

**The Application of *Shari'ah* and International Human
Rights Law in Saudi Arabia**

A dissertation submitted for the degree of Doctor of Philosophy

by

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Dedication

This dissertation is dedicated to my beloved parents and my family.

Abstract

The present dissertation provides an analytical and comparative study of the application of Islamic law (*Shari'ah*) and international human rights law in the Kingdom of Saudi Arabia. It provides an analysis of the sources of Islamic law as well as the sources of international law to set the background for analysis and defines the nature of both laws. It also tackles the subject of the domestic application of international human treaties in Saudi Arabia.

In addition, it examines some reservations Saudi Arabia has entered to some of the international human rights treaties it has ratified, specifically the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and the Convention on the Rights of the Child (CRC). It also sheds some light on the political, cultural and religious obstacles to the realisation of norms protected by international human rights treaties in the country, and in other countries for that matter, clearly stating the impossibility of implementing the provisions of the international human rights treaties in their entirety. This is due to the various political and legal developments towards the internationalization of the concept of human rights. It observes that despite the existence of the international human rights treaties, which aim at reinforcing a universal realisation of international human rights, these rights cannot be possibly realised by all countries.

To stress the importance Saudi Arabia attaches to the issue of human rights, the dissertation discusses some rights of women before Saudi courts in family matters, an issue which has been criticised by some international human rights treaties, and examines to what extent the country has managed to tackle the issue of domestic violence, particularly violence against women. It provides an overview of the major causes of domestic violence against women in Saudi Arabia, presents some cases of domestic violence before Saudi courts and sheds some

light on the measures taken by the Saudi government to combat domestic violence against women. It also tackles this issue both in the international and domestic legal frameworks, clearly stating the Islamic standpoint on the issue, namely that Islamic law, and Saudi Arabia for that matter, whose laws are essentially derived from the two main sources of *Shari'ah*. It also discusses the common forms of violence against women in Saudi Arabia and suggests a number of recommendations towards more effective protection of women against violence in the country.

The dissertation concludes by presenting a number of obstacles in the way of executing judicial decisions in the Kingdom as well as the obstacles which negatively affect the performance of the new code of law practice. It also presents some recommendations concerning personal status law obstacles and hindrances to progress and attempts to answer the research questions it has posed.

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List of Abbreviations

CAT	Convention Against Torture
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CERD	Committee on the Elimination of Racial Discrimination
CESCR	Committee on Economic, Social and Cultural Rights
CHRL	Conventions of Human Rights Law
CIL	Customary International Law
CPPCG	Convention on the Prevention and Punishment of the Crime of Genocide
CRC	Convention on the Rights of the Child
GAUN	The General Assembly of the United Nations
GCC	Gulf Cooperation Council
GPL	General Principles of Law
HRL	Human Rights Law
HRW	Human Rights Watch
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
ICPD	International Conference on Population and Development
ILC	International Law Commission

INTRAC	International NGO Training and Research Centre
LN	League of Nations
KSA	Kingdom of Saudi Arabia
NCHR	National Commission on Human Rights
NFSP	National Family Safety Programme
NHRA	National Human Rights Association
NSHR	National Society for Human Rights
OPCAT	Optional Protocol to the Convention Against Torture
PCIJ	Permanent Court of International Justice
SJC	Supreme Judicial Council
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNC	United Nations Charter
UNCRC	United Nations Convention on the Rights of the Child
UNCHR	United Nations Commission on Human Rights
UNHRC	United Nations Human Rights Council
UNVFVT	United Nations Voluntary Fund for Victims of Torture
VAW	Violence against Women
VDPA	Vienna Declaration and Programme of Action
WSSD	World Summit for Social Development

Glossary

<i>Adhl</i>	Preventing women under one's guardianship from marriage
<i>An-Nas</i>	'Mankind': Name of the last <i>sura</i> (chapter) of the Qur'an
<i>'Aqd</i>	Contract
<i>Dalil</i>	(Plural, <i>adillah</i>) Proof, evidence
<i>Dhihar</i>	Calling them mothers
<i>Diwan Al-Madhalim</i>	The Board of Grievances (Saudi Arabia)
<i>Ghayr mahram</i>	Stranger according to <i>Shari'ah</i>
<i>Hadd</i>	(Plural: <i>hudud</i>) The Qur'anic prescribed punishments
<i>Hadhaanah</i>	Custody, guardianship
<i>Hadith</i>	(Plural, <i>ahadith</i>) The verbalized form of a tradition of the Prophet (pbuh) constitutive of his <i>Sunnah</i> .
<i>Hanafite</i>	One of the four schools of Jurisprudence founded by <i>Imam</i> Abu Hanifah.
<i>Hanbalite</i>	One of the four schools of Jurisprudence founded by <i>Imam</i> Ahmad ibn Hanbal.
<i>Hijaz</i>	The Western region of Saudi Arabia
<i>Hukm</i>	(Plural <i>ahkam</i>) ruling
<i>Ijma'</i>	Islamic legal consensus
<i>Ijtihad</i>	Juridical reasoning of a qualified Muslim jurist
<i>Iillah</i>	Reason, cause
<i>Istihsan</i>	Juristic preference

<i>Istis-hab</i>	Presumption of continuity
<i>Madh-hab</i>	(Plural, <i>madhhahib</i>) School of Islamic jurisprudence
<i>Mahr</i>	Dowry, the money and/or property that a husband must pay to his wife when they get married
<i>Mahram</i>	Male relative a woman cannot marry, such as the father and brother.
<i>Maalikite</i>	One of the four schools of jurisprudence, founded by <i>Imam</i> Malik ibn Anas.
<i>Mujtahid</i>	One who exercises <i>ijtihad</i>
<i>Makrooh'</i>	Disliked
<i>Musawat</i>	Equality
<i>Nafs</i>	Soul or person
<i>Nass</i>	Religious text of the Qur'an or the <i>Sunnah</i>
<i>Nadhar</i>	Personal consideration
<i>Nushuz</i>	Rebelliousness, disloyalty and ill conduct
<i>Qa'idah</i>	(Plural, <i>qawa'id</i>) Rules of <i>fiqh</i> (jurisprudence)
<i>Qisas</i>	Retaliatory punishment
<i>Qiyas</i>	Analogical reasoning
<i>Ra'y</i>	Opinion
<i>Raa'ish</i>	The person who arranges for corruption (bribes) to take place.
<i>Sahabah</i>	(Singular: <i>sahabi</i>) The Prophet's companions
<i>Shafi'ite</i>	One of the four schools of Jurisprudence founded by <i>Imam</i> Ash-Shafi'i.
<i>Salaf</i>	Predecessors, ancestors. As <i>Salaf as-Salih</i> – the

righteous predecessors – refers to the early generations of Muslims including the Prophet’s companions (*sahabah*) and those who succeeded them (*tabi’un*)

<i>Shari’ah</i>	Islamic law
<i>Shura</i>	Consultation
<i>Siwak</i>	A small stick used to clean the teeth
<i>Sunnah</i> or <i>Hadith</i>	The tradition of Prophet Muhammad (pbuh)
<i>Sura</i>	A chapter of the Qur’an
<i>Tabi’un</i>	(Literally, the Followers) These constitute the generation of Muslims who were born after the death of the Prophet (pbuh) but who were contemporaries of the <i>sahabah</i> (Companions)
<i>Tashri’</i>	Legislation
<i>Taqnin</i>	Codification
<i>Ta’zir</i>	Discretionary punishment
<i>Tafsir</i>	Exegesis of the Qur’an
<i>Talaq</i>	Divorce
<i>Uff!</i>	A word of contempt
<i>‘Urf</i>	Custom usage practice
<i>Usul al-fiqh</i>	Principles of Islamic jurisprudence
<i>Ulama</i>	(Singular, <i>alim</i>) Scholars or jurists
<i>Ummah</i>	The Muslim community at large
<i>Wali</i>	The guardian (the person in charge of taking care of someone)

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The Shura Council Law, Royal Order no. A/91, 27/8/1412 AH/ 1 March 1992, *Umm Al-Qura* gazette no. 3397, 2/9/1412 AH/ 5 March 1992.

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Arab Charter on Human Rights, adopted by the Council of the League of Arab States on 22 May 2004.

Charter of the United Nations, signed on 26 June 1945, in San Francisco, at the conclusion of the United Nations Conference on International Organization, and came into force on 24 October 1945.

International Covenant on Economic, Social and Cultural Rights, adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966 and entered into force on 3 January 1976.

International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Sup (no. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171.

Vienna Convention on the Law of Treaties; signed at Vienna on 23 May 1969; entered into force on 27 January 1980.

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2008.

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Court Approval no. 350/S/A; dated 4 *Rabi' Ath-Thani* 1428 AH/21 April 2007.

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General Court of Riyadh; Case no. 148/SH, dated 19 *Safar* 1427 AH/19 March 2006.

General Court of Riyadh; Case no. 20/497, dated 26 *Dhul-Qa'dah* 1424 AH/18 January 2004; Appellate Court's Approval no. 66/SH/A, dated 17 *Muharram* 1425 AH/8 March 2004.

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Summary Court of Madinah, Case no. 5/102, dated 1432 AH/2011.

Summary Court of Jeddah; Case no. 1006, dated 7 *Rabi' Al-Awwal* 1425 AH/26 April 2004; Appellate Court Approval no. 1/5/279/C; dated 4 *Jumada Ath-Thaniyah*, 1425 AH/21 July 2004.

Summary Court of Makkah; Case no. M1/2/30624, dated 8 *Jumada Ath-Thaniyah* 1413 AH/3 December 1992.

Summary Court of Makkah; Case no. M1/2/37014, dated 26 *Ramadhan* 1431 AH/15 September 2010.

Summary Court of Makkah; Case no. 41844/2/1, dated 5 *Muharram* 1431 AH/ 22 December 2009.

Unaizah Court; Case no. 8/1257, dated 4 *Jumada Al-Ula* 1407 AH/5 January 1987; Appellate Court's Approval no. 244/SH/A; dated 26 *Rajab* 1407 AH/26 March 1987.

Chapter I: General Introduction

1. Introduction

This dissertation provides an analytical and comparative study of the application of Islamic law (*Shari'ah*) and the international human rights law in the Kingdom of Saudi Arabia. It also discusses the extent to which Saudi Arabia has dedicated itself to the implementation of some articles of some of the international human rights instruments, such as the Convention on the Rights of the Child (CRC)¹ and the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW).² The dissertation further considers some reservations which Saudi Arabia has entered to some international human rights treaties based on its commitment to the domestic laws which are largely drawn from Saudi Arabia's interpretation of Islamic Law (*Shari'ah*).

The dissertation is divided into six chapters. The first chapter provides an introduction to the dissertation and discusses the research objectives, the research questions, the challenges I encountered in the course of conducting the research and the strategies I adopted in dealing with them, and the methodology I adopted in the research.

The second chapter deals with the theoretical analysis of the sources of the Saudi law, which is based on Saudi Arabia's interpretation of the *Shari'ah*. This provides a general background for the present study as well as material for conducting a comparative study with some of the provisions of international human rights law. In other words, it presents the function of the *Shari'ah* in the Saudi legal system and outlines the sources of *Shari'ah* and its internal system for development. It clearly states the main sources of this law, namely the Qur'an and the

¹ United Nations, Convention on the Rights of the Child (CRC), CRC/C/GC/12, Geneva, 25 May-12 June 2009.

² The Convention on the Elimination of all Forms of Discrimination against Women (CEDAW) G.A. res. 34/180, 34 U.N. GAOR Supp. (no. 46) at 193, U.N. Doc. A/34/46, entered into force 3 Sept. 1981.

Sunnah, being its principal sources, and considers two other secondary sources that are generally agreed upon by Muslim jurists, namely the *ijma'* (consensus) and the *qiyas* (analogical reasoning). This chapter also provides an analysis of the sources of international law to set the background for analysis and comparison intended in the dissertation with the *Shari'ah* as applied in Saudi Arabia.

It is perhaps important to note here that while Islamic law is understood to be based on divine sources in origin, the Saudi legal system, while based on *Shari'ah*, is also interactive with international law. It is necessary, therefore, for any study of the interaction of the *Shari'ah* and international law in Saudi Arabia to establish a clear understanding of international law as it exists today.

The third chapter tackles the issue of the domestic application of international human treaties in Saudi Arabia. It clearly states that notwithstanding the various political and legal developments towards the internationalization of the concept of human rights, many rights have not been realised in practice. It also observes that despite the fact that the Universal Declaration of Human Rights (UDHR)³ declared human rights for all human beings in 1948 with the aim of reinforcing a universal realisation of international human rights, these rights are still not realised by everyone. Indeed, there exist a number of economic, social, political, cultural and religious differences among the various countries in the world which obviously hinder the realisation of this objective.

It is for this reason that even though Saudi Arabia has ratified a number of international human rights treaties, it has entered some reservations to some articles of some of these treaties on the basis of the *Shari'ah*. The reason for such reservations is that some articles of such treaties are perceived to be inconsistent with Article 1 of the Basic Law of Governance, which states:

³ The Universal Declaration of Human Rights (UDHR) G.A. res. 217A (III), U.N. Doc A/810 at 71 (1948).

The Kingdom of Saudi Arabia is a fully sovereign Arab Islamic State. Its religion shall be Islam and its constitution shall be the Book of God and the *Sunnah* (traditions) of His Messenger.

It is observed that Saudi Arabia has entered some general reservations to CEDAW and CRC. Saudi reservations need to be reconsidered to make them specific and compatible with the object and purpose of the relevant treaties.

The fourth chapter examines the rights of women before Saudi courts, focusing on family matters, which are most relevant to the rights of women. These include marriage, divorce, custody, maintenance and polygamy. To this end, it discusses some women's rights, which the Kingdom of Saudi Arabia has protected, as well as some aspects of justice that the *Shari'ah* protects for everyone.

The chapter also makes it clear that the various forms of injustice to which many women are subjected in Saudi Arabia must not be attributed to the *Shari'ah* or to the domestic laws, but rather to the established, deep-rooted non-Islamic practices that are prevalent among some people in the country. It states that, contrary to common belief, women are entitled to the civil, political, social, economic and cultural rights under the *Shari'ah*. It is observed that some Qur'anic verses have been interpreted out of their proper Qur'anic and social contexts, in ways that actually favour the biased legal practices currently practised in Islamic jurisdictions. In fact, once Qur'anic verses are interpreted in their proper Qur'anic, social and historical contexts, it will be clear that the Qur'an never discriminates on the basis of gender.

The fifth chapter brings to light the issue of domestic violence, which obviously has a negative effect on the enjoyment of human rights by women in many countries including Saudi Arabia. It provides some definitions of domestic violence and examines the problem of domestic violence against women in Saudi Arabia. It also provides an overview of the major causes of

domestic violence against women in Saudi Arabia, presents some cases of domestic violence before Saudi courts and sheds some light on the measures taken by the Saudi government to combat domestic violence against women.

The chapter also tackles this problem both in the international and domestic legal frameworks, clearly stating the Islamic standpoint on the issue, namely that Islamic law, and Saudi Arabia for that matter, whose laws are essentially derived from the two main sources of *Shari'ah*, strongly rejects all forms of violence against women. It also discusses the common forms of violence against women in Saudi Arabia and suggests a number of recommendations towards more effective protection of women against violence in the country. The chapter also attempts to be as objective and impartial as possible concerning the full reality of the lives of woman in Saudi Arabia, citing relevant facts and figures in this regard.

The dissertation makes it clear that the Kingdom of Saudi Arabia adopts the dualistic approach to international treaties, which asserts that there are two different legal systems which exist side by side within different spheres of action—the international level and the domestic level, as opposed to the monistic approach which states that there is one system of law, with international law as an element alongside all the various branches of domestic law.

It is important to note that some aspects of Islamic law (such as the recognition of polygamy) are not compatible with international human rights law. This raises a possible conflict between international human rights law and the Saudi Arabian domestic law. It is for this reason that in the event of a disagreement between international law and the Saudi law, courts in Saudi Arabia generally resort to the domestic law, which is based on the provisions of the *Shari'ah*, and discard the international law with regard to human rights. It is partly in this context that Saudi Arabia has entered some reservations to international human rights treaties.

It is worth noting here that in the interaction with international human rights law the impact has not been only one-sided, in that Islamic law has influenced the international human rights law, but international human rights law has also challenged and significantly influenced the evolution and reform of Islamic law in various Muslim states including Saudi Arabia. Article 18 of the International Covenant on Civil and Political Rights (ICCPR),⁴ for instance, guarantees freedom of thought and religion. The initial draft of the article included ‘freedom to change one’s religion or belief’ as in Article 18 of the UDHR, and was opposed by Saudi Arabia. As a compromise, the ICCPR wording was altered to include, instead, ‘freedom to have or adopt a religion or belief of one’s choice.’⁵

The sixth chapter presents a summary of the main points discussed in the dissertation, the obstacles to progress, based on my experience in laying down regulations for the laws of procedure before *Shari’ah* courts and the law of criminal procedure, with regard to the Saudi judiciary which assumes a dual judicial system, namely the ‘general judiciary’, as represented by the courts and the ‘administrative judiciary’, as represented by the Board of Grievances. It also makes mention of the obstacles in the way of executing judicial decisions in the Kingdom as well as the hurdles which negatively affect the performance of the new code of law practice.

The chapter also presents a number of recommendations concerning personal status law, based on my career and experience as a judge in the General Court since 1413 AH (1992) and given the multiplicity of personal status cases and their discrepancy with commercial, criminal and real estate cases.

⁴ International Covenant on Civil and Political Rights. G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (no. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171.

⁵ General Comment no. 22: The right to freedom of thought, conscience and religion (Article 18, forty-eighth session, 30/07/1993, CCPR/C/21/Rev.1/Add.4.

I have used the terms ‘Islamic law’ and ‘*Shari’ah*’ interchangeably, as I see them to be technically synonymous concepts, for they both include the Qur’an, the *Sunnah* of Prophet Muhammad (that is his sayings, actions and tacit approval), analogical reasoning (*qiyas*) and the consensus of Muslim scholars (*ijma’*). This is contrary to the view adopted by some writers, such as Mashood Baderin,⁶ who makes a clear distinction between the *Shari’ah*, which he describes as strictly referring to the fundamental sources of Islam, namely, the Qur’an and the authenticated traditions (*Sunnah*) of Prophet Muhammad (pbuh),⁷ and Islamic law which he defines as the law or rulings that are derived from the *Shari’ah* (the Qur’an and the *Sunnah*) by Muslim jurists and applied by judges.

Regarding Qur’anic references, I have particularly relied on Yusuf Ali’s *Holy Qur’an: English Translation of the Meanings and Commentary*, published in Madinah, Saudi Arabia, by the King Fahd Complex for the Printing of the Qur’an. In these references, the figure on the left side of the column shows the number of the chapter or *surah*, while that on its right is the number of the verse. When the reference is to the chapter of the Qur’an, I have used the term Holy Qur’an. Thus Holy Qur’an, 2:4, for instance, means the fourth verse of the second chapter of the Qur’an. The only change I have made in Yusuf Ali’s translation is that instead of using old English pronouns, such as *ye* and *thou*, I have used their modern equivalents.

I would like to mention here that the cases which I have discussed in Chapter IV, namely ‘Rights of Women before Saudi Courts in Family Matters’, are in the main deeds, some of which I have obtained from my judicial colleagues while the research was in preparation between 17 October 2009 and 21 February 2010. I have mentioned the number of the judicial case and the

⁶ See Mashood A. Baderin, and Manisuli Ssenyonjo, *International Human Rights Law: Six Decades after the UDHR and Beyond*, (Surrey and Burlington: Ashgate Publishing Limited, 2010), p. 340.

⁷ ‘Pbuh’ stands for ‘peace be upon him’. Muslims generally say this in veneration of Prophet Muhammad whenever his name is mentioned.

name and place of the court in which the litigation took place, but I have not mentioned the real names of the parties to the litigation, in compliance with resolution no. 162 issued by the Council of Ministers on 17 *Jumada Al-Ula*, 1423 AH/ 26 August 2002 C.E., which stresses the importance of not revealing the true identity of the litigants.

It is also noteworthy that the Hegira calendar, the Muslim system of dividing a year of 354 days into 12 months and starting to count the years from the Hegira, or Prophet Muhammad's migration from Makkah to Madinah, is the established and approved calendar in the Kingdom of Saudi Arabia. To give the English reader the exact date of the publication of books I have referred to and the various dates of the judicial cases mentioned in the dissertation, among other things, I have supplied the corresponding Gregorian calendar alongside the Hegira calendar.

2. Research Objective

- To show the extent to which sources of Islamic law (*Shari'ah*) as applied in Saudi Arabia are in conformity with the sources of international law with regard to the issue of human rights.
- To show the extent to which international human rights instruments are implemented by Saudi courts.
- To show to what extent Islamic law protects human rights, particularly the rights of women in Saudi Arabia.
- To show to what extent Saudi Arabia has managed to tackle the issue of domestic violence, particularly violence against women.

3. Research Questions

The dissertation examines the application of the *Shari'ah* and international human rights law in the Kingdom of Saudi Arabia and tackles a number of issues in this respect. In order to achieve this aim, I have attempted, to the best of my ability, to answer the following research questions, which, in turn, create the structure of the dissertation, namely:

1. How are human rights applied in Saudi Arabia?
2. What are the obstacles to the realisation of women's human rights in Saudi Arabia?

4. Challenges

In the course of conducting the present research, I encountered a number of challenges. One of these was the scarcity of material on the subject, which was mostly in the form of old editions mainly written in Arabic. The Saudi cases discussed in the dissertation were all in Arabic, and I had to search for them in a number of issues of *Al-Adl* journal, one of the publications of the Saudi Ministry of Justice, as well as in the Saudi family code law, in written form. This task entailed a great deal of effort, visiting a large number of Saudi courts in the hope of finding such cases and incorporating them into the dissertation.

Furthermore, modern studies on human rights, despite their huge number, are characterised by their descriptive discourse, while the actual need is for a scientific and objective study to be conducted that deals with human rights, determines specific means to safeguard them and spells out specific remedies for violating them.

Besides, Saudi laws have not been updated in such a way as to be in harmony with the international human rights treaties, which the Kingdom of Saudi Arabia has ratified. Worse still, judicial decisions are not reported or compiled, hence there are significant differences among

judges as to the judicial rulings in such areas as personal status and criminal rulings. This was also behind the arduous effort I had to make while conducting the present research.

5. Methodology

The research employs a predominantly textual analysis methodology, a data-gathering process whereby valid inferences can be made by interpreting and coding textual material. This represents an objective tool of analysing data as it provides evidence contained in texts. The subject matter required a parallel reading of texts used in international human rights instruments and jurisprudential texts extracted from the sources of Islamic law (*Shari'ah*). These are represented by the primary sources of the *Shari'ah*: the Qur'an and the *Sunnah* (the sayings, actions and tacit approval of Prophet Muhammad) and its secondary sources, as represented by the unanimous agreement of Islamic scholars (*ijma'*) and analogical reasoning (*qiyas*), as well as the Saudi laws which tackle the issues discussed in the dissertation.

The research also employs the comparative method with a view to comparing the applicable international human rights instruments with both Islamic law (*Shari'ah*) and Saudi laws which address the issues relevant to the subject of this study. This method is also objective as it makes the study more structured and conclusions derived more precise.

Chapter II: The Sources of the Saudi Islamic Law (*Shari'ah*) and International Law

1. Introduction

Saudi Arabia's legal system is based on rules of the *Shari'ah* (Islamic law). Thus, Saudi Arabia's supreme law is declared to be the Qur'an and the *Sunnah*. Accordingly, it is essential to understand the sources of Islamic law in order to understand the context in which international law is applied in Saudi Arabia.

The Qur'an and the *Sunnah* are the primary sources of *Shari'ah*. In addition to these two sources, there are two other sources, generally agreed upon by Muslim jurists, namely, *ijma'* (consensus) and *qiyas* (analogical reasoning).¹ Thus, the four primary sources of *Shari'ah* are in this order of importance: the Qur'an, the *Sunnah*, *ijma'* and *qiyas*.

Additionally, there are several kinds of legal reasoning employed by jurists when the primary sources are silent on a matter under question, such as *istihsan* (juristic preference), *istis-hab* (presumption of continuity) and *'urf* (custom).² Muslim jurists must always seek the answer in the Qur'an and the *Sunnah* and then the practice of the early Muslims. If no answer is to be found in all the previous mentioned sources, jurists will apply their own reasoning (*ijtihad*) to interpret the law. Therefore, *ijtihad* is not a source but an activity and struggle to discover the law from the main texts and to apply it to a new situation. However, it is not permitted to exercise *ijtihad* when the Qur'anic text is clear and unambiguous on the matter under study.³

¹ John L. Esposito, *Women in Muslim Family Law*. 2nd edition, (New York: Syracuse University Press, 2001), pp. 3-5.

² Ebrahim Musa, 'Language of change in Islamic Law: Redefining Death in Modernity' in R. S. Khare (ed.), *Perspectives on Islamic Law, Justice and Society*, (Plymouth: Rowman & Littlefield Publishers Inc., 1999), pp. 162-3.

³ Esposito, John L. *Islam: The Straight Path*. 3rd edition, (New York/Oxford: Oxford University Press, 1998), p. 83. For a discussion of *ijtihad*, see generally Imran Ahsan Khan Nyazee, *Theories of Islamic Law: The Methodology of Ijtihad*. (Islamabad: Islamic Research Institute and International Institute of Islamic Thought, 1995).

Hence, the aim of this chapter is to analyse and discuss the most important sources of the *Shari'ah*. At the end of the chapter, an overview is offered on the role of the *Shari'ah* in the Saudi Arabian legal system in order to link the rules with legal practice.

2. Islamic Law in Saudi Arabia and Its Sources

Saudi Arabia was established in the eighteenth century upon deep-rooted Islamic principles.⁴ The current Saudi Arabian State, which was declared as such by King 'Abdul-Aziz in 1932, upholds its duty to carry out the commandments of the faith, to respect morality and justice, and to support and supervise such religious occurrences as the pilgrimage to Makkah. Fortunately, the state has not been the 'victim of Western political imperialism nor the target of Christian missionary efforts; instead, it has been an independent state, enjoying firm and mutually advantageous relations with different parts of the world.'⁵

It has been argued that most Islamic states in the twentieth century would pay greater attention to development and economics rather than to theology.⁶ However, this expectation has not proved accurate in the case of Saudi Arabia, where the political leadership has sought to strike a balance between modernisation and Islamic tradition so that there would be no contradiction between them. In addition, the secular systems in some Middle East states have largely failed because they could not reach their goals, and fewer states offer satisfaction for the religious aspirations of their citizens.⁷ As Dr. Bakr 'Abdullah Bakr, the Rector of the University of Petroleum and Minerals, Saudi Arabia, points out,

⁴ William Ochsenwald, 'Saudi Arabia and the Islamic Revival,' *International Journal of Middle East Studies*, 1981, vol. 13, no. 3, p. 273.

⁵ *Ibid.* pp. 271-286, p. 274.

⁶ *Ibid.*

⁷ *Ibid.*

Some countries have sacrificed the soul of their culture in order to acquire the tools of Western technology. We want the tools but not at the price of annihilating our religious and cultural values.⁸

Despite the massive development of Saudi Arabia in all aspects, the state has managed to keep the rules of Islamic law in force, with the guidance of scholars and jurists (*ulama*).⁹ Under the Saudi legal system, the legislative power belongs to God, as expressed in the Qur'an, and to the Prophet (pbuh), to interpret the Qur'an. The task of the judiciary is to extricate concrete laws, by rationalising the Qur'an and the *Sunnah*. Thus, the Qur'an and the *Sunnah* stand at the head of the legal norms applicable in Saudi Arabia, and no regulations may be contradictory to Islamic law and its principles.¹⁰

Hence, in March 1992, the Saudi government adopted the first written Basic Act. This declared Islam to be the Kingdom's religion and God's Book and the *Sunnah* of the Prophet (pbuh) its constitution (Article 1); and that the Saudi government's power is derived from the Holy Qur'an and the Prophet's tradition (Article 7). Under Article 48, the courts are to 'apply the rules of the *Shari'ah* in the cases that are brought before them, in accordance with what is indicated in the Book (the Qur'an) and the *Sunnah*, and the statutes decreed by the ruler which do not contradict the Book (the Qur'an) or the *Sunnah*.'¹¹

The *Shari'ah*, which is Islam's legal system, differs in one very important and significant way from the legal traditions of the Western world: it governs, or at least informs, every aspect

⁸ *Ibid.*

⁹ Joseph Kechichian, 'The Role of the *Ulama* in the Politics of an Islamic State: The Case of Saudi Arabia,' *International Journal of Middle East Studies*, Feb., 1986, vol. 18, no. 1, p. 57.

¹⁰ Dahman 'Abdur-Rahman, 'A Contribution to the Study of the Koranic Sources of Saudi Arabian Business Law,' *Arab Law Quarterly*, 1988, vol. 3, pp. 132-150.

¹¹ Articles 1, 7 and 48 of the Saudi Basic Act which was enacted by Royal order number A/90 on 27/8/1421 AH (1992). See <http://www.saudinf.com/main/c541.htm>. Accessed on 25 January 2011. See also Rashid Aba-Namay, 'The Recent Constitutional Reforms in Saudi Arabia,' *International and Comparative Law Quarterly*, 1993, vol. 42, pp. 295-331. See also Ayoub M Al-Jarbou, 'Judicial Independence: Case Study of Saudi Arabia,' *Arab Law Quarterly*, 2004, vol. 19, pp. 12-3.

of the life of a Muslim. While Western law confines itself largely to matters relating to crime, contract, civil relationships and individual rights, the *Shari'ah* deals with more than that. In fact, its rulings have been developed to help Muslims comprehend how they should lead every aspect of their lives according to God's wishes. Many of the topics covered by the *Shari'ah* involve situations in the daily life of Muslims that seem rather ordinary and commonplace to the outside observer. However, Muslims simply wish to ensure that their actions comply with Islamic law and rites.

The argument that the *Shari'ah* has been confined in its concept for a long time to ritual and personal status or family law without further reference to other areas of law has been refuted by Frank Vogel, who points to an explicit lack of knowledge about Islamic law and its application. He argues that this lack is the result of the West's conviction that Islamic law is confined to the above-mentioned areas of law.¹² He further adds that Islamic law covers every single aspect of the law: criminal, commercial, contract, property and other legal aspects.¹³

The Islamic law is based in its entirety on Islam, which is in daily practice, belief and philosophy, a complete system of social morality, laying down rules which regulate people's lives in every aspect if they wish to act in God's way. If a person chooses to go against the *Shari'ah*, their offence is against God and not against the state.¹⁴

The Islamic law, just like other world legal systems, has its own distinguishing processes of categorizing and formulating legal norms. However, unlike other legal systems, Islamic law developed in the evolving contexts of Muslim societies and their political regimes.¹⁵

¹² Frank E. Vogel, *Islamic Law and the Legal System: Studies of Saudi Arabia*, (Leiden: Koninklijke Brill N. V., 2000), pp. xi-xiii.

¹³ *Ibid.* pp. xi-xii.

¹⁴ Peter Mansfield, *The New Arabians*, (New York: J.G. Ferguson Publishing Co., 1981), p. 21.

¹⁵ *Ibid.*

2. Sources of Islamic Law

2.1 Primary Sources

This section considers two primary sections of Islamic law, namely the Qur'an and the *Sunnah*.

2.1.1 The Qur'an

In the past three decades or so, Western scholars have increased their studies and writing about the Qur'an, primarily because the Qur'an stands at the very heart of any Islamic system or school of thought.¹⁶ Therefore, studying Islamic law in general or its sources in particular should always start by studying the Qur'an.¹⁷

The word Qur'an means 'that which should be recited, read, or studied' and technically refers to the book embodying the revelation from Allah to his Prophet Muhammad (pbuh).¹⁸ In Arabic books on the foundations of jurisprudence (*usul al-fiqh*), another definition of the Qur'an that refers to it as 'that transferred to us recurrently, starts with *Surat Al-Fatihah* (The Opening Chapter of the Qur'an) and concluded with *An-Nas* (Mankind).'¹⁹ Although the name Qur'an is well known and cited most widely, it can also be referred to as the Book²⁰ or the Criterion,²¹ among other names, as mentioned in some Qur'anic verses.

The Qur'an is believed to have been gradually revealed to Prophet Muhammad (pbuh). In the Prophetic era, revelation used to come in two ways: (1) through the words and the meaning

¹⁶ Fazlur Rahman Malik, 'Some Recent Books on the Qur'an by Western Authors,' *The Journal of Religion* (January 1984), vol. 64, no. 1, pp. 73-4.

¹⁷ Irshad 'Abdal-Haqq, 'Islamic Law: An Overview of its Origin and Elements,' *Journal of Islamic Law*, (1996), vol. 1, p. 19. However, not many western scholars seem to have studied the subject of Qur'an Virtues (*Fada'il Al-Qur'an*). To read about this subject, see Asma Afsaruddin, 'The Excellences of the Qur'an: Textual Sacrality and the Organisation of Early Islamic Society,' *Journal of the American Oriental Society*, (Jan-Mar., 2002), vol. 122, no. 1, pp. 1-24.

¹⁸ Irshad 'Abdal-Haqq, 'Islamic Law: An Overview of its Origin and Elements,' *Journal of Islamic Law*, (1996), vol. 1, p. 19.

¹⁹ Muhammad Al-Khudari, *Usul Al-Fiqh*, [Sources of Islamic Jurisprudence], (Cairo: Dar Al-Kitab Al-Hadith, 2001), p. 207.

²⁰ Holy Qur'an, 2:2: 'This is the Book, whereof there is no doubt.'

²¹ Holy Qur'an, 25:1: 'Blessed be He who sent down the Criterion [of right and wrong].'

of the Qur'an and (2) through the meaning which the Prophet (pbuh) formulated in his own words, which is the *Sunnah* or *Hadith* (the tradition).²² Therefore, Muslims consider the Qur'an as the immortal miracle.²³ In addition, the Qur'an is understood by Muslims as proof that the prophecy of Muhammad (pbuh) is the last in a series of revelations of Divine law that began with the Torah.²⁴ The descent of the Qur'an upon Prophet Muhammad (pbuh) and his deliverance of the Qur'an to his companions is, therefore, the supreme revelatory event in Islam. It has been pointed out that each verse and even each word, is, in a sense, an event in its own right, for each represents an utterance on the part of the Angel Gabriel and then subsequently on the part of the Prophet.²⁵

Although the Qur'an is written, it is not codified as a form of positive law in order to deal with different matters.²⁶ Accordingly, the Qur'an and even the *Sunnah* of the Prophet in many cases do not necessarily state or specify the law, but they contain some indications (*dalalah* or *amarah*; plural, *dalalat* and *amarat*, respectively) and rulings (*ahkam*; singular, *hukm*) that lead to the causes ('*ilal*'; plural, '*illah*'). It is the task of the *mujtahidun* (jurists; singular, *mujtahid*) to apply those indications and rulings on any given question for which there is no ready or exact answer.²⁷ This flexibility enables jurists to apply the Qur'an as a living instrument to reflect different circumstances over time and to suit different places.

²² Ahmad Al-Ghazali, *Muqadimat ash-Shari'ah Al-Islamiyah, (Introduction to Islamic Law)*, (Cairo: Dar An-Nahdah al Arabia, 2007), p. 43.

²³ *Ibid.*, p. 49. See also Irshad 'Abdal-Haqq, 'Islamic Law: An Overview of its Origin and Elements', *Journal of Islamic Law*, (1996), vol. 1, p. 20.

²⁴ Bernard K. Freamon, 'Slavery, Freedom and the Doctrine of Consensus in Islamic Jurisprudence,' *Harvard Human Rights Journal* (1998), vol. 11, pp. 14-5.

²⁵ Bernard Weiss, 'Knowledge of the Past: The Theory of *Tawatur* According to Ghazali,' *Studia Islamica*, 1985, no. 61, pp. 81-105, p. 83.

²⁶ Ayoub M. Al-Jarbou, 'Judicial Independence: Case Study of Saudi Arabia,' *Arab Law Quarterly*, (2004), vol. 19, p. 13.

²⁷ Wael B. Hallaq, 'Was the Gate of Ijtihad Closed?', *International Journal of Middle East Studies* (March 1984), vol. 16, no. 1, pp. 3-41, p. 4.

2.1.2 *Sunnah* (The Prophet's Tradition)

The linguistic meaning of *Sunnah* is 'manner or method, whether good or bad'. In addition, *Sunnah* could mean the opposite of heterodoxy.²⁸ Therefore, for example, a person is considered to be 'on the *Sunnah*' if he conducts his life according to the guidance of Prophet Muhammad (pbuh). At the same time, if a person's conduct is in contravention of the Prophet's guidance, it is considered heterodox.²⁹ Khadduri confuses the linguistic and technical meanings of *Sunnah* when he regards it as consisting of elements in existence in the customary law of pre-Islamic Arab society.³⁰ That ancient time could be referred to linguistically as a *Sunnah* if we use the meaning that Schacht terms 'the living tradition'.³¹

Technically, the *Sunnah* is 'the Prophet's statements and behaviour (doings and sayings) and his approval or disapproval of the statements and behaviour of others that he observed during his lifetime'.³² Usually, the doings and sayings of the Prophet (pbuh) are named *Hadith* or *Sunnah*. However, looking at the detailed meanings of the two concepts, there could be some insignificant differences. The *Sunnah* refers to the Prophet's actual life, actions, sayings, judgements or attitudes, whereas the *Hadith* relates mostly to what he said in expressive opinion on a subject. Clearly, therefore, the word *hadith* is subsumed under the idea of *Sunnah*, as *Sunnah* is more comprehensive in its terms of reference, but in common usage they are used interchangeably. In fact, this is not problematic because the Prophet's sayings and actions are equally regarded as valid sources of Islamic law. In one *hadith*, Prophet Muhammad (pbuh) said, 'I have left amongst you that to which if you hold fast you will never go astray after me: The

²⁸ Ahmad Al-Ghazali, *Muqaddimat Ash-Shari'ah Al-Islamiyah (Introduction to Islamic Law)*, (Cairo: Dar An-Nahdah Al-Arabia, 2007), p. 61.

²⁹ Muhammad Al-Khudari, *Usul Al-Fiqh [Sources of Islamic Jurisprudence]*, (Cairo: Dar Al-Kitab Al-Hadith, 2001), p. 212.

³⁰ Majid Khadduri, 'Nature and Sources of Islamic Law' *George Washington Law Review*, (1953-1954), vol. 22, p. 4.

³¹ Joseph Schacht, *Origins of Muhammadan Jurisprudence*, (Oxford: Oxford University Press, 1950), p. 58.

³² Bernard K. Freamon, 'Slavery, Freedom, and the Doctrine of Consensus in Islamic Jurisprudence,' *Harvard Human Rights Journal*, 1998, vol. 11, p. 19.

Book of Allah and my *Sunnah*.³³ This citation is an example of a *hadith* indicating clearly the supremacy of the Qur'an and then the *Sunnah* over all the other sources.³⁴

Scholars have divided the *Sunnah* into three categories: (1) expressive words, *qawliyah*; (2) actions, *fi'liyah*, such as praying, ablution or pilgrimage; and (3) tacit approval of actions in the presence or absence of Prophet Muhammad (pbuh), on the condition that he knew about it.³⁵ However, some of the Prophet's personal actions such as sleeping or eating and similar actions are not considered a part of the *Sunnah*, but only their descriptions or his methods of doing those actions are considered as *Sunnah*.³⁶

After the descent of the revelation, the Qur'an described the Prophet as a good example, or '*uswah*', of true conduct:

You have indeed in the Messenger of Allah a beautiful pattern [of conduct] for any one whose hope is in Allah and the Final Day, and who engages much in the praise of Allah.³⁷

Accordingly, this verse signals to all Muslims that the conduct of the Prophet (pbuh) as a *Sunnah* gives examples of Islamic law because the eternal divine order was revealed in the Qur'an and manifested in the Prophet's words and deeds. In addition, the *Shari'ah* and the *Sunnah* are not abstract orders; rather, they draw the lines on fixed law and exact requirements with the Prophet (pbuh) as an example of the true and the lawful.³⁸ Thus, the *Sunnah* is critically important to the interpretation, explanation and clarification of the general principles revealed in the Qur'an because it translates those general principles into specific rules applicable for

³³ Imam Malik, *Al-Muwatta'*, tradition vol. 2, p. 899, no. 1594.

³⁴ Irshad Abdal-Haqq, 'Islamic Law: An Overview of its Origin and Elements,' *Journal of Islamic Law*, 1996, vol. 1, pp. 21-2.

³⁵ Muhammad Madkor, *Al-Madkhal Lil-Fiqh Al-Islami (An Introduction to Islamic Jurisprudence)*, (Cairo: Dar Al-Kitab Al-Hadiith, 2005), p. 208. Some scholars have separated the Prophet's physical actions as a fourth category, whereas they come under categories 1 and 2. See Irshad 'Abdal-Haqq, 'Islamic Law: An Overview of its Origin and Elements,' *Journal of Islamic Law*, 1996, vol. 1, p. 22.

³⁶ *Ibid.*

³⁷ Holy Qur'an, 33:21.

³⁸ Smirov A, 'Understanding Justice in an Islamic Context: Some Points of Contrast with Western Theories,' *Philosophy East and West, Seventh East-West Philosophers' Conference*, (July 1996), vol. 46, no. 3, pp. 337-350.

directing the conduct of daily life. For example, the Qur'an is not specific on the rights of women, as in the Qur'anic verse, 'And women shall have rights similar to the rights against them.'³⁹ The *Sunnah* clearly specifies this. When a man asked the Prophet (pbuh), 'What is the right of our wives upon us?' he replied, 'You must feed her whenever you eat and clothe her whenever you clothe himself; you must not hit her on the face, must not call her ugly and must not boycott her except in the house.'⁴⁰ Also, while the Qur'an commands men to spend on their wives,⁴¹ the *Sunnah* clearly confirms this, as the Prophet (s) observed, addressing the assembled men during the Farewell Pilgrimage, 'You must bear the cost of their food and clothing on equitable terms.'⁴²

Even on matters such as divorce, on which the Qur'an is relatively more detailed, the *Sunnah* provides further details. In the Qur'an for example, in Chapter 2 (*Surat Al-Baqarah*), some important rules of divorce are stated in verses 227 and 237. Moreover, Chapter 65 of the Qur'an is entirely devoted to the rules of divorce and is even entitled *Surat At-Talaq* (divorce).

However, the application of the Qur'an rules on divorce is explained in the *Sunnah*. These are reported in the most authentic books of *hadith*, such as *Sahih Al-Bukhari* and *Sahih Muslim*. In each one of these books there is a separate detailed section which relates especially to the *ahadith* (sing. *hadith*, traditions) regarding issues and rules on divorce.⁴³

In fact, there are many examples that show the importance of the *Sunnah* as a source of Islamic law, without which it would be difficult to apply the general Qur'an rules. The Qur'an

³⁹ Holy Qur'an, 2:228.

⁴⁰ *Sunan Abu Dawud, Book of Marriage, hadith no. 2142.*

⁴¹ *Ibid.*, 2:233.

⁴² *Saheeh Muslim, hadith no. 1218.*

⁴³ For the collection of *Sahih Al-Bukhari*, *Sahih Muslim*, *Sunan Abu-Dawud* and Malik's *Al-Muwatta* translated into English, see University of Southern California at:

<http://www.usc.edu/schools/college/crcc/engagement/resources/texts/muslim/hadith/>. Accessed on 25 January 2011. For a survey of the law of divorce in Islam, see Samir Elatar, *Divorce: Its History, Legislation and Modern Reality*, (London: Dar At-Taqwa, 2005), pp. 19-58.

describes the statements of the Prophet (pbuh) as ‘no less than inspiration sent down to him’⁴⁴. Hence, the entire life of the Prophet (pbuh) is an example which any exegete of the Qur’an enjoins people to follow because the Qur’an clearly states:

Take what the Messenger assigns to you, and deny yourselves that which he withholds from you. And fear Allah; for Allah is strict in Punishment.⁴⁵

Most of the *Sunnah* was not recorded in writing until after the death of the Prophet (pbuh), in order not to confuse it with the Qur’an. The Prophet’s companions (*sahabah*) were the first generation who transmitted the *Sunnah* to the successors, or the *tabi’un*, who then passed the traditions on to the successors of the successors.⁴⁶ The central problem with the process of transmission of the *Sunnah* was its authenticity, which can be seen clearly through the classification of the *Sunnah* into recurrent *mutawatir*, which are the most authentic, and *ahad*, which are less authentic.⁴⁷ The term *tawatur* means literally the recurrence of past events to impart knowledge, ‘*at-tawatur yufedu al-‘ilm*’.⁴⁸ Therefore, scholars in the third century of the Hegira (AH), 850 to 915 CE, distinguished between the genuine and false *ahadith* (traditions) by classifying them into flawless or authentic (*sahih*), good (*hassan*) and weak (*dha’if*).⁴⁹ Some scholars called that period of time and the process of classification as the *sahih* movement during which scholars dedicated their time to analysing every single *hadith* and its chain of narrators, including their characters and reputations. As a result, six acclaimed *hadith* books were compiled by scholars that are highly acclaimed both for their knowledge and character, namely: **(1) *Sahih Al-Bukhari*** by Muhammad ibn Isma’il ibn Al-Mughirah Al-Bukhari, **(2) *Sahih Muslim*** by Abu

⁴⁴ Holy Qur’an, 53:4.

⁴⁵ *Ibid.*, 59:7.

⁴⁶ Irshad ‘Abdal-Haqq, ‘Islamic Law: An Overview of its Origin and Elements,’ *Journal of Islamic Law*, 1996, vol. 1, pp. 23-24.

⁴⁷ Wael B. Hallaq, ‘The Authenticity of Prophetic *Hadith*: a Pseudo-Problem,’ *Studia Islamica*, 1999, no. 89, pp. 75-90.

⁴⁸ Weiss, Bernard, ‘Knowledge of the Past: The Theory of *Tawatur* According to Ghazali,’ *Studia Islamica*, 1985, no. 61, p. 86.

⁴⁹ Dahman ‘Abdur-Rahman, ‘A Contribution to the Study of the Koranic Sources of Saudi Arabian Business Law,’ *Arab Law Quarterly*, 1988, vol. 3, pp. 132-150.

Al-Hasan Muslim ibn Al-Hajjaj, (3) *Sunan Abu Dawud* by Sulayman ibn Al-Ash'ath, (4) *Sunan At-Tirmidhi* by Abu 'Isa Muhammad ibn 'Isa At-Tirmidhi, (5) *Sunan An-Nasa'i* by Abu 'Abdur-Rahman Ahmad ibn Shu'ayb, and (6) *Sunan Ibn Majah* by Muhammad ibn Yazid Ibn Majah.⁵⁰

2.2 Secondary Sources

This section considers five secondary sources, namely *ijma'*, *qiyas* (analogical Reasoning), *istihsan* (jurists' preference), *istis-hab* (presumption of continuity and *'urf* (custom).

2.2.1 *Ijma'* (Consensus)

Ijma', or consensus, is the third source of the *Shari'ah* after the Qur'an and the *Sunnah*.⁵¹ The Qur'an and the *Sunnah* are sources of proofs (*adillah*; singular, *dalil*) while *ijma'*, although not a textual source like the first two, is considered a source of proof of the authority of the Qur'an and *Sunnah*.⁵² Thus, as Freamon pointed out, *ijma'* is often used as a confirmatory method of the law, especially when there is no definitive answer in the Qur'an or the *Sunnah*.⁵³

Ijma' literally means an 'assembly' but, in a legal sense, it means a 'consensus or agreement among scholars, *mujtahidun*, from Prophet Muhammad's community in a particular era after the death of the Prophet (pbuh), on a particular issue of law.'⁵⁴ Several points should be noted from this definition:

⁵⁰ Irshad 'Abdal-Haqq, 'Islamic Law: an Overview of its Origin and Elements,' *Journal of Islamic Law*, 1996, vol. 1, pp. 22-24.

⁵¹ Wael B. Hallaq, 'On the Authoritativeness of Sunni Consensus,' *International Journal of Middle East Studies*, 1986, vol.18, no. 4, p. 427.

⁵² George F. Hourani, 'Ghazali on the Ethics of Action,' *Journal of the American Oriental Society*, 1976, vol. 96, no. 1, p. 85.

⁵³ Bernard K. Freamon, 'Slavery, Freedom and the Doctrine of Consensus in Islamic Jurisprudence,' *Harvard Human Rights Journal*, 1998, vol. 11, p. 21.

⁵⁴ Muhammad Madkor, *Al-Madkhal Lil-Fiqh Al-Islami (An Introduction to Islamic Jurisprudence)*, (Cairo: Dar Al-Kitab Al-Hadith, 2005), p. 218. Although there are other definitions of the word '*ijma'*', the one mentioned here is the most common.

- (1) The consensus must be between scholars even if their number is low and, therefore, a consensus of non-scholars cannot be considered an *ijma'*;⁵⁵
- (2) The *ijma'* must be among all Muslim scholars without any single contradiction;⁵⁶
- (3) The question must be applicable for *ijtihad*, meaning that it does already have a definitive rule, '*qat'i addalalah*,' in either the Qur'an or the *Sunnah*; and
- (4) The *ijma'* must be after the death of the Prophet (pbuh) because if he was alive, he would agree and that would mean the answer to the question would have been approved as a *Sunnah*, or if he disagreed the consensus would be null and void.⁵⁷

Therefore, if the Qur'an and *Sunnah* do not provide an unambiguous ruling on a particular question, the consensus of scholars rises to the status of positive law and becomes binding on all future generations of Muslims.⁵⁸ In fact, the function of *ijma'* is not only to validate or reject an opinion but rather to see what aspects of the Qur'an and *Sunnah* are or are not accepted as a basis for that opinion. Thus, the consensus of the entire Muslim community, as represented by its scholars, must be right because they should not be able to agree on error.⁵⁹ The companions (*sahabah*) started the practice of consensus as a form of consultation (*shura*), where each participant would have to resort to individual reasoning (*ijtihad*) in his or her own right.⁶⁰ However, 200 years after the death of the Prophet (pbuh), Ash-Shafi'i

⁵⁵ The *ijma'* could be expressive (*qawli*) or practical ('*amali*) or silent (*sukuti*). See Muhammad Madkor, *Al-Madkhal Lil-Fiqh Al-Islami (An Introduction to Islamic Jurisprudence)*, pp. 220-1.

⁵⁶ Some scholars consider the opinion of the majority as an *ijma'*.

⁵⁷ Muhammad Al-Khudari, *Usul Al-Fiqh (Sources of Islamic Jurisprudence)*, 1st edition, (Cairo: Dar Al-Kitab Al-Hadith, 2001), pp. 267-271.

⁵⁸ Bernard K. Freamon, 'Slavery, Freedom and the Doctrine of Consensus in Islamic Jurisprudence,' *Harvard Human Rights Journal*, 1998, vol. 11, pp. 22-3. For example, the consensus of the companions (*sahabah*) during the caliphate of Abu Bakr that refusal to pay *Zakah* is apostasy which is equal to refusal to offer the obligatory prayers.

⁵⁹ Wael B. Hallaq, 'Considerations on the Function and Character of Sunni Legal Theory,' *Journal of the American Oriental Society*, (Oct. – Dec., 1984), vol. 104, no. 4, pp. 680-1.

⁶⁰ Irshad 'Abdal-Haqq, 'Islamic Law: an Overview of its Origin and Elements,' *Journal of Islamic Law*, 1996, vol. 1, pp. 30-1.

determined a practical approach and rule to the practice of consensus rules which he called *ijma'* in his book *Al-Umm*.⁶¹

The crucial question in *ijma'* is who may participate in the decision-making process. In his book noted above, *Imam Ash-Shafi'i*⁶² followed the *Madinah* jurisprudence of *Imam Malik ibn Anas*, which held that Muslim scholars (*ulama*) in the local community could resolve any juridical matter not resolved by the Qur'an or the *Sunnah*. However, *Ash-Shafi'i*, in his later book, *Ar-Risalah* (the Epistle), changed his view to make the proper *ijma'* one that included the entire community, both lay and scholarly.⁶³ The second view of *Imam Ash-Shafi'i* was not widely accepted even by some of his own students. The common view was that mentioned by *Imam Al-Ghazali*, which held that the community (*ummah*) can reach a consensus on general issues, but on technical and specialized points of law, only qualified jurists, the *mujtahidun*, count.⁶⁴ Being a qualified *mujtahid* (singular form of *mujtahidun*) means that a person has a superior knowledge of Classical Arabic and full knowledge of the revelatory texts of the Qur'an and the *Sunnah*, along with the ability to reason and to distinguish between authentic and non-authentic *ahadith*.⁶⁵ In addition to this, he must have high moral character and integrity.⁶⁶ Therefore, scholars, especially from the *Hanbalite* school of jurisprudence,

⁶¹ See Muhammad ibn Idris Ash-Shafi'i, *Kitab Al-Umm*, (Cairo: Dar Ash-Sha'b, 1996).

⁶² Muhammad Ibn Idris Ash-Shafi'i is well known as *Imam Ash-Shafi'i*, for short. He was born in Ghizza, Asqalan, in Palestine in 150 AH, the very year the great *Imam Abu Hanifah* passed away. He memorized the Holy Qur'an while he was still a young child and died in Egypt in the year 204 AH (819/820 CE). See <http://www.islamcan.com/fourimams.shtml>. Accessed on 25 January 2011.

⁶³ Bernard K. Freamon, 'Slavery, Freedom and the Doctrine of Consensus in Islamic Jurisprudence,' *Harvard Human Rights Journal*, (1998), vol. 11, p. 24.

⁶⁴ Abu Hamid Al-Ghazali, *Al-Mustasfa Min 'Ilm Al-Usul*, vol. 1, (Cairo: Maktabat Al-Jundi, 1322 AH), p. 181. See also Majid Khadduri, 'Nature and Sources of Islamic Law,' *George Washington Law Review*, (1953-1954), vol. 22, p. 15.

⁶⁵ Irshad 'Abdal-Haqq, 'Islamic Law: An Overview of its Origin and Elements,' *Journal of Islamic Law*, 1996, vol. 1, p. 31.

⁶⁶ Bernard K. Freamon, 'Slavery, Freedom and the Doctrine of Consensus in Islamic Jurisprudence,' *Harvard Human Rights Journal*, (1998), vol. 11, p. 22. To read about *ijtihad* and the argument about the closing gate of *ijtihad*, see Wael B. Hallaq, 'On the Origins of the Controversy about the Existence of *Mujtahids* and the Gate of *Ijtihad*,' *Studia Islamica*, 1986, no. 6, pp. 129-141. See also Wael B. Hallaq, 'Was the Gate of *Ijtihad* Closed?,' *International Journal of Middle East Studies*, (Mar., 1984), vol. 16, no. 1, pp. 3-41. See also George Makdisi, 'The Significance of the *Sunni* School of Law in Islamic Religious History,' *International Journal of Middle East Studies*, Feb., 1979, vol. 10, no. 1, pp. 1-8.

emphasise texts as understood by the earliest Muslims (*salaf*) and the companions (*sahabah*), as they are the knowledge link between the Prophet (pbuh) and the Muslims of later times.⁶⁷

2.2.2 *Qiyas* (Analogical Reasoning)

One of the meanings of *usul al-fiqh*, or sources of Islamic jurisprudence, is the four main sources of Islamic law, namely, the Qur'an, *Sunnah*, *ijma'* and *qiyas*. Therefore, *qiyas* is a means to establish a judgement in cases where there is no answer in the first three sources.⁶⁸ Accordingly, after the Qur'an and *Sunnah*, the *ijma'* is ranked higher than the *qiyas* because it represents collective reasoning, whereas the *qiyas* results from individual reasoning.⁶⁹

Literally, *qiyas* means to measure or ascertain the length or quality of a thing by means of comparison between two things of which one is taken as the criterion for evaluating the other. Technically, the meaning of *qiyas* is 'the extension of a *Shari'ah* value from an original case, or *asl*, to a new case, because the latter has the same effective cause as the former'.⁷⁰ Kamali explains the definition, stating that 'the original case is regulated by a given text, and the *qiyas* seeks to extend the same textual ruling to the new case'.⁷¹ This extension is made by virtue of the commonality of the effective cause, or '*illah* between the original case and the new case, and it is through such an application of analysing commonality that *qiyas* is justified.

Recourse to analogical reasoning is only warranted if the solution to the new case cannot be found in the Qur'an, the *Sunnah*, or a definite *ijma'*.⁷² Indeed, the *qiyas* is a mechanism for promoting the development of Islamic law. God revealed textual signs and indications (*dalalat*)

⁶⁷ George F. Hourani, 'The Basic Authority of Consensus in Sunnite Islam', *Studia Islamica*, 1964, no. 21, pp. 36-7.

⁶⁸ Nabil Shehaby, 'Illa and Qiyas in Early Islamic Legal Theory,' *Journal of the American Oriental society*, Jan.– Mar., 1982, vol. 102, no. 1, pp. 27-8.

⁶⁹ Irshad 'Abdal-Haqq, 'Islamic Law: an Overview of its Origin and Elements,' *Journal of Islamic Law*, 1996, vol. 1, p. 32.

⁷⁰ Muhammad Hashim Kamali, *Principles of Islamic Jurisprudence*, (Cambridge: Islamic Texts Society, 1991), p. 197.

