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Women’s Rights and Shari’a
- A comparative study of marriage and family relations under the Convention on the Elimination of All Forms of Discrimination against Women in the cases of Tunisia, Egypt and Yemen

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Summary

The rights of women living in societies ruled by laws based on Shari’a constitute a controversial question in the human rights debate in many countries today. Suggestions that these laws are of a divine nature, and as such cannot be overridden by the human rights principles of western origin leads to discussions in several areas, such as the right to religion, the human rights tradition in Muslim countries, the responsibility of states toward their subjects, and the power of the CEDAW Committee.

As of today, 171 countries have ratified the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). The rights within marriage and at its dissolution are treated in article 16, stating equal rights for women and men in these matters. CEDAW in general and article 16 in particular shall also be interpreted to encompass violence against women, although this is not explicitly stated in any of the articles of the Convention. Special attention has therefore been given to the aspects of domestic violence and its consequences for women.

In this thesis, three countries that recently submitted their reports to the CEDAW Committee, have been selected to constitute the basis for this discussion. The three countries are Tunisia, Egypt and Yemen, countries that to some extent share a common history, but today have evolved in very different directions.

Egypt and Tunisia have both entered reservations to CEDAW, whereas Yemen has not entered any. Yemen is on the other hand showing great failure in its implementation, while Egypt is making slow progress as its government tries to perform some kind of balancing-act between its international obligations under human rights law and pressure from national neo-Islamic movements. In Tunisia the emancipation of women has come the furthest, but the human rights situation in general is not very good.

Many discriminatory customs such as female genital mutilation and child marriage are being promoted as part of Islam when in reality these traditions have other origin. It is my opinion that this fact, if supported by governments and preferably also by laws, could constitute the incitement to abandon these customs. As usual, although it cannot be said too often, it is all a matter of interpretation, and as women are starting to question the grounds for these interpretations, and also contribute with newer ones, there is hope for change.
Preface

First, I would like to express my gratitude to Associate Professor Christer Hedin at the University of Uppsala for his inspiring lectures about Islam given at the Programme of Oriental Studies, which I attended in 1995-96. No lecturer I have had after that has been able to capture a class in the same, almost mesmerizing way as done during that course. Both literature and notes from that time have been of great help in the process of writing this thesis.

I would also like to thank my supervisor Professor Göran Melander and the staff at Raoul Wallenberg Institute for Human Rights and Humanitarian Law for their help and kindness.

I am very grateful for the comments made by LL.M Amelie Sällfors concerning the structure of the thesis, and for the support from, and interesting discussions with, my partner Pelle Bjerke.

Christina Ljung
Lund, July 2003
Abbreviations

CEDAW Convention on the Elimination of All Forms of Discrimination against Women
CHR Commission of Human Rights
CRC Convention on the Rights of the Child
CSW Commission on the Status of Women
DEVAW Declaration on the Elimination of Violence against Women
ECOSOC Economic and Social Council
ICCPR International Covenant of Civil and Political Rights
ICESCR International Covenant of Economic, Social and Political Rights
UDHR Universal Declaration of Human Rights
U.N. United Nations
1 Introduction

1.1 My choice

As technology seems to make the world geographically smaller, it does at the same time seem to widen the cultural gaps, creating new, invisible borders between humans, although they may be living in the same country. Parts of this thesis will attempt to bridge some of those gaps. The fear and scepticism so many feel towards Islamic culture is not easily erased, especially not when media takes care of the opinion-making for us, and facilitates the world by providing its incomplete story of terrorists and women beaters. I would like to go beyond that and at least make an attempt to provide another background than the regular Islam phobic one, where all Muslims are treated as a single-minded entity.

The choice to write my thesis on women’s rights and Islamic law, or Shari’ a, was not a difficult one. The impact religion has on our lives fascinates me, and the translation of religion into law intrigues me. Although the phenomenon of incorporation of religion into law is not a new one, neither exclusive for Islam, I feel that the complexity of Shari’ a needs further exploration, especially when discussing women’s issues.

Curiosity, and a desire to understand, made me write this thesis, and I did learn a lot in the process.

