensuring an important component of justice. They have been described as the most fundamental of the rights of man.⁵³ It also has been argued that inequality of rights was the root cause of all the disturbance, insurrections, colonization, slavery and civil wars that ever happened.⁵⁴ The principle of equality in international human rights law is based on the recognition of human dignity.⁵⁵ The principle of non discrimination is well expressed in Article 1 of the UDHR:

All human beings are born free and equal in dignity and to be enjoyed by all human beings in full equality.” and “without distinction of any kind such as race, colour, sex, language, ...

Article 2(1),⁵⁶ 3 and 26 of the ICCPR also emphasises equality and prohibits non-discrimination under the Covenant. Article 3 of the Covenant emphasises the prohibition of discrimination on the ground of sex by guaranteeing equality of rights between men and women. The HRC restated Article 3 with an “important impact ...

⁵³ The principle of equality and non-discrimination was emphasised by ICJ in *the South West Africa Case*. The court described the principle as the most important of the rights of man and “starting point of all other liberties”. See Justice Tanaka in *the South West Africa Case* (1966), ICJ Rep, p. 304.

⁵⁴ See W. McKean, *Equality and Discrimination under International Law*, Clarendon Press, Oxford, 1983, p. 2. See also A.F. Bayefsky, “The Principle of Equality or Non-Discrimination in International Law”, 11 *HRL*, 1990, p. 1.

⁵⁵ See H. Bielefeldt, “Muslim Voice in the Human Rights Debate”, 17 *HRQ*, 1995, pp. 588-589.

⁵⁶ Article 2(1) of the ICCPR stated that: “Each state party to the present Covenant undertakes to respect and to 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. Article 3 also stated that: “The states parties to the present covenant undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant.” In addition, Article 26 states that: “All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”

on the enjoyment by women of the human rights protected under the Covenant.”⁵⁷ Under Articles 2(1) and 26 the grounds of discrimination and equal rights of men and women are general and identical, namely “race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”

Apart from the prohibition of discrimination on the basis of sex in almost all human rights instruments, the Women’s Convention specifically advocates equality for women and prohibits all forms of discrimination against them.⁵⁸ The Convention provides the basis for realizing equality between women and men in public and private sphere.⁵⁹ States parties to the convention also agree to take all appropriate measures, including legislation and temporary special measures, so that women can enjoy all their human rights and fundamental freedoms.⁶⁰ The Convention is the only human rights treaty which affirms the reproductive rights of women and targets culture and tradition as influential forces shaping gender roles and family relations.

Article 6 of the OIC⁶¹ Cairo Declaration on human rights in the light of Islamic teaching also stated that:

(a) Women is equal to man in human dignity and has rights to enjoy as well as duties to perform; she has her own civil entity and financial independence, and the right to retain her name and lineage.

(b) The husband is responsible for the support and welfare of the family.

However, there are differences between the OIC Declaration as an Islamic approach to the question and other international instruments in regard to recognition of equality of men and women. The former does not advocate absolute equality between men

⁵⁷ General Comment 28 para.1.

⁵⁸ See comprehensive discussion on Women’s Convention and its articles at Chapter 2.

⁵⁹ See R.J. Cook, “Women”, in *The United Nations And International Law*, edited by C.C. Joyne, Cambridge University Press, Cambridge, 1997.

⁶⁰ See R.J. Cook, “State Accountability Under the Convention on the Elimination of All Forms of Discrimination Against Women” in *Human Rights of Women: National and International Perspective*, edited by R.J. Cook, University of Pennsylvania Press, Philadelphia, 1994.

⁶¹ For more information about the Organization of the Islamic Conference see OIC website at <http://www.oic-oci.org/> Available in February 2006.

and women while the latter advocate equality of men and women in all aspects.⁶² Indeed the OIC Declaration recognizes the equality of men and women in restricted sense, when it states that: “Women is equal to man in human dignity and has rights to enjoy as well as duties to perform ... The husband is responsible for the support and welfare of the family.” The concept of human dignity under the OIC Declaration could not recognise and guarantee equality of men and women in all dimensions.⁶³ It seems to me that this is a narrow interpretation of human dignity, which contradicts, the principle of Islamic teaching, that no one can claim to be superior to another except based on *taqwa* or piety before God. In Islam, inherent dignity or unmerited honour is bestowed upon all human beings by God without any distinction based on sex, colour or religion.⁶⁴ The doctrine is referred to in many verses of the *Qur'an* and reliable traditions. In this regard the *Qur'an* says:

We have honoured the children of Adam and carried them on land and sea, and provided them with good things, and preferred them greatly over many of those we carried.⁶⁵

This right is guaranteed to all human beings, who are considered members of one family, sharing common bond by virtue of having descended from the same father and

⁶² See H. Mihrpour, “Criticism and Study of the Cairo Declaration of Human Rights in Islam”, in *Islamic View on Human Rights*, edited by H. Salimi, Al-Hoda International Publisher, London, 2001, pp. 125-143.

⁶³ Mayer in this regard argues that the guarantee of equality ‘in human dignity’ under the OIC Declaration falls short of the guarantee of equality to the enjoyment of all civil and political rights under the ICCPR. See A.E. Mayer, *Islam and Human Rights Tradition and Politics*, Westview Press, London, 1999, p. 120. See also M. Monshipouri, “The Muslim World Half A Century after the Universal Declaration of Human Rights: Progress and Obstacles” 16 *NQHR*, 1998, pp. 289-293; A.E. Mayer, “Universal Versus Islamic Human Rights: A Clash of Cultures or a Clash with a Construct?”, 15 *Mich JIL*, 1994, p. 330.

⁶⁴ See M.J. Hujjati Kirmani, “Survey of the Similarities and Differences of Human Rights in Islam and the West”, in *Islamic View on Human Rights*, edited by H. Salimi, Al-Hoda International Publisher, London, 2001. p. 102; J. Warrensburg, “Human Rights, Human Dignity in Islam”, 27 *Temenos*, Academic Bookstore, Finland, 1991, pp. 155-160. S.M. Haider, *Islamic Concept of Human Rights*, The Book House, Lahore, 1978.

⁶⁵ *Qur'an*: 17:70.

mother.⁶⁶ Therefore, all people are endowed with inherent dignity and share on an equal footing rights and obligations without any distinctions on the basis of race, colour, sex, religion or language.⁶⁷ Jafari argues that Islam as a religion which embodies spiritual beliefs and rules considers that all human beings equally are God's subjects.⁶⁸ In regard to the above-cited verse he also argues that the verse lays down the principle that God, in his wisdom, has originally bestowed honour on human beings generally without any discrimination and made them superior over all other creatures.⁶⁹ Since God is the source of this special status of human beings and has created a special relationship with them, it becomes incumbent on human beings to treat each other with honour and respect.⁷⁰ This firm and indisputable fact, i.e., that the honour bestowed on human beings comes from the highest source, makes the relationship established between the source and the recipients very valuable.⁷¹

According to the *Qur'anic* verse: "And breathed my spirit in him."⁷² The human dignity and the principle of complete equality of all people has been espoused by reliable *hadith*. The Prophet Mohammad said, "All people are equal, as equal the teeth of a comb ..." In regard to human dignity and their rights Imam Ali, also, in a

⁶⁶ See M.T. Jafari, *Op. cit.*, pp. 78-79. See also N.A. Shah, *Women, the Koran and International Human Rights Law: The Experience of Pakistan*, Martinus Nijhoff Publishers, Leiden, 2006, pp. 46-47; J. I. Smith and Y. Y. Haddad, "Eve: Islamic Image of Women", in *Women and Islam*, edited by A. Al-Hibri, 135 *WSIF*, 1982; F. Rahman, "Status of Women in the Quran" in *Women and Revolution in Iran*, edited by G. Nashat, Westview Press, Boulder Co, 1983.

⁶⁷ It has been argued that there is an exception in the case of one who is stripped of this inherent dignity, because of the commission of a crime or any corrupt or evil deed. See M.T. Jafari. *Ibid.* See also A. Javadi Amuli, "Sources of Human Rights in Islam", in *Islamic View on Human Rights*, edited by H. Salimi, Al-Hoda International Publisher, London, 2001, pp. 1-10; R. Hasan, "An Islamic Perspective", in *Women Religion and Sexuality, Studies in the Impact of Religious Teachings on Women*, edited by J. Becker, WLC Publications, Geneva, 1990.

⁶⁸ See M.T. Jafari, *Ibid.*, pp.19-21.

⁶⁹ *Ibid.*

⁷⁰ See M.T Jafari, *Ibid.* See also H. Nasr, "The Concept and Reality of Freedom in Islam and Islamic Civilisation", in *The Philosophy of Human Rights International Perspectives*, edited by A.S. Rosenbaum, Greenwood Press, West Point, 1980; H. Bielefeldt, "Muslim Voices in the Human Rights Debate" 17 *HRQ*, 1995.

⁷¹ *Ibid.*

⁷² *Qur'an*: 15:29.

clear and straightforward admonition to Malik Ashtar, who was appointed as a governor of Egypt, well said:

Fill up your heart with love for you subjects: Do not be like a ferocious beast that enjoys devouring them. Know that people are of two categories: they are either your brothers in faith or your peers in creation.⁷³

Based on inherent human dignity the equality between the sexes in the *Qur'an* is recognized in regard to ethical issues. This equality comes across most prominently in issues such as the creation of men and women, moral and spiritual obligation, and reward and punishment in the hereafter.⁷⁴ According to Islam it is clear that God created men and women from one fundamental substance. The *Qur'an* says, "He created you from one being, then from that (being) He made its mate."⁷⁵

In the *Qur'an*, Adam and Eve are held jointly responsible for the transgression and consequent expulsion from paradise. Woman according to the *Qur'an* is not blamed for Adam's first mistake. Both were jointly wrong in their disobedience to God, both repented, and both were forgiven.⁷⁶ In regard to religious issues, men and women have equal standing. The *Qur'an* provides clear evidence that women are completely

⁷³ Cited in *Nahj al-Balagha*. The *Nahj al-Balagha* (Peak of Eloquence) is the most famous collection of advice, speeches (sermons) and letters attributed to Imam Ali the first of the Imams by *Shi'a*. *Nahj* means open way, road, course, method or manner, *Balagha* means eloquence, art of good style and communication, rhetoric etc. See English version of *Nahj al-Balagha* at www.al-islam.org/nahj/

⁷⁴ See N. El-Sadawi, "Women and Islam", in *Women and Islam*, edited by A. Al-Hibri, Pergamon Press, Oxford, 1982, p. 66-68.

⁷⁵ *Qur'an*: 39:6

⁷⁶ In this regard the *Qur'an* says: He (God) said (to *Iblis*): Go forth from hence, degraded, banished. As for such of them as follow thee, surely I will fill hell with all of you. And (unto man): O Adam! Dwell thou and thy wife in the Garden and eat from whence ye will, but come not nigh this tree lest ye become wrongdoers. Then Satan whispered to them that he might manifest unto them that which was hidden from them of their shame, and he said: You' Lord forbade you from this tree only lest ye should become angels or become immoral. And he swore to them (saying): I am a sincere adviser unto you. Thus did he lead them on with guile. And when they tasted of the tree, their shame was manifest to them and they began to hide (by heaping) on themselves some of the leaves of the Garden. And their Lord called them (saying): Did I not forbid you from that tree and tell you: Lo! Satan is an open enemy to you? They said: Our lord! We have wronged ourselves. If thou forgive us not and have not mercy on us, surely we are of the lost! He said: Go down (from hence), one of you a foe to the other. He said: there shall ye live, and there shall ye die, and hence shall ye be brought forth. O Children of Adam! We have revealed unto you raiment to conceal your shame, and splendid vesture, but the raiment of restraint from evil, that is best. This is of the revelation of Allah, that they may remember. *Qur'an* 7:18-26.

equated with men in the sight of God in terms of their rights and responsibilities.⁷⁷

The *Qur'an* says: "Every soul will be (held) in pledge for its deeds" and also says:

...So their Lord accepted their prayers, (saying): I will not suffer to be lost the work of any of you whether male or female. You proceed one from another ...⁷⁸

The *Qur'an*, also regarding the equality of men and women in moral and spiritual obligations says that:

For Muslim men and Muslim women, for believing women, for devout men and devout women, for true men and true women, for men and women who are patient and constant, for men and women who humble themselves, for men and women who give to charity, for men and women who guard their chastity, and for men and women who engage in God's praise, for them has God forgiveness and great reward.⁷⁹

On the question of equality of men and women in punishment, reward and the eligibility for and entry into Paradise, the *Qur'an* also says:

That was a nation who has passed away. They shall receive the reward of what they earned and you of what you earn. And you will not be asked of what they used to do.⁸⁰

So their Lord accepted of them (their supplication and answered them), Never will I allow to be lost the work of any of you, be he male or female.⁸¹

It is notable that according to Islamic teaching, apart from inherent dignity there is another honour which is considered as value dignity, which is acquired by a person who applies his or her innate aptitudes and talents in accomplishing that which is good and in pursuing the path of truth and justice (or the sensible life), maturity and

⁷⁷ *Qur'an* 74:38 And also says that: "Today each soul is rewarded for what it earned, without unfairness. Surely, God is swift at reckoning." *Qur'an* 40:17.

⁷⁸ *Qur'an*: 3:195. Also says: "Whoever works righteousness, whether male or female, while he (or she) is a true believer (of Islamic Monotheism) verily, to him We will give a good life (in this world with respect, contentment and lawful provision), and We shall pay them certainly a reward in proportion to the best of what they used to do" (i.e. Paradise in the Hereafter). *Qur'an*: 16:97. See also *Qur'an*: 4:124.

⁷⁹ *Qur'an*: 33:35.

⁸⁰ *Qur'an*: 2:134 and 2:141.

⁸¹ *Qur'an*: 3:195.

eventually perfection.⁸² The person who strives for value honour chooses to do so knowing his or her end reward is a life of perfection. More important than the universally recognized belief in man's inherent dignity is the loftier concept of value honour that uses piety as its criterion.⁸³ Some Islamic jurists in regard to value dignity refer to the *Qur'anic* verse which says:

O mankind, we have created you male and female, and appointed you races and tribes, that you may know one another. Surely the noblest among you in the sight of God is the most God fearing of you. God is All-knowing, All-Aware.⁸⁴

They argue that since human beings, endowed with special privileges, talents and aptitudes, have often been guilty of deviating from divine and human precepts and have fallen into unjust, ignoble and morally unacceptable behaviour, it becomes clear why God granted for mankind only the capacity to be accorded honour and respect on the basis of reciprocity, i.e. people are endowed with all the necessary characteristics that will enable them to accord the same honour and dignity to others.⁸⁵ In other words, man's right to dignity is not an absolute that will allow him to claim the right in all cases.⁸⁶ If he uses immoral or illegal means to obtain satisfaction of his desires seeks power at the expense of his subjects, is guilty of using his talents and aptitudes for ill-objectives or to pursue the highest forms of self-centeredness, he will evidently lose his right to honour, dignity and respect.⁸⁷ Further, he will constitute a threat to

⁸² It has been argued that it is the inherent dignity, plus the special qualities, talents and aptitudes bestowed upon human beings, that will enable a person to acquire value and honour if he or she sincerely endeavours to walk on the path of the sensible life. See M.A. Saeed, "Islamic Concept of Human Rights" in *Islamic Concept of Human Rights*, edited by S.M. Haider, The Book House, Lahore, 1978.

⁸³ See M.T. Jafari, *Op. cit.*, p. 261.

⁸⁴ *Qur'an*: 49:13.

⁸⁵ See M.T. Jafari, *Op. cit.*, pp. 266-268. See also Z. Qurbani, *Islam and Human Rights*, Daftar-I Nashr Farhang Islami, Tehran, 1995; M.A. Khan, "Islamic Concept of Human Rights," in *Islamic Concept of Human Rights*, edited by S.M. Haider, The Book House, Lahore, 1978; S. Rahman, *Islamic Law: Its Scope and Equity*, 1970.

⁸⁶ *Ibid.* See also S.H. Mausumi, "Islamic Concept of Human Rights", in *Islamic Concept of Human Rights*, edited by S.M. Haider, The Book House, Lahore, 1978.

⁸⁷ *Ibid.*

others and should be punished as a criminal in order to protect others in the enjoyment of their rights to life, dignity and honour.⁸⁸

It is clear that there is harmony between the Islamic approach and Article 1 of the UDHR regarding human inherent dignity.⁸⁹ However, contrary to Islamic teaching, UDHR did not pay attention to value dignity, which is objected to by some Islamic scholars such as Jafari⁹⁰ and Taskhri.⁹¹ They argued that all people enjoy inherent dignity, but some groups of people, because of their acceptance or awareness of the governing principles and laws of life, may be considered more advanced and enjoy a higher degree of honour.⁹² In response to this argument it is true to say that UDHR did not consider value dignity, because the definition of value in different cultures and religions might be different. Islam and UDHR both recognized that all human beings are born equal in inherent dignity, without any distinction. Islamic teaching also considers value dignity, but the concept of value dignity in Islam applies only before God on judgement day, in relation to which the *Qur'an* in a straightforward manner says, "The dearest of you in Allah's sight is the most pious of you."⁹³

Again, in Islamic teachings, there is no advantage or superiority for a human being based on race, sex, language, etc, because the origin of human creation is the same.

⁸⁸ *Ibid.*

⁸⁹ Article 1 of the UDHR states that: "All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood." In regard to human dignity Howard argued that: "While all societies have underlying concepts of dignity and justice, few have concepts of rights ... In most societies, dignity does not imply human rights." See R.E. Howard, "Dignity, Community, and Human Rights" in *Human Rights Cross-Cultural Perspectives: A Quest for Consensus*, edited by A.A. An-Naim, University of Pennsylvania Press, Philadelphia, 1991, p. 91.

⁹⁰ See M.T. Jafari, *Op. cit.*, p. 66. See also M.I. Malik, "The Concept of Human Rights in Islamic Jurisprudence", 3 *HRQ*, 1981.

⁹¹ See M.A. Taskhiri, "The Development of the Concept of Human Rights", in *Islamic Views on Human Rights*, edited by H. Salimi, Al-Hoda International Publisher, London, 2001, pp. 61-66.

⁹² See M.T. Jafari, *Op. cit.*, p. 67.

⁹³ *Qur'an*: 49:13.

In Islam, inherent dignity is a right guaranteed to all human beings. The *Qur'an*, regarding the male and female says:

Do not recognize them by their being male or female. Recognize them by their human face. The truth of the human being is their spirit rather than their body.⁹⁴

Therefore, there is no superiority based on gender and the body is just a vessel, whether it is male or female.⁹⁵ The basic tone and main goal of Islam is reformative, enjoining upon people equity and justice for all. The ethical voice of the *Qur'an* is said to be egalitarian and non-discriminatory. By virtue of a special relationship with God, the inherent dignity of human beings applies equally to all human beings and makes them worthy of the respect of angels (prostration).⁹⁶ There is no superiority between the sexes and the most loved by God are those who are most useful to the rest of his creation.⁹⁷

Nonetheless, there are a few verses in the *Qur'an*, including those related to women's testimony, which is worth half that of a man in financial transactions;⁹⁸ inheritance rights of women, where women are entitled to half the share of a man in a comparable situation;⁹⁹ polygamy¹⁰⁰ and the superior right of the male to terminate marriage,¹⁰¹ which have created scope for discriminatory laws in the current laws and regulations of Muslim states. This creates instances of differentiation in gender rules under the

⁹⁴ *Qur'an*: 2:292.

⁹⁵ According to *Qur'anic* verse: "The dearest of you in Allah's sight is the most pious of you." *Qur'an*: 49:13.

⁹⁶ Jafari argued that the munificent verse cited above concluded that in addition to the right to life and obligation to respect, there exists the right to inherent dignity which, like the right to life, may not be taken away from a person and creates the obligation on others to respect him for as long as he does not forfeit the right through the commission of crime. See Jafari., *Op. cit.*, p. 263.

⁹⁷ In this regard Prophet Mohammad said that: "Creatures are all Allah's household and the most useful of them are the dearest to him."

⁹⁸ *Qur'an*: 2:282.

⁹⁹ *Qur'an*: 2:180 and 181; 4:7; 4:11 and 12.

¹⁰⁰ *Qur'an*: 4:3.

¹⁰¹ *Qur'an*: 4:129 and 130.

Sharia that may amount to discrimination by the standards of international human rights law. Sardar Ali rightly pointed out:

But these verses are very few, not exceeding 6 out of a total of 6666 that make up the text of the *Qur'an*. Yet it is difficult to understand why and how these 6 verses outweigh the remaining 6660, and the position of women in Islam appears to be determined solely on rules derived from a literal and restrictive reading of these few verses.¹⁰²

It is submitted that those few verses, indeed, have been used to validate the creation and reinforcement of discrimination based on gender. This is why the majority of Muslim states which do not desire to take any serious positive step in women's rights were until recently reluctant to ratify the women's Convention and perceived it as a secularisation of women's rights. They argued that the status of women in Islamic societies is strictly regulated by Islamic law and cannot be included in a secular human rights regime.¹⁰³

The present human rights situation in the majority of Muslim states and the fact that women in most parts of the Muslim world still suffer different forms of gender discrimination, has given rise to different arguments on Islam and international human rights in general and women's rights in particular.¹⁰⁴ On the one hand, with reference to the present gender-discriminatory law, the principle of criminal punishments and the current political situation in most of the Muslim countries, there is a view that

¹⁰² See S.S. Ali, *Op. cit.*, p. 43.

¹⁰³ It is notable that Iran rejects completely any notion of secular human rights and has not adopted the Convention yet, in spite of all the attempts of the former reformist parliament in 2003.

¹⁰⁴ See Concluding Observations on Islamic Republic of Iran (1993), UN Doc. CCPR/C/79 Add.25 para.13; Concluding Observations on Libya (1994), UN Doc. CCPR/C/79 Add.45 para.9. Concluding Observations on Sudan (1997), UN Doc. CCPR/C/79 Add.85, para.22; Concluding Observations on Iraq (1997), UN Doc. CCPR/C/79 Add.56 para.11; Concluding Observations on Sudan (1997), UN Doc. CCPR/C/79 Add.85, para.8, Concluding Observations on Libya (1994), UN Doc. CCPR/C/79 Add.45 para.9. For more discussion on the response and practice of Muslim states on international human rights see M.A. Baderin, "A Macroscopic Analysis of the Practice of Muslim State Parties to International Human Rights Treaties: Conflict or Congruence?" 1 *HRLR*, 2001. See also E. Mayer "Current Muslim Thinking on Human Rights" in *Human Rights in Africa, Cultural Perspective*, edited by A. An-Naim and F. Deng, University of Pennsylvania Press, Philadelphia, 1990, p. 148.

Islamic law is completely incompatible with the ideals of human rights.¹⁰⁵ In this approach, human rights are principles that were developed in Western culture and it is suggested that Western culture should serve as the universal normative model for the content of international human rights law.¹⁰⁶ Some writers in Muslim states believe the only solution regarding human rights issue in Islamic societies is to put aside Islamic laws entirely.¹⁰⁷ On the other hand, many prominent Islamic jurists and thinkers argue that the principles of Islamic law are compatible with most principles of international human rights and women's rights.¹⁰⁸ They also argue that Islamic law, over fourteen centuries ago, had addressed the problem of gender discrimination and established women's position as dignified human beings sharing equal rights with their male counterparts in almost all sphere of life.¹⁰⁹ To them, the reasons for the current gap between Islamic societies and international human rights law are the culture and customs in different societies, the political situation, an institution of legitimacy more than just establishing a religious and legal order and dogmatic interpretation of Islamic law.¹¹⁰

¹⁰⁵ See F. Halliday, "Relativism and Universalism in Human Rights: The Case of the Islamic Middle East", in *Politics and Human Rights*, edited by D. Betham, Blackwell, Oxford, 1995, pp. 154-156. Arlandson also in his article "Top Ten Reasons Why *Sharia* is Bad for All Societies," refers to the poor situation of human rights in some Islamic countries and concludes that it will become clear to anyone who thinks clearly that these punishments and policies are excessive by their very nature, and excess is never just, as Aristotle taught us in his *Nicomachean Ethics*. See J. Arlandson, at http://www.americanthinker.com/2005/08/top_ten_reasons_why_sharia_is.html

¹⁰⁶ See M. Monshipouri, *Islamism, Secularism and Human Rights in the Middle East*, L. Rienner Publishers, Boulder, 1998.

¹⁰⁷ See M. Kar, *Legal Structure of Family System in Iran*, Roshangaran & Women Studies Publishing, Tehran, 2000. See also M. Kar and H. Hoodfar, "Personal Status Law as Defined by the Islamic Republic of Iran: An Appraisal", in *Shifting Boundaries in Marriage and Divorce in Muslim Communities: Special Dossier*, Women Living Under Muslim Laws, Grabels, 1996.

¹⁰⁸ See M. Motahari, *The Basic Teaching of Islam*, Tehran University Press, Tehran, 1987, p. 81. See also A. Mahdi, *The Principles of Human Rights*, Asia Publisher, Tehran, 1964, p. 87; A.J. Amuli, *The Philosophy of Human Rights*, Asra Press, Tehran, 1995; L. Ahmed, *Women and Gender in Islam*, Yale University Press, New Haven, 1992.

¹⁰⁹ See L. Al-Faruqi, *Women, Muslim Society and Islam*, American Trust Publication, Indianapolis, 1988. See also S. El-Bahanssawi, *Woman between Islam and World Legislation*, Dar al-Qalam, Safat, 1985.

¹¹⁰ *Ibid.* See M.T. Jafari, *Op. cit.*, pp. 246-280.

It is submitted that in Islamic law there is equality of men and women as human beings but it does not advocate absolute equality of roles between them, especially in family relationships. In other words, equality of women is recognized in Islam on the principle of “equal but not equivalent.” Qutb in this regard argued that: “While the demand of equality between man and woman as human beings is both natural and reasonable, this should not extend to transformation of roles and function.”¹¹¹ The concept of the *qawwāmun* in *Sharia* and conservative interpretation of Islamic law may result in many disadvantages for women in most parts of the Muslim world, especially in the enjoyment in civil and political rights.

3. *Qawwāmun* - the superiority of male over female

As I indicated earlier, one of the most important verses in the *Qur'an*, which is interpreted in different ways for different kinds of gender discrimination such as family, social and political rights of women is *qawwāmun* - the superiority of male over female. According to the verse:

Men are the protectors and maintainers of women because God has given the one more strength than other, and because they support them from their means
...¹¹²

The verse is used in two different interpretations, in broad and restricted senses.¹¹³ In the broad interpretation of the verse, man has authority and superiority over woman and his authority covers all aspects of women's life. In the restricted sense the verse is only applicable to family issues, since the man is providing the maintenance. The broad interpretation of the verse has resulted in discriminatory laws and regulations in different Muslim countries that, indeed, deny or limit women's fundamental rights

¹¹¹ See M. Qutb, *Islam the Misunderstood Religion*, Darul Bayan Bookshop, Kuwait, 1964, p. 129.

¹¹² *Qur'an*: 4: 34.

¹¹³ See N.A. Shah, “Women's Human Rights in the Koran: An Interpretive Approach”, 28 *HRQ*, 2006, pp. 887-889.

and have a negative effect on various aspect of women's life such as the familial, social and political rights.¹¹⁴ This section of this chapter, in the light of Islamic jurisprudence, examines the scope of the verse briefly.

Islamic jurists from both schools of thought, as well as other writers, whether Oriental and Occidental, classical and modern, have presented different interpretations of the scope of the above verse and the superiority of men over women in Islamic law.¹¹⁵ Here we will examine different arguments of Islamic jurists on the verse in two categories:

The first category is represented by Tabatabaei,¹¹⁶ Khosravi,¹¹⁷ Golpaigani¹¹⁸ and Al-Baydawi.¹¹⁹ They interpret the verse in a broad sense and believe that the scope of the *qawwāmun* goes beyond marital relations and the family sphere to cover all aspects of life.¹²⁰ To them, man not only has authority and superiority over woman in the familial sphere, but also, he has superiority in social issues as well.¹²¹ In this regard, Tabatabaei argued that guardianship is not limited to marital relations and encompasses the various social dimensions, such as the governmental and judicial issues, on which the social life depends.¹²² He believes that men are rationally and

¹¹⁴ See the interpretation of the verse in S.M.H. Tabatabaei, *Al-Mizan Fi Tafsir Qur'an*, Vol. 4, Moasseseh Ismailian, Qum, 1894, p. 365. See also A.J. Arberry, *The Koran Interpreted*, Oxford University Press, Oxford, 1983.

¹¹⁵ See M.A. Baderin, *Op. cit.*, pp. 134-15. See also J. Neuwirth, "Inequality Before the Law: Holding States Accountable for Sex Discriminatory Laws Under the Convention on the Elimination of All Forms of Discrimination Against Women and Through the Beijing Platform for Action," 18 *HURJ*, 1999.

¹¹⁶ See S.M.H. Tabatabaei, *Al-Mizan Fi Tafsir ... Op. cit.*, pp. 365-367.

¹¹⁷ See A. Khosravi, *Tafsir Khosravi*, Vol. 2, Nashr Islami, Tehran, 1894, p. 197.

¹¹⁸ See M. Golpaigani, *Ketab Al-Ghaza Majmae al-Masael*, Vol.1, Dar al-Qur'an, Qum, p. 44.

¹¹⁹ Al-Baydawi's views cited in B. Stowasser, "Religious Ideology, Women, and the Family", in *The Islamic Impulse*, edited by B. Stowasser, Croom Helm, London, 1987, pp. 24-25.

¹²⁰ *Ibid.*

¹²¹ *Ibid.*

¹²² See S.M.H. Tabatabaei, *Al-Mizan Fi Tafsir ... Op. cit.*, pp. 362-367.

physically stronger than women; therefore, guardianship and authority is one of their characteristics.¹²³ Al-Baydawi also argued that:

... because God has preferred men over women in the completeness of mental ability, good counsel, complete power in the performance of duties and the carrying out of (divine) commands. Hence to men have been confined prophecy, religious leadership (*imama*), saintship (*wilaya*), the performance of religious rites, the giving of evidence in law courts, the duties of the Holy War, and worship (in the mosque) on Friday, etc., the privilege of electing chiefs, the larger share of inheritance, and discretion in matters of divorce, by virtue of that which they spend of their wealth, in marrying (the women) such as their dowers and cost of their maintenance.¹²⁴

The second category of our study concerns those writers such as Tousi,¹²⁵ Fazlulah,¹²⁶ Amuli,¹²⁷ and Shirazi¹²⁸ who interpreted the verse as applicable only to family issues. They argue that the *Qur'anic* verse (*qawwāmun*) stipulates that within the context of marriage and as a member of the husband's household, the wife is his responsibility and hence under his authority.¹²⁹ They also discuss that *qawwāmun* is a limited

¹²³ *Ibid.* Some also argued that the reason of superiority of men over women is women's deficiencies in reason/wisdom, religion and testimony. They referred to a *hadith* reporting that Prophet Mohammad said women are inherently inferior to men both in matters of religion and intelligence, because when they menstruate, they are required neither to pray nor fast. It is submitted that this *hadith* is contradictory to the *Qur'anic* verses and Islamic teaching on equality of the men and women in matters of piety or *taqwa*. Regarding the equality of sexes in moral and spiritual obligations, a *Qur'anic* verse says: "For Muslim men and Muslim women, for believing men and believing women, for devout men and devout women, for true men and true women, for men and women who are patient and constant, for men and women who humble themselves, for men and women who give charity, for men and women who guard their chastity, and for men and women who engage in God's praise, for them has God prepared forgiveness and great reward." *Qur'an*: 33:35. See Rahman's response to the above argument in his work "Status of Women in the Qur'an," in *Women and Revolution in Iran*, edited by J. Nashat, Westview Press, Boulder Co, 1983, p.41.

¹²⁴ Cited in B. Stowasser, *Op. cit.*, p. 25.

¹²⁵ See M. Tousi, *Al-Mabsout fi Fiqh al-Imami*, Vol. 4, Maktan Mortazavieh, Tehran, 1947, p. 324. Tabari in this regard stated, "Men are in charge of their women with respect to disciplining (or chastising) them, and to providing them with restrictive guidance concerning their duties towards God and themselves (i.e., the men); by virtue of that by which God has given excellence (or preference) to the men over their wives: i.e., payment of their dowers to them, spending of their wealth on them, and providing for them in full. This is how God has given excellence to (the men) over (the women), and hence (the men) have come to be in charge of (the women) and hold authority over them in those of their matters with which God has entrusted them." See Al-Tabari, *Tafsir al-Tabari*, Mustafa al-Babi, Cairo, 1968.

¹²⁶ See S.H. Fazlulah, *Donya Al-Merat*, Dar al-Malak, Beirut, 1999, p. 91. See also H. Fazulah, *Taamolot Islami Hol Al-merat*, Dar al-Malak, Beirut, 2000.

¹²⁷ See J. Amuli, *Philosophy of Human Rights*, Asra, Tehran, 1996, p. 89. See also J. Amuli, *Zan Dar Ayneh Jalal and Jamal*, Raja, Tehran, 1993, p. 366.

¹²⁸ See N.M. Shirazi, *Tafsir Nemoneh*, Darlketab, Tehran, 1996, pp. 110-111.

¹²⁹ See Tabari, *Op. cit.*, p. 748. See also S.H. Fazlulah, *Op. cit.*, p. 91; J. Amuli, *Op. cit.*, p. 366.

authority which is specifically for men and is limited in scope to the family and marital sphere.¹³⁰ Indeed, they reject the broad interpretation of the word *qawwāmun*, which they say contradicts with the intention of the Islamic teaching and the *Qur'an*. In other words, the verse revolves around the family institution, rather than advocating the superiority of one gender above the other.¹³¹ Shirazi, on the interpretation of the *Qur'anic* verse 4:34 says:

The first part of the verse [grants] guardianship because of the differences that God has set between humans upon creation and the last part of the verse because of the obligations that men are bound by for endowing and making financial payments to women and the family. Therefore, *what is clear is that assigning this duty to men is not based on their human personality because superiority only depends on virtuousness and piety*. Indeed, a deputy in various aspects of the human personality might be superior to his boss, yet the boss better deserves doing the job that has been assigned to him.¹³² (emphasis added)

Amuli in regard to the verse also argues that, man's being in charge is not considered superiority because, in Islamic teaching, there is no advantage or superiority for a human being based on race, sex, language, etc, and no one can claim to be superior to another except based on *taqwa* or piety.¹³³ This has to do with executive and managerial roles. As in socio-economic issues the man can better work to provide the means of livelihood, he is in charge of the family, but this is not a matter of superiority or virtue.¹³⁴

¹³⁰ *Ibid.* In this regard also Ibn Qudamah in *Al-Mugni*, indicated the complementary role of the two genders, but went on to state that the husband's rights were greater than the wife's because God says that "men have a degree above them." He also referred to a *hadith* of the Prophet Mohammad which said that if it were lawful for a human being to prostrate before another, wives would have been ordered to prostrate to their husbands due to the rights of husbands over wives. See M.A. Ibn Qudamah, *Al-Mugni*, Vol.7, Maktabah al-Riyadeh, al-Hadithah, Riyadeh, 1981, p. 223.

¹³¹ See M. Gaudefroy-Demombynes, *Muslim Institutions*, trans by J. MacGregor, George Allen and Unwin Ltd, London, 1968, p. 132. See also N. Honarver, "Behind The Veil: Women's Rights in Islamic Societies" 6 *JLR*, 1988, pp. 355-356.

¹³² See N.M. Shirazi, *Op. cit.*, p. 411.

¹³³ See J. Amuli, *Op. cit.*, pp. 366-367.

¹³⁴ *Ibid.* See also A. Lemu, "Women in Islam", in *The Challenge of Islam*, edited by A. Gauhar, Islamic Council of Europe, London, 1978, pp. 254-255.

The advocates of this view also argue that for the success of family life, there arises the need to differentiate and identify roles within the family structure. They refer to many examples where Islamic teaching requires leadership in a group activity to ensure cohesion in human relationships, e.g. in regard to worship involving two or more people, one of them who is more qualified will lead the others.¹³⁵ In all these situations, the leader is not considered as superior to the others. From a sociological perspective also, authority and power are necessary elements of any group structure and the family, as a small social unit, is no exception.¹³⁶ They concluded that in the family, either the man or woman shall be head of the family and the other shall be his/her deputy and under his/her supervision, because joint simultaneous leadership of two persons does not make sense.¹³⁷ In this regard, the man should be head of the family because of having such characteristics as thoughtfulness, physical power and ability to overcome his emotions.¹³⁸ Indeed, the husband would necessarily be more influential in certain roles, while the wife would be in others.¹³⁹ In addition, the man's obligation towards the woman and children in terms of paying maintenance and dowry entitles him to guardianship.¹⁴⁰ In their view, although there are women who are more capable than men in terms of thoughtfulness and reason, who might be better than their husbands in the above terms, it is only in exceptional cases that the wife

¹³⁵ It is reported that when two or more people travel together, the Prophet instructed that one of them must be selected as leader of the group.

¹³⁶ It has been argued that the concept of authority and power run through all human and animal relationships and from a social psychologist's point of view, ascendance-submission or dominance-compliance, wherever two persons are in contact with each other. See J. Bernard, *American Family Behaviour*, 1942, p. 420.

¹³⁷ See Tabari, *Op. cit.* See also Fazlulah, *Op. cit.*

¹³⁸ *Ibid.*

¹³⁹ *Ibid.*

¹⁴⁰ Picktal in a translation of the *Qur'anic* verse 4:34 stated that: "Men are in charge of women, because Allah hath made one to excel the other, and because they spend their property (for the support of women)." Zeldich who argues that today in most societies the husband plays the instrumental and protective roles, while the wife plays the expressive roles, has presented a similar argument. See M. Zeldich, "Family, Marriage and Kinship" in, *Handbook of Modern Sociology*, edited by R. Faris, Rand McNally, Chicago, 1964, pp. 697-703.

assumes the protective role within the family structure. Nevertheless, the law is intended for society in general, rather than for exceptions.

Al-Hibri rejected the standard interpretation of the verse on the basis of its being inconsistent with other Islamic teaching.¹⁴¹ She argues it is unwarranted to declare men in charge of women's affairs because men are created by God as superior to woman in regard to strength and reason and also because they spend their money on women.¹⁴² To her, there is nowhere in the verse a reference to the male's physical or intellectual superiority.¹⁴³ According to her, there are two conditions in the verse for being *qawwāmun*:

... the man be someone whom God gave more in the matter at hand than the woman and ... he be her provider. If either condition fails, then the man is not *qawwāmun* over that woman. If both obtain, then all it entitles him to is caring for her and providing her with moral guidance. For, only under extreme conditions (for example insanity) does the Muslim woman lose her right to self-determination, including entering any kind of business contract without permission from her husband... It is worth noting that the passage does not even assert that some men are inherently superior to some women. It only states that in certain matters some men may have more than some women.¹⁴⁴

Al-Hibri refers to the *Qur'anic* verse 9:71¹⁴⁵ and argues that the traditional interpretation is inconsistent with other Islamic teachings. The definition of *qawwāmun* is similar to *awliya*, which may be translated as meaning protectors, in charge or guides.¹⁴⁶ She also, in regard to rejection of the idea of superiority, raised the following question: "How could women be *awliya* of men if men are superior to

¹⁴¹ Al-Hibri in this respect also argued that it is difficult to translate the concept of *qawwāmun* of the verse because is not quite accurate, while some writers translate *qawwāmun* as protectors and maintainers, as the basic notion involved here is one of moral guidance and caring. See A. Al-Hibri, "Study of Islamic Herstory or How Did We Ever into this Mess?," 5 *WSIF*, 1982, p. 217.

¹⁴² *Ibid.*

¹⁴³ *Ibid.*

¹⁴⁴ *Ibid.*, p. 218.

¹⁴⁵ *Qur'an* in 9:71 says: "The believers, men and women, are *awliya*, one of the another."

¹⁴⁶ See A. Al-Hibri, *Op. cit.*, p. 218.

women in both physical and intellectual strength?¹⁴⁷ And, how could women be in charge of men who have absolute authority over them?”¹⁴⁸

Both *Qur'anic* verses 2:228 and 4:34 must be understood in the context of the Islamic appreciation of role differentiation within the family, rather than advocating the superiority of one gender above the other. Those verses revolve around the family institution and it would be more consistent to understand them as referring to a degree of responsibility rather than superiority. Therefore, unlike the two previous groups, it seems to me that interpretation of the verse - *qawwāmun* cannot prove men's authority and that women and men are equal in all rights and compulsory duties. Although in Muslim states economic management and payment of maintenance is the man's responsibility, one cannot conclude that the man has to be in charge of the family. With consideration of some *Qur'anic* verses¹⁴⁹ it is possible to reject the superiority of one sex to the other and deny the man's authority according to the principle of human equality in Islam and the tradition of Prophet Mohammad.¹⁵⁰ As Taha¹⁵¹ rightly said, the true message of Islam is one of complete equality.¹⁵² This approach is compatible with international human rights law and it is possible to

¹⁴⁷ *Ibid.*

¹⁴⁸ *Ibid.*

¹⁴⁹ *Qur'an*: 4:1 and 49:13.

¹⁵⁰ The prophet Mohammad said: "All people are equal, as equal as the teeth of a comb. There is no claim of merit of an Arab over a non-Arab, or of a white over a black person, or a male over a female. Only God-fearing people merit a preference with God." *Hadith* cited in M.B. Majlisi, *Bahar al-Anvar*, Moasseseh al-Vafa, Beirut, 1982.

¹⁵¹ See M. Taha, *The Second Message of Islam*, trans by A. An-Naim, Syracuse University Press, New York, p. 139. See also H.M. El-Tayeb, *The Second Message of Islam, a Critical Study of the Islamic Reformist Thinking of Mahmoud Muhammad Taha*, Ph.D Thesis, Manchester University, 1995. It should be noted that Taha argued that the fundamental and universal message of Islam is to be found in *Qur'an* and *Sunna* texts of the earlier stage of Mecca. These earlier verses were not lost forever, despite subsequent superseding texts. Their implementation was merely postponed until such time as it would be possible to enact these into law. See also A.A. An-Naim, *Towards an Islamic Reformation, Civil Liberties, Human Rights, and International Law*, Syracuse University Press, New York, 1990.

¹⁵² *Ibid.* See also W.S. Howard, "Mahmoud Muhammad Taha: A Remarkable Teacher in Sudan", 10 *NEAS*, 1988, pp. 83-93.

reconcile between Islamic law and international human rights law based on principle of human equality.

The notion of *qawwāmun* in *Sharia* is embedded in many features of inequality between men and women in civil, social and political rights. The next chapter, in the light of the theory of authority of men over women in Islamic law, explores and examines the scope of the verse and its effect on women's role in familial, social, and political life.

Chapter IV

Women's Human Rights in Islam and the Laws of Muslim States: Rhetoric or Reality?

In Islamic teachings, there is no advantage or superiority for a human being based on race, sex, language, etc, because the origin of human creation is the same and inherent dignity is a right guaranteed to all human beings. Women and men are addressed in the *Qur'an* without discrimination and no one can claim to be superior to another except based on *taqwa* or piety.¹ However, the broad interpretation of the *qawwāmun* verse - the superiority of male over female- by the majority of Islamic jurisprudence has resulted in discriminatory laws and regulations in different Muslim countries that, indeed, deny or limit women's fundamental rights and have a negative effect on various aspect of women's life such as the familial, social and political rights. This chapter, in the light of the theory of authority of men over women in Islamic law, explores and critically discusses the scope of the *qawwāmun* verse in *Qur'an* and its effect in the real life of women in some Islamic states, as well as their role in familial, social, and political life.

1. *Qawwāmun* in the familial sphere

The broad interpretation of the notion of *qawwāmun* in *Sharia* is embedded in many features of inequality between men and women in the familial sphere, including the role of the husband as the head of the family² and undermining of the mother's rights

¹ According to a *Qur'anic* verse: "The dearest of you in Allah's sight is the most pious of you. *Qur'an*: 49:13. For more discussion on this issue see M.T. Jafari, *A Comparative Study of the Two Systems of Universal Human Rights*, Al-Hoda International Publisher, London, 1999, pp. 259-264.

² For example, the Civil Code of Iran provides: "In the relationship between a husband and wife, the role of the head of family is exclusive right of the husband." The headship of the family is the husband's right and the parties to a marriage cannot set any condition on the marriage or another contract to ignore the position of the man as head of the family or limit its scope. The issue has questioned by Special Representative on the Situation of Human Rights in the Islamic Republic of Iran

in custody and guardianship of her own child. The law relating to custody and guardianship of children is a sensitive aspect of family law. Article 16 of Women's Convention requires state parties to eliminate discrimination against women in matters affecting marriage, family relations, and equal rights and responsibilities for the parenting of their children. The inclusion of this provision represents a step forward of international human rights law. Paragraph 1 of the article obliges state parties to ensure, on the basis of equality of men and women, the same rights in various issues including in matters in relation to their children and the exercise of their rights with regard to guardianship, wardship, trusteeship and adoption of children. The Convention requires state parties to take steps actively to ensure that women are able to exercise the same rights as men and grant women their rights regarding the care and custody of children, whether in marriage or following divorce.

Muslim states party to the Convention entered reservations to the article based on *Sharia*³, as under traditional Islamic law, a mother is not entitled to guardianship of her child. The reservations entered to the article are very detailed and a strong manifestation of the belief that the article conflicts with Islamic law. Algeria, Jordan, Tunisia and Turkey declared domestic law which originated from Islamic jurisprudence as the reason for reservation.⁴ The remaining Muslim states mentioned Islamic law as their justification for entering reservations. For example Bangladesh addressed the provisions, with the statement that "...Bangladesh does not consider as

in 2000. The report acknowledged that the provision is widely disregarded and ... be circumscribed by a suitable provision in a marriage contract. See UN Doc. E/CN. 4/2000/35 of 18 January 2000.

³ The reserving Islamic countries include Egypt, Iraq, Algeria, Bangladesh, Jordan, Libya, Lebanon, Malaysia, Morocco, Tunisia and Turkey. See the texts of reservations, declaration and objections with respect to human rights treaties deposited with the UN Secretary-General are published in the annual volume, "multilateral Treaties Deposited With the Secretary-General", UN Doc. ST/LEG/SER.E/15 (1997). For updated version of this material see www.un.org/womenwatch/daw/cedaw/states.htm. See also L. Lijnzaad, *Reservations to UN-Human Rights Treaties. Ratify and Ruin?* Martinus Nijhoff Publishers, Dordrecht, 1995; R.J. Cook, "Reservations to the Convention on the Elimination of All Forms of Discrimination Against Women", 30 *VJIL*, 1990.

⁴ *Ibid.*

binding upon itself the provisions of articles ...16(1)(c) and (f) as they conflict with *Sharia* law based on Holy *Qur'an* and *Sunna*.”⁵

However, this rule has been diluted in its application by the municipal courts of a few Muslim states, including Pakistan⁶ and Iran.⁷ In Pakistan the courts in *Atia Waris v. Sultan Ahamad Khan Case*⁸ and *Muhamad Bashir v. Ghulam Fatima Case*⁹ have ruled that the best interests of the child should prevail in granting custody. In *Atia Waris v. Sultan Ahamad Khan Case*, the judge ruled as follows:

In considering the welfare the Court must presume initially that the minor's welfare lies in giving custody according to the dictates of the rules of personal law, but if circumstances clearly point that his or her welfare dominantly lies elsewhere or that it would be against his or her interest, the court must at according to the demand of the welfare of the minor, keeping in mind any positive prohibitions of the personal law.¹⁰

The general welfare of the child was also considered by the Special Civil Court of Iran (SCC) in *Narges v. Parham Case*¹¹ in where the judge said, “Welfare of the minor remains the dominate consideration and the rules only try to give effect to it.”¹²

In spite of some exceptional cases in a few Muslim states, the mother under Islamic law is not entitled to guardianship of her child after demise of the father or upon

⁵ *Ibid.*, p. 170.

⁶ See S.S. Ali, *Gender and Human Rights in Islam and International Law: Equal Before Allah, Unequal Before Man?*, Kluwar Law International, The Hague, 2000, pp. 261-262.

⁷ See N. Katuzian, *Huquq Madani*, Tehran, 1978, p. 225 See also M.J. Langaroudi, *Huquq Khanivadeh*, Nashr Dad Gostar, Tehran, 1992; M. Mohaghegh Damad, *Barresi feqhi huquqi khanevadeh*, Neshr Ulum Islami, Tehran, 1993; M. Safaei, *Huquq Khanevadeh*, Tehran, 1994. Also *Narges v. Parham Case* 21/12/1376, 1997, SCC, Tehran.

⁸ *Atia Waris v. Sultan Ahamad Khan Case*, 1959, PLD (WP) Lah 205.

⁹ *Ghulam Fatima Case*, 1953, PLD Lah 73. It should be noted that in the cases of *Mrs Moselle Gubbay v. Kwaja Ahmad Said* and *Grace Abdul Hadi Haqani*, the court of Pakistan has considered the general welfare of the child. As we know, substantive Muslim law lays down that apostasy from Islam is a sufficient ground for taking custody of infant children away from the mother, or the father. The Caste Disabilities Removal Act established that statutory choice of law rule which provides that apostasy itself is not a sufficient reason for denying the right of mother or the father.

¹⁰ *Atia Waris v. Sultan Ahamad Khan Case*, *Op. cit.*, p. 214.

¹¹ *Narges v. Parham Case*, 21/12/1376, 1997, SCC, Tehran.

¹² *Ibid.*

divorce. Here we will examine the issue in traditional Islamic law and its application in the municipal law of some Islamic states.

In Islamic law the one who has the custody of a minor is not necessarily the one who has guardianship of him and administers the financial concerns of the minor, because the custody of the minor and administration of its estate and civil and financial concerns (guardianship) are two separate issues.¹³ The guardian is entitled to hold the property of the ward and manage it as people of ordinary prudence manage their own affairs.¹⁴ He can perform all acts on behalf of the ward which are entirely beneficial to the latter, such as acceptance of a gift and the like, and he is not entitled to bind the ward by any act which is absolutely injurious to the latter's interest, so that the guardian cannot make a gift, a *waqf* or a testamentary disposition of the ward's property, nor pronounce divorce on behalf of the ward.¹⁵ Islamic jurists divide the issue into three categories as follows:

- Custody of the infant during the early years of life when the infant needs someone to look after it;
- Guardianship of education (*weliya*) which according to *Sharia* is men's duty;
- Guardianship of property, which according to *Sharia* is men's duty.¹⁶

For better understanding of the issue, first I will examine the question of custody and then enter into the merits of the problem of women who want to be guardians.

¹³ See D. Pearl, *A Textbook on Muslim Personal Law*, 2nd edn., Croom Helm, London, 1987, p. 97. See also V. Maher, *Women and Property in Morocco*, Cambridge University Press, Cambridge, 1974.

¹⁴ See Rahim's, *Muhammadan Jurisprudence*, Mansoor Book House, Lahore, 1995, pp. 290-291. See also S.M. Ale Bahr ul-Olum, *Balqhat al-fiqhieh*, Vol. 3, Maktab al-Sadeq, Tehran, 1984, p. 210.

¹⁵ See S.H. Imami, *Huquq Madani*, Vol. 5, Entesharat Islami, Tehran, 1984, pp. 212-214.

¹⁶ See V. Zoheilli, *Al-Fiqh Islami va Adelat*, Vol. 10, Dar al-Fikr, Beirut, 1988, p. 7295. See also J. Helli, *Tazkerat al-Foqaha*, Vol. 1, Dar al-Azva, Beirut, 1983, pp. 219-221.

Custody is one of the most important legal and emotional issues in relations between children and parents.¹⁷ It is an established right of the baby from the time of its birth.¹⁸ In Islamic law the question is whether custodianship is a right or a duty. If it is a right it means that parents can refuse to maintain the child, but if it is considered as a duty, then neither of the parents can refuse to maintain the child.¹⁹ The majority of Islamic jurists argue that custody is a right and a duty.²⁰ They distinguish between father and mother on the issue of custody and maintenance of children.²¹ To them, the custody of the child is a right for the mother and a duty for the father.²² Therefore, if the mother refuses to maintain the child, then the custody will be passed on to the father and if both parents do so, then the court shall compel the father to maintain the child because he cannot terminate his duty.²³

Abu-Hanifa recognized the right to custody of the child for the mother; if she is not available or eligible it goes to the maternal grandmother, how-high soever.²⁴ The Jordanian legislator in the light of Hanifi school provides “the real mother has prior rights to the custody of her child and to bring it up for the duration of marriage and

¹⁷ Custody in Islamic law is defined as maintenance of the child for the purpose of preparing him or her to enter society.

¹⁸ For more details of custody see J.J. Nasir, *The Status of Women Under Islamic Law*, Graham & Trotman, London, 1990, pp. 121-131. See also R. Smith, “The Marigold Family”, in *The Character of Kinship*, edited by J. Goody, Ambridge University Press, Ambridge, 1973.

¹⁹ Jurists from both schools of thought have observed different arguments in regard to the issue. Some jurists argue that the custody of children is purely an individual right and therefore there is no binding obligation to maintain the child. They believe that custody of children can be terminated and there is no sufficient proof based on which one can enforce custodianship on parents.

²⁰ See J. Sobhani, *Nezam al-Nekah fi Shai'at al-Islami*, Vol. 2, Moassesseh Imam Sadeq, Qum, 1990, p. 330. See also S. Sabzevari, *Mahzab al-ahkam*, Vol. 25, Mahdavi, Isfahan, p. 281; S.A. Tabatabai, *Riaz al-Masael*, Vol. 7, Moasseseh al-Nashr Islami, Qum, 2001, p. 254.