⁷¹ *Ibid.*

⁷² *Ibid.*

that require the human rational faculty to discover the law.⁷³ Real life endlessly gives rise to new incidents and cases in which humans must search the indications within revealed wisdom in order to find the way to arrive at the right conduct in new scenarios.⁷⁴ Scholars see the rule of *qiyas* as rising from several Qur'anic verses. For example:

If they had only referred it to the Messenger or to those charged with authority among them, the proper investigators would have tested it from them [direct].⁷⁵

In addition, the Prophet (pbuh) advised 'Abdullah ibn Mas'ud, Mu'ad ibn Jabal and Abu Musa Al-Ash'ari (may Allah be pleased with them)⁷⁶ to seek similarities in judgements between things when there was no definitive answer in the Qur'an or the *Sunnah*.⁷⁷ Accordingly, to keep *qiyas* connected with the Qur'an and *Sunnah*, such analogies must always be formed independently from a revealed source and not a separate opinion. Therefore, any analogical reasoning based on revelation (*qiyas shar'i*) starts from rules (*ahkam*; singular, *hukm*) known exclusively from the Qur'an. The reason for that rule ('*illah*') is to be inferred from the original case, and then applied to the new case to extend the divine rules to the new incident.⁷⁸ Hence, the cause ('*illah*') is the cornerstone and the denominator between the original rule and the new one. Moreover, the indispensable requirement of the presence of an '*illah*' in the *qiyas* restricts and guarantees that the scholars' interpretation remains within the frame of the primary sources of Islamic law and does not result from reasoning at their own pleasure.⁷⁹

⁷³ Wael B. Hallaq, 'Muslim Rage and Islamic Law,' *Hastings Law Journal*, 2002-2003, vol. 54, p. 1709.

⁷⁴ Wael B. Hallaq, 'Considerations on the Function and Character of Sunni Legal Theory,' *Journal of the American Oriental Society*, Oct. – Dec., 1984, vol. 104, no. 4, pp. 679- 689.

⁷⁵ Holy Qur'an, 4:83.

⁷⁶ The Arabic formula of this English equivalent is generally used after the name of one of the Prophet's companions is mentioned.

⁷⁷ Muhammad Madkor, *Al-Madkhal Lil-Fiqh Al-Islami (Introduction to Islamic Jurisprudence)*, (Cairo: Dar Al-Kitab Al-Hadith, 2005), p. 236.

⁷⁸ George F. Hourani, 'Ghazali on the Ethics of Action,' *Journal of the American Oriental Society*, 1976, vol. 96, no. 1, p. 85.

⁷⁹ Wael B. Hallaq, 'Considerations on the Function and Character of Sunni Legal Theory,' *Journal of the American Oriental Society*, Oct. – Dec. 1984, vol. 104, no. 4, p. 682.

Moreover, one must distinguish between the pure interpretation of text and the *qiyas*. In pure interpretation, the jurist seeks to ascertain the meaning of the text to apply it in a given situation, whereas in the *qiyas* the jurist seeks to understand the reason (*'illah*) to see whether it is applicable to the new case or not.⁸⁰

2.2.3 *Istihsan* (Jurists' Preference)

The rationalization and systemization of Islamic law occurred mostly between the second and the eighth centuries of the Muslim calendar with an increase in the use of analogical reasoning (*qiyas*). At that time, *qiyas* was interchangeably called *ra'y* (opinion), *nadhrah* (personal consideration) or *istihsan* (juristic preference). Therefore, *istihsan* was originally a form of *qiyas* as the two concepts share the same element of determination, *'illah* (reason), although they differ in the procedure.⁸¹

Imam Abu Hanifah was the first to use the concept of *istihsan* by choosing the least harmful conclusion when there are two traditions standing for the same subject.⁸² *Istihsan*, then, can be defined as 'the process of selecting one acceptable alternative solution over another because the former appears more suitable for the situation at hand.'⁸³ Thus, the jurist must exert his faculties to choose what is most suitable for the public interest.⁸⁴ A number of *Hanafite*⁸⁵ and

⁸⁰ Bernard K. Freamon, 'Slavery, Freedom, and the Doctrine of Consensus in Islamic Jurisprudence,' *Harvard Human Rights Journal*, 1998, vol. 11, p. 30.

⁸¹ Wael B. Hallaq, 'Considerations on the Function and Character of Sunni Legal Theory,' *Journal of the American Oriental Society*, Oct. – Dec., 1984, vol. 104, no. 4, p. 681.

⁸² Majid Khadduri, 'Nature and Sources of Islamic Law' (1953-1954), *George Washington Law Review*, vol. 22, p. 12.

⁸³ Doi, 'Abdur Rahman I, *Shari'ah: The Islamic Law*, 5th edition, (London: Ta Ha publishers, 1984), p. 81.

⁸⁴ *Ibid.* p. 38.

⁸⁵ The *Hanafite* school is one of the four schools of Islamic law named after its founder *Imam* Abu Hanifah (An-Nu'man ibn Thabit). He was born in Kufa, Iraq, in 80 (698 CE). He learned *'ilm al-fiqh* (Islamic jurisprudence) from Hammad ibn Abu Sulayman. He enjoyed the companionship of many notables of the *tabi'un* (the Prophet's Companions' Successors), and of *Imam* Ja'far As-Sadiq. He memorized innumerable Prophetic traditions. He was brought up to become a great judge, but he became an *imam al-madhab*. See <http://www.islamcan.com/fourimams.shtml>. Accessed on 25 January 2011.

*Hanbalite*⁸⁶ jurists have defined *istihsan* as the ‘abandoning of a judgement in favour of another.’⁸⁷ Clearly, both definitions have the same meaning. However, although the term *istihsan* is the most common one for this concept, jurists from the different *Sunni* schools (*madahib*, singular *madh-hab*) may refer to it differently. For example, the *Hanafite* school adopts the term *istihsan*, while the *Hanbalite* school calls it *istislah*⁸⁸ (reclamation).⁸⁹

In addition, Muslim jurists differ in the degree of importance which they accord to *istihsan*. The *Hanafite* jurists make the greatest use of *istihsan* in reasoning, whereas the *Hanbalites* and *Malikites*⁹⁰ make less use of it. *Imam* Ash-Shafi’i rejected the concept of *istihsan* because he thought that it was a form of purely human opinion without a link to textual proof.⁹¹ However, Al-Amidi, one of the *Shafi’ite* scholars, reported that *Imam* Ash-Shafi’i used the principle of *istihsan* in some instances.⁹²

Indeed, as Hallaq points out, even if some jurists rejected *istihsan*, they nonetheless used it under different cover and the differences between them were not significant. Hence, *istihsan* is not the arbitrary opinion of jurists but the result of carefully conducted analogy on the basis of

⁸⁶ The Hanbalite school is another school of Islamic law named after its founder *Imam* Abu ‘Abdullah Ahmad ibn Muhammad ibn Hanbal, born in Baghdad on 20th *Rabi’ Al-Awwal*, 164 AH. He died in the year 241 AH. See <http://www.islamcan.com/fourimams.shtml>. Accessed on 25 January 2011.

⁸⁷ Wael B. Hallaq, ‘Considerations on the Function and Character of Sunni Legal Theory,’ *Journal of the American Oriental Society*, Oct. – Dec. 1984, vol. 104, no. 4, p. 683.

⁸⁸ In fact, there is a slight difference between the concept of *istihsan* and *istislah/istihbab*. See Wael B. Hallaq, ‘Considerations on the Function and Character of Sunni Legal Theory,’ *Journal of the American Oriental Society*, Oct. – Dec., 1984, pp. 684 - 685. See also George F Hourani, ‘Ghazali on the Ethics of Action,’ *Journal of the American Oriental Society*, 1976, vol. 96, no. 1, pp. 85-6.

⁸⁹ ‘Abdur Rahman I Doi, *Shari’ah: The Islamic Law*, 5th edition, (London: Ta Ha publishers, 1984), p. 81.

⁹⁰ The *Malikite* school is another school of Islamic law, named after its founder *Imam* Malik ibn Anas ibn Malik ibn Abu Amir ibn ‘Amr ibn Al-Harith ibn Ghaman ibn Khuthayl (Al-Asbahee, a royal tribe branch of Himyar in Yemen). He was born in the year 93 AH in Madinah and died in 179 AH. See <http://www.islamcan.com/fourimams.shtml>. Accessed on 25 January 2011.

⁹¹ Muhammad Al-Khudari, *Usul Al-Fiqh (Sources of Islamic Jurisprudence)*, (Cairo: Dar Al-Kitab Al-Hadith, 2001), pp. 329-332.

⁹² Muhammad Madkor, *Al-Madkhal Lil-Fiqh Al-Islami (An Introduction to Islamic Jurisprudence)*, (Cairo: Dar Al-Kitab Al-Hadith, 2005), p. 239.

textual evidence. Moreover, whatever the question may be, *istihsan* must always rely on authoritative evidence (*dalil*).⁹³

2.2.4 *Istis-hab* (Presumption of Continuity)

The literal meaning of *istis-hab* is continuity; technically, it means keeping the original status of a past rule valid for the current and future time as long as there is no new rule or incidence to change it.⁹⁴

Jurists from the various *Sunni* schools consider the concept of *istis-hab* as a proof of the continuity of the original rule or status. Thus, from the principle of *istis-hab*, jurists formulated the general bases (*qawa'id*) of *fiqh*. However, *istis-hab* cannot be used to establish a new rule (*hukm*) for specific issues.⁹⁵ Therefore, Doi points out that *istis-hab* is more a rule of evidence rather than a method or process.⁹⁶ For example, a marriage contract continues unless dissolution is proved, and a missing person is presumed alive until his or her death is confirmed. In addition, a fundamental Islamic law principle is that a person is innocent until proven guilty.⁹⁷ In fact, this principle literally means the freedom of a man's conscience '*bara'at adh-dhimmah*' from all obligations to others, whether in civil or criminal matters, until the contrary is proven.⁹⁸ This principle is also well known in the West as the presumption of innocence but is mostly confined to criminal matters.

⁹³ Wael B. Hallaq, 'Considerations on the Function and Character of Sunni Legal Theory,' *Journal of the American Oriental Society*, Oct. – Dec., 1984, pp. 683-684.

⁹⁴ Muhammad Madkor, *Al-Madkhal lil-Fiqh Al-Islami*, pp. 249-253.

⁹⁵ 'Abdur Rahman I Doi, *Shari'ah, The Islamic Law*, (London: Ta Ha publishers, 1984), p. 83.

⁹⁶ *Ibid.*

⁹⁷ *Ibid.*

⁹⁸ Muhammad Al-khudari, *Usul Al-Fiqh*, 1st edition, (Cairo: Dar Al-Kitab Al-Hadith, 2001), p. 348.

2.2.5 'Urf (Custom)

'Urf, also known as 'adah, is considered as a source of law in all four schools of Islamic law. However, Muslim jurists give it differing degrees of importance. The Hanafites are the biggest users of 'urf, whereas the *Hanbalites* make the least use of it, and the *Malikites* and the Shafi'ites are in between. Thus, when *Imam* Ash-Shafi'i moved to Egypt, he changed some of his views on the law according to the new 'urf (custom) of the people in Egypt. However, as in any other source of Islamic law, 'urf must not contradict the existing principles of Islamic law or a definitive text (*nass*) in the Qur'an or the *Sunnah*.⁹⁹ Therefore, the prevailing 'urf must be measured against the Qur'an and the *Sunnah*. Hence, some 'urf gained recognition under *fiqh* (jurisprudence) as Islamic, whereas in fact *fiqh* determination could mean only that 'urf did not contradict any text of the Qur'an or the *Sunnah*.¹⁰⁰

Scholars consider that the permissibility of 'urf arises from several textual proofs, such as 'hold to forgiveness; command what is right'.¹⁰¹ The Prophet (pbuh) also said in a *hadith*, 'Whatever Muslims see as good is also good in the sight of Allah.'¹⁰² The Prophet's silence on some of the Arab peoples' customs was interpreted as his assent to their practice. Accordingly, 'urf has been defined as 'that which is practised by the people more often than not, and would not be invoked on the basis of practice by a few individuals or in a very limited geographic area.'¹⁰³

⁹⁹ Ahmad Al-Ghazali. *Muqaddimat ash-Shariah Al-Islamiyah (Introduction to Islamic Law)*, (Cairo: Dar An-Nahdah Al-Arabia, 2007), pp. 215-216.

¹⁰⁰ 'Abdur Rahim, *The Principles of Islamic Jurisprudence According to the Hanafi, Maliki, Shafi'i and Hanbali schools*. (New Delhi: Kitab Bhavan, 1994), pp. 131-2.

¹⁰¹ Holy Qur'an, 7:199.

¹⁰² Muhammad Madkor, *Al-Madkhal Lil-Hiqh Al-Islami (An Introduction to Islamic Jurisprudence)*, (Cairo: Dar Al-Kitab Al-Hadith, 2005), p. 230.

¹⁰³ Irshad 'Abdal-Haqq, 'Islamic Law: An Overview of its Origin and Elements,' *Journal of Islamic Law*, 1996, vol. 1, p. 34.

3. Sources of International Law

Generally, the sources of international law are divided into formal sources of law and material sources of law. The first are ‘legal procedures and methods for the creation of rules of general application which are legally binding on the addressees’¹ and include custom, conventions or treaties, and general principles of law. The second are those sources that ‘provide evidence of the existence of rules which, when proved, have the status of legally binding rules of general application.’² These secondary sources include judicial decisions, soft law instruments, and legal writers.³ This distinction of sources is not strictly used as a guideline by the International Court of Justice (ICJ); rather, the ICJ’s articles prioritise the application of sources of law in making a legal decision.

These sources, beginning with those that are considered formal, are examined in the following paragraphs.

3.1 Primary Sources of International Law

3.1.1 International Custom

Customary rules derive from the practice and behaviour of states. This was formalised in Article 38, which refers in paragraph (b) to ‘international custom’ as evidence of a general practice accepted as law.⁴ Rebecca Wallace differentiates between ‘mere usage’ and actual custom in the legal sense.⁵

¹ *Ibid.*

² *Ibid.*

³ Ian Brownlie, *Principles of Public International Law*, 6th edition, (Oxford: Oxford University Press, 2003), p. 3.

⁴ *Ibid.* p. 19.

⁵ Rebecca M.M. Wallace, *International Law*, (London: Sweet and Maxwell, 2005), p. 9. See also Luc Reydam, *Universal Jurisdiction: International and Municipal Legal Perspective* (Oxford: Oxford University Press, 2003), p. 7.

The significance of customary international law (CIL) emerges when treaties are not in effect or have become out-of-date because, although custom emerges out of a slow process, CIL is considered to be the ‘the first response to problems that need to be solved in international life.’⁶ Thus, while some codification of CIL exists, new customary laws continually emerge in response to the changing nature of life, and some issues remain mainly under the regulation of customary law including ‘state immunity, state responsibility, [and the] status of foreigners.’⁷

The other prime role that CIL plays is as a source of legal rules either when states are not party to a treaty or when a treaty does not have domestic application.⁸ This is particularly true in relation to basic human rights where ‘the nations of the world ... recognize that respect for fundamental human rights is in their individual and collective interest.’⁹

The universal jurisdiction of CIL allows national courts to ‘hear extra-territorial claims brought under international law.’¹⁰ In addition, drawing on CIL in the form of ‘executive, legislative and judicial precedents, international agreements, the recording expertise of jurists and commentators and other similar sources’,¹¹ domestic courts may uncover existing international legal principles. Finally, within CIL, there is a type known as *jus cogens* that ‘has peremptory force’ and cannot be abrogated by multi-lateral treaties or internal domestic laws.¹²

Malcolm N. Shaw notes that while custom has been sidelined as ‘cumbersome and unimportant and often of only nostalgic value’ in modern law, in international law it becomes dynamic due to the decentralised nature of the international system. It is, however, the ‘clumsy and slow-moving’ nature of customary law which brings it under attack as unable to effectively

⁶ *Ibid.*

⁷ *Ibid.*

⁸ Hannes Vallikivi, ‘Domestic Applicability of Customary International Law in Estonia,’ in *Juridical International Law*, 2002, VII, p. 28.

⁹ *Filartiga v. Pena-Irala*, IRL 77 (1988) 169 at (630 F. 2d 876 (2dCir. 1980) at 889). See Jurgen Brohmer, *State Immunity and the Violation of Human Rights*, (The Hague/Boston/London: Martinus Nijhoff Publishers, 1997), p. 48.

¹⁰ *Ibid.*, p. 45, para. 77.

¹¹ *Ibid.*

¹² *Ibid.*

evolve at the pace of the international community.¹³ Yet equally, there are times when the growth and emergence of CIL is more attractive to states than engaging in ‘self-conscious and static treaty making’ because it is a more dynamic and socially connected form.¹⁴

Another argument against the usefulness of CIL comes from Jack Goldsmith and Eric Posner who believe that it does not affect state behaviour.¹⁵ However, Noonan and Trachtman attack this argument as theoretically incorrect because they question the evidence of Goldsmith and Posner’s factual data and believe that the argument relies on an artificial separation of the motive of self-interest from that due to the law.¹⁶ Noonan and Trachtman counter-argue that CIL acts to create or alter pay-offs related to particular behaviours and therefore does, in fact, affect state behaviour by appealing to state self-interest.¹⁷

3.1.2 Treaties

Treaties are one of the means through which states deal with each other in a precise method of regulating relations between states.¹⁸ The Vienna Convention on the Law of Treaties, Article 2(2) defines a treaty as ‘an international agreement concluded between states in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.’¹⁹

As international law has moved from building bi-lateral to multi-lateral relationships, treaties have become increasingly important. They act to ‘clarify and improve rules of

¹³ Malcolm N Shaw, *International Law*, 5th edition, (Cambridge: Cambridge University Press, 2003), p. 103.

¹⁴ Noonan and Trachtman, no. 34, pp. 541-80.

¹⁵ *Ibid.*, pp. 541-80.

¹⁶ *Ibid.*

¹⁷ *Ibid.*

¹⁸ Malgosia Fitzmaurice, ‘The Practical Working of the Law of Treaties,’ in Malcolm D. Evans (ed.), *International Law*, 2nd edition, (Oxford: Oxford University Press, 2006), p. 187.

¹⁹ Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 331, 8 I.L.M. 679, entered into force 27 Jan 1980.

international law through the process of rendering them in binding written agreements’, while also ‘promot[ing] the coordination of uniform state behaviour in a variety of areas.’²⁰

Treaties are themselves immensely important as sources of international law because they require the express consent of the contracting parties. Treaties are known by many names²¹ and in application they bind only those ‘states that have agreed to be bound by their provisions.’²² Therefore, a state’s consent ‘is required before a state is bound by treaty obligations,’ which it must do of its own volition.’²³

Treaties rank highly in significance in part because they require consent and therefore can make room for consent with reservations. As of May 2011,²⁴ the International Law Commission (ILC) has provided ‘guidelines on reservations to treaties’ which has codified arguments about interpretive declarations and reservations in relation to treaties.²⁵ Treaties are also useful because they are able to cover a wide range of subject matters such as relationships between governments, the protection of people from governmental misuse of power, and the creation of international alliances for significant causes.²⁶ The place of treaties within the national legal structure varies; Britain, for example, requires an Act of Parliament to enable treaties to enter into English law.²⁷ In Saudi Arabia, a treaty can only be ratified after it has been discussed and

²⁰ Jonathan I. Charney, ‘Universal International Law,’ *The American Journal of International Law*, 1999, vol. 40, p. 1.

²¹ D.J. Harris, *Cases and Materials on International Law*, 6th edition, (London: Sweet and Maxwell, 2004), p. 42.

²² Malcolm N Shaw, *International Law*, 5th edition, (Cambridge: Cambridge University Press, 2003), p. 170.

²³ Jonathan I. Charney, ‘Universal International Law,’ vol. 40, 1999, p. 529.

²⁴ International Law Commission, *Guide to Practice on Reservation to Treaties*, adopted by the International Law Commission at its sixty-third session, finalized by the Working Group on Reservations to Treaties from 26 to 29 April, and on 4, 5, 6, 10, 11, 12, 17 and 18 May 2011. See http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/1_8_2011.pdf. Accessed on 29 Oct 2011

²⁵ ‘Abdulbari Altamni, ‘The Distinction between an Interpretive Declaration and a Reservation to Multilateral Conventions: a Model for Resolving the Problem,’ presented at the Saudi International Innovation Conference 2008, University of Leeds, 9-10 June 2008.

²⁶ United Nations Enable, International Norms and Standards Relating to Disability. Available at: <http://www.un.org/esa/socdev/enable/comp101.htm>. Accessed on 22 July 2011.

²⁷ Tim Hillier, *Sourcebook on Public International Law*, 2nd edition, (London: Cavendish, 1998), p. 43.

approved by the Council of Ministers.²⁸ This need for domestic approval of treaties is for some countries a drawback and sometimes makes soft law a preferable option because domestic approval and, therefore, accountability are not required in order for the state to sign up.

3.1.3 The General Principles of Law Recognised by the Community of Nations

Obviously, no law covers exactly all cases. Thus, when a court finds itself looking at a situation where there is no existing applicable law, government statute nor legal precedent, ‘the judge will proceed to deduce a rule that will be relevant, by analogy from already existing rules or directly from the general principles that guide the legal system.’²⁹ This concept of general principles emerged during the drafting of Article 38 for the ICJ when the Commission of Jurists was concerned about future cases where a lack of ‘any treaty’ and ‘established rule of customary law’ could lead to ‘a finding that a particular claim could neither be upheld nor rejected, for lack of any existing applicable rule of law’.³⁰

Thirlway notes that while the idea of civilized nations is clearly out of touch with our age, in the 1920s ‘some legal systems were then regarded as insufficiently developed to serve as a standard of comparison’ with other legal systems in order to extract shared legal principles.³¹ Shaw understands the role of general principles of law to be more important in international law because of ‘the relative underdevelopment of the system in relation to the needs with which it is faced’ and because international law has ‘no method of legislating to provide rules to govern new situations.’³²

²⁸ Shura Council. Available at: <http://www.shura.gov.sa/wps/wcm/connect/ShuraEn/internet/Home/>. Accessed on 17 December 2011.

²⁹ Malcolm N Shaw, *International Law*, 5th edition, (Cambridge: Cambridge University Press, 2003), p. 92.

³⁰ Hugh Thirlway, ‘The Sources of International Law,’ in Malcolm D. Evans (ed.), *International Law*, 2nd edition, (Oxford: Oxford University Press, 2006), p. 127.

³¹ *Ibid.*

³² Malcolm N Shaw, *International Law*, 5th edition, (Cambridge: Cambridge University Press, 2003), p. 93.

General principles of law (GPL) ‘often exist at a very high level of abstraction’, but their technical nature does not necessarily make them ‘rigid and inflexible’.³³ Rather, they can be amended, similarly to municipal law, and so undergo orderly change. Thus, unlike natural law, general principles of law are not considered unchangeable, and their objection does not of necessity undermine the legitimacy of general principles of law.³⁴

General principles of law ‘usually involve an element of analogy’.³⁵ However, the translation of municipal law into international law does not always work due to the significant difference in environment.³⁶ Generally, when a principle is seen to be inappropriate, it would also be inapplicable internationally for other reasons either because it is not a general principle or because it is at odds in some way with treaties or customary law.³⁷

One reason that there can be objections to the use of the GPL as a source of law is the difficulty in demonstrating that they actually exist. A principle is not considered ‘inherent in the very nature of law unless it exists in all systems of law.’³⁸ This is important to recognise because it means that a principle cannot be easily extrapolated from a specific municipal law system because there are various systems of law and what exists in one may not necessarily appear in another era. Thus, while we can find some evidence of GPL in ‘books on comparative law, in decisions of international tribunals or even in General Assembly resolutions’,³⁹ we have to be careful in assuming that this evidence is unequivocal. A tribunal can misinterpret law or, if time has passed, the law on which they drew may have changed. In terms of the General Assembly, the voting states may actually vote in favour of a resolution that in reality does not reflect its own

³³ *Ibid.*

³⁴ Michael Akehurst, ‘Equity and General Principles of Law,’ in *International and Comparative Law Quarterly*, vol. 25, no. 4, 1976, pp. 815-6.

³⁵ *Ibid.*

³⁶ *Ibid.*

³⁷ *Ibid.*

³⁸ *Ibid.*

³⁹ *Ibid.*

laws.⁴⁰ Thus, the only clear proof for the existence of a GPL is to be found ‘by examining the laws of different States.’⁴¹

Obviously it falls to the discretion of the International Court to decide which general principles are applicable in a specific case when neither customary nor treaty law can provide an answer.⁴²

3.2 Secondary Sources of International Law

3.2.1 Judicial Decisions

Brownlie recognises that judicial decisions give ‘authoritative evidence to the state of the law’, but are not themselves a formal source of law.⁴³ This fact is stated in paragraph 1(d) of Article 38 of the ICJ which refers to judicial decisions and teachings as ‘subsidiary means for the determination of rules of law.’⁴⁴ In international law, the application of judicial decisions is governed by Article 59, which states that ‘[t]he decision of the Court has no binding force except between the parties and in respect of that particular case.’ Therefore, while the ICJ and various tribunals may consider and be guided by previous cases, there is no obligation, via *stare decisis*, to abide by prior decisions.⁴⁵

According to Article 38, there is not a limitation on which judicial decisions may be considered applicable to international tribunals, so ‘if a national Court's decision is relevant it may be applied,’ but weighted according to the specific standing of the court internationally.

⁴⁰ *Ibid.*

⁴¹ *Ibid.*, pp. 815-9.

⁴² Malcolm N Shaw, *International Law*, 5th edition, (Cambridge: Cambridge University Press, 2003), pp. 98-9.

⁴³ Ian Brownlie, *Principles of Public International Law*, 6th edition, (Oxford: Oxford University Press, 2003), p. 19.

⁴⁴ Hugh Thirlway, ‘The Sources of International Law’, in Malcolm D. Evans (ed.) *International Law*, 2nd edition, (Oxford: Oxford University Press, 2006), p. 129.

⁴⁵ Rebecca M.M. Wallace, *International Law*, (London: Sweet and Maxwell, 2005), p. 9.

Thirlway notes that of the judicial decisions referred to in Article 38, obviously ‘the decisions of the ICJ [are] the highest authority.’⁴⁶

While judicial decisions are not formal sources for the development of international law, they ‘are regarded as authoritative evidence of the state of the law’⁴⁷ because they are always derived from the principal sources of law. Thus, when reaching a judicial decision, whether in international or municipal courts, a judge will always state its derivation from one of the three principal sources: treaties, custom or general principles.⁴⁸

With the emergence of more judicial and arbitral decisions clarifying rules of law, states often choose to quote from such decisions in disputes, as do individuals, judges and arbitrators in the ICJ. However, the Court itself usually will not refer to such teachings but will refer to its own previous judgements.⁴⁹

3.2.2 Soft Law

Soft law refers to ‘any international instrument other than a treaty containing principles, norms, standards or other statements for expected behaviour.’⁵⁰ The popularity and effectiveness of soft law are due to several qualities. First, in a non-binding format, consensus is easier to reach, resulting in greater detail and provisions due to there being less concern about the consequences of non-compliance. Second, states may more readily agree to non-binding agreements because they have no need to pursue a domestic ratification of the agreement, which then frees them from concerns of democratic accountability. Third, soft law instruments are

⁴⁶ Hugh Thirlway, ‘The Sources of International Law,’ in Malcolm D. Evans (ed.), *International Law*, 2nd edition (Oxford: Oxford University Press, 2006), p. 130.

⁴⁷ *Ibid.*

⁴⁸ Ian Brownlie, *Principles of Public International Law*, 6th edition, (Oxford: Oxford University Press), 2003, p. 19.

⁴⁹ *Ibid.*, p. 129. See also D.J. Harris, *Cases and Materials on International Law*, 6th edition, (London: Sweet and Maxwell, 2004), pp. 50-1.

⁵⁰ Dinah Shelton, ‘International Law and “Relative Normativity,”’ in Malcolm D. Evans (ed.), *International Law*, 2nd edition, (Oxford: Oxford University Press, 2006), p. 180.

flexible and sometimes provide the foundation of a process that leads to a multilateral treaty. Such was the case with the UDHR⁵¹ which preceded the 1966 covenants regarding human rights.

As a foundational instrument, soft law has great significance⁵² and can help interpret or amplify a treaty or act in concert with a treaty to ‘provide evidence of *opinio juris* for the possible emergence of the rule of customary international law.’⁵³ D.J. Harris sees soft law as ‘an asset to the doctrine of international law’, helping ‘to map out the legal implications of legally non-binding instruments, in particular also their relation with full-fledged legal rules.’⁵⁴ Due to the informal structure of the international legal scene, soft law is more useful and more prominent there than in the national legal system.⁵⁵ Soft and hard laws exist in ‘a dynamic interplay’⁵⁶ and have some manners of interplay that emerge in international law.⁵⁷

It is worth noting here that Islamic law recognises soft law as long as it does not oppose any of its provisions. Under Articles 1 and 7 of the Saudi Basic Law of Governance, the constitution of the Kingdom of Saudi Arabia is the Qur’an and the Prophet’s traditions (*Sunnah*). Therefore, all sources of law applicable in Saudi Arabia including soft law ‘must not contravene the principles laid out in the Qur’an and the *Sunnah*.’⁵⁸

⁵¹ *Ibid.*

⁵² ⁵² Alan Boyle, ‘Soft Law in International Law-Making,’ in Malcolm D. Evans (ed.), *International Law*, 2nd edition, (Oxford: Oxford University Press, 2006), p. 142.

⁵³ Alan Boyle, ‘Soft Law in International Law-Making,’ in Malcolm D. Evans (ed.), *International Law*, 2nd edition, (Oxford: Oxford University Press, 2006), pp. 143-4.

⁵⁴ Harris, *Cases and Materials on International Law*, 6th edition, (London: Sweet and Maxwell, 2004), pp. 50-1.

⁵⁵ *Ibid.* p. 63.

⁵⁶ Dinah Shelton, ‘International Law and “Relative Normativity”,’ in Malcolm D. Evans (ed.), *International Law*, 2nd edition, (Oxford: Oxford University Press, 2006), p. 181.

⁵⁷ *Ibid.*, pp. 182-3.

⁵⁸ ‘Abdur-Rahman Salim Al-Saif, *Ab’ad Al-Huquq Al-Iqtisadiya Wa Al-Ijtima’iyah Fi Al-Islam (Dimensions of the Social and Economic Rights in Islam: An Analytical Study in the Light of Modern Theories of Human Rights and their Applications in the Kingdom of Saudi Arabia)*, (Riyadh: Maktabat Ar-Riyadh, 2008), p. 168.

3.2.3 Writers

It was mentioned above that legal writing can be and is consulted in the process of identifying the general principles of law. Thus, as Wallace notes, ‘[T]eachings of the most highly qualified publicists of various nations may be referred to as a subsidiary means in an attempt to settle a dispute.’⁵⁹ This status accorded to ‘the most highly qualified publicists of various nations’ was set historically in the statutes of the International Court.⁶⁰ One reason for the considerable influence of writers on international law is the very ‘youthfulness’ of this legal system.⁶¹ Historically, legal ‘analyses and juristic opinions’ were more significant than the role of state practice and court decision legally. For two hundred years, 1600-1800, ‘[w]riters ... determined the scope, form, and content of international law.’⁶²

Due to the informal nature of the international legal system, where there are no ‘supreme authorities and institutions’, writers have a significant responsibility ‘to inject an element of coherence and order into the [legal system] as well as to question the directions and purposes of the rules.’⁶³ This position is counterbalanced by Thirlway, who perceives that with the increase in judicial decisions, ‘the emphasis in practice has shifted to the contribution made by such decisions, and away from the views of “the most highly qualified publicists of the various nations.”’⁶⁴ Thus, the importance of writers is diminishing as the importance of the existing body of judicial and arbitral decisions is growing.⁶⁵ Nevertheless, there is a potential for highly qualified Islamic writers to make a critique on international law from an Islamic perspective.

⁵⁹ Rebecca M.M. Wallace, *International Law*, (London: Sweet and Maxwell, 2005), p. 29.

⁶⁰ D.J. Harris, *Cases and Materials on International Law*, 6th edition, (London: Sweet and Maxwell, 2004), p. 53.

⁶¹ Rebecca M.M. Wallace, *International Law*, (London: Sweet and Maxwell, 2005), p. 29.

⁶² Malcolm N Shaw, *International Law*, 5th edition, (Cambridge: Cambridge University Press, 2003), p. 106.

⁶³ *Ibid.*

⁶⁴ Hugh Thirlway, ‘The Sources of International Law’, in Malcolm D. Evans (ed.), *International Law*, 2nd edition, (Oxford: Oxford University Press, 2006), p. 129.

⁶⁵ *Ibid.*

It is worth noting here that Saudi Arabia is the only country in the world that still retains some mechanisms of the classical model of Islamic law existing in a state.⁶⁶ To ensure there is clarity in the law for litigants, scholars have become more and more in favour of codification. The country has now partially codified some laws, but until it formulates a full modern civil code, it will have a systematic, unified and coherent legal system.⁶⁷

The law in Saudi Arabia is based on the doctrine of *siyasa shari'ah*, which means governance through the harmonisation between *fiqh* and the practical demands of governance. The Saudi monarch may take any action required for the public good as long as it does not infringe the *Shari'ah*.⁶⁸ Also the provision of *siyasah shar'iyah* allows the judge to make religious ordinances in the best interests of good administration of government.⁶⁹

Islamic Law as state law can fit into the current global world. In fact, all Muslim majority states are members of the United Nations. This proves that *siyasa* is recognised even today.⁷⁰ Some scholars contend that with only a few exceptions Islamic Law is compatible with international human rights law.⁷¹

In my view, international treaties are essentially universal 'contracts' and 'alliances', and Saudi Arabia is amongst those states that have signed such treaties. Therefore, it remains bound by these treaties as long as they do not contravene the *Shari'ah* or affect the state's sovereignty, following in this the dictates of the Qur'an and the Prophet's *Sunnah*, which it takes as its constitution, as article 7 of the Basic law of Governance states that Saudi government's power is

⁶⁶ George Sfeir, 'The Saudi Approach to Law Reform', *The American Journal of Comparative Law*, vol. 36, p. 753.

⁶⁷ *Ibid.*, p. 753

⁶⁸ J.S. Nielson, J.S. and L. Christoffersen, *Shari'a as Discourse*, 1st edition, (Burlington: Ashgate Publishing: 2010), p. 158.

⁶⁹ Joseph Brand, 'Aspects of Saudi Arabian Law and Practice', *Boston College International and Comparative Law Review*, 1986, p. 20.

⁷⁰ Ali Ahmad, 'The Role of Islamic Law in the Contemporary World Order', *Journal of Islamic Law and Culture*, 2001, vol. 6, p. 157.

⁷¹ J.C.N. Paul, 'Islam and the State: The problems of establishing legitimacy and human rights', *Cardozo Law Review*, 1991, vol. 12, p. 1067.

derived from the Holy Qur'an and the Prophet's tradition. The Qur'an also states, 'O you who believe! Fulfil all obligations.'⁷² 'Fulfil the covenant.'⁷³

Indeed, the Prophet (pbuh) approved an agreement that was concluded before the advent of Islam, whereby the Quraysh and other Arabian tribes established the alliance that they would stand on the side of victims of injustice. The Prophet (pbuh) attended the conclusion of this pact, which the Arabs called the Alliance of Fudul, (literally, 'the alliance for charity').⁷⁴ In fact, this alliance constituted the first organisation of human rights which was witnessed and approved by the Prophet (pbuh). Therefore, any international law, regardless of its origin, which does not go against the *Shar'iah* and is bound to benefit people may be considered a way of helping one another with a view to furthering virtue and God-consciousness, as the Qur'an states, 'Help one another in goodness and in piety. Do not help one another in sin and transgression.'⁷⁵ This verse generally commands Muslims to engage in any collective activity that would serve the interest of mankind and strictly prohibits them from engaging in any activity that is bound to do harm to mankind in any way.

4. Conclusion

This chapter has discussed the main sources of Islamic law, both the primary and secondary ones. It has showed that the Qur'an and *Sunnah* are the primary and the most important sources of Islamic law as applied in Saudi Arabia. All the other sources are related directly or indirectly to these two main sources.

In addition, where there is no clear answer to a question in the primary sources, Muslim jurists employ the cause (*'illah*) as the main factor to discover the law or the will of God. In the

⁷² Holy Qur'an, 5:1.

⁷³ *Ibid.*, 14:34.

⁷⁴ Ibn Al-Athir, *Al-Kamil Fi At-Tarikh*, 6th edition, (Beirut: Dar Sadir, 1995), p. 41.

⁷⁵ Holy Qur'an, 5:2.

Saudi legal system, provisions made in the Qur'an and the *Sunnah* are repeated in several regulations as the constitution of the country. Through the practice of Islamic law in Saudi Arabia, it is clear that the *Shari'ah* provides comprehensive answers to legal matters at all times and under all circumstances. Since Islamic law in Saudi Arabia should be applied in the context of Saudi Arabia's international legal obligations, the next chapter considers the sources of Islamic law in detail.

While the primary sources of Saudi Arabian *Shari'ah* are understood to be based on divine sources in origin, the Saudi legal system also interacts with international law. Therefore, while Saudi Arabia applies the *Shari'ah*, the state of Saudi Arabia itself comes under the jurisdiction of international law. Acknowledgement of and participation in the sphere of international law has implications for both a state's international relationships and internal governance. Therefore, it is necessary for any study of the interaction of the *Shari'ah* and international law in Saudi Arabia to establish a clear understanding of international law as it exists today.

This chapter has also discussed the sources of international law while also providing a background to the emergence of international law which became formalised through the work of the Commission of Justice that wrote up the sources of law to be used by the International Court when it was established in 1922. Recognising that the international legal system is very different from the municipal system because it is horizontal and without a hierarchical body that can compel obedience and compliance, it was important to clarify the sources of International law. The Commission of Justice prioritised the sources of international law into formal (or primary) sources which would be legally binding and material (or secondary) sources which relied on the application of primary sources for their authority.

The primary sources act as the foundations of international law as it exists today and include custom, treaties and general principles of law. The secondary sources for international law are judicial decisions, soft law and legal writings. While non-binding, these secondary sources are often very active in the development of international law, sometimes as points of reflection and evaluation and sometimes as tools that states can utilise to support their legal stances more easily, both internally and externally.

The relationship between the various sources of law is interconnected: customary law may precede treaties or treaties may lead to future development of customary law, while general principles of law are drawn from the evidence of customary law, treaties and judicial decisions. The work of writers is useful in the making of judicial decisions and the analytical process that leads to the recognition of the general principles of law. Primary sources of law are binding rather than non-binding but to differing degrees, with custom being recognised and therefore binding on all members of the international community including states applying Islamic law. Treaties are generally applicable only to those states that formally recognise them. Soft law tools often precede or supply support for treaties and customary law but also allow greater fluidity in fields where the need to continuously adapt is significant.

Historically, legal writers have greatly guided the development of international law but are today becoming less significant with the emergence of a greater body of legal decisions relating to international relationships. The legal concept of the general principles of law was introduced in the 1920s to fill a void where customary law and treaties were found inapplicable. Today, despite the significance of treaties, soft law instruments are also growing in significance because of their responsiveness to the needs of rapidly changing technical fields and the

limitations that governments feel when negotiating internationally but being responsible nationally.

In the new and constantly changing environment that is international law, there is a need for both primary and secondary sources of law. CIL acknowledges existing points of international common ground. Treaties reflect agreements between countries and/or regions and provide clarity of international law while encouraging norms of state behaviour. General principles of law allow states to find common ground on which to build relationships, while soft law, judicial decisions and writers provide points of reflection, re-evaluation and change. These various legal sources in combination allow the international legal system to grow and develop in response to our rapidly changing international community.

Significantly, Saudi Arabia has ratified several human rights treaties. The next chapter examines how such treaties are applied in Saudi Arabia.

Chapter III: Domestic Application of International Human Rights Treaties in Saudi Arabia

1. Introduction

This chapter provides a discussion of the application of human rights treaties in Saudi Arabia. Generally speaking, Saudi Arabia has acceded to four of the seven major United Nations conventions concerned with human rights, namely (1) The International Convention on the Elimination of All Forms of Racial Discrimination (1997),¹ (2) The Convention on the Elimination of All Forms of Discrimination against Women (2000),² (3) The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1997),³ and (4) The Convention on the Rights of the Child (1996).⁴ This chapter examines the reservations Saudi Arabia has entered to two of these international human rights treaties, specifically the CEDAW and the Convention on the Rights of the Child (CRC). The reason for this is to show that in the case of a conflict with the norms of the *Shari'ah*, Saudi Arabia, which adopts the dualistic approach, gives precedence to the *Shari'ah* and declares any treaties or articles of treaties that pose such a conflict inapplicable. Finally, the chapter sheds some light on obstacles to the realisation of norms protected by international human rights treaties in the country, namely the political, cultural and religious obstacles.

¹ International Convention on the Elimination of All Forms of Racial Discrimination, G.A. res. 2106 (XX), Annex, 20 U.N. GAOR Supp. (No. 14) at 47, U.N. Doc. A/6014 (1966), 660 U.N.T.S. 195, entered into force Jan. 4, 1969.

² Convention on the Elimination of All Forms of Discrimination against Women, G.A. res. 34/180, 34 U.N. GAOR Supp. (no. 46) at 193, U.N. Doc. A/34/46, entered into force 3 Sept. 1981.

³ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Adopted and opened for signature, ratification and accession by General Assembly, resolution 39/46 of 10 December 1984, entered into force 26 June 1987, in accordance with Article 27 (1). G.A. res. A/RES/57/199, entered into force 22 June 2006 [*reprinted in* 42 I.L.M. 26 (2003)].

⁴ Convention on the Rights of the Child, G.A. res. 44/25, annex, 44 U.N. GAOR Supp. (No. 49) at 167, U.N. Doc. A/44/49 (1989), entered into force Sept. 2, 1990.

2. Application of International Human Rights Treaties in Saudi Arabia

The relationship between international law and national law has often been described by reference to two competing theories: monism and dualism.⁵ Monists assert that there is but one system of law, with international law as an element ‘alongside all the various branches of domestic law.’⁶ For the monist, international law is simply part of the law of the land, together with the more familiar areas of national law.⁷ In other words, it is not only part of the same legal order as municipal law but superior to it. As Slyz puts it:

In a monistic legal system, legislatures too are circumscribed requirements of international law. Similarly, the national executive is obliged to take care that international law is faithfully executed within the state and that the national courts give effect to international law in their decisions.⁸

The monists are united in accepting a unitary view of law as a whole and are opposed to the strict division put forward by the positivists.⁹ In the event of a clash between international law and municipal law, most monists would contend that international law should incontestably prevail.¹⁰

Dualists, on the other hand, assert that there are two essentially different legal systems which exist side by side within different spheres of action—the international plane and the domestic plane.¹¹ This doctrine assumes that international law and municipal law are two separate legal systems which exist independently of each other.¹²

⁵ Rosalyn Higgins, *Problems and Process: International Law and How We Use It*, (Oxford: Clarendon Press, 1994), p. 205.

⁶ *Ibid.*

⁷ Michael Donald Kirby, ‘The Growing Rapprochement between International Law and National Law’. Available at: http://www.highcourt.gov.au/speeches/kirbyj/kirbyj_weeram.htm. Accessed on 28 November 2011.

⁸ George Slyz, ‘International Law Decisions in National Courts’, Thomas M. Franck & Gregory H. Fox (eds.), *International Law in National Courts*, (New York: Transnational Publishers, 1996), pp. 72-3.

⁹ *Ibid.*

¹⁰ Rebecca M.M. Wallace, *International Law*, (London: Sweet and Maxwell, 2005), p. 37.

¹¹ *Ibid.*, p. 37.

¹² *Ibid.*

Fitzmaurice holds that international law and municipal law have separate fields of operation and each is supreme in its own domain.¹³ Where municipal legislation allows the exercise of international law rules, as Oppenheim¹⁴ maintains, ‘this is on sufferance as it were and is an example of the supreme authority of the state within its own domestic jurisdiction, rather than of any influence maintained by international law within the internal sphere.’¹⁵

As a rule of thumb, the ideological background to dualist doctrines is strongly coloured by an adherence to positivism and an emphasis on the theory of sovereignty, while monist schools are more inclined to follow the law thinking and liberal ideas of a world society.¹⁶

According to the Basic Law of Governance, the Law of Procedure before *Shari’ah* Courts, the Law of Criminal Procedure, and all the Saudi laws which are based on Islamic law, all the courts decide the cases before them based on the provisions of *Shari’ah* (Islamic law), namely the Qur’an and *Sunnah* of the Prophet (pbuh).¹⁷

Saudi laws generally adopt the dualistic approach. The Law of Procedure before *Shari’ah* Courts and the Law of Criminal Procedure are two cases in point. It is worth noting here, however, that the Kingdom of Saudi Arabia implements the international agreements it has ratified on condition that they do not contravene the Qur’an and the Prophet’s *Sunnah*, which represent the constitution of the country from which judges derive rulings, as provided for in Article 1 of the Basic Law of Governance, Article 1 of the Law of Procedure before *Shari’ah* Courts and Article 1 of the Law of Criminal Procedure.

¹³ *Ibid.*, p. 38.

¹⁴ That is, Lassa Oppenheim, *International Law: A Treatise, Vol. I: Peace*, (London: Longmans, Green and Co. Ltd., 1928), p. 53.

¹⁵ Malcolm N. Shaw, *International Law*, 5th edition, (Cambridge: Cambridge University Press, 2003), p. 122.

¹⁶ Tim Hillier, *Sourcebook on Public International Law*, 2nd edition, (London: Cavendish Publishing, 1998), p. 63.

¹⁷ See Article 1 of the Basic Law of Governance, Article 1 of the Law of Procedure before *Shari’ah* Courts and Article 1 of the Law of Criminal Procedure.

A typical argument is that a state party to a treaty ‘may not invoke the provisions of its internal law as justification for its failure to perform a treaty.’¹⁸ This argument would only be valid if a state, whether Muslim or not, did not enter any reservation. In other words, if a state accepted a treaty without any reservations and then failed to perform its obligations because of its internal law, the above argument would be valid, based on Article 27 of the VCLT. If a state, however, entered a reservation, whether general or specific, it would be subject to Article 20 of the VCLT, which relates to the free will of acceptance or rejection by other states parties. Practically, Baderin has observed that Muslim states do not reject or fail to perform their obligations but have rather argued against some international human rights interpretations that may ‘not take Islamic values into consideration’.¹⁹ In other words, Islamic law and international human rights law share the same goal of protecting and promoting human rights but may differ in the means in some instances.

According to the Committee on Economic, Social and Cultural Rights (CESCR), a dualistic country is one ‘that adheres to the principle that international treaties do not automatically, on ratification, become part of [the domestic] law. To become directly applicable, international treaties must either be transformed or incorporated into [the domestic] law.’²⁰

In practice, Saudi courts apply the provisions of international law in accordance with domestic law unless there is an express provision in domestic law that directly breaches the international rules; thus, domestic law is generally interpreted in such a way that it is in conformity with international law. Examples include women’s right to seek divorce, the

¹⁸ Article 27, VCLT

¹⁹ Baderin, Mashood A. A macroscopic analysis of the practice of Muslim states parties to international human rights treaties: conflict or congruence? (2001), Vol.1, no. 2, *Human Rights Law Review*, p. 267.

²⁰ The United Nations, E/C.12/SWE/Q/5/Add.1 4 September 2008, Committee on Economic, Social and Cultural Rights, Forty-first session. Geneva, 3-21 November 2008. Available at: <http://www2.ohchr.org/english/bodies/cescr/docs/E.C.12.SWE.Q.5.Add.1.pdf>. Accessed on 28 November 2011.

prevention of racial discrimination and the prevention of trafficking in persons.²¹ However, in the event that international law conflicts with Islamic law, Saudi Arabia feels obliged by its religious allegiance to adhere to Islamic law.²²

It is important to note that Saudi Arabia did not take part in defining and specifying human rights in the UDHR and other international human rights instruments, and that those who did so were members of Western countries²³ whose principles contradict some of those adopted in Saudi Arabia. This clearly shows that there must be some articles²⁴ in these instruments which contradict those stated in the Saudi Arabian constitution with regard to the issue of human rights. It is for this reason that in the event of a clash between international law and domestic law, courts in Saudi Arabia generally opt for the *Shari'ah* law and disregard the provisions of international law which obviously contradict the *Shari'ah*. Cases in which Saudi courts disregard such provisions include, among other things, the recognition of polygamous marriage as discussed in Chapter III.

Islamic texts stress the importance of safeguarding human rights. While Islamic texts are considered binding legislative orders, international conventions are not considered as such. In fact, a Saudi Ministry of Foreign Affairs' memorandum addressed to the specialised international agencies states that such international conventions are 'no more than moral recommendations

²¹ See footnote 23 about a court case to this effect which appeared in *Ash-Sharq Al-Awsat* newspaper, Monday 5 Safar 1432 AH/10 January 2011, Issue no. 11731.

²² Ann Elizabeth Mayer, 'Islamic Reservations to Human Rights Conventions, A Critical Assessment,' *RIMO. Recht van de Islam: Human Rights and Islam*, 1998, Vol. 15, p. 28.

²³ The concept of human rights treaties in its present form was developed following the Second World War, the establishment of the United Nations Organisation and also the adoption of the Convention on the Prevention and Punishment of the Crime of Genocide in 1948. Indeed, all these events took place in Europe, where European nations suffered countless forms of genocide and injustice, hence the idea of initiating human rights treaties to put an end to such injustices. Thus, the majority of the nations which concluded human rights treaties in the 1950s and 1960s were predominantly Western nations. See generally Henry J. Steiner, Philip Alston, Ryan Goodman, *International Human Rights in Context: Law, Politics, Morals*, (Oxford: Oxford University Press, 2008), pp. 58-150.

²⁴ Such as Articles 2, 9 and 16 of the CEDAW.

with no guarantee whatsoever at the national or international levels'.²⁵ It is worth noting here that international human rights instruments can be classified into two categories: declarations, adopted by bodies such as the United Nations General Assembly, which are not legally binding although they may be politically so; and conventions, which are legally binding instruments concluded under international law. As long as the Kingdom of Saudi Arabia has entered reservations to international conventions, it does not remain obliged to implement provisions which contravene the Qur'an and the Prophet's *Sunnah*.

²⁵Kingdom of Saudi Arabia's Memorandum regarding Human Rights in Islam and their Applications in the Kingdom, addressed to the specialised international agencies (in Arabic). Ministry of Foreign Affairs, p. 13.

3. Saudi Arabia's Reservations to International Human Rights Treaties

3.1 Definition and Nature of Reservations

The Vienna Convention on the Law of Treaties (VCLT) defines a reservation as 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 to modify the legal effect of certain provisions of the treaty in their application to that State.²⁶

Reservations are the means whereby states accept as many of the rights and obligations under a treaty as possible, while expressly stating that there are some provisions of the treaty which they cannot accept. Reservations can have the effect of excluding altogether the legal effect of a particular provision, or modifying or qualifying the extent of the provision.²⁷

Generally speaking, a state may seek to adjust the manner in which a treaty will apply to it by means of 'interpretative declarations or reservations'.²⁸ The purpose of formulating a reservation is very often 'to establish an interpretation of the treaty which is consistent with the domestic law of the state concerned.'²⁹ When a state formulates a general reservation, just as Saudi Arabia did regarding the Convention on the Rights of the Child (CRC) for instance, it normally seeks to subordinate a human rights treaty to the domestic law of the reserving state, in particular to Islamic law.³⁰

²⁶ VCLT, Article 2(d).

²⁷ Malgosia Fitzmaurice, 'The Practical Working of the Law of Treaties,' in Malcolm D. Evans (ed.), *International Law*, 2nd edition. (Oxford: Oxford University Press, 2006), p. 73.

²⁸ Anthony Aust, *Modern Treaty Law and Practice*, 2nd edition. (Cambridge: Cambridge University Press, 2007), p. 126.

²⁹ *Ibid.*, p. 127.

³⁰ *Ibid.*, p. 149.

According to the Guide to Practice on Reservations to Treaties, a reservation is only prohibited if it contains a provision (a) prohibiting all reservations, (b) prohibiting reservations to specified provisions to which the reservation in question relates, and (c) prohibiting certain categories of reservations including the reservation in question.³¹ According to the Vienna Convention on the Law of Treaties (VCLT), a reservation ‘incompatible with the object and purpose of the treaty is not permissible.’³²

While the Vienna Convention on the Law of Treaties (VCLT)³³ recognises that non-reserving states may object to a reservation,³⁴ this ability is of little consequence in respect of human rights conventions.³⁵ The VCLT notes that an objection to a reservation does not prevent the entry into force of a treaty unless the objecting State explicitly declares its desire for this result.³⁶ Objections generally result in objecting States claiming either that the reservation is incompatible, inadmissible and without effect³⁷ or that their objection should not be seen as an obstacle to the entry into of the Convention generally.³⁸ The (VCLT) recognizes the freedom of states parties to object to reservations side-by-side with the power of a state to formulate reservations.³⁹ An objection represents the formal expression of the rejection of a reservation by a state that is already a party to the treaty.

³¹ Guide to Practice on Reservations to Treaties, 2011, adopted by the International Law Commission at its sixty-third session and submitted to the General Assembly as a part of the Commission’s report covering the work of that session (A/66/10, para. 75).

³² See Article 19(c) of the VCLT. 1155 U.N.T.S. 331, 8 I.L.M. 679.

³³ Vienna Convention on the Law of Treaties (VCLT), 1155 U.N.T.S. 331, 8 I.L.M. 679, entered into force 27 Jan. 1980.

³⁴ VCLT, Article 20(4)(b).

³⁵ Michel Debolt, ‘Islamic States and the UN Human Rights Treaty System: The Role of *Shari’ah*-based Reservations, April 22, 2004, p. 5.

³⁶ VCLT, Article 21.3.

³⁷ Denmark entered the following objection to the general *Shari’ah*-based reservation entered by Brunei Darussalam against the CRC: ‘The Government of Denmark finds that the general reservation with reference to the Constitution of Brunei Darussalam and to the beliefs and principles of Islamic law is of unlimited scope and undefined character. Consequently, the Government of Denmark considers the said reservation as being incompatible with the object and purposes of the Convention and accordingly inadmissible and without effect under international law ... The Convention remains in force in its entirety between Brunei Darussalam and Denmark.’

³⁸ Michel Debolt, ‘Islamic States and the UN Human Rights Treaty System: The Role of *Shari’ah*-based Reservations, 22 April 2004, pp. 5-6.

³⁹ See generally Anthony Aust, *Modern Treaty Law and Practice*, 2nd edition. (Cambridge: Cambridge University Press, 2007), pp. 125-161.

The objective of the author of the reservation is, in the main, to exclude or to modify the legal effect of certain provisions of the treaty to which the reservation applies and not the provisions themselves.⁴⁰ It may be that, for political reasons, a state may be reluctant to stand in the way of reaching consensus and may even sign a treaty despite some unhappiness at the result. If it is greatly dissatisfied, it will have the choice of not becoming a party. If this would be difficult politically, a state may attempt to modify some provisions in their application to it with a view to making it possible for it to become a party, and thus it will enter reservations.⁴¹

Although a large number of states formulate reservations to specific articles of human rights treaties, the law applicable to these reservations is slightly different to general treaty law because human rights treaties do not primarily entail reciprocal rights and obligations between states.⁴²

Many Muslim states have frequently invoked Islamic law as the reason behind entering reservations to human rights treaties.⁴³ Indeed, the very existence some years ago of the Convention for the Elimination of All Forms of Discrimination against Women (CEDAW) and the Convention on the Rights of the Child (CRC) was a subject of considerable controversy, but these Conventions have quickly become among the most widely ratified. However, many of the ratifications have been accompanied by ‘reservations that considerably decrease and in some cases effectively eliminate any obligations being assumed by the ratifying state.’⁴⁴

⁴⁰ Fourth Report of the *Special Rapporteur*, Mr. Alain Pellet (51st Session of the ILC (1999). Available at: http://untreaty.un.org/ilc/documentation/english/A_54_10.pdf. Accessed on 18 July 2011.

⁴¹ Anthony Aust, *Modern Treaty Law and Practice*, 2nd edition. (Cambridge: Cambridge University Press, 2007), p. 133.

⁴² Robert McCorquodale and Martin Dixon, *Cases and Materials on International Law*, 4th edition, (Oxford: Oxford University Press, 2003), p. 210.

⁴³ Ann Elizabeth Mdinayer, ‘Religious reservations to the Convention on the Elimination of All Forms of Discrimination against Women: What do they mean?’, p. 1. Available at:

<http://www.univie.ac.at/recht-religion/kultur-religion/isl/a%20e%20mayer%20en.pdf>. Accessed on 18 July 2011.

⁴⁴ William A. Schabas, ‘Reservations to the Convention on the Elimination of All Forms of Discrimination against Women and the Convention on the Rights of the Child’, *William and Mary Journal of Women and the Law*, 1997, Vol. 3, Issue 1, Article 4, p. 110.

Saudi Arabia has made reservations to four of the seven major United Nations conventions concerned with human rights, namely (1) The International Convention on the Elimination of All Forms of Racial Discrimination (1977)⁴⁵, (2) The Convention on the Elimination of All Forms of Discrimination against Women (2000),⁴⁶ (3) The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1997),⁴⁷ and (4) The Convention on the Rights of the Child (1996).⁴⁸

I will specifically focus in this section on the reservations Saudi Arabia has entered to the CEDAW and the CRC, which are among the most recent of the universal international human rights instruments.⁴⁹ Both these conventions allow reservations in terms that evoke the relevant provisions of the Vienna Convention on the Law of Treaties.⁵⁰ Although some may argue that

⁴⁵ The text of this reservation reads as follows:

[The Government of Saudi Arabia declares that it will] implement the provisions [of the above Convention], providing these do not conflict with the precepts of the *Shari'ah*.

The Kingdom of Saudi Arabia shall not be bound by the provisions of Article 22 of this Convention, since it considers that any dispute should be referred to the International Court of Justice only with the approval of the State Parties to the dispute.

United Nations Treaty Collection, Chapter IV, Human Rights, Convention on the Elimination of All Forms of Racial Discrimination. Available at:

http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-2&chapter=4&lang=en. Accessed on 18 July 2011.

⁴⁶ The text of Saudi Arabia's reservation reads as follows:

1. In case of contradiction between any term of the Convention and the norms of Islamic law, the Kingdom is not under obligation to observe the contradictory terms of the Convention.