1.2 Aim and delimitations of the thesis

To have equal rights within marriage and at its dissolution, to enter freely into marriage, to have equal rights and responsibilities with regard to mutual children, the same rights in respect of property, and also a right not to be married when still a child; these are rights that I take for granted, but that millions of women all over the world are being denied. These rights are stated in article 16 of the Convention on the Elimination of All Forms of Discrimination against Women (hereinafter referred to as CEDAW).

My primary aim with this thesis is to look at Shari’a from a human rights perspective, and conduct a discussion with its focus on the human rights as stated in article 16 of CEDAW.

In order to achieve this aim, it is necessary to give some explanations. First I will give an introduction to women’s rights and the international instruments regulating them. The focus will lie on CEDAW article 16, and on the marriage-, and family related violence that article 16 is interpreted to encompass.
It would be meaningless to perform this discussion if a thorough effort to explain the meaning of Shari’ā, its origin and functions of today, wasn’t made. To enhance this explanation some examples will be given. Three countries; Tunisia, Egypt and Yemen, whom all recently submitted their reports to the CEDAW Committee, will visualise various ways Shari’ā can be applied in.

I think that it is necessary to look at more than one country in order to understand the complexity of the different legal systems, or simply to understand that the Islamic legal tradition is not a monolithic entity, there are quite big differences between various Islamic countries. I will try to see if, or to what extent, Shari’ā plays a part in the law making of these countries. I will evaluate these three countries’ implementation of CEDAW article 16, and if reservations to it have been made by any of the countries, is that due to the interpretation of Shari’ā in that country?

Finally, I will look at the concluding comments of the three countries made by the CEDAW Committee and try to evaluate the work of the Committee in order to see if constituency can be found in these three cases. The evaluation of the concluding comments is essential for the thesis since these comments are the primary means of controlling CEDAW signatories.

As must be quite obvious, there can be no thorough study of the three countries mentioned. A short introduction of each country will be given, but after that focus will lie on the laws and legislators associated with Shari’ā and its possible effect on CEDAW article 16.

This is a thesis about the law of Shari’ā. The historical, religious, social and cultural background in this thesis is there because I deem it necessary for a comprehensive understanding of the subject. I do not wish to make my own religious interpretation of the Quran, but merely emphasise that interpretations vary a lot.

I am aware that I will only be able to disturb the surface of an ocean in these 50 pages; so therefore, another aim of this thesis is to capture the interest of anyone who may read this, an interest that hopefully will lead to increased awareness of the complexity of these issues.

### 1.3 Method

This thesis is based on literature studies conducted at the library of the Raoul Wallenberg Institute of Human Rights and Humanitarian Law, and at the Lund University library. An important source in finding needed material has been the homepage of the United Nations (hereinafter referred to as the U.N.). The thesis has both a descriptive and an analytical part.

Recent years have witnessed a spurt of literature concerning women in Muslim societies, but these have been largely confined to philosophical,
sociological and historical accounts. The literature that does concern law is usually of a generalising kind, treating problems in common for these societies, rather than country-wise. Yemen has proved to be the country least written about in legal matters, and Egypt by far the most popular.

1.4 Definitions

CEDAW
CEDAW is in this thesis used to refer to the Convention on All Forms of Discrimination against Women. The Committee on the elimination of Discrimination against women is referred to as the CEDAW Committee.

Shari‘a
In this thesis, Shari‘a is to be understood as the principles that are used when creating Islamic law. Most scholars do not make a distinction between the meaning of Shari‘a and Fiqh. In this thesis Shari‘a is intended to be understood as the sources as defined within Sunni and Shi‘a Islam, unconverted into a legal text. When referring to Islamic law I mean the law of a particular state or states who have based its law upon the sources of Shari‘a.

Polygamy
The correct term to use when referring to a man being allowed to take more than one wife would be polygyny, but I will use the term polygamy instead since it is a more frequently used and understood term.

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1 Ali, Shaheen Sardar, p.4
2 Women’s rights

2.1 Women’s rights are human rights

One could argue that there should be no need for specifying women’s rights since these rights are basic human rights too. But since the goal of equality is far from being reached, women’s rights have since the establishment of the U.N. been given a more prominent role, not only through a separate convention, but also in our basic human rights instruments.

In the following, examples of how women’s rights are being emphasised in our fundamental Human Rights instruments will be given.