²¹ See S.A. Khonsari, *Jame al-Madarek*, Vol 4, Maktab al-Sadouq, Tehran, 1989, p. 472.

²² See N.M. Shriazi, *Estefahat Jadid*, Vol. 2, p. 364. See also Tousi, *Al-mabsout*, Vol. 6, Maktab al-Razavieh, Qum, 1973, p. 307.

²³ It should be noted that Sunni jurists also argue that a mother cannot be forced to have custody of her child unless there is a situation in which the mother is the only guardian of the child. See M. Al-Zargha, *Al-Madkhal Al-fiqhi Al-am*, Dar al-Fikr, Damescus, 1989, pp. 543-544.

²⁴ See A.A. Badrdan, *Huquq ul Awlad-fish-Shariat-il-Islamiyya wal Wanoon*, Alexandria, 1981, pp. 64-65.

after separation.”²⁵ In regard to duration of custody, Jordanian law emphasised that: “Custody by the mother who devotes herself entirely to the care and education of her children shall run until they reach puberty.”²⁶ In the light of the Maliki school, legislators of a few Muslim states such as Kuwait²⁷ and Tunisia²⁸ provide custody as a duty of the parents as long as they live together in matrimony. In the case of separation the mother has first claim on the custody of her child.²⁹ The right to custody in Kuwait ceases at puberty for boys and majority or marriage for girls.³⁰ In Tunisia, in the case of separation or divorce, the mother is entitled to custody of boys until the age of 7 years and girls until age of 9 years, after which custody reverts to the father if he requests it, unless the judge considers the child’s mother better suited to maintain custody.³¹

²⁵ Jordanian Law of Personal Status (1976). In 1947 a provisional Law of the Family Rights was enacted and remained in force until was replaced in 1951 by a new Law of Family Rights. The new Law was the first in a series of codifications of Islamic family law issued in the 1950s by the national legislatures of newly independent Arab states. In 1976 the Jordanian Law of Personal Status replaced the 1951 Jordanian Law of Family Rights. See also J.N.D. Anderson, “Litigant Strategies in an Islamic Court in Jordan” in *Law and Islam in the Middle East*, edited by D.H. Dwyer, Bergin & Garvey Publishers, New York, 1990; T. Mahmood, “Jordan”, in *Statutes of Personal Law in Islamic Countries*, India Islam Research Council, Delhi, 1995; S.H. Amin, “Jordan”, in *Middle East Legal System*, Royston Ltd, Glasgow, 1985.

²⁶ *Ibid.*,

²⁷ The Kuwaiti Code of Personal Status Law (1984). Civil Code of Kuwait in 1980 was promulgated and in 1984 the Kuwait Code of Personal Status in the light of Maliki and Jafari doctrine was enacted. See Amin, *Legal System of Kuwait*, Royston Ltd, Glasgow, 1991; T. Mahmood, “Kuwait,” in *Statutes of Personal Law in Islamic Countries*, *Op. cit.*

²⁸ Tunisian Code of Personal Status Law (1993). The first the Tunisian Code of Personal Status in the light of Hanafi and Maliki schools was enacted 1956, just six months after independence. The Code has been amended several times and introduced dramatic reforms on the statutes of women. See also Nelson, *Tunisia: A Country Study*, 3rd edn., Washington D.C., 1988; Brand, *Women, the State, and Political Liberalisation: Middle Eastern and North African Experiences*, New York, 1998.

²⁹ If the mother is not eligible or available, the right goes to her mother, then her mother’s full sister, then her uterine sister, then her consanguine sister, then the father’s mother, then the father’s maternal or parental grandmother how-high-soever, then the sister, then the paternal aunt, then maternal aunt, the sister’s daughter then the brother, then the paternal grandfather, then the brother’s son, then the paternal uncle, then his son. In all cases, the full relation shall have precedence over the uterine, followed by the consanguine. See M. Ibn Farhun, *Al-Dibaj al-Mudhabb fi Marifat A'yan Ulama il Madhab*, Cairo, 1315.

³⁰ The Kuwaiti Code of Personal Status Law (1984).

³¹ *Ibid.*

According to Shafi'i and Hanbali, the mother shall have priority over the father, followed by the mother's mother and how-high soever.³² The Egyptian legislator in the light of the above schools provides priority of mother over the father and regarding duration of custody stated that: "The female's right to custody of the child shall come to an end on the boy reaching the age of 10 and the girl reaching the age of 12 years."³³ Custody may be extended till the age of 15 for boys and till marriage for girls if the judge deems such an extension to be in the best interests of the ward.³⁴

The Syrian legislator also provides that: "Custody shall come to an end for the boy on completing 9 and for the girl completing 11 years of age."³⁵ The Malaysian legislator in the light of Shafi'i and Hanbali jurisprudence provides that in the case of separation, the mother has entitled to custody of boys until 7 years and girls 9 years; subject to classical conditions court may extend the custody to 9 and 11 years respectively.³⁶

³² See Z. Mir-Housseini, *Marriage on Trial: A Study of Islamic Family Law*, I.B. Tauris, 2000, pp. 133-160. See also, D. Pearl, *Op. cit.*, p. 97.

³³ Egyptian Code of Personal Status Law (1920). See also A. Hussein, "Recent Amendments to Egypt's Personal Status Law", in *Women and the Family in Middle East: New Voices of Change*, edited by E.W. Fernea, University of Texas Press, Austin, 1985. It should be noted that the Algerian Law gives the mother the priority, followed by her mother, then the maternal aunt, then the father, then the father's mother, then the next nearest of kin, provided that the ward's interests shall be observed in all cases. See Algerian Family Code (1984).

³⁴ *Ibid.*

³⁵ Syrian Personal Status Law (1975). The first Syrian Personal Status Law was enacted in 1953. The law covers matters of personal status, family relations and interstate and testamentary succession. Major amendment has been made to the above Code in 1975 particularly relating to areas of polygamy, dower, maintenance, custody and guardianship. See J. Anderson, "Syrian Law of Personal Status," *Bulletin of the School of Oriental and African Studies*, 1955, pp. 25-59; Redden, "Syria" in *Modern Legal Systems Cyclopaedia*, Vol. 5, Buffalo, New York, 1990.

³⁶ Malaysia Islamic Family Law (Federal Territories Act 1994). It should be noted that in Federated Malay States, the first legislation regarding Personal Status Law which covered marriage and divorce was enacted in 1885. It called Registration of Muhammedan Marriages and Divorces Orders in Perak and Selangor. Following the independence of Malaysia in 1957, States granted jurisdiction over application and legislation of *Sharia*. From that time till 1978 new laws were promulgated in 11 Muslim majority States of Malaysia and Sabah, generally entitled Admission of Islamic law, explanation of substantive law, and jurisdiction of *Sharia* courts (*syariah*). In 2001 Malaysia established a separate family court. It is notable that new laws relating to personal law were enacted in most States between 1982 and 1989 (Kelantan in 1982, Kedah in 1983, Selangor in 1989). The Malaysia Islamic Family Law was amended in 1985 and 1994 where a major amendment to the Law

Shi'a jurists refer to a famous *hadith* that says, "Mother has preference over others for 7 years from the birth of her child for the custody of the child, unless she wants to transfer this responsibility to others".³⁷ Najafi in his famous work *Javaherolkalam* pointed out that:

... the custody of the child by the mother is the same as breast feeding of the mother as it is not a duty and the mother can terminate it or ask money for doing so. If both parents refuse to give custody and maintain the child, then the court shall compel the father to do so".³⁸

The Iraqi law provides that:

The mother has prior right to the custody and upbringing of the infant, both for the duration of marriage and after separation, unless the ward suffer injury thereby ... In the event of the mother becoming disqualified or of her death, custody shall pass to the father, unless infant's interest dictate otherwise, in which case custody shall pass to whomever the court shall choose, with the best interests of the child being the paramount consideration ... In the event of the father's death or disqualification, the child shall remain with its mother for as long as she remains qualified, with any of its female or male kin having the right to challenge her right thereto until the child reaches the age of majority.³⁹

Iraqi legislators in 1987 provide custody as a duty of the parents as long as they live together in matrimony. Following the separation, the mother has first claim on the custody of her child. The mother's right to custody ceases at 10 years for both sexes and is extendible to 15 years, at which time the ward may chose with which parent she/he wishes to live.⁴⁰

took place. See Siraj, "Women and the Law: Significant Development in Malaysia," 28 *Law and Society Review*, 1994, pp. 561-581; Hooker, *Islamic Law in South-East Asia*, Singapore, 1984.

³⁷ The *hadith* referred to Imam Sadegh see M.H. Horre Amuli, *Vasael Al-Shi'a*, Vol. 15, *hadith* 6, Entesharat Maktabe Islami, Tehran, 1981, p. 192.

³⁸ See M.M. Najafi, *Javaherokallam*, Vol. 53, Chap Najaf, Beirut, 1956, p. 283. See also M.J. Mogneyh, *Al-fiqh in Mazaheb al-khamseyah*, p. 382.

³⁹ Iraqi Code of Personal Status Law (1987). The first Iraqi Code of Personal Status Law was enacted in 1959. The Code has been amended several times including on Minors in 1980, on Divorce in 1981, 1983, and 1986, and finally on Custody in 1987. See M. Mallat, "Shiasim and Sunnism in Iraq: Revising the Codes," in *Islamic Family Law*, edited by Mallat and Connors, Graham & Trotman, London, 1990; Al-Mukhtar, "Iraq", 1 *YIMEL*, 1995, pp. 157-177.

⁴⁰ Iraqi Code of Personal Status Law (1987).

The Civil Code of Iran (CCI)⁴¹ considers the custody of the child to be both the right and duty of the parents. This means that the parents have both the right and duty to maintain their child. However, if they refuse to do so then first the court must induce them to assume this responsibility and if such enforcement is impossible or ineffective, then the court must arrange the custody at the expense of the father or in the event of the death of father, the mother has responsibility. In regard to custody of the child whose parents separate, the mother has preference over others for 7 years from the birth of her child.⁴² After reaching the above age, the custody will devolve on the child's father.⁴³ However, if there is a dispute over custody of the child, then the court shall decide over it by considering the interests of the child.⁴⁴

In traditional Islamic law, as well as the current laws of some Muslim states, there are some impediments, upon which the right of the mother over custody of the child can be waived and these impediments apply only to the mother, with no mention of the father. These are insanity and remarriage of the mother. In regard to insanity it is submitted that good and sound mental health is a prerequisite for someone who is to assume custody of a child. Since the guardian of the child must be of good and sound

⁴¹ The Civil Code of Iran was compiled and approved under the auspices of jurists and authorities in three periods of legislation in 1928, 1934 and 1935 corresponding to 1307, 1313 and 1314, respectively. Partial amendments to CCI were made in 1952. Three years after the Islamic Revolution in 1982, new amendments were made by suggestion of High Judicial Council and approval of the Majlis Judicial Affairs Commission and entered into force for five years. In 1991 those amendments with some changes were approved permanently in parliament.

⁴² Article 1169 of the CCI.

⁴³ In practice there are two procedures with regard to custody of the child after this age. First, the father has exclusive right over the custody of the child unless the physical health or moral well-being of the child are in danger as a result of his negligence or moral turpitude. Second, the father can assume the custody of the child after the age of 7 only if both parents agree and if there is any dispute between the parents then the court may take whatever decision is appropriate for the child's custody. In *Homa v. Majid Case* in 1997 the mother of a 7 year old boy compromised her rights including maintenance and dower instead of custody of her son. *Homa v. Majid Case*, 25/10/1376, 1997 SCC Tehran.

⁴⁴ Both parents have the right to visit their child and to determine the time and place of visit. If there is any dispute between the parents concerning the details relating to the time and place of visits and any other relevant details, the court will make decisions on such matters. With regard to guarantee of its implementation, Article 632 of the Islamic Punishment Code stipulates that "if any one who temporarily has the custody of the child refuse to hand over the child to those who have legal right over the custody of the child, then that person shall be sentenced to 3 to 6 months jail or cash penalty".

mind and mentally in good health, there is no difference between insanity of the mother and father. The other issue that shall cause termination of the right of the mother over custody of her child is her remarriage with a person other than the child's father while the father is still alive. The Iranian legislator has considered the remarriage of the mother as an impediment to her having custody of the child,⁴⁵ based on a *hadith* from the Prophet in which he says, "the Mother has priority to have custody of the child so far as she is not remarried. But if the father of the child is dead, the custody of the child shall rest on the mother even if she has remarried."⁴⁶ In this regard the law of Syria,⁴⁷ Jordan,⁴⁸ Iraq⁴⁹ and Kuwait⁵⁰ also stipulates that the woman shall not be married to a stranger. Tunisian law provides that "a female shall be entitled to the custody of the infant provided that she has no husband with whom marriage has been consummated, unless the husband is in a prohibited degree to, or guardian of, the infant..."⁵¹

The classical law in Islamic countries is based upon the above *hadith*. However, the classical rule diluted by the municipal courts of a few Muslim states, namely Tunisia and Pakistan, in some cases. In Tunisia the court, based on the welfare of the ward, allows the woman to keep the child even if she is married. In Pakistan the court

⁴⁵ It should be noted that before the Islamic revolution in Iran, the Family Protection Act (FPA) 1974 in Articles 12 and 13 stated that if the court decides that the mother, even if she is remarried, has preference over the father to have custody of the child, then the court shall appoint the mother as guardian of the child. The Act has anticipated the interference of the court in preserving the interest of the child but this law became null and void after the revolution. The Article 13 of the said law stated, "The court can take any decision appropriate for the custody of the child on the request of either father or mother of the child or one of its relatives or public prosecutor or other persons (whether already a decision has been taken in this regard or not) or if custody of the child is not in good hands then the court may give the custody of the child to anybody if deems appropriate and the court shall determine who must pay the cost of the custodianship". For more information about the FPA see D. Hinchcliff, "The Iranian Family Protection Act", in 17 *ICLQ*, 1968, pp. 516-521.

⁴⁶ Cited in M.H. Horre Amuli, *Op. cit.*, p. 192.

⁴⁷ Syrian Code of Personal Status Law (1975).

⁴⁸ Jordanian Law of Personal Status (1976).

⁴⁹ Iraqi Code of Personal Status Law (1987).

⁵⁰ The Kuwaiti Code of Personal Status Law (1984).

⁵¹ Tunisian Code of Personal Status Law (1956).

diluted the classical rule in *Zohra Begum v. Latif Ahmad Manawwar Case*.⁵² The court emphasized that:

It is permissible for courts of law to differ from the rules of custody as stated in the text-book of Muslim law sine there was no *Qura'nic* or traditional text on the point, and courts which have taken the place of *Qazis*, can, therefore, come to their own conclusions by a process of *Ijtihad* ... Therefore it would be permissible to depart from the rules stated therein if on the facts of a given case, its application is against the welfare of the minor.⁵³

1.1 *Women and the question of guardianship*

Guardianship or *wilayat* is defined as a right to control the movement and action of a person who, owing to mental defects, is unable to take care of himself or herself and to manage his own affairs. The right extends to the power to handle the property of the ward. Regarding the issue of guardianship and the position of the mother, there are different opinions among jurists in both schools of thought, Sunni and Shi'a. The Shafi from the Sunni school have recognized the natural guardianship of mother over the child.⁵⁴ The scholars belonging to this sect consider the mother's position regarding guardianship over the child's assets after the father and the paternal grandfather.⁵⁵ In other words, these jurists believe that after the father and paternal grandfather, the mother has the priority over the executor administering the assets of her minor child.⁵⁶ In this respect, some of jurists who belong to the Hanafi sect, with regard to guardianship of the mother over the personal and non financial affairs of the child, such as marriage etc., believe that if male relatives of the father do not exist, then the mother can assume guardianship and if the mother is not alive, then the

⁵² *Zohra Begum v. Latif Ahmad Manawwar Case*, 1965, PLD (WP) Lah 695.

⁵³ *Ibid.*

⁵⁴ Abol Saeed Astakhri argument cited in Helli, *Tazkretol Al-foqhaha*, Vol. 2, Moassessh Dar al-Beit, Qum, 1991, p. 92. See also J.J. Nasir, *Op. cit.*, pp. 129-134; M. Ibn Idris al-Shafi'i, *Al-Shafi'i's Risala : Treatise on the Foundations of Islamic Jurisprudence*, trans by M. Khadduri, Islamic Text Society, Cambridge, 1993; A. Abu Isfahani, *Sunni Safi Law Code*, Islamic Book Service, India, 1998.

⁵⁵ *Ibid.*

⁵⁶ *Ibid.*

mother's relatives can assume this responsibility, consideration being given to their degree of closeness to the child.⁵⁷

Shi'a jurists believe that only the father and paternal grandfather can assume the guardianship over the financial affairs of the child and the mother has no role.⁵⁸ In their view, the father and paternal grandfather shall administer the estate of children and the mother has no responsibility over this matter.⁵⁹ In other words, the custody and up-bringing of the child might be in the hands of the mother but she does not have capacity to administer her child's assets. It is worth mentioning that the capacity of the father and paternal grandfather to administer the assets of the child is called "natural guardianship" because by nature or compulsorily they assume this capacity. The father and paternal grandfather can appoint the executor who will become the child's guardian, following their death.⁶⁰ According to this school, both the father and paternal grandfather have the same responsibility and are preferred over the mother.⁶¹

The CCI, in the light of Shi'a jurisprudence on the issue, has recognized the father and paternal grandfather and an executor appointed by them as special guardian of the child.⁶² The CCI, following this view, gives preference in guardianship and administration of the financial affairs of the child to the father and paternal grandfather.⁶³ In this case the father and paternal grandfather have the same

⁵⁷ See S. Mahmassani, *Al-mabadi Al-shariah va Al-ghanooniah*, Vol.1, Sar al-Ilm li al-Malayin, Beirut, 1979, pp. 67-68. See also M. Al-Amriki, *The Essential Hanafi Handbook of Fiqh*, Kitab Bhavan, India, 2000.

⁵⁸ See M.J. Amuli, *Meflah Al-keramah*, Vol. 5, Bitah, Beirut, p. 255. See also S. Sani, *Masalek Al-afham fi Sharh Sharaye al-Islam*, Vol. 1, Chape Tehran, Qum, 1851, p. 250; M. Najafi, *Op. cit.*, Vol. 26, p.110.

⁵⁹ *Ibid.*

⁶⁰ *Ibid.*

⁶¹ See S. Sani, *Op. cit.*, Vol. 1, p. 255.

⁶² See S.H. Safai, *Huquq Khanevadeh*, Vol. 2, Entesharat Daneshgah Tehran, Tehran, 2001, p. 130-132. Article 1181 CCI provides "Either the father or the paternal grandfather has the right of guardianship over his children."

⁶³ Article 1188 of CCI provides that "In all matters relating to estate and the civil and financial affairs of the ward, the guardian will act as his or her representative."

responsibility and each can separately assume the right of guardianship over the child.⁶⁴ For example, even if the father is alive the paternal grandfather can lease the child's house, even if the father opposes such a move. In this case, the father of the child has the right to receive the rental of the child's property that the paternal grandfather has leased, even if the paternal grandfather opposes it or is not informed.

The natural guardian shall be the legal representative of the child in all affairs and issues pertaining to the child's assets and financial rights.⁶⁵ Either the child's father or grandfather, after the death of the other, may appoint the guardian for the child in his custody who can undertake the up-bringing and education of the child and administration of its estate.⁶⁶ In other words, neither a father nor parental grandfather may appoint a guardian for his ward while the other still is alive.⁶⁷ In this case, the legislator not only gives the father and the paternal grandfather priority over the mother in administering child's assets but it considers anybody else as an executor prior to the mother.

Again, the natural guardianship of the father and the paternal grandfather shall not be limited to the period when they are still alive but they can appoint someone such as the child's uncle as the executor to assume the guardianship of the child's assets after their death. In this regard the mother can assume no responsibility whatsoever. Only after the father, paternal grandfather and the executor, might it be the mother's turn to assume such responsibility.⁶⁸ Under the present Iranian legal system, the mother of

⁶⁴ *Ibid.* See M.J Jafari Langaroudi, *Huquq Khnevadeh*, Entesharat Ganj Danesh, Tehran, 1996, pp. 165-170.

⁶⁵ See Articles 1183 and 1184 of the CCI.

⁶⁶ Article 1188 CCI.

⁶⁷ Article 1189 CCI.

⁶⁸ Article 1218 CCI. Also it is worth mentioning that FPA put the mother along with paternal grandfather with regard to guardianship. Article 15 of the FPA stated that "... upon the request of the public prosecutor and approval of the City's court the guardianship shall be granted to either the paternal grandfather or the mother of the child". Therefore according to the said article, in case of death

the child, if she is morally competent and has not re-married, shall have priority over others as guardian of the child, *ghayam*. The *ghayam*, unlike the natural guardian and the executor, must act under the court's supervision and must annually prepare an income and expense statement of the child's assets for the approval of the court and in carrying out some transactions such as sale and mortgage of the child's assets and the like must obtain consent of the court in advance.⁶⁹ However, the natural guardian of the child has absolute authority with no limitation and is not required to obtain the court's consent. In contrast, the mother who, in the absence of the father and the paternal grandfather, is appointed by the court as *ghayam*, must make a complete inventory of the latter's property and send a copy of it to the public prosecutor in whose district the ward resides, before taking any action over matters relating to the ward's financial affairs.⁷⁰ In the case where the mother re-marries, she may lose her legal position or be placed along with other child's relatives or can award this guardianship to someone else and only custody of the child shall remain with the mother. The mother also must contact the public prosecutor of the district within one month of the date of marriage and the court shall decide whether to appoint the mother as the administrator of the child's assets or not.⁷¹

Another controversial issue in this legal system is that the mother of the child cannot appoint an executor, because only the father and paternal grandfather can appoint an

of the father, a natural guardianship would have been given to the mother and the paternal grandfather. In other words, the FPA recognized the natural guardianship of the mother after the father. After the revolution in 1979, however, this law was found to be in contradiction with the *Sharia* and therefore it became null and void. See D. Hinchcliff, "The Iranian Family Protection Act" in 17 *ICLQ*, 1968, pp. 516-521.

⁶⁹ See N. Katousian, *Huquq Madani Khanevadeh*, Tehran University Press, Tehran, 1989, pp. 139-141. See also S.H. Imami, *Op. cit.*, Vol. 5, p. 187. Articles 1236 and 1237 of CCI. Article 1244 of CCI provides that: "The guardian must submit accounts of his period of guardianship at least once a year to the public prosecutor or his representative. If he fails to submit his accounts within one month of a request from the public prosecutor that he should do so, he shall be dismissed on the order of the public prosecutor."

⁷⁰ Article 1236 of CCI.

⁷¹ Article 1251 of CCI.

executor.⁷² If the mother generously gives an asset to her child or if she wills property to her child, she cannot appoint an executor to administer that property and asset, because after death of the mother (legator) the property will automatically belong to the child and administration of child's assets will be in the hands of the guardian or an executor appointed by him. An executor appointed by the mother will not have any capacity in this regard.⁷³ However, the mother can state in her will that an asset is to be given to somebody with the proviso that the person shall spend the revenue earned from this asset for the mother's minor child. In this case, as the said asset will not become the property of the minor child, the natural guardian or an executor appointed by them cannot interfere, and this provision will remain correct and valid.

Discourse on the father's and grandfather's guardianship over children in Islamic law covers a vast area and has wide-ranging aspects to it. This extent in practice deprives the mother of her fundamental rights, including opening an investment account in Iran at the bank for her own children who are under 18 years old. This issue, as a clear example, will be highlighted here.

1.2. The scope of mother's authority in opening an account

Uncertainty about the future of one's own children in many societies including Iran leads many mothers around the world to open some kind of long-term savings account in their children's names in order to provide a kind of quasi-security for their future.

⁷² Article 860 of CCI provides that: "No person other than a minor's father or paternal grandfather may appoint a testamentary guardian to act on their behalf."

⁷³ For example, if the mother generously willed her orchard to her minor and appointed her brother as the executor to administer the affairs of the orchard, and if the mother died, only that part of the will that related to the orchard would be valid i.e. the orchard would belong to the child, while the other part of the will, i.e. appointment of the executor to administer the affairs of the orchard, would become null and void, because she cannot appoint an executor. See S.A. Shaigan, *Huquq Madani*, Entesharat Taha, Qazvin, 1995.

Since they wish to exclude their posterity from inheriting their assets after their death, opening a long-term investment accounts offer a solution for the problem of having a say in who inherits what and how much of what parents leave behind after their death. In Iran after many years of struggle and controversy, as well as extensive challenge by women and intellectuals, eventually the parliament approved this right for mothers in 1978.⁷⁴ The law enables women to open savings accounts in the name of their own minors and withdraw money until the minors reaches 18 years old. After the Islamic Revolution, the Iranian Parliament in 1980 approved the Act for Islamic Interest-free Banking Operations and Financial Transactions based on the *Sharia*.⁷⁵ The Supreme Council of Judiciary system regarding mothers' right to open an investment account for their minors interpreted the 1980 Act as follows: "By the term "Savings Account" it is meant interest free *garz ul hasaneh*."⁷⁶ From this date onwards, almost three decades, mothers have not been able to open long or short term investment savings accounts for their own minors who are children under 18, simply because interest is added to such bank accounts. The most important reason offered by the authorities for the existence of such discrimination against women was the exclusive guardianship rights of fathers and paternal grandfathers over minors.⁷⁷ On this basis, mothers have no right in this respect and the exclusive right to provide for the future of children remains with fathers and parental grandfathers.

⁷⁴ In 1979, considering that due to the economic status and conditions of the country the opening of interest free savings accounts would not from an economic standpoint be reasonable and deprivation of mothers could be the cause of material and financial disadvantage to many individuals. This complication once again became the topic of which much debate. The Iranian National Bank, called Melli Bank, argued that mothers at the time of opening the account enter into a contractual agreement with the bank on the basis of which minors, once they reach the age of legal maturity, come into possession of whatever is saved in their name by their mothers. The Central Bank of Iran rejected this reasoning by the Melli Bank. It claimed that according to laws and regulations governing the country's banking operations and its interpretation by the Judiciary Supreme Council and *Sharia* respecting our banking system, a mother could only open an interest free savings account for her minor.

⁷⁵ *Majmoeh Ghavanen Majles Shura Islami*, Edareh Tanqih Ghavanin, Parliament Press, Tehran, 1980.

⁷⁶ The Council interpretation on the above law cited in *Majaleh Zanan*, Vol. 87, 2003, pp. 8-10.

⁷⁷ See the scope of exclusive guardianship rights of fathers and paternal grandfathers under the Islamic law in this chapter.

In a short period of time, the Iranian Government discovered that an interest free banking system (*Amaliat banki bedoon riba*) is not sustainable, and if banks throughout the country were expected to deliver interest free services to the general public, the banking system would become bankrupt very soon and subsequently the country's economy would encounter a liquidity and financial crisis.⁷⁸ Therefore the Government tried to find a suitable solution under Islamic jurisprudence by consulting high-ranking religious authorities. In response to the problem, some religious leaders issued a *fatwa*⁷⁹ and under certain circumstances⁸⁰ allowed interest for loans, bank investment and saving accounts. Nonetheless, mothers who wish to invest for their minors are prevented from this kind of investment because a mother does not have the right of guardianship over her own children. As a result, the mother cannot give the bank authority to act on behalf of her children and use money saved and invested in their names. In 1992 the Supervisory Body overseeing banking affairs invoked the 1980 Act which entitled women to open savings accounts for their minors. The Body announced:

⁷⁸ For more information about the methods of Islamic banking see A. A. El-Naggar, "Islamic Banks: A Model and the Challenge", in *The Challenge of Islam*, edited by A. Gauhar, Islamic Council of Europe, London, pp. 221-233. See also K. Ahmad, "Islam and the Challenge of Economic Development", in *The Challenge of Islam, Ibid.*, pp. 339-349. The literal meaning of interest or *al-riba* as it is used in the Arabic language means excess or increase. In the Islamic terminology interest means effortless profit or that profit which comes free from compensation or that extra earning obtained that is free of exchange. *Riba* has been described as a loan with the condition that the borrower will return to the lender more than and better than the quantity borrowed. The *Qur'an* says: "O you who believe! Eat not *Riba* (usury) doubled and multiplied, but fear Allah that you may be successful." *Qur'an*: 3:130 *Qur'an* also order that: "Those who eat *Riba* (usury) will not stand (on the Day of Resurrection) ..." *Qur'an*: 2:275 and 281.

⁷⁹ See R. Khomeini, *Esteftaat Imam Khomeini in Tozih al-Masael*, Markaz Nashr Farhangi Rija, Tehran, 1987, para. 2552.

⁸⁰ In this manner, customers at the time of opening an account implicitly give the bank the right to act as agent to divide profit between itself and the customer, while an important part of the interest is guaranteed prior to such transactions by the bank and at the end of the term of investment a little interest is added to it. In other words, the Banks' agent mechanism is such that the person who opens the investment savings account gives the bank authority to use his money in other deals on behalf of the individual customers. After completion of such investment, the profits are shared between the customer and the bank.

Parents, inclusive of mothers and fathers, can open either investment or interest free savings accounts for their minors who are under age of 18 years old.⁸¹

The above-mentioned Directive was opposed and immediately repealed on grounds of being in contradiction with the *Sharia* and CCI. The statement in this respect read as follows:

The banks are, at the time of opening different kind of accounts, duty bound to observe and operate within the laws and regulating governing accounts. One of these laws is the Civil Code of Iran. According to the Civil Code and Islamic jurisprudence any interference with the assets belonging to minors is not legitimate and possible unless under the permission of guardians or tutelage support or trusteeship or direct permission from the court. As far as utilizing savings in the long term investment accounts are concerned, it will require conferment of agent and a mother, except as the guardian of her minor (when appointed by the court) does not under regulations dictated by law possess the necessary legal rights and authority for such a conferment, which lack of required authority is the subject of proviso or amendment to Clause (2) of Rules and Laws governing banking operations relative to interest free savings.⁸²

Since in opening a long or short term investment savings account a person necessarily confers on the bank the right of agent, to use the money deposited in the account in profitable investment projects, and the management of minors assets is the duty of the guardian, executor of the will (*wasi*), and trustee, the mother cannot open an investment savings account for her minor unless she is acting as a trustee appointed by the court. Presently, the legislator in Iran insists on the traditional understanding of the rights of the father and paternal grandfather to become minor's guardian.⁸³ Only in the absence of the guardians, their proven incompetence, dishonesty or mismanagement of the estates of the minor, can a mother become *ghayam* for her own minor.⁸⁴

⁸¹ Directive 35/1927. The Directive cited in *Ettelaet*, 07/09/1371, 1992.

⁸² *Ibid.*

⁸³ Articles 1180, 1189, 1194 of the CCI .

⁸⁴ Under the present Iranian legal system the only way a mother can open an investment savings account is under existing forms which allow anyone (other than the guardian or trustee) to open the said account under any names or for anyone at all. In other words, a mother can be considered as "anyone." In practice, this way poses numerous practical problems, one of which is that the actual

Women's duty in Islamic societies towards family and their society is crystal clear but they are treated unequally in some aspects including custody and guardianship. Equality and non-discrimination are very fundamental principles of human rights. The principle of equality in international human rights law is based on the recognition of human dignity. Article 1 of the UDHR, Article 2(1),⁸⁵ 3⁸⁶ and 26⁸⁷ of the ICCPR also emphasises equality and prohibits non-discrimination on ground of sex. The Women's Convention also paid great attention to the issue and specifically advocates equality for women and prohibits all forms of discrimination against them.⁸⁸ However, lawmakers in some Islamic society have done little to eliminate the present discrimination against women, which deprives them in different dimensions of their daily life. However, in the light of recent *fatwas* (religious decrees) and interpretations by Islamic jurists, fundamental changes are taking place on Islamic economic laws to adjust with today's world.⁸⁹ For example taking or

owner of such an account is the person who has actually opened the account, i.e. in this case the mother herself; the only difference being that when the minor reaches the age of legal maturity, the name of the account holder automatically changes to him/her. If the account holder dies before the minor reaches the age of maturity, the liquid assets saved in that account are distributed amongst their descendant posterity as their rightful inheritance.

⁸⁵ Article 2(1) of the ICCPR stated that: "Each state party to the present Covenant undertakes to respect and to 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. Article 3 also stated that: "The states parties to the present covenant undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant." And Article 26 states that: "All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

⁸⁶ Article 3 of ICCPR stated that: "The state parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant."

⁸⁷ Article 26 of the ICCPR provides that: "All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

⁸⁸ See comprehensive discussion on Women's Convention and its articles at Chapter 2.

⁸⁹ See M.A. Cook, *Studies in the Economic History of the Middle East from the Rise of Islam to the Present Day*, Oxford University Press, London, 1970, pp. 373-427. See also M.N. Siddiqi, *Some Aspects of the Islamic Economy*, Islamic Publications Ltd, Lahore, 1970; Z.Y. Hershlag, *Introduction to the Modern Economic History of the Middle East*, Oxford University Press, London, 1964.

delivering of interest is an illegitimate and cardinal sin *haram* in the Islamic jurisprudence. However, as the Islamic authorities gradually realized the need of economic and banking infrastructures for flexibility in this matter, they have tried to find solutions such as bailment (*muzarabeh*)⁹⁰ and the agent (*vekalat*). Indeed, if we consider merely Islamic law as it was received 14 centuries ago, without dynamic interpretation, then what Islamic banks in various Islamic countries are doing today is in direct opposition to Islamic teachings.

2. *Qawwāmun* and women's political rights

The Convention on the Political Rights of Women in 1952 (CPRW) was one of the earliest international legal instruments, which is considered essential to the realization of the principle of equal political rights of men and women.⁹¹ The convention, indeed, concerned women's rights and provided that women should be entitled to vote in all elections and to hold public office and to exercise all public functions and that they should be eligible for election to all publicity elected bodies on equal terms with men, without any discrimination.⁹² Article 25 of ICCPR also calls for the right and opportunity of every citizen without any restriction mentioned in Article 2⁹³ to participate directly or indirectly in the conduct of public affairs of state. This article, indeed, reflects a democratic process in asserting the rights of every citizens:

⁹⁰ A bailment contract is one that may be revoked at any time. It is a contract whereby one of the contracting parties delivers a capital sum to another party with the stipulation that they use it for commercial activities and share the profits earned thereby. The owner of capital is called the bailer and his agent is known as bailee. It should be noted that the capital delivered must be in the form of a sum of money in cash.

⁹¹ See UNTS, Vol. 193, 1954, pp. 135-143. The Convention entered into force in 1954.

⁹² See Articles 1-3 of the Convention on the Political Rights of Women. For more information see <http://www.unhchr.ch/html/menu3/b/22.htm>.

⁹³ Article 2 of the ICCPR stated that: "A State party to the present Covenant undertake to respect and to 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 ..."

(a) To take part in the conduct of public affairs, directly or through freely chosen representatives;

(b) To vote and to be elected at genuine periodic elections which shall be by universal equal suffrage ... ;

(c) To have access, on general terms of equality, to public service in his country.

In regard to the article the HRC indicated that: "...no distinctions are permitted between citizens in the enjoyment of these rights on the ground of race, colour, sex, language, religion, political," ⁹⁴ The HRC also indicated that:

The conduct of public affairs, referred to in paragraph (a), is a broad concept which relates to the exercise of political power, in particular the exercise of legislative, executive and administrative powers. It covers all aspects of public administration, and the formulation and implementation of policy at international, national, regional and local levels. The allocation of powers and the means by which individual citizens exercise the right to participate in the conduct of public affairs protected by Article 25 should be established by the constitution and other laws. ⁹⁵

Women's Declaration of 1967 in Article 4 paid special attention to the political rights of women. The Declaration grants women the right to vote, the right to be eligible for election, and the right to hold public office. ⁹⁶ It took as its basis the provisions of the Convention on the Political Rights of Women, but it expands the scope of political rights of women.

Participation of women in political and public life, both nationally and internationally is emphasized in Article 7 of Women's Convention, which addresses the obligations of states parties to grant men and women equal rights in this respect. ⁹⁷ Under the article states parties are "obliged to take all appropriate measures to eliminate

⁹⁴ General Comment 25, para 3. It should be noted that unlike the civil rights, political rights do not apply to every individual but only to citizens of particular states. The Covenant does not prescribe the criteria for citizenship of state parties but the HRC has indicated that: "State reports should outline the legal provisions with define citizenship in the context of the rights protected by Article 25..."

⁹⁵ General Comment 35, par.5.

⁹⁶ For the Text of the Declaration, see *Yearbook of the United Nations, 1967*, United Nations Publication, New York, pp. 514-516.

⁹⁷ See R.J. Cook "Women", in *The United Nations And International Law*, edited by C.C. Joyne, Cambridge University Press, Cambridge, 1997.

discrimination against women in the political and public life.” Member states also are obliged to eliminate discrimination against women in voting in all “elections and public referenda and to be eligible for election to all publicly elected bodies.”⁹⁸ The final paragraph of the article goes further and grants women the right “to participate in the formulation of government policy and the implementation thereof.” Women have the right not only to hold public office and to perform public functions at all levels of government which covers all offices and functions of government, legislative, executive and judicial, but also to participate in the formulation of governmental policy, which means women would share power with men by being included in the decision-making process.⁹⁹ The article also grants women the right “to participate in non-governmental organization and associations concerned with the public and political life of the country”.¹⁰⁰ Indeed, the provision extends the scope of women’s rights to participate in political and public life and also the right so provided may have some effect on the right of association in general. The right is further expanded by the article which provides that: “states parties shall take 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 participate in the work of international organization.”

Reservations and declarations to Article 7 have been made by states parties from both Muslim and non- Muslim states.¹⁰¹ The question whether Islamic law prohibits women from voting or having participation in the public affairs of the state is often

⁹⁸ See also R.J. Cook, “State Accountability Under the Convention on the Elimination of All Forms of Discrimination Against Women” in *Human Rights of Women National and International Perspective*, edited by R.J. Cook, University of Pennsylvania Press, Philadelphia, 1994.

⁹⁹ See N. Burrows, *Op. cit.*, p. 432. See also A. Byrnes, “The Convention on the Elimination of All Forms of Discrimination Against Women”, in *Human Rights of Women International and African Perspectives*, edited by W. Renteln, *et al*, Zed Books, London, 1998.

¹⁰⁰ Article 7(c) of the Women’s Convention.

¹⁰¹ For example Belgium, Luxemburg, Malaysia, Kuwait and Morocco. For information about states’ reservation see chapter 2 of this work. See also www.un.org/womenwatch/daw/cedaw/states.htm.

misrepresented by the practice in few Islamic countries such as Kuwait and Saudi Arabia¹⁰² because there is nothing in Islamic law that prohibits women's political rights with respect to voting and taking part in the conduct of public affairs of the state.¹⁰³ A quick look at the *Qur'an* and *Sunna* shows that they contain no specific stipulations regarding the political system. They emphasise that good governance is based on justice, equity and responsibility, but leave its actual administration in the hands of the community. In fact, the community has the right to elect its leader either directly or indirectly.¹⁰⁴ The *Qura'nic* principle of consultation (*shura*) has been interpreted by Islamic jurists to accommodate the process of democratic and free elections.¹⁰⁵ As Hussein rightly argues, nowhere in the *Qur'an* or *Sunna* are women prevented from participating in the *shura* process. He also added:

... Women did participate in the *shura* and participated and continue to participate in the running of the affairs of various Islamic states through the holding of various governmental top positions and through the *shura* process. ... Those who do not support women's participation in the *shura* process and in running the affairs of state base their views not on the principles and rules of the Islamic religion and the Islamic *Shari'a* but on mere social concerns and fears which do not rest on any Islamic principle or rule.¹⁰⁶

In the light of Islamic teaching, Article 23 (b) of the OIC Declaration on Human Rights in Islam pays attention to the issue and stated that:

¹⁰² A fundamentalist approach to different aspect of women rights including the right to political participation has been seen in a few Muslim countries, namely Saudi Arabia and Kuwait. Women in Saudi Arabia are still *de jure* deprived of their right to political participation including the right to vote, although, men too are *de facto* denied any role in governance of the country because of lack of democracy. Kuwait until two years ago took a similar position. In 2005, following great pressure from the international community and challenge of women's activists, the Kuwaiti Government approved a bill which allowed women to vote and stand in elections. See http://news.bbc.co.uk/1/hi/world/middle_east/4325207.stm. See also H. Biefeldt, "Muslim Voice in the Human Rights Debate" 17 *HRQ*, 1995, p. 597.

¹⁰³ See S. Ramadan, *Islamic Law, Its Scope and Equity*, Macmillan, London, 1970, pp. 144-145. See also M. Kadivar, "Political Rights of People in Islam", in *Islamic View on Human Rights*, edited by H. Salimi, Al-Hoda International Publisher, London, 2001, pp. 107-123.

¹⁰⁴ See A.K. Zaidan, *Individual and the State in Islamic Law*, International Islamic Federation of Students Organizations, Kuwait, 1982, pp. 16-26. See also M. Hudson, "Islam and Political Development" in *Islam and Development: Religion and Socio-political Change*, edited by J. Esposito, Syracuse University Press, Syracuse, 1980.

¹⁰⁵ See G.M. Hussein, "The *Shura* and Human Rights in Islamic Law", in *Cairo Conference on Democracy and the Rule of Law*, 1997, pp. 5-6.

¹⁰⁶ *Ibid.*

Everyone shall have the right to participate, directly or indirectly in the administration of his country's public affairs. He shall also have the right to assume public office accordance with the provisions of *Shari'ah*.¹⁰⁷

Nowadays, an important obstacle in the way of political rights of women in some Muslim states is the right of being elected to the highest public office. In some Muslim states, only men are eligible to occupy the highest of positions and become head of the country.¹⁰⁸ This fact is observable in both semi-democratic¹⁰⁹ and monarchical systems.¹¹⁰ In an attempt to justify this *de jure* discrimination against women, they resort to the broad interpretation of the *qawwāmun* verse or a few *ahadith* from the Prophet, of which one of the famous is a tradition in which it is reported that when the Prophet heard that the Persians had enthroned a daughter of the Chosroe as their Queen he said: "Any nation that leaves its affairs in the hands of a woman would not prosper,"¹¹¹ or based on women's *wilaya* and conclude that women cannot be accorded rightful authority as head of an Islamic state.¹¹²

¹⁰⁷ See the Organization of the Islamic Conference (OIC) at <http://www.oic-oci.org/> Available in February 2006. See also H. Mihrpour, "Criticism and Study of the Cairo Declaration of Human Rights in Islam", in *Islamic View on Human Rights*, edited by H. Salimi, Al-Hoda International Publisher, London, 2001, pp. 125-143.

¹⁰⁸ See H. Steiner, "Political Power as a Human Rights", 1 *HHR*, 1988, p.77.

¹⁰⁹ Islamic Republic of Iran is a prominent example in this regard. The Iranian constitution, in Article 115 states that: "The President must be elected from among religious and political *rajal* ..." The term used, "*rajal*", for determining who can become president of Iran is used to mean a male person, and so is indicative that only men can take part in this unequal race and women have not the right even to offer themselves as candidates. Of course, some have argued that the purpose and meaning of the term "political and religious *rajal*" refers to distinguished and important "political and religious personalities"; even though such a meaning is not obvious in the terminology employed. But there are still others who argue that if the purpose and meaning of the lawmaker was to enable only distinguished "political and religious personalities" to become president of Iran, then they could say so by using suitable terms and phrases to make their meaning crystal clear. Rather, using the term "*rajal*" (men) can only mean inadmissibility of women for the top post. In practice, when women put forward their names as potential candidates for the presidency of the country in the last 9 elections, the Guardian Council of the Islamic Constitution resorted to Article 115 of the Constitution and disqualified them from the election. K. Eftikhar, *Basic Documents on Iranian Law*, Royston Publisher, 1987. *Constitution of the Islamic Republic of Iran*, Mizan Press, Tehran, 1980.

¹¹⁰ For example, Saudi Arabia, Kuwait, Bahrain, United Arab Emirate.

¹¹¹ See F. Karim, Al-Hadis, *An English Translation and Commentary of Mishkat-ul-Masbih with Arabic Text*, Vol.2, 1994, p. 206.

¹¹² Nowadays in many countries all kinds of legal barriers have been removed to enable fuller participation by women, but at the same time not enough practical participation has been put forward to be taken up by women. Adjustment of neutral laws and regulations is a great attempt at creation of true equality between male and female, even though legal equality does not guarantee equal treatment of

Due to this fact, that the first and second sources of Islamic law have not laid down any specific political system for the Islamic society, as well as the *Qur'anic* verse that God has made human beings his agents and representatives on earth and this status is conferred upon all human beings, the present author rejects these approaches in the name of religion, because there are no substantive laws in *Sharia* to prevent women from being elected to any public office. Such denial not only cannot be found in the *Qur'an* but also it is true to say that the *Qur'an* speaks quite differently on the same topic, for example it endorses the rulership and government of a queen, Belghais, who was the ruler of the *Saba* nation.¹¹³ From the *Qur'anic* point of view, this lady was a wise, decent and foresighted queen who was the an effective ruler, with leadership ability and in possession of qualities, which make an appropriate and good queen.¹¹⁴

Moreover, not only is the *hadith* referred to an isolated *hadith (ahad)* and there is serious doubt about its authenticity, the words of the *hadith* do not express a prohibition on a woman being elected as a head or leader of state. On the basis of a *hadith* related to Prophet, a petition was brought before the Federal Sharia Court of Pakistan in 1982. Aftab Hussain, the Chief Judge of the Court, in his judgment extensively examined the different opinions of Islamic jurists on the tradition and dismissed the petition. He cited a list of classical and contemporary Islamic legal works to establish that Tabari, for instance, supported the appointment of a woman as head of state. In his judgment he observed that:

It is on account of this *hadith* that in the 22 points of the Ulema of Pakistan which were presented to the government as necessary preliminaries to the framing of a constitution, point No. 12 specifically said that the head of the state will be a Muslim male. This point was re-examined during the course of

men and women in society. See N. Mosafa, "Women's Political Participation: A Field Study", 9 *JFP*, Tehran, 1995, pp. 605-607.

¹¹³ *Qur'an*: 9:14

¹¹⁴ *Qur'an*: 27:44 and 45.

campaign for the Presidential Elections of 1964 in which Miss Fatima Jinnah was nominated by the opposition parties to fight the election to the office of the President of Pakistan against Field Marshal Muhammad Ayub Khan. After a research the view about a woman being qualified for the office of the Head of State was changed on the basis of opinions of two of the most renowned Ulema of the 20th Century in Indo Pakistan, namely Maulana Ashraf Ali Thanvi and Allema Syed Sulaiman Nadvi. The Jamait-e-Islamia Pakistan endorsed this view after retracting its earlier stand on the matter which was reflected in the above-mentioned point No.12. Maulana Maudoodi was severely criticised for this by Kalim Bahadur in his book 'Jamait-i-Islami of Pakistan' But this criticism was not justified since it is the duty of a Muslim to accept the truth and to change and retract his earlier view."¹¹⁵

Finally, a brief look at the Prophet's treatment of his wife and his daughter and his attitude towards them shows his high opinion of women and their place in political and social life.¹¹⁶ In spite of the fact that in the Prophet's day Arab culture placed little importance on the lives of women, the Prophet himself paid much attention and respect to his wife and his daughter. This fact alone is expressive of the true worth and status of women in those bygone days.¹¹⁷

3. *Qawwāmun* and the right to work of women

Work is traditionally recognized as a legitimate means of earning and living of every human society. As Sieghart argued, work is an essential part of the human condition.¹¹⁸ The right to work without any discrimination is recognized in different international documents. Article 23 of the UDHR stated that: "Everyone has the right to work, free choice of employment, ... and to protection against unemployment." Article 6 of the ICESCR in para 1 required that state parties to the Covenant recognize the right to work, which includes freedom of choice or acceptance, and will

¹¹⁵ *Ansar Burney v. Federation of Pakistan Case*, PLD 1983 Federal Sharia Court, p. 85.

¹¹⁶ See A.J. Amuli, *Zan dar Ayeneh Jalal va Jamal*, Nashr Farhangi Rija, Tehran, 1994, p. 346. See also G.M. Hussein, *Op. cit.*, pp. 56-60.

¹¹⁷ *Ibid.* See also F. Mernissi, *The Veil and the Male Elite: A Feminist Interpretation of Women's Rights in Islam*, Addison-Wesley, Reading, 1991. It should be noted that the Prophet, before signing up to the Hadibiyeh Peace Agreement, consulted with his wife and let her view on the topic prevail. On various occasions the Prophet also consulted with his daughter Fatemeh.

¹¹⁸ See P. Sieghart, *The Lawful Rights of Mankind: An Introduction to the International Legal Code of Human Rights*, Oxford University Press, Oxford, 1986, p. 123.

take appropriate steps to safeguard this right.¹¹⁹ Article 2(2) and Article 3 of ICESCR also would prohibit any discriminatory legislation or practice that inhibits certain group such as women from employment.¹²⁰ The International Labour Organization (ILO) also provides that its state parties shall “declare and pursue, as a major goal, an active policy designed to promote full, productive and freely chosen employment, ... irrespective of race, colour, sex, ...”¹²¹

The right to work is fully recognized under the Islamic law and the state has a duty to respect the right of every individual to work and encourage those who have the capacity to do so.¹²² However, the right of the individual to do any work, which he/she freely chooses and accepts will not include the right to choose any work prohibited by the *Sharia*.¹²³ These are considered as a detrimental to both the ultimate well-being of the individual and that of the society at last. Article 12 of the OIC Cairo Declaration on Human Rights in Islam also stated that:

Work is a right guaranteed by the state and society for each person able to work. Everyone shall be free to choose the work that suits him best and which serves his interests and those of society. The employee shall have the right to safety and security as well as to other social guarantees. He may neither be assigned work beyond his capacity nor be subjected to compulsion or exploited or harmed in any way.¹²⁴

In regard to non-discrimination in the right to work, the right of women under the Islamic law freely to choose or accept of their own choice becomes important. In

¹¹⁹ Article 6 of ICESCR.

¹²⁰ See M.C.R. Craven, *The International Covenant on Economic, Social, and Cultural Rights: A Perspective on its Development*, Oxford University Press, Oxford, 1995, p. 13.

¹²¹ ILO 122, 1(2).

¹²² See M. Al-Gazali, *Huquq al-Insan Bayn Talim al-Islam Wa I'lan al-Umam al-Mutahidah*, Dar al-Da'wah, Alexandria, 1993, pp. 177-203.

¹²³ There is some prohibited work under the Islamic law such as gambling, alcohol business, Usury and prostitution. Article 14 of the OIC Cairo Declaration on Human Rights in Islam providing that: “Everyone shall have the right to legitimate gains without monopolization, deceit or harm to oneself or others,” added also that “Usury is absolutely prohibited.” See Karim, *Op. cit.*, p. 410. See also M.S. Chaudhry, *Islam's Charter of Fundamental Rights and Civil Liberties*, Al-Matbaat ul-Arabia, Lahore, 1995, p. 41.

¹²⁴ See H. Moinuddin, *The Charter of the Islamic Conference and Legal Framework of Economic Co-operation among its Members State*, Clarendon Press, Oxford, 1987.

some Islamic states such as Iran, however, women are legally deprived of this obvious right based on *Sharia*.¹²⁵ Following deprivation of Iranian women from magisterial appointment¹²⁶ and the requirement that women obtain the permission of their husbands to take jobs in the Iranian legal system, the ESCR Committee expressed concern in its concluding observations on the initial report of the Iran in 1993¹²⁷ and 2000¹²⁸ on the denial of this right to women.¹²⁹

Judgment in a Court of Law is one of the fundamental civil and political human rights. Nowadays in many countries of the world, women like men are engaged in

¹²⁵ Before the Islamic Revolution in 1979, there was no mention of prohibition or inclusion of women as judges; no kind of negative or positive statement was made respecting women as judges in various laws and regulations relative to the arrangements by which judges could be employed within the Ministry of Justice of Iran or the Employment Laws. For the first time, in 1969, a few women were appointed as judges. In 1979 when the Islamic revolution was at its peak, the Monarchy regime decided to introduce Islamic measures in all areas of daily life, one of which was to prevent women from holding the seat of judgment in courts of law within the judiciary system. Therefore Directives were issued by the Ministry of Justice via the mass media that, irrespective of the prevailing Laws of the country. It stated that: ... only men who had been graduated from the Faculty of Law are qualified and can be considered as potential judges and so only them and no others have the right to take part in the national tests for becoming judges. After the victory of the revolution, the prevailing atmosphere did not admit of women being judges and so the issuing of such licences for women was inhibited. The Minister of Justice established a committee consisting of 5 Ministry judges to take action for the purpose of purging all selected judges of the country. One of the first steps taken by this body was the removal of women from all presidential posts and chairmanships in the judiciary system. See S. Ebadi, *Huquqh Zan dar Ghavanin Jomhoori Islami Iran*, Ganje Danesh, Tehran, 2001, pp. 40-42. See also J. M. Haward, *Inside Iran: Women's Lives*, Middle East Women's Studies, Mage Book, 2002.

¹²⁶ In 1982 an Act determining the conditions and requirements for selecting judges was passed by the parliament, which stated that, "... judges shall be selected from amidst men who meet the following requirements ...". In 1984 the Act was amended and a few notes added. It read as follows: "Women who are in possession of a licence as Judges can work in Special Civil Courts and Offices for Supervision of Children Affairs as consultants while keeping their rights and privileges as judges." As a result of women request as well as ESCR concern a single Article was passed by the Iranian parliament in 1995 which allow Chair of the Judiciary System to employ women who have the right conditions/merits and qualifications as judges, to be engaged in consultative seats at the Administrative Justice Tribunal, Special Civil Courts, ... Two years later, the situation of women in this matter slightly improved when a single Article was approved by the parliament. Under this law women were promoted to the level of Legal Consultants for Judges at Family Courts, and if possible, the verdict must be issued in consultation with them. Today, the Family Courts start their daily hearings with a female consultant, wherever possible, and all decrees/ verdicts issued by judges in these Courts must be approved beforehand by women judges who act as consultants to them. However, in the Iranian legal system women still have no legal right to interfere with the merits of the case and issue their verdicts. See *Majmoe Musavabate Majles Shura Islami*, Edareh Tanqih Ghavanin, Parliament Press, Tehran.