2. The Kingdom does not consider itself bound by paragraph 2 of Article 9 of the Convention and paragraph 1 of Article 29 of the Convention.

United Nations Treaty Collection, Chapter IV, Human Rights, Convention on the Elimination of All Forms of Discrimination against Women. Available at:

http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8&chapter=4&lang=en.

⁴⁷ The text of Saudi Arabia's reservation reads as follows:

The Kingdom of Saudi Arabia does not recognize the jurisdiction of the Committee as provided for in Article 20 of this Convention.

The Kingdom of Saudi Arabia shall not be bound by the provisions of paragraph 1 of Article 30 of this Convention.'

United Nations Treaty Collection, Chapter IV, Human Rights, The Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (CAT). Available at:

http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-9&chapter=4&lang=en#EndDec.

⁴⁸ The text of Saudi Arabia's reservation reads: '[The Government of Saudi Arabia enters] reservations with respect to all such articles as are in conflict with the provisions of Islamic law.' United Nations Treaty Collection, Chapter IV, Human Rights, Convention on the Rights of the Child. Available at:

http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&lang=en.

⁴⁹ William A. Schabas, 'Reservations to the Convention on the Elimination of All Forms of Discrimination against Women and the Convention on the Rights of the Child', *William and Mary Journal of Women and the Law*, 1997, Vol. 3, Issue 1, Article 4, p. 110.

⁵⁰ VCLT, Articles 19-23.

most, if not all, reservations to substantive provisions of these treaties are not compatible with their object and purpose, ‘the fact that reservations are specifically allowed in provisions of the instruments indicates that their drafters did not by any means seek to exclude the possibility of reservations.’⁵¹

It is clear that, given that Islam ‘plays a central role in official ideologies’ in Saudi Arabia,⁵² Islamic states, as Ann Mayer points out, have frequently invoked Islamic law as the reason for making reservations to international human rights treaties,⁵³ and Saudi Arabia has formulated reservations to treaties as well as to those provisions which it considers contradictory to the principles of Islamic law upon which the laws and traditions of the state are founded. As Ann Mayer argues,

Islamic law dictates the stances of Muslim countries on whether or not to commit themselves to abide by human rights conventions or to enter reservations.

By formulating such reservations, William Schabas argues, ‘these states have found a rather curious ally in the United States of America⁵⁴ which, while it has not yet ratified either the Women's or the Children's Convention, favours the same subversive approach to international human rights treaties.’⁵⁵

⁵¹ William A. Schabas, ‘Reservations to the Convention on the Elimination of All Forms of Discrimination against Women and the Convention on the Rights of the Child’, *William and Mary Journal of Women and the Law*, 1997, Vol. 3, Issue 1, Article 4, p. 110.

⁵² Ann Elizabeth Mayer, ‘Islamic Reservations to Human Rights Conventions, A Critical Assessment,’ *RIMO. Recht van de Islam: Human Rights and Islam*, 1998, Vol. 15, p. 43.

⁵³ Ann Elizabeth Mayer, ‘Religious Reservations to the Convention on the Elimination of All Forms of Discrimination Against Women: What Do They Mean?’ Available at: http://www.univie.ac.at/recht-religion/kultur-religion/isl/ann_e_mayer_en.pdf.

⁵⁴ The United States has formulated similar reservations to the four treaties it has accepted: the Convention for the Prevention and Punishment of the Crime of Genocide, the International Covenant on Civil and Political Rights, the International Convention for the Elimination of All Forms of Racial Discrimination, and the Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment.

⁵⁵ William A. Schabas, ‘Reservations to the Convention on the Elimination of All Forms of Discrimination against Women and the Convention on the Rights of the Child’, *William and Mary Journal of Women and the Law*, 1997, Vol. 3, Issue 1, Article 4, p. 111.

3.2 Saudi Arabia's Reservations to the CEDAW

The Convention on the Elimination of All Forms of Discrimination against Women⁵⁶ (CEDAW) is an international human rights treaty that sets the standards for the protection of the human rights of women and the prevention of discrimination against them. Even though the Kingdom of Saudi Arabia ratified the CEDAW on 7 September 2000, it formulated a rather far-reaching reservation regarding the ratification. We will focus here only on Saudi Arabia's general reservation to the CEDAW as well as two specific reservations it has made to the Convention, namely, Article 9(2) relating to nationality rights.⁵⁷ It is worth noting that *Shari'ah* rules, as implemented in the country, are given priority over any other provisions which contravene such rules.

3.2.1 Saudi Arabia's General Reservation to the CEDAW

A general reservation seeks to subordinate a human rights treaty to the domestic law of the reserving state, in particular to Islamic law.⁵⁸ Even though such objections have themselves been objected to by certain Western European states, generally on the ground that the reservations cast doubt on the commitment of the reserving state to the object and purpose of the Convention, in each case the objecting state said that the objection did not preclude the entry into force of the Convention between it and the reserving state.⁵⁹

Saudi Arabia's general reservation to CEDAW states:

[The Government of Saudi Arabia declares that it will] implement the provisions [of the above

⁵⁶ Convention on the Elimination of All Forms of Discrimination against Women, G.A. res. 34/180, 34 U.N. GAOR Supp. (no. 46) at 193, U.N. Doc. A/34/46, entered into force 3 Sept. 1981.

⁵⁷ Article 9.2 says that 'States Parties shall grant women equal rights with men with respect to the nationality of their children.'

⁵⁸ Anthony Aust, *Modern Treaty Law and Practice*, 2nd edition, (Cambridge: Cambridge University Press, 2007), p. 149.

⁵⁹ *Ibid.* p. 149.

Convention], providing these do not conflict with the precepts of the *Shari'ah*.⁶⁰

Even though the Committee on the Elimination of Discrimination against Women notes that the reservation, which consists of a general reference to religious law and national law without specifying its contents, is mainly a precautionary measure and does not hamper the State party's implementation of the Convention, it also notes its concern that the general nature of the reservation allows courts as well as governmental and other officials to negate many of the Convention's provisions, which could raise 'serious concerns as to its compatibility with the object and purpose of the Convention.'⁶¹

The Committee also states that this reservation 'is drawn so widely that it is contrary to the object and purpose of the Convention', and thus urges the State party to 'consider the withdrawal of its general reservation to the Convention, particularly in light of the fact that the delegation assured that there is no contradiction in substance between the Convention and the *Shari'ah*.'⁶²

When asked to clarify the precise scope of Saudi Arabia's general reservation to the Convention on the basis of the norms of Islamic law and to describe the impact of this reservation on the practical realization of the principle of equality between women and men as required under Article 2 (a) of the Convention, the Saudi Arabia delegation stated that the Kingdom formulated this reservation on the basis of its conviction that Islamic law is compatible

⁶⁰ United Nations Treaty Collection, Chapter IV, Human Rights, Convention on the Elimination of All Forms of Racial Discrimination. Available at:

http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-2&chapter=4&lang=en. Accessed on 18 July 2011.

⁶¹ Committee on the Elimination of Discrimination against Women, Fortieth Session, Consideration of reports submitted by States parties under Article 18 of the Convention, Combined initial and second periodic reports of Saudi Arabia, (CEDAW/C/SAU/2; CEDAW/C/SAU/Q/2 and Add.1), 15 February 2008.

⁶² *Ibid.*

with the obligations contained in the general principles of the Convention, even if there is a little difference with regard to some of the implementing provisions.⁶³

Judgements about whether or not such a discrepancy exists are made based on the texts of the *Shari'ah* and the pertinent provisions of the Convention on a case-by-case basis. This proves the extent to which the Government of the Kingdom is seriously committed to fulfilling its obligations under the Convention and ensuring women's rights. Legal interpretation of the provisions of the Convention is left to the judicial authorities, which base their decisions on the facts in each case.⁶⁴

Saudi Arabia argues that this reservation does not affect the core of the Convention or detract from its legal force before the judicial and executive authorities. It argues further that the reservation is merely a precautionary measure at a time when human rights concepts are developing rapidly, because of interpretations following the coming into force of international human rights treaties. The reservation is thus primarily a precautionary measure against possible interpretations of the Convention that might contradict legal provisions in force in the Kingdom.⁶⁵

All in all, the Government does not believe that the wording of its reservation interferes with its obligations under the Convention. This is clear from the Kingdom's report, which lays out the *Shari'ah* and legal provisions relating to women. This shows clearly that *Shari'ah* and the convention can be interpreted to protect women's rights.⁶⁶

In the meeting of the fortieth session of the Committee on the Elimination of Discrimination against Women, held on 17 January 2008, the first issue addressed under Articles

⁶³ Committee on the Elimination of Discrimination against Women, Pre-session working group, Fortieth session, 14 January-1 February 2008, Responses to the list of issues and questions contained in document number CEDAW/C/SAU/Q/2, A.H. 1428 (A.D. 2007), p. 2.

⁶⁴ *Ibid.*

⁶⁵ *Ibid.*

⁶⁶ *Ibid.*

1 and 2 was the determination of the State's general reservation to the Convention. Committee member Flinterman questioned the necessity of this so-called 'precautionary measure', asking whether any of the 25 General Comments adopted by the Committee over the past 25 years had contradicted any of the State's laws. Committee Chairperson Imonović joined him in expressing the hope that the State would consider withdrawing the reservation.⁶⁷

A question may arise here: why has the Kingdom of Saudi Arabia maintained its general reservation to the CEDAW? In fact, all laws and regulations in force in Saudi Arabia, including the Basic Law of Governance, are derived from the Qur'an and the immaculate *Sunnah* of His Messenger (PBUH).⁶⁸ Hence, in March 1992, the Saudi Government adopted the first written Basic Act. This declared Islam to be the Kingdom's religion and God's Book and the *Sunnah* of the Prophet (PBUH) its Constitution (Article 1); in addition, the Saudi Government's power is derived from the Holy Qur'an and the Prophet's Tradition (Article 7). Under Article 48, the courts are to 'apply the rules of Islamic law in the cases that are brought before them, in accordance with what is indicated in the Book and the *Sunnah*, and the statutes decreed by the Ruler which do not contradict the Book or the *Sunnah*'.⁶⁹

It is, therefore, a consistent practice of Saudi Arabia to ratify human rights treaties with a general reservation to apply a Convention as long as it is not in conflict with Islamic law. The same position was practised by Saudi Arabia in 1948 at the time of the adoption of the UDHR, even though it is not a binding instrument.⁷⁰ In addition, in a meeting of the UN on human rights development in 1952, the Representative of Saudi Arabia declared that 'Islamic law is

⁶⁷ Committee on the Elimination of Discrimination Against Women, fortieth session, Saudi Arabia, Combined Initial and 2nd Report, pp. 3-4. Available at: http://olddoc.ishr.ch/hrm/tmb/treaty/cedaw/reports/cedaw%2040/cedaw_40_saudi.pdf. Accessed on 18 July 2011.

⁶⁸ Saudi Arabia, CEDAW/C/SAU/2, 'Combined initial and second periodic reports of state parties', (29 March 2007), p. 7.

⁶⁹ Articles 1, 7 and 48, of the Saudi Basic Law of Governance which was enacted by Royal order number A/90 on 27/8/1421 AH (1992). See generally Rashid Aba-Namay, 'The Recent Constitutional Reforms in Saudi Arabia,' *International and Comparative Law quarterly* 1993, vol. 42, pp. 295-331. See also Ayoub M. Al-Jarbou, 'Judicial Independence: Case Study of Saudi Arabia', *Arab Law Quarterly*, 2004, vol. 19, pp. 12-3.

⁷⁰ General Assembly, A/RES/217 (III) A.

considered the foundation of all fundamental human rights upon which the social structure is built'.⁷¹ Clearly, the invoking of Islamic law by Saudi Arabia has been a consistent practice, even long before the establishment of the CEDAW and most other human rights treaties. The importance given to Islamic law in Saudi Arabia is induced from the fact that Islamic law was accepted as the rule by society and also as the birth place of Islam as well as the place for the two holy mosques.⁷² Furthermore, all rights are derived from the Qur'an and the *Sunnah*, which constitute the mode of life in Saudi Arabia. When speaking about the KSA, it is inconceivable to discuss the application of international law or human rights in the Kingdom in isolation from Islamic law.

In its response to the CEDAW question regarding the general reservation to the CEDAW,⁷³ Saudi Arabia related that to two reasons: (i) the Kingdom has a conviction that the *Shari'ah* is compatible with the general core principles of the CEDAW Convention; and (ii) as a precautionary measure against any unforeseen interpretation of the Convention that might contradict Islamic law.⁷⁴ Indeed, the abstract nature of human rights treaties induces states to propose imprecise reservations in order to specify the vagueness of human rights treaties. However, another important reason for proposing the general reservation that was not mentioned in Saudi Arabia report was to give the CEDAW the legitimacy to be applied under domestic regulations and before the courts. This reason could be more important than the two previously mentioned, as it relates directly to the application of the Convention since it is considered to be a

⁷¹ Saudi Arabia, *Yearbook on Human Rights for 1952*, (United Nations: New York, 1954), p. 253.

⁷² Saudi Arabia, CEDAW/C/SR.815, 'Summary record of the 815th meeting' (15 February 2008), p. 4.

⁷³ Saudi Arabia, CEDAW/C/SAU/Q/2, 'List of issues and questions with regard to the consideration of periodic reports', (16 August 2007).

⁷⁴ Saudi Arabia, CEDAW/C/SAU/Q/2/Add.1, 'Responses to the list of issues and questions contained in document number CEDAW/C/SAU/Q/2, A.H. 1428 (2007), p. 2.

part of domestic regulations.⁷⁵ Bassiouni, for example, has pointed out that ‘nothing in Islamic international law precludes the applicability of these international obligations to the domestic legal system of an Islamic state provided these obligations are not contrary to the *Shari’ah*.’⁷⁶

In reply to the Committee’s written request to shed light on the extent of the general reservation and to express the impact it has on the practical realization of the principle of equality of men and women, the State stressed that the reservation does not affect Saudi Arabia’s core obligations to the Convention and that Islamic law is harmonious with the general principles of the CEDAW.⁷⁷ The State also confirmed that it remained cautious of future interpretations of human rights statements developing within the international arena and reaffirmed the State’s belief that the reservation remains a legitimate safeguard against possible interpretations of the Convention that might contradict the *Shari’ah*.⁷⁸

The general reservation made by Saudi Arabia applied to all provisions including Article 2(f) of the CEDAW. This Article is a general equality provision that calls upon states parties to condemn and eliminate all forms of discrimination against women. For the states parties to the CEDAW to achieve the elimination of discrimination against women, they must change their laws, traditions, customs and religious beliefs in order to comply with the normative standards enumerated in the Convention. To this extent, the CEDAW declares that in addition to changing their laws,⁷⁹ states parties are also required to ‘modify the social and cultural patterns of conduct of men and women’.⁸⁰

⁷⁵ Saudi Arabia, CEDAW/C/SAU/Q/2/Add.1, ‘Responses to the list of issues and questions contained in document number CEDAW/C/SAU/Q/2, A.H. 1428 (2007), p. 4.

⁷⁶ M. Cherif Bassiouni, ‘Sources of Islamic Law and the Protection of Human Rights in the Islamic Criminal Justice System,’ in M. Bassiouni (ed.) *The Islamic Criminal Justice System*, (New York: Oceana Publications, 1982), p. 39.

⁷⁷ The Convention on the Elimination of all Forms of Discrimination against Women (CEDAW) G.A. res. 34/180, 34 U.N. GAOR Supp. (no. 46) at 193, U.N. Doc. A/34/46, entered into force 3 Sept. 1981.

⁷⁸ *Ibid.*

⁷⁹ Article 2(f) of the CEDAW.

⁸⁰ Article 5(a) of the CEDAW.

The reason why Saudi Arabia does not accept this is that some interpretations of the concept of ‘equality’ in Islamic law is somewhat different from the provisions of Article 2 of the CEDAW, hence the general reservation made by Saudi Arabia. Indeed, Islamic law recognizes the legal status of women and men as being equal before God with no distinction whatsoever as to language, race, religion or gender. Hashim Kamali calls this equality, or *musawat*, the recognition of ‘equality in the essence of humanity’.⁸¹

This equality, however, does not denote the existence of uniformity of every aspect between everyone. Islam recognises equality of men and women but does not advocate absolute equality of roles between them, a principle which Mashood A. Baderin refers to as meaning ‘equal but not equivalent’.⁸² The rights and duties ensuing from each of these different entities are qualified by their respective roles, and thus they cannot be the same. Such ‘role differentiation’ is also applied when it comes to the rights and duties arising from the gender differences between men and women. Islamic law as applied in Saudi Arabia generally protects the rights of women and men, as shown in Chapter IV with respect to women’s rights in family matters.⁸³

It is clear that Saudi Arabia’s disagreement with Articles 2(f) of the CEDAW indicates that there is a difference in the notion of gender equality between the CEDAW and the *Shari’ah* as applied in the Kingdom. There is a well-established body of Islamic jurisprudence founded on religiously sanctioned legal doctrines that define gender equality in a manner contrary to the CEDAW in some ways, while it correlates in some other areas.⁸⁴

⁸¹ Muhammad Hashim Kamali, *Freedom, Equality and Justice in Islam*, (Kuala Lumpur: Ilmiah Publishers Sdn. Bhd, 1999), p. 86.

⁸² Mashood A. Baderin, *International Human Rights and Islamic Law*, (Oxford: Oxford University Press, 2003), p. 60.

⁸³ See also Ahmed Ali Sawad, *Reservations to Human Rights Treaties and the Diversity Paradigm: Examining Islamic Reservations* (PhD Dissertation, University of Otago, Dunedin, New Zealand, 2008), p. 48.

⁸⁴ *Ibid.*, p. 236.

Despite the claim that Islamic law and CEDAW principles are harmonious,⁸⁵ Saudi Arabia appears to believe that certain provisions in the CEDAW not only conflict with but, if accepted, have the potential to override and replace Islamic law with a different normative standard. The reservations and the country's reports submitted to the CEDAW Committee by Saudi Arabia always point in this direction.⁸⁶

3.2.2 Saudi Arabia's Specific Reservation to Article 9(2) of the CEDAW

The principle of 'elimination of all forms of discrimination against women' is extended to the area of nationality rights in Article 9(2) of the CEDAW. This article deals with the nationality of married women and requires states parties to 'grant women equal rights with men to acquire, change or retain their nationality.'⁸⁷ It also protects the wife from statelessness or change of nationality that could otherwise occur because of her marriage to an alien or when the husband changes nationality.⁸⁸

The reservation to Article 9(2) was based upon one of the most important foundations of the Saudi Arabian Nationality Act, the principle of non-recognition of dual nationality. The Nationality Law stipulates that a Saudi national is a person with a Saudi father or with a Saudi mother and a stateless father or father of unknown nationality. There is no discrimination against

⁸⁵ The Convention on the Elimination of all Forms of Discrimination against Women (CEDAW) G.A. res. 34/180, 34 U.N. GAOR Supp. (no. 46) at 193, U.N. Doc. A/34/46, entered into force 3 Sept. 1981.

⁸⁶ *Ibid.* p. 214.

⁸⁷ Convention on the Elimination of All Forms of Discrimination against Women, G.A. res. 34/180, 34 U.N. GAOR Supp. (no. 46) at 193, U.N. Doc. A/34/46, entered into force 3 Sept. 3 1981.

⁸⁸ Article 9 of the CEDAW states that '(1) States parties shall grant women equal rights with men to acquire, change or retain their nationality. They shall ensure in particular that neither marriage to an alien nor change of nationality by the husband during marriage shall automatically change the nationality of the wife, render her stateless or force upon her the nationality of the husband. (2) States parties shall grant women equal rights with men with respect to the nationality of their children.'

women in the provisions of this law but it is noticed that these provisions always seek to avoid dual nationality.⁸⁹ The text of this reservation reads:

The Kingdom does not consider itself bound by paragraph 2 of Article 9 of the Convention and paragraph 1 of Article 29 of the Convention.

Saudi Arabia submitted reservations to Article 9(2), stating that its nationality laws do not recognize equal rights of mothers to transmit nationality to their children, that is, to Article 9 paragraph 2. This reservation to Article 9 cannot be considered to be strictly based on the *Shari'ah* because nationality has little, if anything, to do with religion. However, it may be contended that the subject of nationality falls within *Shari'ah* jurisdiction when the question of nationality is associated with the domiciliary status of the husband and wife. Domiciliary status, in this case, refers to the *Shari'ah* concept of the 'common matrimonial home' of the spouses and the rights and obligations associated with it. According to *Shari'ah*, it is the legal obligation of the husband to provide private accommodation for his wife.⁹⁰

In the context of these normative values of *Shari'ah*, it may be suggested that the equal nationality rights as envisioned in Article 9 may have the potential of upsetting a particular type of 'just balance' of rights and obligations in the family that *Shari'ah* claims to promote. However, it may be rather far-fetched to argue such a contention, primarily because nationality

⁸⁹ The United Nations Human Rights Treaties, Reservations, Declarations, Objections and Derogations, CEDAW, Saudi Arabia. Available at <http://www.bayefsky.com/docs.php/area/reservations/state/151/node/3/treaty/cedaw/opt/0>. Accessed on 18 July 2011.

⁹⁰ Justice Tanzilur Rahman, *Maintenance of a Wife in Islamic Law*, (Lahore: All Pakistan Legal Decisions, 1968) as cited in Niaz A. Shah, *Women, the Koran and International Human Rights Law: The Experience of Pakistan*, (Leiden: Martinus Neijhoff Publishers, 2006), p. 160. This doctrine of the husband's maintenance of his wife is endorsed by verse 65:6 of the Qur'an, where it is stated with reference to the divorced wife (who is required to observe the waiting period ('*iddah*'), that is, three consecutive menstrual periods post-divorce), 'Let the women live [in '*iddah*'] in the same style as you live, according to your means: annoy them not so as to restrict them.'

does not automatically affect the domiciliary status of the wife nor for that matter does it *prima facie* affect the domiciliary status of the child.⁹¹

In reply to the question as to whether a Saudi Arabian woman who either married a foreign man or married a Saudi Arabian man who later changed his nationality, would retain her own nationality even if she acquired that of her husband, Mr. Al-Sfayan, a member of the Saudi delegation to the United Nations concerning consideration of reports submitted by States parties under Article 18 of the CEDAW, stated that since domestic law did not provide for dual nationality, a Saudi Arabian woman who married a foreign man would be obliged to give up her own nationality if she took his.⁹² The reservation to Article 9, paragraph 2 of the Convention was made in order to prevent Saudi Arabian children from acquiring dual nationality, which, as everyone knew, could create social problems, such as in matters relating to marriage and divorce.⁹³ However, the child of a Saudi Arabian woman who decided to take her husband's nationality could apply for Saudi Arabian nationality later in life.⁹⁴

It is worth mentioning here that consideration of the public interest is one of the secondary sources of Islamic law, as has been mentioned in Chapter II. Therefore, the Muslim ruler may lay down laws which govern the Muslims' affairs in such a way as to serve the common good as long as they do not contradict the Qur'an and the *Sunnah*.⁹⁵ Indeed, the Kingdom of Saudi Arabia has recently taken some steps to deal with the issue of children born to

⁹¹ Ahmed Ali Sawad, *Reservations to Human Rights Treaties and the Diversity Paradigm: Examining Islamic Reservations*, (PhD Dissertation, University of Otago, Dunedin, New Zealand, 2008), p. 47.

⁹² Committee on the Elimination of Discrimination against Women, Convention on the Elimination of All Forms of Discrimination against Women, fortieth session, Summary record of the 816th meeting held at the Palais des Nations, Geneva, on Thursday, 17 January 2008, CEDAW/C/SR.816, p. 3.

⁹³ See generally 'Ukashah Muhammad 'Abd Al'Al, *Current Trends in Matters relating to Nationality Conflict* (in Arabic), (Beirut: Ad-Dar Al-Jami'iyah, 1996) and Fu'ad Dhib, *Private International Law: The Nationality* (in Arabic), 4th edition, (Damascus: Damascus University Publications, 1994).

⁹⁴ *Ibid.*

⁹⁵ Al-'Izz ibn 'Abdus-Salam, *Qawa'id Al-Ahkam Fi Masalih Al-Anam*, (Damascus: Dar Al-Qalam, 1421 AH/2000), vol. 1, p. 2. See also Muhammad Salim Al-'Awwa, *An-Nidham As-Siyasi Lid-Dawlah Al-Islamiyah*, 9th edition, (Cairo: Dar Ash-Shuruq, 2008), pp. 41-2; see also generally Taqiyyud-Din Abul-'Abbas Ahmad ibn Taymiyyah 'Abdul-Halim ibn 'Abdus-Salam Ibn Taymiyyah, *Majmu' As-Siyasah Ash-Shar'iyah Fi Islah Ar-Ra'i War-Ra'iyah*, (Jeddah: Islamic Jurisprudence Complex, 1429 AH/2008).

a Saudi woman who is married to a non-Saudi man. These include, according to Shura Council Resolution no. 406, issued on 27/12/1433 AH/ 12 November 2012, the Kingdom's responsibility to allow them to come to the Kingdom to stay with their mother who serves as their guardian, give them the opportunity to find employment in the private sector without transferring their guardianship and treating them as Saudi nationals with regard to education and medical treatment.⁹⁶

In its Pre-session working group, the report by the Committee on the Elimination of Discrimination against Women states that Royal Decree no. M/54 (29 Shawwal A.H. 1425), amending several articles of the Saudi Nationality Act to affirm the principle of equality between men and women in all matters relating to Saudi nationality, is to be reviewed by the Ministry of the Interior. Asked to provide an update on the status of this Decree and to indicate how this Decree will affect Saudi Arabia's reservation to Article 9(2) of the Convention, the Saudi Arabian delegation stated that this Decree comprises numerous positive provisions concerning the legal consequences of the marriage of a Saudi woman to a foreign man or a Saudi man to a foreign woman and the resultant consequences regarding the nationality of the husband and the wife in both cases.⁹⁷ The delegation further stated that the Decree does not affect the Kingdom's reservation with regard to Article 9(2) of the Convention, emphasising the fact that this reservation is based upon one of the most important foundations of the Saudi Arabian Nationality Act; namely, the principle of non-recognition of dual nationality.⁹⁸

It is clear that the concepts of sovereignty and independence in Saudi Arabia are themselves based on Islamic law. Indeed, the rules of recognition originating from the

⁹⁶ National Society for Human Rights, Available at: <http://nshr.org.sa>. Accessed on 11 February 2013.

⁹⁷ Committee on the Elimination of Discrimination Against Women, Pre-session working group, Fortieth session, 14 January - 1 February 2008, Responses to the list of issues and questions contained in document number CEDAW/C/SAU/Q/2, A.H. 1428 (2007), p. 18.

⁹⁸ *Ibid.*

prevalence given to Islamic law often govern the legality of the Saudi government. The reservations that Saudi Arabia entered to some articles of the CEDAW clearly demonstrate that Islamic law is the governing factor in all spheres of life and serves as a check on the authority of the country to take up international legal obligations.⁹⁹

Ahmed Ali Sawad goes as far as calling the CEDAW's touching upon areas of law ranging from marriage, divorce, inheritance and children, to freedom of religion, citizenship, education, and political and legal relations¹⁰⁰ 'an intrusion into the exclusive sovereign domain and private space'¹⁰¹ which he also describes as 'contextually bold and daring'.¹⁰² He goes on to state that this approach is 'almost imperial in its disregard for the particularities of the other since it seems to accept only one reality, i.e., that of the CEDAW regime.'¹⁰³

3.3 Saudi Arabia's Reservations to the CRC

The Convention on the Rights of the Child (CRC) is aimed at fostering improvement in the situation of children and protecting their interests. Of all human rights conventions, the CRC is the only one to have found the readiest and most universal acceptance. Ratifications of the CRC by Muslim countries may have been encouraged by the fact that the CRC seems more accommodating of cultural difference than does the CEDAW.¹⁰⁴ Nevertheless, even though the

⁹⁹ Ahmed Ali Sawad, *Reservations to Human Rights Treaties and the Diversity Paradigm: Examining Islamic Reservations*, (PhD Dissertation, University of Otago, Dunedin, New Zealand, 2008), pp. 214-5.

¹⁰⁰ For example, Article 1 of CEDAW states, 'For the purposes of the present Convention, the term, 'discrimination against women' shall mean 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.' See also paragraph 13 of the preamble to CEDAW.

¹⁰¹ Ahmed Ali Sawad, *Reservations to Human Rights Treaties and the Diversity Paradigm: Examining Islamic Reservations*, (PhD Dissertation, University of Otago, Dunedin, New Zealand, 2008), p. 211.

¹⁰² *Ibid.*

¹⁰³ *Ibid.*, p. 212.

¹⁰⁴ Ann Elizabeth Mayer, 'Islamic Reservations to Human Rights Conventions, A Critical Assessment,' *RIMO. Recht van de Islam: Human Rights and Islam*, 1998, Vol. 15, p. 36.

CRC was adopted by a consensus, the rights included in it have not been accepted unconditionally by all the member States.¹⁰⁵

Saudi Arabia ratified the CRC on January 26, 1996 with the following reservation:

[The Government of Saudi Arabia] enters reservations with respect to all such articles conflicting with the provisions of Islamic law.¹⁰⁶

A large number of other signatory States, including Austria, Denmark, Germany, Ireland and Sweden, filed objections to this reservation citing Article 19(c) of the Vienna Convention on the Law of Treaties (VCLT)¹⁰⁷ and the parallel provision in the CRC,¹⁰⁸ and finding the Saudi Arabian reservation ‘unlimited in scope and undefined character’ and therefore ‘inadmissible.’¹⁰⁹

Fifteen Islamic states have made specific reservations to different provisions of the CRC, while nine States have formulated general reservations.¹¹⁰ The majority of the specific reservations appear to be directed at two areas of the CRC that have a strong impact on *Shari’ah*-based rules. The first of these is the provision of CRC relating to freedom of religion of the child, which is contained in Article 14 and to which 12 Islamic States (with the exception of Bosnia and Herzegovina, Egypt and Turkey) have formulated specific reservations.¹¹¹ The second area relates to the provisions of the CRC dealing with adoption, contained in Articles 20 and 21, to which nine Islamic States (excluding Algeria, Bosnia and Herzegovina, Iraq, Malaysia, Morocco

¹⁰⁵ Ahmed Ali Sawad, *Reservations to Human Rights Treaties and the Diversity Paradigm: Examining Islamic Reservations*, (PhD Dissertation, University of Otago, Dunedin, New Zealand, 2008), p. 272.

¹⁰⁶ United Nations Treaty Collection, Chapter IV, Human Rights, Convention on the Rights of the Child. Available at: http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&lang=en. Accessed on 18 July 2011.

¹⁰⁷ 1155 U.N.T.S. 331. Article 19 (c) provides, in the pertinent part: ‘A State may, when signing, ratifying, accepting or acceding to a treaty, formulate a reservation unless: . . .the reservation is incompatible with the object and purpose of the treaty.’

¹⁰⁸ Article 51(b), which provides: ‘A reservation incompatible with the object and purpose of the present Convention shall not be permitted.’

¹⁰⁹ United Nations, Commission on Human Rights, Fifty-ninth session, Item 14(d) of the Agenda, E/CN.4/2003/NGO/260, 20 March 2003, p. 3.

¹¹⁰ Ahmed Ali Sawad, *Reservations to Human Rights Treaties and the Diversity Paradigm: Examining Islamic Reservations*, (PhD Dissertation, University of Otago, Dunedin, New Zealand, 2008), p. 274.

¹¹¹ *Ibid.*

and Turkey) have formulated specific reservations covering one or the other of these two articles.¹¹² But Saudi Arabia's reservation does not specify any particular article.

However, can a general reservation construed as being against the object and purpose of human rights treaties? In its famous General Comments 24 regarding reservations to human rights treaties, the Human Rights Council (HRC) took a radical shift against both the rules of reservations in the VCLT and participating states' reservations. The HRC declared that the rules of reservations in the VCLT are 'inappropriate' for human rights treaties, especially with regard to objections¹¹³ and it would decide to sever any reservation, where it finds such reservation to be incompatible with the object and purpose of the ICCPR.¹¹⁴ The HRC position triggered states, the ILC and international law scholars to adopt critical comments against the HRC approach. Among others, the USA, France and the UK criticized the HRC approach mainly because it runs against the principle of states' consent.¹¹⁵ In addition, the ILC responded by harsh comments declaring that human rights bodies did not have the competence to invalidate states' reservations as this affected the free will of states. According to the ILC, the idea of the incompatibility of rules on reservations to the VCLT is spread by certain writers to the human rights bodies which is accordingly inconceivable.¹¹⁶ In fact, the HRC position also affects the free will of accepting and rejecting parties likewise. When a party describes another party's reservation as invalid it does not mean that the reserving party is bound beyond its reservation.¹¹⁷ The reserving party

¹¹² *Ibid.*

¹¹³ UN.doc. CCPR/C/21/Rev.1/Add.6, (11/11/1994), General comments No.24 (52), para.17.

¹¹⁴ *Ibid.*, para.18.

¹¹⁵ See UN. Report of the Human Rights Committee 1995, UN Doc. A/50/40. Vol. I. United Nations. New York, 1996, pp. 126-134 (Observations by the United States of America and the United Kingdom); and UN, Report of the Human Rights Committee 1996, UN Doc. A/51/40, Vol. I, United Nations, New York. 1997. pp. 104-106 (Observations by France).

¹¹⁶ Report of the International Law Commission on the work of its forty-ninth session. UN doc. A/52/10, para. 135, 142, 67, 68 and 77.

¹¹⁷ Roberto Baratta, 'Should invalid reservations to human rights treaties be disregarded?' *European Journal of International Law*, 2000, vol. 11, no. 2, p. 419.

knows the ‘exact role of its reservation to its consent’.¹¹⁸ Hence, the party could have three options; first, it could maintain its reservation; second, it could withdraw its reservation; third, it could regularize its reservation; and finally, it could renounce its ratification to the treaty.¹¹⁹

The HRC position in its General Comments No. 24 had been answered long time before 1994. The Committee on the Elimination of Racial Discrimination (CERD) in 1976, asked the Office of Legal Affairs of the UN for expert advice on its authority to decide upon the compatibility of reservations entered to the CERD.¹²⁰ The answer of the Office of Legal Affairs was unequivocal in denying the Committee any authority to decide on the compatibility of parties’ reservations. The Office furthermore asserted that even if the whole Committee unanimously pronounced such a reservation is ‘unacceptable could not have any legal effect’.¹²¹ A similar question was asked by the CEDAW Committee and it received a similar answer from the UN Office of Legal Affairs.¹²² Clearly, determination of the reservation consequences is an absolute right of State Parties to a treaty, not the role of human rights bodies.¹²³ It is a well-established principle in international law that, whether a reservation is impermissible or not, this ‘is a determination to be made by participating states to the treaty’.¹²⁴

With regard to reservations to the CRC, it is clear that these reservations are directed at Article 14 mainly because it appears to advance the freedom of religion of the child at the cost of

¹¹⁸ Report of the International Law Commission on the work of its forty-ninth session. UN doc. A/52/10, para. 83 and 84.

¹¹⁹ *Ibid*, para. 83 and 84.

¹²⁰ ‘Legal Effects of Statements of Interpretation and Other Declarations Made at the Time of Ratification or Accession’, ST/LEG/SER.C/14, *UN Juridical Yearbook*, 1976, pp. 219-221.

¹²¹ *Ibid*, p.221, para. 8.

¹²² ‘The Legal Opinion of the Treaty Section of the Office of Legal Affairs of the United Nations Secretariat upon an Inquiry by the Committee Concerning the Implementation of Article 28 of the Convention on the Elimination of All Forms of Discrimination Against Women’, in ‘Report of the Committee on the Elimination of Discrimination Against Women’, vol. 2, Official Records of the General Assembly, 39th Session, Supplement No. 45, UN Doc. A/39/45, 55, p. 56.

¹²³ Roberto Baratta, ‘Should invalid reservations to human rights treaties be disregarded?’ *European Journal of International Law*, 2000, vol. 11, no. 2, p. 419.

¹²⁴ Malcolm N Shaw, *International Law*, 5th edition, (Cambridge: Cambridge University Press, 2003), p. 828.

any institutional role of the parents or the family. This perception of Article 14 is widely seen in the content of most of the reservations made by Islamic States.¹²⁵

Besides the category of specific *Shari'ah*-based reservations, 8 Islamic States, including Saudi Arabia, have formulated general reservations that seemingly apply to all the provisions of the Convention. It may be observed that 'the generality of these reservations creates an inbuilt ambiguity making it difficult to locate their scope and effect with any sense of precision.'¹²⁶

The major role which *Shari'ah* plays in managing all affairs in Saudi Arabia is most obvious in the general reservation which the government has entered to the CRC. This reservation is unequivocal in stating that it applies to 'all such articles as are in conflict with the provisions of Islamic law'.¹²⁷ This stance is not surprising at all, for the Saudi Basic Law of Governance is categorical in proclaiming that 'its religion shall be Islam and its constitution shall be the Book of God and the *Sunnah* (Traditions) of His Messenger, may God's blessings and peace be upon him (pbuh)'.¹²⁸

Moreover, Article 9 of the Basic Law of Governance declares that the family is the nucleus of Saudi society, whose members 'should be brought up on the basis of the Islamic creed and its requirements of allegiance and obedience to God, to His Messenger and to those in authority, respect for and implementation of laws, and love of and pride in the homeland and its glorious history.'¹²⁹ Indeed, bringing up children in the Islamic faith is part of a constitutional

¹²⁵ *Ibid.*, p. 331.

¹²⁶ *Ibid.*

¹²⁷ United Nations Treaty Collection, Chapter IV, Human Rights, Convention on the Rights of the Child. Available at: http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&lang=en. Accessed on 18 July 2011.

¹²⁸ Basic Law of Governance, Article 1.

¹²⁹ *Ibid.*, Article 9.

obligation of the parents and the family. This principle is also promoted in the national education policy, one of the objectives of which is ‘instilling the Islamic faith in the younger generation.’¹³⁰

The national policy on human rights is outlined in Article 26 of the Basic Law of Governance, according to which ‘the State protects human rights in accordance with the *Shari’ah*.’ *Shari’ah*, therefore, functions as a pass key in matters relating to human rights, including the right to freedom of religion of the child covered in Article 14 of the CRC. In fact, the Saudi position holds that Islam’s concern for child welfare surpasses that of the Convention itself.¹³¹ Michel Debolt argues that although one might wonder if this were indeed true, ‘Saudi Arabia should not have had to enter a general reservation against the entire CRC or any part thereof.’¹³² Accepting this reservation in its 2000 report, Saudi Arabia nevertheless noted that it adopted the CRC ‘because the provisions set forth in this Convention are in conformity with the teachings of Islamic law concerning the need to fully respect the human rights of the child.’¹³³

The country’s reports, submitted to the CRC Committee by Saudi Arabia, uncover the persistent nature of this pass key approach in the context of Saudi laws dealing with children’s issues.¹³⁴ The Saudi Arabian context regarding almost every provision of the Convention is explained by reference to *Shari’ah*-based laws implemented in the State. In the particular case concerning the rights under Article 14, the Initial Report of Saudi Arabia explains that since Islamic law guarantees the right of the children to protection, and as children normally follow their father’s religion,

¹³⁰ Ahmed Ali Sawad, *Reservations to Human Rights Treaties and the Diversity Paradigm: Examining Islamic Reservations*, (PhD Dissertation, University of Otago, Dunedin, New Zealand, 2008), p. 358.

¹³¹ Initial report of States parties due in 1998: Saudi Arabia, paras, 7-8, 13, U.N. Doc. CRC/C/61/Add.2 (March 29, 2000).

¹³² Michel Debolt, ‘Islamic States and the UN Human Rights Treaty System: The Role of *Shari’a*-based Reservations, April 22, 2004, p. 39.

¹³³ Initial Report of Saudi Arabia due in 1998, (29 March 2000) United Nations Document CRC/C/61/Add.2.

¹³⁴ Ahmed Ali Sawad, *Reservations to Human Rights Treaties and the Diversity Paradigm: Examining Islamic Reservations*, (PhD Dissertation, University of Otago, Dunedin, New Zealand, 2008), p. 358.

parents have the primary responsibility for the upbringing and guidance of the child, whom they accustom to good morals and teach some essential principles, which prepare him or her for the coming stage.¹³⁵

In addition, while recognizing that Saudi Arabia respects the ‘right of non-Muslim residents to their religious beliefs’, the Initial Report cites Article 7(b) of the Cairo Declaration to support the Saudi position concerning the right of the parents ‘to choose the form of upbringing they want for their children in a manner consistent with their interests and their future in the light of moral values and the regulations of Islamic law.’¹³⁶ It is obvious, therefore, that ‘the *Shari’ah* basis of the Saudi Arabian reservation is substantively supported by national laws rooted in Islam.’¹³⁷

Saudi Arabia also proposes that the flexible nature of Islamic law, as implemented in Saudi Arabia, and reflected in the absence of a minimum marriageable age ‘closes loopholes and safeguards the interest of both parties.’¹³⁸ Islamic law, as implemented in Saudi Arabia, ‘prefers’ non-consanguineous marriage (that is, between unrelated parties) ‘since the children resulting therefrom are sounder in mind and body’.¹³⁹ Once married, the *Shari’ah* places the father as the head of the household, obliging him to support his wife and children, subject to penalty.¹⁴⁰

Saudi Arabia allows abortion, but only where necessary in order to save the life of the mother.¹⁴¹ Regarding breastfeeding, the report notes that God says ‘The mothers shall give such to their offspring for two whole years.’¹⁴² However, the report further states that the State only

¹³⁵ Initial Report of Saudi Arabia due in 1998, (29 March 2000) United Nations Document CRC/C/61/Add.2, para. 31(i).

¹³⁶ *Ibid.*, para.120.

¹³⁷ Ahmed Ali Sawad, *Reservations to Human Rights Treaties and the Diversity Paradigm: Examining Islamic Reservations*, (PhD Dissertation, University of Otago, Dunedin, New Zealand, 2008), p. 539.

¹³⁸ Initial Report of Saudi Arabia due in 1998 (29 March 2000) United Nations Document CRC/C/61/Add.2.

¹³⁹ *Ibid.*, paras. 50-51.

¹⁴⁰ *Ibid.*, para. 161.

¹⁴¹ *Ibid.*, para. 80.

¹⁴² Holy Qur’an, 2:233.

‘encourages’ breastfeeding (through monitoring and public awareness programs).¹⁴³ One might then conclude that the State has some discretion regarding the application of Qur’anic mandates.¹⁴⁴

It is clear, therefore, that Saudi Arabia’s Islamic reservations to human rights treaties ‘rest on divine authority’.¹⁴⁵ In making these Islamic reservations, Saudi Arabia seems to be saying that Islamic law and international law both ‘stand above their domestic laws’ and that, when these two supranational laws come into conflict, it is ‘compelled by their religious allegiance to abide by Islamic law’.¹⁴⁶ As Anna Mayer states,

The underlying reluctance to upgrade domestic laws to conform to human rights standards will most likely mean that conflicts between domestic rights policies and international law will continue to present problems.¹⁴⁷

4. Obstacles to the Realisation of Norms Protected by International Human Rights Treaties in Saudi Arabia

The efforts made by the United Nations (UN) to implement international human rights law and its strong call for a universal practice of this law have ushered in a worldwide approval of the role the UN has played in safeguarding human rights. Nevertheless, the full realisation of human rights has not yet been achieved because political, economic, cultural and religious agendas have, largely, negatively affected and limited such a universal realisation of human rights law.

¹⁴³ *Ibid.*, para. 82.

¹⁴⁴ See generally Michel Debolt, ‘Islamic States and the UN Human Rights Treaty System: The Role of *Shari’a*-based Reservations, 22 April 2004, pp. 39–40.

¹⁴⁵ Ann Elizabeth Mayer, ‘Islamic Reservations to Human Rights Conventions, A Critical Assessment,’ *RIMO. Recht van de Islam: Human Rights and Islam*, 1998, vol. 15, p. 28.

¹⁴⁶ *Ibid.*

¹⁴⁷ Ann Elizabeth Mayer, ‘Islamic Reservations to Human Rights Conventions, A Critical Assessment,’ *RIMO. Recht van de Islam: Human Rights and Islam*, 1998, vol. 15, p. 44.

This section considers key obstacles to the realisation of norms protected by international human rights treaties in Saudi Arabia. Its focus is limited to political, cultural and religious obstacles affecting the realisation of human rights in Saudi Arabia.

4.1 Political Obstacles

Some reservations to international human rights treaties by Islamic states are built purely on sovereign and political reasons and thus can be shared with non-Islamic states. For example, Saudi Arabia, along with other Islamic states, has entered reservations to the CEDAW's dispute settlement provision,¹⁴⁸ just as non-Muslim states, such as France, Monaco, Thailand and Venezuela have done. The reservations by both groups of states related to jeopardising of the principle of sovereignty. The provision could potentially enable one state to hold another state accountable in a court of law without their prior agreement, thus significantly affecting state sovereignty.¹⁴⁹ However, to the extent that international treaties protect the same rights as those protected by the *Shari'ah*, nothing generally impairs an Islamic or Muslim state from becoming a signatory to several international conventions on the protection of human rights. This does not mean, however, that the Islamic states have no reservations against the international human rights treaties.

Nothing in Islamic law precludes the applicability of these international obligations to the domestic legal system of Saudi Arabia provided these obligations are not contrary to the

¹⁴⁸ This provision states:

1. Any dispute between two or more States Parties concerning the interpretation or application of the present Convention which is not settled by negotiation shall, at the request of one of them, be submitted to arbitration. If within six months from the date of the request for arbitration the parties are unable to agree on the organisation of the arbitration, any one of those parties may refer the dispute to the International Court of Justice by request in conformity with the Statute of the Court.
2. Each State Party may at the time of signature or ratification of the present Convention or accession thereto declare that it does not consider itself bound by paragraph 1 of this Article. The other States Parties shall not be bound by that paragraph with respect to any State Party which has made such a reservation.
3. Any State Party which has made a reservation in accordance with paragraph 2 of this Article may at any time withdraw that reservation by notification to the Secretary General of the United Nations.

¹⁴⁹Nisrine Abiad, *Shari'ah, Muslim States and International and Human Rights Treaty Obligations: A Comparative Study*, (London: British Institute of International and Comparative Law, 2008), p. 84.

Shari'ah ... [International human rights] are subject to the purposes and objective of a given society, subject to the due process of law.¹⁵⁰

As noted above, under Article 27 of the VCLT, a state party to an international treaty may not invoke the provisions of its internal law as justification for its failure to a treaty. Therefore, it remains an obligation of Saudi Arabia to interpret and apply its domestic law in a manner that strikes a balance between Islamic law and its international human rights treaty obligations.

Islamic law (*Shari'ah*) as applicable domestic law in Saudi Arabia exercises an effect on the implementation of international human rights law in the country. Thanks to its strong influence, Islamic law will in some way continue to have an effect on the implementation of international human rights law in the country into the future. Such an effect, however, should not necessarily be negative. Rather, 'future endeavours, principally on the part of Saudi Arabia, and other Muslim countries for that matter, should be in the direction of productively employing Islamic law, through an evolutionary perception, for the positive implementation of international human rights law in the Muslim world.'¹⁵¹

It is worth mentioning here that if international human rights treaties are in agreement with the provisions of Islamic law (*Shar'iah*), politics cannot be considered an obstacle at all, for the Kingdom of Saudi Arabia strictly observes and respects the principles of international law and international and bilateral treaties within the framework of international organisations or otherwise.¹⁵²

¹⁵⁰M. Cherif Bassiouni, 'Sources of Islamic Law and the Protection of Human Rights in the Islamic Criminal Justice System,' in M. Bassiouni (ed.) *The Islamic Criminal Justice System*, (New York: Oceana Publications, 1982), p. 39.

¹⁵¹ Mashood A. Baderin and Manisuli Ssenyonjo, *International Human Rights Law: Six Decades after the UDHR and Beyond* (Surrey and Burlington: Ashgate Publishing Limited, 2010), p. 16.

¹⁵² Saudi Arabian Foreign Policy, 10 December 2004, the Saudi Ministry of Foreign Affairs. Available at: <http://www.mofa.gov.sa/aboutKingDom/KingdomForeignPolicy/Pages/ForeignPolicy24605.aspx>. Accessed on 28 November 2011.

4.2 Cultural Obstacles

Raday argues that culture is a macro-concept, which subsumes religion as an aspect of culture.¹⁵³ In the view of the Committee on Economic, Social and Cultural Rights (CESCR), culture

is a broad, inclusive concept encompassing all manifestations of human existence. The expression ‘cultural life’ is an explicit reference to culture as a living process, historical, dynamic and evolving, with a past, a present and a future.¹⁵⁴

The concept of culture, the committee further states:

must be seen not as a series of isolated manifestations or hermetic compartments, but as an interactive process whereby individuals and communities, while preserving their specificities and purposes, give expression to the culture of humanity. This concept takes account of the individuality and otherness of culture as the creation and product of society.¹⁵⁵

For the purpose of implementing Article 15 (1) (a), the committee also mentions that culture:

encompasses, inter alia, ways of life, language, oral and written literature, music and song, non-verbal communication, religion or belief systems, rites and ceremonies, sport and games, methods of production or technology, natural and man-made environments, food, clothing and shelter and the arts, customs and traditions through which individuals, groups of individuals and communities express their humanity and the meaning they give to their existence, and build their world view representing their encounter with the external forces affecting their lives.¹⁵⁶

Many significant areas limit the potential scope of universal human rights law; in particular, the failure of most human rights conventions to consider the dissimilarities between

¹⁵³Frances Raday, ‘Culture, Religion and Gender’, 1 (4) *International Journal of Constitutional Law*, Oxford University Press and New York University of Law, 2003, vol. 1, no. 4, pp. 665–66.

¹⁵⁴ Committee on Economic, Social and Cultural Rights (CESCR), E/C.12/GC/21, Forty-third session, Comment 21, 2-20 November, 2009, para. 11.

¹⁵⁵ *Ibid.*, para. 12.

¹⁵⁶ *Ibid.*, para. 13.

cultures. They unwittingly adopted the idea of universality, ignoring the differences that distinguish one culture from another.¹⁵⁷ The term ‘culture’, for instance, has always been controversial simply because it includes different customs, lifestyles and perceptions which, in turn, create a slippery context in which to discuss a universal principle. Every culture perceives the issue of human rights from a different perspective to that of other cultures which, in turn, can lead nations to fail to appreciate the work of the international organizations in the field of human rights because it fails to fit within their cultural framework.¹⁵⁸

This unwillingness to overstep the scope of their cultures refutes the idea of the universality of international human rights law. Some scholars have argued that regional values must be taken into account for the protection of these laws. Mashood A. Baderin, for example, argues that human rights ‘...cannot be interpreted without regard to the cultural differences of people’.¹⁵⁹

The Islamic headscarf is, in my estimation, a case in point. This head cover for Muslim women is viewed in some Western states such as France as a hindrance to human rights which constitutes a violation of women’s rights. In Saudi culture, however, the case is totally different. Muslim women who voluntarily observe the headscarf do not view the headscarf as a violation of women’s rights at all as it represents complete observance to Islamic injunctions.¹⁶⁰ Besides, the majority of women who wear it in Saudi Arabia do so with conviction.

The issue of women driving a car is also another case in point which clearly states that cultural differences exist not only between the West and Muslim countries but also between the various Muslim countries as well. For instance, North African Muslim countries like Morocco,

¹⁵⁷ *Ibid.*, para. 11.

¹⁵⁸ *Ibid.*, pp. 699 and 705-6.

¹⁵⁹ Mashood A. Baderin, *International Human Rights and Islamic Law*, (Oxford: Oxford University Press 2003), p. 27.

¹⁶⁰ See generally Yaman Siba’i, *Raqisuna ‘Ala Jirahina*, 4th edition, (Oman: Dar Al-Bashir, 1987), pp. 133-4.

Tunisia and Algeria differ in their views and practices of human rights from Saudi Arabia. For instance, while in Saudi Arabia for cultural reasons women do not generally drive cars, women in Tunisia hold high public office and do drive cars. In a question regarding the Saudi government's position regarding women driving cars, Prince Naif ibn 'Abdul-Aziz, the late Saudi Crown Prince, replied, 'I believe that that is a social issue which has been established by society itself. Some people have considered it a major issue, but it is not so at all.'¹⁶¹ I also believe that this is the case due to social factors. In fact, there is no textual evidence in the Qur'an or the *Sunnah* to the effect that women are not permitted to drive. The fact that women are permitted to drive indicates the absence of such textual evidence. As the Prophet (pbuh) once said, 'The best women are the riders of the camels and the righteous among the women are of Quraysh.'¹⁶² By analogy with this *hadith*, women are certainly allowed to drive cars. The fact that many women do not drive cars in Saudi Arabia can be attributed to social circumstances, customs and traditions. In fact, some Saudi women, for instance in the Eastern Province, drive cars following the customs prevalent there.

By giving such a response, the Prophet (pbuh) meant that the *Shari'ah* does not really prevent women from driving but that this practice has only been imposed by social norms and customs and traditions. In the responses to the list of issues and questions contained in a document prepared by the Committee on the Elimination of Discrimination against Women, the State mentions that there is no legal provision banning women from driving cars, adding that this matter is the subject of study and requires time for implementation.¹⁶³

¹⁶¹ *Ar-Riyadh* newspaper, Wednesday 24 *Rabi' Ath-Thani* 1426 AH (1 June, 2005), no. 13419. Available at: <http://www.alriyadh.com/2005/06/01/article69082.html>. Accessed on 10 October 2009.

¹⁶² *Sahih Al-Bukhari, Book of Wedlock, hadith* no. 4794.

¹⁶³ Committee on the Elimination of Discrimination against Women, Pre-session working group, fortieth session, 14 January - 1 February 2008, Responses to the list of issues and questions contained in document number CEDAW/C/SAU/Q/2, A.H. 1428 (2007), pp. 4-5.

The Vienna Declaration and Programme of Action (1993) also reaffirms the commitment of the international community ‘to ensure enjoyment of all peoples’ human rights and fundamental freedoms and to respect the value and diversity of their cultures and identities,’¹⁶⁴ encourages strengthening ‘the enjoyment of economic, social and cultural rights’, and insists that ‘there must be a concerted effort to ensure recognition of economic, social and cultural rights at the national, regional and international levels.’¹⁶⁵

As stated in Vienna Declaration and Programme of Action, Article 5:

All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis. While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms.¹⁶⁶

4.3 Religious Obstacles

Although it seems quite difficult to consider religion as a separate entity from the cultural domain, religion has been seen, in the context of human rights, as a real impediment in its own right. In other words, religious views on human rights differ dramatically from one state to another and among different individuals within states. Regarding this particular point, one can look at Islamic values in Saudi Arabia in relation to human rights. First and foremost, it is remarkable that the United Nations, during the formulation of human rights instruments, did not take into account the potential differences due to the religious bases of societies. For instance, in

¹⁶⁴ Vienna Declaration and Programme of Action, World Conference on Human Rights, A/CONF.157/23, 12 July 1993, para. 98.

¹⁶⁵ *Ibid.*

¹⁶⁶ United Nations General Assembly, World conference on Human Rights, Vienna, 14-25 June 1993A/CONF.157/23, 12 July 1993.

some Islamic countries like Saudi Arabia, the national legal system is the Qur'an, to which morals Muslims show a strict adherence. According to them, the teachings of the Qur'an are irrevocable, unavoidable and invincible.¹⁶⁷ The overwhelming majority of Muslims rely heavily on Qur'anic instructions. There are a number of verses in the Qur'an interpreted as requiring Muslims to follow Qur'anic injunctions. For example,

Say: 'Obey Allah and His Messenger': But if they turn back, Allah loves not those who reject faith.¹⁶⁸

It is not fitting for a believer, man or woman, when a matter has been decided by Allah and His Messenger to have any option about their decision: if any one disobeys Allah and His Messenger, he is indeed on a clearly wrong path.¹⁶⁹

On this basis, Saudi Arabia whose constitution is based on the Qur'an, has entered a number of reservations to human rights treaties (as shown above). The reason behind this is that some provisions in international human rights treaties are perceived as contravening some provisions of the Qur'an.

Nonetheless, the question that needs full appreciation is how to reconcile some interpretations of the Qur'an with international human rights treaties.

In the case of Saudi Arabia, Mrs Al-Usaimi, a member of the Saudi delegation to the United Nations concerning the consideration of reports submitted by States Parties under Article 18 of the CEDAW, stated that the *Shari'ah* is accepted by the majority of society and the

¹⁶⁷Heiner Bielefeldt, 'Muslim Voices in the Human Rights Debate,' *Human Rights Quarterly*, 1995, vol. 17, no. 1, p. 595.

¹⁶⁸Holy Qur'an, 3:32.

¹⁶⁹*Ibid.*, 33:36.

reservation to the Convention must be understood in that light, adding that Islamic law supports the rights of women and in no way infringes them.¹⁷⁰

It is clear, therefore, that it is religious views on human rights, not religion itself, that can create an obstacle to all world states achieving common ground regarding human rights. It is for this reason that Saudi Arabia entered general reservations to international conventions. It seems to me that even though the Committee on the Elimination of Discrimination against Women urged Saudi Arabia to consider the withdrawal of its general reservation to the Convention, particularly in light of the fact that the Saudi delegation assured the CEDAW Committee that there is no contradiction in substance between the Convention and Islamic law (*Shari'ah*),¹⁷¹ I do not think Saudi Arabia will ever withdraw its reservations, especially when there are articles which conflict with the provisions of Islamic law.

5. Conclusion

The issue of human rights has been the main concern of Saudi Arabia given that its constitution is largely based on Islamic law (*Shari'ah*) which has shown concern about human rights for more than fourteen centuries, long before the present-day world countries and organizations realised the importance of this issue. By implementing the principles of the *Shari'ah*, the Kingdom of Saudi Arabia is to some extent in agreement with the regional and international declarations and agreements which call for the protection of human rights. To show its support for this, the Saudi State has ratified a number of human rights conventions such as the Convention on the Rights of the Child, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and the Convention on the Elimination of All Forms of

¹⁷⁰ Committee on the Elimination of Discrimination against Women, Fortieth Session, Consideration of reports submitted by States Parties under Article 18 of the Convention, Combined initial and second periodic reports of Saudi Arabia, (CEDAW/C/SAU/2; CEDAW/C/SAU/Q/2 and Add.1), 15 February 2008.