2.1.1 UDHR

The Universal Declaration of Human Rights (hereinafter referred to as UDHR) was adopted by the U.N. General Assembly on the 10th of December 1948, and is the pillar upon which all human rights Conventions and Declarations rest.\(^2\)

The Commission of Human Rights (hereinafter referred to as CHR) and the Commission on the Status of Women (hereinafter referred to as CSW) clashed several times during the process of drafting the UDHR in 1946-48. The original draft was changed from “all men are brothers” to “all human beings are born free and equal in dignity and rights” thanks to the CSW.\(^3\) This text now constitutes article 1 of the UDHR.

Article 2 contains one of the most fundamental principles in international human rights law, the principle of equality. The prohibition of discrimination applies to all other human rights. It states that “(e)veryone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex…”\(^4\) The right to equality before the law can be found in article 7, and the right to a nationality, that especially applies to women, in article 14.

The right to marry and found a family is established in article 16, and concerns various aspects of this right. First, the right to marry, “without limitation due to race, nationality or religion”, rights protecting the persons entering into marriage, such as consent, minimum age, and equal rights of

\(^2\) General Assembly resolution 217A (III) 10 December 1948
\(^3\) Swedish Ministry for Foreign Affairs/SIDA, *A Handbook on CEDAW*, 2000, p7. See also UDHR art.1.
the spouses during the marriage and at its dissolution. Secondly, the right to
found a family, and the protection of it, and finally, the notion of the family
as “the natural and fundamental group unit of society”\(^5\)

The UDHR is a resolution, and as such it does not bind the Member States.
Although, many argue that UDHR is to be considered as international
customary law.\(^6\)

### 2.1.2 ICCPR

The International Covenant of Civil and Political Rights (hereinafter
referred to as ICCPR) was adopted by the General Assembly in 1966 and
entered into force ten years later.\(^7\)

Article 2 of the International Covenant of Civil and Political Rights is a
non-discrimination clause similar to article 2 of UDHR, stating equality
under the Covenant without distinction of any kind, with emphasis on
providing an effective remedy for any person whose rights according to the
Convention, are violated. Article 3 gives further emphasis to the obligation
of the States Parties to “ensure the equal right of men and women to the
enjoyment of all civil and political rights set forth…”

The right to marry is also protected by ICCPR, and article 23(2-3) states that
free and full consent of the intending spouses is required for a marriage to
take place, and article 23(4) goes on stating that the State Parties to ICCPR
shall take steps to ensure equality of rights and responsibilities of spouses
“as to marriage, during marriage and at its dissolution”.

Article 26 states all individuals’ equality before the law, requiring the law to
prohibit any discrimination, and “guarantee to all persons equal and
effective protection against discrimination on any ground such as…sex”.

ICCPR has so far been ratified by 149 states.\(^8\)

### 2.1.3 ICESCR

The principle of non-discrimination can be found in article 2(2) of the
International Covenant on Economic, Social and Cultural Rights
(hereinafter referred to as ICESCR), and equal rights for men and women in
the enjoyment of these rights are laid down in article 3.

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\(^5\) Alfredsson and Eide, p. 327. Nota bene: No precise definition of the family exists, and
there is no consensus in international law as to the meaning of the term.

\(^6\) Alfredsson and Eide, “The Universal Declaration of Human Rights – A Common
Standard of Achievement”

\(^7\) General Assembly resolution 2200A (XXI) of 16 December 1966

The condition that marriage should be entered into only with free will is confirmed in article 10(1). Article 10(2) recognizes that special protection should be accorded to mothers during a reasonable time before and after childbirth.

### 2.1.4 CRC

The Convention on the Rights of the Child (hereinafter referred to as CRC) was adopted by the General Assembly in 1989 and entered into force 1990, achieving almost universal ratification by 1996. The term “child” means, according to CRC article 1, “every human being below the age of eighteen years unless, under the law applicable to the child, majority is attained earlier.”

Article 2 states that States Parties shall respect and ensure the rights in the Convention to each child within their jurisdiction without any kind of discrimination. Article 7(1) gives every child the right to acquire a nationality, and the right to know and be cared for by his or her parents. According to article 18(1), States Parties shall “use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child.”