¹²⁷ See concluding observations on Islamic Republic of Iran, (1993), UNDoc.E/C.12/1993/7, para.6.

¹²⁸ See UN Doc. E/CN.4/2000/35 of 18 January 2000, para.22.

¹²⁹ In response to the issue, the representative of Iran at the eighth session of the ESCR Committee in 1993 stated that the situation was being corrected and a text had been submitted to the government in that regard. In spite of this claim it is true to say that in 2007 women's situation in the Iranian legal system still has not improved in this respect.

positions of judgment without any discrimination or prejudice whatever against them. Although the number of women throughout the world who are engaged as judges is less than the number of men who are engaged in this important job, there are no legal barriers to their taking up such posts and the law does not deny them this right.¹³⁰ Since this discrimination against women in some Islamic states takes place based on Islamic jurisprudence, we shall examine the issue in the *Sharia* in the light of different Islamic jurists' points of view.

Islamic thinkers and jurists from both schools of thought have differing views on the reasons and logic for and against the right of women to be judges. On the one hand in the Sunni school, some jurists believe women are permitted to become judges within an Islamic framework.¹³¹ In this regard Al-Tabari and Ibn Hazm argue that women have the right to become judges in all areas and to occupy relevant seats in Courts of Law.¹³² In their view, a woman can be appointed as a judge in all cases, like her male counterpart.¹³³ Tabari pointed out that since a woman can be appointed as a jurisconsult, then she can equally be appointed as a judge.¹³⁴ However, jurists who belong to the Hanafi sect endorse women's judgment but distinguish between criminal and civil cases.¹³⁵ In their view women can judge only civil disputes, such as financial, social and economic matters.¹³⁶ They compare judging with testimony and argue that since it is neither possible nor acceptable for women to bear witness in

¹³⁰ Women in such a society, too, like many men may not have all necessary requirements and conditions in order to become judges in their own countries, and/or they may even possess all the necessary qualifications and requirements for occupying such seats in the legal system of their country, and yet not be interested in taking up the vacant situations. However, what matters most to women throughout the world is having the right to become judges if they choose to do so; there should not be any legal barriers on their route to taking up such posts.

¹³¹ See Ibn Qudameh, *Moghni*, Vol. 9, Maktab al-Riadh al-Hadithah, Riyadh, 1981, p. 39.

¹³² See M. Al-Tabari, *Tafsir al-Tabari*, Mustafa al-Babi, Cairo, 1968. See also A. Ibn Hazm, *Al-Muhalla*, Dar al-Afaq al-Jadidah, Beirut, Cairo, ND.

¹³³ *Ibid.*

¹³⁴ *Ibid.*

¹³⁵ Abu Hanafi held this view that women can be appointed as judges only in civil matters. See Ibn Qudameh, *Op. cit.*, pp. 39-40.

¹³⁶ *Ibid.*

punitive matters, therefore they cannot be allowed to be rightful judges of such matters either.¹³⁷ There are supportive views on the rightfulness of allowing women to occupy judging posts in the Shi'a school.¹³⁸ Sanei, one of the great contemporary Islamic jurists, stated that:

... on the question of women judges I have been saying since twenty years ago and am still of the opinion that maleness of the judge is not a condition, and women too can make good judges and should be allowed to compete on the stage for this important job in the legal system.¹³⁹

On the other hand, there are jurists from both schools who believe that women are not permitted to occupy positions of judgment in Courts of Law.¹⁴⁰ In order to support their view, they have claimed consensus among Muslim jurists. In their view, the first condition and criterion for becoming a judge and issuing a judgment is maleness, and they cite the following reasons:

- The broad interpretation of a few *Qur'anic* verses, including the *qawwāmun* verse;
- Existence of a *hadith* from the Prophet which views judgment as a branch of guardianship; and since women do not possess the necessary merits to become guardians, therefore Islamic society cannot have confidence in women as judges;
- Women's alleged incomplete wisdom and lack of steadfastness when issuing judgments;

¹³⁷ *Ibid.*

¹³⁸ The majority of Shi'a jurists also believe that women are not permitted to occupy positions of judgment in Courts of Law. Fazel Hendi in his book *Kashf al-Lesam* has stated that the reason for this is deficiencies in women's wisdom and power of discretion, as well as the lack of religiosity of women, and also because their testimony should be considered as equal to half that of a man. Seyed Yazdi in his famous work *Alorvat al-Vosgha* rejected women's judgment in all cases and even for their own sex. Shaikh Tousi in his work *Al-Mabsout* refers to those Islamic jurists who defend women's judgment as correct and reasonable in their argument but he prefers not to have judges' licences issued to women. See F. Hendi, *Kashf al-Lesam*, Vol. 2, p. 322. See also S.M.K. Al-Yazdi, *Alorvat al-Vosgha*, Vol. 3, Dar al-Kotob al-Islami, Tehran, p. 5; M. Tousi, *Al-Mabsout*, Vol. 8, Maktab al-Mortazavieh, Qum, 1972, p. 101.

¹³⁹ See Y. Sanei, "Jensiat ve Ahkam Mojazat dar Islam", in *Matin*, Vol. 2, Tehran, 2000.

¹⁴⁰ See F. Tabarsi, *Majma al-Bayan fi Tafsir al-Qur'an*, Vol. 3, Dar al-Marefat, Beirut, 1986, p. 68. See also S.M.H. Tabatabaei, *Al-Mizan fi Tafsire Qur'an*, Vol. 4, Moassesseh Ismailian, Qum, 1974, p. 365; F. Hendi, *Op. cit.*; S.M.K. al-Yazdi, *Op. cit.*; M. Tousi, *Op. cit.*

- Inadmissibility of women's testimonies in a punitive court of law;
- Lack of, even one, female judge during the lifetime of the Prophet and his successors *kholafa*;
- The job by nature would require women judges to work alongside men judges, a requirement which would compel women to become unveiled, while they are expected by Islamic jurists to remain covered and veiled at all times in the public sphere.¹⁴¹

What are the yardstick and supporting documents for such fundamental and chronic discrimination against women? Islamic jurists resort to the *Qur'an*, *Sunna* and *ijma* as supports for their beliefs.¹⁴² Tabarsi, Tabatabaei, Golpaygani, and Khoei refer to the *qawwāmun* verse: "Men are the protectors and maintainers of women because God has given the one more strength than other, and because they support them from their means ..."¹⁴³ In regard to the above verse, much debate has taken place among interpreters of the *Qur'an*. To them guardianship and supervision of men relative to women embraces all aspects of public and social life.¹⁴⁴ Tabatabaei also argues that the explicit directive in the mentioned verse is general and the reason for it is the superiority of men over women in terms of physical strength and wisdom and power of reasoning and thought, as well as their greater stamina and forbearance in the face of life's difficulties and insurmountable problems.¹⁴⁵ To him, the real meaning of the

¹⁴¹ See V. Alzohali, *Al-feqh al-Islami va Adelah*, Vol. 6, Dar al-Fekr, Beirut, 1988, p. 845. See also Ibn Godameh, *Moghni*, *Op. cit.*, p. 39.

¹⁴² See F. Tabarsi, *Op. cit.* Tabatabaei, *Al-Mizan fi Tafsire*, *Op. cit.* p. 1989; M. Golpaygani, *Majma al-Masael, Ketab Al-Ghaza*, Vol. 1, Dar al-Qur'an, Qum, 1988, p. 41; A. Khoei, *Menhaj al-Salehin*, Madinat al-Elm, Qum, 1990.

¹⁴³ *Qur'an*: 4:34.

¹⁴⁴ See Tabatabai, *Al-Mizan fi Tafsire*, *Op. cit.* See also Golpayghani, *Op. cit.*; Khoei, *Op. cit.*

¹⁴⁵ *Ibid.* Bahonar argued that men are bigger and stronger and have larger brains, with more of the said brain section dealing with thought and deliberation. A relatively larger portion of the smaller brain is related to emotion, and women have more in the way of the affection and deep tender sentiments that suit them for child care and nursing. Women's sentiments and emotions make them ill equipped to cope with earning a livelihood, which calls for farsightedness, connivance, and the like characteristics

verse is that men have supervisory powers over women and this role is not limited to the family environment, nor does it exclusively concern itself with family affairs.¹⁴⁶

In other words, just as in the family, women have no supervisory or management role in the husband-wife relationship, they cannot have access to positions of power in government nor judgment in the legal system, as these are both important and public roles, and women can never be considered as eligible for such positions in the public sphere.

At the other end of the spectrum there are interpreters of this verse who reject categorically any supervisory role for men over women, and even within the husband-wife relationship and in family affairs, they doubt the validity of women's subjugation to men on the basis of that verse.¹⁴⁷ In this respect some jurists put forward the view that as maintenance and *mahr* is men's duty, therefore the supervisory role within the family is their duty, but it cannot extend to encompass other aspects of life and social issues.¹⁴⁸ To them, the above verse cannot be a basis or a reason for excluding women from important positions as judges in courts of law and the scope and amplitude of this guardianship is also dependent upon many questions and conditions.¹⁴⁹ Jorjani, for example, states that:

We could perhaps say that whenever a woman can muscle enough economic power to run the family on her own and without any assistance whatever from her husband, she can then be considered strong enough to take on the role of guardianship for her family and or share such responsibilities together with her husband. ... If a woman provides her maintenance for herself and the rest of her

that women lack. Therefore, it is men who are equipped by nature to deal with the tumult of life, and who can fight on the battlefield or manage the affairs of government and society. He also concluded that differences in physical structure are reflected in the mental capacities of the two sexes. See Bahonar's argument in A. E. Mayer, *Islam and Human Rights*, Westview Press, Boulder, 1995, pp. 120-121.

¹⁴⁶ *Ibid.*

¹⁴⁷ See Jorjani, *Al-Merat va Al-Ghaza fi Islam*, Qum, p. 137. See also A.J. Amuli, *Op. cit.*, p. 366.

¹⁴⁸ See, for example, M. Tousi, *Op. cit.*, p. 324.

¹⁴⁹ *Ibid.*

family, we can say that male guardianship (supervision) is not an issue any longer.¹⁵⁰

One of the contemporary interpreters on the subject who takes the view that guardianship is not an absolute and predetermined issue argues that where a woman enjoys economic independence and is fit to manage her own family economy, she should clearly specify the scope of guardianship with her husband in the Marriage Certificate and demand that guardianship rights over the family be granted to her.¹⁵¹

In other words, he believes that the question of guardianship of husband over wife is not a *jus cogens* in Islamic law but it is a social question.¹⁵² Therefore, we must interpret the above mentioned verse as expressive of duty, and not as granting a privilege to men. Moreover, the verse is only about family matters and interpersonal relationships between wife and husband, and has no relation whatever with social, legal and political positions within the wider society.¹⁵³

Montazeri also refers to the following verse:

¹⁵⁰ See Jorjani, *Op. cit.*, p. 137.

¹⁵¹ See S.M.H. Bojnordi, *Al-Ghavaed Al-Feqhieh*, Nashr Alhadi, Qum, 1999, p. 98. See also M.H. Ganati, *Ravesh-haye Koli Istenbate dar Fiqh*, Pasuheshgah Farhang va Honar Islami, Tehran, 2000.

¹⁵² It should be noted that Amuli also took the same position. See A.J. Amuli, *Op. cit.*, p. 366.

¹⁵³ In the view of the present author, the position of judgment does not include guardianship over others. A judge's task in actual fact is to remove hostilities and bring about peace and harmony by means of settling disputes, and such a task does not involve guardianship in any way whatsoever. According to Article 167 of the Iranian Constitution the Judge is bound to endeavour to judge each case on the basis of the codified law. In case of absence of any such law, he has to deliver his judgment on the basis of authoritative Islamic sources and authentic *fatawa*. He cannot on the pretext of the silence or deficiency of law in the matter, or its brevity or contradictory nature, refrain from admitting and examining cases and delivering his judgment. Article 3 of Rules Governing Principles of Dispensing Civil Justice General and Revolutionary Courts (means of legal procedures) expresses the view that "if a judge is a clergyman *mojtahed* and believes the codified law to be in opposition with religious rulings, the case shall be forwarded to another branch of the same Court for ruling." Therefore, even if the codified law is in contradiction with the *fatawa* and verdict of a judge who is a *mojtahed*, the codified law shall prevail, and the judge has no right to violate it, and issue decrees on the basis of his own *fatwa*. Instead he should forward the case to another Court of Law *dadsara*. Therefore, bearing in mind the above-mentioned points, we must ask ourselves how we can bring questions of guardianship into those of judgment, while in judgmental questions finding the relevant decree for specific disputes is the most important task of a judge, and only the Law has the right to consider and issue decrees relative to it.

And stay quietly in your houses, and make not a dazzling display like that of the former time of ignorance.¹⁵⁴

He says being engaged in the task of judgment requires that a judge should get out of his house and rub shoulders with men and address individual or groups of men on a daily basis, as an unavoidable aspect of the task of judging the nation.¹⁵⁵ These are affairs from which women should distance themselves, as they are not supposed to get out of the house and rub shoulders with male members of community, let alone speaking with them directly and issuing decrees and ensuring that they are followed by those very men.¹⁵⁶ To Montazeri, women should abstain from the positions of judgment on a voluntary basis.¹⁵⁷

As many *Qur'anic* interpreters such as Al-Suyuti¹⁵⁸, Al-Qurtabi¹⁵⁹ and Tabatabai¹⁶⁰ emphasized, this verse addresses the Prophet's wives alone and no other woman whatever. Therefore, the verse cannot be considered as a directive for Muslim women in depriving them of their freedoms in the areas of education, work including judgment, and participation in social and political life. The important point in this regard is that if women's right to be judges is denied on the grounds that it involves getting out of the house and rubbing shoulders with men, then women should be denied participation in all kinds of socio-economic activity. For what is the difference between rubbing shoulders with men as a judge and/or as a female member of parliament, or as a teacher or as a university lecturer, or as office workers in state departments all over the country and other organizations and centres? It should be

¹⁵⁴ *Qur'an*: 33:33

¹⁵⁵ See H.A. Montazeri, *Velayat Al-Faqih va Fiqh Al-Dolat Islami*, Vol.1, Al-Markaz al-Alami Iedarasat al-Islami, Qum, 1988, p. 353.

¹⁵⁶ *Ibid.*

¹⁵⁷ *Ibid.*

¹⁵⁸ See J Al-Suyuti, *Tafsir al-Jalayan, Qur'an Karim wa bi Hashimi Tafsir al-Imamayn al-Jalayn*, Beirut, ND.

¹⁵⁹ See A. Al-Qurtabi, *Al-Jami li-Ahkam al-Qur'an*, Cairo, 1952.

¹⁶⁰ See Tabatabai, *Op. cit.*

noted that the founder of the Islamic revolution of 1979, Ayatollah Khomeini, used to praise women for participating in the protest marches against the Shah and their role in the victory of the Islamic revolution.¹⁶¹ He also sent a woman as a member of his delegation (three members) to the former Soviet Union in order to give his spiritual letter to the leader of Soviet Union in 1988. The above story shows that the participation of women in all aspects of society is not contrary to Islamic teaching and values.

Marefat in his work¹⁶² refers to the Prophet's time, 14 centuries ago, when only men occupied this position, as well as a *hadith*, "Turn your glance towards a man who is aware of decrees and directives, and go to him for settling your disputes."¹⁶³ Marefat use this *hadith* to substantiate his belief in the unsuitability of women to become judges.¹⁶⁴ In relation to the *hadith* it is argued that it was stated as a warning against recourse to oppressive and exploitative judges.¹⁶⁵ Moreover, the fact that it refers only to "men" is a reflection of conditions at the time, when only men occupied judging positions; indeed, there were few men who had sufficient legal knowledge to be qualified for this position. Therefore, use of the word "men" should not be taken to mean that even today women are not fit to get engaged in judging positions.

None of the reasons and arguments they put forward can stand to reason and not be considered brute force when it comes to the prohibition of women from becoming judges. One also finds nothing in the *Qur'an* and *Sunna* that specifically excludes

¹⁶¹ See F. Farhi, "Women's Studies and Revolution", 4 *JFP*, 1995, p. 592. See also Z. Afshari, "Women's Participation in the Economic Development of Iran", 4 *JFP*, 1995, pp. 650-663.

¹⁶² See M.H. Marefat, "Shayestegi Zanan brai Ghezavat va Manaseb Rasmi" in Vol. 4, *Faslnameh Hokoumat Islami*, 1996, pp. 50-51.

¹⁶³ Cited in J. Helli, *Op. cit.*, p. 388.

¹⁶⁴ See M. H. Marefat, *Op. cit.*, p. 50.

¹⁶⁵ See M.H. Najafi, *Javaher Al-Kalam*, Vol. 40, Biti, Beirut, p. 14.

women from doing any legitimate work of their choice, including judgment. As Abdulati rightly stated:

Historical records show that women participated in public life with the early Muslims, ... They were not shut behind iron bars or considered worthless creatures and deprived of souls. Islam grants woman equal rights to contract, to enterprise, to earn and possess independently.¹⁶⁶

Since having knowledge is by no means gender specific, how can we deny the right of a woman who is an educated expert in legal affairs to be a judge on the basis of such unsubstantiated and doubtful arguments and interpretations of this verse? Nowadays most Islamic jurists and thinkers¹⁶⁷ are unanimous in believing that women can excel sufficiently to attain *ijtehad* or become well versed in Islamic teachings and so be considered a *mojtahed* or issuer of religious decrees. Now we should ask this question: if women can become *mojtaheds*, does this mean that this highest of positions within the Islamic religion can be filled by all without the requirement of having potent wisdom and power of thought, without having the ability to understand deductive reasoning and logic?

Concluding remarks

This part attempted to engage in an analysis of women's human rights in Islam under the Islamic sources, human dignity and Islamic teaching on equality of human being. It appears that despite the main message of Islam, which emphasised that there is no advantage or superiority for a human being based on race, sex, language, etc., the hard-line interpretation of *qawwāmun* in *Sharia*, and a few *ahadith* has resulted in many features of inequality between men and women in civil, social and political rights. The word *qawwāmun* in the *Qur'an*, as the most important Islamic source,

¹⁶⁶ See H. Abdulati, *Islam in Focus*, El-Falah Foundation, Cairo, 1997, pp. 364-365.

¹⁶⁷ Al-Tabari argued that women could be appointed as jurisconsult (*mufti*). See Al-Tabari, *Op. cit.* See also Y. Sanei, *Jensiat Ve Ahkam Mojazat dar Islam*, Vol. 2, Matin, Tehran, 2000; M.H. Bojnourdi, *Op. cit.*, p. 98; M.H. Janati, *Op. cit.*, pp. 388-390.

must be understood in the context of the Islamic appreciation of role differentiation within the family rather than advocating the superiority of one gender above the other - it would be more consistent to understand it as a degree of responsibility rather than superiority. As Shah argues, “some verses of the *Qur'an* have been interpreted out of their proper *Qur'anic* and social contexts, in ways that favour the discriminatory legal norms currently practised in Islamic jurisdictions. When these verses are interpreted in their proper *Qur'anic* and social contexts, we reach a different conclusion: that the *Qur'an* never discriminates on the basis of gender.”¹⁶⁸

Women and men are equal in all rights and compulsory duties. However, as it is invoked to confer on husband the role of head of the family and to support the discourse on the father's and grandfather's guardianship over children in Islamic law and the law of Muslim states undermining a mother's rights in custody and guardianship of her own child, it has wide-ranging ramifications which in practice deprive mothers of their fundamental rights.

Analysis of the Islamic sources also demonstrates that there are none of the verses in the *Qur'an* to which opponents of women's participation refer speak in clear and unambiguous terms on the subject of depriving women of political rights, excluding them from posts such as the judiciary, or denying their participation in the public and social affairs of the state. The *Qur'an* only emphasizes that good governance is based on justice, equity and responsibility and leaves its actual administration in the hands of the community. In fact, the community has the right to elect its leader, either man or woman, directly or indirectly. The *Qur'anic* principle of *shura* (consultation) accommodates the process of democratic and free elections without gender

¹⁶⁸ See N.A. Shah, “Women's Human Rights in the Koran: An Interpretive Approach”, 28 *HRQ*, 2006, p. 903.

approaches. The *Sharia* recognises the independence of women within basic moral and ethical rules that equally apply to men. Islamic sources cannot be considered as a justification for depriving Muslim women of their freedoms in the areas of education, work including judgment, and participation in social and political life. Nevertheless, today, in most Islamic countries, legal discrimination against women exists in various civil, social and political dimensions, in the light of the theory of authority of men over women. This area of discrimination is usually based on long-standing cultural, state policy,¹⁶⁹ or religious practices; it is thus one of the most difficult areas to penetrate and one of the most resistant to change. By reference to the different schools of thought and classical jurists' views and even the early Islamic jurisprudence, this part has shown that by adoption of constructive views that can be relied upon today, the realization of international women rights within the dimensions of Islamic law is possible, if Islamic legislators, in the light of equally valid moderate opinions that have existed from the time of the earliest Islamic jurists, try to review the present discriminatory laws and regulations.

¹⁶⁹ The law in many Islamic countries based on a hard-line religious approach does not establish a wife's unconditional right to work (legitimate work) outside the home without her husband's consent. Failure to protect a wife's right to work outside the home might have been a deliberate policy, designed to create legal obstacles to women's employment during the dislocations of the development process, because of high rates of unemployment in these countries. The legal obstacles to women in some Muslim states such as Algeria, where men are allowed to force their wives to remain at home, are designed to keep women out of the job market and create better opportunity for men to find jobs.

Part III

Muslim Family Law and Implications for Women's Human Rights

The importance of the family and its protection is well established under Islamic law. The family within Islamic society is an important institution that is closely guarded, and family rights and duties are specifically defined under Islamic family law and jurisprudence for its establishment and protection.¹ Every Muslim individual is encouraged to be family oriented and to assist in the realization of a stable society through the establishment of a stable family.² The *Sharia* also places responsibility on both the society and state in respect of protecting the family institution. There is agreement on the general protection and assistance of the family recognized by the international instruments and the principles of Islamic law.

Taking a look at the conditions of families in different societies, one finds that, in spite of the varying attitudes towards family, especially the emphasis by religion on this institution as the centre of affection and friendship, one cannot yet deny the possibility of the collapse of this centre for different reasons. Therefore, divorce or separation may arise due to various causes, to form the end point to the common life

¹ See M. Baderin, *International Human Rights And Islamic Law*, Oxford University Press, Oxford, 2003, p. 194. See also D. Pearl and W. Menski, *Muslim Family Law*, Sweet & Maxwell, London, 1998; H. Abdal 'Ati, *The Family Structure in Islam*, American Trust Publication, Indianapolis, 1977; F. Karim, *An English Translation and Commentary of Mishkat-ul-Masabih With Arabic Text*, 3rd ed., Vol.1, 1994, p.403; A. An-Naim (ed), *Islamic Family Law in Changing World: A Global Resources Book*, Zed Books Ltd., 2002.

² In the light of Islamic teaching, Article 5 of the Cairo Declaration on Human Rights in Islam provides that: a) The family is the foundation of society, and marriage is the basis of its formation. Men and women have the right to marriage, and no restrictions stemming from race, colour or nationality shall prevent them from enjoying this right. b) Society and state shall remove all obstacles to marriage and shall facilitate marital procedure. They shall ensure family protection and welfare. This clearly states the Islamic law position that marriage is the basis of it's the family's formation. The concept of family is thus strictly limited within the confines of legitimate marriage under Islamic law. There are defined rules for legitimate marriage through which a legitimate family may be formed. The husband and wife constitute the primary actors, and only the consequential natural blood-ties of such relationships can create a legitimate family under Islamic law.

of a wife and husband.³ In such conditions, it is the legislator's duty to make laws that guarantee the rights of and a minimize damage to the parties after separation. In matrimonial life, the woman is more vulnerable and needs more support. Divorce is more damaging to the woman mentally and emotionally, as well as economically and socially.⁴ In consideration of this fact, Article 16 of Women's Convention concerning the equality of men and women in all matters relating to marriage and family relations during marriage and upon its dissolution. Muslim states raised some objections to the article, questioning its conformity with principles of Islamic law on rights and responsibilities of spouses during the marriage and at its dissolution⁵ and entered reservations to Article 16, which are the most detailed and strong manifestation of the belief that these are being entered in the light of conflict with *Sharia*.⁶

The important question here is, what are the rights and responsibilities of spouses under the *Sharia* and how does Islamic Law treat women during marriage and on its dissolution? By studying their origins, my main intention here is to explore the reasoning behind the present reservation to the article and current status of women in the personal law of Muslim states, in the light of the arguments of Islamic jurists from

³ See A.R. Doi, *Shariah: The Islamic Law*, Ta Ha Publishers, London, 1984, p. 168. See also A. Ali, *The Spirit of Islam*, London, 1965.

⁴ See Abdal 'Ati, *Op. cit.*, pp. 220-221.

⁵ During the discussions of the draft of the Women's Convention in the Third Committee of the General Assembly, the representative of Muslim states raised their objection to the article and succeeded in achieving only a few amendments to the original draft. See UN Doc. A/C.3/34.SR, pp. 70-73.

⁶ For more information about the Muslim countries' reservations see L. Lijnzaad, *Reservations to UN Human Rights Treaties: Ratify and Ruin?* M. Nijhoff, Dordrecht, 1995, pp. 320-322. See also R. Cook, "Reservations to the Convention on the Elimination of All forms of Discrimination Against Women", 30 *YJIL*, 1990, p. 644; UN Treaty Website www.unhchr.ch/html/menu3/b/1cedaw.html. It should be noted that the Committee of the Elimination of Discrimination Against Women, believing that it would be useful for it to have material on the subject, requested, the UN in its reports of 1987 and 1988 to "promote or undertake studies on the status of women under Islamic laws and customs." This request was, however, turn down at the meeting of both ECOSOC and UNGA due to the objection by some Muslim states. See UN Doc. E/1987/SR10-SR.14(1987); UN Doc. A/C.3/42/SR.22 (1987); UN Doc. A/C.3/42/SR.26-SR.28 (1987) and UN Doc. A/C.3/42/SR.C(1987). See also A.C. Byrnes "The 'Other' Human Rights Treaty Body: The Work of the Committee on the Elimination of Discrimination Against Women", 14 *YJIL*, 1989, pp. 53-55.

both schools of thought, that reflect historical Islam and traditional jurisprudence, in order to determine how Islamic law on this issue can be reconciled with international human rights law. This part, therefore, consists of two chapters providing analyses and critique of different aspects of family law. Chapter five discusses the law of marriage in Islam and its application to women. Chapter six examines the question of dissolution of marriage in Islamic law in the light of present laws and regulations of some Muslim states.

Chapter V

Marriage in Islamic Law and the Law of Muslim States

The question of marriage in Islam, which is influenced by the different interpretations of the traditional jurisprudence to justify restriction of women's rights, will be discussed in this chapter. This chapter provides an overview of the place of family in Islam, the definition of the institution of marriage, dower, maintenance, condition of the marriage, minimum age of marriage, the right to choose a husband, polygamy and equality of rights in marriage in Islamic law.

1. The institution of marriage in Islam and international law

In Islamic law the concept of the family is strictly limited within the confines of legitimate marriage. The family is an important institution within Islamic society that is closely guarded, and family rights and duties are specifically defined under Islamic family law.¹ Article 5 of the OIC Cairo Declaration on Human Rights in Islam provides that:

The family is the foundation of society, and marriage is the basis of its formation. Men and women have the right to marriage, and no restrictions stemming from race, colour or nationality shall prevent them from enjoying this right.

Society and the state shall remove all obstacles to marriage and shall facilitate marital procedure. They shall ensure family protection and welfare.

The recognition of the family as an important natural unit of society and its role in the positive development of individuals can be found in most human rights instruments. For example, Article 16(3) of the UDHR states, "The family is the natural and fundamental group unit of society and is entitled to protection by society and the

¹ See H. Abd Al 'Ati, *The Family Structure in Islam*, American Trust Publication, Indiana, 1977, pp. 140-145. See also K. Ahmed, *Family Life in Islam*, The Islamic Foundation, London, 1974; D. Pearl and W. Menski, *Muslim Family Law*, Sweet & Maxwell, London, 1998.

state.”² The African Charter of Human and Peoples’ Rights (ACHPR) identifies the family as ‘the custodian of morals and traditional values recognized by the community.’³ The European Social Charter (ESC),⁴ Article 17(1) of the American Convention on Human Rights (ACHR)⁵ and Article 23 of the ICCPR also recognize the family institution as “the natural and fundamental group unit of society.” Article 23 of ICCPR recognised the family as an institution which is entitled to protection by society and the state, emphasised the “right of men and women of marriageable age to marry and to found a family”, and made mandatory “the free and full consent of intending spouses” in marriage.⁶ The issue was also emphasised by Article 10 of the ICESCR as follows:

The widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of independent children. Marriage must be entered into with the free consent of the intending spouses. Special protection should be accorded to mothers during a reasonable period of childbirth.

² See A. Lagoutte, and A. Arnason, “Article 16”, in *The Universal Declaration of Human Rights: A Common Standard of Achievement*, edited by G. Alfredson and A. Eide, 1999, M. Nijhoff Publishers, The Hague, 1999, p. 338.

³ Article 18(2) of ACHPR in 1981. For the African Charter perspective on family law see U.O. Umzorike, *The African Charter on Human Peoples’ Rights*, Nigerian Institute of Advanced Legal Studies, 1992. See also F. Ouquerauz and H. Sutcliffe, *The African Charter on Human Peoples’ Rights: A Comprehensive Agenda for Human Dignity and Sustainable Democracy in Africa*, Martinus Nijhoff, London, 2003.

⁴ Article 16 of ESC in 1961. For more information about the Charter see S. Grevisse, *European Social Charter: Committee of Independent Expert*, Council of Europe, 1995.

⁵ Article 17(1) of the ACHR states that: “The family is the natural and fundamental group unit of society and is entitled to protection by society and the state. The right of men and women of marriageable age to marry and to raise a family shall be recognized, if they meet the conditions required by domestic laws, insofar as such conditions do not affect the principle of non-discrimination established in this Convention. No marriage shall be entered into without the free and full consent of the intending spouses. The States Parties shall take appropriate steps to ensure the equality of rights and the adequate balancing of responsibilities of the spouses as to marriage, during marriage, and in the event of its dissolution. In case of dissolution, provision shall be made for the necessary protection of any children solely on the basis of their own best interests. The law shall recognize equal rights for children born out of wedlock and those born in wedlock.”

⁶ Article 23 of the ICCPR stated that: “The family is the natural and fundamental group of society and is entitled to protection by society and the state. The right of men and women of marriageable age to marry and to found a family shall be recognized. No marriage shall be entered into without the free and full consent of the intending spouses. State Parties to the Present Covenant shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and ...”

Similar provision is found in Article 16 of the Women's Convention. The article requires state parties to eliminate discrimination against women in matters affecting marriage and family relations. The article concerns issues of family law in general, and the right to choose a spouse and enter into marriage, and equal rights and responsibilities for the parenting of their children, in particular.⁷ The inclusion of provisions on family law, even in the most general terms, represents a step forward, transcending the traditional public and private dichotomies of international human rights law.

Paragraph 1 of the article provides that state parties shall take measures to eliminate discrimination in all matters relating to marriage and family relations. It also obliges state parties to ensure, on the basis of equality of men and women, the same rights: to enter into marriage; to freely choose a spouse and to enter into marriage with their full and free consent; during marriage and at its dissolution; as parents, irrespective of their marital status, in matters in relation to their children; to decide on the number and spacing of their children and to have access to information, education, and the means to enable them to exercise these rights, with regard to guardianship, wardship, trusteeship and adoption of children, of a personal nature, as husband and wife,

⁷ It is worth discussing two conventions relating to marriage and family relations, and the Declaration 1967 very briefly. The Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery was adopted in 1956. It abolished debt bondage and serfdom, and prohibited: "... any institution or practices whereby (i) a woman, without the right to refuse, is promised or given in marriage on payment of a consideration in money or in kind..., or (ii) the husband of a woman, his family, or his clan, has the right to transfer her to another person for value received or otherwise, or (iii) a woman on the death of her husband is liable to be inherited by another person." According to other provisions of the Convention, States Parties are obliged to prescribe a suitable minimum age of marriage, "encourage the use of facilities whereby the consent of both parties to a marriage may be freely expressed", and encourage the registration of marriage. The second convention was the Convention on Consent to Marriage, Minimum Age for Marriage, and Registration, of 1962. It paid more attention to marriage and family relations and confirmed the principle of free consent of both parties in marriage and registration of marriage, but did not specify a minimum age for marriage. Five years later, the Declaration also paid attention to these rights. It reiterated the principle of free consent and further provided that women shall have equal rights with men during marriage and on its dissolution, that parents shall have equal rights and duties in matters relating to their children, and that child marriage and the betrothal of young girls before puberty should be prohibited.

including the right to choose a family name, a profession, and an occupation; and for both spouses in respect of property.

Paragraph 2 of Article 16 refers to current problems in many countries, which cause untold damage to children, and requires state parties to take measures, including national legislation, in the matter of marriage and family relations. The paragraph emphasises that all necessary action, including legislation, shall be taken in order to specify a minimum age for marriage and “to make the registration of marriage in an official registry compulsory.” According to this paragraph “the betrothal and the marriage of a child shall have no legal effect.” In fact, Article 16 addresses the problem of discrimination against women in the private sphere, including discrimination in the area of family law.

As I indicated earlier, under Islamic law the concept of the family is strictly limited within the confines of legitimate marriage and any sexual relationship out of marriage as well as same sex relationships are not accepted and tolerated under Islamic law.⁸ The HRC in its General Comment 19 issued in 1990 on Article 23 of the ICCPR stated that: “The concept of the family may differ in some respects from state to state, and even from region to region within state ...”⁹. According to this interpretation, the Islamic conception of family would generally raise no problem in this respect. However, the HRC in its General Comment 28, issued in 2000 on Article 3 of the ICCPR observed that: “...it is important to accept the concept of the various forms of family, including unmarried couples and their children ...”¹⁰ The broad interpretation

⁸ See Abd Al ‘Ati, *Op. cit*, pp. 50-145. See also K. Ahmad, *Family Life in Islam*, The Islamic Foundation, London, 1974. M. El-Awa, *Punishment in Islamic Law: A Comparative Study*, American Trust Publishers, Indianapolis, 1982; M. Farhad, *The Concept of Islamic International Criminal Law. A Comparative Study*, CQ Press, London, 1994; M. Shallal, *Islamic Criminal Law*, Amman Press, Amman, 1996.

⁹ HRC General Comment 19, para.2.

¹⁰ HRC General Comment 28, para.27.

of “family” by this General Comment is contrary to the concept of family under Islamic law, and Islamic countries’ practice.

In order to protect children’s rights, the Committee on the Rights of Child expressed its concern at “the potential for stigmatisation of a woman or couple who decide to keep a child born out of wedlock, and at the impact of this stigmatisation on the enjoyment by such children of their rights.”¹¹ Differences between Islamic family law and international human rights law on various issues of family law have led some writers such as Lijnzaad to argue that it is difficult to reconcile the cause of women’s rights with Islamic law.¹² It is essential, therefore, here to examine merits of marriage under Islamic law and the current laws of some Muslim states.

The central idea in Muslim family law is the institution of marriage and every legal concept revolves around the central focal point of the status of the marriage. The *Qur’an* uses two terms to refer to marriage: *nikah* and *zawaj*.¹³ Most commonly used is the term *nikah*. The *Qur’an* says:

And among His sign is this, that He created for you mates from among yourselves, that you may dwell (live) in tranquillity with them, and He has put love and mercy between your hearts. Undoubtedly in there are signs for those who reflect.¹⁴

The *Qur’an* further says:

¹¹ See Concluding Observations of the Committee on the Rights of the Child: Kuwait (1998) UN Doc. CRC/C/15 Add. 96, para.23; See also Concluding Observations of the ESCR Committee: Morocco (2000) UN Doc. E/C.12/1/ Add. 55, para.23. It is also notable that the Kuwaiti representative in response indicated that: “extramarital sex was proscribed by Islamic law, ... a crime, ... In cases where it did occur and a child was born as a result, the tendency was for the parents to rid themselves of the child, since they were forbidden under Islamic law to keep a child conceived out of wedlock. In that event, the child was initially provided for by the Ministry of Public Health, and subsequently by the Ministry of Social Affairs and Labour.” See para.2 of Summary Record of 48th Meeting: Kuwait. CRC/C/SR.489 of 2 October 1998.

¹² See L. Lijnzaad, *Reservations to UN-Human Rights Treaties: Ratify and Ruin?*, M. Nijhoff, Dordrecht, 1995, p. 320.

¹³ The usage of the term *zawage* can be seen in *Qur’an*: 81:7 and 52:20

¹⁴ *Quran*: 30:21.

And Allah has made for you your mates of your own nature and made for you, out of them sons and daughters, and grandchildren, and provided for you sustenance of the best.¹⁵

Apart from the *Qur'an*, there are many *ahadith* from Prophet Mohammad that further explain the Islamic institution of marriage. The Prophet said, "There is no mockery in Islam."¹⁶ He also pointed out, "Marriage is my tradition; whosoever keeps away therefrom, is not from amongst me."¹⁷

The classical jurists define marriage as a contract prescribed by the legislator, and it denotes the lawful entitlement of each of the parties thereto to enjoy the other in a lawful manner.¹⁸ It is also defined as:

A legal pact of association and solidarity between a man and a woman, meant to last, with the objective being to maintain chastity and lawful wedlock, multiplying the nation through founding a family under the patronage of the husband, on solid grounds, to ensure for the contracting parties the discharge of the responsibilities related thereto in security, peace, love and respect.¹⁹

Muslim legislators approach this issue in different ways.²⁰ Algerian Law, for example, defines marriage as:

¹⁵ *Quran*: 16:72.

¹⁶ See A.R. Doi, *Shariah: The Islamic Law*, Taha Publishers, London, 1984, pp. 114-116. See also A. Rahim, *The Principles of Muhammadan Jurisprudence*, Mansoor Book House, Lahore, 1995.

¹⁷ *Ibid.*

¹⁸ See H. Abd Al 'Ati, *Op. cit.* p. 25. See also J.L. Esposito and N. J. Delong-Bass, *Women in Muslim Family Law: Contemporary Issues in the Middle East*, Syracuse University Press, New York, 1982; N.J. Coulson, *Succession in the Muslim Family*, Cambridge University Press, Cambridge, 1971.

¹⁹ See J.J. Nasir, *The Status of Women Under Islamic Law*, Graham & Trotman, London, 1990, p. 3. See also T. Lewicki, "Al-Ibadiyya" in *Encyclopaedia of Islam*, Vol.3, Brill, Leiden, 1971.

²⁰ In this regard Egyptian law includes no provisions defining the marriage contract. Court decisions, however, throw some light on the matter, for example, "Marriage is a social entity, the object of which is to preserve the human race by the establishment of families, kinship and nations." Egyptian Personal Status Law (2000). It should be noted that from 1920 to the early 1950s, the Egyptian legislature enacted a number of laws effecting important changes in legal principles relating to family law and succession. These included the Law of Maintenance and Personal Status in 1920, a law regulating minimum marriage age in 1923, a Law of Personal Status in 1929 on the dissolution of marriage and family disputes, the Civil Code of 1931, the Law of Inheritance in 1943, and the Law of Bequest in 1946. In 1976, a new law established rules for the enforcement of court-orders for payment of maintenance to wives, ex-wives, children and parents. In 1979 controversial amendment introduced on Egyptian Laws of Personal Status of 1920 and 1929 which was struck down by the High Constitutional Court of Egypt on technical grounds and declared *ultra vires* the Egyptian Constitution in 1985. The Law of Personal Status of Egypt was again amended in January 2000. Later the Supreme Constitutional Court declared that the new Law is constitutional. See El-Alami, "Law No.100 of 1985 Amending

A contract lawfully concluded between a man and a woman, the ends of which are, *inter alia*, the formation of a family based on love, compassion, co-operation, chastity of the two spouses and preservation of legitimate lineage.”²¹

Moroccan Law defines marriage in the following terms:

Marriage is a legal pact of association and solidarity which is mean to last. Its objective is chastity, wedlock and multiplying the nation through the founding of a family, under the patronage of the husband, on solid grounds, to ensure for the contracting parties the discharge of the responsibilities related thereto in security, peace, love and respect.²²

Marriage is a civil contract,²³ which is constituted by an offer (*ijab*) and acceptance (*qabul*), without the Christian notion of sacrament.²⁴ It may be spoken by the parties

Certain Provisions of Egypt’s Personal Status Laws,” in *Islamic Law and Society*, Vol. 1, 1994, pp. 116-136; Najjar, “Egypt’s Laws of Personal Status,” 10 *Ara’SQ*, 1988, pp. 319-345; El Alami, *The Marriage Contract and Islamic Law in the Shari’ah and Personal Status Laws of Egypt and Morocco*, Graham & Trotman, London, 1992.

²¹ Algerian Code of Personal Status Law (1984). Article 4 of the Code emphasised that marriage is a contract between man and a woman in legal terms, the goals of which include setting up a family based on affection, kindness, and mutual assistance, morally protecting the spouses, and preserving the family line. See Christelow, *Muslim Law Courts and the French Colonial States in Algeria*, Princeton, 1985; P.R. Knauss, *The Persistence Patriarchy: Class, Gender, and Ideology in Twentieth Century Algeria*, Praeger, New York, 1987; M. Lazreg, *The Eloquence of Silence: Algerian Women in Question*, Routledge, New York, 1994.

²² Article 1 of the Moroccan *Mudawwana*. Moroccan Code of Personal Status Law known as *Mudawwana*. Following independence of Morocco in 1956 a Code of Personal Status Law in the light of Maliki doctrine was enacted in 1958. Since then the Code has been amended several times. The major amendment took place in 1993 and 2004 particularly related to the law governing marriage, divorce, parentage, inheritance, child custody and guardianship. Reforms adopted to the *Mudawwana* in 2004 increase women’s rights. See also J.D. Anderson, “Reforms in Family Law in Morocco”, 2 *JAL*, 1958. They based the issue on the *Qur’an*: 4:21. It is notable that the Moroccan law uses the term pact rather than contract, which lends the contract a spiritual nature. Indeed, this transforms it from being a simple legal contract to something like a covenant comprising the legal element of a contact.

²³ The Supreme Court of Pakistan in *Khurshi Bibi v. Muhammad Amir Case* stated that “marriage is a contract and not a sacrament, and whatever sanctity attaches to it, it remains basically a contractual relationship between the parties.” See *Khurshi Bibi v. Muhammad Amir Case*, 1967, PLD SC 97. See also J. Rehman, “The Sharia, Islamic Family Laws and International Human Rights Law: Examining the Theory and Practice of Polygamy and Talaq”, 21 *IJLPF*, 2007, p. 113.

²⁴ Some writers do not agree with the majority of Islamic scholars who considered marriage as a civil contract. Haeri, for example, in her article “Divorce in Contemporary Iran: A Male Prerogative in Self-Will” argues that the contract of marriage in Islam, though essentially contractual in nature, has religious overtones and undertones in that, the broader outline of the marriage contract is divinely determined. Sardar Ali in her work *Gender and Human Rights in Islam and in International Law* well sums up the issue as: “i) If marriage is indeed considered as a civil contract between two parties (a man and woman), surely this would also entail recognition, at least initially, of a certain measure of equality between the two contracting parties. It is this semblance of equality, no matter how token, that is socially unacceptable; ii) Muslim society does not appear to have any problems in accepting that an adult Muslim woman is (legally) capable of entering independently and of her own accord, into various kinds of contacts and transactions, such as the right to own, buy, sell and otherwise dispose of her property, engage in trade and commerce, etc. But the notion of a woman being able to exercise her choice by entering into a contract of marriage is seen as an affront to the male honour as she is considered the ‘izzat’ of the family and negotiating a marriage contract with a male without an

themselves or by persons legally empowered to perform that act. Marriage is concluded by the formal proposal and its acceptance, presented in a form that explicitly conveys the intention of marriage. The main feature of the form of the marriage contract in Islamic law is the mutually understood expression of intention by the two parties or their representatives.²⁵ Therefore, for the contract, the proposal should be an expression of the desire and intention of one party to marry the other, whilst acceptance should be an expression of the agreement by the second party (or by their representatives) to this specific proposal.²⁶

The Arabic language is considered as necessary for this contract. The majority of jurists, however, argue that it is permissible for the contract to be concluded in another language, if Arabic is not the parties mother tongue.²⁷ In addition, it is a necessary condition, for a marriage to be valid, that the wife and husband should be identified in such a way that neither party is in doubt as to the true identity of the

intermediary poses a threat to existing social structures; iii) Highlighting the contractual element of marriage creates a distinct possibility of entering stipulations in the contract curtailing the husband's prerogative of unrestrained divorce, polygamy etc; iv) ... accepting marriage as a contract, changes the completion of dower, its meaning and implications for both parties. If marriage is a contract, how does one classify it? Is it, as Coulson believes, akin to a contract of sale, dower being the 'price' in exchange for the sexual union with the wife as the object of sale? If dower is not the consideration for the marriage contract and as argued by most Muslim scholars, is a gift to the wife, and a mark of respect for her, why is (at least some of it), payable only at the time of dissolution of marriage, and returnable to the husband if a wife seeks to opt out of the marriage contract?" See S. Haeri, "Divorce in Contemporary Iran: A Male Prerogative in Self-Will" in *Islamic Family Law*, eds., by C. Mallat and J. Connors, Graham & Trotman, London, 1990, p. 56. See also S.S. Ali, *Gender and Human Rights in Islam and International Law Equal before Allah Unequal Before Man?*, Kluwer Law International, The Hague, 2000, pp. 158-159.

²⁵ See N.B. Baillie, *A Digest of Muhammadan Law*, Premier Book House, Lahore, 1965, pp. 4-6. See also J. J. Nasir, *Op. cit.*, pp. 6-7.

²⁶D. S. El Alami, *The Marriage Contract in Islamic Law*, Graham & Trotman, London, 1992, pp. 21-23. See also A. Jeffry, "The Family in Islam" in *The Family*, edited by R.N. Anshen, Harper, New York, 1959.

²⁷Islamic jurisprudence allows speaking in another language if the parties prefer to speak in a language other than Arabic. Language is not an important element in marriage contract, but it is essential that the wording should be a clear and definite indication of the establishment of a contract of marriage. See A.A. Fayzee, *Outline of Muhammedan Law*, Oxford University Press, Oxford, 1964.

other.²⁸ Mutual hearing and understanding of the offer and acceptance are essential to establish a marriage contract. Therefore, if one party is mute and is illiterate, they can use sign language.²⁹

Another important issue in this regard is that the proposal and acceptance must be made at the same meeting.³⁰ Therefore, if the meeting is over after the offer and before the acceptance, the offer becomes void.³¹ Indeed, it is an essential condition for the marriage to be valid that the acceptance follows closely upon the proposal, in accordance with custom. Whether the presence of witnesses to the offer and acceptance is necessary in a marriage contract is disputed between the two schools. To Sunni jurists, the presence of witnesses is essential to ensure publicity,³² which is what distinguishes lawful wedlock from fornication.³³ Shi'a jurists, on the other hand, maintain that the presence of two witnesses is not required for the validity of a marriage, but it is desirable as a precaution against denial.³⁴

²⁸ See S.M. Muhaqqiq Damad, *Barrasi Fihi Huquq Khanivadeh, Nashre Ulum Islami*, Tehran, 1986, pp. 378-379. See also A.A. Engineer, *The Qu'ran Women and Modern Society*, New Dawn Press Group, 2004, pp. 116-120.

²⁹ See J.J. Nasir, *Op. cit.*, p. 7. Also, Article 1066 of CCI provides: "If one or both parties to the marriage dumb, the ceremony may be conducted in sign language by the dumb person or persons, provided that the signs used clearly convey the intention of entering into a contract of marriage.

³⁰ See M. Abu Zahra, "Family Law", in *Law in the Middle East*, Vol. I, edited by M. Khadduri and H.J. Liebesny, The Middle East Institute, Washington D.C., 1955, p. 133.

³¹ See A. Rahim, *Mohammadan Jurisprudence*, *Op. cit.*, p. 278.

³² See K. Ibn al-Hammam, *Fath al-Qadir*, Vol. 3, p. 352. The presence of two male or one male and two female witnesses is required. Therefore, a female may act as witness to a marriage, but the presence of at least one male is compulsory and a marriage with four female witnesses would not be valid.

³³ In order to support their argument, they refer to *hadith* from the Prophet Mohammad that he says: "Publicize marriage even with timbales" and "there is no marriage without witnesses." See M.B. Majlesi, *Bahar al-Anvar*, Moasseseh al-Vafa, Beirut, 1983. Translation of the *hadith* also cited in J.J. Nasir, *Op. cit.*, pp. 12-13.

³⁴ See S.M. Ansari, *Makaseb*, Mohshi, Qum, 1906, p. 67. See also S. M.H. Bojnourdi, *Al-Ghavaed al-fiqhieh*, Nashr Alhadi, Qum, 1998.

1.1. Dower

Dower (*Mahr*) is defined as moveable or immovable property which becomes payable by the husband to the wife as an effect of marriage.³⁵ It should be noted that determination of the amount of dowry to be given is dependent upon the mutual agreement of the marrying parties.³⁶ When the dower is specified at the time of the contact or afterwards by agreement between the parties, it called *mahr musamma*.³⁷ If the amount specified for the dower is unknown or if it is property of such a nature that it cannot be owned, the wife is entitled to receive the amount of dower ordinarily due to a woman of her status and circumstances.³⁸ It has been mentioned in the *Qur'an* and the word of Prophet Mohammad as an essential part of Muslim marriage.³⁹ The *Qur'an* ordains: "And give the woman [on marriage] their dower as a free gift."⁴⁰ The Prophet has also said: "There is no marriage except with the permission of guardian and payment of dower ...".⁴¹ The bridegroom gives a dower to his bride in accordance with their mutual agreement.⁴²

The dower should be considered as a symbol of the improved social and legal status of women that provides them with some independence within the marriage and with basic social security in cases of divorce or widowhood. The dower previously was owed to the bride's father. But according to Islamic law, the woman has the full right

³⁵ See J. Schacht, *An Introduction to Islamic Law*, Clarendon Press, Oxford, 1964, p. 161. See also S. Ameer Ali, *Student's Handbook of Muhammadan Law*, Thacker, Spink & Co, Calcutta, 1925.

³⁶ See M. Motahari, *Nizam-I Huquq-I Zan dar Islam*, World Organization for Islamic Service, Tehran, 1981. pp. 91-94; See also J. L. Coaroff, *The Meaning of Marriage Payments*, Academic Press, London, 1980.

³⁷ See A. Rahim, *Op. cit.*, p. 282. See also A. Rahman, *The Role of Muslim Women in Society: Women in the Quran and Hadith*, Serrah Foundation, London, 1986.

³⁸ See Article 1100 of CCI.

³⁹ *Qur'an*; 4:4. In *Qur'anic* verse 4:20 also declared: "Wed them leave of their owners, and give them their dowers, according to what is reasonable."

⁴⁰ The word *sidaq* is also used in the *Qur'an* to indicate the nuptial gift is *faridah*.

⁴¹ See A.R. Doi, *Op. cit.*, p. 161.

⁴² The bride or her guardian may stipulate at the time of marriage any sum, however large, as a dower.

to dispose of her own property.⁴³ Even if the marriage ends in divorce, the dower remains the wife's property and the husband has no right to take it back, except in the case of *Khul* divorce, where the divorce takes place at the request of the wife in consideration of the return of the whole or part of the dower. According to Islamic law, immediately on the conclusion of the marriage ceremony, the wife becomes the owner of the dower and may dispose of it, in any way she pleases. In the Civil Code of Iran, the wife's ownership of the dower is explained as follows: "A wife may choose to do as she wishes independently with her own property."⁴⁴ It is worth mentioning that if the marriage is dissolved before consummation by any act on the part of the husband, the wife shall be entitled to half of the specified dower.⁴⁵ The *Qur'an* ordains that:

If ye divorce them before ye have touched them and ye have appointed unto them a portion, then pay the half of that which ye appointed.⁴⁶

It is no sin for you if ye divorce woman while yet ye have not touched them, nor appointed unto them a portion. Provide for them, the rich according to his means, and the straightened according to his means, according to custom.⁴⁷

In the light of *Qur'anic* orders, Islamic legislators have adopted different laws and regulations in this respect. According to Syrian Law, "on divorce before consummation or valid retirement, half of the dower should go to the wife if a valid contract includes a validly specified dower."⁴⁸ If no dower has been specified, in this

⁴³ It should be noted that considering the dower as a bride price is a misconception of the dower. Because dower in Islamic law is not like the African custom of giving a bride-price, since marriage is not the sale of a girl to a husband and also it differs from the old European system of dowry in which the father used to give his daughter a heavy dowry at the time of her marriage which become the property of the husband, as if it was inducement to him to marry the girl. See H. Beilefeldt, "Muslim Voices in the Human Rights Debate", 17 *HRQ*, 1995, p. 596.

⁴⁴ Article 118 of CCI.