¹⁷¹ *Ibid.*

Discrimination against Women. Nonetheless, while Saudi Arabia supports human rights, it has expressed a number of reservations about certain human rights treaties.

To guarantee human rights at the domestic level, Saudi Arabia has taken a number of steps, such as setting up the Board of Grievances, the Public Investigation and Prosecution Department and the Human Rights Commission. It has also promulgated a number of laws, such as the Basic Law of Governance, which defines rights and duties within the Kingdom and can be considered as the state's first attempt at enacting a 'bill of rights' in modern constitutional terms, and the Law of Criminal Procedure, which serves to safeguard human rights in the Kingdom and sets a number of standards governing procedures for arrest, detention and trials, as well as prisoners' rights, among other things. To further guarantee human rights, several reforms have been effected and include the ratification of the Code of Lawyers Practice and that of the Judiciary Law and the Court of Grievances Law.

Even though there have been many political and legal developments towards the internationalization of the concept of human rights, there is little agreement about reconciliation in the practice of an international human rights law. In fact, although the basic principles set out by the United Nations point to the respect and dignity of human beings in order to regenerate a universal practice of international human rights law, these resolutions are still controversial. Therefore, it seems that these rights will always be subject to a potential violation. Indeed, differences in economic, social, political, cultural and religious aspects between many countries form a stern rampart that delays the achievement of this objective. However, it should be noted that although international human rights law may not have achieved its intended aims, it has at least increased the culture of human rights.

The application of human rights treaties in Saudi Arabian domestic law can be effected in a number of ways. I recommend that the judiciary in Saudi Arabia, particularly the Higher Judicial Council and the Ministry of Justice, should take steps to apply human rights treaties ratified by Saudi Arabia in domestic law as long as they do not contradict Islamic law. I also recommend that the attorneys general and lawyers should play their respective roles by demanding the implementation of human rights treaties in domestic law when presenting cases before courts. The judiciary should supervise the implementation of these treaties through the High Court in accordance with its jurisdiction, as provided for by Article 11 of the new Law of the Judiciary which states that the High Court will supervise the implementation of Islamic law (*Shari'ah*) and regulations enacted by the King which are consistent with the issues that fall within the general jurisdiction of the judiciary and review rulings issued or upheld by the Courts of Appeal. Furthermore, treaties to which Saudi Arabia is a party should be published with a view to raising the awareness of both citizens and residents, as stated by such treaties.

It is worth noting that Saudi Arabia's reservations to the international human rights treaties constitute a natural course of action which has been dictated by the Basic Law of Governance and the Kingdom's commitment to the dictates of Islamic law. The significance of such reservations lies in the fact that international human rights treaties do not generally take into account each country's cultural, social and religious identity and practices.

Saudi Arabia has passed a number of political reformation laws including Cabinet resolution no. 166, issued on 12 *Rajab* 1421 AH/9 October 2000 which aims at abolishing the so-called sponsorship (*kafalah*) system and improving labourers' conditions; the project of putting an end to domestic violence; giving women the right to submit their candidacy for municipal council membership; and reformation of the sponsorship system. In addition, the fact that Saudi

Arabia has entered into human rights treaties is part of the social, cultural and political reforms that have taken place in the country. According to a new Royal Order, the Shura Council will now be consisting of its Speaker and 150 members, provided that women would be represented in the Council with no less than 20% of its members.¹⁷²

¹⁷² Shura Council. Riyadh, Jan 12, 2013. Available at: <http://www.shura.gov.sa/wps/wcm/connect/ShuraEn/internet/news/>. Accessed on 16 January 2013.

Chapter IV: Rights of Women before Saudi Courts in Family Matters

1. Introduction

This chapter discusses some women's rights which are protected in the Kingdom of Saudi Arabia before Saudi courts. The chapter also sheds some light on the protection of women's rights to equality under *Shari'ah* as well as in Saudi Arabia. In the course of discussing these rights, textual evidence has been supplied from the Qur'an, the Prophetic traditions (*hadith*), and interpretations of Muslim jurists, as well as from some of the prevalent laws in the country, particularly the Basic Law of Governance, the Law of Criminal Procedure and the Law of Procedure before *Shari'ah* Courts. The chapter examines a number of issues relating to women's rights in general including marriage, divorce, custody, maintenance and polygamy. In each one of these issues, a definition has been supplied, followed by an analysis of existing domestic case law on women's rights in Saudi Arabia.

2. The Protection of Women's Right to Equality in *Shari'ah*

Equality is part and parcel of justice and implies equality between all nations and all human beings without there being any distinction based on gender, race, colour, geographical location or social differences.¹

The Qur'an confirms equality between men and women in several geographical aspects and does not make any distinction without reasonable and objective criteria whatsoever on the basis of gender. This is clearly stated in several passages:

¹ Muhammad Anjarini, *Huquq Al-Insan Bayna Ash-Shari'a A-Qanun* (Human Rights between Islamic Law and Man-Made Law), 1st edition, (Amman: Dar Ash-Shihab, 2002), p. 120. See generally Yusuf Al-Qaradawi, *Al-Khasa'is Al-'Ammah Lil-Islam* (General Characteristics of Islam), 2nd edition, (Tanta: Dar As-Sahabah, 1983), p. 123.

O mankind! We created you from a single (pair) of a male and a female, and made you into nations and tribes, that you may know each other (not that you may despise (each other)). Verily the most honoured of you in the sight of Allah is (he who is) the most righteous of you. And Allah has full knowledge and is well acquainted (with all things).²

The Qur'an uses the Arabic sexless word *nafs* (soul or person), reflecting complete gender neutrality. In this regard the Qur'an states:

O mankind! Reverence your Guardian-Lord, who created you from a single person, created, of like nature, His mate, and from them twain scattered [like seeds] countless men and women; reverence Allah, through whom you demand your mutual [rights], and [reverence] the wombs [that bore you]: for Allah ever watches over you.³

It is He who has produced you from a single person.⁴

Allah created the heavens and the earth for just ends, and in order that each *soul* may find the recompense of what it has earned, and none of them be wronged.⁵

Every soul will be held in pledge for its deeds.⁶

The Quran considers all human beings worthy of equal esteem:

We have honoured the children of Adam; provided them with transport on land and sea; given them for sustenance things good and pure; and conferred on them special favours, above a great part of our creation.⁷

We have indeed created man in the best of moulds.⁸

² Holy Qur'an, 49:13.

³ *Ibid.*, 4:1.

⁴ *Ibid.*, 6:98.

⁵ *Ibid.*, 45:22.

⁶ *Ibid.*, 74:38.

⁷ *Ibid.*, 17:70.

⁸ *Ibid.*, 95:4.

The fruits of work belong to the person who has worked:

To men are allotted what they earn, and to women what they earn.⁹

Regarding this point, Nusayr Zaqariq notes that equality between men and women ‘constitutes one of the foundations of social justice in Islam.’¹⁰

Women have equal rights with men before the *Shari’ah*, and the Qur’an proclaims that women are equal to men in the sight of God. The Qur’an states:

I suffer not the work of any one among you, whether male or female, to be lost. One is from the other.¹¹

This verse makes it clear that the primary source of Islamic law, the Qur’an, stresses equality among all people, the abolition of all worldly distinctions, and the belief that equality constitutes an essential element of social justice at its best.

In my opinion, there is no text in the Qur’an or *hadith* which, if interpreted and applied in its context, can possibly be held to justify the practice of depriving women of their human rights, as is the case in many Muslim countries. It is this poor state of affairs in the Muslim world that has led some observers to take the view that the *Shari’ah* does not protect the human rights of women adequately.

Marmaduke Picktall once declared that Prophet Muhammad (pbuh) was ‘the greatest feminist the world has ever known, stating that he uplifted women to a position beyond which they can only go in theory.’¹² The Arabs in Prophet Muhammad’s time and even before his

⁹ *Ibid.*, 4:32.

¹⁰ Nusayr Zawariq, *Maqasid ash-Shari’ah Al-Islamiyah Fi Fikr Al-Imam Sayyid Qutb*, (Cairo: Dar As-Salam publishers, 2010), p. 171.

¹¹ *Ibid.*, 3:195.

¹² Marmaduke Picktall, Social degradation of Women—A Crime and a Libel on Islam: The Un-Islamic Indian-Style Purdah System is a Case of Religious Overkill. Available at: <http://muslim-canada.org/picktall.htm>. Accessed on 18 July 2011.

advent held women 'in supreme contempt, ill-treated and defrauded them habitually, and even hated them'¹³, as the Qur'an clearly states:

O you who believe, you are forbidden to inherit women against their will. Nor should you treat them with harshness, that you may take away part of the dower you have given them, except where they have been guilty of open lewdness; on the contrary, live with them on a footing of kindness and equity. If you take a dislike to them, it may be that you dislike a thing, and Allah brings about through it a great deal of good.¹⁴

Before the advent of Islam, it was a common practice among the Arabs in Saudi Arabia for a stepson or brother to take possession of a dead man's widow or widows along with his goods and chattels. Another trick to detract from the freedom of married women was to treat them badly and force them to sue for *khul'* (divorce initiated by the woman) or its equivalent, when the dower could be claimed back. A divorced woman could be prevented by those who had control over her from remarrying unless she remitted her dower. The verse above strictly forbids this degrading and inhuman custom as well as all kinds of harshness to women.¹⁵

Before the advent of Islam, the Arabs in Saudi Arabia regarded the birth of girl babies as a shame and accordingly buried them alive in different ways. As the Qur'an states:

When news is brought to one of them, of [the birth of] a female child, his face darkens, and he is filled with inward grief! With shame does he hide himself from his people, because of the bad news he has had! Shall he retain it on sufferance and contempt, or bury it in the dust? Ah! What an evil [choice] they decide on!¹⁶

The Qur'an abolished this inhuman practice and warned its perpetrators against painful punishment on the Day of Judgement. The aim was to protect the right to life of the girl child.

¹³ *Ibid.*

¹⁴ Holy Qur'an, 4:19.

¹⁵ Yusuf Ali, *The Holy Qur'an: English Translation of the Meanings and Commentary*, (Madinah: King Fahd Holy Qur'an Printing Complex, 1992).

¹⁶ Holy Qur'an, 16:58-9.

In fact, the Prophet (pbuh) on numerous occasions stressed the importance and value of women in society. The following are some of his statements:

Women are the twin halves of men.¹⁷

A man came to the Prophet (pbuh) and said, ‘Messenger of Allah, I want to perform *jihad* and I came to consult you.’ The Prophet (pbuh) asked him, ‘Is your mother alive?’ ‘Yes,’ the man replied. The Prophet (pbuh) then said, ‘Stay with her and honour her for, verily, Paradise is at her feet.’¹⁸

Whoever looks after two girls until they come of age will be in the Day of Judgement along with me, like these two fingers of mine. (He joined his forefinger and the middle finger as he said this).¹⁹

A man came to the Messenger of Allah (pbuh) and said, ‘Messenger of Allah, who is most deserving of my good company?’ He said, ‘Your mother.’ The man again asked, ‘Then who?’ He replied, ‘Your mother.’ He then asked, ‘Then who?’ He said, ‘Your mother.’ The man further asked, ‘Then who?’ He replied, ‘Then your father.’²⁰

If a woman offers her five daily prayers, fasts her month [of *Ramadhan*], obeys her husband and guards her chastity, it will be said to her [on the Day of Judgement]: ‘Enter Paradise by any of gates of Paradise you wish.’²¹

Whoever has three daughters, three sisters, two daughters or two sisters and fears Allah regarding them and is kind to them will be admitted into Paradise.²²

It is clear that Islamic law does not distinguish between men and women when it comes to human rights, as Pickthall puts it:

¹⁷ Imam Ahmad, *Al-Musnad*, vol. 6, p. 256; At-Tirmidhi, *As-Sunan*, Chapter on Purification, *hadith* no. 113, vol. 1, p. 189; and Abu Dawud, *As-Sunan*, Chapter on Purification, *hadith* no. 236, vol. 1, p. 61.

¹⁸ An-Nasa’i, *As-Sunan*, *hadith* no. 3104; and Ahmad, *Al-Musnad*, vol. 3, p. 429.

¹⁹ *Sahih Muslim*, *Book of Good Manners and Joining of Ties of Relationship*, *hadith* no. 2631, vol. 4, p. 2027.

²⁰ *Sahih Al-Bukhari*, *hadith* no. 5971 and *Sahih Muslim*, *hadith* no. 2548.

²¹ Ibn Majah, *As-Sunan*, *hadith* no. 1853; Ahmad, *Al-Musnad*, *hadith* no. 1661; and Ibn Hibban, *As-Sunan*, *hadith* no. 660.

²² Ahmad, *Al-Musnad*, *hadith* no. 11384, vol. 17, p. 476.

The law of Islam for women, as for men, is justice; the goal of Islam is universal human brotherhood, which does not exclude, but must include, the goal of universal sisterhood as well. That goal can never be attained while the position of women is what it is today in the East or West.²³

The fact that the *Shari'ah* is able to solve social problems amongst Muslims has been declared by the most senior judge in England, Lord Chief Justice Lord Phillips, who gave his blessing to the use of *Shari'ah* law to resolve disputes among Muslims. He stated that that there is 'widespread misunderstanding as to the nature of *Shari'ah* law', and that Islamic legal principles could be employed to deal with family and marital arguments and to regulate finance.²⁴ He also declared,

Those entering into a contractual agreement can agree that the agreement shall be governed by a law other than English law.²⁵

2.1 The Protection of Women's Rights in Saudi Arabia's Basic Law

The *Shari'ah* is the very basis upon which laws in the Kingdom of Saudi Arabia are founded. In fact, Saudi laws guarantee that women must be granted all their rights, whether they are Saudi or non-Saudi, Muslim or non-Muslim. Any practices which may otherwise do them harm with respect to their person, property and dignity are considered unlawful, as clearly stated in the Basic Law of Governance, the Law of Procedure before *Shari'ah* Courts and the Law of Criminal Procedure. The Law of Criminal Procedure, for instance, has taken into account women's rights pertaining to criminal trials, by laying down a number of general legal principles and criteria relating to women during criminal trial procedures, particularly during the

²³ Marmaduke Pickthall, Social degradation of Women—A Crime and a Libel on Islam: The Un-Islamic Indian-Style Religious System is a Case of Religious Overkill. Available at: <http://muslim-canada.org/pickthall.htm>. Accessed on 18 July 2011.

²⁴ Steve Doughty, 'Shari'ah Law should be used in Britain, says UK's top judge', *Daily Mail* official website. Available at: <http://www.dailymail.co.uk/news/article-1031611/Sharia-law-SHOULD-used-Britain-says-UKs-judge.html#ixzz0i8C1NW01>. Accessed on 13 October 2010.

²⁵ *Ibid.*

investigation and trial stages. These principles and criteria are provided for by Article 13 of the Law of Criminal procedure thus:

Investigation and trial of offences committed by juvenile offenders, including girls, shall be conducted in accordance with the relevant laws and regulations.

Some of the rules and regulations regarding investigation and trial of women are included in the Basic Law of the Women's Care Institute issued by the Council of Ministers' Resolution no. 868, dated 19/7/1395 AH (29 July 1975), which provides for the rules relating to holding women in custody during trial. It states that women regarding whom a detention warrant has been issued pending investigation may be kept in the Women's Care Institute. This Institute has been primarily established to care for women who have allegedly committed an offence and who are less than thirty years of age. As for women in general, the Law of Criminal Procedure has laid down a number of rules and regulations which can be implemented by criminal investigation authorities as well as by the Bureau of Investigation and Prosecution.

Article 42 of the Law of Criminal Procedure provides:

A criminal investigation officer may search the accused where it is lawful to arrest him, which may include his body, clothes and belongings. If the accused is a female, the search shall be conducted by a female assigned by the criminal investigation officer.

Article 52 of the same Law clearly states that a woman is to accompany the persons conducting the search of the house of an accused woman:

If there is no person other than an accused woman in the dwelling to be searched, the officers carrying out the search shall be accompanied by a woman.

Therefore, the Law does not allow the officers carrying out the search to search a woman except by a female assigned by the criminal investigation officer. The proceedings relating to criminal investigation are normally conducted by a number of persons, each within his jurisdiction.²⁶ This procedure clearly serves to protect women's dignity and privacy in general.

Article 47 also provides:

The search record shall include the following:

- (1) The name of the officer who has conducted the search, his title, date and time of the search;
- (2) The text of the search warrant or an explanation of the urgency that necessitated the search without a warrant;
- (3) The names and signatures of the persons who were present at the time of the search.
- (4) A detailed description of the seized items;
- (5) Declaration of any action taken during the search and those taken with respect to the seized items.

This applies only in the case where a woman is accused; if this is not the case and she only happens to be in a place which needs searching for investigation purposes, then the officers in charge of the search must be accompanied by a woman. The women inside the dwelling must be given time to put on their veils or leave the dwelling and must be afforded all reasonable assistance that does not negatively affect the search and its results.²⁷

²⁶ Article 26 of the Law of Criminal Procedure states: The proceedings relating to criminal investigation shall be conducted by the following persons, each within his jurisdiction:

- (1) Members of the Bureau of Investigation and Prosecution within their jurisdiction.
- (2) Directors of police and their assistants in the various provinces, counties and districts.
- (3) Public security officers, secret service officers, passport officers, intelligence officers, civil defence officers, prison directors and officers, border guard officers, special security forces officers, National Guard officers and military officers, each in accordance with their specified duties with respect to crimes committed within their respective jurisdictions.
- (4) Heads of counties and chiefs of districts.
- (5) Captains of Saudi ships and aeroplanes, with respect to crimes committed on board.
- (6) Heads of centres of the Bureau for the Promotion of Virtue and Prevention of Vice, with respect to matters falling within their jurisdiction.
- (7) Employees and other individuals who have powers of criminal investigation pursuant to special regulations.
- (8) Entities, commissions and other persons who have been assigned to conduct an investigation pursuant to the regulations.

²⁷ See Article 53 of the Law of Criminal Procedure.

In this way, the Law of Criminal Procedure enjoys such distinctive rules and criteria which govern the way of dealing with women charged with crimes in Saudi Arabia, regardless of their nationality and religion, in such a way as to safeguard their dignity and protect their rights.

This law further safeguards the rights of women who have committed an offence in that it urges prosecutors to treat them in a manner suited to their cultural, psychological and biological makeup. To this end, it has stipulated that treatment of women during trial must be in accordance with specific rules and regulations which take into account women's general circumstances as well as their physical, social and psychological needs.

Therefore, a woman who is less than thirty years of age and who has been accused of committing a crime in Saudi Arabia must be kept in the Women's Care Institute during trial until a judgement regarding her case is issued. She must also be kept in a separate place from other female offenders against whom legal rulings have been issued. She must be tried only in the Women's Care Institute, and prior to the trial a thorough study of her and the circumstances that led to the crime being committed must be conducted. This study, along with the case file, is then referred to the judge to study it and benefit from it during investigation and upon issuing a judgement. In fact, these procedures constitute mitigating circumstances for her.

In addition, punishments prescribed by the judge must be carried out inside the Women's Care Institute, and corporal punishment must be implemented under the supervision of a body comprising a representative of the court and a female representative of the Institute. This, however, applies to women less than thirty years of age. As for women in general, the law of Criminal procedure has laid down numerous regulations and criteria which must be taken into account and implemented by criminal investigation authorities. As mentioned earlier on, if the

accused is a female, the search shall be conducted by a female assigned by the criminal investigation officer,²⁸ hence the Law's tendency to offer women full protection.

Article 8 of the Basic Law of Governance states some principles governing laws in the country relating to rights for both men and women:

Governance in the Kingdom of Saudi Arabia shall be based on justice, *shura* (consultation), and equality in accordance with the *Shari'ah*.

The State undertakes to protect human rights in accordance with the *Shari'ah*²⁹ and guarantees the rights of the citizen and the family in emergencies, sickness, disability and old age. It also supports the social security system and encourages institutions and individuals to participate in charitable work.³⁰

The State also takes upon itself the task of facilitating the provision of job opportunities to every able person, man or woman, and enacting laws that will serve to protect the worker and the employer.³¹ It also undertakes to foster sciences, arts and culture, and to encourage scientific research, protect Islamic and Arabic heritage, and contribute to Arab, Islamic and human civilization.³²

The Basic Law of Governance also protects other rights to all citizens without exception, be they men or women:

The State shall provide public education, and shall be committed to combating illiteracy.³³

The State shall be responsible for the care of public health, and shall provide health care to every citizen.³⁴

²⁸ See Article 42 of the Law of Criminal Procedure.

²⁹ Basic Law of Governance, Article 26.

³⁰ *Ibid.*, Article 27.

³¹ *Ibid.*, Article 28.

³² *Ibid.*, Article 29.

³³ *Ibid.*, Article 30.

³⁴ *Ibid.*, Article 31.

The State shall provide security to all its citizens and residents. A person's actions may not be restricted, nor may he be detained or imprisoned, except under the provisions of the Law.³⁵

The Law of Procedure before *Shari'ah* Courts has also undertaken to secure women's rights on many issues. For instance, Article 32 provides:

Without prejudice to the provisions of the Grievance Board Law, General Courts shall have jurisdiction over all cases outside the jurisdiction of Summary Courts. Specifically, they may consider the following:

- (a) All cases *in rem* dealing with real estate.
- (b) Issuing title deeds, registration of endowment and hearing the declaration thereof, and recording marriages, probate, divorce, *khul'* (divorce at the insistence of the wife), paternity, death and determination of heirs.
- (c) Designating trustees, guardians and administrators and permitting them to perform actions that require the judge's permission, and dismissing them if required.
- (d) Imposing and waiving support.
- (e) Marrying off women who have no guardians.
- (f) Interdicting spendthrifts and bankrupts.

Article 199 also provides:

A judgement incorporating a provision for expeditious execution, with or without bond at the discretion of the judge, shall be made in the following circumstances:

- (a) Judgements in expeditious matters
- (b) If the judgement is for support, nursing or housing expenses, visitation of a minor, delivering a minor to a nursemaid or a woman to her *mahram*, or separating spouses.
- (c) If the judgement is for the payment of wages to a servant, craftsman, workman, wet-nurse or nurse-maid.

³⁵ *Ibid.*, Article 36.

The Law of Criminal Procedure also guarantees the personal liberty of men or women.

Article 36, for example, provides:

No person shall be detained or imprisoned except in the places designated for that purpose by Law. The administration of any prison or detention centre shall not receive any person except pursuant to an order specifying the reasons and period for such imprisonment duly signed by the competent authority. The accused shall not remain in custody following the expiry of the period specified in that order.

As stated above, Saudi laws have generally secured a number of guarantees for women regarding criminal investigation. Some of these are stated as follows:

- a.** Guarantees for searching women are delineated in Article 42(4), (5) and (6) of the Law of Criminal procedure;
- b.** Guarantees relating to searching the house of an accused woman are provided for by:
 - Articles 52 and 53 of the Law of Criminal Procedure as well as Article 52(1) of the Implementing Regulations of the Law of Criminal Procedure;
 - Article 79(14) of the Implementing Regulations of the Law of Criminal Procedure;
 - Article 34(5) of the Implementing Regulations of the Law of Criminal Procedure;
- c.** Guarantees relating to women's position and the places designated for detaining the accused amongst them are provided for by Article 36 of the Law of Criminal Procedure.

3. Marriage and Family relations

3.1 Marriage

Islamic law regards marriage as a contract (*'aqd*) between a man and a woman. Marriage between persons of the same sex are prohibited under Islamic Law.³⁶ In fact, the Kingdom of Saudi Arabia prohibits same-sex marriages and considers it a crime because it goes against texts of Islamic law. Despite all this, few cases have been reported, including one in Al-Khobar Court, in the eastern part of Saudi Arabia. Two homosexual were arrested as a result of a party they had organised on the beach along with a group of other homosexuals. These two homosexual men were dressed as women with makeup all over their faces, in preparation for concluding a marriage contract. The judge ruled that they be sentenced to one year imprisonment and be given 300 lashes each for this act.³⁷

Marriage as a contract obviously entails the free consent of the parties concerned. Parents may give advice or recommend a marriage partner, but the ultimate decision to contract a marriage comes as a result of free choice on the part of each partner. A father is by no means allowed to force his daughter to marry a certain man. As the Qur'an states, 'Do not inherit women against their will.'³⁸

It once happened that a young woman came to the Prophet (pbuh) and informed him that her father had married her off to a certain man against her will, and the Prophet (pbuh) annulled

³⁶ See, for example, Qur'anic verses 7:80-1, 54:34, 29:28, 21:74, 27:54-8 and 4:16. The Prophet (pbuh) also mentioned a number of sayings in this regard. In one of these sayings, he clearly stated, 'There is nothing I fear for my *ummah* more than the [evil] deeds of [Prophet] Lot's people.' (Related by At-Tirmidhi, *As-Sunan*, report no. 1457; Ibn Majah, *As-Sunan*, report no. 2563).

³⁷ Summary Court of Al-Khobar; Case no. 126/2, dated 25/5/ 1427 AH/21 June 2006.

³⁸ Holy Qur'an, 4:19.

the marriage.³⁹ On another occasion, a young woman complained to him that her father had forced her to marry a man, and the Prophet (pbuh) gave her the choice of remaining married to him or seeking a divorce.⁴⁰

It follows, therefore, that marriage in Islam is based on the free choice and consent of both parties to a marriage.

Islamic law allows both men and women to arrange their marriage on condition that during this time they do not engage in dating or premarital sexual activity. Both partners should have the fullest possible intention of keeping the marriage commitment for life. The marriage contract involves (1) a gift from the husband to the wife, called *mahr*, or dowry, which may be a sum of money, an object of some value such as a ring, or such non-material things as teaching a part of the Qur'an; and (2) a commitment from both parties to try to make life physically comfortable for each other and to provide emotional, psychological and spiritual happiness to each other, with the primary responsibility for taking care of economic needs generally falling on the shoulders of the man.⁴¹

Even though the marriage commitment is for life, should it so happen that after marriage the two partners find it impossible to live together Islamic law provides for the termination of the marriage contract. It is clear that the judgement as to whether a marriage partner is obtaining enough satisfaction out of his or her marriage is a subjective one and therefore belongs entirely to the partner himself or herself. Consequently, for the dissolution of marriage Islam does not require that a partner prove to some authority such as a court that

³⁹ This narration is reported by Al-Bukhari, *Fath Al-Bari Sharah Al Bukhari*, vol. 9, p. 194; and Ibn Majah, *Book of Marriage*, vol. 1, p. 602.

⁴⁰ This narration is reported by Abu Dawud, *As-Sunan*, *Book of Marriage*, *hadith* no. 2091.

⁴¹ Ahmad Shafat, *Marriage in Islam: Considered from a Legal Point of View*, (1984). Available at: http://www.themodernreligion.com/family/family_marriagelegal.html. Accessed on 18 July 2011.

there has indeed been a failing on the part of the other partner in the fulfilment of his or her marital obligations.⁴²

It is enough for the unsatisfied partner to say that he or she can no longer love or respect the other partner so as to be able to continue living with him or her. Third parties such as relatives and the community can and indeed should become involved at some stage of marriage difficulties and try to prevent the break-up of the marriage through such means as counselling,⁴³ but they cannot oblige any marriage partner to remain in the marriage bond against their will.⁴⁴

A man can on his own dissolve the marriage by following a prescribed procedure. A woman can also dissolve the marriage by asking the husband to divorce her; if the husband refuses to divorce her, then she can go to court, which should arrange the terms of dissolution as regards compensation and order the husband to dissolve the marriage.⁴⁵ To avoid this procedure the woman can stipulate in the marriage contract that she can dissolve the marriage without having to go to court.

The party which initiates the divorce may have to pay some compensation to the other party. This compensation may be the return of the marital gift in the case of a woman initiating

⁴² *Ibid.*

⁴³ Holy Qur'an, 4:35.

⁴⁴ Ahmad Shafat, *Marriage in Islam: Considered from a Legal Point of View*, (1984). Available at: http://www.themodernreligion.com/family/family_marriagelegal.html. Accessed on 18 July 2011.

⁴⁵ Holy Qur'an (2:229) states, 'A divorce is only permissible twice; after that, the parties should either hold together on equitable terms, or separate with kindness. It is not lawful for you [men] to take back any of your gifts [from your wives], except when both parties fear that they would be unable to keep the limits ordained by Allah. If you [judges] do indeed fear that they would be unable to keep the limits ordained by Allah, there is no blame on either of them if she give something for her freedom. These are the limits ordained by Allah, so do not transgress them; if any do transgress the limits ordained by Allah, such persons wrong [themselves as well as others].' The wife of Thabit ibn Qays came to the Prophet (pbuh) and said, 'Messenger of God, I do not reproach Thabit ibn Qays in respect of character or religious dedication, but I do not want to neglect my duties towards him after becoming a Muslim [as I do not really love him].' God's Messenger asked her if she would give back to Thabit his garden, the marital gift he had given her and when she replied that she would, he told him to take back his garden and to accept the dissolution of marriage.' (Reported by Al-Bukhari on the authority of 'Abdullah ibn 'Abbas).

the divorce, as in the case of the wife of Thabit ibn Qays who sought divorce from her husband and gave him back his garden, the marital gift he had given her.⁴⁶

This compensation may also be a payment of alimony in the case of a man taking that step. As the Qur'an states:

For divorced women, maintenance [should be provided] on a reasonable [scale]. This is a duty on the righteous.⁴⁷

In the above outline of the legal view of marriage in Islam, men and women are generally equal partners except in the following respects:

1. Both parties have an equal responsibility to provide physical, emotional, psychological and spiritual happiness to each other, but men generally have the added responsibility to provide for the economic needs of the wife, for Islam makes it his to take care of his family's needs, as the Qur'an states:

But he shall bear the cost of their food and clothing on equitable terms. No soul shall have a burden laid on it greater than it can bear.⁴⁸

2. In the case where the husband initiates divorce, he is obliged by the *Shari'ah* to pay some maintenance expenses.⁴⁹ This prescribed alimony belongs to the wife by right. However, when the woman initiates the divorce because of her dislike of her husband, she does not pay any compensation to the husband as a requirement of the *Shari'ah*; she needs at most to return part of what she received from the husband as dower if such payment is helpful in an amicable settlement.⁵⁰

⁴⁶ Al-Bukhari, *Book of Divorce*, hadith no. 4867.

⁴⁷ Holy Qur'an, 2:241.

⁴⁸ *Ibid.*, 2:233.

⁴⁹ *Ibid.*, 2:241.

⁵⁰ *Ibid.*, 2:229.

It is worth noting here that both men and women can choose to end the marital relationship for any reason, such as lack of maintenance on the part of the husband or lack of love, and this can be done through specialised courts.

The Qur'an states, regarding their differences:

And women shall have rights similar to the rights against them, according to what is equitable; but men have a degree [of responsibility] over them. And Allah is Exalted in Power, Wise.⁵¹

This verse occurs in a long passage dealing with divorce and should be understood in relation to that context. The degree by which the husband's responsibilities are greater should therefore be understood in the context of the sixth/seventh century Arabian society in which men at that time had the responsibility to maintain women. This degree of responsibility, however, does not imply that men are entitled to more rights than women. In the context of divorce, a woman can still seek annulment of marriage whenever she wants to.⁵²

Another verse also states:

Men are the protectors and maintainers of women, because Allah has given the one more (strength) than the other, and because they support them from their means.⁵³

It is clear that this verse refers to the greater responsibility of husbands had to protect and provide for women. The object and purpose of this verse is therefore to ensure that there is always an effective system to protect against women's human rights violations.

This, however, does not affect the claim that in Islamic law men and women generally enjoy equal rights, since men's greater responsibilities do not mean that men also enjoy more human rights, and because within this relationship men's greater responsibilities in marriage

⁵¹ Holy Qur'an, 2:228.

⁵² Ahmad Shafat, *Marriage in Islam: Considered from a Legal Point of View* (1984), available at: http://www.themodernreligion.com/family/family_marriagelegal.html. Accessed on 18 July 2011.

⁵³ Holy Qur'an, 4:34.

were based on the reality of the structure of the society in the 7th century Saudi Arabia in which men were more involved in economic activities than women. It should be remembered, though, that when the issue of members of society having equal responsibilities is raised, women are never precluded under *Shari'ah* from freely entering into arrangements in which they take greater responsibility if they are willing to and able to do so. The assumption of equality of responsibility by women can contribute towards equality of rights in a marriage since some men use greater responsibility in a marriage to violate women's right to equality during a marriage and at its dissolution.⁵⁴ As the Islamic legal maxim states: *Al-ghunmu bil-ghurm*; one is entitled to a gain only if one agrees to bear the responsibility for the loss.

This principle sometimes works in favour of women. For example: as mothers, women give much more to children than do men as fathers, and so Islamic law recognises the rights of mothers over custody of children of tender years more than those of fathers except where economic considerations demand otherwise.⁵⁵

3.1.1 Consent to Marriage

Women under Islamic law, and in Saudi Arabia for that matter, have an independent right to enter into a marriage contract, the only formalities of which are the offer of marriage by the husband and its acceptance by the wife in the presence of two witnesses.⁵⁶ It is worth noting here that also under *Shari'ah* a woman can offer to marry a man.

It is perhaps important to note that some of the prevalent practices in this respect, such as granting authority to the parent or the guardian (*wali*) to enforce child marriages, are based on

⁵⁴Ahmad Shafat, *Marriage in Islam: Considered from a Legal Point of View* (1984), available at: http://www.themodernreligion.com/family/family_marriagelegal.html. Accessed on 18 July 2011.

⁵⁵ Javaid Rehman, 'The *Shari'ah*, Islamic Family Law and International Human Rights Law: Examining the Theory and Practice of Polygamy and *Talaq*', *International Journal of Law, Policy and the Family*, 21, (2007), pp. 108–109.

⁵⁶ *Ibid.*

either cultural practices or some juristic interpretations of Islamic family laws but are neither stated in the Qur'an nor derived from the *Sunnah*.

It is true that some Muslim scholars, such as Ibn Qudamah and Ibn Hajar Al-Asqalani, contend that it is permissible to marry minor girls. Supporters of the marriage of minor girls often quote the following verse:

Such of your women as have passed the age of monthly courses, for them the prescribed period, if ye have any doubts, is three months, and for those who have no courses [it is the same]: for those who carry [life within their wombs], their period is until they deliver their burdens: and for those who fear Allah, He will make their path easy.⁵⁷

In fact, many Muslim scholars⁵⁸ have strongly criticized and opposed the marriage of minor girls, quoting the verse, 'Make trial of orphans until they reach the age of marriage.'⁵⁹

They argue that such a marriage will be deprived of love and mercy, which constitute the very foundation in every marriage, as the Qur'an clearly states:

And among His signs is this: that He created for you mates from among yourselves, that you may dwell in tranquillity with them, and He has put love and mercy between your [hearts]: verily in that are signs for those who reflect.⁶⁰

In refutation of the argument of those who view the marriage of minor girls as legal, *Sheikh* Muhammad ibn Uthaymin, the late member of the Saudi Council of Senior Scholars, stated:

Such [a marriage] is illegal, for the Prophet (pbuh) said, 'A virgin should not be married off until her consent is obtained.' Therefore, a virgin must not be married off until she reaches the age when she becomes qualified enough to give her consent.⁶¹

⁵⁷ Holy Qur'an, 65:4.

⁵⁸ See *Al-Mabsut*, vol. 4, p. 43 and *Bada'i' As-Sana'i'*, vol. 2, p. 491.

⁵⁹ Holy Qur'an, 4:6.

⁶⁰ *Ibid.*, 30:21.

I stress the importance of specifying marriage age in Saudi Arabia based on the Islamic legal maxim *la dharara wa la dhirar*; that is, ‘There should be neither harming (*dharar*) nor reciprocating harm’; for the marriage of minor girls is bound to do girls a great deal of harm, which Islam has categorically forbidden, as this goes against the basic concept of marriage which is founded on free consent, love and mercy.

3.1.2 Marriage without Consent⁶²

The plaintiff (a young girl in this case) filed a lawsuit against her father who had married her off to a young man without her consent, stating that she had not expressed her agreement in the marriage contract to marry him at all. She said that she had run away from his house and stayed with her father for eleven years and she requested the judge to annul the marriage as she did not want him to be her husband. The judge asked the defendant concerning this claim and he said that it was true that her father had married her off eleven years before but he refused to divorce her as she had accepted the marriage offer, by stating that she initially agreed to marry him.

As the defendant failed to provide evidence in support of his claim, the judge summoned the two men who were witnesses to the marriage contract and asked them about the details of what they had seen. They stated that it was actually the plaintiff's mother who had agreed to marry her daughter to the defendant and that the plaintiff herself was not happy with her mother's decision at all. The plaintiff's brother, who was also a witness, confirmed the

⁶¹ Muhammad ibn Salih ibn Muhammad Al-Uthaymin, *Ash-Sharh Al-Mumti' 'Ala Zad Al-Mustaqni'*, 1st edition, (Dammam: Dar Ibn Al-Jawzi, 1428 AH/2007), vol. 15, p. 57.

⁶² Unaizah Court; Case no. 8/1257, dated 4/5/1407 AH (5 January 1987); Appellate Court's Approval no. 244/Sh/A dated 26/7/1407 AH (26 March 1987).

witnesses' statement, stating that it was common practice in the countryside to marry a woman off without her consent.

The judge also stated that Islamic law grants women the right to choose a marriage partner they wish to marry. He based his judgement on the Prophetic tradition in which Prophet Muhammad (pbuh) said, 'A previously-married woman should not be married without being consulted, and a virgin should not be married without asking her permission.' The Prophet's companions asked, 'Messenger of Allah, how does she give her permission?' He replied, 'By remaining silent.'⁶³

He also quoted Ibn 'Abbas as saying that a young virgin woman once came to the Prophet (pbuh) and mentioned to him that her father had married her off to a man against her will, and the Prophet (pbuh) gave her the choice to stay with him or to leave him.⁶⁴

From this, we understand that Islamic law has granted women the right to choose their own husbands and that it strictly forbids parents to force their virgin daughters to marry anyone without their consent. He went on to say that doing so goes against not only textual evidence from the Qur'an and the Prophet's *Sunnah* but also against reason.⁶⁵

Indeed, forcing a woman to marry someone against her will is a form of violence against women in Islamic law and is contrary to international human rights treaties. In fact, as mentioned earlier, Saudi Arabia has ratified a number of human rights treaties, some with some reservations, including the Convention on the Elimination of All Forms of Discrimination

⁶³ This narration was reported by Al-Bukhari, *hadith* no. 4741 and Muslim, *hadith* no. 2543.

⁶⁴ *Sunan Abu Dawud, Book of Marriage, hadith* no. 2096.

⁶⁵ Taqiyyud-Din Abul-'Abbas Ahmad ibn 'Abdul-Halim ibn 'Abdus-Salam Ibn Taymiyyah, *Majmu' Al-Fatawa*, (Madinah: King Fahd Complex for the Printing of the Holy Qur'an, 1425 AH/2004), vol. 32, p. 20.

against Women (CEDAW).⁶⁶ The Kingdom ratified this convention on 7 September 2000. As Article 16 of the CEDAW states:

States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women:

- (a) The same right to enter into marriage;
- (b) The same right freely to choose a spouse and to enter into marriage only with their free and full consent;
- (c) The same rights and responsibilities during marriage and at its dissolution.

Saudi Arabia should therefore ensure that women enjoy the right to freely choose a spouse and enter into a marriage with free will and full consent both under *Shari'ah* and the CEDAW.

3.1.3 The Question of Marriage Guardianship

The claim that the status of women in the Kingdom of Saudi Arabia has been almost equated to the status of minors and the mentally unstable⁶⁷ is unfounded. Human Rights Watch published a report that investigated the consequences of the principle of 'legal guardianship on women' in Saudi Arabia in 2008.⁶⁸ The report claimed that this requirement contributes to the risk of domestic violence, as even filing a report with the police against an abusive guardian

⁶⁶ Convention on the Elimination of All Forms of Discrimination against Women, G.A. res. 34/180, 34 U.N. GAOR Supp. (no. 46) at 193, U.N. Doc. A/34/46, entered into force 3 Sept. 1981.

⁶⁷ See the Human Rights Watch report, 'Perpetual Minors,' which was released in April 2008. The full report is available at: <http://www.hrw.org/en/reports/2008/04/19/perpetual-minors-0>.

⁶⁸ Human Rights Watch, 'Perpetual Minors': <http://www.hrw.org/en/reports/2008/04/19/perpetual-minors-0>. Accessed on 18 July 2011.

requires the guardian's approval.⁶⁹ It also shows that even where a guardian's approval is not mandatory by a government regulation, some officials may still ask for it.⁷⁰

The requirement of a legal guardian's consent in marriage has led some guardians to abuse this right and withhold consent for their ward's marriage. In a case recorded in *The Compendium of Court Judgements*,⁷¹ a twenty-eight year old woman brought a claim against her father for rejecting a man who had proposed to marry her. After hearing from witnesses, the court found that the father did not have a good reason for his objection and also found that the prospective husband was of good character and recognised social standards. After failing to convince the father to retract his objection to the marriage, the court decided to act as the woman's legal guardian in concluding the marriage contract.⁷² The case indicates that guardianship is capable of being abused by some men; therefore, it is essential to subject it to a monitoring system so that women can freely challenge it before courts if it is not in their interests.

It should be pointed out here that marriage guardianship is not intended to be demeaning to women. Rather, it aims at protecting women's interests, such as ensuring the choice of a good, responsible husband, safeguarding their moral integrity and ensuring that they have a successful marriage. Most women in Saudi Arabia still need a guardian, as men generally understand men's nature better and hence would provide her with expert advice regarding the prospective husband; otherwise, women may be easily intrigued into commitments contrary to their interests.

⁶⁹ Wasim Husam Ad-din Al-Ahmad, *Himayat Huquq At-Tifl Fi Dhaw' Ahkam Ash-Shari'ah al-Islamiyyah Wal-Ittifaqiyyat Ad-Dawliyyah (Protection of Children's Rights in the Light of Islamic Law and International Agreements)*, (Beirut: Al-Halabi Legal Publications, 2009), p. 22.

⁷⁰ Zainah Almihtar, 'Human Rights Of Women and Children under the Islamic Law of Personal Status and Its Application in Saudi Arabia,' *Muslim World Journal of Human Rights*, 2008, vol. 5, no. 1 Article 1, p. 8.

⁷¹ *Mudawanat Al-Ahkam Al-Qada'iyah*, Ministry of Justice, Riyadh, 1429 AH//2008, Issue 3.

⁷² *Ibid.*

Besides, if a woman enters into a marriage contract all by herself, she may give the impression of being inconsiderate, presumptuous and inclined to intermingle with men unnecessarily, which would only stigmatise her character.⁷³ Furthermore, a guardian has no right whatsoever to force her into marriage or prevent her from marrying anyone she likes to marry as long as the husband-to-be meets all the requirements of marriage and is known for his integrity.

Islamic law guarantees men and women equal rights to accept a spouse of their own choosing. It does not give parents the authority to force their children into marriage. In fact, marriage constitutes one of a woman's peculiarities, and Islamic law considers that forcing her to marry a man whom she does not like is a form of injustice and a strictly forbidden act, for a woman in Islamic law has the right to accept or turn down a man for marriage purposes; therefore, forcing her to accept a certain man as a spouse against her will is a form of transgression and infringement on her rights.

Shari'ah courts in the Kingdom of Saudi Arabia have dealt with numerous cases relating to injustice inflicted on women by preventing them from getting married. Some of these cases are considered below.

3.1.4 A Case of Abusing Marriage Guardianship⁷⁴

In Ta'if General Court, the plaintiff (a woman in this case) filed a lawsuit against her father (her marriage guardian) who had prevented her from marrying a young man she wanted to marry because of his integrity and good character. She requested the judge to compel her father to allow her to marry him or annul the marriage guardianship, which was his right. The father refused to marry her off to this young man, under the pretence that he did not know him and that

⁷³ 'Abd Al-Ati Hammudah, *The Family Structure in Islam*, (Maryland: American Trust Publications, 1977), pp. 71-2.

⁷⁴ General Court of Ta'if; Case no. 6/131 dated 29/6/1422 AH (17 September 2001).

instead he wanted to give her in marriage to one of his friends who lived in Saudi Arabia's capital Riyadh.

The plaintiff, however, refused to marry the father's friend, as she did not know him. She also brought along two witnesses who clearly stated that two suitable young men with good character had previously asked for her hand in marriage and she had accepted but her father simply refused to marry her off to either of them. The judge then asked the plaintiff's brother, who was also in the court, if he was prepared to marry his sister off instead of his father doing so.

The brother expressed his willingness on condition that a ruling would be issued to that effect. The judge agreed and issued a judgement to the effect that the father's marriage guardianship was annulled and that the woman's brother was to be granted such a right instead. He based his judgement on a number of reasons, stating, among other things, that the father's act represented a case of *'adhl* (the crime of preventing one's daughter from getting married), which caused a great deal of harm to his daughter, and Islam strictly forbids this unjust act.

He also mentioned the statement by Muslim jurists that if a woman chooses a spouse and her guardian chooses another one for her, she can marry the one she has freely chosen.⁷⁵ He also stated that marriage guardianship has been legislated with a view to protecting women and safeguarding their dignity in the first place, that what the father had done went against this principle altogether, and that Islamic law has forbidden this form of harm and injustice which the father had inflicted on his own daughter.

Although guardianship has been legislated to protect women, it does not in any way mean that a woman may be forced to marry someone against her will, nor is her guardian allowed to put constraints on her, treat her with harshness or make difficulties for her. This case shows that

⁷⁵ Sham ad-Din Abu 'Abdullah Muhammad ibn 'Abdullah Az-Zarkashi, *Sharh Az-Zarkashi 'Ala Mukhtasar Al-Khiraqi*, 1423 AH (2002), Dar Al-Kutub, Lebanon, p. 330.

marriage guardianship can be misused by men to deny women a right to marry. It further indicates that marriage guardianship should be subject to review and monitoring by independent bodies including courts.

3.1.5 A Case of ‘*Adhl* (Preventing Women under Guardianship from Marriage)⁷⁶

The plaintiff filed a lawsuit against her father who refused to appear before the court, stating that a young man proposed to her four years before and her father had initially agreed to marry her off to him. Then her father changed his mind and refused to marry her off due to differences in their ancestry. She then requested the judge to annul her father's guardianship and to marry her off himself. The judge summoned the suitor and asked him if he really wanted to marry the plaintiff and he answered in the affirmative. Once the judge had ascertained that the plaintiff's father had prevented her from getting married without a valid reason approved by the *Shari'ah*, such as asking her opinion about whom she wanted to marry, without being forced into a marriage she did not want, he undertook to marry her off himself, stating that she had been subjected to harm which the *Shari'ah* does not approve of. He also cited Prophet Muhammad's statement that a judge serves as the guardian of those who do not have a guardian.⁷⁷

From this case, we understand that Islamic law prohibits the practice of preventing a woman from getting married and commands that her freedom of choice of a marriage partner has to be respected. In fact, the judgement which the judge issued in this case is fully in agreement with the *Shari'ah* provisions and serves to refute the claim that Islamic law denies women the right to choose a marriage partner. Since some men, as the above case indicates, have abused

⁷⁶ General Court of Jeddah; Case no. 19904, dated 30/10/1430 AH (19 October 2009).

⁷⁷ Wahbah Az-Zuhayli, *Al-Fiqh Al-Islami Wa Adillatuhu (Islamic Jurisprudence and Its Evidence)*, 14th edition, (Damascus: Dar Al-Fikr Al-Mu'asir for Publication and Distribution, 2000), vol. 8, p. 131; Wahbah Al-az-Zuhayli, *Al-Wisayah Wal-Waqf Fi Al-Fiqh al-Islami (Guardianship and Endowment in Islamic Jurisprudence)*, (Beirut: Dar Al-Fikr Al-'Arabi, 1987). p. 115; and Muhammad abu Zahrah, *Al-Ahwal ash-Shakhsiyyah (Personal Status)*, (Beirut: Dar Al-Fikr Al-'Arabi, 1950), p. 480.

their guardianship role, the case also indicates a need for women to use the courts in order to challenge the abuse of guardianship by men.

3.2 Polygamy under *Shari'ah*

The issue of polygamy under Islamic law is one which has of late been surrounded by much controversy.

While a man may marry up to four wives, according to some *Shari'ah* interpretations, this does not mean that he can do so whenever he feels like it without meeting some conditions which serve the purpose of regulating and permitting polygamy in order to protect women's rights. Two conditions are significant.

Generally, all wives must enjoy the same rights and privileges without any distinction whatsoever. A man who marries more than one wife at the same time is required by the *Shari'ah* to observe equality⁷⁸ between them in treatment, provisions and kindness. He must pay each wife a dowry, as the Qur'an states,

Give the women on marriage their dower as a free gift, but if they, of their own good pleasure, remit any part of it to you, take and enjoy it with right good cheer.⁷⁹

This bridal gift is the property of the wife, and neither a testamentary guardian nor the husband may make personal use of it, except with the wife's own accord.⁸⁰

⁷⁸ It is worth mentioning here that equality here applies to material matters which the husband can afford and can do, such as equality in sexual relationship and maintenance. As for maintaining absolute equality between wives in matters concerning love, this is quite impossible as it is something a husband cannot control, as evidenced by the Prophet's statement, 'O Allah, this is my division [between my wives] concerning what I possess, so do not blame me concerning that which You possess but I do not.' This tradition was reported by Abu Dawud, (no. 2134), At-Tirmidhi (no. 1140), An-Nasa'i (no. 3943) and Ibn Majah (no. 1971).

⁷⁹ Holy Qur'an, 4:4.

⁸⁰ Nasr Salhab, *Islam As I Came To Know It, A Religion Of Mercy And Peace*, Translated by Ali Azeriah, (Rabat: Publications of the Islamic Educational, Scientific and Cultural Organization ISESCO, 1422 AH/2001), p. 74.

The man is obliged to fulfil his conjugal responsibility regarding all his wives without exception, and if any one of them feels that he does not fulfil any of her legal needs, she has the right to file a suit against him in this respect.

As far as polygamy is concerned, it is persuasive to say that, except for exceptional circumstances, the sources of the *Shari'ah* have perceived a monogamous relationship as an ideal form of association. The following Qur'anic verse is one of the verses often taken as legitimizing polygamy:

If you fear that you shall not be able to deal justly with the orphans, marry women of your choice, two or three or four; but if you fear that you shall not be able to deal justly [with them], then only one, or [a captive] that your right hands possess, that will be more suitable, to prevent you from doing injustice.⁸¹

This verse should by no means be quoted as an unconditional permit for continuing the institution of polygamous marriages that are contrary to the spirit of the Qur'an. An examination of this verse will reveal that the permissibility to engage in a polygamous marriage serves the purpose of securing justice for female orphans.⁸² There are other conditions, which form an essential precondition to entering a polygamous marriage. The Qur'anic ideal clearly is to establish a monogamous union, which is also affirmed by the Qur'anic verse: 'You are never able to be fair and just as between women, even if it is your ardent desire.'⁸³

The principle of allowing a man to marry up to four wives simultaneously is justified on an out-of-context interpretation of the Qur'anic verse 4:3 quoted above. The provision mentioned in this Qur'anic text should not be understood as requiring Muslims to generally practise polygamy. It permits polygamy only under certain circumstances. As the above verse indicates,

⁸¹ Holy Qur'an, 4:3.

⁸² Javaid D Rehman, 'The *Shari'ah*, Islamic Family Law and International Human Rights Law: Examining the Theory and Practice of Polygamy and *Talaq*,' *International Journal of Law, Policy and the Family*, 2007, vol. 21, pp. 108–127.

⁸³ Holy Qur'an, 4:129.

the issue of polygamy in the Qur'an cannot be understood apart from community obligations towards orphans and widows.⁸⁴ As the Qur'an states,

You are never able to be fair and just as between women, even if it is your ardent desire: But turn not away [from a woman] altogether, so as to leave her [as it were] hanging [in the air]. If you come to a friendly understanding and practise self-restraint, Allah is Oft-forgiving, Most Merciful.⁸⁵

The plain wording of the verse demonstrates that the subject of the verse is about doing justice to orphans, not polygamy *per se*. In other words, polygamy is only permitted conditionally (it is not obligatory) in order to do justice to orphans.⁸⁶

It is important to note here, therefore, that the *Shari'ah* does not make polygamy an obligation upon a Muslim man, nor does it make it compulsory upon the Muslim woman or her parents or close relatives to accept a suitor who already has one or more wives. Rather, it has protected the woman's right to enter a marriage with her full consent. Therefore, a woman who does not wish to enter into a polygamous marriage cannot be forced to enter such a marriage. In fact, some Muslim jurists maintain that a woman has the right to stipulate, upon her marriage, that her husband does not marry again, and that if he does so, then she has the right to demand divorce. As Ibn Qudamah puts it,

If he marries her and makes the condition that he will not get married again, then he will have to divorce her if he does.⁸⁷

This is also the general practice in Saudi Arabia. If a Saudi woman stipulates upon the conclusion of the marriage contract that her husband must not marry again while she is still his

⁸⁴ Sherif 'Abdel Azim, *Women in Islam versus Women in the Judeo-Christian Tradition*, (Cairo: Al-Falah Foundation for Translation, Publication and Distribution, 2005), 2005, p. 58.

⁸⁵ Qur'an, 4:129.

⁸⁶ Niaz A. Shah, 'Women's Human Rights in the Koran: An Interpretive Approach,' *Human Rights Quarterly*, 2006, vol. 28, p. 890.

⁸⁷ Muwaffaq ad-Din 'Abdullah ibn Ahmad Ibn Qudamah, *Al-Mughni*, vol. 6, p. 548.

wife and he agrees to this but later on breaks his promise, then she has the right to divorce him.

This is generally governed by the Prophet's traditions:

Muslims must meet the conditions they stipulate.⁸⁸

From among all the conditions that you have to fulfil, the conditions which make it legal for you to have sexual relations (i.e. the marriage contract) have the greatest right to be fulfilled.⁸⁹

It should be noted that the Qur'an restrains polygamy by limiting the maximum number of contemporaneous marriages and by making absolute equity towards all obligatory on the man. It is also worthy of note that the clause in the Qur'an which contains the permission to contract four contemporaneous marriages is immediately followed by a sentence which cuts down the significance of the preceding passage to its normal and legitimate dimensions. The former passage states, 'If you fear that you shall not be able to deal justly with the orphans, marry women of your choice, two or three or four.' The subsequent lines declare, 'but if you fear that you shall not be able to deal justly [with them], then only one'.

Women can bring cases against husbands before courts in Saudi Arabia to challenge unequal treatment between wives in polygamous marriages. For example, in case 18/12,⁹⁰ a woman filed a lawsuit against her husband, stating that he had married another woman but had not been just between the two wives in terms of companionship, sexual intercourse and travel, in that only his second wife would accompany him on his travels, and she (the first wife) requested the judge to make her husband observe justice. The husband admitted the truth, and so the judge

⁸⁸ At-Tirmidhi, *Book of Rulings*, *hadith* no. 1352.

⁸⁹ Al-Bukhari, *Book of Conditions*, *hadith* no. 2721, and Muslim, *Book of Fulfilling Marriage Conditions*, *hadith* no. 1418.

⁹⁰ General Court of Al-Hasa, Date: 21/1/1419 AH (17 May 1998); Case no. 18/12; Appellate Court Approval no. 296/SH/A, dated 26/2/1919 AH (21 June 1998). See *Code of Judicial Rulings*, 1st edition, General Directorate of the Codification of Rulings, Ministry of Justice, Judicial Affairs Agency, Riyadh, Kingdom of Saudi Arabia, 1429 AH (2008), p. 77.

ruled that the husband had to treat his wives equally in everything and that he should not travel with one wife and leave the other, based on the following verses:

Women shall have rights similar to the rights against them, according to what is equitable.⁹¹

Live with them on a footing of kindness and equity.⁹²

He also mentioned a tradition narrated on the authority of ‘A’ishah, one of the Prophet’s wives, who said, ‘Allah’s Messenger (pbuh) used to divide his time between us (that is, her and his other wives) equally.’⁹³

The judge’s ruling is in total agreement with the *Shari’ah* provisions, for one of the conditions of having more than one wife is that the husband must divide his time equally between them. In fact, Muslim jurists are generally agreed in this respect. As Ibn Qudamah puts it,

We do not know of any disagreement amongst scholars concerning the fact that a man ought to divide his time equally among his wives.⁹⁴

3.3 Divorce

It is a fact that divorce becomes the ultimate and most effective solution when it becomes impossible for a husband and a wife to live together under the same roof after serious attempts at reconciliation are made and after it becomes clear that neither of them can or will ever satisfactorily fulfil the commitment implicit in the marriage contract; namely, to provide enough physical, emotional, psychological and spiritual happiness. Islamic law prides itself on the fact

⁹¹ Holy Qur’an, 2:228.

⁹² *Ibid.*, 4:19.

⁹³ This narration is reported by Abu Dawud, *Book of Marriage*, *hadith* no. 2134.

⁹⁴ Muwaffaq ad-Din ‘Abdullah ibn Ahmad Ibn Qudamah, *Al-Mughni*, 1st edition, (Lebanon: Dar Ihya’ At-Turath Al-‘Arabi, 1405 AH/1985), vol. 8, p. 138.

that it has legislated divorce, detailed its rulings and given divorced partners the opportunity to get back together in three divorce pronouncements, each of which is separated by a waiting period, in such a way that no man-made law has ever produced.