### 2.2 Women’s rights – a brief history

International efforts to address problems involving the status of women began with the women’s suffrage movement in the late 19th Century. Some early attempts were also made by the Pan American Union and the League of Nations.⁹

When the U.N. was established after the Second World War, the incitement for the development of international human rights protection was strong. At the time of the UDHR, the majority of the world’s women could not vote. Securing political rights for women were therefore prioritised. The early years of the U.N: s support for women focused upon establishing women’s legal equality in areas such as political participation, work, education, nationality and marriage.¹⁰ The U.N: s involvement in women’s issues marked the beginning of a historic change in political discourse, in which issues considered strictly private, such as the status of women as wives and mothers would come to be openly debated in a global context.¹¹

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2.2.1 The Commission on the Status of Women

The CSW was established in 1946 under the Economic and Social Council (hereinafter referred to as ECOSOC). The object of the Commission is to promote implementation of the principle that men and women shall have equal rights. ECOSOC determines the Commission to have two basic functions: “to prepare recommendations and reports to the Economic and Social Council on promoting women’s rights in political, economic, social and educational fields”, and to “make recommendations to the Council on urgent problems requiring immediate attention in the field of women’s rights”. The CSW has the authority to receive communications sent to it by individuals or organizations in order to identify consistent patterns of discriminatory practices. The communications may only be used as a source of information since the CSW has no authorization to take action. The mandate of the CSW was expanded in 1987 to include such activities as the advocacy of equality, development and peace, monitoring of the implementation of internationally agreed measures for the advancement of women, and reviewing and appraising progress at the national, sub regional, regional, sectoral and global levels. The CSW: s current work is closely related to the Beijing Declaration and Platform for Action.

In its 1947 statements of principles the CSW declared that “Freedom and equality are essential to human development”, and “since woman is as much human being as man, she is entitled to share these attributes with him”.

Like the UDHR, both ICCPR and ICESCR include provisions specifying that the rights therein apply equally to men and women. This emphasis was added after the CSW presented CHR with suggested amendments to the drafts of the Covenants.

2.2.2 Recognizing Women’s Rights: 1952-1975

In 1952, the General Assembly adopted The Convention on the Political Rights of Women, the first instrument of international law aimed at recognizing and protecting the political rights of women everywhere.

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13 E/RES/2/11, 21 June 1946 (ECOSOC resolution establishing the Commission on the Status of Women)
14 Cook, Rebecca J. *Human rights of women – National and International Perspectives*, University of Pennsylvania Press 1994, p.25
15 E/RES/1987/24, 26 May 1987 (ECOSOC res adopting the long-term programme of work of the CSW to the year 2000)
16 See 2.2.5 below
19 General Assembly resolution 640(VII) of 20 December 1952
The question of women’s rights of nationality in marriage was a major focus of the CSW from its first session in 1947. At that time, a woman who married a man of a different nationality could find herself deprived of her own nationality, and in some cases stateless, especially in the event of a divorce. The Convention on the Nationality of Married Women was adopted in 1957 with a large number of abstentions due to opposition to the idea that a nation’s sovereign interests could be overridden by the international human rights principle of non-discrimination.

In 1959, the CSW urged ECOSOC to press for an international instrument carrying great authority that would cover the minimum age for marriage, free consent and registration of marriages. The result was two separate instruments, a convention and a non-binding recommendation.

Early in the 1950s the problem of customs, ancient laws and practices that were harmful to women and girls came into focus. In an ECOSOC resolution the member states were called upon to take measures to abolish “all customs which violate the physical integrity of women, and which thereby violate the dignity and worth of the human person as declared in the Charter and the Universal Declaration of Human Rights”. At that point, there seemed little likelihood of any strong international action to eliminate practices such as female genital mutilation, and the matter was put aside and did not surface again until the 1970’s.

In 1963, the work to draft a declaration on the elimination of discrimination against women began. The aim was to gather all of the standards on women’s rights that had been developed since 1945. Although much of the declaration dealt with issues already covered in earlier instruments there were disagreements, especially with the provisions on marriage, family and employment. Four years later, the Declaration was accepted, and another important aim in securing the legal foundation of women’s equality was accomplished.