⁴⁵ See O. Abdullah, *Islamic Sharia Provisions on Personal Status*, 6th edn., Alexandria, 1968, pp. 311-312. See also H. Safai, *Huquq Khanevadeh*, 6th edn., Entesharat Daneshgah Tehran, Tehran, 2000, p. 200.

⁴⁶ *Qur'an*: 2:237.

⁴⁷ *Qur'an*: 2:236.

⁴⁸ See Syrian Personal Status Law (1975). See J. Anderson, "Syrian Law of Personal Status," *Bulletin of the School of Oriental and African Studies*, 1955, pp. 25-59.

case the dower of a woman of similar status is called for, and if divorce takes place before the marriage is consummated without anything having taken place which would confirm the dower, then the equivalent of half the dower must be given to the bride as a present.⁴⁹ This present should be one proper for a woman of her status and within the capacity of the husband to pay.⁵⁰ The CCI also provides that:

If a husband divorces his wife before the marriage has been consummated, the wife will be entitled to half of the agreed dowry. If the husband has already paid her more than half of the dowry, he has the right to demand the return of excess paid in its original forms, and equivalent or its equivalent value.⁵¹

If the dowry comprised a particular property that is discovered before the marriage ceremony to be defective, or if it develops some defect or is destroyed after the marriage ceremony but before delivery to the bride, the groom is liable to pay compensation for the defective part or for the value of the property destroyed.⁵²

The dower is not a consideration proceeding from the husband for the contract of marriage, but it is an obligation imposed by the law on the husband as a mark of respect for the wife, as is evident from the fact that the non-specification of dower at the time of marriage does not affect the validity of the marriage.⁵³ If a dower is not mentioned in the marriage contract, or if the non-payment of a dower is set as a condition in a marriage, that marriage will be valid and the parties may subsequently agree a dower by mutual consent. If intercourse between the married couple has already taken place before such a mutual agreement, the wife is then entitled to

⁴⁹ See M. Abu Zahra, *Op. cit.*, p. 143.

⁵⁰ *Ibid.*

⁵¹ See Article 1092 of CCI. It should be noted that Iranian Family Protection Law was passed in 1967 and significantly amended took place in 1975 which abolishing extra-judicial divorce, requiring judicial permission for polygamy and only for limited circumstances, and establishing special Family Courts for the application of the new personal status legislation. Following the Islamic Revolution 1979 Supreme Judicial Council issued proclamation-directing courts that all un-Islamic legislation was suspended. The Special Civil Courts were established in 1979 to adjudicate over matters relating to family law, succession and *awqaf*. Ramaz, "Women in Iran: The Revolutionary Ebb and Flow," 47 *Middle East Journal*, 1993, pp. 409-428 See also Lawyers Committee for Human Rights, Report of, *The Justice System of the Islamic Republic of Iran*, Washington D.C., 1993; Pakzad, "The Legal Status of Women in the Family in Iran," *In the Eye of the Storm: Women in Post-Revolutionary Iran*, edited by Afkhami & Friedl, London, 1994.

⁵² See Article 1084 of CCI.

⁵³ See A. Rahim, *Op. cit.*, p. 282.

receive the amount of dower normally due. Indeed, it is not an essential condition for the validity, binding, or effectiveness of the marriage contract. Ibn-al Hammam in this regard pointed out:

Dower has been ordered to underline the prestige of the marriage contract and to stress its importance ... It has not been enjoyed as a consideration like a price or a wage, otherwise it would have been set as a prior condition.⁵⁴

It should be noted that the Shi'a jurists argue that if the husband makes a condition in a marriage contract that he shall pay no dower, this condition shall be null and void but the contract shall remain valid.⁵⁵ In such cases the wife is entitled to receive a proper dower, which called *mahr-ul-mithl*. It is the dower, which is customarily fixed for the females of her family.⁵⁶ In determining the amount of dower ordinarily due (*mahr-ul-mithl*), the status of the wife in terms of her family's social position, other circumstances, any characteristics peculiar to her in comparison with her equals and relatives and the customs of the locality etc must all be taken into consideration.⁵⁷

1.2. Maintenance

Maintenance (*nafagheh*) is defined as the lawful right of the wife under a valid marriage contract on certain conditions.⁵⁸ Such maintenance costs include accommodation, clothing, food, and furniture appropriate to the wife's situation and on a reasonable basis and the provision of a servant if the wife is accustomed to have

⁵⁴ See K. Ibn Hammam, *Op. cit.*, p. 320.

⁵⁵ See J.J. Nasir, *Op. cit.*, p. 44. See also J. Helli, *Qavaed al-Ahkam*, Vol. 2, Moasseseh al-Nashr al-Islami, Qum, 1924; A. Qumi, *Jame al-Shetat*, Enteshrat Keyhan, Tehran, 1992; A. Ardabili, *Zobdat al-Bayan fi Barahin Ahkam al-Quran*, Entesharat Momenin, Qum, 1999; J.S. Husain, *Origins and Early Development of Shia Islam*, Longman, London, 1979. It is worth mentioning that the Iranian legal system in the light of Shi'a jurisprudence in Article 1081 of CCI provides that: "If a condition is set in the marriage contract that the dowry must be paid within a fixed period of time or the marriage will be annulled, such a condition will be null and void but the marriage contract itself and the dowry agreed shall remain valid."

⁵⁶ See A. Rahim, *Op. cit.*, p. 285.

⁵⁷ Articles 1091 and 1099 of CCI.

⁵⁸ See A.A. Fyzee, *Op. cit.*, p. 211.

servants or if she needs a servant owing to illness or disability.⁵⁹ This right derives from the authority of the *Qur'an*, Sunna and consensus amongst jurist's opinion. In this regard, the *Qur'an* says:

The duty of feeding and clothing nursing mothers according to decent custom is upon the father of the child. No one should be charged beyond his capacity. A mother should not be made to suffer because of her child, nor should he to whom the child is born by his child. And on the father's heir is incumbent the like of that.⁶⁰

And further says:

Men are the protectors, and maintainers of women, because God has given, the one more (strength), than the other, and because they support them from their means.

Maintenance is the husband's responsibility and he has a duty to support his wife as soon as she moves into his house or prepares to move into it.⁶¹ If the husband fails or neglects to provide maintenance, the wife can request a separation on the grounds of such refusal, and the *qadi* can grant her a divorce from the husband.⁶² The Hanafi, however, argued that inability, refusal or neglect to maintain are not sufficient grounds for dissolution, although in the case of refusal, the husband can be imprisoned until he fulfils his duty.⁶³

⁵⁹ *Ibid.*

⁶⁰ *Qur'an*: 2:233.

⁶¹ One of the problems regarding maintenance concerns the standard of maintenance that is required. All schools agree that if both parties come from wealthy backgrounds, then the level of maintenance should be accordance with their standard of living, likewise if both are from poor backgrounds, the level of maintenance will reflect this position. If, however, one party is from a poor background and the other one from a wealthy background, the schools have reached slightly differing interpretations of the level of the appropriate maintenance. However, the opinion of the many jurists is that the wife should be supported in a style, which is in conformity with the husband's status, even though she might be of a wealthy family. See D.S. El Alami, *Op. cit.*, pp. 117-118. See also M. Abu Zahra, *Op. cit.* pp. 144-145.

⁶² According to the Maliki and Shafi'i schools, if the husband has failed or neglected to provide maintenance for a period of two years, the wife is entitled to dissolution of the marriage. See I. Ibn Farhum, *Al-Dibaj al-Mudhab fi Ma'rifat A'yan Ulama'il Madhab*, Cairo, 1894; See also S. Al-Ramli, *Nihayat al-Muhtaj ila Sharh al-Muhtaj fi al-Fiqh ala Madhab al-Shafi'i*, Cairo, 1883.

⁶³ Abu Hanifa further argued that if the husband has fallen into financial difficulties and is unable to support his wife, she shall be supported by one of her relatives who would have been obliged to support her, such as her father or her brother Such support becomes a claim against the husband, the payment of which can be demanded if his financial condition improves. Indeed, the school does not

The laws in Islamic countries recognize maintenance as husband's duty, although it could be forfeited or suspended due to actions on the part of the woman.⁶⁴ If the husband requests her to move and the wife refuses to do so, then she has no claim to being supported by him unless her refusal is for a legal cause.⁶⁵ In addition, a wife could lose her right to maintenance if she is disobedient (*nashiza*) - if she leaves the home without the husband's consent or without a "lawful excuse".⁶⁶ In such cases there is no right to maintenance for the duration of any disobedience on the grounds of non-submission to the husband's authority due to a cause arising from the side of the woman. However, the Hanafi do not consider the wife to be disobedient if she declines to have intercourse, providing the wife remains in the marital home, as she remains confined.⁶⁷ *Nashiza* is defined in the Jordanian and Iranian laws as follows:

The wife who leaves the matrimonial home without a lawful reason or denies her husband access to the home which she owns without first requesting him to accommodate her elsewhere.⁶⁸

permit either separation or release from responsibility for support on the grounds of financial difficulties. See Z. Ibn Bakr, *Al-Bahr al-Ra'iq, Sharh Kinz al-Daqa'iq*, 1st ed., Cairo, 1880.

⁶⁴ For example, Article 39 of Jordanian Personal Status Law provides that, "the husband must maintain his wife and treat her well; the wife owes obedience to her husband." Article 74 of Syrian Personal Status Law states that "the wife owes obedience to her husband in return for maintenance." Article 1129 CCI also provided: "If a husband refuses to pay his wife's maintenance and if it proves impossible to enforce a court order requiring him to pay her maintenance, his wife may refer to a judge requesting divorce and the judge will compel her husband to divorce her. The same provision shall be binding in a case where the husband is incapable of providing for his wife's maintenance." See Z. Mir-Houseini, *Marriage on Trial: A Study of Islamic Family Law*, I.B. Tauris Publisher, London, 2000, pp. 46-48. See also L. Welchman, *Women's Rights and Islamic Family Law: Perspective on Reform*, Zed Books, London, 2004.

⁶⁵ In many cases in Islamic countries the wife loses her right to maintenance because of disobedience. For example in *Ahmad Ali v. Sabha Khatun Bibi Case* and *Ali-Reza v. Parvin Case* the courts refused the wife rights for maintenance on the basis of *nashiza* – leaving the house without the husband's consent and a "lawful excuse." See *Ahmad Ali v. Sabha Khatun Bibi Case*, (Pakistan)1952, PLD Dacca; *Ali-Reza v. Parvin Case* (Iran), 1988 27/11/1368, SCC, Tehran. Article 37 of Personal Status Law of Jordan provides, "the wife owes obedience and cohabitation to her husband. She has the obligation to follow him wherever he decides to go provided he ensures her safety. If she refuses, she loses her right to financial support."

⁶⁶ See A.A. Maudoodi, *The Law of Marriage & Divorce in Islam*, Islamic Book Publisher, Kuwait, 1983, pp. 23-24. See also Abd Al'Ati, *Op. cit.*, pp. 157-159.

⁶⁷ See D.S. El Alami, *Op. cit.*, p. 116.

⁶⁸ Jordanian Code of Personal Status Law (1976). See J.N.D. Anderson, "Litigant Strategies in an Islamic Court in Jordan" in *Law and Islam in the Middle East*, Bergin & Garvey Publishers, New York, 1990; T. Mahmood, "Jordan", in *Statutes of Personal Law in Islamic Countries*, Indian Islam Research Council, Delhi, 1995.

If a wife refuses to fulfil her duties as a wife without legitimate reason, she will lose her entitlement to receive maintenance.⁶⁹

Apostasy is another case in which the wife loses her maintenance right. This is the instance where a Muslim woman rejects Islam, in which case she will lose her right to maintenance.⁷⁰ However, if a woman is an adherent of one of the divine religion and is married to a Muslim man, she is entitled to maintenance.⁷¹

2. Minimum age of marriage

The Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages in 1962 requires that the parties to the marriage must give their consent and also requires the states parties to legislate a minimum age for marriage and set up a programme of official registration of marriage.⁷² Article 16 of the Women's Convention also emphasizes that all necessary action, including legislation, shall be taken in order to specify a minimum age for marriage and "to make the registration of marriage in an official registry compulsory." According to the Convention "the betrothal and the marriage of a child shall have no legal effect".⁷³ However, there is no consensus amongst Islamic jurists on the minimum age of marriage.⁷⁴ Therefore, legislators in Islamic states approach the question in various ways.

In regard to the marriage of minors and the mentally unsound, the general view of the Islamic jurists is that compulsory guardianship applies to them, the principle being

⁶⁹ Article 1108 CCI.

⁷⁰ Egyptian law, for example, provides that the wife shall lose her maintenance right if she changes her religion. The ruling can be inferred under the *Sharia* and other laws from the fact that apostasy renders the marriage contract void. Egyptian Code of Personal Status law (2000).

⁷¹ See D. S. El Alami. *Op. cit.*, pp. 116-117.

⁷² 521 UNTS 231 (1962).

⁷³ Article 16 of the Women's Convention.

⁷⁴ See A. Al-Kasani, *Bada'i al-Sana'I fi Tarlib al-Shara'i*, Dar Ehya al-Toras al-Arabi, Beirut, 1907. See also S.M.R Golpaigani, *Majma al-Masa'el*, Dar al-Qur'an Karim, Qum; M. Al-Asbahi, *Al-Mudawwanah al-Kubra*, Cairo, 1907; T. Ibn Taymiyyah, *Majmu Fatwa Ibn Taymiyyah*, 1983; S. Al-Ramli, *Op. cit.*

that inexperienced and irresponsible persons of either sex should be subject to guardianship.⁷⁵ Some Islamic jurists supported the idea of the marriage of minors on condition that it is in the interests of the ward, with the permission of the guardian.⁷⁶ However, others do not accept compulsory guardianship in marriage of minors.⁷⁷ El-Alami argues that there is no guardianship for minors in marriage, as a minor does not fulfil the requirements of the marriage contract, which cannot therefore come into effect before maturity is reached and guardianship is not necessary at this stage.⁷⁸ He concluded that:

... there is no need for guardianship for a minor in that the reason for guardianship is the ward's need for it, and so long as there is no need for marriage then no guardianship is applicable.⁷⁹

The lawmakers of different Islamic states have taken different positions in this respect. For example the Syrian legislator considers 18 years as the minimum age for marriage of male and 17 for females, with scope for judicial discretion for males of 15 years and females of 13 years if either the father or grandfather serving as *wali* consents and the parties appear physically able.⁸⁰ If the court finds incompatibility in age between betrothed parties, the judge may withhold permission for marriage. In such case both parties require their *wali's* permission for marrying under the age of full capacity,

⁷⁵ See D. S. El Alami. *Op. cit.*, p. 50.

⁷⁶ See H. Helli, *Tazkerah al-Ahkam*, Vol. 2, Moasseseh Al al-Beit, Qum. See also S.A. Isfehni, *Serat al-Nejat*, Chapkhaneh Islami, Tehran, 1956. Article 1041 of CCI provides a marriage contract before the age of full maturity may be concluded with the permission of the legal guardian and on condition that it is in interests of the ward.

⁷⁷ See D.S. El- Alami, *Op. cit.*, pp. 50-51. It should be noted that the Hanafi school of thought limit guardianship in marriage just to the insane and the demented. See B. Al-Marghinani, *Al-Hidayah Sharh Bidayat al-Mubtadi*, Cairo, 1906.

⁷⁸ *Ibid.*, p. 50.

⁷⁹ *Ibid.*

⁸⁰ Article 18(2) of Syrian Personal Status Law (1975). According to the article "the judges may decide to marry a boy at the age of 15 and girl at the age of 13."

though a judge may overrule a *wal'is* unreasonable objection to the marriage of his female ward.⁸¹

In Pakistan the minimum marriage age is 18 for males and 16 for females. Despite the provision of penalties for contracting under-age marriages, such unions are not rendered invalid.⁸²

Legal modernisation of the family law including the age of marriage took place in the laws of North African countries, Tunisia, Morocco, and Algeria where *Sharia* still plays an important role in the laws and regulations of those countries. According to the Tunisian Law, no marriage can be contracted between a man under 20 years of age and a woman under 17 without special court permission which shall not be given unless there are serious grounds for such permission, and marriage unquestionably benefits the welfare of the two spouses.⁸³ The law also stipulates the age of majority, at 20 years for both sexes.⁸⁴ Accordingly, the marriage of persons under the legal age is subject to guardian's consent.⁸⁵ The matter is referred to the court if such consent is

⁸¹ See G. Tabet, "Women in Personal Status Laws: Iraq, Jordan, Lebanon, Palestine, Syria," in *Women's Studies/ Gender Research*, No. 4, 2005, p. 26.

⁸² Since 1947 the legislation relating to Muslim family law introduced in British India continued to govern personal status. In 1955 a Commission on Marriage and Family Laws was established with a remit to consider the personal status laws applicable in the new state and determine the areas needing reform. In 1961 the Muslim Family Laws Ordinance (MFLO) was adopted and introduced reforms to various aspects of the classical law based on some of the provisions of the Report of the Commission which submitted in 1956, aiming to reform the divorce law, place restrictions on the practice of polygamy, and reform the law relating to dower and maintenance in marriage and divorce, compulsory marriage registration, to amend existing legislation with relation to marriage age, formalisation of reconciliation procedures in disputes relating to maintenance or dissolution of marriage, and recovery of dower, along with specified penalties for non-compliance, inheritance rights of orphaned grandchildren, and so on. See M. Mahmood, "Pakistan," *Op. cit.*. See also D. Pearl and W. Menski, *Muslim Family Law*, 3rd edn., Sweet & Maxwell, London, 1998.

⁸³ See Tunisian Code of Personal Status (1993). For more details about reform on new Tunisian Code of Personal Status see A.E. Mayer, "Reform of Personal Status Laws in North Africa: A Problem of Islamic or Mediterranean Laws?," 49 *Mid'EJ*, 1995, pp. 432-446. See also Nelson, *Tunisia: A Country Study*, 3rd edn., Washington D.C., 1988; Brand, *Women, the State, and Political Liberalisation: Middle Eastern and North African Experiences*, New York, 1998.

⁸⁴ *Ibid.*

⁸⁵ *Ibid.*

withheld, and the spouses-to-be persist.⁸⁶ Morocco's new Personal Status Law also in its final reforms in 2004 raised the minimum age of marriage for women from 15 to 18 years old. Under the new Code the age of legal capacity for marriage for both males and females is 18. Marriage of parties under the statutory age of majority is restricted to judicial permission and subject to the consent of the guardian.⁸⁷ The Algerian legislator took a further step and set the age of marriage at 21 for males and 18 for females; there is scope for judicial discretion if necessity or benefit is established for marriage below that age.⁸⁸

There are different provisions in the Lebanon based on different schools.⁸⁹ The Sunni rules provide that the man's age of legal capacity for marriage is 18 and for a woman it is 17.⁹⁰ However, the law recognizes the power of the court to sanction the marriage of adolescents below the set ages, should their circumstance so warrant.⁹¹ The Shi'a rules forbid marriage for a boy under 15 or a girl under 9 years, and the puberty of the parties must be proven.⁹²

The Iraqi law has completely rejected the power of a guardian to force a marriage, whether of minors or mature persons.⁹³ The minimum age is 18 for both sexes.

⁸⁶ *Ibid.*

⁸⁷ Moroccan Code of Personal Status (2004). See J.N.D. Anderson, *Op. cit.* See also T. Mahmood, "Morocco," *Op. cit.*

⁸⁸ Algerian Code of Personal Status Law (1984). See Mitchell, "Family Law in Algeria before and after the 1404/1984 Family Code," in *Islamic Law: Theory and Practice*, edited by Cleave, London, 1997.

⁸⁹ See Lebanon Law on the Rights of the Family (1962). The law directs the application of Hanafi doctrine to Sunni and Jafari *fiqh* to Shi'a. See El-Gemayel *et al*, *The Lebanese Legal System*, Vol. 1, Washington D.C., 1985.

⁹⁰ *Ibid.*

⁹¹ *Ibid.*

⁹² See Shi'a jurist's argument on the age of marriage at S.M. Mohaqqiq Damad, *Op. cit.*, p. 47. See also M.A. Araki, *Ketab al-Nekah*, Nour Negar, Qum, 1999; M. Ashtiani, *Ketab al-Nekah*, Bitā, Mashad; S.M. Hakim, *Mostamsek al-Oravat al-Vosgha*, Chap Najaf, Najaf.

⁹³ Iraqi Code of Personal Status Law (1987). The Iraqi legislator directly states that: "No kin or stranger may compel any person whether male or female to marry against his/her consent. A marriage contract under compulsion is void, if no consummation has occurred. Similarly, no kin or stranger may prevent the marriage of anyone who has the legal capacity for marriage under this law." See Al-Mukhtar, "Iraq", 1 *YIMEL*, 1995, pp. 157-177. See also C. Mallat, "Shiasim and Sunnism in Iraq: Revising the Codes," in *Islamic Family Law*, edited by C. Mallat and J. Connors, Graham & Trotman, London,

However, judicial permission for under age marriage may be granted at 15 for men and women, if fitness and physical capacity are established.⁹⁴

Before the Islamic revolution in Iran, the Family Protection Act (FPA)⁹⁵ prohibited marriage of girls before reaching the age of 15 and boys before the age of 18 but there was some exemption in age of marriage upon the request of the public prosecutor and approval of the court.⁹⁶ After the Islamic Revolution, the age of marriage and majority were amended in 1991; the law provides:⁹⁷

The age of majority for a male is 15 complete lunar years and 9 complete lunar years for a female.⁹⁸

Marriage for both males and females before they are fully matured is forbidden. A marriage contract before the age of full maturity may be concluded with the permission of the legal guardian and with the condition that it is in the interests of the ward.⁹⁹

1990; D. Hinchcliff, "Legal Reforms in the Shi'i World –Recent Legislations in Iran and Iraq", 10(2) *MLR*, 1968, pp. 292-305.

⁹⁴ *Ibid.*

⁹⁵ Iranian Family Protection Act was passed in 1967 and significantly amended took place in 1975 which abolishing extra-judicial divorce, requiring judicial permission for polygamy and only for limited circumstances, and establishing special Family Courts for the application of the new personal status legislation. Following the Islamic Revolution 1979 Supreme Judicial Council issued proclamation-directing courts that all un-Islamic legislation was suspended. The Special Civil Courts were established in 1979 to adjudicate over matters relating to family law, succession and *awqaf*. Ramaz, "Women in Iran: The Revolutionary Ebb and Flow," 47 *Middle East Journal*, 1993, pp. 409-428 See also Lawyers Committee for Human Rights, Report of, *The Justice System of the Islamic Republic of Iran*, Washington D.C., 1993; M. Pakzad, "The Legal Status of Women in the Family in Iran," *In the Eye of the Storm: Women in Post-Revolutionary Iran*, edited by Afkhami & Friedl, London, 1994; S.H. Amin, *Middle East Legal Systems*, Royston Ltd, Glasgow, 1985.

⁹⁶ It is notable that permission under this law could not granted to girls under the age of 13 and to boys under the age of 15. According to the law, marriage of any person under the minimum legal marriage age is an offence that renders the person responsible liable to between six months and two years imprisonment. For more information about FPA see.

⁹⁷ See Z. Mir-Housseini, *Marriage on Trial ... Op. cit.*, pp. 23-25. See also Z. Mir-Housseini, "Women, Marriage and the Law in Post-Revolutionary Iran", in *Women in the Middle East: Perceptions and Struggles*, edited by H. Afshar, Macmillan, London, 1993.

⁹⁸ Article 1210 of the CCI.

⁹⁹ In regard to the dispute between the guardians, the question may arise; "Is the guardianship of the father and paternal grandfather on a priority basis?" In answering this question one can say that the guardianship of the father and paternal grandfather over the marriage of a minor girl and boy (under legal age as stated in the law), if both are alive, is not on a priority basis but is at the same level for each of them. Any one of them can decide about the marriage of the girl or boy without obtaining permission from the other. In other words, in this case, both minor girl and boy can marry by obtaining the permission and blessing of either the father or the paternal grandfather. Article 1041 of the CCI.

This is to say that this law allows marriage even before maturity (9 years old for girls and 15 years old for boys) with the permission of the guardian and on the condition that it is in the interests of the ward. The law, indeed, was designed, in on some jurists' view, on the early Muslim society and provided a good ground for some rural citizens in Iran who force their children to marry in order to receive some money, or based on old superstitions.¹⁰⁰ In 2000, the Iranian Parliament passed a bill that determined the age of marriage for both girls and boys as 18 years old but it was rejected by the Guardian Council¹⁰¹ on the ground that it is contradictory to Islamic law.¹⁰² As a result of the dispute between Parliament and the Council, the said bill was referred to the Expediency Council. After a serious debate on the issue, the Expediency Council in 2002 stated "marriage of the girl before reaching the full age of 13 and the boy before reaching the full age of 15 is dependent on permission of the

¹⁰⁰ According to the latest survey of National Youth Organization the average marriage age in Iranian cities was 24 years old for girls and 26 years old for boys. NYO, Handbook, Persian Study, Tehran, 2004.

¹⁰¹ Following the Islamic revolution 1979 the Guardian Council was established in accordance to Chapter 6 of the Constitution. The chapter explains its inter-workings with the Islamic Consultative Assembly. The council is a high chamber within the constitution of the Islamic Republic of Iran. It is uniquely involved in the legislative process. The Guardian Council does not start bills. Bills are started in the Parliament. However, all bills must be reviewed and approved by the Guardian Council. According to the Iranian Constitution, the Parliament has no legal status without the Council, which holds veto power over all legislation approved by the Parliament, in accordance with Article 97 of the Constitution. It can nullify a law on two grounds: being against Islamic laws, or being against the Constitution. While all the members vote on the laws being compatible with the Constitution, only the six clerics vote on them being compatible with Islam. According to the Constitution if a bill is rejected based on the above reason, it will be passed back to the Parliament for correction. If the Parliament insists on its position or the Council of Guardians cannot decide on a case, it is passed up to the Expediency Council for a decision. It should be noted that the Council has 12 members: six clerics, conscious of the present needs and the issues of the day, appointed by the leader and six jurists, specializing in different areas of law, to be elected by the Parliament from among the Muslim jurists nominated by the Head of the Judicial Power. See http://en.wikipedia.org/wiki/Guardian_Council; http://news.bbc.co.uk/1/shared/spl/hi/middle_east/03/iran_power/html/guardian_council.stm; http://www.iranembassy.hu/political_guardians.html

¹⁰² Several women MPs criticised the ruling and called on Islamic clerics to help mediate the dispute. In the view of the MPs the Council is not considering the consequences of forced marriages. They concluded that "we must be ensure that our young people reach their physical and intellectual maturity. See <http://mella.majlis.ir/>.

legal guardian and with the condition that it is in the interest of the ward on the decision of the court.”¹⁰³

Neither the Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages nor the Women’s Convention specified any age as minimum for marriage but both conventions require that states parties take all necessary action, including legislation in order to specify a minimum age for marriage and to make the registration of marriages in an official registry compulsory. However, the Women’s Convention states that the betrothal and the marriage of a child shall have no legal effect. Different Muslim states provide in their legal systems different ages as the minimum age for marriage of girls, from 9 to 20 years old, based on *ahadith* and *maslaha*. The personal status law in Muslim states on this issue varies. On the one hand, some states, in the light of Islamic jurisprudence, reject the practice of force marriage by providing a reasonable age for marriage which is compatible with the philosophy of the modern family model. On the other, some Islamic countries insist on the traditional Islamic law based on a few *ahadith* and provide legal ground for forced marriage. Therefore, in order to prevent forced marriage, as well as for compatibility with international human rights standards, it is necessary for those states to modify their present personal law on this issue.

3. The right to choose a husband in Islam

Article 23 of the ICCPR and Article 10 of the ICESCR emphasised that no marriage shall be entered into without the free and full consent of the intending spouses. Article 16 of the Women’s Convention also states that: “states parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality

¹⁰³ See www.majma.ir/English.aspx

of men and women: The same right to enter into marriage; the same right freely to choose a spouse and to enter into marriage only with their free and full consent ...”

While international instruments emphasised that marriage must be entered into with the free consent of the intending spouses, there is a different approach in the law of Islamic states. In Islamic law, an adult and mentally sound male has complete freedom of choice in connection with marriage, without any restrictions. The important question in this regard is, does an adult girl who is of sound mind have full freedom to choose her husband as a man can? There is distinction between a virgin and non virgin girl in Islamic law- the basis of marriage guardianship of a girl is her virginity and there is no restriction on the marriage of a divorced woman or widow.¹⁰⁴ If a girl has been married, the marriage has been consummated and it is then dissolved, she has complete freedom to choose her husband and conclude the marriage contract herself.¹⁰⁵ In regard to marriage of a virgin girl, different views have been expressed. We can categorize them into three groups.

The view of the first group is that when a child a boy or a girl reaches the age of maturity, guardianship shall terminate.¹⁰⁶ Based on this view, a virgin girl is no longer required to obtain the permission and consent of the guardian¹⁰⁷ for her marriage and

¹⁰⁴ See H. Helli, *Qhavaed al-Ahkam ...Op. cit*, 1990, pp. 125-130. See also M. Tousi, *Al-Mabsout*, Vol. 4, Maktab al-Mortazavieh, Qum, 1972.p. 163.

¹⁰⁵ According to the *Qur'an* a divorced woman is not to be prevented from remarrying in a lawful manner. (*Qur'an* 2:232). In a case of a widow, the *Qur'an* also says, “But if they themselves go away, there is no blame on you for what they do of lawful deeds by themselves.” (*Qur'an* 2:240). These two verses clearly recognize the right of a divorced woman or widow to give herself in marriage if she agrees, and prohibit interference of the guardian in the issue. Prophet Mohammad also said that, “The widow and the divorced woman shall not be married until her order is obtained, and the virgin shall not be married until her permission is obtained.”

¹⁰⁶ In this regard, the Hanafi school of thought, as well as some Shi'a jurists, believe that there is no requirement for a guardian to conclude the marriage contract of the woman. See generally M. Al-Amriki, *The Essential Hanafi Handbook of Fiqh*, Kitab Bhavan, India, 2000. See also M. Ansari, *Op. cit*, Qum, p. 264; Tousi, *Tbian*, Vol. 2, Moassesseh Nashr Islami, Qum, 1999, p. 273; S. Sani, *Masalek Al-Afham*, Vol. 7, Chap Tehran, Qum, 1851, p. 129; M. Tabatabai Yazdi, *Oruoj*, Vol. 2, Dar al-Ketab Islami, Tehran, 1850, p. 361.

¹⁰⁷ It is notable that the marriage guardians according to the Sunni school shall be descendants, i.e. the son and the son's son, how-low-soever; ascendants, i.e. the father and the grandfather from how-high-

can marry without any consent. To them, there is no difference between pecuniary/financial and non-pecuniary/non-financial affairs.¹⁰⁸ Since the girl is free in pecuniary affairs, therefore she can also be free and independent in non-pecuniary matter.

The second group is that of those Islamic jurists who believe that only the guardian of a girl can decide on her marriage.¹⁰⁹ In their view, the guardian can arrange the marriage of the girl with anybody that he thinks fit and there is no need for her consent.¹¹⁰ In other words, the girl has no authority and role in choosing her future husband and it is duty of the guardian of the girl to decide on her marriage. They refer to some verses of the *Qur'an*, particularly, this verse: "Marry those among you who are single."¹¹¹ They concluded that according to the *Qur'an*, the man can pronounce the ceremonial act of marriage and therefore the woman cannot do so.¹¹² Single in this verse means anyone not in the bond of wedlock, whether unmarried or lawfully divorced, or widowed. However, the above verse does not say anything about the man's power to pronounce the ceremonial act of marriage, and the majority of Islamic jurists do not support this argument and interpretation.¹¹³

Those Islamic jurists who argue that a woman cannot be compelled to choose a particular husband, but should be assisted in this by her guardian, support the third

soever; the brothers and their male descendants, how-low-soever; the uncles and their sons or any other blood relatives on her father's but not on her mother's side. To the Shi'a, the guardian is always the father or the paternal grandfather. If the woman's father or parental grandfather is not present and it proves impossible to receive their permission for the marriage and if it is necessary for the woman to be married, she may marry. The Civil Code of Iran in the light of the Shi'a jurisprudence took the same position. It also provided that registration of this marriage in the registry office requires that the aforementioned conditions in relation to the SCC are fulfilled.

¹⁰⁸ See M. Ansari, *Op. cit.*, pp. 264-267. See also A. Helli, *Al-Saraer*, Vol. 2, Nashr Islami, Qum, 1986, p. 534.

¹⁰⁹ The Shafii school of thought allows a virgin girl to forced into marriage by her guardian. See O. Abdullah, *Ahkam Sharia il Islamiyya Fil Ahwal Shakhsiyya*, Alexandria, 1968, p. 137. See also A.A. Fyzee, *Op. cit.*, p. 208; A. Rahim, *The Principles of Muhammadan Jurisprudence According to the Hanafi, Maliki, Shafi'i and Han bali Schools*, Mansoor Book House, Lahore, 1976.

¹¹⁰ *Ibid.*

¹¹¹ *Qur'an*: 2:221 & 24: 32.

¹¹² See O. Abdullah, *Op. cit.* pp. 137-139.

¹¹³ See S. M.H. Bojnourdi, *Al-Ghavaed al-fiqhieh*, Nashr Alhadi, Qum, 1998, p. 220.

group.¹¹⁴ To them, neither the guardian nor the girl has sole authority in marriage and they consult with each other about the marriage decision.¹¹⁵ This group has accepted a middle ground that is between the other two mentioned theories. In fact, neither can the girl marry without the consent of her guardian, nor can the guardian force the girl to get married without her consent.

The jurists who believe on guardianship in marriage seem to consider that it is a duty of the guardian rather than a right, or at least a synthesis of both. While the guardian has the right to conclude a marriage on his ward's behalf and to give his consent or object to her unwise choice, it is his duty to exercise this right in her best interests and he is enjoined to consider her wishes. Therefore, he must have the right to participate in the decision-making process and draw on his experience in helping her to fulfil this duty. It has been argued that the right of the guardian, like any other right, is restricted by the requirement that it be used for in the ward's interest.¹¹⁶ However, if a girl disagrees with her guardian on the issue, for example, she chooses a person that the guardian does not agree with, she can take her case to a *qadi* and seek his permission to marry. The *qadi* listens to her petition and the objection of her guardian; if the *qadi* thinks that the guardian's objection is in her interest he rejects her petition, and if he does not think that the objection is sound then her marriage can take place.¹¹⁷

¹¹⁴ This is the idea of some Islamic jurists, namely, Sheikh Mofid in *Moghnae* i p. 510; See also A. Halabi, *Al-kafi fi Al-Fiqh*, Maktab al-Imam Amir al-Momenin, Isfahan, 1982, p. 292; S.R. Khomeini *Tahrir al-Vasileh*, Vol. 2, Moasseseh Tanzim va Nashr Asar Imam Khomeini, 1991, p. 254; S. Khoi *Tozih al-Masael*, p. 637; Y. Sanei, *Tozih al-Masael*, Entesharat Dafrar Tabliqhat Islami, Qum, 1997, p. 392; M. Abu Zahra, *Op. cit.*, pp. 137-139.

¹¹⁵ See Sheikh Mofid, *Ibid.*, p. 510. See also M. Abu Zahra, *Al Ahwal ush Shakhsiyya-Qism uz Zawaj*, Cairo, 1950, p. 129.

¹¹⁶ See M. Muhaqqiq Damad, *Op. cit.*, p. 228. See also D.S. El Alami, *Op. cit.*, p. 52.

¹¹⁷ An important question may arise here: what happens if any dispute arises between guardians? Whose view and opinion is valid? In this regard, different opinions have been expressed by different jurists. Some of them argued that in the case of a dispute between guardians, it the matter is settled by a

This approach, which restricts a girl in choosing her future husband and gives her guardian the right to interfere in this matter, causes discrimination in the family law of many Muslim states. Regarding this issue, Article 21 of Syrian Personal Status Law provides that "Matrimonial Guardianship is mandatory for women only."¹¹⁸ The CCI states that the marriage of a virgin girl who has reached puberty depends on the permission of her father or paternal grandfather. If, however, the father or paternal grandfather withhold the permission without justification, then the girl can refer to the court.¹¹⁹ Therefore, obtaining permission of the guardian will no longer be necessary. The law has given the girl the opportunity, if the father or the paternal grandfather withholds permission without sufficient justification and the girl wishes to marry a man who is fit, to refer to the Special Civil Court (SCC) to obtain the court's permission. The guardian should have a legitimate reason for withholding permission, otherwise, it is not valid. It is notable that in case the natural guardians are absent or if they are dead, then there is no need to obtain permission and the woman can marry.¹²⁰

judge's decision. They refer to the *hadith* which said, "If they dispute, the authorities will act as guardian for the person who has no guardian". In the Shi'a school, on the one hand some believe that this right is on a priority basis, which means if the father is alive, the girl should refer to her father for permission for marriage and only if her father is dead then the paternal grandfather can assume such authority. Others, on the other hand, argue that the permission of either the father or the paternal grandfather is enough and there is no need to observe the priority system. The CCI follows the latter view and provides: "The marriage of a woman who is virgin, even after she has reached puberty, requires the permission of her father or paternal grandfather." Article 1041 of the CCI. See D.S. El Alami, *Op cit.*, p. 54. See also N. Katouzian, *Op. cit.*, 1978, p. 115; M. Kar, *Sakhtar Huquqi Khanevadeh dar Iran*, Nashr Roshangaran, Tehran, 1999, p. 24; M. Kar and H. Hoodfar, "Personal Status Law as Defined by the Islamic Republic of Iran: An Appraisal" in *Women Living Under Muslim Law , Shifting Boundaries in Marriage and Divorce in Muslim Communities: Special Dossier*, Women Living Under Muslim Laws, Grabels, 1996.

¹¹⁸ Article 21 of Syrian Personal Status Law (1975).

¹¹⁹ Article 1043 of the CCI in this regard stated that, "The marriage of a woman who is a virgin, even after she has reached puberty, requires the permission of her father or parental grandfather. If, however, her father or parental grandfather withhold their permission without sufficient justification, the woman can introduce the man she wishes to marry to the courts, giving full particulars of him as well as the terms of the marriage contract and the agreed dowry. After receiving permission to marry from the special civil court, they should proceed to the Registry Office in order to register their marriage."

¹²⁰ Article 1044 of the CCI stated that: "If the woman's father or parental grandfather is not present and it proves impossible to receive their permission for the marriage and if it is necessary for the woman to

The Algerian law also states that no guardian can stop his ward from marrying if she so wishes, and if it is in her interests. Should he prevent her from doing so, the judge may give her permission. However, the father may prevent his virgin daughter from marrying if that prevention is in her interests.¹²¹ But no guardian, whether a father or otherwise, can compel his ward to marry, nor can he get her to marry against her consent.¹²² The Kuwaiti Law also states that a virgin girl between puberty and 25 years of age needs a marriage guardian, who shall be an agnate¹²³ in his own right in the order of inheritance, failing whom, a judge; the previously married woman or a woman of 25 or over, has the choice in marrying, but shall delegate the matter of the contract to her guardian.¹²⁴ Moroccan Law, however, in its latest amendment in 2004 eliminates the requirement of a marital guardian for women to marry.¹²⁵

In practice, many marriages in Islamic countries take place without obtaining the permission of the guardian. The important question in this regard is: What is the legal state of such marriages? There are two alternatives: one is that the girl's guardian gives his blessing and permission after the marriage; in this case this marriage is valid and proper. The second option is that after the marriage the guardian objects to such a marriage. Najafi, Helli, and Tousi on the one hand argue that such a marriage is valid and obtaining permission from the guardian in Islamic jurisprudence is only considered as a duty and therefore breaching that will not render the marriage null and

be married, she may marry. Registration of this marriage in the registry office requires that the aforementioned conditions relation to the special civil court are fulfilled."

¹²¹ Algerian Code of Personal Status Law (1984).

¹²² *Ibid.*

¹²³ An agnate is a person whose relation to the ward can be traced without the intervention of female links.

¹²⁴ The Kuwaiti Code of Personal Status Law (1984). See S.H. Amin, *Legal System of Kuwait*, Royston Ltd, Glasgow, 1991; T. Mahmood, "Kuwait," in *Op. cit.*

¹²⁵ Morocco Personal Status Law (2004). Previous law stated that: "A woman does not make her own marriage contract but authorizes her guardian to do so on her behalf", "the guardian, even if he is the father, shall not compel his daughter who has reached puberty, even if she is a virgin, to marry without her permission and consent unless temptation is feared, in which case the judge shall have the right to compel her marry in order that she may be under the protection of an equal husband who will take care of her."

void.¹²⁶ Mofid¹²⁷ on the other hand, argues that a marriage contracted without the knowledge or approval of the girl's guardian is invalid and null and void.

Despite the opinion of the majority of Islamic jurists who endorse the validity of such a marriage, the Iranian courts in many cases have followed the theory of cancellation and ruled for annulment of a marriage entered into married without the approval of the women's guardian. Based on this cancellation, their relationship is considered as illegitimate and unlawful. The prominent example in this respect is *Bahram v. Mahin and Javad Case*¹²⁸, which attracted intense and widespread media attention. Mahin, an adult Muslim woman who was a student, married Javad without the permission of her father. When her father found out about the marriage, he applied to the court for annulment of his daughter's marriage on the grounds that they had married without his permission, and of non-equality. During the hearing, Mahin emphasised her right to choose her husband without the interference of her father, as well as the right to uphold her marriage. The court rejected these arguments and considered the marriage in contradiction with Islamic law and ruled that the marriage was invalid and void.¹²⁹ The above verdict did not pay any attention to the rights, wishes and desires of the couple concerned and imposed the view and opinion of the guardian - the father or the paternal grandfather.

In Pakistan, the issue was also raised in *Abdul Waheed v. Asma Jehangir Case*¹³⁰ where a Muslim woman of 22 years of age contracted a marriage without the knowledge or approval of her parents in 1996. Her father disapproved of her choice

¹²⁶ See M. Najafi, *Javaher al-Kalam*, Chap Najaf, Beirut, 1956, p. 183. See also S.M.R. Golpaigani, *Op. cit.*, pp. 151-159.

¹²⁷ See S. Mofid, *Op. cit.*, p. 78.

¹²⁸ *Bahram v. Mahin and Javad Case*, 12/06/ 1361, SCC, Tehran.

¹²⁹ *Ibid.*

¹³⁰ *Abdul Waheed v. Asma Jehangir Case*, PLD 1997 Lah. 331

and attempted to file a suit under the *Zina* Ordinance 1979. The question put before the Court was whether or not an adult Hanafi Muslim woman may contract herself in marriage without the consent of her father. The judge in this case expressed his belief that as a condition for a valid marriage, the woman's family must arrange an assembly for the *nikah* ceremony to which friends and family must be invited; that the proposal and acceptance must be made in this assembly convened by the woman's family; that with the permission of the *wali*, the woman will give her consent and, the contracting party to the marriage will be the *wali* and not the woman herself. However, the Supreme Court of Pakistan in the light of the Hanafi school of thought overturned the Judgment of the High Court and ruled that:

Consent of '*wali*' [guardian] is not required and a *sui juris* Muslim female can enter into valid *nikah*/marriage of her own will. Marriage is not invalid on account of the alleged absence of consent of *wali*.¹³¹

4. Polygamy

One of the issues to be addressed in the discriminatory category of rights within the institution of marriage in Islamic law is polygamy. The HRC, in its General Comment 28, observed that polygamy is incompatible with equality of rights in marriage under the ICCPR and that it should definitely be abolished wherever it continues to exist.¹³²

The permissibility of polygamy in Islamic law is based on a *Qur'anic* verse which states that men may marry up to four wives at any one time, from among *Ahlekitab*, "women of the people of the Book", that is Christian, Jewish, and Zoroastrians, while there is strict monogamy for women and they are also confined to a Muslim spouse.

¹³¹ *Abdul Waheed v. Asma Jehangir Case*, PLD Supreme Court, 2004. 219. Cited in N.

¹³² General Comment 28, para. 24. See also the Committee's Concluding Observations on Nigeria (1996), UN Doc. CCPR/C/79/Add.65; para.291; Concluding Observation on Libya (1998), UN Doc. CCPR/C/79/Add.101; para.17; Concluding Observation on Cameroon (1999), UN Doc. CCPR/C/79/Add. 116; para. 10. See also CEDAW's General Recommendation 21, UN Doc. HR/GEN/1/Rev. 1 at 90 (1994), para.14.

Marry the woman of your choice, two, three or four. But if you fear that you shall not be able to deal justly with them, then only one, or that your right hands possess. That is nearer to prevent you from doing injustice.¹³³

Muslim jurists, both classical and contemporary, generally agreed that according to the *Qur'an* the ability to treat wives “justly” is a prerequisite for this permissibility of polygamy.¹³⁴ Modern Islamic jurists, however, hold that the mere apprehension of not being able to deal justly between co-wives removes the permissibility of polygamy in Islamic law and that the verse therefore advocates monogamy.¹³⁵ To them, the word, “justly” in the above verse must be interpreted in a broad sense and includes both material matters such as residence, food, clothes and so on and spiritual ones such as love.¹³⁶ In order to reinforce their argument they also refer to the concluding sentence of the verse which says: “[monogamy] is nearer to prevent you from doing injustice,” as well as another *Qur'anic* verse, “You will never be able to be fair and just among women even if you tried hard,” and then conclude that the *Qur'an* itself confirms the inability of men to fulfil the requirement of dealing justly with all their wives;¹³⁷ therefore monogamy is the rule, while polygamy is only an exception. To them, the two *Qur'anic* verses must be read and interpreted together.¹³⁸

The above view, however, is opposed by some Muslim jurists who support the traditional interpretation of the verse, insisting that the words “justly” and “just” in the above verses must be interpreted in a restricted sense. To them the words refer only

¹³³ See *Qur'an*: 4:3.

¹³⁴ See W. Al-Zuhayli, *Al-Fiqh Al-Islami va Adillatuth*, Vol. 9, Dar al-Fikr, Pittsburgh, 1997, pp. 6669-6670; Tanzil –ur-Rahman, *A Code of Muslim Personal Law*, Vol. 1, Hamaed Academy, Karachi, 1978, pp. 92-110

¹³⁵ The Egyptian jurist Muhammad Abduh also argues that the abuse of polygamy created injustice to women and that, combining the interpretation of two *Qur'anic* verses, polygamy is prohibited under Islamic law. For an English translation of Abduh's view see M.A. Baderin, *Op. cit.*, p. 140. See also A. Al-Hibri, *Op. cit.*, p. 216; F. Rahman, *Op. cit.*, pp. 45-49; M.M. Taha, *The Second Message of Islam*, trans by A.A. An-Naim, Syracuse University Press, Syracuse, 1987, p. 140.

¹³⁶ *Ibid.*

¹³⁷ *Qur'an*: 4:129.

¹³⁸ See A. Al-Hibri, *Op. cit.*, p. 216. See also F. Rahman, *Op. cit.*, pp. 45-49; M.M. Taha, *Op. cit.*, p. 140.

to the humanly possible equitable treatment, which is a matter of providing equality in residence, food, clothes and so on.¹³⁹ They also argue that polygamy in Islamic law is a prescription for various circumstances including demographic needs, economic factors in different societies, chronic illness of the wife or barrenness of the wife,¹⁴⁰ and conclude that the *Qur'an* does not aim to impose an unachievable condition such as love, which is beyond a man's control.¹⁴¹

It is important to understand that the verse was revealed immediately after the Battle of Uhud when the Muslim communities were left with many orphans and widows. The *Qur'anic* verse permitted marrying them if by this means it was certain that justice would be done and their rights and property protected, or making other arrangement for orphans.¹⁴² Yusuf Ali cited the Battle of Uhud as the main reason for granting the institution of polygamous marriage and rightly argued, the "occasion is past but the principles remain."¹⁴³ Rehman, in this regard also pointed out:

It is important to have regard to the seventh century Arabian tribal customs as well as the then persisting socio-economic circumstances. The *Quran* and the *Sunna* provided a reformist and enlightened code of family values to a society engaged in substantial violation of women's and children's rights. Insofar as *the institution of polygamy is concerned it is pervasive to say that, save for exceptional circumstances, the classical sources of the Sharia have perceived monogamous relationship as an ideal form of association.... To invoke the above verses as an unrestricted licence for continuing the institution of polygamous marriage is contrary to the spirit of the Quran. An examination of the Quranic verses reveals the highly restrictive nature of polygamy within the Sharia* (emphasis added).¹⁴⁴

¹³⁹ See Y. Al-Qaradawi, *The Lawful and the Prohibited in Islam*, trans by K. El-Helbawy and S. Shukry, The American Trust Publications, Indianapolis, 1984, pp. 192-193. See also U. Al-Zayla'i, *Tabyin al-Haqaiq: Sharh Kanz al-Daqa'iq*, Vol. 3, Mtaba'ah al-Amiriyyah al-Kubra, Cairo, 1893. p. 25.

¹⁴⁰ See A. Doi, *Op. cit.*, p. 146. See also Ibn Qayyim al-Jawziyyah, *Kitab Ahkam al-Nisa*, Vol. 2, Matba'ah al-Taquddum, Cairo, 1900, pp. 85-87.

¹⁴¹ *Ibid.*

¹⁴² See N.A. Shah, *Women, the Koran and International Human Rights Law: The Experience of Pakistan*, Martinus Nijhoff Publishers, Leiden, 2006, p. 49.

¹⁴³ See Y. Ali, *The Meaning of the Holy Qur'an*, Amana Corporation, Maryland, 1989.

¹⁴⁴ See J. Rehman, *Op. cit.*, pp. 114-115.

Taking into consideration the context of revelation and the philosophy of the verse, it seems that polygamy is allowed in the *Qur'an* in exceptional circumstances, in order to protect vulnerable women in certain circumstances and prevent injustice to orphans and widows. Clearly, present circumstances are different from those which existed in Arab society at the time of the revelation of the *Qur'an*, when women were deprived of their fundamental civil rights.

The legislators of most Islamic countries, however, today generally favour restricting polygamy in their Law of Personal Status in various ways, such as requiring judicial permission and obtaining the permission of the wife or wives.¹⁴⁵ For example in Iraq, polygamy is only permitted with judicial permission, obtainable on condition that the husband shows some lawful benefit and financial ability to support more than one wife. The permission is not to be granted if the judge fears unequal treatment of co-wives.¹⁴⁶ According to the Malaysian Personal Status Law, polygamy is allowed only with judicial permission, contingent upon application to the court and a hearing with the existing wife or wives.¹⁴⁷ The court requires proof of necessity, for example the first wife's sterility, physical infirmity, or wilful avoidance of a restitution order, proof of financial capacity, guarantee of the equitable treatment of all co-wives, and proof that the proposed marriage will not lower the standard of living of the existing wife or wives and other dependents.¹⁴⁸ In Pakistan, the Muslim Family Laws Ordinance 1961 has created some restriction on polygamous marriage, including compulsory registration of all marriages solemnized under Muslim Law and a

¹⁴⁵ It is notable that the Iraqi legislator in 1959 prohibited polygamy and provided a specified term of imprisonment and a fine for any violator. Fear of violating the sanctity of *Qur'anic* permissibility gave rise to strong opposition by some Muslim jurists from both schools of thought, who considered polygamy permissible in exceptional circumstances and the law as contravening the *Qur'an*. The law was revised and the article was removed in 1963. See M. Khadduri, "Marriage in Islamic Law: The Modernist Viewpoints" 26 *AJCL*, 1978, p. 216.

¹⁴⁶ Iraqi Code of Personal Status law (1963).

¹⁴⁷ Malaysian Code of Personal Status law (1987).

¹⁴⁸ *Ibid.*

requirement that the written permission of the Arbitration Council be obtained prior to entering into a polygamous marriage.¹⁴⁹ Syrian law has also tried to restrict polygamy through judicial permission, contingent upon some circumstances. The law provides: “The judge is empowered to refuse permission to a married man to marry another woman if it is established that he is not in a position to support two wives.”¹⁵⁰ Morocco’s new Personal Status law, enacted in 2004, also tries to place polygamy under strict judicial control.¹⁵¹ However, it is true to say that the moves by legislators of the above states towards restricting polygamy are minuscule and have not proved effective as deterrent. In practice, there are significant breaches of the provisions in the above states relating to judicial permission, obtaining the requisite permission or registration of the marriage at the notary’s office.

The Tunisian Code in the law of Personal Status, in the light of re-interpretation of the *Sharia*, took a further step and prohibited polygamy.¹⁵² The legislator interpreted the word “justly” in the *Qur’an* in a broad sense, which includes both material conditions and spiritual matters such as love. The combined interpretation of two *Qur’anic* verses (4:3 and 4:129) is held to remove the permissibility of polygamy in Islamic law and require monogamy. According to the law, “Polygamy is forbidden. Any person who, having entered into a bond of marriage, contracts another marriage before the dissolution of preceding one, is liable to one year’s imprisonment or to a fine ...”.

¹⁴⁹ Polygamous marriage is permissible when the Arbitration Council is satisfied that the marriage is necessary and just in accordance with Rule 14 of Muslim Family Law Ordinance 1961. The law defines just and necessary on some grounds, namely, physical unfitness, insanity, infertility, sterility of the wife and wilful avoidance of a decree for restitution of conjugal rights on the part of the existing wife. Rule 14 of Muslim Family Law Ordinance (1961).

¹⁵⁰ Article 17 of Syrian Personal Status Law (1953).

¹⁵¹ Moroccan Personal Status Law (2004).

¹⁵² The Tunisian Code of Personal Status (1956).