It should be noted that Islamic law recognizes the right of a husband and a wife to end their relationship for compelling reasons. It grants the husband the right to divorce his wife (*talaq*) and gives the wife the right to dissolve the marriage (*khul'*) because of harm done to her, if she dislikes him or dislikes being with him, or if it becomes impossible for her to stay with him. In the first case, the husband cannot ask for the return of any of the bridal gifts he has already given to his wife.⁹⁵

In the second case, the wife may return the bridal gifts to her husband as a fair compensation to him as he is keen to keep his wife when she chooses to leave him. A husband in this case is not allowed to take back any of the gifts he has given to his wife⁹⁶ except when it is the wife who chooses to dissolve the marriage.⁹⁷

There are many verses of the Qur'an which deal with divorce. The following verse is one of the most important of them:

For those who swear that they will not approach their wives, there shall be a waiting period of four months: if they go back, remember God will be most forgiving and merciful, but if they are determined to divorce, remember that God hears and knows all. Divorced women must wait for three monthly periods before remarrying, and, if they really believe in God and the Last Day, it is not lawful for them to conceal what God has created in their wombs: their husbands would do better to take them back during this period, provided they wish to put things right. Wives have [rights] similar to their [obligations], according to what is recognised to be fair, and husbands have a degree [of right] over them: [both should remember that] God is Almighty and Wise.⁹⁸

⁹⁵ See Holy Qur'an, 4:2.

⁹⁶ See Holy Qur'an, 2:229.

⁹⁷ Sherif 'Abdel Azim, *Women in Islam versus Women in the Judeo-Christian Tradition*, (Cairo: Al-Falah Foundation for Translation, Publication and Distribution, 2005), pp. 38-39.

⁹⁸ Holy Qur'an, 2:226-28.

Indeed, the issue of divorce is mentioned in detail in both the Qur'an and the *Sunnah*. In the *Qur'an*, for example, general rules on divorce are mentioned in the following verses:

A divorce is only permissible twice; after that, the parties should either hold together on equitable terms or separate with kindness. It is not lawful for you, [men], to take back any of your gifts [from your wives], except when both parties fear that they would be unable to keep the limits ordained by Allah. If you [judges] do indeed fear that they would be unable to keep the limits ordained by Allah, there is no blame on either of them if she gives something for her freedom. These are the limits ordained by Allah; so do not transgress them; if any do transgress the limits ordained by Allah, such persons wrong [themselves as well as others].⁹⁹

So if a husband divorces his wife [irrevocably], he cannot, after that, re-marry her until after she has married another husband and he has divorced her. In that case, there is no blame on either of them if they reunite, provided they feel that they can keep the limits ordained by Allah. Such are the limits ordained by Allah, which He makes plain to those who understand.¹⁰⁰

While Islamic law allows divorce, as it seems to be the best solution to certain relationships and when estrangement between the husband and the wife reaches a level where they can no longer live peacefully together as husband and wife, it does not encourage it, due to the detrimental effects which divorce is bound to leave in some cases. A Muslim man should not divorce his wife just because he dislikes her. The Qur'an commands husbands to show kindness towards their wives even in feelings of dislike:

Live with them on a footing of kindness and equity; if you dislike them, it may be that you dislike something in which Allah has placed a great deal of good.¹⁰¹

When you divorce women and they fulfil the term of their waiting period (*'iddah*), either take them back on equitable terms or set them free on equitable terms.¹⁰²

⁹⁹ *Ibid.*, 2:229.

¹⁰⁰ *Ibid.*, 2:230.

¹⁰¹ *Ibid.*, 4:19.

Let the man of means spend according to his means; and the man whose resources are restricted, let him spend according to what Allah has given him. Allah puts no burden on any person beyond what He has given him. After a difficulty, Allah will soon grant relief.¹⁰³

The Prophet (pbuh) also discouraged divorce by stating that divorce is the most abhorrent lawful act to Allah.¹⁰⁴ Thus, divorce, according to the Qur'an and the *Sunnah*, should be restricted to cases where there is an irretrievable breakdown of marriage. He further discouraged men from beating women, noting that:

A believing man must not hate a believing woman. If he dislikes one of her traits, he will certainly be pleased with another.¹⁰⁵

Furthermore, the Prophet (pbuh) encouraged Muslims to treat wives in a humane manner, noting that:

The believers who show the most perfect faith are those who have the best character, and the best of you are best to their wives.¹⁰⁶

In short, divorcing women under Islamic law must be limited to circumstances where there is an irretrievable breakdown of marriage.

3.3.1 Wife's Right to Divorce a Husband (*Khul'*)

The Arabic word *khul'* is derived from the triliteral root *kh-l-*, which means to 'take off' or to 'dismiss'. In the Qur'an there is one derivation of the root, *ikhla'*, which means 'take off'. It is mentioned in the story of Moses when he was ordered to take off his shoes in the sacred valley

¹⁰² *Ibid.*, 2:231.

¹⁰³ *Ibid.*, 65:7.

¹⁰⁴ Abu Dawud, *Book of Divorce*, vol. 2, p. 255, *hadith* no. 2178.

¹⁰⁵ Muslim, *Book of Suckling*, Topic on Taking Care of Women, *hadith* no. 1469.

¹⁰⁶ At-Tirmidhi, *Book of faith*, *hadith* no. 2612.

of Tuwa.¹⁰⁷ The Qur'anic verse which is understood to be dealing with the wife's right to divorce is 2:229.¹⁰⁸

According to Muslim jurists, *khul'* means 'to untie the bond of marriage by using the word *khul'* itself or any other word which serves the purpose in return for a compensation which the woman pays to her husband.'¹⁰⁹ To illustrate, a husband may say to his wife, 'I agree to divorce you in return for giving the dowry back to me' and she says, 'I accept.' A woman may also say to her husband, 'Divorce me in return for £100 or the dowry you have given me', and he replies, 'I accept.' For *khul'* to take effect, it does not matter if acceptance is expressed by either the husband or the wife.¹¹⁰

If the wife is not satisfied with her husband in any way and she feels that her relationship with him does her a great deal of harm, Islamic law grants her the right to seek divorce from him. This type of seeking divorce is called *khul'*. Haddad mentions some of the circumstances under which a woman has the right to initiate divorce, thus:

If the husband is not spending the amount of money required of him to provide her and her dependents food and shelter; if he has ceased cohabiting with her, whether deliberately or for a protracted period (i.e. one year or more), due to absence abroad, imprisonment or sickness; for example [but not due to study, trade, lawful employment or military service], or even under one and the same roof for a period varying from six months to three years according to the jurists of the different schools; if she has discovered a physical or other blemish in him that makes the conditions of conjugal life impossible or intolerable, such as sexual impotence or insanity [in which cases the marriage may already be invalid to start with, since the absence of such defects is a precondition for its validity]; if any of the explicit additional conditions agreed upon in the marriage contract [if any] are not met; if he mistreats her in a patently cruel and unbearable way

¹⁰⁷ Holy Qur'an, 20:12.

¹⁰⁸ *Ibid.*, 2:229.

¹⁰⁹ Muhammad Sallam Madhkur, *Ahkam Al-USrah Fi Al-Islam (Rulings on the Family in Islam)*, (Beirut: Dar An-Nahdhah Al-'Arabiyah, 1970), p. 495.

¹¹⁰ *Ibid.*

[e.g. she bears the marks of beating on her face or body]; if he is or becomes a non-Muslim or prevents her from praying, then there are grounds for divorce.¹¹¹

The following are examples of acceptable reasons in *Shari'ah* for a woman to ask her husband for *khul'*:

- If a woman dislikes her husband's treatment of her – for example, he is over-strict, hot-tempered or easily-provoked, or frequently becomes angry, or criticizes her and rebukes her for the slightest mistake or shortcoming, then she has the right of *khul'* (female-instigated divorce); if she dislikes his physical appearance because of some deformity or ugliness, or because one of his faculties is missing, she has the right of *khul'*.
- If he is lacking in religious commitment – for example, he does not pray or neglects to offer the congregational prayer in the mosque, or does not fast in *Ramadhan* without a valid excuse, or he goes to parties where unlawful practices are committed, such as fornication, drinking alcohol and listening to singing and musical instruments, etc. – she has the right of *khul'*;
- If he deprives her of her rights to maintenance, clothing and other essential needs, when he is able to provide these things, then she has the right to ask for *khul'*;
- If he does not grant her her conjugal rights and thus keep her chaste, because he is impotent (i.e. unable to have intercourse), or because he does not like her, or he prefers someone else, or he is unfair in the division of his time (i.e. among co-wives), then she has the right to ask for *khul'*.¹¹²

In the Prophet's *Sunnah*, there are a number of reports to this effect. The following is an example:

The wife of Thabit ibn Qays came to the Prophet (pbuh) and said, 'Messenger of Allah, I do not reproach Thabit ibn Qays in respect of character or religious dedication but I do not want to

¹¹¹ Gibril Fouad Haddad, 24 June 1999. Available at: http://www.livingislam.org/fiqhi/fiqha_e59.html. Accessed on 18 July 2011.

¹¹² Muhammad Saed 'Abdur-Rahman, *Islam: Questions and Answers - Jurisprudence and Islamic Rulings*, (London: MSA Publication Limited, 2004), p. 99.

neglect my duties towards him after becoming a Muslim [as I do not really love him].¹¹³ Allah's Messenger asked her if she would give back to Thabit his garden, the dowry he had given her. When she replied that she would, he told him to take back his garden and to accept the dissolution of marriage.¹¹⁴

As the above survey indicates, both men and women have the right to divorce under *Shari'ah*. In Saudi Arabia, a woman can request divorce procedures to be taken in a different city even without the presence of a male guardian, against the rule which states that:

A lawsuit shall be filed with the court with jurisdiction over [the] defendant's place of residence. If he has no place of residence in the Kingdom, jurisdiction belongs to the court with jurisdiction over [the] plaintiff's place of residence.¹¹⁵

3.3.2 Saudi Cases on Divorce

Some cases are considered below to illustrate how courts in Saudi Arabia have handled divorce.

3.3.2.1 *Khul'* as a result of a Woman's Hatred of her Husband¹¹⁶

The husband claimed that he married the defendant and paid her a bridal sum of SR50,000 (approximately £8350) but after six months she left for her parents' house and refused to come back to him. When the defendant was asked about this, she confirmed what he said, stating that she did not like him.

Based on the Qur'anic statement, 'If you fear a breach between the two of them, appoint [two] arbiters, one from his family and the other from hers; if they wish for peace, Allah will

¹¹³ Probably she meant she did not like him enough as a marriage partner and so was afraid she might not give him the respect and love due to a husband.

¹¹⁴ Al-Bukhari, *Book of Divorce*, no. 4867.

¹¹⁵ Law of Procedure before *Shari'ah* Courts, Article 34.

¹¹⁶ General Court of Riyadh; Case no. 3/41, dated 13/2/1428 AH (3 March 2007). Appellate Court Approval no. 350/S/A, dated 4/4/1428 AH (21 April 2007).

cause their reconciliation, for Allah has full knowledge and is acquainted with all things,¹¹⁷ the judge requested each of the two parties to appoint an arbiter of his or her own choosing. The wife appointed her maternal uncle as an arbiter, while the husband appointed his paternal uncle as his arbiter. The judge then requested the two arbiters to meet with the disputing partners and try their best to reconcile them; otherwise, divorce would be the only solution. He also instructed them to discuss the issue of compensation if divorce was considered by the husband. The arbiters did as they had been told and decided that reconciliation was impossible and that it would be better to annul the marriage on condition the wife would return the bridal sum back to her husband. The wife agreed to this and the court granted her divorce.

The judge supported his judgement by citing the following Qur'anic verse:

A divorce is only permissible twice; after that, the parties should either hold together on equitable terms, or separate with kindness.¹¹⁸

He also cited the incident of the wife of Thabit mentioned above

In my estimation, the court's decision demonstrates that parties were treated equally before the law through the appointment of their respective arbiters. The court accepted the wife's choice to dissolve the marriage.

3.3.2.2 Annulment of Marriage without Compensation¹¹⁹

The judge may deem it necessary to judge that a marriage be annulled without requiring the wife to pay any compensation whatsoever to the husband, especially if he sees that she has been wronged and that he is not her legal match. In one court case, the plaintiff claimed that her

¹¹⁷ Holy Qur'an, 4:35.

¹¹⁸ *Ibid.*, 2:229.

¹¹⁹ General Court of Jeddah; Case no. 10517, dated 28/5/1430 AH (23 May 2009); Approval no. 3043458.

husband, Mr. Muhammad ‘Ali, was not her legal match and not suitable for her as a husband as he had been a drug addict who had been previously sentenced to fifteen years’ imprisonment in Abha, in the fertile mountains of south-western Saudi Arabia, and that he had been convicted three times before.

She requested the judge to annul the marriage due the great harm that her husband had done to her and her children. The judge decided to annul her marriage, without compensation, on the following grounds:

Firstly, Mr. Muhammad ‘Ali had been sentenced to fifteen years’ imprisonment, that is since 25/10/1427 AH (16 November 2006), on charges of selling cannabis, and that he had been previously convicted, according to letter no. 1/22/5103/11, issued by the Director of Abha General Prison, dated 14/6/1430 AH (7 June 2009).

Secondly, the judge found that ‘Ali’s wife and children had been subjected to a great deal of harm.

Finally, the judge relied on the Prophet’s narration which states, ‘There should be neither harming (*dharar*) nor reciprocating harm.’

He stated that marital life is essentially based upon love and affection, without which a happy life would be impossible, and also made mention of Articles 34, 34(10) and 37 of the Law of Procedure before *Shari’ah* Courts in support of his judgement.

Given that the judge made a legal decision by independent interpretation (*ijtihad*), his judgement is in total agreement with the *Shari’ah* rules, as *ijtihad* is considered to be one of the sources of Islamic legislation. This case shows the potential to use *ijtihad* to advance the protection of women’s human rights under *Shari’ah*.

3.3.2.3 A Woman Seeks to Annul the Marriage Contract as She does not Like her Husband

A woman (the plaintiff here) filed a lawsuit against her husband (the defendant) in the General Court in Riyadh, stating that he had married her and she stayed with him for two years and four months, then she left him and went to stay with her parents. She also mentioned to the judge that she was not willing to go back to her husband as she did not like him, and requested that her marriage to him be annulled. The defendant replied by saying that what she had said was right except for the claim that she did not like him and that it was her parents who actually wanted her to demand a divorce. He also requested the judge to ask her to return to him.

The judge adopted all the procedures possible to settle the dispute, based on the Council of Senior Scholars' resolution no. 26, dated 21/2/1394 AH (7 March 1974). First, he advised the wife to show obedience to her husband and to return to him but she refused. He also advised the husband to divorce his wife in return for the dowry he had paid her upon marriage, but he also refused.

He also considered the Qur'anic verse:

If you fear a breach between the two of them, appoint [two] arbiters, one from his family and the other from hers; if they wish for peace, Allah will cause their reconciliation, for Allah has full knowledge and is acquainted with all things.¹²⁰

Based on this verse, he requested the two parties to appoint an arbiter from each side. The wife appointed her paternal uncle and the husband appointed his paternal uncle. The arbiters then appeared before the judge who reminded them of the importance of fearing Allah in such matters, trying their best to reconcile husband and wife without being biased in favour of either

¹²⁰ Holy Qur'an, 4:35.

party and studying the matter thoroughly. He also requested them to inform him of any decision they would reach, as to whether to recommend a settlement or annulment of marriage with or without compensation. The two arbiters then met up with the two parties but to no avail, as they failed to agree on the same decision. The litigants were then summoned to appear before the judge, and he informed them and requested them to appoint two more arbiters to settle the matter. The defendant appointed an arbiter, but the plaintiff's arbiter refused to take part in the arbitration process.

The plaintiff then requested the judge to issue a judgement regarding her case, stating she was willing to return the bridal gift and the jewellery her husband had bought her. The judge once again advised her to return to her husband but she again refused. He also suggested to the defendant to divorce his wife in return for what she had offered to give him but he also refused.

The judge further based his judgement on the Qur'anic statement,

A divorce is only permissible twice; after that, the parties should either hold together on equitable terms, or separate with kindness.¹²¹

Because it was impossible to keep his wife who had left him for such a long time, given that men must not take them back to injure them, as evidenced by verse 231 of *Surat Al-Baqarah*; based on the Prophet's tradition, 'There should be neither harming (*dharar*) nor reciprocating harm', and based on the fact that divorce initiated by the wife (*khul'*) due to the impossibility of effecting a reconciliation is recognised in *Shari'ah*,¹²² the judge ruled that the husband should divorce his wife in return for the bridal gift and the jewellery he had bought her. As the husband refused to divorce his wife, the judge annulled the marriage, and the plaintiff

¹²¹ *Ibid.*, 2:229.

¹²² This is based on the report narrating the story of the wife of Thabit who requested the Prophet (pbuh) to annul her marriage to her husband and he did so.

returned the dowry and jewellery to the defendant. The Appellate Court approved the judgement, as the judge only acted in the light of the teachings of the Qur'an and the *Sunnah*, and this is unquestionably the ultimate solution to such a problem.¹²³

3.3.2.4 A Woman Seeks Divorce from her Sterile Husband

Islamic law protects women's right to have children. A divorce may be granted by court on the ground of a husband's sterility. I have actually dealt with a case in this respect. This incident took place in 1417 AH (1996). A woman filed a lawsuit against her husband, claiming that she had been married for fifteen years after she realized she could not have any children from her husband who turned out to be sterile. She requested the court to annul the marriage and showed her readiness to pay him a compensation of SR10,000 (approximately £1,728). The defendant denied he was sterile.

When I asked the plaintiff if she had known about his sterility before marriage, she replied that she only found out three years after marriage. I then asked the defendant if he had ever married before that, and he replied that he had married his cousin whom he claimed to have divorced because of her sterility and that he married another woman and he had children with her.

To ascertain whether or not the plaintiff herself was sterile, I required her to have fertility tests, which all proved she was fertile and could conceive.

I ruled that the husband should divorce his wife, based on an incident which took place during the caliphate of 'Umar ibn Al-Khattab, the second Rightly-Guided Caliph. A sterile man married a woman and when he met 'Umar, he informed him that he was sterile. 'Umar then

¹²³ *Al-Adl* Journal, A Quarterly refereed Journal concerned with juristic and legal issues, Ministry of Justice, Saudi Arabia, Issue 28, *Shawwal* 1426 AH/November 2005, p. 220.

asked him if he had informed his wife of this and he replied in the negative. ‘Go and tell her about it,’ ‘Umar ordered him, ‘and give her the option of staying with you or seeking a divorce.’¹²⁴

I also employed analogical reasoning, which is one of the sources of Islamic legislation, as noted in Chapter I, stating that sterility is a defect that legally requires the annulment of marriage. As Ibn Al-Qayyim puts it:

Any defects which cause alienation between spouses and fail to meet such marriage goals as mercy and love give the spouses the option of staying together or opting for divorce.¹²⁵

Sheikh Muhammad ibn Ibrahim also states in this connection:

A woman has the right to demand annulment of marriage from a man she has been married to for a long time without having any children with him, and her husband married another woman before her without having any children with her either and divorced the former who gave birth to children after divorce.¹²⁶

Based on these reasons, I ruled that the defendant should divorce his wife in return for a compensation of SR10,000, and the judgement was approved by the Appellate Court.¹²⁷ This is because a woman in Islam has the right to have children and if she becomes aware that her husband is sterile and it is impossible for him to have children, she has every right to seek divorce.

¹²⁴ Abu Bakr ‘Abd Ar-Razaq As-San’ani, *Musannaf ‘Abd Ar-Razzaq*, 2nd edition, (Beirut: Al-Maktab Al-Islami, 1403 AH/1982), vol. 6, p. 162.

¹²⁵ Ibn Qayyim Al-Jawziyyah, *Zad Al-Ma’ad Fi Khayri Al-‘Ibad*, 14th edition, (Beirut: Maktabat Al-Manar Al-Islamiyah, 1407 AH/1987), vol. 5, p. 162.

¹²⁶ Muhammad ibn Ibrahim ibn ‘Abdullatif Al Ash-Sheikh, *Letters and Legal Opinions of Sheikh Muhammad ibn Ibrahim ibn ‘Abdullatif Al ash-Sheikh*, Trans. Larbi Benrezzouk, 1st edition, (Makkah, Government Press, 1399 AH/1979), vol. 10, p. 165.

¹²⁷ *Al-Adl* Journal, a quarterly refereed journal concerned with juristic and legal issues, Riyadh, Saudi Arabia, *Rajab* 1423 AH/2002, Issue 15, p. 251.

3.3.2.5 A Man Divorces his Wife in his Last Illness¹²⁸

A man has no right whatsoever to divorce his wife with the intention of doing her harm, such as by depriving her of her share of the inheritance. It is for this reason that the *Shari'ah* is concerned with women's rights regarding inheritance and considers divorce in one's last illness invalid. Given that Saudi courts implement the *Shari'ah* rulings, based on the Qur'an and the Prophet's *Sunnah*, it is appropriate to mention and discuss the following case which took place in Madinah.

The plaintiff filed a lawsuit against the heirs, stating that she had married their deceased father on 28 *Jumada Al-Ula* 1422 AH (18 August 2001). She further stated that he divorced her in his last illness on 13 *Ramadhan* 1424 AH (7 November 2003), that is, three days before he died on 16 *Ramadhan* 1424 AH (10 November 2003) with the intention of depriving her of her right to inheritance. In these circumstances, she requested that the divorce pronouncement be annulled and that she be included amongst the heirs.

The heirs responded by stating that the defendant had indeed been married to their late father, a victim of asthma, diabetes and high blood pressure, and that he had divorced her three days before he passed away, just as she had claimed, after a failed operation.

The judge dealing with this case ruled that the defendant had a right to inheritance and that the divorce which her husband had pronounced was invalid for a number of reasons including the following:

- A wife has the right to inheritance when she is observing the waiting period (*'iddah*) after her husband has divorced her in his last illness.

¹²⁸ See *Code of Judicial Rulings*, 3rd edition, General Directorate of the Codification of Rulings, Ministry of Justice, Judicial Affairs Agency, Riyadh, Kingdom of Saudi Arabia, 1429 AH /2008, p. 33.

- The legal Islamic maxim states, ‘Whoever hastens something before it is due will be deprived of it altogether as a punishment.’¹²⁹
- The judge ascertained that he only divorced her with the intention of depriving her of her share of the inheritance. Ibn Qudamah said in this respect:

If [he] divorces [his wife] during a life-threatening sickness and then dies while she is observing the waiting period, then she has the right to inheritance. This has been reported on the authority of a large number of the Prophet’s companions and the leading scholars who followed them. In fact, [the third caliph] ‘Uthman ibn ‘Affan ordered that Tamadhur, daughter of Al-Asbugh from the Banu Kilab tribe, had the right to the inheritance her husband ‘Abdur-Rahman ibn ‘Awf had left, for he only divorced her in his last illness.¹³⁰

- According to the established *Hanbalite* school of jurisprudence, the established school of Islamic law in Saudi Arabia, a woman has the right to inheritance if her husband divorces her in his last illness unless she gets married again. *Imam* Ahmad, the founder of the *Hanbalite* school of jurisprudence, attributed this opinion to a number of leading Muslim jurists including *Imam* Malik.¹³¹

The Appellate Court issued a statement, no. 526/H/1/1 on 20 *Dhul-Hijjah* 1425 AH (31 January 2005), in which it approved the judge’s ruling in this case. The case is important in so far as it protects women against divorce from men who intend to abuse divorce by using it as a means to deny them the right to maintenance and ownership of property.

¹²⁹ Legal maxims (*Qawa'id Al-Kulliyah Al-Fiqhiyyah*) are theoretical abstractions, usually in the form of short epithetical statements, that are expressive, often in a few words, of the goals and objectives of the *Shari'ah*. Muhammad Hashim Kamali, *Qawa'id Al-Fiqh: The Legal Maxims of Islamic Law*, the Association of Muslim Lawyers. Available at: http://sunnah.org/fiqh/usul/Kamali_Qawaid_al-Fiqh.pdf. Accessed on 28 November 2011. See also Muhammad Sidqi al-Borno, *Encyclopaedia of Islamic Legal Maxims* (in Arabic), 2nd edition, (Riyadh: At-Tawbah Bookshop, 1418 AH/1997), p. 15; and Muhammad Sidqi Al-Borno, *A Brief Explanation of the Comprehensive Legal Maxims* (in Arabic), 5th edition, (Beirut: Mu'assasat Ar-Risalah, 1419 AH/1999), p. 8.

¹³⁰ *Al-Mughni*, Book of Inheritance, Chapter on Divorce, p. 750.

¹³¹ *Ibid.*, Chapter on Divorce, p. 750. See also Ibn Taymiyyah, *Majmu' Al-Fatawa*, (Madinah: King Fahd Complex for the Printing of the Holy Qur'an, 1425 AH/2004), vol. 32, p. 20. vol. 4, p. 143.

3.3.2.6 A Woman Seeks Divorce from her Husband due to Long Absence (Desertion)

In case no. 20/497,¹³² a Saudi wife claimed that she was married to a Jordanian citizen and that he had been absent from his Saudi home for six years, without leaving her or her children any support expenses. She added that she did not know his whereabouts or any particular address and requested the judge to annul the marriage. She further stated that she made an announcement as to his absence in *Riyadh* newspaper, issue 12684 on 14 *Muharram* 1424 AH (17 March 2003) in order to see if there was anyone who might have been able to help regarding his whereabouts. She brought along two witnesses who testified that the defendant had left the Kingdom on a final exit visa.

The Department of Criminal Investigation also declared in Report no. 1483, dated 15/6/1424 AH (13 August 2003), that the plaintiff's husband left the country on a final exit visa on 11/12/1418 AH (9 April 1998). After the judge had ascertained that the plaintiff's claim was true, and was satisfied with the evidence she had brought forth, he ruled that her marriage to her absent husband be annulled. He based his judgement on the following:

- The Prophet's tradition, 'There should be neither harming nor reciprocating harm.'
- Muslim jurists' statement that if a husband has been absent from home without leaving his wife any support expenses, she has the right to demand annulment of marriage.¹³³
- Article 10(34) of the Implementing Rules of the Law of Procedure before *Shari'ah* Courts, which provides:

¹³² General Court of Riyadh; Case no. 20/497, Dated 26/11/1424 AH (18 January 2004); Appellate Court Approval no. 66/Sh/A, dated 17/1/1425 AH (8 March 2004).

¹³³ See *Zad Al-Ma'ad*, vol. 4, p. 11.

Maintenance is the backbone of marital life, which cannot possibly be established without it, as the Qur'an says, 'The father shall bear the cost of the mother's food and clothing on equitable terms.'¹³⁴

The case may be understood as supporting the view that desertion without justifiable reasons is a ground for divorce.

3.3.2.7 Turning down a Lawsuit against Divorce¹³⁵

Conversely, if a man divorces his wife in an illness which is not life-threatening and his wife demands an annulment of divorce, her claim will not be considered as long as the divorce is considered valid. The ruling regarding this case is different from that of the previous case.

A wife filed a lawsuit against her husband, stating that he had married her twenty-five years before and had had nine children with her and then divorced her when he allegedly found out that he had cancer and was HIV-positive. She further stated that he had another wife who had eight children with him and that he only divorced her to deprive her of her share of the inheritance. The plaintiff also requested an annulment of divorce.

The defendant husband responded by saying that the plaintiff actually sought divorce, and when the judge asked him about his health he replied by saying that he had liver cancer but that his health was quite stable as he was still working for the government.

To investigate the matter further, the judge requested the hospital to provide a medical report of his health. The hospital issued a report on 6 *Shawwal* 1426 AH (8 November 2005) to the effect that the defendant suffered from weight loss and a lymphatic tumour related to the human immune deficiency virus (HIV).

¹³⁴ Holy Qur'an, 2: 233.

¹³⁵ Case no. 148/SH, dated 19 *Safar* 1427 AH (19 March 2006). *Code of Judicial Rulings*, 1st edition, General Directorate of the Codification of Rulings, Ministry of Justice, Judicial Affairs Agency, Riyadh, Kingdom of Saudi Arabia, 1428 AH/2007, General Court of Riyadh, p. 300.

The judge discussed the matter further with the defendant only to find out that his health was stable. He ruled on 21 *Dhul-Hijjah* 1426 AH (21 January 2006) that the plaintiff's claim be turned down as the defendant's health was stable and his illness was not life-threatening. The Appellate Court issued Approval no. 148/SH on 19 *Safar* 1427 AH (19 March 2006).

In my estimation, so long as the defendant did not pronounce a divorce in his last illness, the hospital's report proved that his health was stable and he was still carrying on with his employment as normal, the judge's ruling was right and in accordance with the teachings of the *Hanafite* school of jurisprudence adopted in the Kingdom of Saudi Arabia.¹³⁶

3.3.2.8 Confirmation of a Divorce

A woman has the right to ask her husband to confirm divorce. In the case where this is not possible, an application may be made to court to confirm the divorce. This is the case in Saudi Arabia, as the following two cases clearly demonstrate.

In the general Court of Jeddah, the plaintiff (a woman) filed a lawsuit against the defendant, stating that he used to be her husband and that he divorced her in the month of *Muharram*, 1429 AH (January 2008) but did not ask her to return to him.¹³⁷ Therefore, she requested the judge to ask him to confirm the divorce pronouncement he had made. The defendant replied by saying that he made the divorce statement, 'You are divorced thrice.' Based on this statement, the judge then ascertained that the plaintiff's divorce from the defendant did take place and thus was confirmed.

In the second case, no. 23/5, the plaintiff (a woman) filed a lawsuit against her husband, stating that he had previously uttered three divorce pronouncements on 9 *Ramadhan* 1429 AH

¹³⁶ Ali Haydar, *Durar Al-Hukkam Sharh Majallat Al-Ahkam*, 1st edition, (Beirut: Dar Al-Kutub Al-'Ilmiyyah, 1419 AH/1998), p. 314.

¹³⁷ General Court of Jeddah; Case no. 10113, dated 22/5/1430 AH/17 May 2009.

(10 September 2008).¹³⁸ The plaintiff requested the judge to confirm her divorce. The defendant appeared before the court and declared that he had not divorced his wife. However, two witnesses came and declared that the defendant had indeed divorced his wife. Based on this evidence, the judge decided that the divorce was confirmed.

The two cases above demonstrate that women can seek confirmation of divorce from the courts. Such confirmation is essential because it clarifies the marital status of women, in particular whether they are married or divorced. Confirmation of this status enables women to enjoy their rights in relation to termination of marriage, such as a share of the property.

3.4 Women's Rights to Custody

If the parents are divorced, Islamic law states that if the minor is a girl she remains under the custody of her mother until she turns seven, when guardianship is transferred to the father on condition her mother does not get married before she turns seven,¹³⁹ as evidenced by the Prophetic tradition in which the Prophet (pbuh) said to a woman with a similar case, 'You are best entitled to the custody of [your infant] as long as you do not get married.'¹⁴⁰ In the case of a male, if he turns seven, he is given the opportunity to choose the parent he wants to stay with,¹⁴¹ as evidenced by the tradition which states that the Prophet (pbuh) gave a child the opportunity to choose the parent he wanted to stay with when his parents disputed before him as to who was

¹³⁸ General Court of Riyadh, Case no. 23/5, dated 7/2/1430 AH/ 2 February 2009; Appellate Court's approval no. 621/Sh/A, dated 29/5/1430 AH/ 24 May 2009.

¹³⁹ Muwaffaq ad-Din 'Abdullah ibn Ahmad Ibn Qudamah, *Al-Mughni*, 1st edition, (Lebanon: Dar Ihya' At-Turath Al-'Arabi, 1405 AH/1985), vol. 9, pp. 301-2. See also Abu Zakariyya An-Nawawi, *Rawdhat At-Talibin Wa 'Umadu Al-Muftin*, 3rd edition, (Beirut: Al-Maktab Al-Islami, 1412 AH/1991), vol. 9, p. 103.

¹⁴⁰ Abu Dawud, *Book of Divorce*, *hadith* no. 1938; and Ahmad, *Al-Musnad*, *hadith* no. 6420.

¹⁴¹ Taqiyyud-Din Abul-'Abbas Ahmad ibn 'Abdul-Halim ibn 'Abdus-Salam Ibn Taymiyyah, *Majmu' Al-Fatawa*, (Madinah: King Fahd Complex for the Printing of the Holy Qur'an, 1425 AH/2004), vol. 34, p. 58. See also 'Ala-ud-Deen Abu Bakr ibn Mas'ud Al-Kasani, *Bada'i' As-Sana'i' Fi Tartib Ash-Shara'i'*, 1st edition, (Beirut: Dar Al-Kutub Al-'Ilmiyyah, 1997), vol. 4, pp. 43-4; and Muhammad ibn Ahmd Al-Qurtubi, *Al-Jami' Li Ahkam Al-Qur'an*, 1st edition, (Riyadh: Mu'assasat Ar-Risalah, 2006), vol. 3, p. 164.

entitled to have custody of the child.¹⁴² The mother is entitled to the custody of her children if she meets the following conditions:

She must be:

- (a) a free person;
- (b) an adult;
- (c) sane;
- (d) trustworthy; and
- (e) capable¹⁴³

Her right to custody is forfeited in the following conditions:

- 1) If she remarries and the marriage is to a *ghayr mahram* (stranger according to *Shari'ah*) of the child;
- 2) If she demands remuneration for the upbringing of the child whereas there is another woman to rear the child without remuneration and the father cannot afford to remunerate her;
- 3) If she does not attend to the child responsibly; for instance, leaving the child in the house very often without a responsible person to take adequate care of the child;
- 4) If she openly indulges in sin and there is a risk of the child being affected or influenced.¹⁴⁴

¹⁴² Reported by At-Tirmidhi, *Book of the Prophet's Rulings, hadith* no. 1357.

¹⁴³ Al-Bahuti, *Kash-shaf Al-Qina'*, (Beirut: 'Alam Al-Kutub, 1997), vol. 5, p. 498; Ibn 'Abidin, *Al-Hasiyah*, (Beirut: Dar Al-Kutub Al-'Ilmiyyah, 1415 AH/1994), vol. 3, p. 556; and As-Sarakhsi, *Al-Mabsut*, (Beirut: Dar Al-Ma'rifah, 1409 AH/1988), vol. 5, p. 207.

¹⁴⁴ Council of Muslim Theologians. Available at:

The mother is more entitled to take custody of the child because she is considered more capable of carrying out the task of taking care of the child at this age. She is the one who can breastfeed the child and obviously has more patience than a man in bringing the child up in the best possible manner. This is based on a Prophetic tradition narrated from ‘Abdullah ibn ‘Amr (may Allah be pleased with him) that a woman said to the Prophet (pbuh), ‘Messenger of Allah, my womb was a ‘container’ for this son of mine, my lap was a ‘haven’ for him, and he drank milk from my breasts. His father has divorced me and wants to take him away from me.’ The Prophet (pbuh) replied, ‘You have more right to him so long as you do not get married again.’¹⁴⁵

Yahya ibn Sa’id also reported:

I heard Al-Qasim ibn Muhammad say, ‘Umar ibn Al-Khattab had a wife from among the *Ansar* who bore him Asim ibn ‘Umar, then ‘Umar divorced her. ‘Umar came to Quba’ and found his son ‘Asim playing in the courtyard of the mosque. He took him by the arm and seated him in front of him on his riding-animal, but the child’s grandmother caught up with him and fought with him over the child until they went to Abu Bakr As-Siddiq. ‘Umar said, ‘[He is] my son!’ and the woman said, ‘[He is] my son!’ Abu Bakr then said, ‘Leave them alone,’ and ‘Umar did not say anything.’¹⁴⁶

According to some reports, Abu Bakr said, ‘The mother is more compassionate, more kind, more merciful, more loving and more generous, and she has more right to her child unless she gets married again.’¹⁴⁷

Abu Bakr’s description of the mother as being kinder and more compassionate is the reason why the mother has priority to the custody of her young child.¹⁴⁸

http://www.jamiat.org.za/index.php?option=com_content&view=article&id=369:custody-of-children-in-the-event-of-a-divorce-&catid=112:divorce-talaq&Itemid=18. Accessed on 28 November 2011.

¹⁴⁵ Abu Dawud Sulayman ibn Al-Ash’at As-Sijistani Al-Azdi, *As-Sunan*, 1st edition, (Beirut: Dar Al-Hadith, 1389 AH/1969), vol. 2, pp. 707-8. See also *Imam Ahmad ibn Hanbal, Al-Musnad*, 1st edition, (Cairo: Dar Al-Hadith, 1416 AH/1995), vol. 2, p. 182.

¹⁴⁶ Narrated by Malik in *Al-Muwatta’*, 2/767; al-Bayhaqi, 8/5). Ibn ‘Abd Al-Barr said, ‘this *hadith* is well known with a variety of chains of transmission, complete and incomplete, and is accepted by the scholars.

¹⁴⁷ As-Sayyid Sabiq, *Fiqh as-Sunnah*, translated by Muhammad Sa’id Dabas and Jamal Ad-Din M. Zarabozo, (Indiana: American Trust Publications, 1412 AH/1991), vol. 2, pp. 289-90.

When the male child turns seven, he is given the choice to stay with whichever of his parents is dearer to him. As for the female child, Muslim jurists have expressed different opinions. Abu Hanifah said, 'The mother is more entitled to have custody of her until she gets married or menstruates.'¹⁴⁹ Malik ibn Anas said, 'The mother has more right to her custody until she gets married and her husband consummates the marriage with her.'¹⁵⁰ Ash-Shafi'ee said, 'She should also be given the choice.'¹⁵¹ Ahmad said, 'The father has more right to her because the father is the best one to look after her.'¹⁵²

In view of these differences and the fact that there is no clear textual evidence from the Qur'an or the *Sunnah* as to who has the right to have custody of the female child, the matter should be referred to the judge to determine who the daughter should live with when she reaches the age of seven.

The four schools of Islamic jurisprudence have deduced various rules for child custody after a divorce. According to Az-Zuhayli, the main principle of the Islamic legal material in the matter of custody is 'the welfare of the child'.¹⁵³

In Islamic jurisprudence, there are two stages of child custody. The first stage, called *hadhanah* (nursing), applies to small children. There is unanimous agreement among Muslim scholars that children should at this stage be cared for by women: first, the mother if she has not

¹⁴⁸ *Ibid.*

¹⁴⁹ 'Ala-ud-Deen Abu Bakr ibn Mas'ud Al-Kasani, *Bada'i' As-Sana'i' Fi Tartib Ash-Shara'i'*, 1st edition, (Beirut: Dar Al-Kutub Al-'Ilmiyyah, 1997), vol. 2, pp. 42-3.

¹⁵⁰ Muhammad ibn 'Abdur-Rahman At-Tarabulsi Al-Maghribi, best known by the name Al-Hattab, *Mawahib al-jalil Fi Sharh ash-Sheikh Khalil*, (Beirut: Dar 'Alam Al-Kutub, 1423 AH /2003), vol. 4, p. 214. See also 'Ala-ud-Deen Abu Bakr ibn Mas'ud al-Kasani, *Bada'i' As-Sana'i' Fi Tartib ash-Shara'i'*, 1st edition, (Beirut: Dar Al-Kutub Al-'Ilmiyyah, 1997), vol. 2, pp. 42-3.

¹⁵¹ Abu Zakariyya An-Nawawi, *Rawdhat At-Talibin Wa 'Umadu Al-Muftin*, 3rd edition, (Beirut: Al-Maktab Al-Islami, 1412 AH/1991), vol. 9, p. 103.

¹⁵² Ibn Qayyim Al-Jawziyyah, *Zad Al-Ma'ad fi Khairi Al-'Ibad*, 7th edition, (Beirut: Mu'assasat Ar-Risalah, 1405 AH/1984), vol. 5, p. 475. See also Muwaffaq ad-Din 'Abdullah ibn Ahmad Ibn Qudamah, *Al-Mughni*, (Beirut: Dar Al-Fikr, 1414 AH/2003), vol. 9, pp. 301-2.

¹⁵³ Wahbah Az-Zuhaili, *Al-Fiqh Al-Islami Wa Adillatuhu (Islamic Jurisprudence and its Evidence)*, (Damascus: Dar Al-Fikr, 1989), vol. 7, pp. 743-5.

remarried again, and second the mother's mother.¹⁵⁴ Scholars differ about who should come next. Some take the view that it should be the mother's grandmother, then the child's paternal grandmother, the sister, and so on. According to the *Hanbalite* school of jurisprudence, the father of the child is second after of the maternal grandmother.¹⁵⁵ All schools of Islamic jurisprudence have long lists of preferences in the matter of custody, but it is important to be aware that many of these are individual judgements (*ijtihad*).

As for the second stage of child custody, that is, when children attain puberty, there are different opinions among scholars about who should have custody. Some Prophetic traditions suggest that children should be able to choose for themselves. A woman came to the Prophet (pbuh) and said, 'My husband wants to take away this child from me even though he has brought over water for me from the well of Abu 'Inabah and given me a lot of benefit.' The Prophet (pbuh) said to her, 'Both of you can cast lots on this.' When the husband heard, he said, 'Who will quarrel with me regarding this son of mine?' The Prophet (pbuh) turned to the son and said to him, 'This is your father and this is your mother; take the hand of the one you want to stay with.' The child grasped the mother's hand and she took him away.¹⁵⁶

On another occasion too, the Prophet (pbuh) gave a boy the chance of choosing to stay with either his father or mother.¹⁵⁷

The four law schools have detailed regulations for child custody. Within the legislation of the *Hanafite* school of jurisprudence, a boy should move to his father when he is no longer in need of 'women's care'.¹⁵⁸ This school defines this age as seven, and at nine years at the latest,

¹⁵⁴ *Ibid.*

¹⁵⁵ *Ibid.* vol. 7, pp. 744-5.

¹⁵⁶ Abu Dawud, *As-Sunan*, vol. 2, p. 708.

¹⁵⁷ At-Tirmidhi, *As-Sunan*, *Book of Rulings*, hadith no. 1357.

¹⁵⁸ Wahbah Az-Zuhaili, *Al-Fiqh Al-Islami Wa Adillatuhu (Islamic Jurisprudence and its Evidence)*, (Damascus: Dar Al-Fikr, 1989), vol. 7, p. 742.

the stage of *hadhanah* (custody).¹⁵⁹ As for a girl, she should stay with the mother for a longer period (as she needs a female education) until menstruation, at either nine or eleven years of age, when she moves to her father.¹⁶⁰

Two cases involving custody are examined below to illustrate how the issue of custody has been dealt with by courts in Saudi Arabia.

3.4.1 A Judge Rules that a Husband Hands the Child over to his Mother

In case no. 14549,¹⁶¹ the plaintiff (a woman in this case) filed a lawsuit against her husband, stating that they had one son whom they named Ibrahim, who was one year and nineteen months at the time of the hearing. She went on to state that after her husband had divorced her, he took over custody of their son against her will. She then requested the judge to grant her custody of the child instead of him. The defendant refused to return the child and instead sent him off to the child's paternal grandmother who lived in Abha, the capital city of Asir province in Saudi Arabia. The judge asked him whether he had sent the child off to his paternal grandmother before or after the lawsuit had been filed, and he said that this happened after the case had been filed, that is, after receiving a summons to appear before the court.

The judge then ruled that the defendant must return the infant to his mother and awarded custody to her after hearing her claim and the defendant's response. He based his judgement on the Prophetic tradition in which the Prophet (pbuh) said to a woman with a similar case, 'You are

¹⁵⁹ *Ibid.*

¹⁶⁰ *Ibid.* vol. 7, p. 742. See also Anne Sofie Roald, *Women in Islam: the Western Experience*, 1st edition, (London: Routledge, 2001), p. 232.

¹⁶¹ General Court of Makkah, Date: 30/6/1430 AH (23 June 2009); Appellate Court Approval no. 16/125, dated 3/8/1430 AH (25 July 2009).

best entitled to the custody of [your infant] as long as you do not get married.’¹⁶² He also based this judgement on Article 199 of the Law of Procedure before *Shari’ah* Courts which provides:

A judgement incorporating a provision for expeditious execution, with or without bond at the discretion of the judge, shall be made in the following circumstances:

- (a) Judgements in expeditious matters;
- (b) If the judgement is for support, nursing or housing expenses, visitation of a minor, delivering a minor to a nurse-maid or a woman to her *mahram* or separating spouses;
- (c) If the judgement is for the payment of wages to a servant, craftsman, workman, wet-nurse, or nurse-maid.

3.4.2 A Judge Grants Custody of a Nine-Year-Old Female Child to the Father, Following the Mother’s Marriage to Another Man

Islam attaches much importance to children’s upbringing and general welfare, especially after their parents’ separation as a result of a divorce. A case in point here is that in which the plaintiff (a man in this case) filed a lawsuit against his wife (the defendant) who bore him a girl whom they named Ala’.¹⁶³ By the time Ala’ turned nine, her parents had already divorced and she lived with her mother. The plaintiff’s request to the judge was that he wanted to take over custody of Ala’, but her mother, who was then married to another man, refused.

The judge ruled that the defendant should give up custody of her daughter so that her father could take care of her instead. He based his decision on Muslim jurists’ ruling that a child’s custody is to be given to the father when the child turns seven and she can stay with him until she gets married, without being allowed to choose whomever she

¹⁶² Abu Dawud, *Book of Divorce*, *hadith* no. 1938; and Ahmad, *Al-Musnad*, *hadith* no. 6420.

¹⁶³ General Court of Makkah; Case no. 12904, dated 24 *Shawwal* 1430 AH (13 October 2009).

wants to stay with.¹⁶⁴ This is also the opinion of the Ifta Permanent Committee in Saudi Arabia.¹⁶⁵

3.5 Women's Rights to Maintenance

Muslim scholars are generally agreed that a husband's maintenance of his wife is a duty dictated by marriage in Islamic law. As the Qur'an states:

Men are the protectors and maintainers of women, because Allah has given the one more [strength] than the other, and because they support them from their means.¹⁶⁶

Indeed, it is a reflection of the honourable treatment which Allah has enjoined on Muslim husbands towards their wives. As the Qur'an states:

Live with them on a footing of kindness and equity.¹⁶⁷

Let the man of means spend according to his means; and the man whose resources are restricted, let him spend according to what Allah has given him. Allah puts no burden on any person beyond what He has given him. After a difficulty, Allah will soon grant relief.¹⁶⁸

The mothers shall give such to their offspring for two whole years, if the father desires to complete the term. But he shall bear the cost of their food and clothing on equitable terms.¹⁶⁹

¹⁶⁴See Al-Bahuti, *Kash-shaf Al-Qina'*, (Beirut: 'Alam Al-Kutub, 1997), vol. 5, p. 52. See also Abu 'Umar Yusuf ibn 'Abdullah ibn Muhammad ibn 'Abd Al-Barr, *Al-Kafi Fi Fiqh Ahl Al-Madinah*, 1st edition, (Riyadh: Maktabat Ar-Riyadh Al-Hadithah, 1980), vol. 3, p. 386.

¹⁶⁵ *Fatwa* issued by the Ifta Permanent Committee, *Fatwa* no. 14806, vol.21, p. 21; available at the official site of the General Presidency of Scholarly Research and Ifta: <http://www.alifta.net/Default.aspx>. Accessed on 28 November 2011.

¹⁶⁶ Holy Qur'an, 4:34.

¹⁶⁷ *Ibid.*, 4:19.

¹⁶⁸ *Ibid.*, 65:7.

¹⁶⁹ *Ibid.*, 2:233.

As for the amount of maintenance, this depends to a large extent on the husband's financial standing. 'A'ishah, the Prophet's wife, (may Allah be pleased with her) narrated:

Hind bint 'Utbah, the wife of Abu Sufyan, came the Messenger of Allah (pbuh) and said, 'Messenger of Allah, Abu Sufyan is a tight-fisted man who does not spend enough on me or my children, except for what I take from his wealth without his knowledge. Is there any sin on me for doing so?' The Prophet (pbuh) replied, 'Take only what is sufficient for you and your children on a reasonable basis.'¹⁷⁰

A woman is entitled to a *mahr* (dowry), when the marriage contract is completed or when the marriage is consummated. It is an entitlement that the man is obliged to pay to the woman.

As the Qur'an states:

And give the women [on marriage] their dower as a free gift; but if they, of their own good pleasure, remit any part of it to you, take it and enjoy it with right good cheer.¹⁷¹

The prescription of the *mahr* demonstrates the seriousness and importance of the marriage contract, and is a token of respect and honour to the woman. It is not, however, a condition of the marriage contract, according to the majority of Muslim jurists; rather it is one of its consequences. If the marriage contract is concluded without any mention of the *mahr*, it is still valid, according to the consensus of the majority of Muslim jurists, as the Qur'an states:

There is no blame on you if you divorce women before consummation or the fixation of their dower; but bestow on them (a suitable gift), the wealthy according to his means, and the poor according to his means: A gift of a reasonable amount is due from those who wish to do the right thing.¹⁷²

¹⁷⁰ This narration is reported by Al-Bukhari, *hadith* no. 5364 and Muslim, *hadith* no. 1714. See also See: *Al-Mawsu'ah al-Fiqhiyyah (Encyclopaedia of Islamic Jurisprudence)*, Vol. 41, p. 39.

¹⁷¹ Holy Qur'an, 4:4.

¹⁷² Holy Qur'an, 2:36.

The fact that divorce is permitted before consummation of the marriage or before stipulating the *mahr* indicates that it is permissible not to stipulate the *mahr* in the marriage contract. If it is stipulated, it becomes obligatory upon the husband; if it is not stipulated, then he must give the *mahr* that is given to women of similar status to his wife.

Muslim scholars are also generally agreed that a husband must spend on his wife on the condition that she does not desert him.¹⁷³ If she deserts him without a reasonable excuse, then she is not entitled to this right.

The reason why it is obligatory to spend on her is that the woman is available only to her husband, because of the marriage contract, and she is not allowed to leave the marital home except with his permission.¹⁷⁴ Therefore, he has to spend on her and provide for her, and this is in return for her making herself available to him for his pleasure.

Housing is also one of the wife's rights. This means that the husband must provide adequate accommodation according to his means. As the Qur'an states,

Let the women live (in *'iddah*) in the same style as you live, according to your means.¹⁷⁵

4. Conclusion

This chapter has discussed some of the rights of Muslim women under the *Shari'ah* as practised in Saudi Arabia in the family relationship. It is clear from the foregoing that the *Shari'ah* protects the rights of women relating to marriage, divorce, custody and maintenance. A

¹⁷³ Muwaffaq ad-Din 'Abdullah ibn Ahmad Ibn Qudamah, *Al-Mughni*, Vol. 7, p. 594.; 'Ala-ud-Deen Abu Bakr ibn Mas'ud Al-Kasani, *Bada'i' As-Sana'i' Fi Tartib ash-Shara'i*, 2nd edition, (Beirut: Dar Al-Kutub Al-'Ilmiyyah, 1424 AH/2003), Vol. 4, p. 140; and Ash-Sharbini, *Mughni Al-Muhtaj*, (Beirut: Dar Al-Kutub Al-'Ilmiyyah, 1451 AH/1994), Vol. 3, p. 436.

¹⁷⁴ Taqiyyud-Din Abul-'Abbas Ahmad ibn 'Abdul-Halim ibn 'Abdus-Salam Ibn Taymiyyah, *Majmu' Al-Fatawa*, (Madinah: King Fahd Complex for the Printing of the Holy Qur'an, 1425 AH/2004), Vol. 32, p. 261. 'A'ishah (may Allah be pleased with her) narrated that she once asked the Prophet (pbuh), 'Do you allow me to visit my parents?' This *hadith* is reported by Al-Bukhari, *hadith* no. 414, and Muslim, *hadith* no. 2770. In case there is a necessity, the husband can go out without her husband's permission. See generally, Al-Bahuti, *Kash-shaf Al-Qina*, (Beirut: 'Alam Al-Kutub, 1423 AH/2003) and Muwaffaq ad-Din 'Abdullah ibn Ahmad Ibn Qudamah, *Al-Mughni*, (Lebanon: Dar Ihya' At-Turath Al-'Arabi, 1405 AH/1985).

¹⁷⁵ *Ibid.*, 65:6.

number of cases relating to different women's issues have been discussed in support of this fact. These aspects include marriage, divorce, custody and maintenance. It should also be noted that the many forms of injustice from which many women in Saudi Arabia suffer should not be attributed to Islamic law, but rather to prevalent non-Islamic practices and some weaknesses in the enforcement of Islamic law before domestic courts, such as the lack of legal aid to support women to bring cases involving family matters before courts; lack of legal literacy among women and men compounded by the lack of comprehensive codification of Islamic law so that it becomes more accessible; and the widespread cultural norms among the population that family matters should be generally be resolved outside the court system. .

Chapter V: Domestic Violence against Women in Saudi Arabia

1. Introduction

The previous chapter discussed the rights of women before Saudi courts regarding family matters. Domestic violence has a negative effect on women's enjoyment of human rights in many countries including Saudi Arabia. This issue is discussed in this chapter both in the international and domestic legal frameworks, clearly stating the Islamic standpoint on the subject. The chapter adopts the following structure: Section 1 provides some definitions of domestic violence. Section 2 examines the problem of domestic violence against women in Saudi Arabia. Section 3 is an overview of the major causes of domestic violence against women in Saudi Arabia. Section 4 sheds some light on the measures taken by Saudi Arabia to combat domestic violence against women. Section 5 suggests some recommendations towards more effective protection of women against violence in the country. The chapter also attempts to be as objective and impartial as possible concerning the full reality of the lives of woman in Saudi Arabia, citing relevant facts and figures in this regard.

2. Defining Domestic Violence against Women

Many definitions have been provided for domestic violence, which generally refer to behaviour that involves the use of force in assaulting another person for not being willing to do or say something, and which is bound to cause the victim physical, psychological and social harm.¹

¹ 'Abbas Abu Shama 'Abd Al-Mahmood and Muhammad Al-Amin Al-Bishri, *Al-'Unf Al-Usaree Fi Dhilli Al-'Awlamah (Domestic Violence under Globalisation)*, 1st edition, (Riyadh: Nayef College for Security Sciences, 2005), pp. 129-130.

According to Article 1 of the United Nations Declaration on the Elimination of Violence against Women of 1993,² domestic violence is

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 private life.

Although this definition is potentially inclusive of many separately named forms of violence against women, including domestic violence, sexual assault, stalking, sexual harassment in the workplace, female genital mutilation, dowry deaths and so-called honour crimes, the breadth of this definition, Sylvia Walby argues, is:

both a strength and a weakness. It is a strength in that it enables the inclusion of the range of women's experiences of violence. It is a weakness in some contexts where this may be associated with a dilution of the attention to specifically gender-based violence and hence a loss of focus for both explanations and policy development.³

According to the Islamic Fiqh Academy,⁴ domestic violence refers to words or deeds, characterized by harshness, which are directed by one person against another and are bound to cause physical or psychological harm to the family or to one of its members.⁵

Such a conduct, the Academy further observes, 'is strictly prohibited in Islam as it opposes Islamic law which commands the preservation of life and the intellect, among other human rights, and contravenes the divine guidance which is based on kindness and equity.'⁶

² Declaration on the Elimination of Violence against Women, United Nations General Assembly A/RES/48/104 - 85th plenary meeting, 20 December 1993, Article 1.

³ Sylvia Walby, 'Improving the statistics on violence against women,' *Statistical Journal of the United Nations* ECE 22, IOS Press, 2005, p. 194.

⁴ The International Islamic Fiqh Academy is an Academy for advanced study of Islam based in Jeddah Saudi Arabia. It was created at the decision of the second summit of the Organisation of the Islamic Conference (OIC), 1974, and inaugurated in February 1988.

⁵The International Islamic Fiqh Council, Resolution no. 180 (19/6), dated 27/5/2009. Available at: <http://www.fiqhacademy.org.sa/>. Accessed on 18 July 2011.

⁶ *Ibid.*

Article 2 of the Declaration on the Elimination of Violence against Women states that violence against women is to be understood to encompass, but not be limited to, the following:

- (a) 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;
- (b) 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;
- (c) Physical, sexual and psychological violence perpetrated or condoned by the State, wherever it occurs.⁷

Today, the dramatic increase in research on violence against women and support for their cause, Patricia Tjaden contends, has resulted in greater awareness about the scope of this phenomenon. This has also led to ‘a shift from defining the problem from a narrow criminal justice perspective to one that encompasses public health issues and human rights.’⁸ The increase in research and advocacy shed ample light on the need for reliable surveillance systems in all countries, that will measure the full breadth of violence perpetrated against women.⁹

⁷ United Nations General Assembly, Declaration on the Elimination of Violence against Women A/RES/48/104, 85th plenary meeting, 20 December 1993.

⁸ Patricia Tjaden, ‘Defining and measuring violence against women: Background, issues, and recommendations,’ *Statistical Journal of the United Nations* ECE 22, IOS Press, 2005, p. 223.

⁹ *Ibid.*

3. The Problem of Domestic Violence against Women in Saudi Arabia

3.1. The Scope of Domestic Violence in Saudi Arabia

Domestic Violence against Women as a Global Phenomenon

Domestic violence is a global epidemic that plagues women of all ages.¹⁰ It is most commonly perpetrated against women and is one of the major international health risks for them.¹¹ It crosses religious, social, cultural, economic and geographic boundaries. It is not restricted to Saudi Arabia but occurs in all countries of the world. Indeed, it is a global epidemic.¹² Though separated by religious, ethnic and cultural differences, all societies share this common thread; industrialized and developing nations alike experience high levels of domestic violence.¹³

Domestic violence in Saudi Arabia is a subject that has only recently entered public discourse but still remains a taboo subject for discussion,¹⁴ and despite the reforms that the government has undertaken, women ‘continue to face severe discrimination in law and practice.’¹⁵

Indeed, this constitutes a new phenomenon that emerged in the Saudi society in the past few decades, as have been indicated by a number of studies. This phenomenon has not received

¹⁰ Jodie G. Roure, ‘Gender Justice in Puerto Rico: Domestic Violence, Legal Reform, and the Use of International Human Rights Principles’, *Human Rights Quarterly* (2011), Vol. 33, p. 793. See also Anthony Aust, *Modern Treaty Law and Practice* 2nd edition, (Cambridge: Cambridge University Press, 2007) and United Nations General Assembly, 66th session, Advancement of Women, A/66/215, 1 August 2011.