The law also provides penal sanctions for a wife who knowingly enters into a polygamous marriage, which is one year's prison sentence and/or a fine.¹⁵³

It seems that in the 21st century, when many changes in different aspects of human life including social, economic, political and legal, have occurred, the continuation of the practice of polygamy is contrary to the spirit of the *Qur'an*.¹⁵⁴ Nowadays, the main historical reasons for justifying the institution of polygamous marriage no longer exist in the majority of Muslim states. Therefore, it is a duty of states to provide a social security network to protect vulnerable women, rather than simply providing a licence to continue the institution of polygamous marriage. The permissibility of polygamy in the law of Muslim states is often abused by Muslim men in a way that in reality works against the family institution. Abd al 'Ati pointed out, "Polygamy in Islam is no more and no less than that of a permissible act like any other act lawful in principle, it becomes forbidden if it involves unlawful things or leads to unlawful consequences such as injustice."¹⁵⁵ Prohibition of polygamous marriages by the Tunisian legislature represents the proper understanding of the purpose of the *Sharia*¹⁵⁶ which must be considered by other Islamic states.

¹⁵³ Article 18 of Personal Status Code (1956). See also A. Mashhour, "Islamic Law and Gender Equality: Could There be a Common Ground? A Study of Divorce and Polygamy in *Sharia* Law and Contemporary Legislation in Tunisia and Egypt" 27 *HRQ*, 2005, p. 585.

¹⁵⁴ The *Qur'an* says: "God commands justice, the doing of good, and liberty to kith, and He forbids all shameful deeds, and injustice and rebellion: He instructs you, that you may receive admonition." *Qur'an*: 16: 90.

¹⁵⁵ See A. Abd al 'Ati, *Op. cit.*, p. 119. El-Bahnassawi also has observed "Islam permitted polygamy as remedy for some social diseases-under certain conditions without which plurality of wives shall be prohibited ...because Islam, since the very beginning, favours monogamy." See El-Bahnassawi, *Op. cit.*, p. 157.

¹⁵⁶ *Qur'an*: 49:13; 6:115; 6:57; 4:46.

Chapter VI

Divorce in Islamic Law and the Law of Muslim States

This chapter, in the light of the laws of some Muslim states, examines the question of divorce in Islamic law including forms of divorce, divorce at the request of the husband, divorce at the request of the wife, divorce at the request of both of the parties, representation for divorce and annulment of marriage.

1. Divorce in Islamic Law

In consideration of the reality of human life, Islam allows divorce if circumstances warrant or necessitate it, because the main purpose of marriage which is tranquillity, love and compassion is not always the case.¹ Islam encourages reconciliation between spouses rather than severance of their relations.² However, where good relations between spouses become distinctly impossible, Islam does not keep them tied in a loathsome chain to a painful and agonizing position and permits divorce.³ Therefore, it does make provisions for divorce by either party, even though it discourages it.⁴

Nevertheless, there are some apparent differences between the thresholds of Islamic law and international human rights law regarding equality of rights and responsibilities of spouses at the dissolution. Article 23(4) of the ICCPR stated that, "State parties to the present convention shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its

¹ According to the *Sharia* divorce is used to denote the legal method whereby a marriage is brought to an end. See A.R. Doi, *Shariah: The Islamic Law*, Ta Ha Publishers London, 1984, p. 169, A. Rahim, *The Principles of Muhammadan Jurisprudence*, Mansoor Book House, Lahore, 1995, p. 283.

² *Qur'an*; 2:224 -237.

³ See A.R. Doi, *Op. cit.*, pp. 168-173. See also A. Jeffry, "The Family in Islam" in *The Family: its Future and Destiny*, edited by R.N. Anshen, Happer and Brothers, New York, 1949; K. Ahmad, *Family Life in Islam*, The Islamic Foundation, London, 1974.

⁴ *Ibid.*

dissolution. In the case of dissolution, provision shall be made for the necessary protection of any children.” Article 16 Paragraph 1 of the Women’s Convention provides that: “state parties shall take measures to eliminate discrimination in all matters relating to marriage and family relations. It also obliges state parties to ensure, on the basis of equality of men and women, the same rights, during marriage and at its dissolution.” The HRC observed that in the dissolution of marriage, states must ensure that “grounds for divorce and annulment should be the same for men and women.”⁵

With consideration of some differences between the thresholds of Islamic law and international human rights law regarding equality of rights and responsibilities of spouses at the dissolution, the question here is, how is possible to reconcile the cause of women’s rights in this issue with Islamic law? I will therefore examine in detail here those specific areas of differences with regard to equality of rights and responsibilities of spouses at the dissolution under Islamic law and present law of some Muslim states which belong to all schools of thought.

Divorce, as I indicated earlier, has been recognised in Islam as a reality of human life. The *Qur’an*, however, ordains that arbiters be appointed to resolve marital differences and bring about reconciliation between the parties. It says:

If you fear a break between two, appoint, (two) arbiters, one from his family, and the other from hers; if they wish for peace, Allah will cause them reconciliation: for Allah has full knowledge and is acquainted with all things.⁶

If the arbitrators fail to effect a rapprochement between the spouses, the Islamic law has permitted divorce reluctantly, neither liking nor recommending it.⁷ According to the *Qur’anic* verse:

⁵ General Comment 28, para. 26.

⁶ *Qur’an*: 4:35.

And if you fear that the two (i.e. husband and wife) may not be able to keep the limits ordered by Allah, there is no blame on either of them if she redeems herself (from the marriage tie).⁸

A divorcing party must be of legal age, legally competent, capable of forming an intention and able to act freely.⁹ Divorce may be given orally, or in writing, but it must take place¹⁰ in the presence of witnesses.¹¹ It ruled that the parties separate with kindness when they have reached their prescribed time.¹² Whatever the actual words used for divorce, they must expressly convey the intention that the marriage tie is being dissolved.¹³

2. Forms of divorce

A marriage contract in Islamic law may be dissolved in the following manner:

⁷ Apart from some verses in *Qur'an*, which refers directly to divorce, there are *ahadith* from Prophet Mohammad. In a famous *hadith* the Prophet said: "Among lawful things, divorce is most disliked by Allah." See A.R. Doi, *Op. cit.* p. 169.

⁸ *Qur'an*: 2:29.

⁹ According to Article 1137 of Civil Code of Iran: "The guardian of a person who is certifiably insane may divorce the latter's wife on their behalf if that is in the interest of their ward."

¹⁰ It has been argued that different views regarding to the formula of divorce have been expressed by both schools of Sunni and Shi'a. The Sunnis allow the formula used in a divorce pronouncement by the husband to be either absolute, unconditional, with immediate effect, or contingent, subject to a condition, in the form of an oath, or relegated to some event in the future. However, in this regard the Shi'a school believes that a divorce must be in clear and explicit wording and a conditional divorce is without any force. In other words the Shi'a recognize only the absolute unconditional formula. See A.A. Fyze, *Outlines of Muhammadan Law* 3rd edn, Oxford University Press, Oxford, 1964, p. 143. See also M. Tousi, *Khalaf*, Moasseseh al-Nashr al-Islami, Qum, 1996.

¹² The Shi'a requires witnesses under this *Qur'anic* verse "Take for witness two persons from among you endued with justice and establish the evidence before God." (*Qur'an*: 65:2.) However, the Sunnis allow divorce without witnesses. They argue that it is an established right of a husband which needs no evidence. For more details see, M. Abu Zahra, "Family Law" in *Law in the Middle East*, edited by M. Khadduri and H.J. Liebesny, Vol.1, The Middle East Institute, Washington D.C. 1955, p. 149. See also Z. Mir-Hosseini, "The Delegated Right to Divorce: Law and Practice in Morocco and Iran" in *Talaq-I-tafwid: The Muslim Woman's Contractual Accesses to Divorce*, edited by L. Carroll, Women Living Under Muslim Laws, Grabels, 1996, pp. 121-133.

¹² *Qur'an*; 65:2.

¹³ See A.R. Doi, *Op. cit.*, pp. 173-174. See also H. Abd Al 'Ati, *The Family Structure in Islam*, American Trust Publication, Indianapolis, 1977. The majority of Islamic jurists argue that an evident intention is a necessary factor in the dissolution of marriage and divorce is ineffective if given under compulsion or influence, or in a state of intoxication, or in anger or jest, or by mistake or inadvertence. A legal representative or husband may speak the actual ritual form of words of a divorce. It has been argued that the Hanafi school views the divorce as becoming effective whether the words be uttered in sport or jest or in a state of drunkenness and whether a person utters them willingly or under compulsion. See M. Abu Zahra, *Op. cit.*

- By the husband's unilateral repudiation (*talaq*),
- Dissolution by mutual agreement (*khul* or *mubarat*),
- Dissolution through judicial order (*tafriq*).

Unilateral repudiation is a right of the husband, while the other three forms (*khul*, *mubarat* and *tafriq*) can be requested by the wife.¹⁴ Unilateral repudiation is, however, the simplest method of marriage dissolution and can be legally exercised exclusively by the husband at his discretion for any or no reason at all,¹⁵ because divorce in Islam, is an *iqaa* a unilateral act that occurs at the disposal and on behalf of the man.¹⁶ Despite the main elements of marriage, which are offer and acceptance, *iqaa* is a unilateral term that is formed by the man and does not require the acceptance of the woman.¹⁷ In regard to this unilateral power in Islamic law, there is a broad interpretation of this right by those who argue that Islam grants the man complete liberty of divorce and demands of him no justification for divorcing his wife.¹⁸ Upholders of this view also conclude that a man can divorce his wife at his own caprice, but no such facility exists for a woman.¹⁹

¹⁴ See also J. J. Nasir, *The Status of Women under Islamic Law*, Graham & Trotman, London, 1990, pp. 69-70.

¹⁵ It is worth mentioning that nowadays, different Muslim states have limited traditional divorce by their personal status laws. The most radical modifications prohibit the husband's right to divorce his wife extra-judicially through unilateral repudiation.

¹⁶ See M. Abu Zahra, *al-Ahwal al-Shakhsiyya*, 3rd edn., Cairo, 1957, pp. 420-429. See also S. Sani, *Masalek al-Afham*, Chap Tehran, Qum, 1851, p. 280.

¹⁷ See S. M. Muhaqqiq Damad, *Barresi Fiqhi Huquq Khanivade*, Nashr Ulum Islami, Tehran, 1986, p. 379. See also A.A. Engineer, *The Qu'ran Women and Modern Society*, New Dawn Press Group, 2004, pp. 89-99; A. M. Sangalagi, *Kulliyat Uqud va Iqa at va Qanun-I Riza dar Islam*, Tehran, pp. 12-13; M. Jafari Langaroudi, *Tirminuluji-yi Huquqi*, Ganj Danesh Press, Tehran, 1989, p. 100; J.N. Anderson, *Islamic Law in the Modern World*, New York University Press, New York, 1959.

¹⁸ For more details of the above view see A. Jeffery, "The Family in Islam", in *The Family: Its Future and Destiny*, edited by R.N. Anshen, Harper and Brothers, New York, 1949, p. 39. See also J. Esposito, *Women in Muslim Family Law*, Syracuse University Press, New York, 1982.

¹⁹ *Ibid*, p. 60. See also Y. Papoport, *Marriage, Money and Divorce in Medieval Islamic Society*, Cambridge University Press, Cambridge, 2005, pp. 69-89.

Men certainly have an advantage over women in the procedure of marriage dissolution under traditional Islamic law. It is also true to say that men and women have not “equal” or the “same” rights of divorce under Islamic law but the broad interpretation from unilateral power is a misconception of Islamic law that men have an exclusive right of marriage dissolution. Indeed, the right of unilateral repudiation has been abused by men from quite an early period of Islam. Therefore, Muslim states in variety of ways try to limit this power and have sections dealing with it in their Personal Status Laws.²⁰ Nowadays, in the law of many Muslim states, divorce requested by the man may occur in two ways: the husband requests divorce while having a justifiable reason, e.g. the woman has committed a crime and has been sentenced to prison for long period (the Iranian legislator provides at least 5 years for this legal ground), or the husband requests divorce without a justifiable reason.²¹ In the former, he has a legal obligation to pay dower and maintenance to the woman before the divorce is registered.²² In the latter, a case in which the husband has no justifiable reason for divorce, i.e. if divorce petition is not founded on the woman’s violation of her spousal duties or misconduct, certain financial rights have been defined for the woman.

Under Islamic Law, apart from the divorce effected by the husband, marriage may be dissolved by mutual consent, by the wife giving the husband something for her freedom, called *khul*²³ and *mubarat*.²⁴ This kind of divorce is initiated by the wife and

²⁰ See N. Anderson, *Law Reform in the Muslim World*, 1976, The Athlone Press, Antoun, pp.118-123. See also E. Hill, “Comparative and Historical Study of Modern Middle Eastern Law”, 26 *AJCL*, 1978; D. Hinchcliffe and D.S. El- Alami, *Islamic Marriage and Divorce Laws of the Arab World*, CQ Press, London, 1996.

²¹ See A. M. Sangalagi, *Op. cit.*, p. 13. See also M. Mazandarani Haeri, *Izdivaj va Talaq dar Islam va Sayir-I Adyan*, Nashr Parsa, Tehran, 1985.

²² See N. Katuzian, *Huquq Madani Khnevadeh*, Tehran University Press, Tehran, 1989, p. 380. See also J.N.D. Anderson, *Op. cit.*

²³ *Khul* is an Arabic word that means removing the dress from the body, as is declared in the *Qur’an*: “The woman are your dress and you are their dress”. *Qur’an*: 2:187.

entails the wife giving her dowry to end the marriage, because she is the “contract” breaker.²⁵ It is a divorce secured by a wife on the basis of her incompatibility with her husband, secured against property that she cedes to her husband.²⁶ This property may comprise the original dowry or the monetary equivalent thereof, whether that is a greater or lesser sum than the dowry. The latter is in the case of divorce secured on the basis of mutual incompatibility, in which case the compensation paid must not be greater than the original dowry.²⁷

There are two forms of divorce, namely revocable divorce (*rij-yee*) and irrevocable divorce (*ba-en*). In the case of revocable divorce, the husband can take his wife back during the period of *idda*.²⁸ He has the right to resume matrimonial relations with his wife as long as the period of *idda* has not elapsed.²⁹ According to traditional jurisprudence, a husband’s return to his wife following divorce may be effected by

²⁴ Under the *Qur’anic* rule marriage may be dissolved by mutual consent by the wife giving something to her husband. The *Qur’an* says: “It is not lawful for you that ye take from woman aught of that which ye have given them except in the case when both fear that they may not be able to keep within the limits imposed by God. And if ye fear that they may not be able to keep the limits of God, it is no sin for either of them if the woman ransom herself.” See *Qur’an*: 2:229.

²⁵ It has been said that in the case of divorce where the husband is the “contract” breaker, he must pay the dowry in full in cases where all or part of it was deferred.

²⁶ See S. Haeri, “Divorce in Contemporary Iran: A Male Prerogative in Self-Will”, in *Islamic Family Law*, edited by C. Mallat and J. Connors, Graham & Trotman, London, 1990, pp. 65-67.

²⁷ See H. Imami, *Huquq Madani*, Vol.4, Entesharat Islami, Tehran, 1991, pp. 46-49. See also N. Coulson, *Conflict and Tension in Islamic Jurisprudence*, The University of Chicago Press, Chicago, 1969, p. 19.

²⁸ *Idda* is the waiting period which the woman must observe before marrying again, whether in the event of divorce or death. The period of *idda* following a divorce or annulment of a marriage consists of three consecutive monthly periods for a woman or, if she is without monthly period despite being of child-bearing age, of three calendar months. It has been argued that the reason for the *idda* in the case of divorce is to determine whether the woman is pregnant and to provide an opportunity for the husband who has divorced his wife to take her back. In the case of death, it is both to determine whether the woman is pregnant and to provide a period of mourning for the deceased husband. The *idda* shall be observed on divorce if consummation has actually occurred. The *Qur’an* rules that: “Divorced women shall wait concerning themselves for three monthly courses.” (*Qur’an*: 2:228) However, if the marriage has not been consummated, no *idda* shall be observed. The *Qur’an* says: “O ye who believe! When ye marry believing woman, and then divorce them before ye have touched them, no period of *idda* have ye to count in respect of them.” (*Qur’an*: 18:49) It should be noted that in the case of the death of the husband, *idda* shall be observed even if there was no consummation of marriage. See J. Schacht, *An Introduction to Islamic Law*, Clarendon Press, Oxford, 1964, pp. 99-131.

²⁹ For more information about *idda* in Islamic law see M. Al-Sabaqi, *Sharh Qanoun Al-Ahval Al-Shakhsiyya Al-Souri fi Al-zowaj va Al-Talaq*, Daralvaraqh, Beirut, 1996. See also J. Soubhani, *Nezam Al-Nekah fi Sharia Al-Islami*, Moassesseh Imam Sadeq, Qum, 2000.

any word or action indicating such an intention, provided that it is based on a real intention to do so.³⁰ Indeed, the husband has the option to revoke the pronouncement either expressly by word, or implicitly by resuming material relations, without the necessity of a new contract or a new dower and he has access to his wife even without her consent.³¹ This is based on the *Qur'an*, which says: "And their husbands have the better right to take them back in that period if they wish for reconciliation."³²

In the case of irrevocable divorce (*ba-en*), the husband has no right to take his wife back during the period of *idda*.³³ It takes place on the following conditions:

- Divorce secured before the marriage has been consummated;
- A divorce secured by the wife on the basis of her incompatibility with her husband and mutual agreement (*khul* or *mubarat*) as long as the wife has not claimed the return of the dowry or its equivalent;
- The third divorce secured after three consecutive marriages between the same parties have been concluded either by the husband renouncing his wish to divorce his wife or by re-marriage between the two parties.³⁴

3. Divorce at the request of the wife

In some cases, Islam entitles the woman to petition for divorce before judge when the husband's failure to fulfil his duties, such as maintenance, or good company, whether

³⁰ See A. Rahim, *Op. cit*, pp. 283-284. See also A.A. Engineer, *The Right of Women in Islam*, New Dawn Press, 2004, p. 145.

³¹ See O. Abdullah, *Islamic Sharia Provisions on Personal Status*, 6th edn., Alexandria, 1986, p. 423.

³² *Qur'an*: 2:228.

³³ In this kind of divorce the husband may remarry his repudiated wife under a new contract, for a new dower, and subject to her consent.

³⁴ It is notable that in this kind of divorce the wife becomes temporarily prohibited for the husband to remarry. He can only remarry her after she has been duly married to another, and her second marriage has been duly dissolved, after she has counted her *Idda*. See J. Schacht, *The Encyclopaedia of Islam*, Vol. 4, Brill, Leiden, 1932, pp. 636-640.

it is or it is not the husband's fault.³⁵ This is subject to the difficulty of matrimonial life and continuation of married life. The woman may also get a delegated right from the husband as an additional condition during marriage, so that she may get divorced if certain conditions are met or under any conditions. In such a case a judge can either compel the husband to allow the divorce, or act on his behalf.³⁶ In the law of some Muslim states such as Iraq,³⁷ Syria,³⁸ Jordan,³⁹ Egypt,⁴⁰ Morocco,⁴¹ and Algeria,⁴² there are a few grounds, namely, discord, a defect on the part of husband, failure to pay maintenance, absence or imprisonment of the husband, on which application may be made to the court for divorce. The Islamic jurisprudence, defines certain reasons for divorce at the request of wife, which will be examined here briefly. They include divorce due to refusal or inability to pay maintenance, the husband's unjustifiable absence and divorce based on difficulty and hardship.

3.1. *Divorce due to refusal or inability to pay maintenance*

³⁵ See M. Abu-Zahra, *Op. cit.*, pp. 345-375.

³⁶ See Z. Davar, *Op. cit.*, p. 225. See also Imami, *Op. cit.*, p. 476; A. Shaygan, *Huquq Madani*, Entesharat Taha, Qhazvin, 1996; J.N. Anderson, "The Islamic Law of Marriage and Divorce", in *Reading in Arab and Middle Eastern Society and Cultures*, eds., by A.M. Lutfiyya and C. Churchill, Mouton, Hague, 1970.

³⁷ Iraqi Code of Personal Status Law (1987). See C. Mallat, "Shiasim and Sunnism in Iraq: Revising the Codes," in *Islamic Family Law*, edited by C. Mallat and J Connors, Graham & Trotman, London, 1990.

³⁸ Syrian Personal Status Law (1975). See G. Tabet, "Women in Personal Status Laws: Iraq, Jordan, Lebanon, Palestine, Syria," in *Women studies/ Gender Research*, No. 4, 2005, pp. 26-27. See also J. Anderson, "Syrian Law of Personal Status," *Bulletin of the School of Oriental and African Studies*, 1955, pp. 25-59.

³⁹ Jordanian Code of Personal Status Law (1976). See also J.N.D. Anderson, "Litigant Strategies in an Islamic Court in Jordan" in *Law and Islam in the Middle East*, Bergin & Garvey Publishers, New York, 1990.

⁴⁰ Egyptian Personal Status Law (2000). See Najjar, "Egypt's Laws of Personal Status," 10 *Ara'SQ*, 1988, pp. 319-345. See also El Alami, *The Marriage Contract and Islamic Law in the Shari'ah and Personal Status Laws of Egypt and Morocco*, Graham & Trotman, London, 1992.

⁴¹ Moroccan Code of Personal Status Law (2004). See Z. Mir-Hosseini, *Marriage on Trial ... Op. cit.*, pp. 84-114. See also J.N.D. Anderson, "Reform of Family Law in Morocco, 2 *JAL*, 1958, pp. 146-159; L. Rosen, *Bargaining for Reality: the Construction for Social Relations in a Muslim Community*, Chicago University Press, Chicago, 1984.

⁴² Algerian Code of Personal Status Law (1984). See Christelow, *Muslim Law Courts and the French Colonial States in Algeria*, Princeton, 1985.

Failure by the husband to pay maintenance is a valid ground for the wife to apply to the court for a divorce.⁴³ A *Qur'anic* verse in this regard says: “[A woman] must be retained in honour or released in kindness.”⁴⁴ In the light of this verse, Iraqi Law recognizes the wife’s petition for divorce on the following grounds

The abstention by the husband from paying maintenance without a lawful excuse, after being given notice to pay within 60 days;

The impossibility of collecting maintenance from the husband on account of his being away, or in jail for more than two years;

If the husband refrains from paying the accumulated maintenance ordered against him by the court, having been given notice by the enforcement officer to pay within 60 days. Such a divorce shall be irrevocable.⁴⁵

In case of refusal of the husband to pay maintenance, the Iranian law first provides for the woman’s right to refer to the court and for obligating the husband to be compelled to pay maintenance.⁴⁶ If it is impossible to force the husband to pay maintenance, the court can force the husband to divorce the wife. Failure to maintain is a crime according to the Islamic Penal Code of Iran (IPCI) and results in punishment.⁴⁷ The IPCI states, “If anyone is financially capable and fails to pay his wife’s maintenance, ... the court will sentence him from 3 months and 1 day to 5 months in prison.”⁴⁸ Therefore, if a man having sufficient property refuses to pay maintenance, the wife first has to set forth her maintenance claim to the court. If, after issuance of the order, the man refuses to pay maintenance, the wife shall be entitled to divorce. In other

⁴³ It should be noted that minority of Islamic jurists including Hanafis argued that such a divorce is not permissible, whether the reason for the failure to pay maintenance is insolvency of the husband, or just refusal. See H. Helli, *Qhavaed al-Ahkam*, Vol. 3, Nashr Islami, Qum, 1994, pp. 778-781. See also M.H. Najafi, *Javaher Al-Kalam*, Chap Najaf, Beirut, 1956, p. 289.

⁴⁴ *Qur'an*: 2:22.

⁴⁵ Iraqi Code of Personal Status (1987).

⁴⁶ See Article 1111 of Civil Code of Iran, which provides that: “A wife may make a claim to the court if her husband refuses to provide her maintenance costs. In such cases, the court will set the amount of maintenance and will compel her husband to pay it.” See A. Sharif, *Nafaqhe, va Tamkin dar Huquq Khanevadeh*, Nashr Besharat, Tehran, 2000, pp. 80-87.

⁴⁷ Article 642 IPCI.

⁴⁸ *Ibid.*

words, divorce is first subject to issuance of a maintenance order and the woman cannot from the very beginning and directly apply for divorce without first applying for maintenance.

In case of the man's inability to pay maintenance, the same conditions apply. Therefore, if a man is unable to pay maintenance, the wife first has to refer to the court to apply for maintenance. The court will obligate the man to pay maintenance. If the man fails to pay maintenance, then the court may issue a divorce order.⁴⁹ The important point to note is that, in case of the man's inability to pay maintenance, the court does not issue a divorce order in the beginning and first obligates the man to pay maintenance. Then, if the man fails to pay, it will issue a divorce order.⁵⁰ With regard to this point, some have argued that this is in order to make sure that the husband is unable to pay maintenance, which is provided for in the law.⁵¹ Now, in the event of refusal to pay maintenance, conditions not provided for in the law can be appropriately justified because, if the husband states he will not pay maintenance while he is financially capable, then there is no need to issue a maintenance order until, after undergoing lengthy formalities, the woman can obtain a divorce action, because it takes a long time for a woman to get a divorce.

Does refusal to pay maintenance, which is ground for divorce, cover past maintenance or future maintenance or both? Juridical procedures vary on this matter and different decisions have been issued.⁵² The Pakistani Court in *Rashid Ahmad Khan v. Nasim Ara Case* decided that maintenance which is awarded to the wife after reconciliation

⁴⁹ See H. Imami, *Op. cit.*, p. 450.

⁵⁰ *Ibid.*

⁵¹ See N. Katouzian, *Huquq Madani Khanevadeh*, Tehran University Press, Tehran, 1989, p. 372-373. See also M. Jafari Langaroudi, *Huquq Khanevadeh*, Entesharat Ganj Danesh, Tehran, 1995, pp. 224-226.

⁵² See Matin, *A Collection of Legal Procedure*, Tehran. See D. Pearl, *A Textbook on Muslim Personal Law*, 2nd edn, Croom Helm, London, 1987; A. Doi, *Op. cit.*, p. 208.

and arbitral procedures implicit in Section 9(3) of the Family Laws Ordinance (1961)⁵³ can include payment for past maintenance as well as future obligation.⁵⁴ In the Iranian legal system, branches 3 and 4 of the SCC emphasise that the law provides for future maintenance⁵⁵ because the woman's claim for past maintenance counts as debt rather than maintenance; therefore the law is deemed to cover future maintenance.⁵⁶ However, the General Board of the Supreme Court (GBSC) includes under the article 1129 of CCI past maintenance as well.

3.2 The husband's absence or imprisonment

The absence of the husband without any justification or his imprisonment is valid legal grounds for the wife to apply for a divorce.⁵⁷ The absence or imprisonment must be actual rather than anticipated, and for a long time, during which the wife suffers injury.⁵⁸ Different schools of thought and legislators of Muslim states specified different times for petitioning the court for divorce, setting that time from 6 months to 4 years.⁵⁹

Moroccan Law, for example, in the case of a husband's absence for more than a year without an acceptable excuse, recognises the wife's petition to the court for an

⁵³ According to Section 9 of the Muslim Family Laws Ordains, where a husband fails to maintain his wife adequately, then the wife may apply to the Chairman (of a local Union Council) who shall constitute an arbitration council to determine the matter.

⁵⁴ *Rashid Ahmad Khan v. Nasim Ara Case* 1968 PLD Lah 93.

⁵⁵ Article 1129 of CCI provides that: "If a husband refuses to pay his wife's maintenance and if it proves impossible to enforce court order requiring him to pay her maintenance, his wife may refer to a judge requesting divorce and the judge will compel her husband to divorce her. This same provision shall be binding in a case where the husband is incapable of providing for his wife's maintenance."

⁵⁶ SCI 12/04/1316. *Matin, Op. cit.*, pp. 279-283.

⁵⁷ See M.M. Feiz Al-Kashani, *Mafatih Ashraei*, Vol. 2, Majma Al-Zakhaer Al-Islami, Qum, 1980, p. 351. See also J. Schacht, *An Introduction to Islamic Law*, Clarendon Press, Oxford, 1964.

⁵⁸ See M.H. Tousi, *Mabsout*, Vol. 5, Qum, p. 278. See also J. Helli, *Shariat al-Islam*, Vol. 2, Qum, p. 385; S. Mofid, *Moqhnae*, Qum, p. 83.

⁵⁹ See Z. Mir-Housseini, *Divorce in Islamic Law and in Practice: The Case of Iran* 11 *Cambridge Anthropology*, 1953, p. 45. See also J.L. Eposito and N. Delon-Bass, *Women in Muslim Family Law: Contemporary Issues in Middle East*, Syracuse University Press, New York, 2002.

irrevocable divorce.⁶⁰ According to Egyptian law, if the husband is absent for a year or more without an acceptable excuse, his wife may ask the court for an irrevocable divorce should she suffer injury due to his absence, even though he has property from which she can obtain her maintenance.⁶¹ In Syria, a wife whose husband has gone absent without an acceptable excuse, or who has received a prison sentence of more than three years, may apply to the court for a divorce after one year of the absence or imprisonment, even if there is property of the husband from which she could obtain maintenance. Such a divorce shall be revocable.⁶² According to Iranian law a wife can apply for divorce when her husband is absent without any justifiable reason. Articles 1029⁶³ and 1023⁶⁴ of the CCI, the husband's absence for four complete years is deemed as grounds for divorce. Considering the timing of notification in the official gazette, it actually takes the wife five years to get divorced.

However, considering the present conditions and the present problems in different societies, the period of four complete years required in the Iranian legal system is problematic. There have been many cases in Iranian courts when the husband deserted home without letting his family know. In some cases, for example *Shirin v*

⁶⁰ See Moroccan Code of Personal Status Law (2004). For more discussion on the issue in Morocco Personal Status Law see D. Dwyer, "Bridging the Gap Between the Sexes in Moroccan Legal Practice" in *Sexual Stratification*, ed. by A. Schlegel, Columbia University Press, New York, 1977. See also Z. Mir-Huseini, Marriage on Trial ... *Op. cit.*, pp. 100-101; D. Dwyer, "Women, Suffism, and Decision-Making in Moroccan Islam", in *Women in the Muslim World*, edited by L. Beck and N. Keddie, Harvard University Press, Cambridge and Mass, 1978.

⁶¹ See Article 12 of Egyptian Personal Status Law (1985). See also A. Hussein, "Recent Amendments to Egypt's Personal Status Law", in *Women and the Family in Middle East: New Voices of Change*, edited by E.W. Fernea, University of Texas Press, Austin, 1985.

⁶² Syrian Personal Status Law (1975).

⁶³ According to the CCI: "If a man has been regarded as a missing person for four full years, his wife may apply for divorce. A judge shall then grant her a divorce subject to the provisions of Article 1023."

⁶⁴ Article 1023 of CCI states that: "... A court may only issue a verdict of presumed death of a missing person once has been published three consecutive times at one month intervals in a local newspaper and in one of the widely distributed Tehran newspapers a notice inviting any persons who may have news of him to pass on their information to the court. If, after one year has passed from the date of first publication of such a notice, it is not proved that the person is still alive, then such a verdict may be issued."

Mahmoud,⁶⁵ *Laleh v Hamed*,⁶⁶ *Samira v Koorosh*,⁶⁷ *Vida v Ali*⁶⁸ and *Zeinab v Farhad*,⁶⁹ the husbands migrated to European countries and claimed asylum under new identities, without ever intending to return home. In these cases, the wife had to wait and, after four years, present the divorce petition to the court and, after undergoing the formalities provided for in the law, get a divorce. Since four years is not a reasonable period of time in the age of communications and information, the wife's petition for divorce on the ground of difficulty and hardship is recognized by the latest reform in Iranian legal system in 2002.⁷⁰ It should be noted that in the conditions of the marriage certificate, it is stipulated that, if the husband deserts familial life without any justifiable reason and is absent for six months without justifiable reason, the wife will represent him in the divorce. This condition only applies when a husband signs the condition in the marriage certificate.

3.3. Divorce based on harm or difficulty and hardship (*asr va haraj*)⁷¹

Among the other cases in which the wife can apply for divorce is when she can prove to the court that continuation of matrimonial life causes difficulty and hardship to her.⁷² The difficulty and hardship rule is a secondary rule in Islamic jurisprudence. The primary rule is that the husband has the option to decide on divorce. However, if continuation of matrimonial life causes difficulty and hardship to the wife and the husband does not divorce the wife, as a secondary rule the wife can apply for divorce and the court can force the husband to divorce.

⁶⁵ *Shirin v Mahmoud Case*, 10/12/1379, SCC Tehran.

⁶⁶ *Laleh v Hamed Case*, 18/02/1381, SCC Isfahan.

⁶⁷ *Samira v Koorosh, Case*, 11/09/1381, SCC Tabriz.

⁶⁸ *Vida v Ali Case*, 25/11/1379, SCC Tehran.

⁶⁹ *Zeinab v Farhad Case*, 22/09/1382, Tabriz.

⁷⁰ See www.majma.ir/english.aspx.

⁷¹ This is a *Sharia* concept which allows the sanction of a rule to be lifted when adherence to it creates hardship. Under the Shi'a law this is a rationale upon which divorce is available to a woman. See S.R. Khomeini, *Touzih Al-Masael*, Markaz Nashr Farhangi Rija, Tehran, 1987,

⁷² *Ibid.*, para. 2528. See also M. Jafari Langaroudi, *Op. cit.*, Tehran, 1998, p. 227.

The Moroccan law empowers the judge to effect a divorce on women's demand when the husband's ill-treatment of the wife causes continuation of marital life to become impossible for a woman of her status.⁷³ The Egyptian law in the light of doctrine of harm recognised the wife petition for divorce on the ground of the husband's ill-treatment.⁷⁴ The Jordanian legislator also recognized woman's petition for divorce in the case of harm.⁷⁵ Jordanian law, by enabling separation to be decreed in the event of the allegation of ill-treatment even if the fault is entirely that of the wife, has gone further than the Egyptian and Moroccan laws.⁷⁶ In spite of the above laws in Islamic states there are many cases in different Muslim states including Morocco, Iran, and Egypt that show that it is not easy task for women to convince the judges in order to obtain a divorce on the grounds of harm.⁷⁷ Indeed their petition for dissolution may be rejected because of lack of concrete proof of ill-treatment, which is not easy to supply.⁷⁸

Iranian law in the light of Shi'a jurisprudence recognised the wife's petition for divorce on the ground of difficulty and hardship in 1935.⁷⁹ The law was reformed in 1991 and provides: "If continuation of matrimonial life causes difficulty and hardship

⁷³ See Article 56 of Moroccan Code of Personal Status. See also Z. Miadi, *Al-Usrat al-Maghribiyya bain al-Khatib al-Shari va al-Khatib al-Shabi*, National Centre for Coordination and Popular Discourse, Rabat, 1988.

⁷⁴ According to Article 6 of Egyptian Law (1929) the wife can obtain a divorce on the grounds of the husband's impeachability. The wife alleges that the husband is guilty of cruelty in a way which makes the continuance of the marital relationship impossible for people of their class. See also A. Mashhour, "Islamic Law and Gender Equality: Could There be a Common Ground?: A Study of Divorce and Polygamy in Sharia Law and Contemporary Legislation in Tunisia and Egypt" 27 *HRQ*, 2005, p. 580.

⁷⁵ Articles 113-116, 120, 123, 125-127, 132-133 of Jordanian Code of Personal Status Law recognized the wife has the right to seek divorce if she can prove that she has suffered damage or ill-treatment. Jordanian Code of Personal Status Law (1976).

⁷⁶ *Ibid.*

⁷⁷ See Z. Mir-Housseini, *Marriage on Trial, ...*, *Op. cit.*, p. 108; Matin, *Op. cit.*; A.K. Ferdowsi, "The Status and Rights of Women in Ithna Ashari Shi'a Islam," in *Women and the Family in Iran*, Brill, Leiden, 1985; A. Fathi, "Introduction", in *Women and the Family in Iran*, Brill, Leiden, 1985.

⁷⁸ It should be noted that some cases in which women tried to obtain a divorce based on harm, such as the *Huria Case*, took almost six years. See *Huria Case* in Z. Mir-Housseini, *Ibid.*, pp. 108-112.

⁷⁹ The Civil Code of Iran in Article 1130 provided "a) When the husband does not fulfil the other obligatory rights of the woman and it is not possible to force him to fulfil the same; b) bad company of the husband so as to make continuation of living unbearable for the wife; c) contraction of a refractory disease that makes continuation of matrimonial life risky for the other party.

to the wife, she can refer to a judge and apply for divorce. If said difficulty and hardship is proved at the court, the court may force the husband to divorce. If it is not possible to force him, the wife shall be divorced upon the judge's order."⁸⁰ Since the said article created problems in determining difficulty and hardship, in 2002, the Expediency Council added a note to the article and tried to clarify difficulty and hardship. In this regard it mentions just some cases as examples. The added note provides:

Difficulty and hardship as provided in this article is creating a condition in which continuation of life is made difficult and unbearable to the wife. The following cases, if verified by the court, are examples of difficulty and hardship:

1. The husband's deserting the familial life for at least six consecutive months or nine alternating months within a year without a justifiable reason;
2. The husband's addiction to any narcotic drug or alcoholic beverages so as to damage the foundation of familial life or the impossibility of forcing him to give up the addiction during a period that a doctor deems necessary for the addition. If the husband does not fulfil his obligation or, after quitting, further becomes addicted, the divorce will be carried out upon the wife's request;
3. Final sentencing of the husband to five years or more in prison;
4. Battery or any continuous misuse by the husband that is not normally bearable by the wife according to her conditions;
5. The husband's contraction of refractory mental diseases or rabies or any other refractory disease that disturbs matrimonial life.⁸¹

The above cases in this article do not prevent the court from refusing the wife divorce in other cases in which difficulty and hardship is verified. The wife must provide concrete proof of difficulty and hardship, which it is not easy to supply. In *Mina v. Amir Case*⁸² where Mina requested divorce on the ground of harm (ill-treatment) and demanded neither maintenance nor her dower, the Court rejected her demand for

⁸⁰ Article 1130 of the CCI amended in 1991

⁸¹ Cited in [www. Majma.ir/English.aspx](http://www.Majma.ir/English.aspx). In Tehran in 2005 out of 755 women who requested the divorce on the ground of difficulty and hardship 39 per cent based their application on the husband addiction to drug, 5 per cent on the husband's mental condition resembling insanity, 10 per cent on the husband's desertion of marital home, 5 per cent of the husband's sterility and 41 per cent ill-treatment. *Handbook of the Persian Study Institute*, No. 85, 1384.

⁸² *Mina v. Amir Case*, 12/12/1375, SCC Tehran.

divorce because of the insufficient proof (neither the medical report that she produced nor the testimony of witnesses were accepted) and ordered her to return to her marital home (*tamkin*).⁸³ The judge ordered that:

... Since the wife has not submitted any convincing reasons for her demand and since the husband had not agreed to her request, the court rejects her demand on the basis of the *hadith*, divorce is in the hand of the one who took the calf, that is, divorce is the man's right.⁸⁴

The way that hardship is defined and the grounds needed to establish it may vary from one judge to another.⁸⁵ In the Iranian legal system, the SCC decisions even in similar cases vary. For example in *Shadi v Mehran Case* the court refused Shadi's petition for divorce on the ground of Mehran's addiction and concluded that Mehran's addiction did not cause hardship.⁸⁶ In another case when the husband's addiction to narcotic drugs was verified by the Forensic Medicine Department, the court ordered for divorce based on hardship.⁸⁷ *Nazi v. Hamid Case* is another example in this respect.⁸⁸ In this case Nazi demanded a divorce on the ground of harm and the judge required her to bring witnesses confirming her claim.⁸⁹ Following the testimony of four witnesses the court granted her a divorce.⁹⁰ The above cases illustrated how difficult it can be to obtain divorce on the ground of hardship.

⁸³ *Ibid.*

⁸⁴ *Ibid.* It should be noted that after 4 years in 1998 Mina's attempts on appeal failed again.

⁸⁵ It should be noted that under the current system if the wife applies for divorce because of narcotic drugs or alcohol, the Forensic Medicine Department must verify this.

⁸⁶ *Shadi v Mehran Case*, 23/07/1384, SCC Tehran

⁸⁷ *Fariba v. Vahid Case*, 10/06/ 1380, SCC Shiraz; *Zahra v. Kaveh Case*, 25/03/1381, SCC Tehran; *Yasaman v. Babak Case*, 11/06/1378, SCC Mashad.

⁸⁸ *Nazi v. Hamid Case*, 29/07/1380/ SCC Tehran.

⁸⁹ *Ibid.*

⁹⁰ *Ibid.*

4. Divorce at the request of both of the parties

Under Islamic law marriage may be dissolved by mutual consent. A divorce which is effected by a mutual agreement is known as a *khul*.⁹¹ In this case the wife gives the husband a certain sum in return for the agreement of the husband to release her from the marriage tie. This is an irrevocable divorce. The jurists refer to the *Qur'anic* verse:

And it is not lawful for you that ye take from women aught of that which ye have given them except in the case when both fear that they may not be able to keep within the limits imposed by God. And if ye fear that they may not be able to keep the limits of God, it is no sin for either of them if the woman ransom herself.⁹²

In reliance upon the above verses, the Supreme Court of Pakistan in *Khurshi Bibi v. Muhammad Amir Case*, held that *Khul* is a right of the wife and is available to her regardless of the husband withholding his consent. The Court stated that:

Islam, recognizing the weaknesses in human nature, has permitted the dissolution of marriage, and does not make it an unseverable tie, condemning the spouses to a life of helpless despair. The *Qur'anic* legislation makes it clear that it has raised the status of women. The Holy *Qur'an* declares in verse 2: 228 that women have rights against men similar to those that men have against them. It conferred the right to *khula* on women as against the right of *talaq* in men.⁹³

Another kind of divorce by mutual consent is *mubarat*, where the compensation is a matter of arrangement between the husband and wife. The wife may return all or a portion of the dower (which does not exceed what was given to her as dower) in return for her divorce.⁹⁴

⁹¹ See J.J. Nasir, *Op. cit.*, p. 78.

⁹² *Qur'an*: 2: 229.

⁹³ *Khurshid Bibi v. Muhammad Amin Case*, 1967, PLD SC 97.

⁹⁴ See H. Imami, *Op. cit.* p. 49. See also S. Safai & A. Imami, *Op. cit.*, p. 288.

5. The delegated right to divorce

Under the Islamic Law, the wife has a right to stipulate during the marriage contract that the husband delegated to her, absolutely or conditionally, the right of unilateral repudiation whereby she will have a right to invoke it when absolutely necessary.⁹⁵

This does not divest the husband of his own original right to divorce. Both he and his wife can then exercise the right unilaterally.⁹⁶ There were discussions in some Muslim states, namely Iran, Iraq, and Lebanon about whether women should be given the right to divorce and attempts were made to do this according to the laws of the *Sharia*. The legislators of the above states recognised this right for the wife when the husband signed the conditions which had been stipulated in the marriage contract,⁹⁷ but this right is restricted to some cases such as failing to pay maintenance, absence for a specific period of time, or ill-treatment. According to the Islamic jurisprudence, however, the wife may rather be given absolute power of attorney for divorce.⁹⁸ Therefore, the delegated right to divorce of the wife does not have to be made subject to an act such as failing to pay maintenance, absence or misconduct. In this regard, Ayatollah Khomeini says,

*... for women, the religious legislator has provided an easy way so that they can take control of divorce, i.e. at the time of marriage they can stipulate that they shall represent the husband for divorce absolutely ... and they can divorce themselves. (emphasis added)*⁹⁹

⁹⁵ See S. Sani, *Op. cit.*, p. 4. See also A. Isfehni, *Vasilat al-Nejat*, Vol.2, Chapkhaneh Islmai, Tehran, 1957, p. 436. See also, M. Najafi, *Op. cit.*, Vol. 32, pp. 24-25.

⁹⁶ See M. Ghazanfari, *Khudamuzi Luma'ih*, Vol.1, Tehran, 1957, p. 130. See also M.A. Ibn Abidin, *Radd al-Muhtar*, Vol. 2, Dar al-Ketab, Beirut, 1994, p. 497.

⁹⁷ See D. Hinchcliffe, "Legal Reforms in the Shi'i World – Recent Legislation in Iran and Iraq", 10 *MLR*, pp. 292-305. See also W. Madelung, "Shi'i Attitude Toward Women as Reflected in *Fiqh*" in *Religious Schools and Sects in Medieval Islam*, Variorum Reprints, London, 1985.

⁹⁸ See J. Al-Alami, *Mefatih Al-Keramah fi Sharh Ghavaed A-Alamat*, Beirut, 1995, p. 89. See also H. Modaressi-Tabatabai, *An Introduction to Shi'a Law: a Bibliographical Study*, Ithca Press, London, 1984.

⁹⁹ See S.R. Khomeini, *Sahifeh Nour*, Vol. 10, Moasseseh Nashr va Asar, Tehran, 1986, p. 78.

In Iran, following the decisions of the judicial authorities in 1983, provisions were included in the marriage certificate as conditions.¹⁰⁰ According to these conditions, every woman and man who wants to get married has rights and obligations in the matrimonial life within a certain framework. The conditions are set forth under two headings, to which the husband consents by signing. The first heading requires the husband to pay his wife upon divorce up to half of the wealth he has acquired during the marriage, provided that the divorce has not been initiated or caused by any fault of the wife. The second gives the wife the delegated right to divorce herself after recourse to the court, where she must establish one of the conditions,¹⁰¹ which have been inserted in her marriage contract.¹⁰² Although a divorce petition by the wife

¹⁰⁰It is notable that before the Revolution in 1979 in Iran the legislator supported the wife's delegation for divorce. Therefore, women whose marriage certificates were drawn up between 1967 and 1978, according to the provisions contained in their marriage certificate, were able to represent their husband for divorce. This group of women can invoke the same condition of representation as provided in their marriage certificate and refer to the court to get a divorce. The courts accepted this condition after the Islamic revolution. See S.M. Muhaqqiq Damad, *Op. cit.*, pp. 330-333. See also A.R. Naghavi, "The Family Protection Act," in *Islamic Studies*, Vol. 6, 1967, pp. 241-264; H. Afshar, "Women, Marriage and State in Iran", in *Women, State and Ideology*, edited by H. Afshar, Macmillan, London, 1986.

¹⁰¹ The following conditions are printed in official marriage certificates of Iran and the husband by signing the conditions commits himself to them. Conditions are included as part of the marriage contract or stipulated in a separate binding contract. The woman may obtain irrevocable representation with the right of substitution so as to refer to the court in the following cases and have herself divorced with the court's permission after choosing the type of divorce. These are a) When the husband for any reason refuses to pay maintenance for six months, and when it is not possible to obligate him to do so. Also in cases when the husband does not fulfil his other duties to his wife for six months and it is not possible to obligate him do so; b) Misconduct and bad company of the husband to the extent that continuation of matrimonial life is risky for the other party; c) Suffering of the husband from a refractory disease to the extent that continuation of marriage is risky for the other party. d) Insanity of the husband in cases where the cancellation of marriage is not possible religiously; e) The husband's refusal to abide by the court's order not to engage in any profession inconsistent to family life, interests and reputation of the wife; f) Conviction of the husband to five years or more in prison or to a fine, inability to pay which will end up to five years in prison and that such a sentence is being carried out; g) Any harmful addiction of the husband which, at the discretion of the court, is prejudicial to the family foundation and could make the continuation of matrimonial life impossible; h) If the husband abandons the family life or is absent for six months with no justifiable excuse at the discretion of the court; i) Definite conviction of the husband of a crime which, at the discretion of the court, is inconsistent with the family prestige and dignity of the wife. The court, by considering the wife's position and prestige and the norms and other considerations, shall decide if the conviction is inconsistent with the prestige and dignity of the family' j) If the wife cannot have a child from the husband after five years due to his being infertile or other physical problems; k) Where the husband disappears and is untraceable six months after the wife applying the court; l) When the husband marries another wife without his wife's consent or, at the discretion of the court, does not treat his wives equally.

¹⁰² Some of the above provisions exist in the CCI and some others are included therein only to provide for the rights and interests of the wife. The first three are included in former Articles 1129 and 1130 of

based on certain grounds such as difficulty and hardship, the husband's failure or inability to pay maintenance, the husband's absence or the wife's delegated right to divorce is recognized in the law of Iran, discrimination between women and men in divorce has imposed difficult conditions on women.¹⁰³ There are numerous cases in Iranian courts in which women were not only unable to obtain divorce within a reasonable period of time, but also bore the harmful material and mental effects thereof for a long period of time. In the *Shima v. Davood Case*,¹⁰⁴ the wife lived a matrimonial life of just a few days and incompatibility between the couple resulted in her presenting a divorce petition. Since the court could not seek the causes of divorce petition and the above cases did not apply to her, she could not get a divorce until three years had elapsed, and then only by giving up her basic rights and after paying the heavy expenses of the proceedings, along with suffering the harmful mental and emotional effects.

6. Annulment of a marriage (*faskh*)

Annulment of marriage is defined as the ground on which the spouses may obtain a judicial termination of their marital status.¹⁰⁵ In the legal system of some Muslim

the CCI while Article 1130 changed in the year 1982 and the order was included as 'difficulty and hardship'.

¹⁰³ For example in case of issuance of an incompatibility certificate by the court (the certificate is valid for three months), if the woman does not appear at the notary public's office, the man may appear and have the divorce formalized and registered. However, if the man fails to appear at the notary public's office, the woman has to refer to the court to further obtain the court order for formalization of divorce. According to the law of Iran in 1997, "If the wife fails to appear, the husband may have the divorce formalized and registered by the notary public's office and notify the same to the wife. However, if the husband refuses to appear for formalization of the divorce, the notary public's office shall confirm the failure and notify the same to the certificate-issuing court. The court, at the wife's request, shall summon the husband and, if he fails to appear, the court shall formalize the divorce by abiding by the religious aspects and shall order and notify the same to the divorce registry office."

¹⁰⁴ *Shima v. Davood Case* 15/04/1382 SCC Tehran.

¹⁰⁵ See O. Abdullah, *Op. cit.*, pp. 470-486. See also A. El-Ahzari Sonbol, ed., *Women, the Family in and Divorce Laws in Islamic History: Contemporary Issues in Middle East*, Syracuse University Press, New York, 1996.

states such as Iran, Lebanon, Iraq,¹⁰⁶ on the one hand, annulment of marriage due to apparent defects in either party, based on the *Sharia*, has been recognized.¹⁰⁷ Some Islamic legislators such as Syria, Egypt, Jordan and Morocco,¹⁰⁸ on the other hand, adopt the position that the wife is entitled to sue for divorce on the grounds of a defect on the part of the husband, and retain many of the previous provisions.¹⁰⁹

Some defects in the man, which are listed by the legislators, will give the wife the right to annul the marriage.¹¹⁰ There are also some defects relating to the woman, due to which the husband is entitled to annulment of the marriage.¹¹¹ However, some

¹⁰⁶ For example Iraqi law provides that the wife may apply to the judge if she finds her husband to be impotent, or unable, because of any defect, to perform connubial intercourse due to organic or psychological causes, or if he becomes so defected after consummation, and a competent official medical committee certifies that such a defect is incurable. However, if the court finds that the cause is psychological, it shall adjourn divorce for a year, provided that the wife shall make herself available to her husband in the meantime. The wife shall also have the right to petition for dissolution if the husband is, or becomes, sterile after marriage without her having any surviving child by him. The same right shall prevail if she find, after marriage, that her husband is suffering from any such illness as to render living with him impossible for her without injury to herself. The examples cited are leprosy, tuberculosis, a venereal disease, and insanity, even if they occur later. However, should the court find, following a medical examination, that such a disease is curable, it shall adjourn divorce until the actual cure, and the wife meanwhile should avoid living with the husband. Nevertheless, the judge shall order an irrevocable divorce if there is no hope that the disease would be cured within a reasonable time, and if the husband refuses to repudiate his wife. See Iraqi Code of Personal Status Law (1987).

¹⁰⁷ See M.B. Mohaqeq, *Huquqh Madani Zowjein*, Tehran, 1989, p. 277-279. See also N. Katouzian, *Op. cit.*, pp. 276-279.

¹⁰⁸ For example the Syrian legislator provides, "the wife is entitled to petition for a divorce on the grounds of the husband's defect: a) if the husband suffers from a defect that renders him incapable of consummating the marriage, provided that the wife is free from such a defect. With the exception of impotence, for which the right to apply for a divorce shall not lapse under any circumstances, the wife shall lose the right to petition for dissolution of the marriage by the court if she knew of the existence of the defect before the contract, or if she consented to continue marriage thereafter; b) If the husband becomes insane after the contract. The judge shall order a divorce forthwith if such a defect is not curable. If it is, the judge shall adjourn the case for a period not exceeding a year, at the end of which he shall order a divorce if no cure was found. Such a divorce shall be irrevocable." See Syrian Code of Personal Status Law (19).

¹⁰⁹ It should be noted that the Maliki sect considers the issue as divorce, not as annulment. They allow a divorce by the court on the grounds of such defects on the part of either spouse. However, the Shafii sect consider such a divorce a decree of annulment, since it is not effected by the husband personally and of his own free will. Abu Hanafi argues that the judge has no power to order a divorce on the grounds of a defect on the part of the wife, because the husband possesses the right to repudiate her. He allows such a divorce to be ordered on the grounds of defects of the man. In the case of the husband's refusal to repudiate, the judge shall act on his behalf and order a divorce. See J.J. Nasir, *Op. cit.*

¹¹⁰ According to Article 1122 of CCI the defects are: Castration, impotency and amputation of male member in such a way that he is incapable of performing the matrimonial act.

¹¹¹ According to Article 1123 if any of the following physical conditions is found to afflict a wife, it gives her husband the right to have their marriage annulled. 1. Protrusion of the womb, 2. Black leprosy, 3. Connection of the vagina to the anal passage. 4. Leprosy. 5. A crippling physical disability. 6. Blindness, in both eyes.

diseases such as a crippling physical disability and blindness in both eyes may exist in either party but the Iranian legislator has a discriminatory attitude by providing that, in case such defects exist in the wife, the husband is entitled to annulment of marriage, but not vice versa. Equality of men and women requires that they should have a similar status in the right to dissolve marriage by annulment.¹¹² Therefore, they must have a role without discrimination in dissolving marriage by annulment, especially due to defects and diseases. It seems that the basis for creation of the right to annul a marriage annulment right due to defects and diseases in Islamic law is based on the no-loss rule (*ghadeh la zarar*).¹¹³ Therefore, there should be no difference between women and men in this respect.¹¹⁴

Here the question is, what is the basis for such discrimination? It is submitted that a quick look at the Islamic sources shows that this discrimination has no basis in the *Sharia* - there is no verse in the *Qur'an* or ruling in other Islamic reliable sources about this issue. Isfehni argues that such diseases are considered common defects and both parties must have the annulment right.¹¹⁵ To him, failure to annul the marriage results in loss to a party, which is contrary to Islamic teaching.¹¹⁶ In Islam, there is much advice about prohibiting loss or providing the ground for loss of another

¹¹² It should be noted that annulment of marriage on the ground of defect in either spouse is a subject of some controversy among Islamic jurists. On the one hand, Ibn Hazm argues that no marriage shall be nullified, once it is duly celebrated, by any leprosy, insanity, nor any other defect on the part of the wife, nor by impotence nor by a vaginal defect, nor by any defect whatsoever. Ibn Qayyim, on the other hand, argues that every defect, whether on the part of the man or the wife, shall entitle the other spouse to petition for a divorce, since the contract was solemnized on the assumption of freedom from all defects, an implied condition based on custom, which ought to be fulfilled and was found to be lacking. See A. Ibn Hazm, *Al-Muhalla*, Dar al-Afaq al-Jadidah, Beirut, ND, p. 91.

¹¹³ See S. Sani, *Rozat Al-Bahiat*, Vol. 5, Nashr Islami, Qum, 1989, p. 383. See also F. Hendi, *Kashf al-Lesam*, Vol. 2, Nashr Ehsan, Qum, 1992, p. 70.

¹¹⁴ *Ibid.*

¹¹⁵ See S. Abul Hasan Isfehni, *Vasilat al-Nejat*, Vol. 2, Al-Mata'bat al-Aalavia, Najaf, 1934, p. 397. See also F. Hendi, *Op. cit.*

¹¹⁶ *Ibid.*

person.¹¹⁷ The no-loss rule is one of the important jurisprudential rules and principles, about which the Prophet has a saying. Although Islamic jurists and thinkers, based on their interpretation of the *hadith*, have expressed different views, yet they unanimously agree that no one should incur loss from another person or due to another person's action.¹¹⁸ Therefore, in this case, if annulment is to remove loss, then it is necessary to remove loss from both sides and there shall be no difference between women and men in this respect.

Laws and regulations in Islamic countries, emanating from the *Sharia*, give the divorce right to the husband. Therefore, even if the law does not grant the husband the right to annul the marriage, he will still be entitled to the divorce right. In contrast, women's use of judicial divorce is very limited, and they are not given the right of marriage annulment in case of such diseases. Logically, if such diseases create the annulment right, why should there be a difference between women and men? The harmful effects of these diseases can be more serious in the man because, according to the Islamic law, in the relationship between the husband and wife, the role of the head of the family is the exclusive right of the husband, and such diseases can affect the man's role in the family, as well as his ability to provide.

Concluding remarks

In summation, it is submitted that one of the most important challenges between international human rights law standards and the law of Muslim states is related to family relations and adjustment of private life between husband and wife. The purpose of Article 16 of the Women's Convention is to ensure the application of the

¹¹⁷ See S. Sani, *Op. cit.* See also Ibn Beraj, *Al-Mohazab*, Vol. 2, p. 231; M.H. Horre Amuli, *Vasa'el Al-Shi'a*, Vol. 14, Entesharate Maktab Al-Islami, Tehran, 1988. p. 594.

¹¹⁸ *Ibid.*

Convention to the most private arena of human relationships, the family and state parties undertake to take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations. Article 16 of the Convention, however, has elicited some reservations by states parties, of which the greatest number belong to Muslim states on the basis of conflict with Islamic law and *Sharia*. The personal status laws of Muslim states, indeed, vary in terms of the degree of deference they show to traditional Islamic law affecting women and the family. Equal rights and responsibilities for spouses during marriage and divorce are emphasised by articles of law, while Islamic traditional law provides different tasks and responsibilities, which actually causes serious gender discrimination in the laws of many Muslim states. The question here is whether these tasks and responsibilities set out in Islamic sources are fixed and unchangeable or changeable according to the well-being of the people and consideration of existing conditions, if the concept of well being or the existing conditions change. Mutahhari rightly pointed out:

The conditions in our age require a re-evaluation of many issues and the former values are not sufficient anymore. Family rights and obligations systems are among them.¹¹⁹

An obvious example in this regard is divorce where, under Islamic traditional law, the husband can repudiate his wife unilaterally. Since the right of unilateral repudiation has been abused by men from quite an early period of Islam, legislators of Muslim states have tried in various ways to modify the traditional rules of marriage dissolution in order to limit the husband's power in their Personal Status Laws, even though their efforts are not enough. One of the alternative approaches is through the exercise of the right of the stipulations which are now printed in the marriage contract. This is a step forward towards recognizing women's rights for divorce but

¹¹⁹ M. Mutahhari, *Women's Right in Islam*, Sadra, Tehran, p. 13.

stipulating conditions for invoking the delegation in the marriage contract, means the wife's rights are limited to those conditions, so in reality it is not easy to implement. However, under the Islamic law, the wife has a right to stipulate in the marriage contract that the husband delegates to her, absolutely, the right of unilateral repudiation, whereby she will have a right to invoke it when absolutely necessary. This delegation is neither contrary to the essence of marriage nor contrary to *Sharia*.¹²⁰ By recognising the absolute delegated right to divorce in the Personal Status Laws of Muslim states both parties have equal right to divorce and can then exercise the right unilaterally.

However, lack of accurate understanding of *Sharia* in some Islamic countries and interference of ethnic rituals and tradition has caused women's rights to be disregarded. Therefore, the idea of Islamic justice for securing women's rights is crucially important, and the collection of Muslim Personal Laws deserves due attention. Personal incorrect interpretations as well as patriarchal justification in different fields of family law including polygamy, unilateral repudiation and guardianship, have worked to the detriment of Islamic justice. Relying on the spirit of Islam, which is justice, it is submitted that changes in different Islamic societies are inevitable and this revision should be within the domain of the basic principles governing Islamic thought as to time and place requirements.

¹²⁰ See A. Mamaqhani, *Menhag Al-Mottaggin*, Moassesseh Al Al-Beit, Qum, 1989, p. 384. See also N. Katouzian, *Op. cit.*, p. 321-322.

Part IV

Women in Islamic Criminal Law and National Penal Law of Some Muslim States

Article 2 of the Women's Convention requires that state parties undertake to embody the equality of men and women in their national constitutions or appropriate legislation, if it is not yet incorporated therein, and to ensure, through law and other appropriate means, the practical realization of this principle. It defines the potential sources of discrimination broadly to include any legally sanctioned activities that may be taken by "any person, organization or enterprise" and calls on members "to modify or abolish existing [discriminatory] laws, regulations, customs and practices." It emphasises the duty to embody principles of equality in national constitutions and legislation, "to adopt appropriate legislative and other measures, including sanctions" and to repeal national penal provisions that discriminate against women.¹ However, discrimination can also be seen in many cases of Islamic criminal law including *shahadat* (testimony), *qeous* (retaliation) and *diyya* (compensation, also called "blood money"), and the age of criminal responsibility. The penal laws of some Islamic states² also treat women unequally.

This part, which consists of two chapters, tries to explore and examine Islamic criminal law and the concept of "justice of Islam", which has re-emerged, two centuries after the French revolution of 1789, in the Islamic countries applying

¹ 34 UN GAOR Supp. (No 21), (A/34/46) at 193, UN Doc. A/RES/34/180.

² See B. Ali, "Islamic Law and Crime: The Case of Saudi Arabia," 9 *IJCACJ*, 1985, pp. 45-57. See also Richter H. Moore, "The Criminal Justice System of Saudi Arabia," in *International Criminal Justice Systems II*, Academy of Criminal Justice Sciences, Omaha, Nebraska, 1986, pp. 139-198; Richter H. Moore, "Islamic Legal Systems: A Comparison-Saudi Arabia, Bahrain and Pakistan," *Comparative Criminal Justice Chicago*, Office of International Criminal Justice, 1989, pp. 243-250; G.C. Taylor, "The Criminal Justice System of Egypt," in *International Criminal Justice Systems II*, Academy of Criminal Justice Sciences, 1986, pp. 13-26. See also B. Nathan, *Ibid*; H. Rezaei, "The Iranian Criminal Justice under the Islamization Project", 10 *EJCLCJ*, 2002.

Islamic law in their criminal justice systems and its effect including discriminatory laws in *shahadat*, *qeusas*, *diyya*, and the age of criminal responsibility in Islamic Penal Law as well as the current law of a few Muslim states. Since the criminal legal system and its punishment based on *Sharia* in practice is faced with serious questions about violation of the prohibition of cruel, inhuman, and degrading punishment under international law, the following questions will be highlighted in this part: Do these systems constitute a sufficient response for solving human beings' problems, in consideration of the paradigmatic change in human life? Is the present gender discrimination in Islamic criminal system laws firmly evidenced and documented in Islamic jurisprudence? Or is it possible to secure equality between men and women in the criminal system by reinterpretation of Islamic sources without impugning divine commands?

Chapter VII

Islamic Penal Law in Theory and Practice

This chapter examines the Islamic criminal system as well as the concept of “justice of Islam”, as it has re-emerged in the Islamic countries applying Islamic law in their criminal justice systems, notably the Islamic Republic of Iran, where the revolution of 1979 came with the idea of Islamization of laws, regulations and the judicial system, in order to explore and examine the situation of women in Islamic penal law in both theory and reality.

1. Islamic Criminal Law

The penal or criminal law in Islam is called *al-Uqubat*, a word derived from *aqb* which means “one thing coming after another”, because punishment follows transgression of the limits set by Divine Law.¹ *Al-Uqubat* covers both torts and crimes.² There is very little difference between the two. The *Sharia* places emphasis on fulfilling the rights of all individuals as well as the public at large. Offences where the law gives the remedy to the public are crimes and those where it is given to the individual are torts. According to Islamic law, crime is “every deed or action which is forbidden (*haram*) by *Sharia*’, be it in the case of property or life.”³ Crime is a moral problem considered serious in Islam, because it threatens the peace and harmony of human life.⁴ If crime is widely committed, benevolence in society is destroyed, but

¹ See <http://en.wikipedia.org/wiki/Sharia>. See also A.R. Doi, *Sharia: The Islamic Law*, Ta Ha Publishers, London, 1984, pp. 220-221.

² *Ibid.*

³ See B. Gamal Mouri, “Islamic Law: Its Relation to Other Legal Systems,” 26 *AJCL*, 1978, pp. 187-198.

⁴ See A.R. Doi, *Shariah in the 1500 Century of Hijra Problems and Prospects*, Ta Ha Publishers, London, 1981. See also M. El-Awa, *Punishment in Islamic Law: A Comparative Study*, American Trust Publishers, 1982; E.S. Fairchild, *Comparative Criminal Justice Systems*, Wadsworth Publishing Co., Belmont, 1993.

Islam itself is a religion that promises peace and harmony to the society.⁵ Therefore, in facing crime, Islam has a special view that stresses the importance of terminating the criminal actions or preventing their escalation. Some writers divide criminal actions in Islam into the following categories:

- Crimes against physical life such as injuring people or murdering them;
- Crimes against property such as robbing, vandalizing and etc;
- Crimes against descendents, such as adultery;
- Crimes against human virtues and chastity, such as false accusations of unchastity (*qazaf*) or drinking intoxicants.⁶

There are two major categories of crime and punishment in Islamic legislation: determined and discretionary. The categories will be explained very briefly here.

Determined: the crimes and penalties are those provided for in the *Qur'an* or *Sunna* where both the form of the criminalized conduct and its assigned punishment are specified. Determined crimes are of two kinds: crimes of *hudud*, and crimes of *qesas* (retribution) and *diyya* (compensation).

Discretionary: A crime or penalty is discretionary when neither *Qur'anic* nor *Sunna* texts render the act in question criminal. Therefore, its criminalization results from the implementation of general legislation by the competent authority of the Islamic state. Discretionary crime is called *ta'zir*.

⁵ See B. Weiss, "Interpretation in Islamic Law: The Theory of *Ijtihad*," 26 *ACL*, 1978, pp. 199-212. See also Heer, *Islamic Law and Jurisprudence*, University of Washington Press, Washington D.C., 1990; M.C. Bassiouni, "Sources of Islamic Law and the Protection of Human Rights in the Islamic Criminal Justice System," in *The Islamic Criminal Justice System*, edited by M.C. Bassiouni, Oceana Publications, London, 1982.

⁶ See N.J. Coulson, *A History of Islamic Law*, Edinburgh University Press, Edinburgh, 1994. See also Goldziher, Ignaz, *Introduction to Islamic Theology and Law*, Princeton, 1981; S. Mahmassani, *The Philosophy of Jurisprudence in Islam*, Leiden, 1961.

1.1 *Hudud*

The word *hudud* is the plural of an Arabic word *hadd* which means prevention, restraint or prohibition, and it refers to a restrictive and preventive ordinance, or statute, of Allah concerning things lawful (*halal*) and things unlawful (*haram*). In the Islamic legal terminology *hudud* means: “specified punishments imposed by *Sharia*’ as an obligation to be implemented in order to carry out the right of Allah.”⁷ In legal terms, the term is used to describe laws that define a level of crime classification.⁸ The function of *hudud* crimes and punishment is to protect public interest in Muslim society, public property and security, family structure, personal reputation and the public religious order in Islamic society.⁹

Crimes classified under *hudud* are the most severe of crimes in Islamic law, such as murder, theft, adultery, defamation, false accusation of adultery or fornication, robbery and drinking alcohol. The first four *hudud* crimes are subject to specific punishments set out in the *Qur’an*.¹⁰ In other words, these most serious of all crimes are distinguished by an express reference in the *Qur’an* to a specific act and a specific

⁷ See Islamic Encyclopedia website at www.islamset.com/encyclo/encyclo.html, Available September 2006.

⁸ Among offences which are categorized as offences punishable by *hudud* are stealing, robbing, fornication, false accusation of unchastity without valid evidence, drinking alcohol and *murtad* (apostasy from the religion of Islam). If one of the offences is found to have been committed, and the court finds the offender guilty, the punishment to be meted out is determined by *Sharia*’. Man has no right to add, alter or reduce the punishment after it has been decided, as *hudud* is the right of Allah. Man is only commanded to fully execute and implement it.

⁹ See M. Khadduri and H.J. Liebesny, *Law in the Middle East, Origin and Development of Islamic Law*, William Byrd Press, Washington D.C., 1955, pp. 225-227.

¹⁰ Punishment of the crimes are based on *Qur’anic* verse as follows:

“As to the thief, male or female, cut off his or her hand: a punishment by way of example, from God, for their crime” *Qur’an*: 5:38.

“The punishment of those who wage war against God and His Messenger, and strive with might and main for mischief through the land is: execution, or crucifixion, or the cutting off of hands and feet from opposite sides, or exile from the land ...” *Qur’an*: 5:33.

“The woman and the man guilty of *zina*, flog each of them with a hundred stripes; Let no compassion move you in their case, in a matter prescribed by God if you believe in God and the last day ...” *Qur’an*: 24:2. While Muslim jurists agree that the term *zina* covers both adultery and fornication, the punishment prescribed here is applied only to unmarried persons (fornication) while according to the *sunna* the punishment for adultery in the case of married persons is stoning to death *rajm*.

“And those who launch a charge against chaste women and produce not four witnesses (to support their allegations) flog them with eighty stripes” *Qur’an*: 24:4.

punishment for that act.¹¹ However, the last three crimes are mentioned in the *Qur'an*, without a specific punishment being prescribed.¹²

There are minor differences in views between the Sunni and Shi'a schools about sentencing and specifications for these laws. It is often argued that, since *Sharia* is God's law and states certain punishments for each crime, they are immutable.¹³ However, among some jurists who express concerns about the validity of *hadith*,¹⁴ a major component in the creation of Islamic law, questions have arisen about administering certain punishments.

1.2 *Qeusas*

Qeusas is an Arabic word meaning, "he cut" or "he followed his track in pursuit", and it comes therefore to mean the law of equality or equitable retaliation for the murder already committed.¹⁵ Doi explained *qeusas* as "the treatment of murderer should be the same as his horrible act, that is, his own life should be taken just as he took the life of his fellow man."¹⁶ He also mentions, "this does not mean that he should also be killed with the same instrument or weapon."¹⁷ The philosophy of *qeusas* in Islamic law is based on the principles of sacredness of life, strict justice and equality of the value of human life.¹⁸ According to the *Qur'an*, one man's murder is considered to

¹¹ For more argument on the issue see S.M. Safwat, "Offences and Penalties in Islamic Law", 26 *Is'Q*, 1982, p. 169. See also F. Schmallegger, *Criminal Justice Today*, Englewood Cliffs, 2nd edn., 1993, p. 603.

¹² See T. Mahmood and *et al*, *Criminal Law in Islam and Muslim World*, Institute of Objective Studies, Delhi, 1996, pp. 235-244.

¹³ *Ibid.*

¹⁴ See A. Fahed and J.E. Scott, "Islamic Law: An Examination of its Revitalization," 21 *BJC*, 1981, pp. 58-69. See also A.A. Abd al-Aziz, "Punishment in Islamic Criminal Law" in *The Islamic Criminal Justice System*, ed., by Bassiouni, Ocean Publication Inc, New York, 1982, pp. 227-236; M. Khadduri and J.L. Herbert, (eds.) *Origin and Development of Islamic Law*, AMS Press, New York, 1984.

¹⁵ See A.R. Doi, *Sharia: The Islamic ...*, *Op. cit.*, p. 232. See Islamic Encyclopedia, *Op. cit.*

¹⁶ *Ibid.*, pp. 232-233.

¹⁷ *Ibid.*

¹⁸ The *Qur'an* has mitigated the horrors of revenge and retaliation which were practised in the *Jahiliyyah* period or much of what is even prescribed in a slightly modified form in the modern so-called civilized world. During the *Jahiliyyah* period before Islam, the Arabs were always prone to take

be the murder of the entire human race, and whoever saves a life, it is as if he had saved the lives of all mankind.¹⁹

Muslim jurists also argue that the law of *qesas* was prescribed in the Old Testament and it is accepted by almost all Christian traditions that the New Testament needs to be read as a continuation of the Old Testament.²⁰ It is also believed that Old Testament commands are binding for Christians as well as those of the New Testament, except for the ceremonial law. In this regard, it is accepted that violence is permissible according to the Old Testament: "An eye for an eye and a tooth for a tooth."²¹ In Islam, equality in retaliation is prescribed with a strict sense of justice, but it makes a clear provision for mercy and forgiveness.²² The following verses of the *Qur'an* clarify the aims of *qesas*:

... that if any one slew a person-unless it be for murder or for spreading mischief in the land-it would be as if he (slew) the whole people: and if anyone saved a life, it would be as if he saved the life of the whole people.²³

O you who believe! The law of equality is prescribed to you in cases of murder: the free for the free, the slave for the slave, the woman for the woman. But any remission is made by the brother of the slain, then grant any reasonable demand, and compensate him with handsome gratitude. This is a concession and a Mercy from your Lord. After this, whoever exceeds the limits shall be in grave penalty.²⁴

... we ordained therein for them: 'life for life; eye for eye; nose for nose; ear for ear; tooth for tooth, and wounds equal for equal.' But if any one remits the retaliation by way of charity it is an act of atonement for himself. And if any fail

revenge even for a wrong done centuries before. If a member of a clan or tribe was killed by a member of another clan, revenge was taken by killing any innocent person belonging to the enemy clan. The chain reaction that would start would not end for generations. See N.J. Coulson, *A History of Islamic ...*
Op. cit.

¹⁹ *Qur'an*: 5: 32.

²⁰ See M. Fayzee, *Islamic Criminal Law*, Oxford University Press, New Delhi, 1974. See also M. Farhad, *The Concept of Islamic International Criminal Law, A Comparative Study*, CQ Press, London, and New York, 1994; M. Shallal, *Islamic Criminal Law*, Amman Press, Amman, 1996.

²¹ See Ex. 21:24; Lev. 24:20; Deut. 19:21.

²² To the Prophet Mohammad, homicide was the greatest sin, only next to polytheism. He said, "The greatest sins are to associate something or someone with Allah and to kill a human being." See M.B. Majlisi, *Bahar al-Anvar*, Moasseseh al-Vafa, Beirut, 1984.

²³ *Qur'an*: 5:32.

²⁴ *Qur'an*: 2: 187.

to judge by (the light of) what God hath revealed, they are (no better than) wrong-doers.²⁵

Do not kill a soul which Allah has made sacred except through the due process of law.²⁶

...Take not life, which God has made sacred, except by way of justice and law. Thus does He command you, so that you may learn wisdom.²⁷

1.3 *Diyya*

Crimes of retaliation and compensation include homicide, bodily injury or other forms of harm committed against the physical security of the person.²⁸ They are labelled as such because the punishment imposed is either a retributive penalty equivalent to the injury inflicted on the victim, or takes the form of pecuniary compensation for the victim's injuries.²⁹ The *Qur'an* and *Sunna* prescribe compensation.

In earlier days, retaliation was also ordered in some cases of wounding, but this was before an express commandment came and limited it to the cases of murder only. However, the relative or the person who suffers from the death of the murdered man can make a remission, and ask for *diyya* instead.³⁰ The compensation can also take the place of a death sentence if it is proved that the killing was unintentional.³¹ *Diyya* has its roots in Islamic law and dates to the time of the Prophet Mohammad when

²⁵ *Qur'an*: 5:45.

²⁶ *Qur'an*: 6:15.

²⁷ *Qur'an*: 6:151.

²⁸ See M. Salim Al- Awwa, "The Basic of Islamic Penal Legislation," in *The Islamic Criminal System*, edited by M. C. Bassiouni, Oceana Publication, London, 1982, pp. 127-128.

²⁹ *Ibid.*

³⁰ It should be noted that *qesas* law combines the process of criminal and civil hearing into one, just as the "civil law" is applied in many nations of the world. The *qesas* crimes require compensation for each crime committed. Each nation sets the damage before the offence and the judge then fixes the proper *diyya* - taking *diyya* must be carried out through proper governmental and judicial authority. If an offender is too poor to pay the *diyya*, the family of the offender is called upon first to make good the *diyya* for their kin. If the family is unable to pay, it is the responsibility of the State to pay from public funds. The victim or family in the common law should sue the offender in a civil tort action for damages.

³¹ The *Qur'an* says: "And it does not behove a believer to kill a believer except by mistake, and whoever kills a believer by mistake, he should free a believing slave, and blood-money should be paid to his people unless they remit it as alms, but if he be from a tribe hostile to you and he is a believer, the freeing of a believing slave."

there were many local families, tribes and clans. They were nomadic and travelled extensively. The Prophet was able to convince several tribes to take a monetary payment for damage to the clan or tribe. This practice grew and now is an acceptable solution to some *qeusas* crimes. Today, the offender pays the *diyya* to the victim if he is alive; if not, the money is paid to the victim's family. The assumption of *diyya* is that victims will be compensated for their loss.

Capital punishment for a murderer is not the only kind of retaliation. *Diyya* can be paid by the family of the murderer to the family of the person killed if the latter accepts it. Also the family of the victim may forego retaliation as a goodwill offering. The rule is an indication that Islamic laws consider murder a serious crime against humanity and wish to guard against it with the utmost care. Jafari in this regard pointed out:

... human life is a manifestation of God's magnificence and nobody should dare destroy it. Murder transgresses the spring of life; therefore, a murderer's life is of no value due to his own transgression. This order will prove that retaliation is not the only punishment for the murderer. This order shows that Islam is a serious threat for those who make an attempt to murder. Is it possible to make a more logical rule to indicate the significance and greatness of lives of the human beings?³²

1.4 *Ta'zir*

Ta'zir literally means disgracing the criminal for his shameful criminal act. Doi pointed out that:

This kind of punishment by discretion has been provided in special consideration of the various factors affecting social change in human civilisation and which vary on the basis of variations in the methods of commission or the kind of criminal conduct indictable under the law. Offences

³² See M.T. Jafari, *A Comparative Study of the Two Systems of Universal Human Rights*, Al-Hoda International Publisher, London, 1999, p. 174.

punishable by this method are those against human life, property, and public peace and tranquillity.³³

The punishments for *ta'zir* crimes are not fixed, and the judge has great discretion in deciding the punishment. The punishment can take the form of lashes, imprisonment, fine, warning etc and this depends on the laws of the country.³⁴ In some Islamic countries *ta'zir* crimes are identified and penalties set by parliamentary legislation. Differences in the criminal codes in Muslim states lead to different punishments for the same crime. Indeed, there is a great disparity in the punishment of some of these crimes such as bribery, selling tainted or defective products, treason, etc. Each judge is free to punish based upon local norms, customs, and informal rules.

2. Islamic criminal law in practice

The French revolution of 1789 can be considered as a point of departure from pre-modern religious systems of criminal justice to a modern and secular one in Europe.³⁵

Two centuries later, the concept of “justice of Islam”, has re-emerged in the Islamic countries applying Islamic law in their criminal justice systems, such as Saudi-Arabia,³⁶ Libya,³⁷ Iran,³⁸ Pakistan,³⁹ and Northern Nigeria.⁴⁰

³³ See A.R. Doi, *Sharia: The Islamic ...*, *Op .cit.*, p. 226.

³⁴ Some writers argue that the difference between *hadd* and *ta'zir* can be compared with felony and misdemeanors in different legal system. This analogy is partially accurate. *Ta'zir* crimes can and do have comparable “minor felony equivalents.” These “minor felonies” are not found in the *Qur'an* so the Islamic judges are free to punish the offender in different ways. *Ta'zir* punishments vary according to the circumstances. They change from time to time and from place to place. They vary according to the gravity of the crime and the extent of the criminal disposition of the criminal himself. *Ta'zir* crimes are acts which are punished because the offender disobeys God's law and word. *Ta'zir* crimes can be punished if they harm the societal or public interest. The assumption of the punishment is that a greater “evil” will be prevented in the future if the offender is punished now. See M. Salam Madkoar, *Op. cit.* See also M. Salim, “The Basic of Islamic Penal Legislation”, in *The Islamic Criminal ... Op. cit.*, pp. 143-146; M. Hasan, *History of Islam*, New Delhi, 1992.

³⁵ See J.M. Kelly, *A Short History of Western Legal Theory*, Oxford University Press, Oxford, 1993, pp. 295-296.

³⁶ Saudi courts impose capital punishment and corporal punishment, including amputation for serious robbery, and floggings for lesser crimes. The number of lashes is not clearly prescribed by law and varies according to the discretion of the presiding judges. In 2002, the UNCAT criticized Saudi Arabia over the amputations and floggings it carries out under the *Sharia*. See R.H. Moore, “Courts, Law, Justice and Criminal Trials in Saudi Arabia” 11 *IJCACJ*, 1987. See also F.A. Mourad and H. Al-Saaty, “Impact of Islamic Penal Law on Crime Situation In Saudi Arabia: Findings of A Research Study,” in

Among Muslim states that applied *Sharia* in their criminal justice systems, the Iranian revolution of 1979 came with the idea of Islamization of all laws and regulations and judicial system, namely the intended revival of pre-modern Islamic law, as a thoughtful event in an increasingly secular world.⁴¹ Islamic law, as a sacred law, is the most typical manifestation of the Islamic way of life and is the kernel of political Islam.⁴² Following the Islamic revolution, which was to a large degree a reaction to the Shah's radical secularization programme,⁴³ the first step taken by the new

Criminal Law in Islam and the Muslim World, edited by T. Mahmood *et al.*, Institute of Objective Studies, Delhi, 1996.

³⁷ Libya also introduced Islamic criminal law in its judicial system in 1973 but in reality does not apply Islamic penalties in many cases. See T. Mahmood, "The Legal System of Modern Libya: Enforcement of Islamic Penal Laws," in *Criminal Law in Islam and the Muslim World*, edited by T. Mahmood *et al.*, Institute of Objective Studies, Delhi, 1996.

³⁸ See H. Rezaei, "The Iranian Criminal Justice under the Islamization Project", 10 *EJCLCJ*, 2002.

³⁹ See the Hadood Ordinance in 1979 in Pakistan. For more information about Islamisation of criminal laws in Pakistan see N.A. Shah, *Women, the Koran and International Human Rights Law: The Experience of Pakistan*, Martinus Nijhoff Publishers, Leiden, 2006, pp. 127-148.

⁴⁰ Between 2000 and 2002, 12 Northern Nigerian states introduced Islamic Law in their penal legislation including Bauchi, Borno, Gombe, Jigawa, Kaduna, Kano, Katsina, Kebbi, Niger, Sokoto, Yobe, and Zamfara. See R. Peters, *The Reintroduction of Islamic Criminal Law in Northern Nigeria*, Lagos, Amsterdam, 2001.

⁴¹ For more information about the Iranian Islamic Revolution of 1979 see J.L. Esposito, *Islam and Politics*, 3rd edn., Syracuse University Press, New York, 1991, pp. 84-86. See also E.G Brown, *The Persian Revolution*, Cambridge University Press, Cambridge; A Schirazi, *The Constitution of Iran, Politics and the State in Islamic Republic*, trans by O'Kanne, Tauris, London, 1997; C. Mallat, *The Renewal of Islamic Law*, Cambridge University Press, Cambridge, 1993.

⁴² It is notable that the Islamic revolution of Iran succeeded in reviving political Islam in the Islamic world. In the view of the founder of the revolution, Ayatollah Khomeini, Islam is not confined to the arena of individual rituals and moralities; it is the theory of government and is integral to the conduct of social, economic, legal and political relationship. The sacred legislation of Islam is the sole legislative power. Islam has precepts for everything which concerns man and society. Islam is essentially political and an Islamic ruler must therefore Islamicize the entire system. The examination of the Islamization process and its consequences within Iranian society is arguably a good method of evaluating the achievements of political Islam in challenging the exigencies of criminal justice in the modern society. As a matter of comparative scholarship and in the quest for an effective criminal justice system, it could be interesting for scholars of criminal justice to observe this different model of legal change. It may therefore be regarded as a fascinating subject for comparative criminal justice scholars, who are interested in the study of the full range of possible legal phenomena. For more details of the Islamic revolution and its impact in raising interest in Islamic Law in the West, see the view of Coulson in Rezaei, *Ibid*.

⁴³ The legal history of Iran shows that justice had always been located between two powers, the Shah and the clergyman. The modernization of Iranian criminal justice began from the early 20th century and astonishingly throughout this period Iran witnessed two revolutionary movements. During the first one, i.e. the constitutional revolution of 1906-11, modern legal concepts were introduced to the Iranian customary law. This revolution resulted in a constitution, which laid down for the first time a division of powers. Although the majority of religious scholars had expected a return to classical Islamic law in its entirety, the waves of constitutional revolution affected a section of the clergy, and they consequently recognized a process of modernization in criminal justice, especially the right to be tried in accordance with due process of law. But, according to the dominant religious culture, it was

government was the preparation of a new constitution to reflect the new revolutionary goals: “freedom, rule of law and Islamic government,” or in other words, Islamism and republicanism. The Islamic republic is a system based on belief in:

1. The One God (as stated in the phrase “There is no God except Allah”), His exclusive sovereignty and right to legislate, and the necessity of submission to His commands;
2. Divine revelation and its fundamental role in setting forth the law;
3. The return to God in the Hereafter and the constructive role of this belief in the course of man’s ascent towards God;
4. The justice of God in creation and legislation;
5. Continuous leadership and perpetual guidance, and its fundamental role in ensuring the uninterrupted process of the revolution of Islam;
6. The exalted dignity and value of men, and his freedom coupled with responsibility before God; in which equity, justice, political, economic, social, and cultural independence, and national solidarity are secured by recourse to: Continuous *Ijtihad* of *Fuqaha* possessing necessary qualifications, exercised on the basis of the *Qur’an* and *Sunna* of the *Masumun*, upon all of whom be peace; Sciences and arts and the most advanced results of human experience, with the effort to advance them further; Negation of all forms of oppression, both the infliction of and the submission to it, and of dominance, both its imposition and its acceptance.⁴⁴

Making a modern and harmonized composition of those idealistic aspects of the revolution was not an easy task. Article 4 of the Iranian constitution of 1979, however, set the stage for using “Islamization” as a pretext for changing substantive and procedural criminal law in post-revolutionary Iran. It states that:

All civil, penal, financial, economic, administrative, cultural, military, political laws and other laws or regulations must be based on Islamic criteria. This principle applies absolutely and generally to all articles of the constitution as well as to all other laws and regulations and the *Fuqaha*’ of the Guardian Council are judges in this matter.⁴⁵

provided that no legislation shall be contrary to the Islamic law. Under the formulation of Article 2 of the supplementary constitution of 1906-7 a supreme parliamentary committee of five high-ranking Islamic jurists was established. They would determine whether legislation was in conformity with *Sharia*. Despite Article 2 of the constitution of 1906-7, an autocratic process of secularization in the Shah monarchy, was pursued. In 1910, a department of public prosecution was set up. In 1912, the first Iranian Code of Criminal Procedure entitled “the temporary codes of criminal trials” was passed by a body of modern lawyers appointed by the justice Minister. For more details see H. Rezaei, *Ibid.*, pp. 65-67.

⁴⁴ Article 2 of the CIRI.

⁴⁵ Article 4 of the CIRI.

Since the principal aim of these radical changes in the Iranian criminal justice was the application of the divine laws, the features of Iranian criminal justice are different from all other forms of contemporary criminal justice reforms in the West. The formation of courts and their jurisdiction is to be determined by Article 61 of the constitution which stipulates:

... the functions of the judiciary are to be performed by courts of justice, which are to be formed in accordance with the criteria of Islam, and are vested with the authority to examine and settle law suits, protect the rights of the public, dispense and enact justice, and implement the Divine limits.

Further, Article 167 the Iranian constitution of 1979 provided that:

The judge is bound to endeavour to judge each case on the basis of the codified law. In case of the absence of such a law, he has to deliver his judgment on the basis of authentic Islamic sources or authoritative *Fatwas*. He cannot, on the pretext of the silence of or deficiency of law in the matter, or its brevity or contradictory nature, refrain from admitting and examining cases and delivering his judgement.⁴⁶

In 1982, 30 fundamental articles of a criminal procedure law were enacted by the Iranian parliament based on the traditional understanding of *Sharia* principles. Under the Act,⁴⁷ the previous system of classification of crimes, adopted from the French penal code of 1816, which divided offences according to their seriousness into crimes, misdemeanours and violations, was abandoned. Instead, an Islamic classification, simultaneously based on crime/punishment, was introduced. The new code of criminal procedure, for instance, intentionally seeks to put the scope of public law into the content of Islamic law. In Islamic law, there are three key notions:

- God's right,

⁴⁶Article 167 of the CIRI. These formulations show very well a structural dualism within the Iranian judicial system originating from the constitution. Indeed, during last two decades many courts have issued judgments with reference to the Article 167, which is also repeated in several procedural laws. The problems related to this dualism have developed out of an unusual system of criminal procedure in Iran.

⁴⁷ It should be noted that this Act was amended in 1988 and 1992.

- the individual's right
- and the public's right.

In July 1991, pursuant to Article 85 of the Constitution, the Islamic Penal Code of Islamic Republic of Iran (IPC) was passed by the Judiciary Committee of the Islamic Consultative Assembly and was subsequently approved by Expediency Council in November 1991. The new Code entered into force in December 1991. Consequently, Article 2 of IPC provides for three kinds of rights:⁴⁸

God's rights, which cover offences that are considered violations of God's commands as enunciated in the *Qur'an* and *Sunna*;

Rights of the individual, which include the rights granted by God to his servants, e.g. the right to ask for retaliation (*qeous*) or compensation;

"Public" rights' based on the duty of the Islamic ruler to maintain public order and security. In the case of murder for instance, under Article 208 of the IPC of 1991, the offender, apart from the victim's right, will in any case be punished by imprisonment from 3 to 10 years by virtue of the public's right.⁴⁹

By adopting this Islamic doctrine, the Islamic lawmaker also annulled the previous French-based model of the classification of crimes⁵⁰ and introduced a criminal system based on:

- *Hudud*: determined offences with quantified, mandatory and fixed punishments based on the *Qur'an*;⁵¹

⁴⁸ According to Islam Allah has given the right of prosecution and punishment to the individual in murder. Only the family of the victim of a killing, or in the case of bodily harm, the victim himself, has the right to press charges for retaliation, to forgive the culprit or demand compensation for the injury and damage, according to this understanding of Islamic law.

⁴⁹ In regard to those rights it is true to say that the Iranian legislator does not offer specific criteria distinguishing these three sorts of rights, although this classification shapes the whole of criminal procedure. Therefore the courts still have problems in new criminal cases in deciding whether the crime/ punishment rests upon public or individual rights. See Rezaei, *Ibid.*, pp. 64-65.

⁵⁰ The previous system was very much influenced by the French code of criminal instruction of 1808.

⁵¹ Crimes that require *hudud* punishments include adultery, male homosexuality, lesbianism, sexual procurement, accusations of adultery or homosexuality, use of alcoholic beverages, fighting, corruption on earth, and armed robbery.

- *Qeusas*: crimes of just retaliation for intentional homicide and based on the *Qur'an*;⁵²
- *Diyyat*: crimes of compensation for unintentional homicide and battery and as an alternative to retaliation;⁵³ and
- *Ta'zirat* crimes of discretionary punishments.

The idea of Islamization of laws and regulations and application of Islamic law in criminal justice systems based on prescribed fixed punishments for certain offences *hudud*, retributive punishment for other offences *qeusas* as well as discretionary punishment *ta'zir*, introduced harsh penalties such as stoning to death, amputation and flogging in the penal code of Iran as well as other Islamic states.⁵⁴ However, the availability of harsh penalties such as stoning to death and amputation, in the law of Muslim states, does not necessarily mean that the harsh, mutilating punishments it prescribes are actually applied.⁵⁵ In the case of the more severe penalties, such as *hudud*, the Islamic law takes due care to impose conditions that it is virtually impossible to meet. In the light of this approach, in many Muslim states such penalties based on strict standards of evidence are not enforced. At the same time,

⁵² *Qeusas* is used in cases of homicide or damage to bodily organs.

⁵³ *Diyya* is used when a crime against life or a bodily organ has been committed. The Code details the extent, amount, and conditions of *qeusas* and payment of *diyya* in relation to practically all parts of the human body.

⁵⁴ For example stoning sentences have been introduced in Penal Code of some Muslim states such as Iran, Saudi Arabia, Sudan, Pakistan, the United Arab Emirates, two state of Malaysia Terengganu and Kelantan, the province of Aceh in Indonesia and in twelve federal states in Northern Nigeria. Cases of stoning have been reported from these countries. The practice of stoning explicitly contradicts Article 5 of the UDHR, Article 7 of the ICCPR, the Second Optional Protocol to the ICCPR, aimed at the abolition of the death penalty as well as the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. See Amnesty International at <http://www.amnesty.org/ailib/aireport/ar99/asa33.htm>.

⁵⁵ Provisions for stoning in the penal codes of some Islamic states does not necessarily mean its strict application. For example, Egypt, which does base its jurisprudence on *Sharia*, some *hudud* offences such as adultery, is punished with prison sentences of up to six months for men and up to two years for women. In the United Arab Emirates, a young Indonesian housemaid called Kartini was sentenced to death by stoning for alleged adultery in the Emirate of Fujairah in 2000. The sentence of stoning to death was later commuted on appeal to one year's imprisonment and deportation. In Sudan, the 18-year old Christian Abok Alfa Akok was sentenced to death by stoning in December 2001 in the West-Sudanese Darfur. The punishment was commuted to 75 lashings in March 2002.

such harsh penalties are still applied in the light of a conservative approach in a few Muslim countries.⁵⁶

The application of those penalties have aroused concern and been criticized as violations of human rights in general and violation of the prohibition against cruel inhuman, and degrading punishment under international law in particular.⁵⁷ The severity of some criminal punishments under Islamic law has been brought into issue within international human rights discourse. In the view of many writers,⁵⁸ the laws of those Islamic states which imposing such fixed penalties (*hudud*) are in violation of

⁵⁶ A study conducted on behalf of the European Commission in Northern Nigeria in 2001 emphasised that enactment of Sharia's Penal Codes violate basic human rights on several scores. The study also pointed out, "the most important area of conflict is that these laws prescribe for certain offences penalties which must be regarded as torture or degrading and inhuman punishment. Within the framework of Islamic law, there are sufficient legal possibilities to restrict and even preclude the imposition of these penalties, e.g. by demanding very strict standards of evidence and by allowing many defence pleas based on uncertainty. There are many such defences listed in classical doctrine. This will require a more thorough training of the police and the Shari'a judges as well as enlightenment campaigns among the population." For more details on the Islamization project in the Northern States in Nigeria see R. Peters, *Op. cit.*

⁵⁷ Stoning is a legal sentence for certain activities deemed criminal in some Muslim states. See above n. 55. At the same time, execution of stoning sentences in those Muslim states needs to be differentiated. For example in Pakistan, in spite of the Haddood Ordinance 1979, the Federal Shariat Court overruled the stoning sentence of a Sharia Court in *Zafran Bibi Case* on 6 June 2002. Instead, extra-judicial stoning executions have occurred in the country. In Iran, since the IPC was approved by the Islamic Consultancy Parliament on 30 July 1991 and ratified by the Expediency Council on 28 November 1991 stoning sentences have been executed in few cases. According to Article 82 and 83 of IPC "The penalty for adultery in the following cases shall be death, regardless of the age or marital status of the culprit: (1) Adultery with one's consanguineous relatives (close blood relatives forbidden to each other by religious law); (2) Adultery with one's stepmother in which the adulterer's punishment shall be death; (3) Adultery between a non-Muslim man and a Muslim woman, in which case the adulterer (non-Muslim man) shall receive the death penalty; (4) Forcible rape, in which case the rapist shall receive the death penalty." "Adultery in the following cases shall be punishable by stoning: (1) Adultery by a married man who is wedded to a permanent wife with whom he has had intercourse and may have intercourse when he so desires; (2) Adultery of a married woman with an adult man provided the woman is permanently married and has had intercourse with her husband and is able to do so again." On 8 August 2001, the Special Rapporteur on violence against women, its causes and consequences sent a joint urgent appeal with the Special Representative on the situation of human rights in Iran, in which they urged the government of Iran to remove the article concerning stoning from the Islamic Code and to actively undertake a policy of suppressing recourse to stoning throughout the country. In December 2001 the UNGA expressed its concern about "the growing number of executions in the absence of respect for internationally recognized safeguards and, in particular, public and especially cruel executions, such as stoning" in Iran. In the course of negotiation with the EU on 26 December 2002 Iran officially announced to temporarily suspend the punishment of death by stoning.

⁵⁸ See A.E. Mayer, "A Critic of An-Na'im's Assessment of Islamic Criminal Justice", in *Islamic Law Reform and Human Rights: Challenges and Rejoinders*, edited by T. Lindholm and K. Vogt, Norwegian Institute of Human Rights, Oslo, 1993. See also P. Bannerman, *Islamic in Perspective: A Guide to Islamic Society, Politics and Law*, Routledge, London, 1988, p. 26. Bannerman argue that it would be foolish to deny that in Western eyes today, some penalties in Islamic criminal system, such as amputation, are brutal. Bannerman, *Ibid.*, p. 26.

Article 7 of the ICCPR which provides, “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.”⁵⁹ Mayer in this regard argues that the imposition of fixed punishment under Islamic law is inconsistent with modern penological principles and modern human rights norms.⁶⁰

HRC in its General Comments 7⁶¹ and 20⁶² observed that the aim of the provision is to protect both the dignity and the physical and mental integrity of the individual. HRC in regard to Article 7 of the ICCPR also has observed that the prohibition of cruel, inhuman or degrading treatment or punishment must extend to corporal punishment, including excessive chastisement ordered as punishment for crime.⁶³ In its consideration of the report of some Muslim states, it held that punishments under Islamic law such as amputation, stoning to death, flogging are incompatible with Article 7 of the ICCPR.⁶⁴ It emphasized that the article must be read in conjunction with Article 2 of the Covenant to the effect that a state party is under an obligation specifically to abrogate any law considered incompatible with Article 7 of the Covenant.⁶⁵ It ruled out any justification or limitation in respect of the article.⁶⁶

⁵⁹ It should be noted that the ICCPR does not define the term “torture” but there is a widely accepted definition of torture in Article 1(1) of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT). The article provides that: For the purposes of this Convention [i.e. CAT], the term ‘torture’ means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions. See 1465 UNTS, p. 85.

⁶⁰ *Ibid.*, p. 37.

⁶¹ See General Comment 7, para. 1.

⁶² See General Comment 20, para. 2.

⁶³ See UN Doc. HRI/GEN/1/Rev. 1 at 30 (1994), para. 5. Concluding Observation on Sudan (1997) UN Doc. CCPR/C/79/ Add.85, para. 9.

⁶⁴ See Concluding Observation on Sudan (1997) UN Doc. CCPR/C/79/ Add.85, para. 9.

⁶⁵ See General Comment 20, para. 14.

⁶⁶ See General Comment 20, para. 3.

The European Court of Human Rights, also, in both *Ireland v UK Case* and *Tyrer v UK Case*⁶⁷ observed its concern on issue and clarified that the term “torture”, attaches “a special stigma to deliberate inhuman treatment causing cruel suffering.”⁶⁸ In *Tyrer v UK Case* the Court under Article 3 of the European Convention observed that a punishment does not “lose its degrading character just because it is ... an effective deterrent or aid to crime control.”⁶⁹

In general, the prohibition of torture or cruel, inhuman, or degrading treatment is endorsed by Islamic law. There are many verses in the *Qur'an* and tradition of the Prophet, which prohibit torture, inhuman, or degrading treatment. Based on Islamic teaching Article 20 of the OIC Cairo Declaration on Human Rights in Islam provides that:

It is not permitted to subject (an individual) to physical or psychological torture or to any form of humiliation, cruelty or indignity. Nor is it permitted to subject an individual to medical or scientific experimentation without his consent or at the risk of his health or of his life. Nor is it permitted to promulgate emergency laws that would provide executive authority for such actions.

Islamic law, however, distinguishes between criminal justice as important aspect of public law and general prohibition of torture, inhuman, or degrading treatment. Al-Mawardi argues that fixed punishments in this system are classified as the right of God, and their severity cannot be questioned.⁷⁰ Nonetheless, some Muslim jurists such as Al-Zuhayli and Shalabi emphasised the harshness of the punishment and argued that under *Sharia*, prescribed punishments actually serve as a deterrent to the offences for which they are prescribed.⁷¹ To them, deterrent punishment is

⁶⁷ See *Ireland v. UK Case* in ECHRR, (1978) and *Tyrer v. UK Case* in ECHRR (1978).

⁶⁸ See *Ireland v. UK Case* in ECHRR, (1978), Series A, No. 3, para. 167.

⁶⁹ See *Tyrer v. UK Case* in ECHRR (1978) Series A, No. 28, para. 30.

⁷⁰ See A. Al-Mawardi, *Kitab al-Ahkam al-Sultaniyyah*, Mustafa al-Babi al-Halabi, Cairo, 1966. See also A. Al-Mawardi, *The Laws of Islamic Governance*, trans by A. Yate, Ta Ha Publishers, London, 1966.

⁷¹ See W. Al-Zuhayli, *Al-fiqh al-Islami wa-Adillatuh*, Vol. 7, Dar-al-Fikr, Pittsburgh, 1997, p. 537.

“prescribed by God to prevent Men from committing what He forbade.”⁷² Therefore, before application of these punishments, guilt must be proved beyond any atom of doubt, which is not easy task.⁷³ They refer to the tradition of the Prophet and his famous *hadith*, “Avert the *hudud* punishment in the case of doubt ... for error in clemency is better than error in imposing punishment.”⁷⁴

Although those are strict standards of proof for *hudud* punishments in Islamic traditional law and some Muslim jurists argue that that it is virtually impossible to meet the conditions imposed by *Sharia*, it is submitted that the legislators of a few Muslim states provide wide discretion for judges to implement the harsh penalties in different circumstances. As a result of this legal position, such harsh penalties are enforced in different cases and leave a negative image of the Islamic criminal system. Punishment under Islamic law is interpretable pragmatically to accommodate modern penological principles depending on the political and humanitarian will of the ruling authority. For example in non-*hudud* offences the state has discretion to impose less harsh punishment such as imprisonment, fine, warning etc under Islamic law. Some Muslim states in non-*hudud* offences effectively exercise that discretion in cognizance of their international human rights law obligations and outlaw corporal punishment such as lashes, instead imposing a fine, imprisonment or warning. Others directly impose harsh penalties such as lashes in their non-*hudud* punishments, contrary to the prohibition of cruel, inhuman, and degrading punishment. Differences in the criminal codes in Muslim states, indeed lead to different punishments for the same crime in the

⁷² *Ibid.*

⁷³ For example, punishment for adultery in Islamic law is very harsh (flogging or stoning) when the adulterer or the adulteress is of age, sane, in control of his or her action and cognizant of the illicit nature of his or her act. It may be proven by confession or testimony. According to Islamic law, if a man or a woman repeats his or her confession of adultery only four times before the judge, or by testimony of four just men or that of three just men and two just women, then she/he shall receive the designated punishment. However, if the adulterer or the adulteress repents prior to confessing to the act of adultery, he or she shall not be punished (subject to *hadd*).

⁷⁴ *Ibid.*, p. 538.

name of religion. Therefore, review of the laws of many Muslim states, even in relation to *ta'zir* punishment, is necessary in order to ensure compatibility with principles of human rights which are consistent with the Islamic *Shariah*. In the case of accusation of *hudud* offences, Islamic legislators, because of the difficulty of proof, can regulate *hudud* application of punishments through legally valid procedural devices, to avert the *hudud* penalty without impugning the divine Law. In such cases, *ta'zir* punishments are applied instead of the *hudud* punishments. Averting *hudud* punishment through procedural means does not amount to impugning divine commands.

As a result of the Islamization of criminal law based on conservative interpretation of *Sharia*, the situation of women in some Muslim states is greatly undermined in some important issues, namely; in testimony law, *qesas*, *diyya* and the age of criminal responsibility, while Article 2 of Women's Convention require that states parties undertake to embody the equality of men and women in their national constitutions or appropriate legislation. The Convention also urges states "to adopt appropriate legislative and other measures, including sanctions" and to repeal national penal provisions that discriminate against women.⁷⁵ Discriminatory law can be seen in the current laws of most Muslim state. In this regard, some important issues such as testimony, *qesas*, *diyya*, and the age of criminal responsibility will be examined in the following chapter.

⁷⁵ 34 UN GAOR Supp. (No 21), (A/34/46) at 193, UN Doc. A/RES/34/180.

Chapter VIII

Women's Place in Testimony, Retaliation and Compensation Laws of Islam

This chapter consists of four sections which examine and scrutinize the situation of women in the law of testimony (where a woman has half the testimonial competence of a man) retaliation (where men and women are not equal in retaliation for murder), compensation (where a woman's value is considered half that of a man) and the age of criminal responsibility in Islamic law which are inconsistent with the principle of equality before God and the law. I briefly trace the issues through laws and regulations of Islamic states, and then show the present gender discrimination in those issues. In this regard, various inspirations and commentaries on the issue in the light of both Sunni and Shi'a schools of thought are considered here.

1. Women and the question of testimony law in Islam

Testimony in the laws of Muslim states is a proof that can be used for a claim in civil as well as criminal affairs.¹ One of the problems in the discussion of testimony in Muslim states is the role of gender in the validity of testimony, i.e. does it make a difference if a man or a woman is giving testimony? The laws of some Muslim states which are based on jurisprudential views on women's testimony, show that in certain cases women's testimony is not at all acceptable as one of the ways to prove a claim and, in some cases, a woman's testimony will be worth half that of a man. In contrast the equality of parties before the court in both criminal and civil proceedings is required by international documents including Article 14 (1) of the ICCPR. Under Article 14 (1) of ICCPR "all persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations

¹ For example, Article 1258 of the CCI defines five proofs for a claim, including testimony, which has also been stipulated in the civil procedure. Testimony is also a proof of crime in criminal affairs of different Muslim states, the terms of which have been provided by testimony in various affairs.

in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.”² In the article, equity of parties before the courts in both criminal and civil proceeding is guaranteed. The HRC in *Bahamonde v. Equatorial Guinea Case* expressed its concern with the notion of equality before the court and tribunals.³ The Committee has also required that states parties take a serious step in order to guarantee the equality of parties before the courts and fair and public hearing by legally competent tribunals.⁴

Under Islamic traditional law, however, the rules of evidence in some cases require the evidence of two men or alternatively, one man and two women – a woman’s testimony is considered worth half that of a man. This has been used as justification for creating gender hierarchies within the Islamic tradition. It also raises a question on equality and non-discrimination on the ground of sex under international human rights law. The rule of evidence in the majority of Muslim jurisdictions is legislated and, as a result, the status of women in this issue is legally reduced. The present situation of women in the testimony law of the majority of Islamic states led the HRC in its General Comment 28 raise to the issue of women giving evidence as witnesses on the same terms as a men under Article 14 ICCPR.⁵ This brings the evidential capacity of women into the issue as matter concerning the equal right to a fair hearing under Islamic law.