¹¹ Bonita Meyersfeld, ‘Domestic Violence, Health and International Law’, *Emory International Law Review*, Vol. 22, 2008, p. 62.

¹² Najma M. Adam, ‘Domestic Violence against Women Within Immigrant Indian and Pakistani Communities in the United States (Unpublished doctoral dissertation, University of Illinois at Chicago, 2000).

¹³ Rebecca Adams, ‘Violence against Women and International Law: The Fundamental Right to State Protection from Domestic Violence’, *New York International Law Review*, Winter, 2007, p. 3.

¹⁴ Nora Almosaed, ‘Violence against women: a cross-cultural perspective’, *Journal of Muslim Affairs*, 2004, Vol. 24, No. 1, p. 67.

¹⁵ Saudi Arabia - Amnesty International Report 2010, Human Rights in the Kingdom of Saudi Arabia. Available at: <http://www.amnesty.org/en/region/saudi-arabia/report-2010>.

much attention, and not many studies have been conducted on it due to a number of reasons including the following:

1. The particularity of the Saudi society culture which considers family relationships highly confidential. However, confidentiality of family relations should not justify domestic violence since there is nothing confidential about violence;
2. Failure of victims of domestic violence to inform on those who commit it due to economic, social and psychological reasons, particularly when the victim of domestic violence is the wife. There is a need to empower victims to report cases of domestic violence as observed in Section 6;
3. The recurrence of domestic violence against women due to the absence of laws which protect women against it. As noted in Section 6, a comprehensive law to address domestic violence is necessary;
4. The fact that it is hard to detect domestic violence and the tendency of both the perpetrator and the victim to deny that an act of violence has taken place;
5. The fact that it is hard to study domestic violence cases and the failure of domestic violence victims to cooperate with researchers conducting studies on this phenomenon.¹⁶

There is a need to address this culture through education about domestic violence.

According to Ahmad Al-Mazyad and Adil Ash-Shaddi, both are professors at King Saud University, Riyadh, domestic violence in Saudi Arabia poses a big problem to specialists in this field for a number of reasons including the following:

1. Domestic violence cases are shrouded in total secrecy;

¹⁶ Munira bint Abdur-Rahman Al Saud, *Child Abuse, Its Types and Causes and the Traits of Its Victims and Challenges This Poses to the Social Service Profession: An Exploratory Study in Riyadh*, (in Arabic) (Unpublished doctoral dissertation, King Saud University, Riyadh, 2000), p. 3; Sa'd ibn Sa'id Az-Zahrani, *The Phenomenon of Child Abuse in the Saudi Society*, (in Arabic), (Riyadh: Centre of Crime Prevention Research, Ministry of the Interior, 2004, p. 7; Abdullah Al-Yusuf, Salih Ar-Rumih, Nayazi and Abdul-Majid Tash, *Domestic Violence: A Field Study across the Kingdom of Saudi Arabia*, (in Arabic), (Riyadh: Ministry of Social Affairs, 2005), p. 15.

2. The causes of many domestic violence cases are not identified due to the particularity of relationship between family members;
3. Customs and traditions constitute a major reason behind the failure to report domestic violence incidents. Indeed, fear of shame and glee at one's misfortune prevents domestic violence cases from reaching the concerned authorities to deal with them appropriately
4. Failure of official authorities to carry out their duties properly and to implement Islamic rulings which help avoid women falling prey to domestic violence.¹⁷

It seems that domestic violence is encouraged in the Saudi society because many people consider it a private affair between husband and wife, and that nobody should interfere unless it is happening constantly and causing serious and visible injury to the woman, or more importantly, injury to the children.¹⁸ The most striking finding seems to be 'the degree of acceptance of violence against women and the lack of clear differences between men and women in their attitudes to this sort of violence.'¹⁹

The absence of a law criminalising violence against women and inconsistencies in the application of laws and procedures is another reason why many women are subject to abusive environments.²⁰ In this regard, the lack of written laws governing private life constitutes a major obstacle to women's access to justice.²¹

Although the *Shari'ah* prohibits abuse and violence against all innocent persons, including women, accounts of violence and abuse appear to be shockingly numerous and

¹⁷ Ahmad Al-Mazyad and Adil Ash-Shaddi, *Domestic Violence: Its Reality, Sources and Types* (in Arabic), (Riyadh: Dar Al-Watan, 2012), pp. 10 and 35.

¹⁸ Hague, Gill and Malos, Ellen, *Domestic Violence: Action for Change*, 2nd edition, (Trowbridge: Cromwell Press, 1998), p. 52.

¹⁹ Nora Almosaed, 'Violence against women: a cross-cultural perspective', *Journal of Muslim Affairs*, 2004, Vol. 24, No. 1, p. 86.

²⁰ Country Reports on Human Rights Practices for 2011, United States Department of State, Bureau of Democracy, Human Rights and Labour, p. 24.

²¹ Ertürk, Yakin, Report of the Special Rapporteur on Violence against Women, Its Causes and Consequences, Human Rights Council, eleventh session, agenda item 3, A/HRC/11/6/Add.3, 14 April 2009, p. 2.

common. Hospital workers reported that many women were admitted for treatment of injuries that apparently resulted from spousal violence; hospitals are now required to report any suspicious injuries to authorities.²² Data and statistics centres in government departments dealing with domestic violence in the Kingdom of Saudi Arabia point to the fact that all forms of domestic violence in the country have dramatically increased. A study conducted by the Ministry of Interior indicates that 45 per cent of Saudi children are abused on a daily basis and that groups that are the most subjected to abuse are orphans (70 per cent), followed by children of separated parents (58 per cent).²³

According to the National Society for Human Rights' statistics concerning domestic violence, the organization received 370 cases of domestic violence in 2011.²⁴ This is already more than the total recorded the previous year (294 cases).²⁵ According to the latest statistics, cases of physical and psychological violence make up around 74 per cent of the total cases recorded by the organization. The next most common case was the refusal to give permission for marriage (6.8 per cent), followed by asylum seeking (4 per cent), sexual harassment (3.4 per cent), abuse as a result of drug or alcohol addiction (2.7 per cent), denial of salary and property infringement (2.7 per cent), preventing children from seeing their mother (1.7 per cent), the denial of education (1 per cent), and finally the denial of employment (0.3 per cent).²⁶

As in many countries, the violence that a woman in Saudi Arabia experiences in an abusive situation is not normally a constant abuse, but rather periodic and often unpredictable,

²² Violence against Women In The Hejaz: Disconcertingly Common, Fri, 30 Nov 2007. Available at: <http://www.cablegatesearch.net/cable.php?id=07JEDDAH498>. Accessed on 16 January 2013.

²³ Khalid ibn Sa'ud Al-Hulaybi, *Al-'Unf Al-'Usari: Asbabuhu wa Madhahiruhu wa Atharuhu Wa 'Ilajuhu (Domestic Violence: Its Causes, Aspects, Effects and Solution)*, Hasa, 14/9/1430 AH/ 4 September 2009, p. 20. Available at: http://www.almostshar.com/web/Consultant_Desc.php?Consultant_Id=22&Cat_Id=1. Accessed on 28 November 2011.

²⁴ The Eighth Annual Report of the National Society for Human Rights, 1432 AH/2011, Statistics of Cases Reported, Activities, Interviews and Data, p. 37. Available at: http://nshr.org.sa/Siteimages/BooksList/File/567_PDF.pdf. Accessed on 2 April 2013.

²⁵ *Ibid.*

²⁶ *Ibid.*

for ‘it can come in many forms such as intimidation, punches, slaps, kicks, sexual assault, pushing or emotional/mental abuse.’²⁷

Studies conducted in Saudi Arabia indicate that 90% of domestic violence perpetrators are males and that 50% of domestic violence cases involve husbands committing violence against their wives.²⁸ A recent legal study has stressed that domestic violence in the Kingdom has dramatically increased in the last few years and that 50% of women who have been victims of domestic violence do not report on their oppressing husbands who subject them to such violence.²⁹

The latest statistical study conducted by the Ministry of Social Affairs last year (1433AH/2012) shows that the highest rate of domestic violence cases is recorded in Riyadh, followed by Makkah and then Asir.³⁰ The study also indicates that 45% of all Saudi children are victims of domestic violence, stating that perpetrators of such violence are, to a large degree, the parents (45%), followed by brothers, teachers, domestic workers and strangers (14%) and then unknown people (12%).³¹

The Human Rights Commission Branch of Makkah stated in a statement that out of 560 cases it dealt with in 1433 AH/2012, 50 of them are related to the rights to protection against domestic violence against women.³²

Of all the cases reported to the Human Rights Commission, domestic violence cases constituted 22 per cent. The Society for the Protection of Family in Jeddah has reported that it

²⁷Spousal Abuse, prepared by the Canadian Resource Centre for Victims of Crime. See <http://www.crcvc.ca/docs/spousalabuse.pdf>. Accessed on 28 December 2011.

²⁸ Consultative Centre for Legal Courses. Available at: <http://www.cclc.info/home.php>. Accessed on 24 October 2012.

²⁹ *Ibid.*

³⁰ National Centre for Studies and Social Development, Annual Report 1432 AH/2011. Available at: http://mosa.gov.sa/portal/uploads/smartsection/41_T_M_W1432.pdf. Accessed on 13 January 2013.

³¹ *Ibid.*

³² *Al-Yawm* newspaper, 14 *Safar* 1433 AH/28 December 2012. Available at: <http://www.alyaum.com/News/art/66000.html>. Accessed on 13 January 2013.

received more than 100 domestic violence cases eleven months after its establishment.³³ Some studies indicate that 90 per cent of those who commit domestic violence acts are men and that 50 per cent of these cases involve men's violence against their wives.³⁴ The following table, provided by the National Society for Human Rights (NSHR), shows some examples of the reported cases of domestic violence over a period of eight years.³⁵

	Administrative	Labour	Domestic violence	Personal status	Civil status	Violence against children	Judicial	Prisoners	Other	Total
2004	193	279	44	37	66	--	56	271	158	1114
2005	822	278	284	296	217	--	251	636	995	3879
2006	912	422	385	298	307	--	183	603	465	3575
2007	1248	341	265	294	331	--	210	670	443	3801
2008	1530	543	306	294	365	--	242	794	448	4522
2009	1556	386	257	311	239	72	176	558	446	4001
2010	1748	555	382	356	361	82	130	709	460	4783
2011	1437	584	370	312	473	95	146	759	516	4692
Total	9445	3498	2293	2198	2359	249	1394	5000	3931	30367

Total number of cases reported to the National Society for Human Rights since its establishment until 2011 according to the main categories and years.

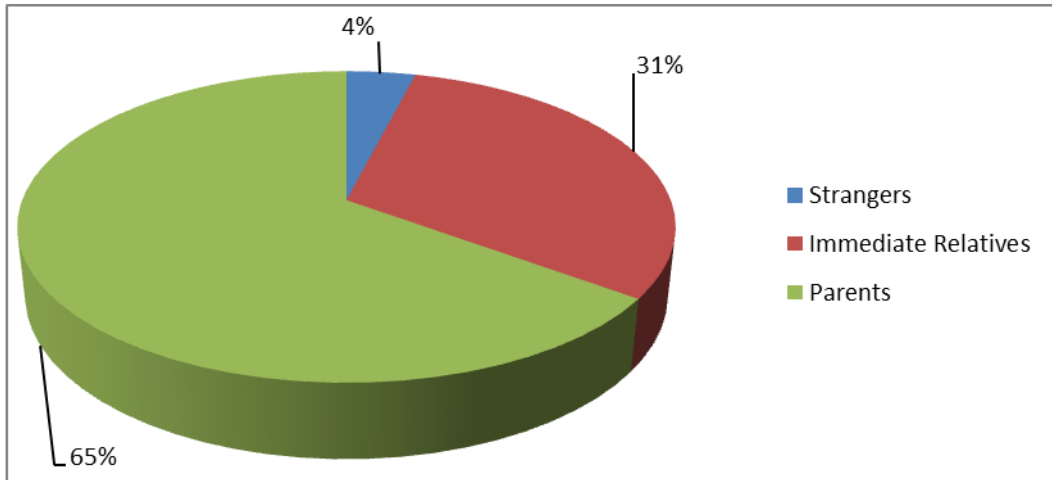
The following pie charts, provided by the National Family Safety Programme, shed some more light on violence acts committed in Saudi Arabia, the perpetrators as well as the nature of these acts.³⁶

³³ The Eighth Annual Report of the National Society for Human Rights, 1432 AH/2011, Statistics of Cases Reported, Activities, Interviews and Data, p. 15. Available at: http://nshr.org.sa/Siteimages/BooksList/File/567_PDF.pdf. Accessed on 5 January 2013.

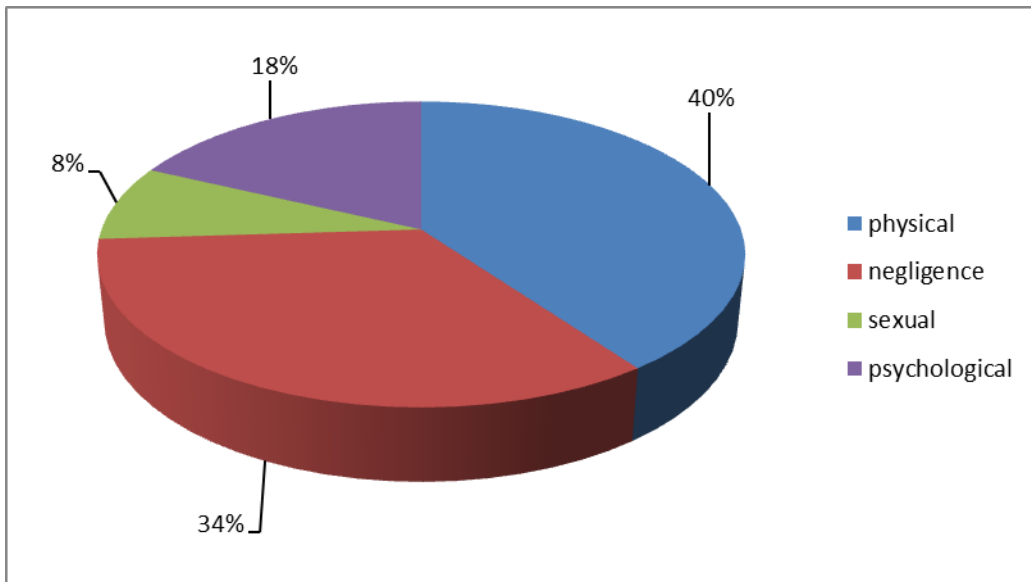
³⁴ *Ibid.*, p. 21.

³⁵ *Ibid.*

³⁶ The National Family Safety Programme, Annual Report, 1432 AH/2011, p. 41. Available at: http://nfsp.org.sa/images/annual_report_2011.pdf. Accessed on 5 January 2013.



The victim's relationship to the perpetrator of violence.



Distribution of cases according to the type of violence.

The Director of Makkah's Social Protection Home mentioned that domestic violence in Saudi Arabia is on the increase, that numerous domestic violence cases go unreported and that

many reported cases are filed against ‘an unknown person’, who in many cases turns out to be one of the parents or close relatives.³⁷

The following facts and figures, which are quite appalling by Saudi standards, clearly indicate that domestic violence in the country is on the increase, which necessitates urgent action to contain the problem.³⁸

- One in four girls is sexually abused before the age of 18.
- One in ten boys is sexually abused before the age of 18.
- 10 per cent of these children are under school age.
- In 85-90 per cent of these cases, the perpetrator is the victim’s relative.
- In 35 per cent of these cases, the perpetrator is a member of the immediate family.
- Only 10 per cent of these cases include physical abuse.
- 50 per cent of all these assaults have taken place in the house of the victim or in that of the abuser.

3.2. Forms of Domestic Violence against Women in Saudi Arabia

Violence against women and girls remains a persistent problem ‘due to the power and control held by the abuser and the fear, intimidation and humiliation suffered by the victims of this crime.’³⁹

³⁷ *Al-Hayat* newspaper, 26 Jan. 2008, Issue 16367.

³⁸ *Asabi’ Al-Ittihad, Ilaa Ayna?* A paper presented by Dr. Sulayman Al-Muhaymid to the Child Abuse Conference, quoted in Khalid ibn Sa’ud Al-Hulaybi, *Al-’Unf Al-Usari: Asbabuhu wa Madhahiruhu Wa Atharuhu Wa ‘Ilajuhu* (Domestic Violence: Its Causes, Aspects, Effects and Solution), Hasa, 14/9/1430 AH/ 4 September 2009, pp. 22-3. Available at: http://www.almostshar.com/web/Consultant_Desc.php?Consultant_Id=22&Cat_Id=. Accessed on 28 November 2011.

³⁹ Spousal Abuse, prepared by the Canadian Resource Centre for Victims of Crime. See <http://www.crcvc.ca/docs/spousalabuse.pdf>. Accessed on 28 November 2011.

Domestic violence in Saudi Arabia takes many forms. This consists of violence in the family, violence in the public sphere, forced marriage and divorce and abuses against female domestic workers.⁴⁰

Husbands or ex-husbands, followed by close relatives (mainly fathers and brothers), are the most common perpetrators of violence against women within the family. A study showed that 52.6 per cent of men interviewed abused their wife for ‘misconduct’, an act that 52.7 per cent of the male respondents accept as ‘the appropriate way to deal with women’s misconduct’.⁴¹ Data from the National Programme for Family Safety shows that physical violence is the most common form of violence reported.⁴² There is also anecdotal evidence of neglect, abuse and violence against girls by family members. In 2006, there were around 1,300 girls in institutions for juveniles, many of whom are said to be there because they ran away from domestic abuse.⁴³

Cases of rape, a very common form of violence against women in the public sphere, are not discussed openly and women and girls fear they will be judged by society if they report rape. Only rarely are rape cases brought to public and Government attention. Health professionals in contact with victims of rape acknowledged that rape is an emerging issue that deserves more attention.⁴⁴

Women and children who are victims of domestic violence face societal and governmental obstacles in obtaining redress. Given prevailing norms of sex segregation, Saudi women are often hesitant to walk into a police station, as all police officers are male.⁴⁵

⁴⁰ United Nations General Assembly, Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development, Report of the Special Rapporteur on violence against women, its causes and consequences, Yakin Ertürk, Mission to Saudi Arabia, A/HRC/11/6/Add.3, 14 April 2009, pp. 12-18.

⁴¹ Nora Almosaed, ‘Violence against women: a cross-cultural perspective’, *Journal of Muslim Affairs*, 2004, Vol. 24, No. 1, p. 67.

⁴² A/HRC/11/6/Add.3, p. 13.

⁴³ *Ibid.*

⁴⁴ *Ibid.*, p. 13.

⁴⁵ World Report 2011: Saudi Arabia. Available at: <http://www.hrw.org/world-report-2011/saudi-arabia>. Accessed on 25 October 2012.

It is worth noting here that the *Shari'ah* stresses ease in all matters, as evidenced by Prophet's statement, 'Make things easy [for people], not difficult.'⁴⁶ Because the Constitution of the Kingdom of Saudi Arabia is based on the *Shari'ah*, as Articles 1 and 7 of the Saudi Basic Law of Governance state, there is no article in this Law which prohibits women from going to police stations and courts without a *mahram*. The law requires that men and women only need to produce their identification cards. The requirement that a woman must be accompanied by a *mahram* to visit a police station or a court is only the personal opinion of some judges. With the new system of fingerprint identity recognition, which is still under study, there will be no need for a *mahram* or even an identification card. I believe that women's unawareness of their rights is the main reason behind their suffering.

Asian embassies report thousands of complaints each year from domestic workers forced to work 15-20 hours a day, seven days a week, and denied their salaries.⁴⁷ Domestic workers frequently endure forced confinement; food deprivation; and severe psychological, physical, and sexual abuse.⁴⁸

In a judicial precedent which is considered to be the first of its kind in Saudi Arabia, a Madinah court sentenced a Saudi woman to three years' imprisonment on charges of beating her Indonesian housemaid and thereby causing her severe bodily harm.⁴⁹

Laws which require the employer to pay wages to their employees on time without deducting any amount whatsoever from their wages against private rights without their written consent, not allowing employers to make their employees work more than eight hours a day and filing grievances against employers are set out in articles 90, 92, 97, 98, 99 and 104 of the

⁴⁶ *Sahih Al-Bukhari, Book of Knowledge, hadith no. 69; Sahih Muslim, Book of Jihad, hadith no. 1734.*

⁴⁷ Human Rights Watch, World Report 2012: Saudi Arabia. Available at: <http://www.hrw.org/world-report-2012/world-report-2012-saudi-arabia>. Accessed on 15 November 2012.

⁴⁸ *Ibid.*

⁴⁹ Summary Court of Madinah; Case no. 5/102, dated 1432 AH/2011.

Labour and Workmen Law.⁵⁰ The *Shari'ah* also stresses that it is not permissible to delay payment of labourers' wages, as the Prophet (pbuh) states, 'Pay the labourer his wages before his sweat dries up.'⁵¹

According to the spokesman for the Ministry of labour, the new contract for Filipino maids, as agreed upon between the Filipino embassy and the Recruitment Committee in Saudi Arabia, now includes 30-day paid official holiday during their two-year contract period and they are entitled to a round-trip ticket to be paid by the sponsor so that they would spend their holiday in the Philippines, in addition to one paid day holiday in the week. However, the contract does not specify the monthly salary amount and leaves it to be determined between the two parties. A new condition stipulates that Filipino maids must have bank accounts and that their salaries must be deposited in their accounts.⁵²

I think that maids must be treated humanely and their salaries must be specified in the written contract, for failure to do so will certainly lead to disputes and even cases of violence against them and they will not be able to enjoy their rights.

It is noteworthy that laws that prevent violence against women do exist but they are not activated and many people do not follow them. The key objective of the National Anti-corruption Commission, which was established by Royal decree no. A/65 on 18 March 2011, must be activated, as it seeks to follow up implementing the orders and instructions relating to the common public and the citizens' interests to ensure the compliance therewith.⁵³

⁵⁰ Available at: <http://portal.mol.gov.sa/en/Documents/LaborLawPart6.pdf>. Accessed on 15 November 2012.

⁵¹ This *hadith* is reported by Ibn Majah, *As-Sunan, Book of Leasing, hadith* no. 2443.

⁵² 30-Day Paid Holiday for Filipino Maids, *Riyadh* newspaper, 3 October 2012, Issue no. 16172. Available at: <http://www.alriyadh.com/2012/10/03/article773349.html>. Accessed on: 28 October 2012.

⁵³ See the official website of the National Anti-corruption commission: <http://www.nazaha.gov.sa/Mobile/Pages/default.aspx>. Accessed on 16 November 2012.

The abusive husband exhibits offensive behaviour which prohibits normal, healthy interaction and demonstrates a lack of respect for individual thoughts, feelings and opinions.

As in any other country, domestic violence in Saudi Arabia takes a number of forms including the following:

3.2.1. Physical Abuse/ Beating

Forms of physical abuse generally reported to courts include, among other things, slapping, kicking, biting, hitting with the fist, choking, pushing, and threatening to or using a sharp instrument, such as a knife. In such cases, the abuser begins and continues his behaviour because ‘violence is an effective method for gaining and keeping control over another person and he usually does not suffer adverse consequences as a result of his behaviour.’⁵⁴ The following cases illustrate examples of physical abuse in Saudi Arabia.

A Twelve-Year-Old Girl Had Her Hand Burned⁵⁵

The prosecutor charged the father of Wijda, a twelve-year-old girl, with performing an act of violence against her, accusing him of burning her hand with a hot iron. The charge was confirmed by medical report no. 2679 on 8 May 2010. The defendant admitted that he had tortured his daughter because she was accused of stealing some items from electrical goods stores. The prosecutor stated that the defendant also had two previous convictions. After massive evidence was established against him, the defendant was sentenced to four months’ imprisonment and to 150 lashes.

⁵⁴ Spousal Abuse, prepared by the Canadian Resource Centre for Victims of Crime. See <http://www.crcvc.ca/docs/spousalabuse.pdf>. Accessed on 13 April 2011

⁵⁵ Summary Court of Makkah; Case no. 22125/2/1, dated 6/5/1431 AH/ 20 April 2010.

Islam, as well as the domestic laws of the country, stresses the importance of protecting women and children and considers all forms of violence against them strictly prohibited. In support of the international efforts to this end, Saudi Arabia ratified a number of human rights conventions including the Convention on the Rights of the Child (CRC) and the Committee on the Elimination of Discrimination against Women (CEDAW).

A Man Bludgeons His Wife⁵⁶

One such case of domestic violence reported in Saudi Arabia concerns the case of a man who bludgeoned his wife, causing considerable injury to her back and face, in addition to shouting abuse at her and treating her badly. The medical report proved signs of beating, and the husband admitted the assault. After receiving medical treatment, the wife showed her desire to stay with her husband after waiving her individual right for the sake of her family, and the judge ruled that the husband must pledge not to repeat his misdeed or else he would be subject to severe punishment.

Reconciliation between spouses is one of the effective methods of dealing with spousal violence in Saudi Arabia, and Islam stresses this point, as the Qur'an states,

If a wife fears cruelty or desertion on her husband's part, there is no blame on them if they arrange an amicable settlement between themselves; and such settlement is best.⁵⁷

A Non-Saudi Husband Beats up His Wife⁵⁸

In this case, the plaintiff, a non-Saudi woman, filed a suit against her non-Saudi husband, stating that he had beaten her, using the hose of a cooking gas cylinder as a weapon, as well as having kicked and punched her, causing a nose fracture and neck wounds. The medical report

⁵⁶ Summary Court of Makkah; Case no. M1/2/30624, dated 8/6/1413 AH (3 December 1992).

⁵⁷ Holy Qur'an, 4:128.

⁵⁸ Summary Court of Makkah; Case no. M1/2/37014, dated 26/9/1431 AH/15 September 2010.

also indicated signs of torture on her back. After the claim was confirmed and the defendant admitted the assault, the judge ruled that the husband be subjected to discretionary punishment of four months' imprisonment and seventy lashes. The defendant was also made to pledge he would not repeat his misdeed.

Islam strictly prohibits all forms of aggression, and the punishment in my estimation was suitably commensurate with the crime committed. The judge applied the domestic applicable law in this case, for the defendant was living in Saudi Arabia when he assaulted his wife. Indeed, the Kingdom of Saudi Arabia gives total supremacy to the Qur'an and the Prophet's *Sunnah* in matters of legislation, as Article 1 of the Basic Law of Governance states:

The Kingdom of Saudi Arabia is a fully sovereign Arab Islamic State. Its religion shall be Islam and its constitution shall be the Book of God and the *Sunnah* (traditions) of His Messenger.

Article 26 also guarantees protection of human rights according to the dictates of these two sources which form the core of the *Shari'ah*, or Islamic law:

The State shall protect human rights in accordance with the *Shari'ah*.

Article 47 guarantees such rights to all residents, Saudis and non-Saudis alike:

The right to litigation is guaranteed to citizens and residents of the Kingdom on an equal basis. The law defines the required procedures for this.

It is worth noting here that Islam has laid down well-established rules regarding conjugal relationships, as the Qur'an states,

Live with them (i.e. wives) on a footing of kindness and equity. If you take a dislike to them, it may be that you dislike a thing, and Allah brings about through it a great deal of good.⁵⁹

⁵⁹ Holy Qur'an, 4:19.

It is true that, according to their interpretation of the word *dharaba* discussed later in the chapter, some scholars argue that husbands can resort to light beating;⁶⁰ this does not mean, however, that they must beat them severely with the intention of gratifying their thirst for revenge, punishment, abuse or forcing them to lead a certain way of life against their will. Rather, it is chiefly meant for disciplinary purposes, ensuring that they are not subject to harm or severe pain.

As noted in Section 2.4.2, commenting on the above-mentioned verse, Qur'an exegetes contend that the Prophet (pbuh) explained beating as one that is in no way severe and does not leave any signs of beating or wounds, nor does it cause any fractures whatsoever. They also argue that it would be better that men restrict themselves to warning their disobedient and rebellious wives.⁶¹ In this connection, Ibn Hajar, a medieval Muslim scholar, states that giving a warning or something similar should suffice and is better.⁶²

A Woman Receives Discretionary Punishment for Shaving a Girl's Head against Her Will⁶³

In fact, domestic violence is not confined to women but also includes girls, and this often takes place in Saudi Arabia after a divorce, especially if the husband marries another woman. The prosecutor charged a divorced woman with shaving the head of the daughter he had from his new wife against her will when the latter, accompanied with her father, paid her a visit. The plaintiff emphatically denied the charge, stating that she shaved her hair after the little girl asked her to do so as she was suffering from head lice. The plaintiff claimed that her husband's

⁶⁰ *Ibid.*, 4:34.

⁶¹ Muhammad ibn 'Abdullah Al-Andalusi (Ibn Al-Arabi), *Ahkam Al-Qur'an* (Qur'an Rulings), 1st edition, (Beirut: Dar Al-Kutub Al-'Ilmiyyah, 1421 AH/2001), p. 536. See also Abu Ja'far Muhammad ibn Jarir At-Tabari, *Tafseer At-Tabari*, 2nd edition, (Beirut: Dar Al-Kutub Al-'Ilmiyyah, 1421 AH/2001), p. 313; and Isma'il ibn 'Umar ibn Kathir, *Tafsir Al-Qur'an Al-'Adhim*, 1st edition, (Riyadh: Dar Taybah, 1422 AH/2002), p. 293.

⁶² Ahmad ibn 'Ali ibn Hajar Al-'Asqalani, *Fath Al-Bari Sharh Sahih Al-Bukhari*, (Cairo: Dar Ar-Rayyan publishers, 1407 AH/1986), Vol. 9, p. 379.

⁶³ General Court of Banu Malik; Case no. 1826, dated 5/3/1427 AH/ 3 April 2006.

divorced wife took her into a room, shaved her hair against her will, placed the hair in a bag and handed it to her to give it to her father.

The judge asked the defendant to prove that the girl was willing to have her hair shaved off. As she could not produce any evidence, the father was made to swear that he never asked his divorced wife to shave off his daughter's hair, based on the *hadith* which states, 'The burden of proof is upon the claimant and the taking of an oath is upon the one who denies the allegation.'

Also, because the medical report no. 586, issued on 9/4/1427 AH/7 May 2006, clearly indicated that the girl's scalp did not show any signs of any disease, the judge was convinced that the defendant did shave off the girl's hair against her will, and so he sentenced her to fifteen days' imprisonment and thirty-five lashes as a discretionary punishment.

The judgement was suitable and served as a deterrent against an act of violence, and the divorce proved to be one of the reasons behind such an act of domestic violence. A child, male or female, also has rights that are guaranteed by Islam and stressed by domestic laws and international agreements which the Kingdom of Saudi Arabia has signed.

A 2004 family case that was reported in the media in Saudi Arabia concerns an incident that took place in Jeddah, a city on the coast of the Red Sea and the major urban centre of western Saudi Arabia.⁶⁴ In this case, a husband beat his wife and tried to strangle her for allegedly behaving in a strange manner and making unnecessary phone calls. A hospital report showed evidence of a nose fracture and an eye injury. The public prosecutor filed a lawsuit against the husband and demanded that he be subjected to discretionary punishment. The husband admitted committing such offences and the judge sentenced him to six months' imprisonment and three hundred lashes to be inflicted on him on different occasions.

⁶⁴ Source: Jeddah Summary Court; Case no. 1006, dated 7/3/1425 AH (26 April 2004). Appellate Court Approval no. 1/5/279/C, dated 4/6/1425 AH (21 July 2004).

This judgement proves beyond doubt that Islamic law can protect women against domestic violence and all forms of inhuman, degrading and cruel treatment. It is also worth noting that the judgement is entirely based on the judge's discretion, as legal rulings in Saudi Arabia are not codified.

3.2.2. Killing

Killing is also one of the various forms of domestic violence in Saudi Arabia, as the following cases illustrate.

A Non-Saudi Man Kills His Wife and Accuses Her Relatives of the Crime⁶⁵

This is one of the worst domestic violence court cases in Saudi Arabia. A man informed the police that his wife had died in his house because of a heart attack. A group of police officers visited the man's house only to find the wife lying dead and covered with a blanket, with visible marks of torture on her hands and legs, and blood in her eyes. They also detected an electric wire on the floor, not far from the corpse. A medical examination showed head injuries, swollen eyes, beating marks on the back, chest, abdomen and limbs, and some broken ribs, which had obviously led to her death. Based on the collected evidence, the prosecutor charged the husband with the wrongful killing of his wife after taking *qat*, which the World Health Organisation classified as a drug that can produce mild to moderate psychological dependence less than tobacco or alcohol. The prosecutor ruled that a sentence be issued as to the private and public right of action in accordance with Article 174 of the Law of Criminal Procedure.⁶⁶

⁶⁵ General Court of Makkah; Case no. 29/86974, dated 20/9/1429 AH/20 September 2008.

⁶⁶ The Law of Criminal Procedure issued Royal Decree No. (M/39), 28 *Rajab* 1422 AH/16 October 2001, *Umm Al-Qura gazette*, no. (3867), 17 *Sha'ban* 1422 AH/3 November 2001.

The defendant denied the crime, claiming that he found his wife dead when he tried to wake her up in the morning. However, after it was proved that he was the perpetrator of the crime, the judge ruled that he be imprisoned for two years and be subjected to 400 lashes. In this way, the judge implemented Saudi domestic law which applies to Saudis and non-Saudis alike.

A Twelve-Year-Old Girl Is Tortured to Death⁶⁷

In this case, both parents of Ghassoun, a young girl, admitted before the judge that they had performed acts of violence against her. The father confessed that he tortured her, burned her, attempted to run her over with his car and even kill her on the grounds that he was suspicious about her ancestry, claiming she was not his daughter. His wife was an accomplice in the crime, for she poured kerosene on the girl's naked body. The prosecutor added that the father's confessions included heating a knife blade with which he burned her tongue and one of her heels as well as stubbing out cigarettes on her body, claiming that he did all that in compliance with his wife's request.

The father also confessed that he once tied Ghassoun, whom he deprived of formal education, with a metal chain for three days, offered her nothing to eat or drink and that he only provided her with a little food and drink after her health had deteriorated. He also confessed that he once attempted to have her drown in the sea. The mother confessed to the prosecutor that her husband once tried to force their daughter to drink her urine, and tied her one evening with an iron chain underneath the stairs and turned all the lights off, leaving her in complete darkness, and that he untied her only the next morning.

The prosecutor confirmed that the inheritance patterns of a blood test proved that Ghassoun was indeed the perpetrator's daughter. He added that they admitted committing the

⁶⁷ General Court of Makkah; Case no. 2/15, dated 7/1/1429 AH/ 16 January 2008.

acts of violence against the young girl while they were in their full senses and without having been forced to do so. The judge then sentenced both of them to death.

This case clearly points to the power of the judiciary to protect the rights of young children against violent parents who are deprived of all human values. Indeed, Article 3 of the Law of Criminal Procedure stresses the prohibition of all forms of bodily and psychological harm. Islam also stresses that violence, not only against women but also against children, is not acceptable, and the Prophet (pbuh) mentioned a number of traditions in this respect.⁶⁸ This proves that Islam approved human rights and condemned violence against women and children long before the Convention on the Elimination of Discrimination against Women (CEDAW) and the United Nations Convention on the Rights of the Child (UNCRC).

3.2.3. Psychological Abuse

The abuser's psychological or mental violence can include constant verbal abuse, harassment, excessive possessiveness, deprivation of physical and economic resources, and destruction of personal property including valued possessions. For many Saudi women the shame of being called a divorced woman is very distressing, and that is why they choose to endure physical pain to living in shame, which reaches deep levels of humiliation and dehumanization, especially when they have no financial resources.

The following case illustrates an example of psychological abuse

⁶⁸ See for instance *Sahih Al-Bukhari*, Vol. 5, p. 2243, *hadith* no. 5683; and *Sahih Al-Bukhari, Book of Marriage*, *hadith* no. 4787 and *Sahih Muslim, Book of Nursing*, *hadith* no. 2671.

A Girl Escapes Her Father's Violence⁶⁹

A seventeen-year-old non-Saudi girl tried to escape her violent father after he had detained her inside a toilet for sixteen hours in their house in Ta'if. The reason for this was that the father found out that she brought a new mobile phone without telling him where she had obtained it. The father and one of her older brothers beat her and then confined her in the toilet. When her grandmother paid the family a visit later on, the father set the girl free and she ran away. Then she gave herself up to the police so that she would be sent to the Comprehensive Rehabilitation Centre for Girls and thus avoid her father's cruelty.

After the mobile phone was searched, no suspicious numbers were found in it, and the father was made to pledge never to commit any acts of violence against her.

Freedom and dignity are guaranteed for both men and women, and assaulting others' property is strictly forbidden in Islam. It could be that unreasonable, unfounded suspicion was the main reason behind this act of violence in this case.

3.2.4. Sexual Abuse

Sexual abuse takes place when a child or young person is pressurised, forced or tricked into taking part in any kind of sexual activity with an adult or young person. This can include kissing, or oral sex. Cases of sexual abuse reported in Saudi Arabia include kissing, rape, paedophilia, gang rape, and touching a woman's or a young person's genitals or breasts.

In one case of rape⁷⁰ that have taken place in Riyadh, the victim, a young woman, used to go to work by taxi every day. One day, the taxi owner, who always dropped her to work, changed his vehicle, claiming that his car had broken down and was in the garage to be repaired.

⁶⁹ *Sabq* electronic newspaper; news item published on 12 June 2011.
See <http://sabq.org/sabq/user/news.do?section=5&id=25978>. Accessed on 13 July 2011.

⁷⁰ General Court of Riyadh; Case no. 3049131 dated 10/4/1430 AH (6 April 2009).

Before he picked her up as usual, he had already agreed with two of his friends to meet him at a certain place. The taxi driver took a different route to where he and his friends had agreed to meet. When the victim saw that they were getting into the car, she screamed and called up her husband. The taxi driver beat her and switched off her mobile. Then all the three raped her. The victim's husband informed the police who later tracked them down and brought them to justice. Even though they attempted to deny the crime, DNA and other evidence proved them wrong, and were thus sentenced to fifteen years' imprisonment as well as 1,500 lashes each.⁷¹

In another case,⁷² a foreign worker, whose job was to deliver bottles of water to customers in a block of flats, once knocked on the door of one of his customers and an eight-year-old girl opened it. When he tried to hold her, touching her private parts as he did this, she screamed so loudly that he ran away, only to be caught by some of the flat occupiers. The perpetrator admitted his crime when he appeared before the Bureau of Investigation and Public Prosecution in Makkah and was subsequently sentenced to four months' imprisonment and one hundred lashes.⁷³ Sexually abusing children is a serious crime, and rulings in this respect are left to the judge's discretion. However, it is necessary that there should be a law that criminalises sexual abuse and specifies punishment for it.

3.2.5. Verbal Abuse

Dr Khalid Umar Ar-Radi'an, professor of sociology at King Saud University, Saudi Arabia, stresses that verbal abuse is the most common form of abuse against women in Saudi Arabia, followed by social abuse, a form of which is to deprive women of their basic rights, prevent them from their right to education, restrict their movement, not to ask their opinion as to

⁷¹ *Ibid.*

⁷² Summary Court of Al-Khubar, Dammam; Case no. 2/1900, dated 1425 AH (2004).

⁷³ *Ibid.*

choosing their own husbands or marry them off to men much older than them.⁷⁴ This is followed by economic abuse, a form of which is to deprive women of their economic rights, such as controlling their income or denying them their right to inheritance by their brothers and some other relatives.⁷⁵

Royah Centre for Social Studies conducted a nationwide statistical study on types of verbal and physical abuse in Saudi Arabia and found out that 30% to 42% and that the highest percentage of verbal abuse is severe reprimand, followed by contemptuous remarks and then insulting the spouse's parents or using threats of divorce.⁷⁶

According to a court case,⁷⁷ a woman informed the police that her son had been systematically subjecting her to severe verbal abuse in addition to banging the house doors. The son admitted his wrongdoing, claiming that his mother did not give him pocket money. The judge sentenced him to eight weeks' imprisonment after taking the pledge that he would not do so again in the future. It is worth mentioning here that there is no specific punishment for verbal abuse, or domestic violence as a whole for that matter, in Saudi Arabia and that the determination of appropriate punishment for such offences is left to the discretion of the judge.

3.2.6. Legal Abuse

More often than not, a woman's response to abuse meted out to her is linked to the extent of her awareness of her legal rights. In some areas, legal abuse can also be generally attributed to women's low legal status, illiteracy, the inadequacy of laws governing physical, psychological and sexual abuse or women and negligence on the part of security authorities in sufficiently

⁷⁴ Al-Madinah newspaper, 15 *Safar* 1434 AH/28 December 2012, Issue no. 18146. Available at: <http://www.al-madina.com/node/247430>. Accessed on 28 December 2012.

⁷⁵ *Ibid.*

⁷⁶ Royah Centre for Social Studies, available at: <http://www.royahcenter.com>. Accessed on 12 January 2013.

⁷⁷ Summary Court of Jeddah; Case no. 369, dated 26 *Muharram* 1429 AH/4 February 2008.

dealing with problems of violence against women.⁷⁸ These factors make women feel rather insecure in case they resort to the police or the court for a number of considerations in the Saudi society which still considers violence against women a mere family issue.⁷⁹

3.2.7. Economic Abuse

Financial control keeps a person dependent and without power as it has to do with the ability to make decisions and maintain self-esteem. Often the needs of family members are not fulfilled when an abusive husband holds control of all the household finances. In many cases, the husband takes the salary of his wife or the father takes that of his daughter.⁸⁰ This is a very common phenomenon in Saudi Arabia.

One may wonder why some women who are victims of various forms of domestic violence choose to remain with an abusive husband. There are a number of reasons for this in the context of Saudi Arabia, and some of them include shame, lack of resources, lack of funds and housing and children. For many women, being a single parent is a huge responsibility. In addition to this, the abusive husband may resort to threatening the wife that he will take custody of the children if she considers leaving him.

The following is a case which illustrates an example of economic abuse.

A Man Stabs His Wife in the Head and Hands and Takes Her Money⁸¹

Violence against women in Saudi Arabia can sometimes be attributed to social and economic factors. One such case records that a man stabbed his wife in the head and hands with

⁷⁸ Maysun bint Ali Al-Faiz, *Violence against Women*, Human Rights Commission, (Riyadh: Media and Publications Centre , 2009), p. 20.

⁷⁹ *Ibid.*

⁸⁰ Aleqtisadiyah: A Study Claims that 93% of Saudi Women Are Subjected to Violence, Sunday 26 *Rabee' Ath-Thani*, 1431 AH/11 April 2010, Issue no. 6026. Available at: http://www.aleqt.com/2010/04/11/article_377683.html. Accessed on 3 April 2013.

⁸¹ Summary Court of Makkah; Case no. 41844/2/1, dated 5/1/1431 AH/ 22 December 2009.

a knife and took her money from her handbag. This act of violence was proved with medical report no. 269 on 20/12/1430 AH/ 7 December 2009 which indicated a swollen forehead and cut fingers as a result of the stabbing incident. The prosecutor charged the husband with the stabbing crime and demanded his punishment. The husband eventually admitted committing the assault, claiming that he had done so because she had left the house without his permission. The husband was then sentenced to ten days' imprisonment and fifty lashes as a discretionary punishment.

This judgement is absolutely in line with Islamic rulings and the Saudi law, for Islam strictly prohibits assaulting others, as the *hadith* states, 'Your lives and property are inviolable to one another.'⁸²

3.3. Domestic Violence against Women and Saudi Arabia's Legal Obligations

A. International Legal Obligations⁸³

Domestic violence against women is a universal phenomenon that is predominant in every country without exception,⁸⁴ and violence against women 'is pervasive, widespread and unacceptable.'⁸⁵ It seems that the various forms and manifestations of violence against women are concurrently 'causes and consequences of discrimination, inequality and oppression.'⁸⁶ Evidence gathered by researchers of the pervasive nature and multiple forms of violence against women, together with advocacy campaigns, led to the recognition that violence against women

⁸² Reported by An-Nasa'i, *Book of Allegiance*, *hadith* no. 4153 and Ibn Majah, *Book of Trials and Tribulations*, *hadith* no. 3944 and *Book of Pilgrimage*, *hadith* no. 3055.

⁸³ See generally Ronagh J.A. McQuigg, 'International human rights law and domestic violence: the effectiveness of international human rights law,' (Abingdon: Routledge, 2011).

⁸⁴ World Health Organization. *WHO Multi-country Study on Women's Health and Domestic Violence against Women*, 2005. Available at: http://www.who.int/gender/violence/who_multicountry_study/en/ . Accessed on 13 April 2011.

⁸⁵ Rashida Manjoo, 'The Continuum of Violence against Women and the Challenges of Effective Redress,' *International Human Rights Law Review* 1, (2012), at p.1.

⁸⁶ *Ibid.*

was global, systemic and rooted in power imbalances and structural inequality between men and women.⁸⁷

Through thematic reports, country missions, consultations, experts meetings, communications to Governments and other mechanisms, the mandate of the UN Special Rapporteur on violence against women, its causes and consequences has addressed violence against women in all spheres of life, specifically in four spheres,⁸⁸ namely, violence in the family, violence in the community, violence perpetrated or condoned by the State, and violence in the transnational sphere.⁸⁹

Globally, the prevalence of different manifestations of gender-related killings is reaching alarming proportions. ‘Culturally and socially embedded, these manifestations continue to be accepted, tolerated or justified—with impunity as the norm.’⁹⁰

Violence in the family includes intimate-partner violence, which is a problem affecting millions of women all over the world.⁹¹ In 2008, females age 12 or older experienced about 552,000 nonfatal violent victimizations (rape/sexual assault, robbery, or aggravated or simple assault) by an intimate partner (a current or former spouse, boyfriend or girlfriend).⁹²

Domestic violence continues to be perceived as both socially acceptable and legitimate,⁹³ and impunity for the killings of women has become a global concern. When the State fails to hold the offenders accountable, ‘impunity not only intensifies the subordination and

⁸⁷ See UN In-depth study on all forms of violence against women, report of the Secretary-General, A/61/122/Add.1, 2006, at para. 14, p. 30.

⁸⁸ See Report of the Special Rapporteur on violence against women, its causes and consequences, Yakin Ertürk, 15 Years of the United Nations Special Rapporteur on Violence against Women, Its Causes And Consequences (1994-2009) - A Critical Review, Human Rights Council, Eleventh session, Agenda item 3, 27 May 2009, A/HRC/11/6/Add.5, para. 2.

⁸⁹ Human Rights Council, *Report of the Special Rapporteur on violence against women, its causes and consequences, Rashida Manjoo*, U.N. Doc. A/HRC/20/16, (2012), p. 3.

⁹⁰ *Ibid.*, p. 8.

⁹¹ Heise, L. and C. Garcia-Moreno, (2002) —*Violence by intimate partners*. In E. G. Krug, L. L. Dahlberg, J. A. Mercy, A. B. Zwi, and Lozano, R. (eds.). World report on violence and health, pp. 89-121. Geneva, Switzerland: World Health Organization.

⁹² Catalano, S., Smith, E., Howard, S., and M. Rand, (2009) —*Female Victims of Violence*, Bureau of Justice Statistics, Selected Findings. U.S. Department of Justice, September 2009. Available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/fvv.pdf>.

⁹³ United Nations General Assembly, Sixty-sixth session, Item 28 of the provisional agenda, Advancement of Women, Manjoo, 1 August 2011, A/66/215, Article 28, p. 10.

powerlessness of the targets of violence, but also sends a message to society that male violence against women is both acceptable and inevitable.⁹⁴

Manifestations of violence against women in the community include, among other things, trafficking, forced prostitution, violence against women migrant workers, bride-kidnapping, femicide and pornography.⁹⁵ Manifestations of violence in the family include domestic violence, battering, incest, forced prostitution by the family, violence against domestic workers, violence related to exploitation, sex-selective abortion and infanticide, traditional practices such as female genital mutilation and dowry-related violence.⁹⁶

Violence perpetrated or condoned by the State includes gender-based violence during armed conflict, custodial violence, violence against refugees and internally displaced persons (IDP s), and violence against women from indigenous and minority groups.⁹⁷

The ‘transnational arena’, which, due to globalization and increased transnational processes, has emerged as a fourth level where women are encountering new vulnerabilities.⁹⁸ The risks and vulnerability of violence against women in the transnational arena constitutes a ‘continuum of life experience across conventional state boundaries.’⁹⁹ Defilement, rape, early marriages and survival sex continue to be major problems affecting women asylum-seekers and

⁹⁴ United Nations, *In-depth study on all forms of violence against women: Report of the Secretary-General*, A/61/122/Add.1 (2006), at 76, p. 29.

⁹⁵ Rashida Manjoo, ‘The Continuum of Violence against Women and the Challenges of Effective Redress,’ *International Human Rights Law Review* 1 (2012), at p. 11.

⁹⁶ Ertürk’s first report to the CHR, ‘Integration of the Human Rights of Women and the Gender Perspective: Violence against Women’, E/CN.4/2004/66. This issue will be further developed in Ertürk’s last report on ‘Political Economy and Violence against Women’, to be presented in 2009 as document A/HRC/11/6.

⁹⁷ See A/HRC/11/6.

⁹⁸ 15 years of the United Nations Special Rapporteur on Violence against Women, Its Causes and Consequences, (1994-2009) – A Critical Review, p. 4. Available at: <http://www2.ohchr.org/english/issues/women/rapporteur/docs/15YearReviewofVAWMandate.pdf>. Accessed on 9 November 2012.

⁹⁹ E/CN.4/2004/66, paras. 43-44, p. 14.

refugees, both in camps as well as women residing outside the camps.¹⁰⁰ During conflicts, women are often trafficked across borders to provide sexual services to combatants in armed conflict. Abuses against women and girls have also been committed by international personnel deployed in United Nations peace operations.¹⁰¹

Under international human rights law, states are required to observe due diligence to end, investigate, punish and provide redress for acts of violence against women. Therefore, the due diligence standard presents ‘a way to measure whether a state has fulfilled its obligations to prevent and respond to violence against women.’¹⁰² The due diligence standard, within international human rights law, has progressively become the parameter that determines the level of State compliance with its obligations to prevent, and respond appropriately to acts of violence against women.¹⁰³

The due diligence standard has helped to challenge the liberal doctrine of State responsibility with regard to violation in the ‘private sphere’. This means that the State, by failing to respond to intimate/domestic violence, can be held responsible for not fulfilling its obligation to protect and punish in a non-discriminatory way and can be charged as an accomplice to private violations.¹⁰⁴

¹⁰⁰ Human Rights Council, Seventeenth session, Agenda item 3, Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development, Report of the Special Rapporteur on violence against women, its causes and consequences, Rashida Manjoo, Addendum, A/HRC/17/26/Add.4, p. 8.

¹⁰¹ United Nations General Assembly, Fifty-ninth session, Agenda item 77, Comprehensive review of the whole question of peacekeeping operations in all their aspects, A/59/710, 24 March 2005, p. 2.

¹⁰² See generally Carin Benninger-Budel, *Due Diligence and Its Application to Protect Women from Violence*, (The Netherlands: Martinus Nijhoff Publishers, 2008).

¹⁰³ See United Nations Economic and Social Council, Commission on Human Rights, Sixty-second session, Item 12 (a) of the provisional agenda, Integration of the Human Rights of Women and the Gender Perspective: Violence against Women, The Due Diligence Standard as a Tool for the Elimination of Violence against Women, E/CN.4/2006/61, 20 January 2006.

¹⁰⁴ E/CN.4/2006/61, Article 61, p. 14.

States have adopted numerous measures in terms of their due diligence obligation to protect, which consist mainly of the provision of services such as telephone hotlines, health care, counselling centres, legal assistance and financial aid to victims of violence.¹⁰⁵

However, the implementation of the due diligence obligation to reparations remains utterly underdeveloped in practice. The little attention devoted to gender-specific damages, both at a substantive and procedural level, contrasts with the fact that women are often the target of both sex-specific and other forms of violence.¹⁰⁶

To tackle the issue of domestic violence, Manjoo suggests that a framework of prevention to address violence against women should include, among other things: (a) legislative measures, including the ratification of international human rights instruments, the financial and human resources to guarantee effective application of such laws; (b) institutional and policy measures, including the removal of any obstacles to the investigation and prosecution of violence against women and the establishment of coordination mechanisms between authorities and service providers to guarantee effective cooperation and information-sharing on matters relating to investigation and prosecution of violence against women; (c) capacity-building activities, including training and awareness-raising, such as gender-sensitive training for all civil servants addressing violence and discrimination against women, and the incorporation of a gender equality perspective into school textbooks and curricula.¹⁰⁷

Rashida Manjoo further suggests an all-inclusive approach to comprehending discrimination and violence against women, which requires, amongst others: (a) treating rights as

¹⁰⁵ Rashida Manjoo, The Continuum of Violence against Women and the Challenges of Effective Redress, *International Human Rights Law Review*, Vol. 1, no. 1, (2012), at p. 19.

¹⁰⁶ United Nations General Assembly, Human Rights Council, Fourteenth session, Agenda item 3, Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development, Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Mr. Frank La Rue, A/HRC/14/23, 20 April 2010, p. 23.

¹⁰⁷ Rashida Manjoo, 'The Continuum of Violence against Women and the Challenges of Effective Redress,' *International Human Rights Law Review*, Vol. 1, no. 1, (2012), at p. 25.

universal, interdependent and indivisible; (b) situating violence on a continuum that spans interpersonal and structural violence; and (d) analysing social and/or economic hierarchies among women, and between women and men.¹⁰⁸

By situating violence along a continuum, States may suitably contextualise violence and recognise that the deprivation of other human rights can be ‘just as egregious and debilitating as family violence. Although these forms of violence are by no means the same, they can be viewed as parallel and similar when considering their interrelationship.’¹⁰⁹ According to Manjoo, The fight for the human rights of women ‘remains a collective endeavour in which joint global action is essential to ensure the full enjoyment of all rights by all women and girls worldwide.’¹¹⁰

Because domestic violence against women has become a world phenomenon, a number of international human rights instruments have addressed the problem. Some international legal instruments have addressed the issue either directly or indirectly, but several of the instruments that refer to violence against women tend to give a timid account of domestic violence.¹¹¹ The 1989 U.N. report on Violence against Women described the use of violence by men against women within the family structure as ‘coercive’. This understatement received minimal improvement in 1992 by the Committee on the Elimination of Discrimination against Women in General Recommendation No. 19, which states that violence against women ‘is a form of discrimination that seriously inhibits women’s ability to enjoy rights and freedoms on a basis of equality with men.’¹¹²

¹⁰⁸ *Ibid.*, p. 27.

¹⁰⁹ See A/HRC/17/26, 2 May 2011, Articles 64-66, p. 16.

¹¹⁰ Rashida Manjoo, ‘The Continuum of Violence against Women and the Challenges of Effective Redress,’ *International Human Rights Law Review*, Vol. 1, no. 1, (2012), at p.29.

¹¹¹ Bonita C. Meyersfeld, ‘Reconceptualizing Domestic Violence In International Law,’ *Albany Law Review*, 4/11/2004, Vol. 67, p. 395.

¹¹² *Ibid.*

Conventions and conferences which showed some concern about the issue of violence against women include, among many others, the Universal Declaration of Human Rights (UDHR),¹¹³ the International Covenant on Civil and Political Rights (ICCPR),¹¹⁴ the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT),¹¹⁵ the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)¹¹⁶ and the Declaration on the Elimination of Violence against Women (DEVAW).¹¹⁷

B. Domestic Legal Obligations under *Shari'ah*

Prophetic traditions prove that the term ‘violence’ was common amongst the Arabs at the advent of Islam, as the Prophet Muhammad (pbuh) said:

Allah is gentle and loves gentleness. He gives to those displaying gentleness what he does not give to those displaying violence.¹¹⁸

This *hadith*, or prophetic tradition, makes it clear that violence is condemned in Islam.

Islam promotes kindness rather than violence, as the Prophet (pbuh) said:

Whenever kindness is in a thing it adorns it; and whenever it is removed from anything, it disfigures it.¹¹⁹

The Prophet (pbuh) considered violent people who do not deal gently with others as evil:

‘Whoever is deprived of gentleness is indeed deprived of all good.’¹²⁰

¹¹³ The Universal Declaration of Human Rights (UDHR) G.A. res. 217A (III), U.N. Doc A/810 at 71 (1948).

¹¹⁴ International Covenant on Civil and Political Rights. G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171.

¹¹⁵ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Adopted and opened for signature, ratification and accession by General Assembly, resolution 39/46 of 10 December 1984, entered into force 26 June 1987, in accordance with Article 27 (1). G.A. res. A/RES/57/199, entered into force 22 June 2006 [*reprinted in* 42 I.L.M. 26 (2003)].

¹¹⁶ Convention on the Elimination of All Forms of Discrimination against Women, G.A. res. 34/180, 34 U.N. GAOR Supp. (No. 46) at 193, U.N. Doc. A/34/46, entered into force 3 Sept. 1981.

¹¹⁷ Convention on the Elimination of All Forms of Discrimination against Women, G.A. res. 34/180, 34 U.N. GAOR Supp. (No. 46) at 193, U.N. Doc. A/34/46, entered into force 3 Sept. 1981.

¹¹⁸ *Sahih Muslim*, tradition no. 2593.

¹¹⁹ *Sahih Al-Bukhari*, tradition no. 6024 and *Sahih Muslim*, tradition no. 2165.

Indeed, all forms of domestic violence, including violence against women, are considered prohibited in Islam. Women in Islam must be treated humanely and with respect. In fact, domestic violence is against the *Shari'ah* principles.¹²¹ A cursory look at some Qur'anic verses and Prophetic traditions will reveal that violence, in all its forms, is prohibited and that its opposite, kindness, is a highly commended act.