The important question here is what is the basis for ignoring the evidential capacity of women under the Islamic law? It is based on the *Qur’an* which provides:

² Article 14(1) of ICCPR.

³ See UN Doc. CCPR/C/49/D/468/1991, (1993).

⁴ See General Comment 13, para. 3.

⁵ See General Comment 28.

O you who believe! When you contract a debt for fixed period, write it down. And get two witnesses out of your own men, and if there are not two men[available] then a man and two women, such as you agree for witnesses, so that if one of them [two women] errs, the other can remind her.⁶

The above verse is used in two different contexts, in broad and restricted interpretations. In its broad sense, the value of the testimony of two women is equal to that of one man, which means that the value of a woman's testimony as half that of a man, and this applies in all cases, including civil and criminal matters. Under this approach women are inferior, because there is rational deficiency in women vis-à-vis men, mentioned in a *hadith* from Prophet Mohammad that stated that women were inferior both in matters of religion and intelligence.⁷ Advocates of this approach argue that the reason the Prophet is supposed to have mentioned women's inferiority in intelligence is that the value of their evidence is half that of a man's.⁸ To them, the above verse affects all aspects of testamentary law under Islamic law. In the light of the verse and the *hadith*, in many cases a woman's testimony cannot be an independent proof and is valid only if it is accompanied, unequally, by men's testimony. In many criminal issues, including cases of *hadd* punishment, women's testimony is not basically accepted and cannot be part of the proofs of the crime.⁹ In other claims, women's testimony shall be acceptable along with men's.

⁶ *Qur'an*: 2:282.

⁷ Rahman rejects the authenticity of the *hadith* and argues that the book does not state any general law of the evidentiary value of women's and men's statements in law. See F. Rahman, "Status of Women in the *Qur'an*", in *Women and Revolution in Iran*, edited by G. Nashat, Westview Press, Boulder, 1983, pp. 42-43.

⁸ See M.R. Bahonar's view cited in *Islam Tradition and Politics Human Rights*, Westview Press, Boulder, 1995.

⁹ See M. Khadori and H.J. Liebesny, *Law in the Middle East, Origin and Development of Islamic Law*, William Byrd Press, Washington D.C., 1955. See also M. Fayzee, *Islamic Criminal Law*, Oxford University Press, New Delhi, 1974; M. Farhad, *The Concept of Islamic International Criminal Law, A Comparative Study*, CQ Press, London, and New York, 1994.

In its restricted sense, the above verse is restricted only to testimony in business transactions, civil debates and contracts.¹⁰ Under this approach, the reason for mentioning two women in the above verse is for one of them to remind the other if she forgets or is mistaken, so as to avoid any error or mistake in testimony, which may happen to one of the women. Therefore, it can be concluded that, while appearing as a witness in the court, what is considered as proof is the testimony of one woman, and the presence of the other woman is only as a reminder and to prevent any mistake or omission due to forgetfulness of the first witness. Thus, if the woman witness does not make any error or mistake or deviation, there is no need for a reminder and, practically, the proof is the same, rather than each of the women being worth a half witness and the two together a full witness.

El-Bahnassawi argues that this provision in Islamic law is restricted only to testimony in business transactions, civil debt and contracts, and is mainly precautionary because such activities are seldom undertaken by women.¹¹ He concluded that their lack of experience in the intricacies involved may make them more likely to err in the presentation of evidence.¹² Thus, the request for two women in the place of one man was so that, if one of them erred in the presentation of issues, the other could remind her.¹³ As El-Bahnassawi rightly argues, there is consensus among Muslim jurists that women's evidence alone is admissible in cases where men lack adequate knowledge or where it is impossible for men to have such knowledge as women.¹⁴ He also argues that:

¹⁰ See A.A. Rahman, *Witnesses in Islamic Law of Evidence*, Pelanduk Pubns Sdn Bhd, 1999, pp. 42-45.

¹¹ See S. El-Bahnassawi, *Women Between Islam and World Legislation*, Dar- ul-Qalam, Safat, 1985, pp. 130-131.

¹² *Ibid.*

¹³ *Ibid.*

¹⁴ *Ibid.*, p. 132.

Islam attributed this differentiation between the sexes to their respective natural dispositions, though it had acknowledged their creation from the same origin and essence. It is not indicative of woman's inferiority but touches directly on people's interests and safeguarding of justice. Should the law treat the testimony of a woman-as she is [was?] inexperienced in business and commercial fields-equal to that of a man, it would be detrimental to the cause of justice and the interests of the contracting parties. Woman, it is clear, shall not draw any gain or advantage therefrom.¹⁵

Aftab Hussain in his work, *Status of Women in Islam*, rejects the interpretation of the verse which rules that the evidence of two women is equal to that of one man. He also pointed out:

The scope of the verse is confined on the law about reducing to writing the contracts of debt or of sale and purchase. ... The reason for execution of the document is that it avoids doubt and becomes testimony or evidence of transaction while the reason for having two women is that if one forgets in future the other may remind her. It does not necessarily follow from this that the need to remind must arise in court proceedings only. ... the evidence of one woman may be sufficient for that purpose. The object is that if one of the two women forgets the other may remind her. What is therefore, visualised by the verse is the evidence of one woman only. The presence of the other is required only when the woman witness forgets or errs in her testimony on account of forgetfulness. The only role that the *Qur'an* mentions of that other woman is that she may remind the female witness.¹⁶

Rahman also pointed out:

The intention of the *Qur'an* apparently was that since it is a question of financial transaction and since women usually do not deal with such matters or with business affairs in general, it would be better to have two women rather one – if one had to have women – and that, if possible at all, one must have at least one male.¹⁷

He then concluded that verse 2:282 does not have the slightest intention of proving any rational deficiency in women vis-à-vis men and therefore one can simply not deduce from the verse a general law to the effect that under all circumstances and for all purposes, a women's evidence is inferior to a man's.¹⁸ Shah also argues that: "the

¹⁵ *Ibid.*

¹⁶ See A. Hussain, *Status of Women In Islam*, Law Publisher Company, Lahore, 1987, pp. 244-245.

¹⁷ See F. Rahman, *Op. cit.*, p. 42.

¹⁸ *Ibid.*

verse does not consider women to be mentally deficient or weak, which is why they are allowed to be witnesses. If a person is mentally deficient, neither he nor she can conduct transactions or bear witness.”¹⁹ To him the concern of the *Qur'an* is to find the truth in order to prevent injustice, which can be achieved by the evidence of man or woman.²⁰

1.1 *Testimony law in practice*

Testimony is a proof that can be used for a claim in civil as well as criminal affairs. Article 1258 of the CCI defines five proofs for a claim, including testimony, which has also been stipulated in the civil procedure. Testimony is also a proof of crime in criminal affairs, the terms of which have been provided by testimony in various affairs. One of the problems in the discussion of testimony is the role of gender in the validity of testimony, i.e. does it make a difference if a man or a woman is giving testimony? In other words, is a woman's testimony as valid as a man's? The provisions of Iranian laws on women's testimony are based on jurisprudential views. According to the present laws, in certain cases women's testimony is not at all acceptable as one of the ways to prove the claim and, in some cases, a woman's testimony will be worth half that of a man. In a few cases, women's testimony is so valid that it can prove a claim independently or along with the oath of the claimant. However, in general, in many cases the woman's testimony cannot be an independent proof and is valid only if it is accompanied, unequally, by men's testimony. In many criminal issues including the cases of *hadd* punishment, women's testimony is not basically accepted and cannot be part of the proofs of the crime. In other claims, women's testimony is acceptable along with men's.

¹⁹ See N.A. Shah, "Women's Human Rights in the Koran: An Interpretive Approach", 28 *HRQ*, 2006, p. 899.

²⁰ *Ibid.*, p. 903.

Failure to recognize the woman's legal capacity does not relate only to testimony. It also includes a woman specialist's opinion. For example, Article 457 of IPCI, concerning the discussion of *diyya*, provides that blinding both of the victim eyes is subject to full blood money and blinding one eye is subject to half blood money. If there is a dispute between the criminal and the victim as to whether the vision has been completely destroyed or not and hence whether full blood money shall be paid or not, the dispute shall be referred to an ophthalmologist who shall conduct medical examinations to give an opinion if the eye has been fully blinded or not. In such a case, the opinion depends solely on specialized knowledge but the IPCI provides that the gender is also important and considers two woman ophthalmologists to be equal to one man ophthalmologist.²¹

It is submitted that a quick look at the first source of Islamic law shows that equality of parties in both criminal and civil proceedings is emphasised in the *Qur'an*²² and doing justice is considered under Islamic law as a duty to God from which emanates the rights to equality and fairness for all human beings without regard to sex, religion or race.²³ The expression "O Mankind" in verse 4:1 is an important indicator of non-regard to status, gender, race, or religion in the claiming of rights and doing justice. This issue is confirmed by other verses in the *Qur'an*, which have dealt with the issue of testimony. It shows that no distinction is made between the male and female. In

²¹ Article 459 of the IPCI stipulates, "If there is any dispute/difference between the criminal and the victim, there is need for testimony by two specialist men or one specialist man and two specialist women to the effect that the vision has been fully destroyed and will not return or if there is any hope of its return ..."

²² According to *Qur'anic* verse: "O you who believe! Be maintainers of justice, bearers of witness for God's sake, even though it be against your own selves, your parents, or your near relatives, and whether it be against [the] rich or [the] poor." *Qur'an*: 4:135. "Be upright for God, bearers of witness with justice and let not the hatred of a people swerve you to act inequitably." *Qur'an*: 5:8.

²³ O Mankind! Be mindful of your duty to your Lord who created you all from a single soul and from it created its mate from the two of them spread out a multitude of men and women. Be careful of your duty toward God, through Whom you claim [your rights from one another] ... and God is ever-watchful over you all. *Qur'an*:

other cases, including divorce,²⁴ bequest matters²⁵ and fornication/adultery²⁶ it mentions just “two persons” or witnesses, without any differentiation of gender. The use of the generic term “two persons” in all other cases without any differentiation of gender shows that the application of the provision concerning commercial transactions to all other types of testamentary evidence arose from the traditional position of women in Arab society at that time, and not from a direct *Qur’anic* text. Nowadays women in different societies, including Islamic countries, take part in business transactions and even many women have acquired professional experience commensurate to that of men in commerce. The hard-line traditional approach to testimony law adopted by some Muslim legislators, which simply reduces the legal capacity of women, is contrary to the equality of parties in both criminal and civil proceedings which is emphasised in the first Islamic source as well as in breach of Article 14(1) ICCPR as interpreted by the HRC.

2. Retaliation in Islamic Law

Retaliation has been interpreted as the act of following a performed act. As the human soul is of special importance, the retaliator follows the criminal’s act and carries out a similar act.²⁷ On the philosophy of retaliation in Islamic law based on *Qur’an* and *Sunna*, Muslim jurists and philosophers argue that the main core of this law is the value of human life.²⁸ The aim of the retaliation law is not particularly to

²⁴ The *Qur’an* says: “When you divorce women ...either take them back on equitable terms or part with them on equitable terms; and take for witness from among you endued with justice.” *Qur’an*: 65:1-2.

²⁵ The *Qur’an* says: “Oh you who believe! When death approaches any of you, witnesses among yourselves when making bequest.” *Qur’an*: 5:106.

²⁶ The *Qur’an* in relation to fornication provides: “And those of your women who committed lewdness, take the evidence from amongst you against them.” *Qur’an*: 4:15.

²⁷ See M.T. Jafari,, *A Comparative Study of the Two Systems of Universal Human Rights*, Al-Hoda International Publisher, London, 1999, pp. 235-237. See also J. Schacht, *An Introduction to Islamic Law*, Oxford University Press, Oxford, 1964.

²⁸ See M. El-Awa, *Punishment in Islamic Law: A Comparative Study*, American Trust Publishers, Indianapolis, 1982. See also E.S. Fairchild, *Comparative Criminal Justice Systems*, Wadsworth

clear away the vicious life of the murderer. Retaliation, as one of the two alternatives, punishment and release, will also indicate the greatness and dignity of human life. No doubt, the right to life is the supreme and most fundamental human right, without which all other human rights will be meaningless. Ramcharan in his work, "The Right to Life"²⁹ and Higgins in "Derogation under Human Rights Treaties"³⁰ refer to Article 4(2) of ICCPR, which states that the right is non-derogable and claim that the right to life in international law is *jus cogens*.³¹ Article 6(1) of ICCPR emphasises the right as follows:

Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life."

The article provides for the sanctity of human life and imposes a positive obligation on the state to protect life and negative obligation not to take life arbitrarily. The term "arbitrarily" in the article means that deprivation of life by the state is strictly limited and must be in full accordance with due process of law as well as strictly proportionate to the facts. Joseph *et al* in this regard argue that there is an obligation upon the issue on states and must prevent arbitrary killing by its security forces and law enforcement agents.³² However, it is true to say that the Covenant in Article 6(1) does not abolish the death penalty as judicial punishment. The Covenant only places some restrictions³³ on its imposition as follows:

Publishing Co., Belmont, 1993; A.A. Abd al-Aziz "Punishment in Islamic Criminal Law" in *The Islamic Criminal Justice System*, edited by Bassiouni, Ocean Publication Inc, New York, 1982; M. Khadduri and J.L. Herbert, (eds.) *Origin and Development of Islamic Law*, AMS Press, New York, 1984.

²⁹ See B.G. Ramcharan, "The Right to Life," *Neth ILR*, 1983, pp. 307-308.

³⁰ See R. Higgins, "Derogations under Human Rights Treaties", 48 *BYIL*, pp. 281-282.

³¹ *Ibid.*

³² See S. Joseph, J. Schultz and M. Castan, *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary*, Oxford University Press, Oxford, 2000, p. 108.

³³ See A.H. Robertson, "The United Nations Covenant on Civil and Political Rights and The European Convention on Human Rights," 43 *BYIL*, pp. 21-22.

- the death penalty may not be imposed except for “the most serious crimes” and in accordance with the law in force at the time of commission of the crime;³⁴
- no deprivation of life must be contrary to the provisions of the covenant; for example, fair hearing must be guaranteed,³⁵ there must be no discrimination in capital punishment, and methods of execution must not amount to torture or to cruel, inhuman, or degrading punishment;³⁶
- the death penalty can only be carried out pursuant to a final judgment rendered by a competent court;³⁷
- anyone who is sentenced to death shall be entitled to seek pardon or commutation of sentence and may be granted amnesty, pardon, or commutation of sentence;³⁸
- the death penalty shall not be imposed for crimes committed by person below eighteen years of age and shall not be carried out on pregnant women.³⁹

Among the above restrictions in the Covenant, Article 6(2) restricts the death penalty imposition to “the most serious crimes”. What is the definition of “the most serious crimes”? The ICCPR does not provide any definition of the term. This has resulted in different interpretations from one country to another. HRC in this regard observed that this expression must be read restrictively to mean that the death penalty should be a quite exceptional measure.⁴⁰ It also observed that the provisions of the article

³⁴ Article 6(2) provides, “In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgment rendered by a competent court.

³⁵ Pursuant to Article 14 of ICCPR.

³⁶ Pursuant to Articles 2(1), 26 and 7 of ICCPR.

³⁷ Article 6(2) of ICCPR.

³⁸ Article 6(4) of ICCPR.

³⁹ Article 6(5) of ICCPR. Article 6(6) also provides, “Nothing in this article shall be invoked to delay or to prevent the abolition of capital punishment by any State Party to the present Covenant.”

⁴⁰ See General Comment 6, para.7. The HRC in General Comment 6 also observed that the Article 6(2) and 6(6) suggest the desirability of abolishing the death penalty under international law. See General Comment 6, para.6.

suggest the desirability of abolishing the death penalty under international law.⁴¹ However, there is as yet no unanimity amongst the states of the world on the abolition of the death penalty. The widespread imposition of the death penalty by some Member states to the Covenant, which are considered as “non-abolition states”, led the Committee to conclude that robbery, traffic in toxic dangerous wasters, abetting suicide, drug-related offences, property offences, multiple evasion of military service, apostasy, committing a third homosexual act, embezzlement by officials, theft by force, crimes of a economic nature, adultery corruption and crimes that do not result in the loss of life are not “the most serious crimes.”⁴²

Optional Protocol to the ICCPR adopted in 1989 aimed to abolishing the death penalty as punishment for certain crimes. However, there is no unanimity on this matter amongst states yet. Some states are considered as “abolitionist states” and others are considered as “non-abolitionist states.” Muslim states are considered as “non-abolitionist states” and have not become parties to the Protocol.⁴³ To Muslim states, abolishing the death penalty is contrary to the *Qur’anic* verses which prescribe the penalty as punishment for certain crimes, including the retaliation law. There are many verses of the *Qur’an* that acknowledge the sanctity of human life, enjoin its protection and prohibit its arbitrary depravation. According to the *Qur’an* “... take not life which God has made sacred, except by the way of justice and law; thus does He command you that may learn wisdom.”⁴⁴ In other words, there are exceptions to

⁴¹ *Ibid.*

⁴² Concluding Observations on Republic of Korea in 1992, UN Doc. A/47/40, 122-124, para.9; Concluding Observations on Cameroon in 1994, UN Doc. CCPR/C/79/Add.33, para.9; Concluding Observations on Islamic Republic of Iran in 1995, UN Doc. CCPR/C/79/Add.25, para.8; Concluding Observations on Sir Lanka in 1996, UN Doc. CCPR/C/79/Add.56, para.1; Concluding Observations on Iraq in 1997, CCPR/79/Add.56, para.11; Concluding Observations on Sudan in 1997, UN Doc. CCPR/C/79/ Add.85, para.8.

⁴³ It should be noted that only the Republic of Azerbaijan and Turkey from OIC became a party to the Second Optional Protocol to the ICCPR and abolished the death penalty.

⁴⁴ *Qur’an*: 6:151.

the right to life in Islamic law which are prescribed “by the way of justice” and “for just cause” in respect of crimes attracting the death penalty under the *Sharia*. The human soul and blood in Islam are considered as sacred. Therefore, Islam has defined retaliation as a punishment for the criminal. According to the *Qur’an*, “O believers, in retaliation there is life for you.”⁴⁵ Jafari argues that the words “there is life” in *Qur’an* means that the threat of retaliation is the best defence against those who would play with the lives of people or kill others in order to obtain or to gain worldly wealth etc.⁴⁶ According to the *Sharia*, retaliation must be strictly in accordance with due process of law. However, there are numerous verses in the *Qur’an* and in *Sunna* in which the victim’s family is encouraged to forgive the criminal and entitled to receive compensation.

As to retaliation, there is a consensus among Islamic jurists to the effect that women and men are equal in principle. However, there is a difference of opinion between Sunni and Shi’a jurists when the murderer is a man and the victim a woman. As Islamic jurists differ in their attitude towards the subject of retaliation, we will discuss and study two prevailing views in the light of IPCI.

2.1 The Sunni view on *qesas*

Most jurists in the Sunni school believe that women and men are equal in retaliation. To them, a man who murders a woman will be *qesas* in retaliation without any payment of blood money. Al-Hesas, a famous jurist belonging to the Hanfi school, argues that there is no difference between women and men in *qesas*.⁴⁷ Directly invoking the *Qur’an’s* verses,⁴⁸ he emphasises equal retaliation between men and

⁴⁵ *Qur’an*: 2:179.

⁴⁶ See M.T. Jafari, *Op. cit.*, p. 239.

⁴⁷ See A. Al-Hesas, *Ahkam al-Qur’an*, Vol. 1, Dar Ehya al-toras al-Arabi, Beirut, 1991, pp. 138-139.

⁴⁸ *Qur’an*: 2:178 and 17:33

women.⁴⁹ According to Shafi'i, if a man murders a woman, he will be killed and similarly a woman who has killed a man will be killed.⁵⁰ In such a case, the woman or her family will give no benefit to the family of the victim (a man).⁵¹ A well-known Hanbali jurist has also discussed this subject.⁵² He states that a man will be *qesas* for killing a woman and a woman will be *qesas* for killing a man, and this is the general view of the jurists.⁵³ It is true to say that there is consensus among Sunni jurists on this point, although there are a few objections in this case.

All four Sunni schools believe in the equality of women and men in the subject of retaliation. To emphasize the equality of women and men in retaliation, they invoke the *Qur'an's* verses, *Sunna* and the practical tradition of the Prophet, as well as the principle of equality of women and men in Islam.

2.2 The Shi'a's view on *qesas*

Most Shi'a jurists believe that, if a man kills a woman intentionally, the murderer will be subject to retaliation according to the Islamic law.⁵⁴ However, the act of retaliation is subject to payment of compensation- half blood money by the next of kin of the victim to the murderer's family. Nevertheless, if a woman kills a man intentionally, the man's next of kin can claim retaliation without paying any compensation.⁵⁵ Discrimination between men and women in this case is obvious.

⁴⁹ See A. Al-Hesas, *Op. cit.*, p. 139.

⁵⁰ See A.A. Al-Shafi'i, *Mokhtasar Al-Muzni*, p. 811. See also W. Al-Zuhaili, *Al-fiqh al-Islami wa-Adillatuh*, Vol. 6, Dar-al-Fikr, Pittsburgh, 1997, pp. 271-269.

⁵¹ *Ibid.*

⁵² See Ibn Qudamah, *al-Mugni*, Maktabah al-Riyath al-Hadithah, Riyadh, Vol. 9, 1981, pp. 377-378. See also A. Zeidan, *Al-Mofassal fi Ahkam al-Marat va al-Beit al-Muslem fi Shariat al-Islami*, Vol. 5, Moasseseh al-Resalat, Beirut, 1997, pp. 345-346.

⁵³ *Ibid.*

⁵⁴ See M. Golpaygani, *Majma al-Masael*, Dar al-Qur'an, Qum, 1988. See also A. Khomeini, *Menhaj al-Salehin*, Madinat al-Elm, Qum, 1990; S.R. Khomeini, *Touzih Al-Masael*, Markaz Nashr Farhangi Rija, Tehran, 1987.

⁵⁵ See F. Tabarsi, *Majma al-Bayan fi Tafsir al-Qur'an*, Vol. 1, Dar al-Marefat, Beirut, 1986, p. 388. See also F. Meghdad, *Kanz al-Erfan*, Vol. 2, p. 355.

What is really the foundation of Shi'a jurists in such a gross discrimination? Does this exist in the *Qur'an* as the first source of Islamic law, or in other Islamic sources? As I indicated before, the subject of retaliation is discussed in some verses of the *Qur'an*. According to the *Qur'an*:

“Life for life, eye for eye, nose for nose, ear for ear, tooth for tooth, and wounds equal for equal.” But if any one remits the retaliation by way of charity it is an act of atonement for himself and if any fail to judge by what Allah hath revealed, they are wrong-doers.⁵⁶

According to the above verse God does not differentiate between women and men and retaliation of women and men against each other is allowed without any distinction. According to Islam the human soul is of special importance and, therefore, this verse points out that a woman can be punished in return for a man and a man in return for a woman. In this connection, Ardabili argues that the abovementioned verse makes clear the fact that, before God, there is no difference among human beings and all human beings are equal.⁵⁷ Taking into consideration the main interpretations of the verse in Muslim exegesis, it can be said that there is no gender discrimination in retaliation.

On the contrary, there are jurists who believe that a man is not retaliated against for a woman unless the victim's family pays half a man's full blood money.⁵⁸ They refer to the following *Qur'anic* verse:

O ye who believe! The law of equality is prescribed to you in case of murder: The free for the free, the slave for the slave, the woman for the woman. But if any remission is made by the brother of the slain then grant any reasonable demand, and compensate him with handsome gratitude. This is a concession

⁵⁶ *Qur'an*: 5:45.

⁵⁷ See M. Ardabili, *Zobdat Al-Bayan*, p. 670.

⁵⁸ See Al-Zamkhashri, *Al-Kashif*, Vol.1, pp. 220-221. See also M. Lankarani, *Tafsil al-Sharia fi Sharh Tahrir al-Vasileh, Bab Qeusas*, Qum, 2000.

and a mercy from your Lord. After this whoever exceeds the limits shall be in grave chastisement.⁵⁹

They draw attention to the above verse and argue that a man is not retaliated against for a woman because the said verse provides “the free for the free, the slave for the slave and the woman for the woman”.⁶⁰ In regard to the said verses, which seem contradictory, Islamic writers have presented different interpretations. A number of Islamic thinkers have argued that the latter abrogates the former;⁶¹ therefore, only the latter shall be invoked.⁶² This argument is rejected by some jurists who argue that the latter verse deals with cases when a person murders another of the same type (the same gender) and, when a person murders someone other than their type, the former clearly provides an order.⁶³ Qurtabi argues that, if a woman is murdered by a man, verse 45, which orders equal retaliation, will be the criterion for action.⁶⁴ He cites the *Sunna* of the Prophet when a Jewish man had murdered a woman and the Prophet confirmed the retaliation without any compensation.⁶⁵

Tabatabaei, the great expert in *Qur'anic* exegesis and well-known Islamic philosopher, has discussed the issue.⁶⁶ He rightly pointed out that “verse 178 does not abrogate verse 45 and there is no reason to accept that a man is not retaliated against for a woman.”⁶⁷ In this regard Yazdi also says:

... one who murders someone will be *qeuas*, whether the murderer or the victim is free, a slave or a woman because a human soul is put against another

⁵⁹ *Qur'an*: 2:178.

⁶⁰ *Ibid.*

⁶¹ *Qur'an*: 5:45

⁶² See M.H. Najafi, *Javaher al-Kalam*, Chap Najaf, Beirut, 1956, pp. 80-85.

⁶³ For example, Qurtabi in his famous work *Al-Jame al-Ahkam al-Qur'an*, has deeply discussed on the issue. See Qurtabi, *Al-Jame al-Ahkam al-Qur'an*, Vol. 2, Dar-Al-Ahya, Beirut, 1984, p. 256.

⁶⁴ *Ibid.*

⁶⁵ *Ibid.*

⁶⁶ See S.M.H. Tabatabaei, *Al-Mizan fi Tafsiire Qur'an*, Vol. 4, Moassesseh Ismailian, Qum, 1974, p. 167.

⁶⁷ *Ibid.*

human soul and human bloods are equal and it does not make sense to talk of masculinity or femininity.⁶⁸

As I indicated earlier, Islamic jurists have provided different arguments in regard to verse 45 of *Qur'an*, which expresses the equality of human souls of any gender. Horre Amuli and Najafi argue⁶⁹ that the said verse is abrogated by verse 178 of *Qur'an*.⁷⁰ However, the argument is not appropriate because, according to the *Qur'an* interpreters⁷¹ the *Sura* of *Al-Ma'ida*⁷² was the last complete chapter *Sura* revealed to the Prophet, i.e. it was revealed after *Al-Baqara*.⁷³ Therefore, it can abrogate verse 178 in *Al-Baqara*⁷⁴ but it cannot be abrogated by *Al-Baqara*.⁷⁵ Moreover, if we accept the *hadith* according to which women and men were treated equally in the Torah in terms of retaliation, it is not possible and acceptable for it to be abrogated by Islam because the religion attempted to improve women's position and rights compared with that under previous religions and it is very far-fetched to say that Islam has made such a distinction. It can be said in general that both verses 5: 45 and 2: 178 are in the same line but they have different expressions and each has its own special way of expressing the order on retaliation in the case of murder and equality. Verse 5:45 explicitly puts a human soul against a human soul and verse 2:178 limits retaliation to the murderer, without considering the gender or the slave or free status.

⁶⁸ See M. Yazdi, *Fiqh al-Qur'an*, Vol. 1, p. 320.

⁶⁹ See M. Najafi, *Op. cit.*, p. 84.

⁷⁰ This group of jurists refer to a saying of Imam Ali in which he says: "Verse 45 of the Holy *Qur'an* provides the retaliation order as mentioned in the Torah, in which men and women and free people were equal in retaliation. However, God has provided verse 178 to abrogate the Torah's order and said that "the free for the free, the slave for the slave, the woman for the woman." See *Ibid*.

Cited in *Ibid*. See also in M.H. Horre Amuli, *Vasa'el Al-Shi'a*, Vol. 19, Entesharate Maktab Al-Islami, Tehran, 1988. p. 63.

⁷¹ For example see M.H. Tabatabaei, *Op. cit.*, Vol. 5., p.167.

⁷² *Qur'an*: 5:45.

⁷³ *Ibid*.

⁷⁴ *Qur'an*: 2:178

⁷⁵ *Ibid*.

To further clarify the issue, it is necessary to consider the cause of revelation of the verse. Tabarsi argues that the verse was revealed about two Arab tribes, one of which thought of itself as superior to the other.⁷⁶ The tribe, in retaliation for one of its slaves being murdered by the other tribe, would kill a slave of the other tribe and, in addition, another free person as well.⁷⁷ If one of their women was murdered, they would retaliate not only against the murderer but also against another person as well.⁷⁸ This verse was revealed in order to condemn this kind of retaliation and, on a case basis, said that each individual has to be retaliated against for another, i.e. the verse was aimed at establishing equality between human beings.⁷⁹ Therefore, if an individual intentionally murders another, the victim's family may enforce retaliation whether the murderer is a free person, a slave or a woman, because there is the question of a soul for a soul and human bloods are respected against each other.⁸⁰

By considering the discussions set forth, the interpretation of verses by Islamic philosophers such as Tabatabaei, the cause of revelation of verse 2:178 and the issue of abrogation, clearly the invocation of the verses of the *Qur'an* is not a valid basis for present sex discrimination.

It can be said that the most important reason given by Shi'a jurists to justify retaliation of double blood money for a man compared to a woman is the *ahadith* that exist in this respect.⁸¹ One of them occurred at the time of Imam Sadeq, in which

⁷⁶ See F. Tabarsi, *Op. cit.*, p. 488. See also H. Mehrpour, "Barisi Tafavot Ejrai Hokm *Qeusas* dar Mord Zan va Mard", 4 *FEP Mofid*, Qum, 2000, pp. 9-10.

⁷⁷ *Ibid.*

⁷⁸ *Ibid.*, p. 489.

⁷⁹ *Ibid.*

⁸⁰ *Ibid.*

⁸¹ In regard to *ahadith* it is true to say that the *ahadith* which have been recounted by individuals, have indeed been affected by the interpretations of the narrators depending on their own interests, traditions and culture through 14 centuries. As we well know, the patriarchal culture prevailed in most countries throughout the world even up to the early twentieth century, and this resulted in various forms of discrimination between women and men. The oriental culture has still retained its past characteristics to

a man had intentionally murdered his wife.⁸² Imam Sadeq was asked what should be done. He said that the next of kin could retaliate if they paid half a man's full blood money to the murderer's family.⁸³ Tousi, however, has rejected the authenticity of the above *hadith* and expressed his doubt about its validity.⁸⁴ He believes that this *hadith* contradicts verse 5:45 of *Qur'an*.⁸⁵ Tousi also referred to another *hadith*, which contradicts the said *hadith*. For example, it has been narrated that the Prophet said, "Superiority in human soul is not acceptable."⁸⁶ Imam Ali also said, "Women and men are equal in retaliation law" and "The man can be *qeous* in return without any compensation (half blood money)".⁸⁷

Sanei argues that under the Islamic law women and men are equal in the issue of retaliation and payment of half a man's blood money by the woman or her family is a serious injustice.⁸⁸ He pointed out:

... the most important reasons that Islamic jurists provide in believing that a man is not retaliated against for a woman are *ahadith*. Therefore, even if we accept the authenticity of the *ahadith*, they cannot be invoked because they contradict the *Qur'an*, and the *Sunna*, the intellect and the conclusive rules and principles of Islam. That the *ahadith* in this issue cannot be relied on is clearer than the day because one of the important conditions for relying on a saying is that it should not be in contradiction with the *Qur'an* and the *Sunna*, and this is supported by a large number of *ahadith*. For example, the Prophet in his speech in Mena said, "Oh people, what you are said to have been told by me, if that agrees with the *Qur'an*, I have said that and if it disagrees with the *Qur'an*, I

a certain extent. Therefore, narration of *ahadith* through time has been affected by the governing patriarchal culture and the result is discrimination between women and men, which has no foundation in the *Qur'an*.

⁸² *Hadith* cited in Horre Amuli, *Op. cit.*, Vol. 1, p. 80.

⁸³ *Ibid.* It should be noted that there are similar *hadith* in this respect, which have been referred to by Islamic jurists who believe that a man is equal to a woman in retaliation if her family pays half the man's full blood money. *Ibid.*, Vol. 2, p. 81; Vol. 3, p. 81.

⁸⁴ See Tousi, *Tahzib al-Ahkam*, Vol. 10, Dar al-Kitab al-Islami, Tehran, 1880, p. 183.

⁸⁵ *Ibid.*

⁸⁶ *Ibid.*, p. 184

⁸⁷ *Ibid.*

⁸⁸ See Y. Sanei, *Fiqh al-Seghalayn fi Sharh Tahrir al-vasilaeh*, Moasseseh Oruj, Tehran, 1993, p. 193.

have not said that.” Therefore, it is very important that *ahadith* agree with the *Qur’an* and the *Sunna*.⁸⁹

Continuing his discussion, he mentions the following verses of the *Qur’an*:

O mankind! We created you from a single (pair) of a male and a female, and made you into nations and tribes, that ye may know each other (not that ye may despise each other). Verily the most honoured of you in the sight of Allah is the most righteous of you. And Allah has full knowledge and is well acquainted.⁹⁰

The word of the Lord doth find its fulfilment in truth and in justice.⁹¹

Say: “for me, I am on a clear sign from my Lord but ye reject him. What ye would see hastened, is not in my power. The command rests with none but Allah: he declares the truth, and he is the best of judges.”⁹²

Whoever works righteousness benefit his own soul; whoever works evil, it is against his own soul: nor is thy Lord ever unjust to his servants.⁹³

He then argues that the above verses state that God’s orders are for justice and rights and God does not do injustice to his servant.⁹⁴ To Sanei, differentiation or discrimination between women and men in this issue and obligating the woman’s family to pay half the man’s blood money is a case of injustice because according to the *Qur’an* and the *Sunna* and the intellect, women and men are equal in their human nature, political, social, economic as well as other rights.⁹⁵ He says:

As emphasized in the *Qur’an* while God is recounting the phases of creation of the human being, He states the importance of the human existence in general, which is not limited to men. According to the *Qur’anic* verses in which women and men are of equal value before God, how can one differentiate between them in the issue of retaliation? Therefore, according to these verses and the religious stories, there is no doubt that the difference is an injustice according to the logic of the *Qur’an* and the *Sunna*, the social conventions and the intellect. In addition, retaliation against a man for a woman on condition of payment of half blood money contradicts the principle of a life for life in the *Qur’an* which says

⁸⁹ *Ibid.*, *Bab qeusas*, p. 261.

⁹⁰ *Qur’an*: 49:13.

⁹¹ *Qur’an*: 6:115.

⁹² *Qur’an*: 6:57.

⁹³ *Qur’an*: 4:46.

⁹⁴ See Y. Sanei, *Op. cit.*, p. 194. It should be noted that there are also other verses of the *Qur’an* in this regard such as 3:182; 23:14; 22:10; 8:51 and 50:29.

⁹⁵ *Ibid.*

“Life for life, eye for eye, nose for nose, ear for ear, tooth for tooth, and wounds equal for equal.”⁹⁶

2.3 Retribution law in practice

Apart from Turkey and Republic of Azerbaijan the criminal laws of Islamic countries have recognized retaliation in the light of the *Sharia*.⁹⁷ Many Muslim states who apply Islamic criminal law only try to avoid the death penalty through either procedural or commutative provisions available within *Sharia*, instead of directly prohibiting it. Islamic law demands strict evidential requirements for death penalties, which often lead to payment of blood money for murder. The *Qur'an* has emphasized the equality of human souls and admits no superiority of blood based on race, colour or sex. However, in the laws of Iran, which are based on Islamic jurisprudence and the *Sharia*, retaliation is subject to sex discrimination. Article 209 of the IPCI provides:

If a Muslim man kills a Muslim woman intentionally, he will be sentenced to retaliation. However, before retaliation, the woman's side/guardian has to pay half a man's blood money.

Article 258 of the IPCI also states:

If a man kills a woman, the avenger of blood is entitled to enforce retaliation after paying half a man's full blood money or the avenger of blood, instead of retaliation, may settle for full blood money or less or more than that.

The above articles emphasise that retaliation against a man who has murdered a woman is subject to payment of half blood money to the murderer or his family. The

⁹⁶ *Ibid.*, p. 204. In regard to the *Qur'anic* verse “life for life” some jurists argue that it is a general discussion, and a brief mention of the principle of retaliation; therefore it cannot be invoked. Sanei rejects the argument and believes that the verse is an expression of the issue. Also in connection with the numerous *ahadith* concerning this issue, he mentions that there are a number of *ahadith* in this respect which may be false and even if they are authentic, because of their disagreement with the *Qur'an*, the Prophet's tradition and reasoning, they should not be set as criteria for action and should be rejected. See Sanei, *Ibid.*

⁹⁷ Azerbaijan became a Party to the Second Optional Protocol to ICCPR in 1999. Turkey which also abolished the death penalty in 2002 in peacetime as part of a raft of reforms aimed at preparing the country for European Union membership. Apart from those states no other Islamic states abolished the death penalty or become a Party to the Second Optional Protocol to the ICCPR adopted in 1989 specifically aimed to abolishing the death penalty. Muslim states, indeed, belong to the group of non-abolitionist states. See UN. Doc. A/RES/44/128. See also <http://news.bbc.co.uk/2/hi/europe/2168563.stm>; <http://web.amnesty.org/library/Index/engEUR440362002?>

articles have created many problems in investigating judicial cases and resulted in lengthening of the procedure. The imposition of payment of half a man's full blood money on the murdered woman's family (who were the victims of a crime) is an injustice that the law does to them. There are many cases in which a man had intentionally murdered a woman and the crime had been proved during the investigations and in the criminal courts but the imposition of the punishment was suspended because of payment of half blood money to the murderer or his family. It is worth mentioning *Hanif v. Javad Case*⁹⁸ as an example. Javad murdered his wife Mona with malice aforethought in 1989. During the hearing of the case in the 1st Class Criminal Court, the victim's family asked for their rights to retaliate against the murderer.⁹⁹ In the hearing, Javad accepted his guilt and confessed to the murder. The Court issued its verdict on *qeousas*.¹⁰⁰ The Court of Appeal as the next highest court in the chain heard the case and approved the court verdict in 1991.¹⁰¹ Finally appeals from the Appeal Court and the 1st Class Criminal Court were heard by the Supreme Court, the highest court in Iran and rejected in 1993.¹⁰² Although the verdict of *qeousas* was approved by the Supreme Court of the country, the death penalty was not imposed until 2001 because of the issue of blood money payment. According to Article 209 of IPCI, the murdered woman's family had to pay half the man's full blood money before retaliation could take place. As the family were in a critical financial situation and could not pay the half blood money and at the same time were unwilling to give up retaliation, the murderer spent 12 years in prison in a very bad psychological condition. Eventually, the victim's family managed to provide the required amount, with many difficulties. They paid the amount and retaliation was

⁹⁸ *Hanif v. Javad Case*, 12/12/1368, FCCC Tehran.

⁹⁹ *Ibid.*

¹⁰⁰ *Ibid.*

¹⁰¹ 21/08/1370/CATehran.

¹⁰² 18/12/1372/ SC Tehran.

enforced after 12 years. This is double injustice. On the one hand, the victim's family, having already lost their child, had to pay a considerable sum to the murderer or his family, for a gender-based reason, even though the *Sharia* and the Constitution have emphasized the equality of human beings. On the other hand, the murderer had to bear additional punishment. Arguably, the expectation of death is as traumatic as the death penalty itself. Twelve years in prison while worrying about the death penalty exerts additional stress on the murderer. Is it fair that the murderer should be punished by retaliation after several years of being in an undecided situation and bearing part of the punishment? It is clear that the fear and worry of the arrival of death is very difficult to bear. This case is one of the many cases in Iranian courts which show the importance of studying the subject of retaliation and discrimination in order to review and reform in the criminal laws of Muslim states.

3. Women and the law of *Diyya* in Islam

Diyya in the Islamic law is defined as “monetary compensation that the *Sharia* has specified for the loss or damage caused in crime against a life or a bodily harm, which is paid to the victim or his next of kin.”¹⁰³ As I discussed earlier, voluntary homicide with or without premeditation is punishable by retribution or legal compensation with consent of the representative of the victim. In legal compensation the family of the victim may demand the payment of, in effect, a ransom for the lost life or injury during the period when the exercise of retribution is still possible. Assaults resulting in homicide and quasi-voluntary homicide are punished by legal compensation. If the criminal refuses to consent to compensation, he is punished by *qeousas*. A contemporary Islamic jurist in regard to *diyya* says, “Interpreting *diyya* as the blood money will not be a proper interpretation from Islamic law. It has a dual

¹⁰³ See <http://www.Islamset.Com/encyclo/encyclo.html>. See also C. Chechata, *Encyclopedia of Islam*, E.J. Brill, Leiden, 1965.

nature, i.e. it is a form of punishment as well as a form of legal compensation for loss of life or bodily harm.”

IPCI provides that, “*diyya* is monetary compensation that the *Sharia* legislator has specified for crimes”¹⁰⁴ and “*diyya* is monetary compensation given to the victim or his next of kin because of crime against a life or a bodily harm.”¹⁰⁵ According to these definitions, it can be said that *diyya* is monetary compensation and its amount is determined by the *Sharia* and the legislator cannot determine the amount of the compensation. It is to be mentioned, however, that there are cases in which no specific compensation has been determined by *Sharia* for some forms of bodily harm, known as *arsh* - difference between the healthy and defective body, which is determined by an appraiser. According to the IPCI, in the case of any crime that is committed against someone for which the *Sharia* does not provide any specific amount, the criminal shall pay legal compensation according to the *arsh*.¹⁰⁶

The main reason for compensation in Islamic law is crime against the victim, as a result of which an intentional or unintentional damage has been caused to him. It is important to understand that compensation in Islamic law is not regarded purely as compensation of the victim in the same manner as civil damages, for *diyya* also has a punitive damage component, which gives it criminal characteristics. It is akin to the setting of the fine for a particular crime, which is different from civil damages, except that in the case of *diyya*, the fine goes to the member of the victim’s family rather than to the state. Those entitled to receive compensation are the victim, if he is alive, or, in case he has died, his next of kin. There are two types of *diyya* as follows:

¹⁰⁴ Article 15 of IPCI.

¹⁰⁵ Article 294 of IPCI.

¹⁰⁶ See S.R. Khomeini, *Op. cit.*

- *Diyya* for homicide; it is compensation which is applied when the victim has died and is to be paid to the victim's next of kin.
- *Diyya* for bodily harm; it is a compensation for the bodily harm when someone commits a crime against someone else. There is no difference whether the crime was intentional or unintentional.

On the subject of *diyya* for bodily harm, on the one hand, some Muslim jurists argue that *diyya* for bodily harm of women and men is equal until its value is as much as a third of the full blood money.¹⁰⁷ Then, when the *diyya* for bodily harm/parts is one third or more of the full compensation, the woman's *diyya* is reduced to half.¹⁰⁸ On the other hand, others argue that a woman's *diyya* is half of a man's, whether it is one third or not.¹⁰⁹ In this regard, Sunni scholars are divided into two groups. The first group, supported by Shafi'i and the Hanafi, say that a woman's *diyya* is half of a man's, whether it is one third or not.¹¹⁰ They mostly believe that the *diyya* for a woman's body parts is half of male blood money.¹¹¹ The second group, supported by the Hanbali and the Maleki, argue that a woman's *diyya* in the case of bodily harm is equal to a man's until it is one third of the full blood money, and then it will be half.¹¹² Most Shi'a jurists also argue that a woman's *diyya* in the case of bodily harm

¹⁰⁷ See A. Ahmad Qadri, *A Sunni Shafi'i Law Code*. See also D. Forte, *Studies in Islamic Law*, Oxford University Press, Oxford, 1999; S. Oudeh, *Islamic Criminal Law*, Oxford University Press, New Delhi 1996; B Spalek, *Islam, Crime and Criminal Justice*, Willan, Cullompton, 2002; A. Kader, *Crime and Punishment in Islam*, Lenasia Press, South Africa, 1999.

¹⁰⁸ *Ibid.*

¹⁰⁹ See Ibn Edris, *Alsaraer*, Vol. 2, Qum, p. 360. See also Sanei, *Sharh Lomeh*, Vol. 10, Qum, p. 41.

¹¹⁰ See A. Ahmad Qadri, *Op. cit.* See also Muhammad Adel *et al* (eds.), *Criminal Justice in Islam: Judicial Procedure in the Sharia*, London 2003.

¹¹¹ *Ibid.*

¹¹² *Ibid.*

is equal to a man's until it is one third of the full blood money, and then it will be half.¹¹³ IPCI, in the light of most Shi'a jurisprudence argument, provides:

There are equal rights for women and men in retaliation of body part. ... Until the amount of blood money for the injured body part becomes a third or more of the full blood money, then the woman's blood money is reduced to half of a man's.¹¹⁴

According to the above article, compensation for bodily harm of women and men is equal until its value reaches a third of the full compensation. Then, when the blood money for bodily harm is one third or more of the full *diyya*, the woman's compensation is reduced to half.¹¹⁵

It is clear that *Diyya* is another important area of gender discrimination in Islamic law. The question here is whether the present discrimination in the law of some Islamic states supported by firm evidence in the *Sharia*. What is obvious is that most Islamic jurists from both schools, Sunni and Shi'a, believe that a woman's *diyya* is half the amount of a man.¹¹⁶ The view's of Islamic jurists who argue that a woman's *diyya* is

¹¹³ For example Sheikh Mofid, *Al-Moghneh fi al-Osul va al-Forou*, Qum, p.56. Tousi, *Op. cit.* A. Ibn Edris Helli, *Al-Saraer*, Qum, 1987, p.329. A minority of jurists such as Sanei argue that there is no difference whatsoever between men and women on this issue.

¹¹⁴ Article 273 of IPCI.

¹¹⁵ For example, if a woman who worked in a factory accidentally lost one, two or three fingers during her work, she would be entitled to equal compensation with a man, but if she lost four fingers, her *diyya* would be reduced to half of a man's. In other words, she is entitled to receive compensation for only two fingers. Clearly compensation for four fingers should be more than for three fingers, or if not, at least it should not be less than that. Whatever judgment and order is provided in the *Qur'an* has wisdom of its own because orders and regulations in Islam are purposeful. Therefore, each religious order is based on a criterion and prudence. It should be said that many people, as well as some jurists, have had serious doubts about the said issue. How does prudence of a religious order require the blood money for loss of four fingers to be less than that for loss of three fingers? In regard to *diyya* for bodily harm, as with *diyya* for homicide, there is a clear distinction between women and men, which is due to the outlook of the Iranian legislator. This discrimination against women is not only problematic but also humiliating to women in their society. This law also creates many problems for female victims who are entitled to receive compensation. Indeed, the current amount for female victims does not suffice to cover the heavy expenses of treatment and the peripheral expenses of disability and defective limbs. The interesting point in this regard is that the practice contradicts the philosophy of *diyya* in Islamic law, as well as the definition of *diyya* in Article 294 of IPCI, which provided: "*Diyya* is monetary compensation given to the victim or his next of kin because of crime against a life or a bodily harm." *Diyya* in Islamic law is supposed to compensate for damage to the victim while the present law not only cannot provide for such compensation but also humiliates women in practice.

¹¹⁶ See N. Makarem Shirazi, *Op. cit.*, p. 39. See also M.H. Tabatabai, *Op. cit.*; A. Oudah, *Al-Tashria Al-Jenai Al-Islami*, Vol. 2, Beirut, 1997, p. 176.

half of a man's in the light of the Islamic sources, as well as recent Muslim jurists who believe in the principle of equality before God and the law, are examined here.

3.1 *Diyya* in Islamic sources

The *Qur'an* deals with the subject of *diyya* in the following verse:

Never should a believer kill a believer, except by mistake, and whoever kills a believer by mistake it is ordained that he should free a believing slave. *And pay blood-money to the deceased's family, unless they remit it freely.* If the deceased belonged to a people at war with you, and he was a believer, to freeing of a believing slave. If he belonged to a people with whom ye have a treaty of mutual Alliance, blood-money should be paid to his family, and a believing slave be freed.¹¹⁷ (emphasis added)

The above verse only mentions the principle of payment of *diyya* in killing by mistake. What is certain is that the *Qur'an* refers to blood money but does not say anything in regard to the amount of *diyya*, or difference between men and women. Since, the *Qur'an*, as the first source of Islamic law, cannot be invoked by Islamic jurists and legislators to the effect that a woman's *diyya* is half that of a man, they refer to tradition – a letter by Prophet Mohammad¹¹⁸-which shows that a woman's compensation is half that of a man.¹¹⁹ However, many jurists argue that the Prophet in his famous letter did not mention anything about the amount of *diyya*.¹²⁰

Jurists who believe in the inequality of blood money for men and women have provided different reasons to justify their opinion, including man's economic capability. Amuli and Makerm Shirazi argue that, since a man is economically more

¹¹⁷ *Qur'an*: 4:92.

¹¹⁸ A few Shi'a jurists, such as Tabataei, Khoei and Najafi also refer to a story in which a man had intentionally killed a woman and then Imam Sadeq was asked what should be done. It is reported that the Imam said, "If the woman's next of kin ask for retaliation, they shall pay the half difference of the blood money. If they [the next of kin] do not do so, a murderer shall pay a full female blood money as *diyya* [to the next of her kin] which is half that of a man in order to exempt from retaliation." *Hadith* cited in M.H. Al-Huramouli, *Vasael al-Shi'a*, Vol.1, Tehran, 1988, p. 80.

¹¹⁹ See A. Oudah, *Op. cit.*, p. 176.

¹²⁰ Ahmadi who cited the Prophet's letter in his book *Makatib al-Rasoul* believed that the Prophet did not mention anything about the amount of *diyya* in his famous letter to Amro Ibn Hazm. See also H. Mihrpur, *Mabaheesi az Huqugh Zan*, Etelaat Prees, Tehran, 2000, pp. 265-268.

valuable and capable, especially in traditional societies, a woman's blood money in Islam is considered different from a man's.¹²¹ Amuli refers to the economic importance of men in different societies and rejects the idea of the superiority, reliability and value of men.¹²² To him, there is no such distinction between men and women in Islam.¹²³ However, concerning the issue of blood money, which concerns the material aspect, since men are economically more active than women, a man's blood money is more than a woman's, though this does not mean that men are more valuable than women.¹²⁴ Amuli also argues that in essence, *diyya* has nothing to do with evaluation of the spirit and should not be set forth in problems relating to anthropology or the dignity of women and men.¹²⁵ Makerm Shirazi considers *diyya* as a kind of remedy and concluded that the economic loss resulting from the absence of a woman in the society or the family is less than the economic loss resulting from the absence of a man, which is why a woman's *diyya* is defined as half of a man's.¹²⁶ He also argues that a woman's personality, like that of a man, has three aspects: human and divine, scientific and cultural, and economic.¹²⁷ From the human and divine point of view, according to a large number of verses of the *Qur'an*, there is no distinction between women and men and they are equal.¹²⁸ In the second aspect, i.e.

¹²¹ See A. Javadi Amuli, *Zan da Ayneh Jalal and Jamal*, Tehran, 1993. See also N.M. Shirazi, *Anvar al-Foqhah*, Vol 1, Madreseh al-Imam Ali Ibn Abi Talib, Qum, 1995; S.M. Bojnordi, "Taamol and Taarouz beyn Fiqh va Huquqh Bashari", 3 *Farzaneh*, Tehran, p. 12.

¹²² A few writers, such as Al-Seyed Ali Tabatabai and Ibn Arabi, argue that the reason is the superiority, reliability and value of men. To them, a man's *diyya* is higher than that of a woman because of his higher reliability and value. Clearly this argument has no place in the *Qur'an* and Islamic teaching - the criterion for attributing value to humans is piety and righteousness, not gender. If the amount of blood money has to do with the reliability and value of humans, then a specialist's blood money should be more than that of a simple worker. See Al-Seyed Ali Tabatabai, *Riyaz al-Masael*, Vol. 10, Moasseseh al-Nashr al-Islami, Qum, 2000, p. 248. See also M. Ibn Arabi, *Ahkam al-Qur'an*, Vol. 1, Dar al-Fikr, Beirut, p. 478.

¹²³ See A. Javadi Amuli, *Op. cit.*, p. 366

¹²⁴ *Ibid.*

¹²⁵ *Ibid.*

¹²⁶ See N. Makerm Shirazi, *Anvar al-Foqhah*, *Op. cit.*

¹²⁷ See N. Makarem Shirazi, *Bohoos Fqhi Hameh*, Vol. 6, Madreseh al-Imam Ali Ibn Abi Talib, Qum, 2000, p. 147.

¹²⁸ *Ibid.*, p. 148.

the scientific and cultural aspect, women and men are still equal.¹²⁹ Therefore, there is no discrimination between women and men in Islam in terms of acquisition of knowledge.¹³⁰ In the third aspect, i.e. the economic dimension, unlike the two previous aspects, there is no equality between women and men and, as a man's role is economically more prominent than a woman's role, the economic disturbance resulting from the man's absence in the family will be much bigger and more problematic than that of a woman in the family.¹³¹ Therefore, a man's blood money has been defined as twice that of a woman.¹³²

In spite of the above argument, however, in contrast to traditional societies in the past in which women were economically little active, we see nowadays that women in many Islamic societies participate actively in socio-economic affairs. The important question in this regard is, can *diyya*, which is based, according to some Islamic jurists, on the economic value of women and men - women are economically less responsible and are just consumers rather than producers - be changed? Even if we consider that today, in some Muslim states, women have an economically less important role than men, it is impossible to agree with those writers who try to justify present gender discrimination based on economic role, because there is a discrimination between a boy child and a girl child or even in the case of a foetus when it is known that it is male or female. This does not indicate economic role but a gender-based approach to the issue. Based on the concept of justice under Islamic law, as a duty to God from which emanates the rights to equality and fairness for all

¹²⁹ *Ibid.*

¹³⁰ *Ibid.*

¹³¹ *Ibid.*, p. 149.