Addressing men, Allah commands them to treat their wives kindly, as the Qur'an states, 'Live with them on a footing of kindness and equity.'¹²²

Not only that, Islam also considers the husband's kindness to his wife a sign of good character and perfect faith.¹²³ The Prophet (pbuh) said,

The best of the believers in faith are those with the best character, and the best among them are those whose treatment of their wives is the best.¹²⁴

The Prophet (pbuh) also exhorts Muslims to show kindness to women. 'Be gentle with the glass vessels,' he once commanded.¹²⁵

While commanding Muslims to give in charity, Islam obliges them to say kind words if they do so, as the Qur'an states, 'Kind words and the covering of faults are better than charity followed by injury.'¹²⁶

The Prophet (pbuh) also said,

¹²⁰ *Sahih Muslim*, tradition no. 2592.

¹²¹ See Murad H. Elsaidi, 'Human Rights and Islamic Law: A Legal Analysis Challenging the Husband's Authority to Punish "Rebellious" Wives', *Muslim World Journal of Human Rights*, 2011, Vol. 7, Issue 2, article 4, p. 21.

¹²² Holy Qur'an, 3:19.

¹²³ Dr Nuha Adnan Al-Qatarji, Professor of Islamic Studies, Imam Al-Awza'i College for Islamic Studies, Beirut, Lebanon, *Al-Unf Al-USari Bayna Al-I'lanat Ad-Dawliyah Wa Ash-Shari'ah Al-Islamiyah (Domestic Violence between International Conventions and Islamic Law)*, a paper presented to the 19th Session of the International Islamic Fiqh Academy, Shariqa, on 26-30 April, 2009, p. 13-4.

¹²⁴ *Jami' At-Tirmidhi*, Vol. 3, p. 466, tradition no. 1162.

¹²⁵ *Sahih Al-Bukhari, Book of Manners*, tradition no. 5857.

¹²⁶ Holy Qur'an, 2:263.

A good Muslim is one whose fellow Muslims are safe from the harm that may be caused by his tongue and hands.¹²⁷

Whoever believes in Allah and the last day should speak good or remain silent.¹²⁸

Allah reminds Prophet Muhammad (pbuh) of His favour upon him by instilling kindness into his heart:

It is part of the mercy of Allah that you [O Muhammad] deal gently with them. Were you severe or harsh-hearted, they would have broken away from about you.¹²⁹

He also commands him to be gentle under all circumstances.

Nor can goodness and evil be equal. Repel evil with what is better. Then will he between whom and you was hatred become as it were your friend and intimate!¹³⁰

In fact, when the Qur'an commands the Prophet (pbuh) to do something, the command covers all Muslims, who are required to follow in his footsteps.

This kindness extends to include parents as well, as the Qur'an states,

Your Lord has decreed that you worship none but Him, and that you be kind to parents. Whether one or both of them attain old age in your life, say not to them a word of contempt, nor repel them, but address them in terms of honour. And, out of kindness, lower to them the wing of humility, and say, 'My Lord! Bestow on them Your mercy even as they cherished me in childhood.'¹³¹

Anger, in many cases, leads to evil acts, including acts of domestic violence against women. When anger takes the better of a Muslim, the Qur'an reminds him to observe patience.

¹²⁷ *Sahih Al-Bukhari, Book of Faith*, tradition no. 10.

¹²⁸ *Sahih Al-Bukhari, Book of Good Manners*, tradition no. 6018.

¹²⁹ Holy Qur'an, 3:159.

¹³⁰ *Ibid.*, 41:34.

¹³¹ *Ibid.*, 17:23-4.

Indeed, Allah commends ‘those who restrain anger, and pardon people’¹³² and considers them ‘doers of good’.¹³³

Islam also prohibits alcohol, which is behind numerous incidents of violence against women, and the Prophet (pbuh) once referred to it as ‘the root of all evil’.¹³⁴ As the Qur’an states,

O you who believe! Intoxicants and gambling, [dedication of] stones, and [divination by] arrows, are an abomination of Satan’s handwork: eschew such [abomination], that you may prosper.¹³⁵

Before the advent of Islam, the number of wives a man could have was unlimited, and once a woman lost her husband she would be confined in an isolated place for a year. She was also subjected to many forms of violence, such as beating and harsh treatment, until Islam came and limited the number of wives to four on condition that equal treatment is observed. Islam put an end to the forms of violence practised against women and called for kindness and cooperation amongst members of the family and society at large.¹³⁶

Among the pagan Arabs before Islam, inheritance rights were confined exclusively to the male relatives.¹³⁷ The Qur’an abolished all these unjust customs and gave women a share in inheritance, as the Qur’an states:

From what is left by parents and those nearest related there is a share for men and a share for women, whether the property be small or large — a determinate share.¹³⁸

¹³² *Ibid.*, 3:134.

¹³³ *Ibid.*

¹³⁴ Abul-Qasim Sulayman ibn Ahmad At-Tabarani, *Al-Mu’jam Al-Awsat*, (Riyadh: Maktabat Al-Ma’arif, 1985), *tradition* no. 3810. See also *Sunan An-Nasa’i*, *tradition* no. 5666.

¹³⁵ Holy Qur’an, 5:90.

¹³⁶ Dr Nuha Adnan Al-Qatarji, Professor of Islamic Studies, Imam Al-Awza’i College for Islamic Studies, Beirut, Lebanon, *Al-Unf Al-Usari Bayna Al-I’lanat Ad-Dawliyah Wa Ash-Shari’ah Al-Islamiyah (Domestic Violence between International Conventions and Islamic Law)*, a paper presented to the 19th Session of the International Islamic Fiqh Academy, Shariqa, on 26-30 April, 2009, p. 3.

¹³⁷ See Muhammad Qutb, *Shubuhah Hawla Al-Islam (Misconceptions about Islam)*, 8th edition, (Cairo: Dar Ash-Shuruq, 1408 AH/1988), p. 106; Muhammad Al-‘Assal, *Al-Islam Wa Bina’ Al-Mujtama’ (Islam and the building of Society)*, 8th edition, (Kuwait: Dar Al-Qalam, 1407 AH/1987), p. 157; and ‘Abbas Al-‘Aqqad, *Al-Mar’ah Fee Al-Qur’an (Women in the Qur’an)*, 3rd edition, (Beirut: Dar Al-Kitab Al’Arabi, 1969).

Apart from recognition of woman as an independent human being acknowledged as equally essential for the survival of humanity, Islam, as noted above, has given her a share of inheritance. Before Islam, she was not only deprived of that share but was herself considered as property to be inherited by man.

After her husband's death, a woman would be treated just like chattels. Regarding the verse:

O you who believe! You are forbidden to inherit women against their will, and you should not prevent them from marriage that you may take back part of the dower you have given them.¹³⁹

'Abdullah ibn 'Abbas, a paternal cousin of the Prophet (pbuh) known for his deep religious knowledge and his expertise in *tafsir* (exegesis of the Qur'an), as well being an authority on the Prophet's *Sunnah*, said,

[Before this revelation], if a man died, his relatives used to have the right to inherit his wife, and one of them could marry her if he would, or they would give her in marriage if they wished, or, if they wished, they would not give her in marriage at all, and they would be more entitled to her than her own relatives. So the above verse was revealed in this connection.¹⁴⁰

Women in Arabia before the advent of Islam had virtually no legal status.¹⁴¹ They were sold into marriage by their guardians for a price paid to the guardian, the husband could terminate the marriage bond whenever he wanted, and women had little or no property or succession rights. If a man died, his widow would have no control over any of his inheritance, and she was in many cases married off to her former husband's brothers or relatives against her

¹³⁸ Holy Qur'an, 4:7.

¹³⁹ *Ibid.*, 4:19.

¹⁴⁰ *Sahih Al-Bukhari, Book of Qur'an Exegesis, hadith no. 4303, Vol. 4, p. 1670.*

¹⁴¹ Isma'il ibn 'Umar ibn Kathir, *Tafsir Al-Qur'an Al-'Adhim*, 1st edition, (Riyadh: Dar Taybah, 1422 AH/2002), p. 466.

will.¹⁴² In some cases, the deceased's friend would take possession of her. If he found her beautiful, he would marry her; otherwise, he would confine her until she died and then he would inherit from her.¹⁴³ Islam put an end to this form of violence against women, as the Qur'an states,

O you who believe! You are forbidden to inherit women against their will. Nor should you prevent them from marriage, that you may take away part of the dower you have given them.¹⁴⁴

Regarding inheritance, the general rule is that the female share is half the male's except in cases in which the mother receives an equal share to that of the father.¹⁴⁵ This rule, if taken in isolation from other laws concerning men and women, may appear unfair. In fact, in adopting this rule, Islam relies on the rule *al-ghunmu bi al-ghurm*, that is, the profit stands against expenses.¹⁴⁶

In the ideal Islamic context, financial obligations of men in Islam far exceed those of women. For example, a bridegroom must provide his bride with a marital gift, a dowry. This gift becomes her exclusive property and remains so even if she is later divorced. The bride is under no obligation to present any gifts to her groom. Furthermore, the husband, according to Islamic dictates, must support his wife and children, while the wife is not obliged to help him economically in this regard.¹⁴⁷ Her property and earnings are for her own use alone except what she may voluntarily offer her husband. These and other facts clearly indicate that Muslim men in

¹⁴² *Ibid.*

¹⁴³ *Ibid.*

¹⁴⁴ Holy Qur'an, 4:19.

¹⁴⁵ Chawki El-Moussawi and Hassan Obeid, 'Evaluating the Productive Efficiency of Islamic Banking in GCC: A Non-Parametric Approach', *International Management Review*, Vol. 7 no. 1 2011, p. 10.

¹⁴⁶ *Ibid.*

¹⁴⁷ Financial Security and Inheritance Laws of Women in Islam part 2, Objections to the Heretics of the Early Islamic Era. Available at: <http://www.nusantaraku.org/forum/religious-talk/50963-financial-security-inheritance-laws-women-islam-part-2-a.html>. Accessed on 25 August 2011.

general have greater financial burdens than Muslim women, and thus inheritance rules are meant to offset this imbalance so that the society lives free of all gender or class wars.¹⁴⁸

Islam also commands Muslims to show kindness to the children.¹⁴⁹ The Prophet (pbuh) once kissed his grandson al-Hasan ibn ‘Ali while Al-Aqra’ ibn Habis, one of his companions, was with him. Al-Aqra’ said, ‘I have ten children and have never kissed any of them.’ Not happy with such a violent attitude, the Prophet (pbuh) looked at him and said, ‘Those who do not show mercy will not be shown mercy.’¹⁵⁰

The International Islamic Fiqh Academy stresses the importance of ‘protecting Muslim women against the practices, customs and traditions which subject them to injustice and violate their rights to safeguard their religion, dignity, honour and property and other rights which have been approved by the principles of international human rights, not to speak of the *Shari’ah* principles.’¹⁵¹

An early form of violence against girls before the advent of Islam came to be known as female infanticide. The Arabs would never welcome a newborn female child into the family and would resort to burying her alive. Islam not only prohibited such erroneous and cruel practices but also ridiculed those who view the birth of a girl child with contempt. As the Qur’an states,

When news is brought to one of them, of [the birth of] a female [child], his face darkens, and he is filled with inward grief! With shame does he hide himself from his people, because of the bad news he has had! Shall he retain it on [sufferance and] contempt, or bury it in the dust? Ah! What an evil [choice] they decide on!¹⁵²

¹⁴⁸ *Ibid.*

¹⁴⁹ Dr Nuha Adnan Al-Qatarji, Professor of Islamic Studies, Imam Al-Awza’i College for Islamic Studies, Beirut, Lebanon, *Al-Unf Al-Usari Bayna Al-I’lanat Ad-Dawliyah Wa Ash-Shari’ah Al-Islamiyah (Domestic Violence between International Conventions and Islamic Law)*, a paper presented to the 19th Session of the International Islamic Fiqh Academy, Shariqa, on 26-30 April 2009, p. 14.

¹⁵⁰ Reported by Al-Bukhari, *Book of Good Manners*, traditions nos. 5651, Vol. 5, p. 2235.

¹⁵¹ The International Islamic Fiqh Council, Resolution no. 159 (17/8) on Women’s situation and their social role from an Islamic perspective. Available at: <http://www.fiqhacademy.org.sa/>. Accessed on 15 July 2011.

¹⁵² Holy Qur’an, 16:58-59.

While Islam obliges men to treat their wives with respect, violence against women remains quite widespread even in parts of countries with the Islamic legal system. Islamic law has laid the foundations for both husband and wife to treat each other with love and mercy, as the Qur'an clearly explains,

Among His Signs is this: that He created for you mates from among yourselves, that you may dwell in tranquillity with them, and He has put love and mercy between your [hearts]. Verily in that are signs for those who reflect.¹⁵³

Moreover, the Qur'an repeatedly warns against the use of injurious statements by a husband against his wife, as the Qur'an states:

If any men among you divorce their wives by *dhihar* (calling them mothers), they cannot be their mothers: None can be their mothers except those who gave them birth. And in fact they use words both iniquitous and false: but truly Allah is one that blots out [sins], and forgives again and again. But those who divorce their wives by *dhihar* then wish to go back on the words they have uttered, - [It is ordained that such a one] should free a slave before they touch each other: Thus are you admonished to perform: and Allah is well-acquainted with all that you do. And if any has not the wherewithal, he should fast for two months consecutively before they touch each other. But if any is unable to do so, he should feed sixty indigent ones, this, that you may show your faith in Allah and His Messenger. Those are limits set by Allah. For those who reject Him, there is a grievous Penalty.¹⁵⁴

Rape, which Islam regards as a violent crime not only against the victim, but also against God and society, deplorably remains a common form of violence against women. More often than not, women are generally blamed for being the victim of rape. Islam considers the perpetrator as having committed an odious crime and the victim is an unwilling partner in the sex act and thus bears neither blame nor stigma.¹⁵⁵

¹⁵³ *Ibid.*, 30:21.

¹⁵⁴ *Ibid.*, 58:2-4.

¹⁵⁵ An Islamic Perspective on Violence against Women, Muslim World League, March 1995. Available at: <http://www.mwlusa.org/topics/violence&harrasment/violence.html>. Accessed on 24 June 2011.

Another form of violence against women is female genital mutilation, which Islam strictly rejects and condemns even though it is a widespread practice in some parts of the Muslim world. Rather than being attributed to Islam, it should be viewed as a cultural practice that has no basis in Islam.¹⁵⁶ The renowned Egyptian scholar Yusuf Al-Qaradawi strongly opposes this practice, considering it ‘a forbidden practice’ that goes against Islamic law and an aspect of ‘Satanic handiwork’.¹⁵⁷

In addition to the violence to which women are subjected during times of peace, women are particularly vulnerable during times of war. Islam condemns violence against women under all circumstances. War is no exception. Prophet Muhammad (pbuh) was strict in ensuring that non-combatants, primarily women and children, were not harmed during wartime.¹⁵⁸ Instructing Muslim fighters once, he said, ‘Don’t kill women, children and the aged.’¹⁵⁹

Islam considers men and women to be equal as to human dignity, and women have rights and obligations which perfectly suit their nature, abilities and physical and psychological make-up. While both men and women enjoy different natural qualities, they complement each other as to the responsibilities the *Shari’ah* has enjoined on them.¹⁶⁰ Islam’s mandate of equality between women and men necessitates that all forms of violence against women be removed, for so long as women suffer abuses, they cannot achieve their full potential as free and equal members of society.¹⁶¹ Perpetrators of domestic violence must not go unpunished.

It is upon these Islamic principles that domestic laws in Saudi Arabia are founded.

¹⁵⁶ *Ibid.*

¹⁵⁷ Yusuf Al-Qaradawi: Female Circumcision from an Islamic Perspective. Available at: <http://www.qaradawi.net/fatawaahkam/30/1465.html>. Accessed on 16 August 2011.

¹⁵⁸ *Ibid.*

¹⁵⁹ *Sunan Abu Dawud, Book of Military Expeditions*, tradition no. 2704.

¹⁶⁰ The International Islamic Fiqh Council, Resolution no. 114 (12/8), Organisation of Islamic Conference, 12th Session held in Riyadh, Saudi Arabia, 23-28 September 2000. Available at: <http://www.fiqhacademy.org.sa/>. Accessed on 15 July 2011.

¹⁶¹ *Ibid.*

4. Major Causes of Domestic Violence against Women in Saudi Arabia

Many factors contribute to domestic violence in Saudi society. In fact, while some factors may be common to all societies, each country has unique factors that contribute to the nature of domestic violence in that particular area.¹⁶²

Some abusive husbands believe in the legitimacy of violence against their wives. This attitude has no support in Islamic law but is quite widespread, and could be attributed to the wrong interpretation of the Arabic word *dharaba*, mentioned in the Qur'anic verse 5:34 discussed earlier.¹⁶³ Some men with very traditional beliefs may think they have the right to control women, and that women are not equal to men. Some of them hold non-Islamic, cultural ideologies that ascribe to an unequal and inferior social status for women. This has legitimized the husbands' use of violence to discipline their wives.

In a study conducted by *Riyadh* newspaper in 1426 AH (2000) on the causes of domestic violence in Saudi Arabia, it was found out that 34.96% of respondents attribute it to failure to observe religious practices, 31.64% ascribe it to the husbands' lack of awareness of their marital duties, 20.80% attribute it to family culture and customs and traditions, 6.64% state that family members interference is the main cause and 5.97% attribute it to disputes over the wife's salary.¹⁶⁴

¹⁶² Gretchen E. Ely, Catherine N. Dulmus And John S. Wodarski, *Domestic Violence: A Literature Review Reflecting an International Crisis, Stress, Trauma, and Crisis*, Taylor & Francis Inc., 2004, p. 79.

¹⁶³ Dr Nuha Adnan Al-Qatarji, Professor of Islamic Studies, Imam Al-Awza'i College for Islamic Studies, Beirut, Lebanon, *Al-'Unf Al-'Usari Bayna Al-'I'lanat Ad-Dawliyah Wa Ash-Shari'ah Al-Islamiyah (Domestic Violence between International Conventions and Islamic Law)*, a paper presented to the 19th Session of the International Islamic Fiqh Academy, Shariqa, on 26-30 April, 2009, p. 35.

¹⁶⁴ Royah Social Services. Available at: <http://www.royahcenter.com/#?6789%26bm789wedbfv394fbsdnbbb++7234hn1>. Accessed on 24 October 2012.

Some men mistakenly believe that beating women is a way of reforming them and is closely related with proving their manhood and imposing their authority. They believe that doing so would make their wives more submissive.¹⁶⁵

The kind of wrong education that abusers receive from their family backgrounds makes them believe that violence is a natural behaviour. Studies suggest that violent behaviour is often caused by an interaction of situational and individual factors. This means that abusers learn violent behaviour from their family, people in their community and other cultural influences as they grow up. Indeed, many abusers tend to come from abusive families.¹⁶⁶

Psychological problems are also a contributory cause. Studies have indicated that there is a relationship between psychopathic traits and domestic violence. Psychopaths are characterized by depression and anger and are likely to perpetrate more domestic violence.¹⁶⁷

Economic problems, such as unemployment, poverty and debt, are also to blame for the dramatic increase in psychological pressures, causing the husband to experience feelings of weakness and helplessness.¹⁶⁸ Indeed, economic inequalities constitute a causal factor for violence against women. Women's economic inequalities and discrimination against women in areas such as employment, income, access to other economic resources and lack of economic independence reduce women's capacity to act and take decisions and increase their vulnerability to violence.¹⁶⁹

¹⁶⁵ *Ibid.*

¹⁶⁶ Abdullah ibn Ahmad Al-'Allaf, 25/9/2010. *Domestic Violence and Its Effects on the Family and Society*, p. 6. Available at: <http://saaid.net/book/open.php?cat=6&book=3991>. Accessed on 19 July 2011.

¹⁶⁷ Anthony Storr, *Human Aggression* (Arabic edition), translated by Muhammad Ahmad Ghali and Ilhami Abd Adh-Dhahir 'Afifah, (Cairo: Al-Hay'ah Al-Misriyah Al-'Ammah Lil-Kitab, 1975), p. 153.

¹⁶⁸ Bahnam Ramsis, *The Criminal: His makeup and Ways of reforming Him* (in Arabic), (Alexandria: Dar Al-Ma'arif, 1993), p. 219.

¹⁶⁹ See United Nations Economic and Social Council, Commission On Human Rights, Fifty-eighth session, Item 12 (a) of the provisional agenda, Integration Of The Human Rights Of Women And The Gender Perspective, Violence against Women, Report of the Special Rapporteur on violence against women, its causes and consequences, Ms. Radhika Coomaraswamy, submitted in accordance with Commission on Human Rights resolution 2001/49 Cultural practices in the family that are violent towards women, E/CN.4/2000/68/Add.5.

The detrimental influence which the media exercises over people, particularly violent scenes shown on TV, also plays a major role in causing domestic violence. Studies have indicated that violence scenes incite violence.¹⁷⁰ A study conducted by the Corporate Alliance against Television Violence over a twenty-two-year period showed that there is a close link between violent films and the increase in violent crimes. The study mentioned that 25 to 50 per cent of violent crimes are attributed to cinema and television violence.¹⁷¹

A study shows that with the widespread of movies and electronic games with scenes of violence in the Kingdom of Saudi Arabia (It is estimated that Saudi children spend about \$400 dollars a year on such entertainment games), the negative effect of these movies and games has become apparent behaviour of school children who use white arms in their fights.¹⁷²

While most migrant workers come voluntarily to Saudi Arabia, some are allegedly trafficked for the purpose of forced labour. For instance, a woman who had been recruited in the Philippines to work as a beautician was forced to work as a maid.¹⁷³ She was abused by her employer and suffered serious injuries while trying to escape.¹⁷⁴ Upon arrival, all migrants have their passport and residency permit taken away from them. Government officials report, however, that there are initiatives under way to prevent such crimes, and that a law on trafficking had been finalized and was being presented to the Shura Council.¹⁷⁵

Alcohol and drug addiction are also two of the major causes of domestic violence against women. Many reported cases of abuse indicate that husbands abuse their wives while in an

¹⁷⁰ Muhammad ibn ‘Abdur-Rahman Al-Hudheef, *How the Media Influences People* (in Arabic), 1st edition, (Riyadh: Maktabat Al-‘Ubaykan, 1994), p. 73.

¹⁷¹ Marwan Kujuk, *The Muslim Family in front of the Television* (in Arabic), 1st edition, (Cairo: Dar Al-Kalimah At-Tayyibah, 1986), p. 129.

¹⁷² Rashad Ubayd, *Movies and Electronic Games and Their Impact on the Behaviour of Children*, Saturday 11 August 2012. Available at: <http://www.wafa.com.sa/node/9913>. Accessed on 6 January 2013.

¹⁷³ *Arab News*, 11 September 2008.

¹⁷⁴ *Ibid.*

¹⁷⁵ A/HRC/11/6/Add.3, p. 16.

addicted state.¹⁷⁶ Indeed, a huge volume of research has uncovered links between alcohol abuse and domestic violence in Saudi Arabia.¹⁷⁷ In one case,¹⁷⁸ a Saudi woman was rushed to King Fahd Hospital in Jeddah after she had suffered severe beating at the hands of her drunken husband. Before he committed this act of violence, he locked up his daughters in one room and took the victim to another room where he beat up severely with a screwdriver while drinking alcohol.¹⁷⁹

Some women's frigidity or refusal to engage in sexual intercourse to satisfy their husbands' needs is one of the causes. This frigidity or refusal to engage in sexual intercourse clearly goes against the teachings of Islam,¹⁸⁰ as it exposes the husband to sexual temptations, paving the way for immorality. Frigidity can be caused by exhaustion, and this applies to women who work outside the home for long hours, such as doctors. The findings of a study conducted by Royah Centre for Social studies indicates that frigidity is amongst the main reasons that lead to domestic violence in Saudi Arabia.¹⁸¹

Some women erroneously believe that by being obstinate they can prove their independence, following the dictates of the so-called women's liberation ideas that started surfacing recently.¹⁸² Indeed, when women who have been influenced by feminists' ideas attempt to impose such ideas at home and in some cases refuse to carry out some housework duties or neglect their duties towards their husbands, this only incites their husbands' resentment

¹⁷⁶ Mahasin Al-Hawati, *Domestic Violence: Aspects and Solutions*, Women Knowledge Network. Available at: <http://www.amanjordan.org>. Accessed on 19 July 2011.

¹⁷⁷ Abdulaziz A. Albrithen, 'Alcoholism and Domestic Violence in Saudi Society,' Thesis submitted in accordance with the requirements of the University of Liverpool for the degree of Doctor of Philosophy in Social Work, University of Liverpool, September 2006, p. 1.

¹⁷⁸ MzMz. 5 December 2011. Available at: <http://mz-mz.net/23779/>. Accessed on 4 January 2013.

¹⁷⁹ *Ibid.*

¹⁸⁰ *Sunan At-Tirmidhi, Book of Nursing*, tradition no. 1160, Vol. 3, p. 465.

¹⁸¹ Royah Centre for Social Studies. Available at: <http://www.royahcenter.com/>. Accessed on 16 January 2013.

¹⁸² Dr Nuha Adnan Al-Qatarji, 'Domestic Violence between International Conventions and Islamic Law', a paper presented to the 19th Session of the International Islamic Fiqh Academy, Shariqa, on 26-30 April, 2009, p. 38.

and anger and leads to violence against these women.¹⁸³ It is worth mentioning that in 2012 the Kingdom's courts implemented 2653 orders demanding wives not to rebel against their husbands, to show them obedience and not leave their homes against their husbands' will. The Kingdom's courts also received in the same year 896 requests from women demanding their husbands treat them with kindness.¹⁸⁴

Some women also tend to accept the violence perpetrated against them without even attempting to put an end to it. The following are some of the erroneous beliefs such victims of domestic violence hold:

- The psychological fear some Saudi women undergo prevents them from reporting their abusive husbands to the police or the court. This includes their fear of being left at the mercy of an unjust father who will beat them; fear of shame, which is generally attached to divorced women in Saudi society; or fear of facing revengeful reactions from their abusive husbands if they seek divorce from them.¹⁸⁵ The same thing applies to Saudi Arabia.
- The abused woman's love for her abusive husband makes her patiently endure her ordeal, in the hope of trying to help him mend his ways.¹⁸⁶ A study indicates that women in Saudi Arabia are subjected to violence in the first year of marriage and never inform their families due to either their love for their husbands or fear of failure in marriage.¹⁸⁷

¹⁸³ *Ibid.*

¹⁸⁴ Al-Mawaddah Society for Social Reform. Available at: <http://www.almawaddah.net/post.php?id=5009&partid=52>. Accessed on 4 January 2013.

¹⁸⁵ *Ibid.*

¹⁸⁶ Tarif Shawqi, *Domestic Violence in the Egyptian Family* (in Arabic), (Cairo, National Centre for Social and Criminal Studies, 2009), p. 60.

¹⁸⁷ Islam Memo, Divorce Rate in Saudi Arabia Reaches 60%, Saturday 17 April 2010. Available at: <http://www.islammemo.cc/akhbar/maraa-wa-tefl/2010/04/17/98396.html>. Accessed on 3 January 2013.

Children who witness or are the victims of violence may learn to believe that violence is a reasonable way to resolve conflicts between people. Boys who learn that women are not to be valued or respected and who see violence directed against women are more likely to abuse women when they grow up. Girls who witness domestic violence in their families are more likely to be victimized by their own husbands. This also applies to Saudi Arabia.¹⁸⁸

Other factors which have been associated with increased risk of domestic violence in Saudi Arabia include stress-related factors, such as poverty, lack of education, lack of financial resources, levels of jealousy, and living in a large family.¹⁸⁹ They also include women's low social status, oppressive fundamental religious beliefs that devalue women, family dysfunction, inadequate communication skills, economic hardship and 'honour killing'.¹⁹⁰ Honour killings occur when a woman is killed by a male member of her household, usually a husband, brother, or father, for dishonouring the family status, often because of perceived sexual indiscretion.¹⁹¹

Khalid Al-Halibi argues that video games promoting domestic violence can lead to domestic violence and affect not only children but also adults, instilling in them the view that being violent is quite natural, acceptable and even enjoyable,¹⁹² and giving them lessons in punching and verbal abuse. The following table, provided by a recent study, shows this.¹⁹³

It is important to stress that since domestic violence is against Islamic principles (as shown above under legal obligations under *shari'ah*), the points considered above do not justify the continuation of domestic violence in Saudi Arabia. Therefore, the government must address the

¹⁸⁸ Tarif Shawqi, *Domestic Violence in the Egyptian Family* (in Arabic), (Cairo, National Centre for Social and Criminal Studies, 2009), p. 60.

¹⁸⁹ *Ibid.*

¹⁹⁰ Gretchen E. Ely, Catherine N. Dulmus and John S. Wodarski, 'Domestic Violence: A Literature Review Reflecting an International Crisis', *Stress, Trauma, and Crisis*, Taylor & Francis Inc., 2004, p. 79-80.

¹⁹¹ *Ibid.*

¹⁹² Sal Seifer, *How to Set a Good Example to Your Children* (in Arabic), 1st edition, Translated by Maktabat Jarir, (Riyadh: Maktabat Jarir, 2001), p. 253.

¹⁹³ Khalid ibn Sa'ud Al-Halibi, *Al-'Unf Al-Usari: Asbabuhu wa madhahiruhu wa atharuhu wa 'ilajuhu* (Domestic Violence: Its Causes, Aspects, Effects and Solution), Hasa, 14/9/1430 AH/ 4 September 2009, p. 16-7. Available at: http://www.almostshar.com/web/Consultant_Desc.php?Consultant_Id=22&Cat_Id=1. Accessed on 19 July 2011.

causes of domestic violence since failure to do so is incompatible with Saudi Arabia's international and domestic legal obligations under *Shari'ah*.

Scenes	In Eight Hours	In One Day	In One Month	In One Year
Indecent exposures	114	342	10260	123120
Sexual scenes	4	12	360	4320
Alcohol	41	123	3690	44280
Night clubs	29	87	2610	31320
Passionate kissing	30	90	2700	32400
Violence and killing	2	6	180	2160
Horror	4	12	360	4320

4.1. Religious Misinterpretation and Application of the Concept of *Dharaba*: Qur'anic Verse 4:34

The Qur'an states:

Men are the protectors and maintainers of women, because Allah has given the one more [strength] than the other, and because they support them from their means. Therefore, the righteous women are devoutly obedient, and guard in [the husband's] absence what Allah would have them guard. As to those women on whose part you fear disloyalty and ill-conduct, admonish them [first], [next], refuse to share their beds, [and last] beat them [lightly]; but if they return to obedience, seek not against them means [of annoyance], for Allah is Most High, Great [above you all].¹⁹⁴

A literal reading of this verse would make the reader mistakenly believe that women are subjugated to men's will and that the verse permits the use of violence against women. However,

¹⁹⁴ Holy Qur'an, 4:34.

there is a surprising amount of interpretation involved in such a conclusion. To begin with, the word ‘beat’ (*dharaba* in Arabic) can mean either ‘to beat’ or ‘to leave.’¹⁹⁵

In nine of the 16 instances in which the Arabic word *dharaba* is mentioned in the Qur’an, it clearly refers to departing or separating. Why, then, is *dharaba* in this instance so frequently translated as ‘beat’?¹⁹⁶

In some exegeses such as those of Ibn Kathir, the actions prescribed in the above verse are to be taken in sequence: the husband is to admonish the wife, after which (if his previous correction was unsuccessful) he may remain separate from her, after which (if his previous correction is still unsuccessful) he may admonish her by light tapping.¹⁹⁷ Contemporary Egyptian scholar Abd Al-Halim Abu Shaqqa refers to the opinions of jurists Ibn Hajar Al-Asqalani and Ash-Shawkani who state that hitting should only occur in extraordinary cases.¹⁹⁸

Some Islamic scholars and commentators have emphasized that beatings, even where permitted, are not to be harsh,¹⁹⁹ or some, like ‘Abdullah ibn ‘Abbas, one of the earliest authorities on Qur’an exegesis, even assert that they should be ‘more or less symbolic’. According to ‘Abdullah Yusuf ‘Ali and Ibn Kathir, the consensus of Islamic scholars is that the above verse designates a light beating, merely symbolic and not intended to cause any harm.²⁰⁰ Abu Shaqqa refers to the edict of *Hanafite* scholar Al-Jassas (d. 981) who notes that the

¹⁹⁵ Summer Hathout, ‘Don’t Hold All Muslims Responsible for Men Who Misuse Quran, Beat Women,’ Muslim Women’s League. Available at: <http://www.mwusa.org/topics/violence&harrassment/domesticviolence.htm>. Accessed on 18 July 2011.

¹⁹⁶ Cybèle Cochran, ‘Women and the Law in Islamic Societies: Legal Responses to Domestic Violence in Saudi Arabia and Morocco,’ *The Fletcher School Online Journal on Southwest Asia and Islamic Civilization*, The Fletcher School, al Nakhlah, Tufts University, Spring 2009, p. 6.

¹⁹⁷ Ibn Kathir, *Tafsir Al-Qur’an Al-‘Adhim*, (London: Al-Firdous Ltd., 2000), p. 50-53.

¹⁹⁸ Anne S. Roald, *Women in Islam: The Western Experience*, (New York: Routledge, 2001), p. 166.

¹⁹⁹ Ahmad Shafaat, Tafseer of *Surah An-Nisa*, Ayah 34, *Islamic Perspectives*, 1984, Revised 2000. Available at: <http://www.islamicperspectives.com/Quran-4-34.htm>. Accessed on 22 July 2011.

²⁰⁰ Ibn Kathir, *Tafsir Al-Qur’an Al-‘Adhim*, (London: Al-Firdous Ltd., 2000), p. 50-53.

reprimand should be ‘a non-violent blow with *siwak* (a small stick used to clean the teeth) or similar. This means that to hit with any other means is considered forbidden in Islam.’²⁰¹

Some jurists argue that even when beating is acceptable under the Qur’an, it is not a desirable course of action.²⁰² Ibn Kathir, in concluding his exegesis, exhorts men not to beat their wives, quoting a *hadith* from the Prophet (pbuh) who said, ‘Do not hit Allah’s servants,’ meaning women.²⁰³

The narration continues,²⁰⁴ stating that Umar complained to the Prophet (pbuh) that many women turned against their husbands. Muhammad (pbuh) gave his permission that the men could hit their wives in cases of rebelliousness. When the women turned to the wives of the Prophet and complained about their husbands, the Prophet said, ‘Many women have turned to my family complaining about their husbands. Verily, these men are not among the best of you.’²⁰⁵

It is worth noting that at a time when men used to beat their wives in 7th century Arabia, Prophet Muhammad (pbuh) instructed them not to hit their wives’ faces,²⁰⁶ not to beat them in such a way as to leave marks on their body,²⁰⁷ and not to beat them as to cause pain.²⁰⁸ Scholars, too, have stipulated against beating or leaving marks, with others such as the Syrian jurist Ibn ‘Abidin proposing discretionary punishments against abusive husbands. According to Ahmad Shafaat, an Islamic scholar,

²⁰¹ Anne S Roald, *Women in Islam: The Western Experience*, (New York: Routledge, 2001), p. 169.

²⁰² Muhammad Asad, *The Message of the Qur’an*, Holy Qur’an, 4:34. Available at: <http://arthursclassiconovels.com/koran/koran-asad10.html>. Accessed on 23 July 2011.

²⁰³ An-Nasa’i, *As-Sunan Al-Kubra*, tradition no. 9167.

²⁰⁴ Anne S Roald, *Women in Islam: The Western Experience*, (New York: Routledge, 2001), p. 167.

²⁰⁵ *Sunan Abu Dawud*, tradition no. 2146, and *Sunan An-Nasa’i*, tradition no. 9176.

²⁰⁶ Ibn Majah, *As-Sunan*, tradition no. 1841.

²⁰⁷ Abul-A’la Al-Mawdudi, *Towards Understanding the Qur’an*, Holy Qur’an, 4:34. Available at: <http://www.islamicstudies.info/tafheem.php?sura=4&verse=34&to=42><http://www.islamicstudies.info/tafheem.php?sura=4&verse=34&to=42>. Accessed on 23 July 2011.

²⁰⁸ Muhammad Asad, *The message of the Qur’an*, Holy Qur’an, 4:34. Available at: <http://arthursclassiconovels.com/koran/koran-asad10.html>. Accessed on 23 July 2011.

If the husband beats a wife without respecting the limits set down by the Qur'an and *hadith*, then she can take him to court and if ruled in favour has the right to apply the law of retaliation and beat the husband as he beat her.²⁰⁹

Regardless of the intended meaning of the word, several Qur'anic verses require Muslims to contain their anger, resist violence, respect one another as equals, and treat spouses with love and tenderness.²¹⁰ The Prophet (pbuh) once observed, 'The strong man is not the one who can wrestle another to the ground; the strong man is the one who can control himself when he is angry.'²¹¹ When a man once asked the Prophet (pbuh) for advice, the Prophet (pbuh) said to him, 'Do not become angry.' The man repeated his request several times, and the Prophet (pbuh) gave him the same answer.²¹²

The Prophet (pbuh), the epitome of good character, whom Muslims take as their perfect model, never hit any of his wives, and even scolded those companions of his who had done so. He never shouted at any of them or any of his companions, let alone hitting any of them. 'A'ishah (may Allah be pleased with her), one of the Prophet's wives, narrated that the Prophet (pbuh) never hit a woman or a servant.²¹³ Anas ibn Malik, one of the Prophet's companions, once said,

I served the Prophet (pbuh) for ten years and he never said to me 'Uff!' (a word of contempt) or 'Why did you do such-and-such?' or 'Why did you not do such-and-such?'²¹⁴

Some scholars interpret the above verse as a three-step anger management system designed to teach tribal Arab males to subdue their anger, solving problems with their wives first

²⁰⁹ Yasmine Hassan, *The Haven Becomes Hell*, (Lahore: Shirkat Gah, 1995), pp. 57-60.

²¹⁰ Uzma Mazhar, 'Surah al Nisa 4.34: The Most Misunderstood Ayah of the Qur'an Regarding Women,' Crescent Life. Available at: http://www.crescentlife.com/thisthat/feminist_muslims/4_34.htm. Accessed on 18 July 2011.

²¹¹ *Sahih Al-Bukhari, Book of Good Manners*, tradition no. 6114.

²¹² *Sahih Al-Bukhari*, tradition no. 6116.

²¹³ *Sahih Muslim*, tradition no. 2328.

²¹⁴ *Sahih Al-Bukhari*, tradition no. 6690 and *Sahih Muslim*, tradition no. 2309.

through dialogue, then separation. Hitting is a last resort with many stipulations, the most noteworthy of which being not to cause harm.²¹⁵

Besides, *Sheikh* ‘Ali Jumu’ah, the late Egypt’s grand mufti, argues that in our modern situation, hitting one’s wife ‘is absolutely inappropriate as society deems it hateful and it will only serve to sow more discord.’²¹⁶ Given Islam’s emphasis on harmony, it is indeed questionable that verse 4:34 sanctions physical abuse.

According to Muhammad Mahmoud, the beating measure of verse 4:34 has presented past and present-day exegetical scholars with a most troubling and difficult ethical dilemma. Since the measure could not have been ‘edited out’ of the Qur’anic text, he argues, the next best achievable step was to ‘bracket’ it. This ‘bracketing’, in turn, generated two opposing readings: one which stresses the light and lenient nature of beating a wife who commits *nushuz* (rebelliousness, disloyalty and ill-conduct), and a more radical reading that rejected any physical abuse against women altogether and effected a virtual abrogation of the beating measure. A real rejection of domestic violence is only possible through the adoption of the reading of virtual abrogation. If the virtual abrogation reading becomes the basis of a new consensus among Muslims today, this offers the possibility of the establishment of virtual abrogation as an active and effective hermeneutic tool in transforming the Islamic tradition.²¹⁷

4.2 Religious Misinterpretation and Application of the Concept of *Mahram*

Misinterpretation of the concept of a male guardian (*mahram*) also constitutes one of the causes of domestic violence against women in the country. Some men misunderstand the concept

²¹⁵ Neil MacFarquhar, ‘New Translation Prompts Debate on Islamic Verse,’ *The New York Times*, March 25, 2007. Available at: <http://www.nytimes.com/2007/03/25/us/25koran.html>. Accessed on 18 July 2011.

²¹⁶ Azizah Yahia al-Hibri, ‘Muslim Women’s Rights in the Global Village: Challenges and Opportunities,’ *Journal of Law and Religion*, Vol. 15, 2000–01, pp. 63-4.

²¹⁷ Mohammad Mahmoud, ‘To Beat or Not to Beat: On the Exegetical Dilemmas over Qur’an, 4:34, Tufts University,’ *Journal of the American Oriental Society*, Vol. 126, 2006, p. 549.

of guardianship, taking it to mean domination, oppression and tyranny, while in actual fact it is a form of assuming responsibility, spending on the family and taking good care of the family members. The Qur'an states, 'Men are the protectors and maintainers of women, because Allah has given the one more [strength] than the other, and because they support them from their means.'²¹⁸

In fact, guardianship does not apply to all aspects of life, such as education and employment.²¹⁹ This has deplorably been a cultural matter which has been practised in the country so much and for so many years that it has become deeply rooted in the fabric of society.

As one of the reports prepared by the National Society for Human Rights states:

The laws that guarantee women's rights are in most cases available; however, the trouble is in their implementation or in their erroneous interpretation by some authorities. In spite of this, the texts of law and instructions should be revised that disparage the legal capacity or personality of women in a way that contradicts the principles of *Shari'ah*, especially those laws that necessitate their guardian's permission. Such cases include all forms of guardianship over women's financial transactions, which prevent them from managing their wealth without the guardian's consent, entering into financial contracts without a male guardian, educating themselves, working or engaging in business without their guardian's consent.²²⁰

The same report further states,

Some legal texts exist that should be amended to remove any discriminatory tendency or any interpretation that restricts women's rights, such as Article 76 of the Civic Affairs Code, which requires the woman's guardian's consent for her to obtain her civic affairs card. This condition leads to her deprivation or restriction of her right to obtain one, the consequential effect of which is that she is deprived of her right to freedom of decision. Likewise, Article 7 of the Political and

²¹⁸ Holy Qur'an, 4:34.

²¹⁹ National Society for Human Rights, Second Report on the Status of Human Rights in the Kingdom of Saudi Arabia1431 AH/2010. Available at: <http://nshr.org.sa/tabid/88/Default.aspx>. Accessed on 20 January 2013.

²²⁰ National Society for Human Rights, Second Report on the Status of Human Rights in the Kingdom of Saudi Arabia1431 AH/2010. Available at: <http://nshr.org.sa/tabid/88/Default.aspx>. Accessed on 20 January 2013.

Private Passports Law and Articles 5, 8 and 9 of the Bylaw of the Travel Documents Law can be said to disparage women's legal personality, and should be reconsidered.²²¹

Regarding the issue of travel, the general ruling regarding a Muslim women's travel is that she is not allowed to do so without a *mahram*, as evidenced by the *hadith* in which the Prophet (pbuh) said, 'A woman who hopes for Allah and the hereafter must not travel for one day and one night except with a *mahram*.²²² It is due to the generality of this textual evidence that some scholars argue that a woman must not travel alone.

Some other scholars, however, maintain that she can travel if she is accompanied by a group of virtuous men or men and women. The reason behind such prohibition is, of course, fear that she may be subjected to harm or seduction that may be caused if she travels by herself. This was the case in the olden days when the dangers of travel were numerous. In fact, Umar ibn Al-Khattab, the third Rightly-Guided Caliph gave permission to the Prophet's wives to undertake the journey to Makkah to perform pilgrimage as they were accompanied by virtuous people. He sent along with them two righteous men who are not related to them, namely, Uthman ibn Affan and Abdur-Rahman ibn Awf.²²³ Therefore, a woman can travel alone as long as doing so will not cause any seduction whatsoever and will not involve fear for her safety. Today, safety is generally guaranteed that travel has become a lot easier than ever before. This applies only if these conditions are met and if she is going to reach her destination on the same day. If, however, travel involves spending the night in hotels or spending a few days away from home, she has to be accompanied by her *mahram*, or at least to spend that period of time in the company of a

²²¹ *Ibid.*

²²² *Sahih Muslim, Book of Pilgrimage, hadith, no. 1338.*

²²³ *Sahih Al-Bukhari, hadith no. 1761.*

Muslim family in the destination country in order to block all the means to seduction and fear of harm.

As for going out for work or education or for running household errands or doing something for the children, she does not need a general permission from the husband, nor does she have to ask permission every time she goes out for these purposes. In fact, doing so is generally governed by the prevailing customs (*'urf*). If, however, she intends to visit a family not known to the husband, or if going out involves spending the night outside, she has to seek the husband's permission. If he does not grant her permission, then she is not allowed to leave the house.²²⁴

Marriage guardianship is a controversial issue among Muslim scholars. Those who stipulate marriage guardianship for a marriage contract to be concluded provide evidence from the Qur'an and the Prophet's traditions. From the Qur'an they quote the verse, 'Marry them, then, with their people's leave.' (4:25) Imam Al-Qurtubi argues another reason that the marriage guardian is required in the conclusion of a marriage contract is that the Qur'an addresses only men here. Were this not the case, women would be addressed instead.²²⁵ They also quote the *hadith* in which the Prophet (pbuh) said, 'There is no marriage without [the permission of] the guardian (*wali*).'²²⁶

Abu Hanifah, however, maintains that there is no need for a guardian and that a woman may get married without her guardian's permission if her prospective husband is a righteous

²²⁴ European Council for Fatwa and Research. Available at: <http://www.e-cfr.org/ar/index.php?ArticleID=51>. Accessed on 3 January 2013.

²²⁵ Muhammad ibn Ahmad Al-Qurtubi, *Al-Jami' Li Ahkam Al-Qur'an*, 1st edition, (Riyadh: Mu'assasat Ar-Risalah, 2006), Vol. 3, p. 49.

²²⁶ *Sunan At-Tirmidhi*, *hadith* no. 1101, and *Sunan Abu Dawud*, *hadith* no. 2085.

man. He advances this opinion by analogy with sale, in which case a woman can engage in a sale transaction without her guardian's permission.²²⁷

Those who do not stipulate marriage guardianship in the conclusion of a marriage contract also furnish evidence from the Qur'an and the Prophet's traditions. From the Qur'an they quote the verse, 'There is no blame on you if they dispose of themselves in a just and reasonable manner.'²²⁸ They argue that this verse makes it clear that a woman has the right to conclude a marriage contract herself.²²⁹

They also quote the verse, 'When you divorce women, and they fulfil the term of their ('iddah), do not prevent them from marrying their [former] husbands, if they mutually agree on equitable terms.'²³⁰

This verse, they argue, indicates that they can conclude the marriage contract themselves without the guardian's stipulation.²³¹ They also quote the Prophetic tradition, 'A woman who has been previously married or a widow has more right to her person than her guardian; and a virgin's consent must be obtained from her, her consent being her silence.'²³²

This Prophetic tradition (*hadith*), they maintain, clearly indicates that he has the right to conclude the marriage contract but with her consent. It also indicates that she has more right to do so herself in case she marries someone without his consent.²³³

The European Council of Fatwa and Research is of the opinion that if a mature, adult woman

²²⁷ Ahmad ibn 'Ali ibn Hajar Al-'Asqalani, *Fath Al-Bari Sharh Sahih Al-Bukhari*, (Riyadh: Taybah publishers, 1426 AH/2005), Vol. 9, p. 187.

²²⁸ Holy Qur'an, 2:234.

²²⁹ Ibn Rushd Al-Qurtubi, *Bidayat Al-Mujtahid Wa Nihayat Al-Muqtasid*, 1st edition, (Beirut: Dar Ibn Hazm, 2003), Vol. 2, p. 9. Ibn Rushd Al-Qurtubi, *Bidayat Al-Mujtahid Wa Nihayat Al-Muqtasid*, 1st edition, (Beirut: Dar Ibn Hazm, 2003), Vol. 2, p. 9.

²³⁰ Holy Qur'an, 2:232.

²³¹ 'Ala-ud-Deen Abu Bakr ibn Mas'ud Al-Kasani, *Bada'i' As-Sana'i' Fi Tartib ash-Shara'i'*, 2nd edition, (Beirut: Dar Al-Kutub Al-'Ilmiyyah, 1424 AH/2003), Vol. 2, p. 248. See also Ibn Ali Ar-Razi Al-Jassas, *Ahkam Al-Qur'an*, 1st edition, (Beirut: Dar Ihya' Tt-Turath al-'Arabi, 1405 AH/1983), Vol. 2, p. 100.

²³² *Sahih Muslim*, Book of Marriage, *hadith* no. 1419.

²³³ Muhammad ibn Abdul-Wahid Kamal-ud-Deen Ibn Al-Humam, *Sharh Fath Al-Qadeer 'Ala Al-Hidayah Sharh Bidayat Al-Mubtadi'*, 1st edition, (Beirut: Dar Al-Kutub Al-'Ilmiyyah, 1424 AH/2003), Vol. 3, p. 259.

marries a virtuous man with good character without her guardian's permission, her marriage is valid.²³⁴

Regarding the guardian's consent to the marriage contract, the European Council for Fatwa and Research opines that the presence of a woman's guardian is a social and religious requirement when it comes to concluding marriage contracts. However, if circumstances require that she be married off without her guardian, due to the impossibility of obtaining his permission or if he prevents her for getting married, it is permissible to act on the opinion of those who view that a woman can get married in the absence of her guardian.²³⁵

4.3 Cultural Beliefs and Practices

Cultural beliefs and practices in Saudi Arabia are generally due to ignorance, the low educational level²³⁶ and ignorance of Islamic teachings. Such erroneous cultural beliefs and practices include, among other things, marriage of minor girls. It is common practice amongst some Saudi families that the daughter must be married off to her cousin even though they may be still minor.²³⁷

There is growing concern about the bride's age, which varies according to the socio-economic level of the family and local circumstances. In some areas, girls may be forced by their guardian to marry older men or men with mental disabilities for monetary or family considerations.²³⁸ The marriage of an 8-year-old girl to a 58-year-old man by her father, who needed the early payment of the dowry to solve his financial problems, provoked national and

²³⁴ European council for fatwa and research. Available at: <http://www.e-cfr.org/ar/index.php?ArticleID=514>. Accessed on 4 January 2013.

²³⁵ *Ibid.*

²³⁶ A statement issued by the Minister of Interior's Directive no. 52181, dated 11/5/1431 AH/ 25 April 2010 to set up a committee from the Ministry of the Interior, the Ministry of Justice, the Ministry of Islamic Affairs and the Ministry of Social Affairs to discuss the issue of marriage of minor girls.

²³⁷ *Ibid.*

²³⁸ Human Rights Commission Newsletter, Vol. 1, Issue 2, August 2008.

international uproar.²³⁹ The government has not yet set a minimum legal age for marriage. A divorced father married off his 12-year-old daughter for 80,000 riyals (ca. £13,333) because his ex-wife had gained custody.²⁴⁰

It is true that families sometimes arrange marriages whereby girls are married off without their consent to settle family debts, but this trend is purely cultural.²⁴¹ It is worth noting that there is no law that prevents marriage of minor females; however, a committee from the Ministry of the Interior, the Ministry of Justice, the Ministry of Islamic Affairs and the Ministry of Social Affairs issued a decision to the effect that those girls under 16 must obtain the judge's permission to get married on a number of conditions. One of these conditions is to present a medical report issued by a committee consisting of a maternity specialist, a psychological specialist and a social specialist to the effect that her marriage will not pose any danger to her. Another condition states that the judge must ensure that the girl consents to the marriage. The mother's consent is also required to ensure that the girl's interests and wellbeing are taken into account²⁴² In support of this move, *Sheikh Abdullah Al-Mani*, a member of the Council of Senior Scholars, declared that it is wrong for parents to marry off their minor girls, stating that those who call on specifying the marriage age do not go against the *Shari'ah* rulings by doing so but rather demand the solution to a problem related to interests.²⁴³

It is worth noting here that the Saudi Human Rights Commission has condemned marriage of minor girls and considered it a breach of the Convention on the Rights of the Child

²³⁹ A/HRC/11/6/Add.3, p.15.

²⁴⁰ *Riyadh* newspaper, Saturday 9 January 2010, Issue no. 15174. Available at: <http://www.alriyadh.com/2010/01/09/article488331.html>. Accessed on 25 October 2012.

²⁴¹ Country Reports on Human Rights Practices for 2011, United States Department of State, Bureau of Democracy, Human Rights and Labour, p. 27.

²⁴² A statement issued by the Minister of Interior's Directive no. 52181, dated 11/5/1431 AH/ 25 April 2010 to set up a committee from the Ministry of the Interior, the Ministry of Justice, the Ministry of Islamic Affairs and the Ministry of Social Affairs to discuss the issue of marriage of minor girls.

²⁴³ The National Family Safety Programme, Annual Report, 1432 AH/2011. Available at: http://nfsp.org.sa/images/annual_report_2011.pdf. Accessed on 6 January 2013.

which the Kingdom of Saudi Arabia ratified in 1996, as well as the Convention on the Elimination of All Forms of Discrimination against Women²⁴⁴ (CEDAW), which the Kingdom ratified in 2000.²⁴⁵

Customs, traditions and religious values are also often used to justify violence against women. Certain cultural norms constitute causal factors for violence against women, including the beliefs associated with ‘harmful traditional practices’ (such as female genital mutilation/cutting, child marriage and son preference), crimes committed in the name of ‘honour’, which remain underreported and underdocumented globally,²⁴⁶ discriminatory criminal punishments imposed under religiously based laws, and restrictions on women’s rights in marriage.²⁴⁷

Honour killings have been characterized as being among the most severe manifestations of harmful practices.²⁴⁸ An-Noor hospital in Makkah received the body of a seventeen-year-old secondary school female student whose father claimed she had fallen unconscious. An investigation, however, indicated that she had been beaten and strangled to death. The Criminal Investigation Department dispatched an investigation team to the victim’s house and discovered traces of the victim’s blood and vomit. The victim’s father was then arrested, and when he was investigated by the Bureau of Investigation and Public Prosecution, he admitted that he was

²⁴⁴ Convention on the Elimination of All Forms of Discrimination against Women, G.A. res. 34/180, 34 U.N. GAOR Supp. (No. 46) at 193, U.N. Doc. A/34/46, entered into force 3 Sept. 1981.

²⁴⁵ *Ash-Sharq Al-Awsat* newspaper, Monday 16 *Muharram* 1430 AH/12 January 2009, Issue no. 11003. Available at: <http://www.aawsat.com/details.asp?issueno=10992&article=50249>. Accessed on 5 January 2013.

²⁴⁶ UN In-depth study on all forms of violence against women, report of the Secretary-General, A/61/122/Add.1, 2006, at para. 221, p. 66.) Available at: <http://www.un.org/womenwatch/daw/vaw/violenceagainstwomestudydoc.pdf>. Accessed on 8 November 2012.

²⁴⁷ United Nations Economic and Social Council, Commission On Human Rights, Fifty-sixth session, Item 12 (a) of the provisional agenda, Integration Of The Human Rights Of Women And The Gender Perspective, Violence against Women, Report of the Special Rapporteur on violence against women, its causes and consequences, Ms. Radhika Coomaraswamy, submitted in accordance with Commission on Human Rights resolution 1997/44, Addendum, Economic and social policy and its impact on violence against women, E/CN.4/2002/83. Available at: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G00/112/65/PDF/G0011265.pdf?OpenElement>. Accessed on 8 November 2012.

²⁴⁸ United Nations, *In-depth study on all forms of violence against women: Report of the Secretary-General*, A/61/122/Add.1 (2006), at 124, p. 40.

responsible for her death as she was involved in a moral case in which it was discovered that had a relationship with a member of the opposite sex two years before.²⁴⁹

This is an example of violence which is common among ignorant members of tribes who consider honour killing the only solution to 'protect the family' honour'.²⁵⁰

Some women in Saudi Arabia mistakenly believe that Islam commands or permits women to be submissive to their husbands, since men are the head of the family. It is true that Islam commands Muslims to hold the family together and reinforces commitment to marriage but not when this leads to performing violence against women or children. Both men and women should be educated to understand that domestic violence is contrary to *Shari'ah*.

4.4 Economic Problems

Economic reliance on the abusive husband is a very strong reason for many wives in the country to remain in a destructive relationship and for some women social security assistance is not enough. The Ministry of Social Affairs is now considering supporting widows and divorced women by helping them engage in productive projects before they start receiving social security aid,²⁵¹ and 75 per cent of the productive projects it supports are geared towards widows and divorced women.²⁵² Even if this takes place, many women might not find the idea practical, given the huge responsibility of looking after their children. For some women, staying with an abusive husband who provides food and a home is far better than receiving social security aid.

²⁴⁹ *Sabq* electronic newspaper; A Saudi Man Is Charged with the Killing of His Teenage Daughter, 12 September 2012. Available at: <http://sabq.org/oqsfde>. Accessed on 12 January 2013.

²⁵⁰ *Sabq* electronic newspaper; A Saudi Man Is Charged with the Killing of His Teenage Daughter, 12 September 2012. Available at: <http://sabq.org/oqsfde>. Accessed on 12 January 2013.

²⁵¹ *Ar-Riyadh* newspaper, Issue 15725, Thursday 14 July, 2011. Available at: <http://www.alriyadh.com/2011/07/14/article650441.html>. Accessed on 16 July 2011.

²⁵² Kingdom News, 24 Feb. 2011. Available at: http://www.insanonline.net/print_news.php?id=14991 Accessed on 16 July 2011. Accessed on: 16 July 2011.

Some women may not want to report their abusive husbands to the police and have them jailed, as they are often dependent on them for their survival and their children's livelihoods.

Many abused women often lack a support system due to isolation.²⁵³ Even if their family ties and friendships are not utterly destroyed, many of them have no property of their own, fear losing joint assets or custody of their children, or face a decrease in living standards for themselves and their children.