¹³² *Ibid.*

human being, the present author believes compensation for women and men in *diyya* law should be equal.¹³³

Another important area of discrimination among women and men in Islamic criminal law is the age of criminal responsibility, which is highlighted in the final section of this chapter.

4. Gender and the age of criminal responsibility in Islam

In Islamic law, responsibility means the questionability of a person or the legal obligation of the person to remove a loss inflicted upon another.¹³⁴ If someone injures another, the legal consequences will depend on the state of mind of the offender at the time. If it happened with malice aforethought he may be liable to criminal prosecution and punishment. All criminal systems have evolved various gradations of offence, so that as the offence is more or less serious, the penalty is more or less severe. If the offender had no intention to harm the other, he will not be criminally liable but may face civil liability and civil action against him. Liability is either civil or criminal. In both cases, an individual will be liable for acts of commission or omission resulting in damage to others.¹³⁵

¹³³ A few jurists in both schools, including Ibn 'Alayh and Asam and Sanei, rejected the discriminatory view of the majority of Muslim jurists on *diyya* and emphasised equality between the sexes. Among them, Sanei who believes in equal *diyya* for women and men in unintentional homicide and quasi-intentional homicide, states that: "Islamic jurisprudence is open to discussion and Islam is a dynamic religion. Nowadays, people want to know what Islamic says about their rights? There was a time when jurists talked about a limited number of issues and, when they were asked a question, they referred to *hadith* from *masoum*. At that time, there were a limited number of problems in the society but they (*masoum*) predicted that humankind was progressing and, therefore, they founded jurisdiction on bases that were open to *ijtehad* discussion and showed rules based on which we shall try to provide proper answer to the questions of our own time. Examples include problems relating to such topics as cheques, promissory notes and insurance, which are modern problems and did not exist in the past." (emphasis added). See Y. Sanei, *Fiqh Al-Seqhalein, Al-Taba Al-Ola*, Qum, 2003, pp. 196-200.

¹³⁴ See A.R. Doi, *Shariah: The Islamic Law, Op. cit.*, p. 227

¹³⁵ See M. J. Langaroudi, *Terminology Huqhuqh*, Ganj Danesh, Tehran, 1996, pp.334-335.

4.1. *Civil liability in Islamic law*

Civil liability in Islamic law means that an offender is forced to compensate another person; the former has a civil liability towards the latter.¹³⁶ In contrast, in the case in which the person does something forbidden or fails to do something required, which is a crime, i.e. it violates another person's right physically or mentally or disturbs the social order, since he/she is responsible for the effects and results of his/her criminal action, he/she has a criminal liability towards the society and the victim.¹³⁷ Apart from the conditions of liability there are many other differences between civil and criminal law, particularly in the processes of trial and judgment, which are not our concern here. Although civil liability differs from criminal liability in many respects, it also has similarities to it. In both, the result of the act or omission is damage to another person.¹³⁸ However, there are distinguishing features between criminal liability and civil liability. Incidents resulting in criminal liability involve greater risks for individual freedoms. Therefore, a person has criminal liability when he/she commits one of the crimes provided in the criminal laws, while civil liability concerns any action that the law defines with more flexibility and includes any action that results in loss or damage to another person.¹³⁹ Another difference between civil liability and criminal liability is in the objective. The objective of criminal liability is to punish the criminal, which is usually carried out in order to defend and protect the society in terms of order, public compensation, correcting the criminal and preventing

¹³⁶ See M. Saleh Validy, *Huqhuqh Jazaye Islami*, Tehran, 2000, p. 37.

¹³⁷ *Ibid.*

¹³⁸ In civil liability, the damage is to an individual, while in criminal responsibility it is to the society. There are cases, however, in which an act incurs both criminal responsibility and civil liability. Examples include theft, fraud and forgery which, apart from legal punishments of the criminal, require compensation of the damages to a private claimant. See M. Saleh Validi, *Op. cit.* pp. 38-40. See also M. Muslehuddin, *Concept of Civil Liability in Islam and the Law of Tort*, Islamic Publication, 1982.

¹³⁹ In Article 1382 CCI, the legislator, mentioning "any action that results in loss by another", has used the same general rule to express and recognize the various acts that result in civil liability. Article 1382 of CCI.

other individuals from committing the crime. However, the objective of civil liability is to compensate/ provide remedy to the affected person.¹⁴⁰

4.2. Criminal liability in Islamic law

Criminal liability results from a crime. Therefore, the legal principle of “crimes and punishments” defines the limits of criminal activities of individuals in the society. One of the characteristics of criminal responsibility is its being personal.¹⁴¹ Therefore, the punishment shall be enforced only against the criminal and is not transferred to the other members of his family if he dies.¹⁴² However, in civil liability, when the person responsible dies, the victim can receive compensation from the deceased perpetrator’s properties and assets. In other words, as there is an aspect of loss and damage and compensation of another individual to civil liability, the loss and damage, after demise, can be compensated from the properties of the perpetrator.

In regard to criminal responsibility many verses in the *Qur’an*, refer to the issue in various ways.¹⁴³ The principle of individual criminal responsibility can be adjudged as one of the foundations of individual security. This principle means that the actor himself is the only person who can be accused of a particular crime and no one else, and no one shall escape responsibility, irrespective of blood ties or friendship to the victim (or to the judge or ruler).¹⁴⁴ A person who has taken part in a prohibited act, whether he is the principal or an accomplice, must be incriminated according to the

¹⁴⁰ Punishment in criminal liability, depending on the type of crime, can be execution, imprisonment, exile or fine in cash while, in civil liability, the perpetrator shall compensate/make reparation to the affected person for the loss or damage incurred. See M. Muslehuddin, *Op. cit.* p. 76. See also M.C. Bassiouni, “Sources of Islamic Law, and the Protection of Human Rights in the Islamic Criminal System”, in *The Islamic Criminal Justice System*, edited by M.C. Bassiouni, Oceana Publications, London, 1982.

¹⁴¹ See A. Rouhi, *Aeen Dadresi dar Islam*, Tehran, 1995, p. 98. See also A. M. Awad, “The Right of the Accused under Islamic Criminal Procedure” in *The Islamic Criminal Justice, Op. cit.*

¹⁴² As indicated earlier, the *Qur’an* says that nobody will bear the burden of another. Therefore, the responsibility for the crime committed will be that of the criminal alone. The personal nature of criminal responsibility is endorsed by the Iranian Criminal Code.

¹⁴³ See *Qur’anic* verses 6: 164, LII, 21,

¹⁴⁴ See A. Zeraat, *Sharh Ghanoon Mojazat Islami*, Tehran, 1997. p. 78.

rules of accountability. The principle of the personal responsibility of the individual for crimes which he has committed, is established by the following verses of the *Qur'an*:

No burdened one shall bear another's burden.¹⁴⁵

Pledged to God is every man for his actions and their desert.¹⁴⁶

That man hath only that for which he make effort.¹⁴⁷

Whoso doth right, it is for his soul and whoso doth wrong, it is against it.¹⁴⁸

Collective criminal responsibility had been customary among the Arabs before Islam. According to the above verses, the responsibility for the crime committed is that of criminal alone.¹⁴⁹ The most prominent example in regard to Islamic law for confining criminal responsibility to the criminal alone is the will of Imam Ali, who suffered a fatal blow from Ibn Muljam in the Mosque. Imam Ali called his sons to his deathbed and advised them in the following manner:

Do not kill anyone except him who killed me. But wait; if I die from his blow, retaliate/revenge me a blow for a blow, and don't mutilate the man, for I heard the messenger of Allah say: "Beware of mutilation even if it were an ailing dog."¹⁵⁰

Indeed, Islam put an end to the custom of collective criminal responsibility but it continued to recognise the collective responsibility of the family for payments of

¹⁴⁵ *Qur'an*: 6: 124.

¹⁴⁶ *Qur'an*: 12: 21.

¹⁴⁷ *Qur'an*: 6:164.

¹⁴⁸ *Qur'an*: 35:18. *Qur'an* also says, "each soul earneth on its own account" and "He who doth wrong will have the recompense thereof". See 53:28 and 2:228.

¹⁴⁹ It should be noted that Islam developed and applied the principle of individual responsibility fourteen centuries ago, while its inception in positive law took place after the French Revolution. Before that, a person was held responsible not only for acts he had committed, but also for acts committed by others, even though he had not taken part in them and had no control over the offender. Thus, a whole family could be held responsible for a crime committed by one of its members. See M. C. Bassiouni, (ed.), *The Islamic Criminal Justice System, Op cit.* See also N. Hanif, *Islamic Concept of Crime and Justice*, Saroup & Sons, New Delhi, 1999; H. Saeed, *Basic Principles of Criminal Procedure Under Islamic Sharia*, London, 2003.

¹⁵⁰ Cited in A.R. Doi, *Sharia: The Islamic ...*, *Op. cit.*, p. 227.

damages resulting from a crime.¹⁵¹ Therefore, it is stipulated that not only the criminal but also his/her family collectively are responsible for blood money and fines imposed for physical injury.¹⁵² Islamic law recognises no criminal responsibility on the part of children.¹⁵³ Likewise, no responsibility attaches to insane or imbecile persons.¹⁵⁴ According to the famous *hadith*, Imam Ali said; “No deeds good or evil, are recorded (for the following) and [they] are not responsible for what they do:

- An insane person till he becomes sane;
- A child till he grows to the age of puberty;
- A sleeping person till he/she awakes.¹⁵⁵

In Islamic law there is no criminal liability for a person who has committed a crime in a state of insanity, a person who has committed a crime under force or duress, or a child who has committed a crime. It is very important that the *qadi* assure himself of the sound mind of the criminal before he pronounces his verdict. In regard to a person who committed a crime in the state of insanity, concerning *hadd* punishment, Yusuf argued that:

The *hadd* punishment can be imposed on the accused after his confession, if it is made clear that he is not insane, or mentally troubled. If he is free from such deficiency, he should then be submitted to the legal punishment.¹⁵⁶

There is no legal responsibility of a minor, i.e. children of all ages until they reach the age of puberty. Therefore a child will not be given *hadd* punishment for a crime committed by him. However, it is notable that the *qadi* will still have the right either

¹⁵¹ See M. C. Bassiouni, (ed.), *The Islamic Criminal ... Op. c it.* See also A.R. Doi, *Sharia: The Islamic ...*, *Ibid.*, pp. 226-227.

¹⁵² *Ibid*

¹⁵³ *Ibid*

¹⁵⁴ *Ibid*

¹⁵⁵ See A.R. Doi, *Sharia: The Islamic ...*, *Ibid.*, p. 226.

¹⁵⁶ Cited in *Ibid.*, p. 227.

to admonish the juvenile delinquent or impose on him some restrictions which will help to reform him and stop him from committing any future crime.

If it is proved that a person committed a crime under force or duress, there will be no legal liability. Therefore no punishment will be given for crimes committed under such a state of mind, as there is no responsibility for the criminal act. The Prophet Mohammad said, “My *ummah* will be forgiven for crimes it commits under duress, in error, or as a result of forgetfulness.”¹⁵⁷

Considering as a whole the *Qur’anic* verses on this subject, it can be said humans are liable because the philosophy of creation is to make humans who are aware and responsible and the human responsibility depends on a person’s abilities, aptitudes and choices.¹⁵⁸ As a result, all people will be liable and responsible for performing their individual and social duties according to the limits of their abilities, aptitude and awareness.¹⁵⁹

Criminal responsibility is of special importance in Islamic law. According to Islamic law a person will be criminally responsible when he has grown up physically and mentally, commits the crime at his own will and choice, with a knowledge and awareness of the legal prohibition. Certain persons may be incapable of criminal responsibility by virtue of belonging to a class of persons who are subject to special rules or privileges. Children and insane people are not qualified for criminal responsibility. In theory, there is no gender discrimination on the issue but in reality, as we will see, discrimination is practised in the law of some Muslim states, based on *Sharia*.

¹⁵⁷ *Ibid.*, p. 228.

¹⁵⁸ *Qur’an*:102:7 and 17:36

¹⁵⁹ *Qur’an*: 6:152. See also 2: 286 and 65:7.

4.3 *The age of criminal responsibility in practice*

As I discussed earlier, a person will be criminally responsible when he/she has grown up physically and mentally, and commits the crime at his or her own will and choice, with a knowledge and awareness of the legal prohibition in accordance of Islamic law.¹⁶⁰ According to the IPCI, certain persons may be incapable of criminal responsibility by virtue of belonging to a class of persons who are subject to special rules or privileges. Children and the insane are not qualified for criminal responsibility.¹⁶¹ Childhood, which is one of the factors removing the liability, is a term denoting a period of human life from birth to adulthood/puberty.

In the *Sharia*, in the first period of childhood, because the child is not capable of perceiving and recognising good from bad, the minor is called *gheir momayez* (undiscerning).¹⁶² The second period of childhood is when the reasoning and perceiving abilities of the child develop. The child in this period, who attains puberty and is assumed to be able to perceive the good and bad of his acts and behaviour, as well as to distinguish profit from loss, is called a discerning child. According to Islamic law and the IPCI, a child is incapable of criminal responsibility. Therefore, even if such a child commits an act, which would otherwise be an offence, no offence has been committed.¹⁶³ However, the important questions in this regard are, who is a child according to the laws of Iran? In addition, what is the age of criminal

¹⁶⁰ See M. Mohseni, *Padideh Jenai*, Ganj Danesh, Tehran, 1995, pp. 3-20. See also M.S. El-Awa, *Punishment in Islamic Law*, American Trust Publications, Indianapolis, 1982.

¹⁶¹ *Ibid*

¹⁶² See M. H. Marashi, *Didgahhaye Nou dar Huqhuqh Keifari Islam*, Nashr Mizan, Tehran, 1994, p. 20. See also T.J. Al-Alwani, "Judiciary and Rights of the Accused in Islamic Criminal Law" in *Criminal Law in Islam ... Op. cit.*

¹⁶³ Before the Islamic revolution, the classification of crimes in the Iranian system was adopted from the French penal code. It divided offences according to their seriousness into crimes, misdemeanours and violations. After the revolution, classification based on crime/punishment was introduced. The new code of criminal procedure and Islamic Punishment Law were introduced for 10 years. Although many Islamic scholars, thinkers, lawyers and human rights activities demanded deep transformation of the Criminal Code, it was renewed for another 10 years by the Iranian Parliament.

responsibility? Is there any difference between girls and boys in the age of criminal responsibility? If so, why? Moreover, what is the philosophy of this discrimination in the age of criminal responsibility?

According to Article 34 of the Iranian Criminal Code 1925, which was in force before the [Islamic] Revolution, a *gheir momayez* child was not criminally liable. An undiscerning child was a child less than 12 years old. Therefore, according to the pre-Revolution Criminal Law, before the age of twelve, the minor *gheir momayez* had no criminal liability and the age of criminal liability was twelve. There was a sort of graduated scale of criminal responsibility for non-adult discerning minors who were not yet 15 years of age and committed a crime. They would be sentenced to 10-15 lashes. If those older than 15 but younger than 18 years committed a crime, they would be imprisoned in a house of correction for less than 5 years. After the Islamic revolution, the legislator in Article 49 of the Islamic Punishment Code divested minors of any criminal liability and provided that:

... their upbringing, as decided by the court, shall be undertaken by a minor's guardian or, if necessary, the house of correction.

According to the post-revolution laws, minors are still divested of any criminal liability. The note to the aforementioned article defines a minor as "one who has not reached the religiously defined adulthood limit."¹⁶⁴ Therefore, according to the above article, a child who has not reached the religiously defined adult age is considered a minor and, if he commits a crime, he will not be criminally liable. However, the important point in this regard is the definition of puberty, as there is no puberty/adult age in *Sharia*. There is no verse in the *Qur'an* that specifies a particular age to define adulthood. Similarly, studying the words of the Prophet and his tradition, it can be

¹⁶⁴ *Ibid.*

said that no specific age of adulthood has been defined.¹⁶⁵ The lack of a clear definition in the *Qur'an* and *Sunna* has given rise to different approaches by both schools of thought to the issue. They provide different ages for adulthood. For example, in the Shi'a school of thought, some jurists say the age of adulthood for girls is 9 and for boys it is 15.¹⁶⁶ There is another saying according to which adulthood is reached at 13 for girls and 15 for boys.¹⁶⁷ There are also some who propose the age of 13 for girls and 14 for boys as the criteria of adulthood. However, Article 1210 (1) of CCI follows the idea of those Islamic jurists who set the age of majority at 15 years old for boys and 9 for girls. The article provides that:

The age of majority for a male is 15 complete lunar years and 9 complete lunar years for a female.¹⁶⁸

A child, if committing a crime, has no criminal liability – girls under the age of 9 and boys under the age of 15 are deemed minors. The gender discrimination of this law concerning the age of girls and boys means that, if a girl or a boy commits a similar crime, they will be treated differently. For example, if a 14-year-old boy commits an act of theft, he will not be punishable by the law since, according to the law, children (boys under 15 years of age) are divested of criminal liability. Yet if the same crime of theft is committed by a 10-year-old girl, she will bear criminal liability and the crime will be punishable. The fact is that one of the important elements of criminal liability is having full perception and comprehension of the act or omission of the act. Therefore, how can one distinguish between children according to whether they are girls or boys, which is gender-based, in criminal liability affairs?

¹⁶⁵ M. H. Horre Amuli, *Op. cit.*, p. 32. See also M. Mehrizi, *Bolough Dokhtaran kavoshi dar Fiqh*, Daftar Tablighat Islami, Qum, 1994, p. 231.

¹⁶⁶ See S.R. Khomeini, *Op. cit.*, See also Z. Sefati, *Pasuheshi Piramoon Sen Taklif*, Tehran, 1996. p. 35.

¹⁶⁷ See Y. Sanei, *Resaleh Tozih al-Masael*, Entesharat Dafrar Tabliqhat Islami, Qum, 1997.

¹⁶⁸ Article 1210 (1) of CCI amended on 5 November 1991.

In sum, there is no verse in the *Qur'an* and the words of the Prophet and his tradition that specifies a particular age to define adulthood. Therefore, it is true to say that setting the religiously-defined adult age in the law as 9 for girls and 15 for boys does not have a strong foundation in Islamic sources. It is essential for the legislators in Islamic states to set a suitable age as the age of adulthood and criminal maturity, without any distinction based on sex in the same way as for legal affairs and legal maturity (where the threshold is age 18 at which the person is considered able to administer his property in his interest, regardless of sex). Criminal affairs are basically more important than legal affairs and require more attention.

Concluding remarks

Gender discrimination in retaliation, compensation, and the age of criminal responsibility law are not documented nor mentioned directly in the *Qur'an*. Despite this, however, we see that jurists have referred to the *Sunna* to defend the discrimination but as we discussed in this chapter there are contradictory *ahadith*, and this indicates that they cannot be invoked. With regard to the fact that there are two groups of *ahadith* which have been supported by a number of Islamic jurists, it can be said that considering the interests of today's society and the basic developments in human rights based on equality of human beings, one should logically invoke that group of *ahadith* in which there is no sex discrimination, which is in harmony with the verses of the *Qur'an* and the Prophet's tradition. *Sunna* and *ahadith* are valid only so long as they do not contradict the *Qur'an*. Therefore, those *ahadith*, which contradict with the teaching of the *Qur'an* in general, and *Qur'anic* verses which say that "the laws of Islam are just," in particular, therefore, cannot be relied upon.

Moreover, it is important to consider in relation to this issue that Islamic jurisprudence, which consists of the perceptions of Islamic jurists, is not necessarily mere Islam and can be changed over time and place. We see that a certain Islamic jurist may think of something as forbidden while another may deem the same as allowed. Why? Because they may have different interpretations depending on the sources they use in Islamic law. Every Islamic scholar may have a different perception of a *hadith* because everyone is free in the way they think and there is nothing wrong with different approaches of Islamic jurists, but the legislators of Islamic states as well as other scholars cannot consider their interpretations as unchangeable religious principles and ignore the fundamental human rights in the name of *Sharia*. Therefore, many cases in which women's rights are treated in a discriminatory way can be reviewed and reconciled with international human rights law including Article 2 of the Women's Convention. Reasonable interpretation of *Sharia* on different issues including the law of testimony and compensation can prevent miscarriage of justice in Islamic society as demonstrated in *Ansar Burney v. Federation of Pakistan*¹⁶⁹ where the Pakistani Federal Shariat Court referred to possible instances of a single female witness and *Case Concerning Compensation for Physical and Moral Damages* where the Iranian Court provided equal compensation for 78 female victims along with male victims.¹⁷⁰

¹⁶⁹ *Ansar Burney v. Federation of Pakistan*, 1983, PLD (FSC), p. 73. See also M. A. Baderin. *International Human Rights and Islamic Law*, Oxford University Press, Oxford, 2003, at p. 64 and 102.

¹⁷⁰ *Compensation for Physical and Moral Damages Case*, 12/06/1384 SCC Tehran.

Conclusion

The problem of equal rights for women has a long history. In the ancient and middle ages, women had a very low social position and their rights were not recognised and protected. With the rise of the movement for human rights in modern times, women came to realise that the principle of equality should be applied to them. The struggle for women's rights began to develop and had become a matter of international concern at the turn of the 20th century. After World War I, the international community began to be persuaded that the problems of women's rights, like those of human rights in general, should be dealt with at the international level. The scourge of World War II and mass violations of human rights before and during the war reinforced the belief that human rights, including the rights of women, are factors closely linked to peace and security in the world at large. With the establishment of the UN in 1945, the protection of human rights, including women's rights, was given prominence in the Charter. Sex is one of the specified grounds on which distinction is not permitted. Article 1(3) of the Charter provides: "respect for human rights and for fundamental freedoms for all without distinction" on account of sex or other grounds. The CSW has drafted several international Conventions in various fields of women's rights including DEDAW. The international norms of non-discrimination on the basis of sex as reflected in the UN human rights instruments culminated in adoption of the Women's Convention, which deals with various fields of women's rights, political, economic, social and cultural. It crystallises the past efforts in eliminating discrimination against women and furnishes the basic framework for attaining the good of human equality without distinction based on sex. The Convention is considered as the most universal legal instrument as well as binding document that prohibits discrimination against women.

However, it met with a large number of reservations by many member states, including Muslim states based on *Sharia* that became parties of the Convention. Such reservations in which Muslim states have mainly made their implementation of Convention provisions conditional on their conformity with Islamic rules, as well as discriminatory laws and regulations in many cases in civil and penal laws¹ of those states, have led to the belief that Islamic principles are an obstacle in eliminating discrimination against women.² Here, the important question is: are the ideals of international human rights including women's rights compatible and realizable within the dispensation of Islamic law?

Following the discussion in the three parts of this project, the view may be presented that the concept of human rights and women's rights in Islam is reconcilable with international human rights norms on the subject, such as those expressed in the Women's Convention, if Islamic jurists and lawmakers recognize the transformation of the present time and re-analyse Islamic sources in order to give a proper response to women's rights. In Islam, there is no advantage or superiority for a human being based on race, sex, language, etc, because the origin of human creation is the same

¹ See Parts two, three and four of this work which contained an in-depth discussion on current discriminatory laws and regulations, including the scope of the *qawwāmūn* - the superiority of male over female in familial, social, and political life - in civil and criminal law which deny or limit women's fundamental rights and have a negative effect on various aspects of women's life and rights. These were examined by studying their roots/origins from both schools of thought. See also B. Nathan, *Inscribing the Islamic Sharia in Arab Constitutional Law*, Washington D.C., 2001; B. Ali, "Islamic Law and Crime: The Case of Saudi Arabia," 9 *IJCACJ*, 1985, pp. 45-57; R.H. Moore, "The Criminal Justice System of Saudi Arabia," in *International Criminal Justice Systems II*, Academy of Criminal Justice Sciences, Omaha, Nebraska, 1986, pp. 139-198; R.H. Moore, "Islamic Legal Systems: A Comparison-Saudi Arabia, Bahrain and Pakistan," *Comparative Criminal Justice*, Chicago, Office of International Criminal Justice, 1989, pp. 243-250; C. Taylor, "The Criminal Justice System of Egypt," in *International Criminal Justice Systems II*, Academy of Criminal Justice Sciences, 1986, pp. 13-26.

² See L. Lijnzaad, *Reservations to UN-Human Rights Treaties: Ratify and Ruin?* M. Nijhoff, Dordrecht, 1995. See also V.P. Nanda, "Islam and International Human Rights Law: Selected Aspect", *ASILP*, 1993; F. Sabbah, *Women in the Muslim Unconscious*, Pergamon, New York, 1984; E. Mayer, "Current Muslim Thinking on Human Rights", in *Human Rights in Africa, Cultural Perspective*, edited by An-Naimi and F. Deng, 1990; E. Mayer, "Universal Versus Islamic Human Rights: A Clash of Cultures or a Clash with a Construct?", 15 *MJIL*, 1994; F. Hussain and K. Radwan, "The Islamic Revolution and Women: The Quest for the *Qur'anic* Model", in *Muslim Women*, edited by Hussain, St. Martin's Press, New York, 1984.

and inherent dignity is a right guaranteed to all human beings. Women and men are addressed in the most important source of Islamic law without discrimination and no one can claim to be superior to another except based on piety.³ According to *Qur'anic* verses: "The dearest of you in Allah's sight is the most pious of you" and "Do not recognize them by their being male or female. Recognize them by their human face. The truth of the human being is their spirit rather than their body."⁴

In spite of the clear message of the Islam, today in many Islamic states, based on some jurists' understanding and interpretation of a few verses and traditions, women are deprived of their fundamental rights. An example is the scope of *qawwāmun* which is reflected in Muslim states' reservations to substantive provisions of the Women's Convention as well as by many present discriminatory laws and regulations in such states related to marriage, divorce, guardianship, custody, freedom of movement and choice of residence, exclusion of women from the bench and restriction on enjoyment of political rights. In the first decade of the 21st century, women in Muslim states are still struggling to obtain legal equality with men in various aspects of their civil, political and social life.

Considering the reservations of Muslim states to the Women's Convention, the *de jure* status of women in the civil and criminal codes of those states, the principles of criminal punishment and women's political and social situation, some writers take a unilateral approach, demanding a purely secular framework in order to find the solution.⁵ The advocates of this approach refer to the gender discrimination law of

³ *Qur'an*: 49:13.

⁴ *Qur'an*: 2: 292.

⁵ See V.P. Nanda, *Op. cit.*, pp. 327-331. See also R. Afshari, "An Essay on Islamic Cultural Relativism in the Discourse of Human Rights", 16 *HRQ*, 1994, pp. 235-236; E. Mayer, "Current Muslim Thinking on Human Rights", *Op. cit.*, p. 148; E. Mayer, "Universal Versus Islamic Human Rights: ... *Op. cit.*; Hussain and K. Radwan, *Op. cit.*

Muslim states and conclude that the only solution regarding the issue of women's rights in Islamic societies is to put aside Islamic laws entirely.⁶ They argue that Islamic law is entirely irreconcilable with the ideals of human rights and international human rights instruments particularly the Women's Convention.⁷ In their view, there is no harmonization between Islamic law and women's rights because such rights are principles that were developed in Western culture, and they suggest that Western culture should serve as the universal normative model for the content of international human rights law.⁸ This approach in Islamic society is neither influential nor practical. It is not influential because Islam is not only a religion, it is an all-pervasive code of civil, economic, social and political life in which the majority of Muslims believe, and not practical because the constitution and jurisprudence of the majority of Islamic countries does not allow such a change.

A quick look at some events in the last three decades in some Muslim states shows that the secularisation of women's rights has been neither successful nor even welcomed by the majority of Muslim women. In Iran, the efforts of Reza Shah and his son Mohammad Reza, with the idea of secularisation of the country, to put aside Islamic values and gradually transform the Islamic legal system into a secular legal system, gave rise to an Islamic revolution 1979, with the aim of Islamization of laws and regulations.⁹ Other prominent examples in this regard are Turkey, Egypt, Algeria and Tunisia. In those states the secularisation of the women's rights movement

⁶ See M. Kar and H. Hoodfar, "Personal Status Law as Defined by the Islamic Republic of Iran: An Appraisal", in *Shifting Boundaries in Marriage and Divorce in Muslim Community: Special Dossier, Women Living Under Muslim Laws*, Grabels, 1996. See also L. Lijnzaad, *Op. cit.*

⁷ *Ibid.*

⁸ See Nanda, *Op. cit.*, pp. 330-331.

⁹ See H. Rezaei, "The Iranian Criminal Justice under the Islamization Project", 10 *EJCCCJ*, 2002. See also H. Algar, *Islam and Revolution: Writings and Declarations of Imam Khomeini*, Mizan Press, Berkeley, 1981; A. Banani, *The Modernization of Iran, 1921-1941*, Stanford University Press, Stanford, 1961; N.R. Keddie, *Iran and the Muslim World: Resistance and Revolution*, New York University Press, New York, 1995; S. Ebadi, *Women's Rights in the Laws of the Islamic Republic of Iran*, Ganj Danesh, Tehran, 2001.

alienated and excluded many women. In Turkey,¹⁰ an army officer, Kamal Ataturk, established a secular regime in 1926¹¹ and created a strict separation between religion and state. In spite of his attempt to remove Islam entirely from the constitution, at the turn of 21st century when democratic process started in the country, Islamic parties, namely, Refah and then Justice and Development Party, won the elections.¹² In some Muslim states such as Egypt, Algeria and Tunisia, the secular framework is not only unsuccessful but has also left the way clear for those extremist Muslim writers who, based on a hard line interpretation of the *Sharia*, believe that international human rights and its objective is an imperialist agenda that must be rejected.¹³ Maududi, for example, in his work “Human Rights in Islam” stated that:

Since in Islam human rights have been conferred by God, no legislative assembly in the world, or any government on earth has the right or authority to make any amendment or change in the rights conferred by God. No one has the right to abrogate them or withdraw them. Nor are they the basic human rights which are conferred on paper for the sake of show and exhibition and denied in actual life when the show is over.¹⁴

In regard to the Women’s Convention, they consider the object of the Convention as outside the realm of Islamic thought because it belongs to the secular sphere of human

¹⁰ Turkey is a nation of Muslims, 99.8 per cent of Turks follow the Islamic faith.

¹¹ See N. Berkes, *The Development of Secularism in Turkey*, Hurst and Co, London, 1998.

¹² In April 2002 AK won the election and occupied the majority seat of the 550-seat of parliament. In April 2007 when AK named Foreign Secretary Abdullah Gul as its candidate for president, crisis in the country began when the powerful Turkish army, political opposition and the Courts, in the name of democracy, in country where 99.8 per cent of population are Muslim, put pressure on the candidate to stand down because his wife wore the veil.

¹³ Baderin argued that this is a result of the fear of neo-colonialism, and is a psychological effect of the past colonial experience of most developing states. He also pointed out; “That fear is sometimes strengthened by the western nations’ insistence on defining human rights only in the Western perspective without consideration for the contribution and understanding of other cultures.” See M. Baderin, *International Human Rights and Islamic Law*, Oxford University Press, Oxford, 2003, p. 14. See also F. Halliday, “Relativism and Universalism in Human Rights: The Case of the Islamic Middle East” in *Politics and Human Rights*, edited by Beetham, Blackwell, Oxford, 1995, p. 154; A.A. An-Naim, *Toward an Islamic Reformation: Civil Liberties, Human Rights, and International Law*, Syracuse University Press, Syracuse, 1990, p. 27.

¹⁴ See S. Maududi, “Human Rights in Islam”, 4 *al Tawhid Journal*, 1987. The article also is available at <http://www.islam101.com/rights/index.htm>.

thought; therefore it is an issue independent of the religious sphere.¹⁵ To them, international women's rights as they appear in the Convention are contrary to Islamic law because *Sharia* is immutable; it is impossible to change or modify the Islamic laws and every attempt by Muslim jurists and states in this direction is contrary to pure Islam.¹⁶ This approach, based on their own understanding of the religion, denies other interpretations and blocks the way for *ijtihad*, the exercise of independent juristic reasoning and the doctrine of *maslehat*. Rehman rightly argues that such argument that believes the doors to *ijtihad* had been closed, "undermined the essence of Islam, which is based on change, reform and re-interpretation."¹⁷ Therefore, struggle within Islamic law and enforcing a secular framework in the Muslim world is not only an ineffective and inappropriate prescription but also would leave the path clear for extremist and restrictive arguments which would endanger the status of women even more.

It seems to me that the scope of international women's human rights can be positively enhanced in the Muslim world through moderate, dynamic, and constructive interpretations of the *Sharia* rather than through hard-line and static interpretations of it. In such a moderate approach, there need be no contradiction between Islam and international human rights instruments including the Women's Convention. Moreover, it is possible to achieve and implement equal rights for women in Islamic societies as articulated in the Convention. This study, contrary to the common

¹⁵ See S. Tabandeh, *A Muslim Commentary on the Universal Declaration of Human Rights*, Goulding, Guilford, 1970. See also A.A. Mawdudi, *Human Rights in Islam*, Islamic Foundation, Leicester, 1980.

¹⁶ In their understanding of the religion, all Muslims must consider Islamic law solely as it was received 14 centuries ago, without dynamic interpretation; therefore, it is impossible to change the laws and regulations. This approach is supported by *Salafyya* and has culminated in the oppressive treatment of women by a fundamentalist militant group in Afghanistan during the Taliban regime. See I. Ghanem, *Outlines of Islamic Jurisprudence, Riyadh, Saudi Arabia*, Saudi Publishing and Clearing House, 1983.

¹⁷ See J. Rehman, "The Sharia, Islamic Family Laws and International Human Rights Law: Examining the Theory and Practice of Polygamy and Talaq", 21 *IJLPF*, 2007, p. 124.

perception, emphasises that the principles of Islamic law are reconcilable with most principles of international human rights, including women's rights as they appear in the Women's Convention because:¹⁸

- Islamic law is not an immutable, unchanging set of norms, but there is an in-built dynamism that is sensitive and susceptible to changing needs according to time and place. This gives the advantage that Islamic law could remain up-to-date and respond to the questions and demands of people at different times and places. This approach is more consistent with the Islamic teachings, which contain common principles of human rights such as human welfare, respect for justice, protection of human life and dignity.¹⁹
- This work has demonstrated that most of present forms of discrimination against women are not documented or mentioned in the *Qur'an*, the most important source of Islam. Despite this, however, we see that jurists have referred to the *Sunna*. The wording of the *ahadith* themselves leaves room for the different opinions that have been expressed by Islamic jurists concerning their interpretation and resulted in different discriminatory laws and regulations in different Muslim states. We have consider this fact that this is human' understanding and interpretation rather than Islam *per se*. Therefore, they are valid only so long as they do not contradict with the main teaching of the *Qur'an*: "the laws of Islam are just".²⁰

¹⁸ See Y. Sanei, *Fiqh Al-Seghalein fi Sharh Tahrir Al-Vasileh*, Tehran, 2001. See also M. H. Bojnourdi, *Al-Ghavaed Al-Fiqhieh*, Qum, 1998; S.M. Heider, *Islamic Concept of Human Rights*, Book House, Lahore, 1978; A.A. An-Naim, "A Modern Approach to Human Rights in Islam: Foundations and Implications for Africa", in *Human Rights and Development in Africa*, edited by C. Welch and R. Meltzer, SUNY Press, Albany, 1984.

¹⁹ See *Qur'an* at 17:70, 49:13

²⁰ As Sanei, on the issues of retaliation and compensation rightly pointed out: "... even if we accept the authenticity of the *ahadith*, they cannot be invoked because they contradict the *Qur'an*, and the *Sunna*,

- Islamic jurisprudence consists of the perceptions of Islamic jurists and can be changed. We see that the perceptions of Islamic jurists have differed over time. A certain Islamic jurist may think of something as forbidden (*haram*) while another may deem the same as allowed (*halal*). Why? Because they may have different interpretations depending on the sources they use in Islamic law. Everyone may have a different perception of *ahadith* because everyone is free in the way they think. There is nothing wrong with different approaches of Islamic jurists, but we cannot consider their interpretations as unchangeable religious principles and ignore women's fundamental rights.

Why do Islamic jurists, recognizing the transformation of the present times, not by re-analysis of Islamic sources give a proper response to women's needs and rights, compatible with *Sharia*? Why must women in Islamic societies suffer discriminatory laws and regulations and struggle to obtain legal equality with men in different aspects of daily life, while the advantage of *ijthad*, Islamic dynamic jurisprudence, which is sensitive and susceptible to changing needs of time and place, in regard to human rights issue including women's rights is simply ignored by the majority of jurists and Muslim states? As Rehman argues, "a cardinal mistake in the subsequent history of Islam was an insistence upon Taqlid or imitation."²¹ Until two centuries ago, Islamic jurists understood the transformation of the times and therefore tried to give proper responses to human needs which were compatible with *Sharia*. From that

the intellect and the conclusive rules and principles of Islam. That the *ahadith* in this issue cannot be relied on is clearer than the day because one of the important conditions for relying on a saying is that it should not be in contradiction with the *Qur'an* and the *Sunna*, and this is supported by a large number of *ahadith*. For example, the Prophet in his speech in Mena said, "Oh people, what you are said to have been told by me, if that agrees with the *Qur'an*, I have said that and if it disagrees with the *Qur'an*, I have not said that." See M.B. Majlisi, *Bahar al-Anvar*, Dar al-Kitab Al-Islami, Tehran, 1964.

²¹ See J. Rehman, *Op. cit.*, p. 124.

time until now, however, few Islamic jurists and Muslim scholars have tried to maintain an in-built dynamism that is sensitive and susceptible to the changing needs of time. Therefore, a fossilization of Islamic law is adversely affecting a wide range of people and institutions, including women.

In sum, the view may be presented that lack of education and awareness of women of their legal rights in Islamic law, and of a strong movement by Muslim scholars who recognize the problems of women in their society, has created an opportunity for some jurists and authorities to justify the present situation based on their own understanding of *Sharia* in the name of *Sharia* while many present forms of gender discrimination against women are not only contrary to the *Qur'an*, but also contrary to the principles and customs of the society and in many cases lead to oppression. Through moderate, dynamic, and constructive interpretations of the *Sharia*, the scope of international women's human rights can be positively enhanced in the Muslim world. Therefore, based on the true import of Islamic teaching and its primary mission including justice, equity and equality for all,²² there is room for legislators of Muslim states to eliminate the present gender discrimination in order to achieve the objectives of equal rights articulated in international human rights instruments, particularly the Women's Convention.

²² According to the *Qur'an*: "God commands justice, the doing of good, and liberty to kith, and He forbids all shameful deeds, and injustice and rebellion: He instructs you, that you may receive admonition." "God's orders are for justice and rights and God does not do injustice to his servant." *Qur'an*: 16:90. There are some verses of the *Qur'an* in this regard such as *Qur'an* 3:182; 23:14; 22:10; 8:51 and 50:29.

Annex

The Cairo Declaration on Human Rights in Islam adopted by the Organization of Islamic Conference in Cairo on 5 August 1990

The Member States of the Organization of the Islamic Conference,

Reaffirming the civilizing and historical role of the Islamic Ummah which God made the best nation that has given mankind a universal and well-balanced civilization in which harmony is established between this life and the hereafter and knowledge is combined with faith; and the role that this Ummah should play to guide a humanity confused by competing trends and ideologies and to provide solutions to the chronic problems of this materialistic civilization.

Wishing to contribute to the efforts of mankind to assert human rights, to protect man from exploitation and persecution, and to affirm his freedom and right to a dignified life in accordance with the Islamic *Shari'a*

Convinced that mankind which has reached an advanced stage in materialistic science is still, and shall remain, in dire need of faith to support its civilization and of a self motivating force to guard its rights;

Believing that fundamental rights and universal freedoms in Islam are an integral part of the Islamic religion and that no one as a matter of principle has the right to suspend them in whole or in part or violate or ignore them in as much as they are binding divine commandments, which are contained in the Revealed Books of God and were sent through the last of His Prophets to complete the preceding divine messages thereby making their observance an act of worship and their neglect or violation an abominable sin, and accordingly every person is individually responsible - and the Ummah collectively responsible - for their safeguard.

Proceeding from the above-mentioned principles,

Declare the following:

Article 1

(a) All human beings form one family whose members are united by submission to God and descent from Adam. All men are equal in terms of basic human dignity and basic obligations and responsibilities, without any discrimination on the grounds of race, color, language, sex, religious belief, political affiliation, social status or other considerations. True faith is the guarantee for enhancing such dignity along the path to human perfection.

(b) All human beings are God's subjects, and the most loved by Him are those who are most useful to the rest of His subjects, and no one has superiority over another except on the basis of piety and good deeds.

Article 2

(a) Life is a God-given gift and the right to life is guaranteed to every human being. It is the duty of individuals, societies and states to protect this right from any violation, and it is prohibited to take away life except for a *Shari'a* prescribed reason.

(b) It is forbidden to resort to such means as may result in the genocidal annihilation of mankind.

(c) The preservation of human life throughout the term of time willed by God is a duty prescribed by *Shari'a*.

(d) Safety from bodily harm is a guaranteed right. It is the duty of the state to safeguard it, and it is prohibited to breach it without a *Shari'a*-prescribed reason.

Article 3

(a) In the event of the use of force and in case of armed conflict, it is not permissible to kill non-belligerents such as old men, women and children. The wounded and the sick shall have the right to medical treatment; and prisoners of war shall have the right to be fed, sheltered and clothed. It is prohibited to mutilate dead bodies. It is a duty to exchange prisoners of war and to arrange visits or reunions of the families separated by the circumstances of war.

(b) It is prohibited to fell trees, to damage crops or livestock, and to destroy the enemy's civilian buildings and installations by shelling, blasting or any other means.

Article 4

Every human being is entitled to inviolability and the protection of his good name and honor during his life and after his death. The state and society shall protect his remains and burial place.

Article 5

(a) The family is the foundation of society, and marriage is the basis of its formation. Men and women have the right to marriage, and no restrictions stemming from race, colour or nationality shall prevent them from enjoying this right.

(b) Society and the State shall remove all obstacles to marriage and shall facilitate marital procedure. They shall ensure family protection and welfare.

Article 6

(a) Woman is equal to man in human dignity, and has rights to enjoy as well as duties to perform; she has her own civil entity and financial independence, and the right to retain her name and lineage.

(b) The husband is responsible for the support and welfare of the family.

Article 7

(a) As of the moment of birth, every child has rights due from the parents, society and the state to be accorded proper nursing, education and material, hygienic and moral care. Both the foetus and the mother must be protected and accorded special care.

(b) Parents and those in such like capacity have the right to choose the type of education they desire for their children, provided they take into consideration the interest and future of the children in accordance with ethical values and the principles of the *Shari'a*

(c) Both parents are entitled to certain rights from their children, and relatives are entitled to rights from their kin, in accordance with the tenets of the Shari'ah.

Article 8

Every human being has the right to enjoy his legal capacity in terms of both obligation and commitment, should this capacity be lost or impaired, he shall be represented by his guardian.

Article 9

(a) The quest for knowledge is an obligation and the provision of education is a duty for society and the State. The State shall ensure the availability of ways and means to acquire education and shall guarantee educational diversity in the interest of society so as to enable man to be acquainted with the religion of Islam and the facts of the Universe for the benefit of mankind.

(b) Every human being has the right to receive both religious and worldly education from the various institutions of, education and guidance, including the family, the school, the university, the media, etc., and in such an integrated and balanced manner as to develop his personality, strengthen his faith in God and promote his respect for and defence of both rights and obligations.

Article 10

Islam is the religion of unspoiled nature. It is prohibited to exercise any form of compulsion on man or to exploit his poverty or ignorance in order to convert him to another religion or to atheism.

Article 11

(a) Human beings are born free, and no one has the right to enslave, humiliate, oppress or exploit them, and there can be no subjugation but to God the Most-High.

(b) Colonialism of all types, being one of the most evil forms of enslavement, is totally prohibited. Peoples suffering from colonialism have the full right to freedom and self-determination. It is the duty of all States and peoples to support the struggle of colonized peoples for the liquidation of all forms of colonialism and occupation,

and all States and peoples have the right to preserve their independent identity and exercise control over their wealth and natural resources.

Article 12

Every man shall have the right, within the framework of *Shari'a*, to free movement and to select his place of residence whether inside or outside his country and if persecuted, is entitled to seek asylum in another country. The country of refuge shall ensure his protection until he reaches safety, unless asylum is motivated by an act which *Shari'a* regards as a crime.

Article 13

Work is a right guaranteed by the State and Society for each person able to work. Everyone shall be free to choose the work that suits him best and which serves his interests and those of society. The employee shall have the right to safety and security as well as to all other social guarantees. He may neither be assigned work beyond his capacity nor be subjected to compulsion or exploited or harmed in any way. He shall be entitled - without any discrimination between males and females - to fair wages for his work without delay, as well as to the holidays allowances and promotions which he deserves. For his part, he shall be required to be dedicated and meticulous in his work. Should workers and employers disagree on any matter, the State shall intervene to settle the dispute and have the grievances redressed, the rights confirmed and justice enforced without bias.

Article 14

Everyone shall have the right to legitimate gains without monopolization, deceit or harm to oneself or to others. Usury (*riba*) is absolutely prohibited.

Article 15

(a) Everyone shall have the right to own property acquired in a legitimate way, and shall be entitled to the rights of ownership, without prejudice to oneself, others or to society in general. Expropriation is not permissible except for the requirements of public interest and upon payment of immediate and fair compensation.

(b) Confiscation and seizure of property is prohibited except for a necessity dictated by law.

Article 16

Everyone shall have the right to enjoy the fruits of his scientific, literary, artistic or technical production and the right to protect the moral and material interests stemming therefrom, provided that such production is not contrary to the principles of *Shari'a*.

Article 17

(a) Everyone shall have the right to live in a clean environment, away from vice and moral corruption, an environment that would foster his self-development and it is

incumbent upon the State and society in general to afford that right.

(b) Everyone shall have the right to medical and social care, and to all public amenities provided by society and the State within the limits of their available resources.

(c) The State shall ensure the right of the individual to a decent living which will enable him to meet all his requirements and those of his dependents, including food, clothing, housing, education, medical care and all other basic needs.

Article 18

(a) Everyone shall have the right to live in security for himself, his religion, his dependents, his honour and his property.

(b) Everyone shall have the right to privacy in the conduct of his private affairs, in his home, among his family, with regard to his property and his relationships. It is not permitted to spy on him, to place him under surveillance or to besmirch his good name. The State shall protect him from arbitrary interference.

(c) A private residence is inviolable in all cases. It will not be entered without permission from its inhabitants or in any unlawful manner, nor shall it be demolished or confiscated and its dwellers evicted.

Article 19

(a) All individuals are equal before the law, without distinction between the ruler and the ruled.

(b) The right to resort to justice is guaranteed to everyone.

(c) Liability is in essence personal.

(d) There shall be no crime or punishment except as provided for in the *Shari'a*.

(e) A defendant is innocent until his guilt is proven in a fair trial in which he shall be given all the guarantees of defence.

Article 20:

It is not permitted without legitimate reason to arrest an individual, or restrict his freedom, to exile or to punish him. It is not permitted to subject him to physical or psychological torture or to any form of humiliation, cruelty or indignity. Nor is it permitted to subject an individual to medical or scientific experimentation without his consent or at the risk of his health or of his life. Nor is it permitted to promulgate emergency laws that would provide executive authority for such actions.

Article 21

Taking hostages under any form or for any purpose is expressly forbidden.

Article 22

(a) Everyone shall have the right to express his opinion freely in such manner as would not be contrary to the principles of the *Shari'a*.

(b) Everyone shall have the right to advocate what is right, and propagate what is good, and warn against what is wrong and evil according to the norms of Islamic *Shari'a*

(c) Information is a vital necessity to society. It may not be exploited or misused in such a way as may violate sanctities and the dignity of Prophets, undermine moral and ethical values or disintegrate, corrupt or harm society or weaken its faith.

(d) It is not permitted to arouse nationalistic or doctrinal hatred or to do anything that may be an incitement to any form or racial discrimination.

Article 23

(a) Authority is a trust; and abuse or malicious exploitation thereof is absolutely prohibited, so that fundamental human rights may be guaranteed.

(b) Everyone shall have the right to participate, directly or indirectly in the administration of his country's public affairs. He shall also have the right to assume public office in accordance with the provisions of *Shari'a*.

Article 24

All the rights and freedoms stipulated in this Declaration are subject to the Islamic *Shari'a*.

Article 25

The Islamic *Shari'a* is the only source of reference for the explanation or clarification of any of the articles of this Declaration.

Adopted during the Nineteenth Islamic Conference of Foreign Ministers (Session of Peace, Interdependence and Development), Cairo, Egypt, 31 July - 5 August 1990.

Glossary

<i>Adalah</i>	Justice; probity
<i>Ahad</i>	Solitary <i>hadith</i> transmitted through a single chain of narration.
<i>Ahl-kitab</i>	Belonging to one of the revealed religions i.e., Judaism and Christianity.
<i>Ahwal al-Shakhsiyya</i>	Personal status
<i>Al-Uqubat</i>	Criminal Law
<i>Aqd</i>	Contract
<i>Bulugh</i>	Puberty
<i>Diyya</i>	Blood money
<i>Faskh</i>	Judicial annulment of marriage
<i>Fatwas</i>	Legal or religious opinion by a qualified Islamic jurisconsult.
<i>Fiqh</i>	Jurisprudence
<i>garz ul hasaneh</i>	Interest free
<i>Ghaiba</i>	Absence/ ground for divorce in some Muslim states.
<i>Ghayem</i>	Custodian
<i>Gheir momayez</i>	Undiscerning
<i>Had</i> (plural <i>Hudood</i>)	Limit/s prescribed, the term is used in Islamic Jurisprudence to denote that punishment which has been prescribed in the <i>Qur'an</i> for a particular offence and is therefore deemed the maximum punishment awardable.
<i>Hadith</i> (plural <i>Ahadith</i>)	The traditions of the Prophet Mohammad, compiled as records of his words and deeds.
<i>Hanbali</i>	School of Sunni juristic thought
<i>Hanafi</i>	School of Sunni juristic thought
<i>Haqq</i>	Right
<i>Haram</i>	Forbidden, unlawful
<i>Hizanat</i>	Custody
<i>Ibadat</i>	Ritual acts
<i>Iddat</i>	Period after death/ divorce during which a woman cannot contract another marriage.
<i>Ijab</i>	Offer
<i>Ijma</i>	Consensus of opinion
<i>Ijtihad</i>	Exercising independent juristic reasoning
<i>Iqa</i>	Unilateral act
<i>Isnad</i>	Chain of narrators of <i>Hadith</i>
<i>Jahiliya</i>	Days of ignorance, referring to the days before Islam
<i>Khul</i>	Dissolution of the marriage on the initiative of the wife by offering compensation to the husband.
<i>Kifalah</i>	Legal guardianship
<i>Madhab</i>	School of jurisprudence
<i>Mahr</i>	Dower; a sum of money or other property which a wife is entitled to receive from the husband in consideration of the marriage.
<i>Mahr al-mithl</i>	Exemplary divorce
<i>Mahr al-Musamma</i>	Defined dower

<i>Majlis Shura</i>	Parliament
<i>Maliki</i>	School of Sunni Juristic thought
<i>Matn</i>	Context
<i>Muamalaat</i>	Contract
<i>Mubarat</i>	Dissolution of marriage by mutual consent of the husband and wife.
<i>Mujtahid</i>	A person qualified to carry out <i>ijtihad</i>
<i>Muta Marriage</i>	Temporary marriage
<i>Nafagheh</i>	Maintenance
<i>Nashiz</i>	Disobedient
<i>Naskh</i>	Abrogation or repeal of the legal efficacy of certain verses of the <i>Qur'an</i> in favour of other verses.
<i>Nikah</i>	Marriage
<i>Qabul</i>	Acceptance
<i>Qawwāmun</i>	Protector, provider, maintainer, guider and manager
<i>Qazi</i>	Judge or arbitrator
<i>Qazf</i>	False testimony
<i>Qeusas</i>	Retribution
<i>Qiyas</i>	Analogical deduction
<i>Qur'an</i>	The primary source of Islamic law believed by Muslims to be the word of God revealed to the Prophet Mohammad.
<i>Rajm</i>	Punishment by stoning
<i>Riba</i>	Interest
<i>Sahih</i>	Reliable
<i>Shafi'i</i>	School of Sunni juristic thought
<i>Sharia</i>	Principles of Islamic Law
<i>Shi'a</i>	A sect of Islam
<i>Shura</i>	Consultation
<i>Sunna</i>	The words and deeds of the Prophet Mohammad
<i>Sunni</i>	A sect of Islam
<i>Sura</i>	A chapter of the <i>Qur'an</i>
<i>Tafsir</i>	Exegesis
<i>Talaq</i>	Dissolution of marriage at the instance of the husband
<i>Tamkin</i>	Obedience
<i>Tazir</i>	Discretionary punishment
<i>Umma</i>	Community of Muslims
<i>Vakil</i>	Representative/ Lawyer
<i>Wajib</i>	Compulsory
<i>Wali</i>	Guardian
<i>Waqf</i>	A religious endowment of property / land, usually for charitable.
<i>Weliyat</i>	Guardianship
<i>Zaif</i>	Weak
<i>Zina</i>	The offence of fornication or adultery

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