It is worth mentioning here that even though there are several causes of domestic violence mentioned above, they must not be used to justify domestic violence in any way. Special legislation to protect against domestic violence must be made as there is no law criminalising violence. Special rulings defining violence and its manifestations, ways of reporting it and prosecuting its perpetrators must be laid down. It must be considered a crime not only against an individual but against society at large. It must not be condoned and there should be some flexible legal means which aim to administer justice in order to put an end to violence and provide the maximum protection to its victims.

The law must define the judicial procedures that must be adopted and must make it incumbent upon the concerned bodies to provide prompt services and assistance to victims of domestic violence. The government must also provide specialised training courses for officials charged with executing laws in order to familiarise them with cases of domestic violence. It must also provide training courses for court officials and judges dealing with cases of domestic violence as well as consultants and experts to assist the police and judges and victims of domestic violence as well as perpetrators of domestic violence to help them give up violent behaviour.

²⁵³ *Ibid.*

Instead, domestic violence must be everyone's business. Mosques and religious bodies must play a more pro-active role in eliminating domestic violence and in eradicating its acceptance within the community. Religious leaders should be specifically trained to deal with cases of violence against women in a gender-sensitive manner. Regular gender-sensitivity training programmes should be carried out at all levels of the police force. Members of the Judiciary need to undergo gender sensitivity training and awareness on the dynamics of violence against women. Sentencing should be seriously reviewed with a board of enquiry set up to look into this issue. Serious and urgent commitment must be accorded to ensuring that specific domestic violence and sexual assault legislation is enacted at the earliest possible time. Expert counselling should be made available to all perpetrators of violence against women and children, and legal aid should be made more accessible.

The Government must make a serious commitment towards combating domestic violence by increasing its budget allocation to the department of social welfare. Staff members must undergo appropriate gender training, training on the issues of violence against women and children and training in counselling skills.

Even though I believe that the law in itself is not sufficient to change human behaviour and prevent domestic violence from taking place, a law that criminalises domestic violence and lays down preventive measures to protect against it, deters its perpetrators and brings them to justice. Even if this law is not fully implemented, it is a step forward and constitutes an urgent need given the present culture which justifies many forms of domestic violence and makes victims of such violence accept the violence perpetrated against them in order to maintain the stability of the family. Such a law will certainly make perpetrators of domestic violence aware that they are not exercising a legitimate right but are rather violating both Saudi Arabia's

domestic laws including *Shari'ah* law and international law and that they will be subjected to punishment for such human rights violations.

5. Combating Domestic Violence against Women in Saudi Arabia

There is no doubt that in recent years domestic violence against women in Saudi Arabia has increased dramatically and has gradually been recognized as an issue deserving public attention and intervention. Within this context, issues related to early and forced marriage and divorce are also increasingly gaining public attention.²⁵⁴ During her visit to Saudi Arabia in February 2008 on a fact-finding mission within her mandate, the Special Rapporteur on violence against women, its causes and consequences, Ms Yakin Erturk, did, however, express appreciation for the cooperation extended by the Saudi government and welcomed developments conducive to the maintenance of women's rights. Her report concluded, among other things, that views on women varied in the Kingdom, from contentment and satisfaction with the status quo to the voicing of concerns about the level of discrimination against women.²⁵⁵ Her report also made several recommendations to the Saudi government aimed at empowering women's role in the public sphere, including the creation of national machinery for women with prerogatives to intervene in cases of violence against women.²⁵⁶

According to the Concluding Observations of the Committee on the Elimination of Discrimination against Women, the Committee called upon Saudi Arabia to enact legislation on violence against women, including a comprehensive law on domestic violence, to ensure that violence

²⁵⁴ United Nations, General Assembly, Human Rights Council, Eleventh session Agenda item 3, Promotion And Protection Of All Human Rights, Civil, Political, Economic, Social And Cultural Rights, Including The Right To Development, Report of the Special Rapporteur on Violence against Women, its Causes and Consequences, Yakin Ertürk, Addendum, on her Mission to the Kingdom of Saudi Arabia, A/HRC/11/6/Add.3, 14 April 2009, p. 12.

²⁵⁵ UN document, A/HRC/11 of 9 February 2009, Report of the Special Rapporteur on Violence against Women, its Causes and Consequences, on her Mission to the Kingdom of Saudi Arabia.

²⁵⁶ Abdulaziz M. Alwasil, 'Saudi Arabia's engagement in, and interaction with, the UN human rights system: an analytical review', *The International Journal of Human Rights*, 27 May 2010, p. 12.

against women is a criminal offence, that women and girls who are victims of violence have access to immediate means of redress and that perpetrators are prosecuted and punished...to implement educational and awareness-raising measures aimed at law enforcement officials, the judiciary, health-care providers, social workers, community leaders and the general public, to ensure that they understand that all forms of violence against women, including violence in the home, are unacceptable...²⁵⁷

While Saudi Arabia has not yet enabled a comprehensive law on domestic violence, it is essential to consider this law as it will provide a sound legislative framework to bring perpetrators of domestic violence to justice.

In some recent high-profile cases such as that of Rania Al-Baz, Muslim women have publicized their mistreatment at the hands of their husbands, in the hope that public condemnation of wife beating will end toleration of the practice.²⁵⁸ Rania Al-Baz, a TV presenter, was savagely assaulted by her husband who slammed her face against the marble-tiled floor of their home until she suffered 13 fractures.²⁵⁹ Indeed, in Saudi Arabia, only in 2004 did the first successful prosecution for domestic violence occur after international attention was drawn to the case of Rania Al-Baz.

The following are some areas in which Saudi Arabia has attempted to combat domestic violence against women.

²⁵⁷ Convention on the Elimination of All Forms of Discrimination against Women, CEDAW/C/SAU/CO/2, Committee on the Elimination of Discrimination against Women, Fortieth session, 14 January-1 February 2008, Concluding comments of the Committee on the Elimination of Discrimination against Women, Saudi Arabia, p. 5.

²⁵⁸ Doug Alexander, 'Addressing Violence Against Palestinian Women'. International Development Research Centre (June 23, 2000). Available at: <http://publicwebsite.idrc.ca/EN/Resources/Publications/Pages/ArticleDetails.aspx?PublicationID=744>. Accessed on 18 July 2011.

²⁵⁹ Breaking the silence, *The Guardian* newspaper, Wednesday 5 October 2005. Available at: <http://www.guardian.co.uk/media/2005/oct/05/broadcasting.saudiArabia>. Accessed on 19 July 2011.

5.1 Education

In the past few years, many positive developments have taken place in women's status. The most remarkable has been in the area of women's access to education, which has resulted in substantial improvements in the literacy rates for women in a relatively short period of time. Currently, more than 300 higher education colleges exist for women in the country alongside universities, and women represent more than 56.6% of the total number of Saudi university students and more than 20% of those benefiting from overseas scholarship programme. The 2009 global gender gap report ranked Saudi Arabia at 25th among countries in terms of the gap between the two sexes in university registration.²⁶⁰

Women are enjoying free and close to full access to primary, secondary and college and university education. In higher education, even though women are still excluded from some fields, they are increasingly admitted to new fields of study, such as law, with the first students graduating this year.²⁶¹

It is worth noting that The Human Rights Commission has recently made the recommendation to the King that human rights should be taught as a subject in public and private school and universities and that this subject must include human rights in Islam, human rights in international law and human rights in domestic laws.²⁶²

²⁶⁰ Ministry of Higher Education, General Department of Planning and Statistics, *Women in Higher Education, Saudi Initiatives & Achievements*, 2nd edition, (Riyadh: King Fahd Library, 1431 AH/2010), p. 2. Available at: <http://www.mohe.gov.sa/ar/Ministry/Deputy-Ministry-for-Planning-and-Information-affairs/The-General-Administration-of-Planning/Documents/womenInMohe.pdf>. Accessed on 3 Jan. 2013.

²⁶¹ UN Human Rights Expert on Violence against Women Concludes Visit to Saudi Arabia. Available at: <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=8927&LangID=EUN> Human Rights Expert on Violence against Women Concludes Visit to Saudi Arabia. Accessed on 24 October 2012.

²⁶² Teaching Human Rights in Higher Education Institutions. Available at: <http://nshr.org.sa/portals/0/4.pdf>. Accessed on 17 January 2013.

5.2 Legislation

It is worth mentioning that Saudi Arabia has made huge efforts to solve this problem and has taken a number of steps to ameliorate the situation. It has taken several measures to address all forms of violence against women and girls, recognizing that violence is a form of discrimination against women and constitutes a violation of their human rights.

All laws and regulations effective in the country comprise many provisions prohibiting discrimination on the grounds of race, colour or gender, or other forms of discrimination. They include clear rulings in favour of non-discrimination between men and women, desiring that women enjoy the same rights and duties on a basis of equality.²⁶³

The Basic Law of Governance addresses the protection of human rights in a general manner. Article 26 guarantees the protection of human rights in accordance with Islamic law (*Shari'ah*), including the prohibition of discrimination against women. This law also provides for the principle of equality before the law, as Article 47 clearly stipulates.²⁶⁴

Since its foundation, Saudi Arabia has stressed the social and economic aspects of the family in general and of women in particular. On the social front, it has established governmental organizations and encouraged and supported charitable and civic organizations committed to social development and implementation of state policy in the area of social solidarity, which has resulted in considerable efforts being made and continuing to be made in women's welfare. On the economic front, it has played an effective role in protecting women against poverty, affirming their key role in the welfare of the family, particularly in the event of the death,

²⁶³ Committee on the Elimination of Discrimination against Women, Consideration of reports submitted by States Parties under Article 18 of the Convention on the Elimination of All Forms of Discrimination against Women, Combined initial and second periodic reports of States Parties, Saudi Arabia, CEDAW/C/SAU/2, 29 March 2007.

²⁶⁴ *Ibid.*

incapacity or imprisonment of the husband, or divorce. It has done so by promulgating laws in this regard.²⁶⁵

The Law of Procedure before *Shari'ah* Courts²⁶⁶ and the Law of Criminal Procedure²⁶⁷ stress the importance of the protection of human rights and guarantee the implementation of the *Shari'ah* rulings under all circumstances. They include a number of articles which guarantee the right to anyone who has been subjected to any act of violence, domestic or otherwise, including domestic violence against women, to file a complaint against abusers in the respective competent courts which will undertake to seek the assistance of a lawyer or a representative to defend the accused person during the investigation and trial stages, all free of charge.

Abuse is closely related to human rights. Every human being has the right to a reasonable standard of life and care a decent life and total care. Despite the fact that there are laws in the country which oppose violence against women, there is no such thing as a law or government body which deals with abuse cases. There is, however, a project for limiting abuse in the Kingdom of Saudi Arabia, following the Council of Ministers' Resolution 366, issued on 1 December 2008. The project, prepared by Dr Sami ibn Abdul-Aziz Ad-Damigh and Dr. Munirah Al Saud, has been approved by the Council of Ministers' Board of Experts.²⁶⁸

The project tackles a number of issues including causes of abuse, its effects, strategies to deal with this phenomenon, available choices and efforts made in facing this problem and the law of protection of women and children against abuse. The main objective of the project is to provide protection to women and children against abuse, by a number of means such as by

²⁶⁵ *Ibid.*

²⁶⁶ Issued by Royal Decree No. M/21, 20 *Jumada II* 1421AH /19August 2000, *Umm Al-Qura* gazette No3811 , 17 *Jumada II* 1421AH / 15September 2000.

²⁶⁷ Issued by Royal Decree No. M/39, 28 *Rajab* 1422 AH/16 OCT 2001, *Umm Al-Qura* gazette No. 3867, 17 *Sha'ban* 1422 AH/3 November 2001.

²⁶⁸ The official site of the Saudi Ministry of Social Affairs: <http://www.mosa.gov.sa/portal/index.php?start=175&storytopic=0>. Accessed on 17 July 2011. See also King Khalid Foundation: <http://www.kkf.org.sa/ar/publications/Pages/publication.aspx>. Accessed on 16 July 2011.

introducing new legislation for such protection, as well as the necessary social, psychological assistance and medical treatment (Article 2); drawing up a proposal for implementing rules relating to giving shelter to victims, receiving abuse reports, training in the field of protecting women and children against abuse, among other things; and drawing up a proposal concerning mechanisms for dealing with abuse by social institutions, schools, hospitals and police departments.²⁶⁹

Article 22 of the proposed project states that women and children subjected to domestic violence and abuse will have the right to obtain financial compensation, through competent courts, for physical and psychological abuse suffered.²⁷⁰ Article 24 of the Law also specifies certain forms of punishment to be administered to abusers, including warnings, financial compensation not exceeding SR500,000 (approximately £84,000) and imprisonment up to 120 days.²⁷¹ Article 25 also makes it clear that in the case where the victim of violence is a domestic worker, the law will terminate the contract of employment binding her to the employer who has abused her and will ensure that he pays her all that is due to her till the end of the contract.²⁷²

²⁶⁹ *Ibid.*

²⁷⁰ *Ibid.*

²⁷¹ *Ibid.*

²⁷² *Ibid.*

According to the National Report submitted in accordance with Paragraph 15(A) of the Annex to the Human Rights Council Resolution 5/1, Saudi Arabia has been studying a bill to protect persons from various types of harm through, for instance, preventive measures, the provision of assistance, and adoption of the legislative measures necessary for the punishment of the perpetrators.²⁷³ It would be essential to approve and adopt the bill into law as it will help eliminate all forms of violence against women.

Both the new Law of the Judiciary and the Law of the Board of Grievances²⁷⁴ aim to guarantee the right to litigation, free of charge, for citizens and residents alike, before all courts and judicial bodies, with a view to realising equality among all members of society and safeguarding human rights.

State authorities are committed, in the performance of their work and exercise of their competence, to the principle of equality between men and women, as affirmed by the relevant articles of the Basic Law of Governance and other laws, such as the Civil Service Law and the Labour and Workers Law. To ensure that women enjoy these rights in practice, the regulations guarantee women the right to resort to litigation in the event of any violation of the rights guaranteed to them by the Basic Law of Governance or other laws. Through their various bodies, the judicial authorities provide all means of redress to women.²⁷⁵

The National Family Safety Programme (NFSP) was also established in September 2007 following Royal Decree No. 11471/MB, dated 18 November 2005, to provide the provision of care and adequate services for the victims of this violence. Many women attended training

²⁷³ The United Nations, General Assembly, A/HRC/WG.6/4/SAU/1, 11 December 2008, Human Rights Council ,Working Group on the Universal Periodic Review, Fourth session ,Geneva, 2-13 February 2009, p. 21.

²⁷⁴ *Umm Al-Qura* Gazette No. 4170 (30/9/1428 AH, Oct. 12, 2007).

²⁷⁵ United Nations, Convention on the Elimination of All Forms of Discrimination against Women, Committee on the Elimination of Discrimination against Women, Consideration of reports submitted by States Parties under Article 18 of the Convention on the Elimination of All Forms of Discrimination against Women, Combined initial and second periodic reports of States Parties, Saudi Arabia, 29 March 2007, pp.13-4.

programmes provided by the Haven Wolverhampton,²⁷⁶ which has worked in partnership with voluntary organisations from Saudi Arabia since December 2007 to raise global awareness about domestic violence. Training included theoretical background on domestic violence, national UK strategies and practical approaches, such as services for victims. Particular attention was paid to multi-agency and partnership working.

The Saudi National Family Safety Programme (NFSP) was set up to develop new services for victims of domestic violence in Saudi Arabia. The Haven Wolverhampton has hosted visits from Saudi Arabia and worked in partnership with a number of voluntary organisations in the Kingdom to tackle the issue of domestic violence on a global level. The Haven was approached by members of the International NGO Training and Research Centre (INTRAC)²⁷⁷ about the training project in late 2007 and asked to provide information about services and other international work. As a result, in March 2008, INTRAC hosted a visit by senior representatives of Saudi charities and the Ministry of Social Affairs to the UK, and the Haven was contracted to deliver part of the training programme.²⁷⁸

Furthermore, King Abdullah announced on 25 September 2011 that women in Saudi Arabia will have the right to vote and run in municipal elections, the kingdom's only public poll, from 2015 and be appointed to the Shura Council, a body that advises the monarchy.²⁷⁹

The government has also lately announced plans to form a 'woman friendly' city in the eastern province of Hofuf next year, aiming to boost employment opportunities for women

²⁷⁶ Set up in 1973, The Haven Wolverhampton is a charitable organisation which provides safe, temporary, emergency accommodation and support services to women and dependent children affected by domestic violence and homelessness. The Haven Wolverhampton is one of the largest independent charities in the United Kingdom and is also one of the largest refuges in the country.

²⁷⁷ INTRAC exists to support and strengthen civil society. It seeks to increase the effectiveness of civil society organisations (CSOs) in all parts of the world. Civil society is key to establishing democratic societies and CSOs play a key role in promoting sustainable development in a just society. See <http://www.fsd.org.qa/common/ngo/ngo/1742.html>. Accessed on 28 November 2011.

²⁷⁸ See: <http://www.havenrefuge.org.uk/About%20Us/International/Saudi%20Arabia.html>. Accessed on 30 November 2011.

²⁷⁹ Saudi Arabia – Amnesty International Report 2012. Saudi Arabia - Amnesty International report. Available at: [http://www.amnesty.org/en/region/saudi-arabia/report-2012#section-31-6women's rights](http://www.amnesty.org/en/region/saudi-arabia/report-2012#section-31-6women's%20rights). Accessed on 21 October 2012.

without transgressing religious boundaries. As part of an effort to reduce the 2.4 billion Saudi riyals, or \$640 million, spent on unemployment benefits last year alone, the ministry gave Glowork, a recruitment site for women, access to all its unemployment data, 1.2 million of them from women. The Ministry of Labour has pushed through a ‘feminization’ programme that has included replacing the men who work in sales at lingerie stores with women. Jewellery stores are following suit, and stores that sell *abayas*, the coverings women are required to wear, will be feminized next year.²⁸⁰

5.3 Counselling and Awareness Programmes

Thirteen social protection committees, attached to the Ministry of Social Affairs, were created on 20 April 2004 in 13 regions of the country. These committees dispatch executive work teams, consisting of a male and female social worker and a male and female psychologist, to undertake field research, investigate complaints and submit reports to the committee. The committees’ task is to receive complaints of mental or physical abuse of women or child victims, ascertain their health and formulate appropriate treatment solutions. The committees focus on solving problems in an amicable manner between the two parties. They also focus on social rehabilitation through therapy and counselling sessions, and psychological rehabilitation.²⁸¹

In response to the Committee’s written request for further information relating to trends in violence against women, Saudi Arabia presented a comprehensive and honest report on domestic violence research and policy. The delegation’s report cited a lack of recognition of domestic violence as a problem in Saudi Arabia until 2000. The presentation stated that in 2004

²⁸⁰ Sara Hamdan, ‘Saudi Arabia Signals Openness to Women Seeking Work,’ *The New York Times*, September 5 2012. Available at: http://www.nytimes.com/2012/09/06/world/middleeast/saudi-arabia-signals-openness-to-women-seeking-work.html?pagewanted=all&_r=0. Accessed on: 28 October 2012.

²⁸¹ United Nations, Convention on the Elimination of All Forms of Discrimination against Women, Committee on the Elimination of Discrimination against Women, Consideration of reports submitted by States Parties under Article 18 of the Convention on the Elimination of All Forms of Discrimination against Women, Combined initial and second periodic reports of States Parties, Saudi Arabia, 29 March 2007, pp. 22-3.

the Ministry of Social Affairs established a Social Protection Committee to examine the causes of the problem and implement suitable intervention methods in each of the 13 provinces of Saudi Arabia. Each province also established family protection centres linked to health centres.²⁸²

In addition, in 2005, Saudi Arabia established a programme to increase awareness and train professionals including prosecutors, lawyers, police, doctors and social workers to deal with violence against women. Finally, the delegation highlighted the creation of the Family Court in 2007 and mandatory reporting of all cases of domestic violence by all health care professionals in Saudi Arabia.²⁸³

The Ministry of Social Affairs is currently engaged in implementing a social awareness campaign on the dangers of violence and the harm it does to the individual, the family and society. It is doing so with a team of male and female social workers, psychological counsellors, student guidance counsellors, doctors, judges and police officers to be trained in how to uncover and deal with cases of domestic violence.²⁸⁴

It should be noted here that Royal Order no. A/14 (2 April 2005) included the establishment of advice sections, specialized in family counselling, to provide legal, psychological and social counselling services and advice on how to improve domestic life in order to preserve the substance and stability of the family.²⁸⁵

In cases where a female prisoner has custody of her children or is pregnant, the Prisons Law grants special medical care in terms of nutrition and sleep and transfer to hospital when delivery approaches. The child remains with her until the nursing period is complete. If she does

²⁸² *Ibid.*

²⁸³ Treaty Body Monitor, Human Rights Monitor Series, International Service for Human Rights, Committee on the Elimination of Discrimination Against Women, 40th Session, Saudi Arabia, Combined Initial and 2nd Report, 17 January 2008, p. 11.

²⁸⁴ United Nations, Convention on the Elimination of All Forms of Discrimination against Women, Committee on the Elimination of Discrimination against Women, Consideration of reports submitted by States Parties under Article 18 of the Convention on the Elimination of All Forms of Discrimination against Women, Combined initial and second periodic reports of States Parties, Saudi Arabia, 29 March 2007, pp. 22-3.

²⁸⁵ *Ibid.*

not wish the child to remain with her, either before or after the end of the nursing period, the child is turned over to the father or legal guardian. If there is no father or relative to act as legal guardian, the child will be placed in a children's home, where the mother may see him or her in accordance with the regulations.²⁸⁶

In addition, social development commissions are implementing numerous counselling and awareness programmes for women in which symposia, meetings and courses are held for the discussion of all issues of concern to Saudi women and families. Many awareness and counselling programmes on women's rights are also organized for men. Two bills of law on child abuse and domestic violence have also been drafted.²⁸⁷

5.4 Judicial Protection

Saudi Arabia has demonstrated a commitment to addressing women's and related justice issues. In 2004, the Kingdom established the first non-governmental human rights commission, the National Human Rights Association (NHRA),²⁸⁸ which is dedicated to implementing international human rights charters signed by Saudi Arabia and includes a panel that addresses women's rights. The association has begun accepting complaints from citizens, launched awareness campaigns, and compiled reports and recommendations for the government. However, it is not yet clear how the government is responding to the association's efforts.²⁸⁹

In October 2007, Saudi Arabia announced an overhaul of its legal system. Funded by USD2 billion from the state, the new system established three levels of courts (instead of the previous two), a new Supreme Court, and specialized courts (including criminal, family and

²⁸⁶ *Ibid.*, pp. 22-3.

²⁸⁷ *Ibid.*

²⁸⁸ First independent human rights organization in Saudi Arabia, 2004 Press Release, 3/07/2004. Available at: <http://www.saudiembassy.net/archive/2004/press/page59.aspx>. Accessed on 17 July 2011.

²⁸⁹ Cybèle Cochran, 'Women and the Law in Islamic Societies: Legal Responses to Domestic Violence in Saudi Arabia and Morocco,' *The Fletcher School Online Journal on Southwest Asia and Islamic Civilization*, The Fletcher School, Tufts University, Spring 2009, p.7.

commercial). The latter reform serves to help judges become specialists in one category of legal issues. In principle, the specialized family courts enable judges to better understand the dynamics of domestic relations and women's concerns.²⁹⁰

Saudi Arabia is also a State Party to the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). It submitted its State report to the CEDAW on 29 March 2007 to demonstrate to the United Nations the steps it has taken to meet the Convention's standards, including steps to address violence against women.²⁹¹ The report systematically addresses the State's compliance with each of the first sixteen articles of the Convention. In general, the report asserts that there has been a 'change in the traditional view of women' (This is, at the very least, a recognition of the need to fully respect the human rights of women including freedom from domestic violence) in Saudi Arabia, and that women are now assured legal protection, and participation in political, social and economic activity. Access to health care and family planning services is reported as widespread, and progress has been noted in improvement of access to education, implementation of domestic violence programmes and various programmes in rural areas. Of note, under Article 16, the report states that women in Saudi Arabia have the freedom to marry, choose a husband, and instigate divorce, and that marriage does not affect a woman's independent legal capacity or financial status.²⁹²

It is true that societal discrimination based on widespread gender segregation 'excluded women from most aspects of public life, with the large-scale exclusion of women from formal decision-making,'²⁹³ Saudi Arabia has made huge efforts to ameliorate women's conditions in

²⁹⁰ Saudi Arabia: 'Law of God versus law of man', *The Economist*, 11th Oct. 2007. Available at: <http://www.economist.com/node/9954500>. Accessed on 17 July 2011.

²⁹¹ Treaty Body Monitor, *Human Rights Monitor Series*, International Service for Human Rights, Committee on the Elimination of Discrimination Against Women, 40th Session, Saudi Arabia, Combined Initial and 2nd report, 17 January 2008, p. 2.

²⁹² *Ibid.*

²⁹³ Country Reports on Human Rights Practices for 2011, United States Department of State, Bureau of Democracy, Human Rights and Labour, p. 21.

this area. For example, two royal orders, amending the Shura Council law and forming a new chamber for four Hijra years, starting the expiration of the term of office of the current Shura Council, have recently been issued.²⁹⁴ According to the Royal Order, the Shura Council will be consisting of its Speaker and 150 members, all to be chosen by the King according to their knowledge, experience and profession, provided that women would be represented in the Council with no less than 20% of its members.²⁹⁵ In addition, women have now been granted permission to engage in legal practice.²⁹⁶

To further ensure that domestic laws are in agreement with international instruments, a committee has been formed within the Human Rights Commission to study the scope to which Saudi legislation is in agreement with human rights instruments as a first step towards harmonization of the Kingdom's existing laws with its obligations under international treaties and conventions. It is also dealing with the possibility of access to instruments to which the Kingdom is not yet a party.²⁹⁷

When a woman in Saudi Arabia is subjected to any form of abuse, she can call the police or she can apply directly to the court. The police deal with crimes while the courts deal with spousal conflicts and divorces. For conjugal conflict, either with criminal incidents or without, the matter is transferred to the court and a judge will then start investigations with both sides and with witnesses. Nowadays, large cities in Saudi Arabia have established centres that 'treat' social

²⁹⁴ Shura Council. Riyadh, Jan 12, 2013. Available at: <http://www.shura.gov.sa/wps/wcm/connect/ShuraEn/internet/news/>. Accessed on 16 January 2013.

²⁹⁵ *Ibid.*

²⁹⁶ *Huquq* Newsletter, National Society for Human Rights, *Safar* 1434 AH/January 2013, Issue 83, p. 9.

²⁹⁷ The United Nations, General Assembly, A/HRC/WG.6/4/SAU/1, 11 December 2008, Human Rights Council ,Working Group on the Universal Periodic Review, Fourth session ,Geneva, 2-13 February 2009, p. 24.

and marital problems informally and peaceably, but up to now there is no law or official requirement for the referral of cases to these centres.²⁹⁸

6. Conclusion: Towards More Effective Protection of Women against Domestic Violence in Saudi Arabia

Based on the foregoing discussion, from the present chapter it is evident that domestic violence is an international phenomenon that has negatively affected not only Saudi Arabia but also all parts of the world without exception. Furthermore, it is a multi-causal social problem that is indicative of power relations that are ideologically based and deeply rooted in the social fabric which provides space for its existence. Facts and figures clearly indicate that domestic violence against women in the country has dramatically increased.

Although Saudi Arabia has made huge efforts to put an end to domestic violence against women in the country, has demonstrated a commitment to addressing women's and related justice issues and has responded favourably to the CEDAW to demonstrate to the United Nations the steps it has taken to meet the Convention's standards, including steps to address violence against women, much still needs to be done. A comprehensive intervention to support the survivors of domestic violence is needed, and integration of responses to domestic violence should include legal, social, and educational and health approaches. The following are some recommendations to that end.

- a.** Set up a specific and comprehensive law against domestic violence in the country;
- b.** Activate the role of the judiciary and put an end to the phenomenon of perpetrators escaping justice, encourage social cooperation and respond favourably to the needs of

²⁹⁸ Abdulaziz A. Albrithen, *Alcoholism and Domestic Violence in Saudi Society*, Thesis submitted in accordance with the requirements of the University of Liverpool for the degree of Doctor of Philosophy in Social Work, University of Liverpool, September 2006, p. 36.

victims of domestic violence including compensation of the victims of domestic violence and/or emotional damages/traumas suffered;²⁹⁹;

- c.** Implement laws, conventions and agreements which deal with domestic violence
- d.** Encourage schools and universities to show support for gender equality as for honour and dignity;
- e.** Spread the culture of opposing violence against women at home, at school and in society at large;
- f.** Reconsider the laws and regulations concerned with domestic violence, particularly violence against women;
- g.** Introduce just legislation which guarantees women's rights in the political, educational and medical fields;
- h.** Raise public awareness of the importance of a culture which guarantees all members of society their right to freedom of expression and participation in political life.
- i.** Encourage victims of domestic violence to report their abusive husbands to the police as this will serve as a deterrent to such abuse. The police should be encouraged to investigate cases of domestic violence;
- j.** Set up social Islamic societies concerned with domestic violence against women as well as hotlines for women and girls who are victims of domestic violence in order to provide them with the assistance, counselling and support needed;
- k.** Train judges and instruct them about the facts and myths associated with spousal abuse. They should be trained to be highly sensitive to what victims of domestic violence have experienced and not sit in judgement of their actions;

²⁹⁹ See Communication 323/2006: Egyptian Initiative for Personal Rights and Interights v Egypt, adopted by the African Commission on Human and Peoples' Rights during the 10th Extraordinary Session from the 12-16 December 2011, Banjul, the Gambia.

- l.** Give survivors of domestic violence further guidance, counselling and rehabilitation.
The Ministry of Health and other relevant institutions should provide integrated care services in hospitals and should train health care professionals to inspect cases of violence and to help survivors of domestic violence;
- m.** Because prevalence surveys are major sources of information about the nature and extent of physical and sexual violence against women in society, they must be designed to assess the extent of such violence against them and societal responses to it.
- n.** Continue cooperating closely with non-governmental organizations to ensure their full participation and capacity-building in all efforts aimed at eliminating violence against women;
- o.** Cooperate with civil society organizations, develop monitoring and evaluation tools to evaluate progress made in eradicating violence against women in a clear systematic way, and integrate such tools in the country's periodic demographic and health surveys;
- p.** Ensure the adequate defining and criminalization of all forms of violence against women and to provide for sufficient and adequate services and shelters for women victims of violence, including refugee women and migrant domestic workers;
- q.** Provide for additional temporary special measures, including quotas and preferential treatment, to advance women's integration into education and the economy;
- r.** Train and sensitize the media in issues related to women's rights generally and violence against women in particular, in order to contribute to changing the predominant social and cultural beliefs and attitudes that perpetuate harmful stereotypes and myths about women;

- s. Continue strengthening, systematizing and tailoring capacity-building and training activities for all those involved in providing services to women who have been subjected to violence, including policymakers, health-care professionals, judicial officers and other service providers.

Chapter VI: Conclusion and Recommendations

1. Summary

The chief objective of this dissertation has been to examine and evaluate the application of Islamic law (*Shari'ah*) and international human rights law in Saudi Arabia. In order to discuss this issue adequately, the dissertation has tackled several issues which, I believe, are pertinent to this. The dissertation has delineated the theoretical analysis of the sources of Islamic law (*Shari'ah*) by pointing out its main sources, both primary and secondary, and touching upon the role it plays in the legal system of Saudi Arabia. Having demonstrated that the Qur'an and *Sunnah* are the primary sources of Islamic law, the dissertation has explained that all the other sources are related directly or indirectly to them and that where there is no obvious response to a given question in textual evidence provided by the Qur'an and the *Sunnah*, Muslim jurists generally resort to the cause (*'illah*), which constitutes the chief factor to discover the law or the will of God. Through the practice of Islamic law in Saudi Arabia, it is abundantly clear that the *Shari'ah* furnishes encompassing answers to practically all legal matters at all times and under a variety of circumstances.

The dissertation has also analysed the sources of international law against which Islamic law has been discussed in Chapter II. To do this, I have looked into the sources of international law and explained that the Commission of Justice, which wrote up the sources of law to be used by the International Court when it was established in 1922, prioritised the sources of international law into two categories: (1) formal, or primary, sources, which would be legally binding and material; and (2) secondary sources, which relied on the application of primary sources for their authority. The primary sources serve as the foundations of international law and

include, among other things, custom and treaties. The secondary sources of international law are judicial decisions, soft law and legal writings. Being non-binding, these secondary sources are often very active in the development of international law.

The various sources of law are interrelated. While customary law often precedes treaties, general principles of law are drawn from the evidence of customary law, treaties and judicial decisions. The work of the legal writers, who have significantly guided the development of international law but are today becoming less significant with the emergence of a greater body of legal decisions concerning international relationships, remains of paramount importance in formulating judicial decisions and analytical processes that lead to the recognition of general principles of law. Primary sources of law are binding but to varying degrees, and custom is considered binding on all members of the international community while treaties are applicable only to those states that formally recognise them. Soft law tools often precede or provide support for treaties and customary law as well allowing greater fluidity in areas where there is a considerable need to constantly adapt.

In the new and ever-changing environment that is international law, there is a need for both primary and secondary sources of law. Customary international law acknowledges existing points of international common ground. Treaties reflect new connections between countries and/or regions and provide clarity in international law while encouraging norms of state behaviour. General principles of law allow states to find common ground on which to build relationships, while soft law, judicial decisions and writers provide points of reflection, re-evaluation and change. These various legal sources in combination allow the international legal system to grow and develop in response to our rapidly changing international community.

This dissertation has also discussed the domestic application of international human rights treaties in Saudi Arabia. It has been noted that despite the numerous political and legal developments towards the internationalization of the concept of human rights, there is little agreement about reconciliation in the practice of an international human rights law. Further, the dissertation has observed that notwithstanding the fact that the UDHR declared human rights for all human beings in 1948 with a view to reinforcing a universal realisation of international human rights, these rights are still not practised by everyone. In fact, economic, social, political, cultural and religious differences among the various countries in the world constitute obstacles that prevent the achievement of this objective. However, it is pertinent to note that although the international human rights law has not yet achieved its intended aims, it has at least helped to develop the culture of human rights.

The issue of human rights has also been a major concern of Saudi Arabia, given that its constitution is largely based on Islamic law which had shown concern about human rights more than fourteen centuries ago, long before the present-day world countries and organizations realised the importance of this issue. By implementing the principles of the *Shari'ah*, the Kingdom of Saudi Arabia is, to some extent, in agreement with the regional and international declarations and agreements which call for the protection of human rights. To show its support for this, Saudi Arabia has ratified a number of human rights conventions such as the Convention on the Rights of the Child (CRC), the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), and the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). However, while Saudi Arabia supports human rights, it has expressed a number of reservations about certain provisions in international human rights treaties.

To guarantee human rights at the domestic level, Saudi Arabia has put in place a number of procedures, such as setting up the Board of Grievances, the Public Investigation and Prosecution Department and the Human Rights Commission. It has also promulgated a number of laws, such as the Basic Law of Governance, which defines rights and duties within the Kingdom and can be considered as the state's first attempt at enacting a 'bill of rights' in modern constitutional terms; and the Law of Criminal Procedure, which serves to safeguard human rights in the Kingdom and establishes a number of standards governing procedures for arrest, detention and trials, as well as prisoners' rights, among other things. To further guarantee human rights, several reforms have been effected and include the ratification of the Code of Lawyers Practice and that of the Judiciary Law and the Court of Grievances Law.

The application of human rights treaties in Saudi Arabian domestic law can be effected in a number of ways. I recommend that the judiciary in Saudi Arabia, particularly the Higher Judicial Council and the Ministry of Justice, should take steps to apply human rights treaties ratified by Saudi Arabia in domestic law, in a manner that is compatible with Islamic law; that the attorneys and lawyers should play their respective roles by demanding the implementation of human rights treaties in domestic law when presenting cases before courts; that the judiciary should supervise the implementation of these treaties through the High Court in accordance with its jurisdiction, as provided for by Article 11 of the new Law of the Judiciary which states that the High Court will supervise the implementation of Islamic law (*Shari'ah*) and regulations enacted by the King which are consistent with the issues that fall within the general jurisdiction of the judiciary and review rulings issued or upheld by the Courts of Appeals; and that treaties to which Saudi Arabia is a party should be published with a view to raising the awareness of both citizens and residents, as stated by such treaties.

It is worth noting that Saudi Arabia's reservations to international human rights treaties was dictated by the Basic Law of Governance and the Kingdom's commitment to the dictates of Islamic law. The significance of such reservations lies in the fact that international human rights treaties do not generally take into account each country's cultural, social and religious identity and practices. Therefore, the Kingdom's ratification of such treaties without the possibility of having domestic laws negatively affected in any way, is obviously far better than withdrawing its reservations.

Saudi Arabia has passed a number of political reformation laws including Cabinet resolution no. 166, issued on 12 *Rajab* 1421 AH/9 October 2000 which aims at abolishing the so-called sponsorship (*kafalah*) system and seeking to improve labourers' conditions; the project of putting an end to domestic violence, giving women the right to become members of the Shura Council (the formal advisory body of Saudi Arabia) as well as their right to submit their candidacy for municipal council membership; and reformation of the sponsorship system. In addition, the fact that Saudi Arabia has ratified some human rights treaties is part of the social, cultural and political reforms that have taken place in the country. According to a new Royal Order, the Shura Council will now be consisting of its Speaker and 150 members, provided that women would be represented in the Council with no less than 20% of its members.

Adopting the *Shari'ah* as its constitution, Saudi Arabia has attached much importance to the issue of human rights, given that Islam encourages its adherents to take this issue seriously. In its implementation of the *Shari'ah* principles, Saudi Arabia seems to be, to some extent, in harmony with the international human rights conventions. Indeed, it has ratified a number of human rights conventions to demonstrate its support for the protection of human rights. As noted above, these conventions include, among many others, CRC, CAT and CEDAW.

The dissertation has also tackled the issue of women's rights in Islamic law as applied in Saudi Arabia, and shown how these rights are protected. To clarify and support this view, I have mentioned a number of cases regarding various women's issues, such as marriage, divorce, custody, maintenance and polygamy. I have made it abundantly clear that the numerous forms of injustice to which Muslim women are subjected in Saudi Arabia must not be attributed to the application of Islamic law or to the governing laws of the country, but rather to the established, deep-seated non-Islamic practices still practised in Saudi Arabia. The primary source of Islamic law, the Qur'an, confirms that women are entitled to civil, political, social, economic and cultural rights. However, some Qur'anic verses have been interpreted out of their proper Qur'anic and social contexts, in ways that actually favour the biased legal practices currently practised in Islamic jurisdictions. In fact, once Qur'anic verses are interpreted in their proper Qur'anic, social and historical contexts, it will be clear that the Qur'an never discriminates on the basis of gender.¹ It is rather the interpretation of the Qur'an which reflects the masculine and patriarchal prejudices of the interpreters that is biased.²

Given that domestic violence, particularly violence against women, is an international phenomenon that has negatively affected not only Saudi Arabia but also all parts of the world without exception, the dissertation has tackled this problem both in the international and domestic legal frameworks. It has clearly stated the Islamic law standpoint on the issue, namely that Islamic law, and Saudi laws for that matter, being derived from the two main sources of Islam, reject all forms of violence against women. It has also delineated the steps taken by the Kingdom to address the problem, identified the causes and forms of domestic violence and

¹ Niaz A. Shah, 'Women's Human Rights in the Koran: An Interpretive Approach,' *Human Rights Quarterly*, 2006, Vol. 28, p. 883.

² *Ibid.*, p. 884.

illustrated the scope of the problem by presenting some cases of domestic violence before the Saudi courts.

Saudi Arabia has made huge efforts to put an end to domestic violence against women in the country, has demonstrated a commitment to addressing women's and related justice issues and has favourably responded to the CEDAW Committee to demonstrate to the United Nations the steps it has taken to meet the convention's standards, including steps to address violence against women, although much still needs to be done. A comprehensive intervention to support the survivors of domestic violence is needed, and integration of responses to domestic violence should include legal, social and educational and health approaches. The dissertation has suggested some recommendations to that end.

Saudi laws, it is clear, adopt the dualistic approach to international treaties, which asserts that there are two essentially different legal systems which exist side by side within different spheres of action—the international plane and the domestic plane, as opposed to the monistic approach which asserts that there is one system of law, with international law as an element alongside all the various branches of domestic law.

It is important to note that some aspects of Saudi Arabian Islamic law (such as the recognition of polygamy) are not compatible with international human rights law. This raises a possible conflict between international human rights law and the Saudi Arabian domestic law with regard to the issue of human rights. It is for this reason that in the event of a clash between international law and the law in the Kingdom, courts in Saudi Arabia generally opt for the *Shari'ah* and disregard international law with regard to human rights. It is partly in this context that Saudi Arabia has entered some reservations to international human rights treaties.

A question arises here: Is this position consistent with the Vienna Convention? The answer to this question requires some discussion.

First, the term 'reservation' must be defined. According to Article 2(d) of the Vienna Convention on the Laws of Treaties (VCLT),

'reservation' means a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State.³

Second, in cases where a reservation is to be formulated, a number of conditions must be met, as Article 19 VCLT, concerning the formulation of reservations, states, namely:

A State may, when signing, ratifying, accepting, approving or acceding to a treaty, formulate a reservation unless:

- (a) the reservation is prohibited by the treaty;
- (b) the treaty provides that only specified reservations, which do not include the reservation in question, may be made; or
- (c) in cases not falling under subparagraphs (a) and (b), the reservation is incompatible with the object and purpose of the treaty.

Acceptance and objection to reservations is generally done following certain conditions, as stated in Article 20 VCLT 1, 4 (a), (b) and (c) and 5 and Article 21, legal effects of reservations and of objections to reservations, 1 (a) and (b).

It is worth mentioning that the general principle behind the performance of a treaty is based on good faith, as Article 26 VCLT clearly states. Special mention must also be made of Article 27 VCLT relating to the internal law and observance of treaties as well as Article 46 concerning provisions of internal law regarding competence to conclude treaties.

³ Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 331, 8 I.L.M. 679, entered into force 27 Jan. 1980.

Third, reservations started after the conclusion of the Convention on the Prevention and Punishment of the Crime of Genocide (CPPCG) in 1948.⁴ Acceptance of reservations was, according to international tradition, given following consensus of the parties to the Convention. This tradition continued in practice until the United Nations General Assembly posed a question to the ICJ to this effect, and the ICJ issued a resolution in 1951, stating that individual acceptance was also acceptable.⁵ States Parties to the Convention adopted the advisory opinion of the ICJ in 1969.

Based on the foregoing discussion, human rights treaties, in my opinion, like all other treaties, are subject to the VCLT. Indeed, this is the position adopted by the International Court of Justice (ICJ) as to the reservations to the CPPCG. It is clear that a state may make any reservations unless it is prohibited by a treaty or it is incompatible with the object and purpose of the treaty, just as the other States Parties may object to any reservations they wish. In addition, the VCLT defines the word 'reservation' as a unilateral statement, however phrased or named, made by a State. Therefore, making reservations gives the reserving States the opportunity to enter a treaty without any harm being done to its interests or internal laws.

The gap between the requirements of the conventions on human rights and those of the domestic laws in Saudi Arabia may be attributed to the fact that reconciliation of Saudi regulations with these conventions is not receiving adequate attention. It should be noted, however, that the situation is gradually improving because specialised bodies have been created to take this issue in charge. These include, among others, the Commission on Human Rights (CHR) and the National Human Rights Committee (NHC). These specialised bodies are bound to

⁴ Convention on the Prevention and Punishment of the Crime of Genocide. 78 U.N.T.S. 277, entered into force 12 Jan. 1951.

⁵ International Court of Justice Reports of Judgements, Advisory Opinions and Orders Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide Advisory Opinion of 28 May 1951. See the official website of the International Court of Justice: <http://www.icjij.org/docket/files/12/4285.pdf>. Accessed on 27 October 2011.

decrease the gap between Saudi Arabia's internal Laws and Regulations and the provisions of the human rights conventions. It seems that the creation of such specialised bodies is a clear indication that Saudi Arabia intends to spend an effort in this particular area and fill the gap and delays caused in past years.

Islamic law, as implemented in Saudi Arabia, exerts an influence on the implementation of international human rights law in the country. Because of this influence, Islamic law will in some way continue to exercise an effect on the implementation of international human rights law in the country into the future. Such an influence, which should not necessarily be negative, must pave the way for 'future endeavours to be in the direction of productively employing Islamic law, through an evolutionary perception, for the positive implementation of international human rights law in Muslim world.'⁶

It is worth mentioning here that in the interaction between international human rights law and Islamic law the impact has not been only one-sided, in that Islamic law influenced international human rights law, and international human rights law has also challenged and greatly influenced the evolution and reform of Islamic law in various Muslim states including Saudi Arabia. Article 18 of the International Covenant on Civil and Political Rights (ICCPR), for instance, guarantees freedom of thought and religion. The initial draft of the article included 'freedom to change one's religion or belief' as in Article 18 of the UDHR, which was opposed by Saudi Arabia. As a compromise, the ICCPR wording was altered to include, instead, 'freedom to have or adopt a religion or belief of one's choice.'⁷

⁶ Mashood A. Baderin and Manisuli Ssenyonjo, *International Human Rights Law: Six Decades after the UDHR and Beyond* (Surrey and Burlington: Ashgate Publishing Limited, 2010), p. 16.

⁷ General Comment no. 22: The right to freedom of thought, conscience and religion (Article 18, forty-eighth session, 30/07/1993, CCPR/C/21/Rev.1/Add.4, General Comment no. 22.

It is worth noting that with Saudi Arabia's ratification of the international conventions, such conventions become part and parcel of the Saudi law, in which case Saudi Arabia is obliged to adopt national implementing legislation to ensure that its domestic law does not contravene the provisions stated in these conventions. It is therefore essential for Saudi Arabia to review Saudi laws in order to achieve harmony with international human rights conventions which it has ratified. This can generally be done by Royal Decrees, as Article 70 of the Basic Law of Governance clearly states:

International treaties, agreements, regulations and concessions are approved and amended by Royal Decree.

The present dissertation has shown that Saudi Arabia has a genuine interest in demonstrating to the rest of the world that human rights as observed in the Kingdom are not only in accordance with Islamic law but also in harmony with, or at least not in violation of, internationally recognised human rights standards. Indeed, Saudi Arabia's interaction with the UN human rights system has increased since the 1990s, but it is important to view such involvement as a preliminary step in the process. There have been numerous indications as to the influence of the UN human rights system on the greater enjoyment of human rights in Saudi Arabia. A number of developments with respect to human rights have taken place in recent years, particularly the establishment of institutions and the ratification of laws intended to guarantee greater protection of human rights. While these constitute minor changes, they actually represent major achievements that eventually aim at formulating a course of action that may, in the long run, significantly change the situation of human rights in the country.

2. Obstacles to Progress

The main obstacles to the application of international human rights law in Saudi Arabia include, among other things, general reservations to some ratified human rights treaties; a lack of general awareness of human rights; a lack of implementation of international human rights treaties in practice; discriminatory cultural practices and stereotypes; violence against women; and the absence of specific laws relating to violence against women. Most of these obstacles have been identified by UN treaty monitoring bodies.⁸ For example, regarding Saudi Arabia's reservation to the CRC, the Committee stated as follows:

7. The Committee notes the information that the reservation which consists of a general reference to religious law and national law without specifying its contents, is mainly a precautionary measure and does not hamper the State party's implementation of the Convention. But the Committee reiterates its concern that the general nature of the reservation allows courts, governmental and other officials to negate many of the Convention's provisions and this raises serious concerns as to its compatibility with the object and purpose of the Convention.

8. The Committee reiterates, in [the] light of article 51, paragraph 2, of the Convention, its previous recommendation that the State party review the general nature of its reservation with a view to withdrawing it, or narrowing it, in accordance with the Vienna Declaration and Plan of Action of the World Conference on Human Rights of 1993.⁹

The fact that the new Saudi Judiciary assumes a dual judicial system, namely the 'general judiciary', as represented by the courts and the 'administrative judiciary', as represented by the Board of Grievances, constitutes a major development in the judicial domain in Saudi Arabia. However, from my experience in laying down regulations for the Law of Procedure before

⁸ See generally United Nations, Convention on the Rights of the Child, Forty-first session, Concluding Observations: Saudi Arabia, CRC/C/SAU/CO/2, 17 March 2006. Available at: <http://www.ohchr.org/EN/countries/MENARRegion/Pages/SAIndex.aspx>. Accessed on 20 January 2012.

⁹ United Nations, Convention on the Rights of the Child, Forty-first session, Concluding Observations: Saudi Arabia, CRC/C/SAU/CO/2, 17 March 2006.

Shari'ah Courts and the Law of Criminal Procedure, I have become aware of a number of obstacles to progress in this respect, including the following:

1. Delays on the part of departments and institutions to amend procedural laws including the Law of Procedure before *Shari'ah* Courts and the Law of Criminal Procedure. In fact, an attempt by such departments and institutions would certainly activate laws in the country;
2. Some laws have not been amended in such a way as to be in compliance with the international human rights conventions which the Kingdom of Saudi Arabia has ratified. For instance, the employer's action of retaining his employees' passports, which contravenes Article 13 of the UDHR; and preventing employees from free movement, which contravenes Article 21 of the Arab Charter on Human Rights.
3. Failure to activate the judicial inspection system in judicial institutions and lack of competent committees to implement it;
4. Failure to implement and activate the law during the litigation process;
5. Failure of the judicial inspection system to properly check on judges to see to what extent they implement the provisions of the law;
6. Shortage in the number of qualified judges and the paucity of training courses in the legislative, judicial and law practice fields inside the country and abroad;
7. Inadequacy of rules regulating jurisdiction provisions, hence the unnecessarily long time spent on considering the various judicial cases due to lack of coordination between courts;

8. There are no laws which deal with all the objective aspects of bodies and committees with judicial jurisdiction in addition to the obvious failure of most of them to publish their precedents and judicial principles;
9. Slowness in deciding cases due to a number of reasons including shortage of judges and lack of provision of sufficient training and qualifications for them, in addition to shortage of cadres and efficient mechanisms;
10. Lack of unified guides, forms or criteria when preparing laws, hence the multiplicity of incongruous laws and the inappropriateness of certain regulating rules as these have been issued under different forms, such as 'rules', 'memoranda', 'criteria' and 'orders'.
11. Some implementing rules have been issued without prior sufficient study; there is also a lack of cooperation among the concerned bodies and specialists regarding such rules; in fact, some international human rights treaties to which Saudi Arabia has acceded, such as the CEDAW, have not been added to these implementing rules;
12. The new Code of Law Practice is undoubtedly one of the most important forms of reform in the judicial establishment. It is concerned with the legal representation of third parties before courts of law in disputes with a view to realising the legal guarantees of individuals and groups. By this I mean the following:
 - a. To champion the right of the injured where such a person cannot do so on their own for some reason, and
 - b. To help the judge make the truth prevail.

However, the law in general faces some hindrances including the lack of sufficient vocational training for most lawyers and the lack of granting women the right to represent third parties before courts of law. Despite the fact that the law does not actually prevent women from

exercising their right to do so, no woman has been granted permission to engage in practising law because this profession does not, according to Royal Order no. 759/8, dated 5 *Shawwal* 1421 AH as well as the Workforce Board decision no. 1/2/19/1405, dated 1 *Rabee' Al-Awwal* 1408 AH, suit their nature.

It is worth mentioning here that the criticism levelled at the Saudi state regarding sex segregation and the practice of male guardianship, stating that they 'pose important obstacles to women's autonomy, legal capacity as adults, and ability to participate in the full range of activities available in society and in the workplace'¹⁰, as well as that regarding its general reservation which the UN CEDAW Committee urges Saudi Arabia to withdraw, stating that 'there is no contradiction in substance between the Convention and Islamic law (*Shariah*)'¹¹ is to be reconsidered.

It is to be noted that guardianship in no way limits women's exercise of their rights, in particular with regard to their legal capacity and in relation to issues of personal status, including marriage, divorce, child custody and education, among other issues; nor does it contribute to the prevalence of a patriarchal ideology with stereotypes and the persistence of deep-rooted cultural norms, customs and traditions that discriminate against women and constitute serious obstacles to their enjoyment of their human rights.

¹⁰ United Nations General Assembly, Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, including the Right to Development, Report of the Special Rapporteur on violence against women, its causes and consequences, Yakin Ertürk, 15 Years of the United Nations Special Rapporteur on Violence against Women, Its Causes And Consequences (1994-2009) - A Critical Review, Human Rights Council, Eleventh session, Agenda item 3, 27 May 2009, A/HRC/11/6/Add.5.

¹¹ Committee on the Elimination of Discrimination against Women, Fortieth session, Concluding comments of the Committee on the Elimination of Discrimination against Women, O/2, 8 April, 2008. See also Committee on the Elimination of Discrimination against Women, Fortieth session, including comments of the Committee on the Elimination of Discrimination against Women, Advance Unedited Version, CEDAW/SP/2010/2, 1 March 2008; and Committee on the Elimination of Discrimination against Women, Fortieth session, including comments of the Committee on the Elimination of Discrimination against Women, Advance Unedited Version, CEDAW/SAU/Q/2, 16 August 2007.

Committee on the Elimination of Discrimination against Women, Fortieth session, including comments of the Committee on the Elimination of Discrimination against Women, Advance Unedited Version, CEDAW/ C/SR.816, 27 February 2008.

In fact, it is guardianship abuse that constitutes a major problem that has to be addressed, and those involved in abusing it must be held accountable. This phenomenon must not be used to criticise the true nature of guardianship and the various benefits it is bound to yield. Abuse of guardianship constitutes blatant injustice practised against women in Saudi Arabia, for marriage guardianship has been prescribed in Islam in the best interests of women. It does not degrade or disparage them in any way, nor does it imply that women are weak-minded or should be treated like helpless children. Indeed, marriage guardianship helps protect women against manipulation and deception and assist them in finding suitable spouses. Marriage guardians have no right whatsoever to control women, prevent them from exercising their right to marriage or coerce them into marrying men whom they do not like, for doing so clearly goes against the teachings of Islamic law, which is founded on justice and which takes women's interests into account. It also constitutes a blatant violation of human rights which is condemned by both Islamic law and international agreements. To put an end to guardianship abuse, I believe severe punishment should be inflicted on the perpetrators.

The issue of women driving a car should not be made into a major issue, as Islamic law does not really forbid women from driving cars. In fact, this is a purely social issue, for in some parts of the country, such as in the eastern Province, many women drive their cars without any restrictions whatsoever.

3. General Recommendations

Furthermore, on the basis of my career and experience as a judge in the General Court since 1413 AH (1992) and given the multiplicity of personal status cases and their discrepancy with commercial, criminal and real estate cases, I make the following recommendations concerning Personal Status Law:

1. Creating personal status circuits which may be attached to general courts as a temporary solution until personal status specialised courts are created.
2. Creating a comprehensive and integrated system for personal status matters and combining anything that relates to the Personal Status Law and the Law of Procedure before *Shari'ah* Courts, and creating a comprehensive system in such a clear manner as to settle litigants' disputes that arise between them.
3. Appointing specialised judges in personal status courts.
4. Appointing experts in the social and psychological domains with a view to seeking their assistance with regard to marital matters when the need arises.
5. Activating the Muscat Document on the GCC Common Law of Personal Status, dealing with matters relating to family, guardianship, wills and inheritance, particularly in Article 282, which was approved and adopted by the Supreme Council in its 16th session held in Oman (4-7 December 1995) and which came into force after the member states had ratified it. In their 7th Meeting held in Muscat, 1996, Ministers of Justice adopted this law as a reference law for four years and hence it was named the 'Muscat Document of the GCC Common Law of Personal Status'. The Supreme Council also adopted the Document (17th session, Doha, December 1996). Implementation of the Document as a reference law was further extended for four years by resolution of the Supreme Council (21st session, Manama, December 2000). Implementation of the Document as a reference law was also extended for four more years by resolution of the Supreme Council (25th session, Bahrain, 20-21 December 2000) to allow Member States more time to benefit from the Law. Some Member States have used this law for preparing their own laws.

It is worth mentioning here that whenever Saudi Arabia finds an opportunity to support human rights it seizes it without delay as long as its fundamental principles and laws which are based on the *Shari'ah* are not challenged. It is for this reason that it has signed and even ratified a number of human rights treaties including the Arab Charter on Human Rights which it signed in 2004 and eventually ratified in 2009. What is new and important in the new version of this Charter is the confirmation of equality between men and women in the Arab World (Articles 1 and 3). The new version also guarantees children's rights (Articles 3 and 34) and the rights of handicapped persons (Article 40).

Following the Kingdom's ratification of the Arab Charter on Human Rights, Turki ibn Khalid As-Sudayri, President of the Saudi Human Rights Commission, stated that such ratification constituted a major achievement as it clearly serves to realise a national benefit, and he stressed that the Charter's articles do not contravene domestic laws.¹² Indeed, the Charter's articles are comprehensive and in harmony with the principles of *Shari'ah* and do not belittle any of the human rights provided for in international human rights treaties.

With Saudi Arabia becoming a party to international and regional human rights treaties, such treaties must be implemented in the Saudi legal system. Once a royal decree to this effect has been issued, the Kingdom then takes it upon itself not to issue any law that is bound to contravene any articles included in such charters. It even undertakes to review its laws to ascertain their compatibility with such charters to which it has become a party. Article 70 of the Basic Law of Governance states that international treaties, agreements, regulations and concessions are approved and amended by Royal Decree. What is needed, however, is an effective enforcement mechanism to guarantee that human rights are fulfilled.

¹² *Riyadh* newspaper, Thursday 21 *Safar* 1429 AH (28 February 2008), Issue no. 14493.

It is worth noting here that the binding nature of international treaties leads to respect of human rights and guarantees their incorporation and implementation in domestic laws. Failure to modify general reservations will certainly deprive citizens of enjoying their human rights in full. Therefore, general reservations must be reviewed to make them specific and clear, and related to specific articles. In addition, domestic laws must be interpreted and applied in a manner that is compatible with international human rights treaties in order to guarantee the implementation of these laws.

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