1975 was designated International Women’s Year, aiming to remind the international community that discrimination against women was a persistent problem in much of the world, and that joint efforts in this area needed to increase. During this year, the first international women’s conference was held in Mexico City. When the Conference came to a close, delegates had

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23 E/RES/445 C (XIV), 28 May 1952, see also A/RES/843 (IX), 17 December 1954
adopted a “World Plan of Action for the Implementation of the Objectives of the International Women’s Year”, offering a comprehensive set of guidelines for the advancement of women until 1985. Its overall objective was threefold: to promote equality between men and women; to ensure the integration of women in the total development effort; and to increase the contribution of women to the strengthening of world peace.\(^{26}\) To ensure that national and international action to advance the status of women was sustained, the conference urged that the U.N. proclaim the period from 1976 to 1985 as the United Nations Decade for Women and Development.\(^{27}\)

### 2.2.3 The Decade for Women and Development: 1976-1985

The Decade for Women is remembered for several historic events. For the first time, U.N. statistics dramatized the fact that women’s rights were far from being isolated issues, but important factors in the well being of all people. Studies conducted throughout the world showed that declines in infant mortality, improved nutrition and medical care as well as lower fertility rates were functions of a mother’s level of education.\(^{28}\)

A new autonomous U.N.-affiliated institution was created, the International Research and Training Institute for the Advancement of Women, INSTRAW, aiming to conduct research and studies with particular attention paid to problems facing women in developing countries.\(^{29}\)

The Voluntary Fund for the United Nations Decade was renamed the United Nations Development Fund for Women, UNIFEM, and authorized as a new, permanent, autonomous body.\(^{30}\)

The second global conference on women was held 1980 in Copenhagen, and had the objectives to review the progress in implementing the goals of the Mexico City Conference, and to update the 1975 World Plan of Action. Unfortunately, no consensus was reached, although the Programme of Action was adopted, calling for stronger national measures to ensure women’s ownership, and right to inheritance and child custody.\(^{31}\)

The third global conference on women took place in Nairobi 1985. The 372-paragraph Nairobi Forward-looking Strategies for the Advancement of Women was debated at length, but finally adopted by consensus. The Forward-looking Strategies were an updated blueprint for the future of


\(^{28}\) Ibid p37

\(^{29}\) Ibid p39

\(^{30}\) Ibid p40

\(^{31}\) Ibid 44f
women to the end of the century. The document contained a series of measures for implementing equality at the national level, and guidelines for the participation of women in efforts to promote peace.  

2.2.4 Beijing and onwards

A review of the progress made five years after the Nairobi Conference gave a discouraging picture of the general progress of development made worldwide, and especially the effects this had on women in developing countries. In 1995, another review showed some progress in the aftermaths of the cold war where democratisation gave women new opportunities, but also stated that women continue to be the majority of the countless victims of political and ethnic violence, and that much remains to be done before the world can claim that the objectives of the Nairobi Forward-looking Strategies have been achieved.

The fourth World Conference on Women was held in Beijing 1995 and was the most heavily attended U.N. conference in history. 189 countries adopted the Beijing Declaration and the Platform for Action unanimously.

The Platform for Action is an agenda for women's empowerment. It aims at accelerating the implementation of the Nairobi Forward-looking Strategies for the Advancement of Women and at removing all the obstacles to women's active participation in all spheres of public and private life through a full and equal share in economic, social, cultural and political decision-making. This means that the principle of shared power and responsibility should be established between women and men at home, in the workplace and in the wider national and international communities.

The Platform for Action recognizes that women face barriers to full equality and advancement because of such factors as their race, age, language, ethnicity, culture, religion or disability, because they are indigenous women or because of other status. Many women encounter specific obstacles related to their family status.

Four years after the Beijing Conference, governments were asked to report on their actions to implement the Platform for Action in the 12 critical areas.

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32 Ibid 46f
33 CEDAW was adopted before the Beijing conference, see 2.2.5 below
35 "Overview of the Report of the Secretary-General to the CSW on the Second Review and appraisal of the implementation of the Nairobi Forward-looking Strategies for the Advancement of Women", and Ibid p.50f
36 Ibid p63
37 www.un.org/womenwatch/daw/beijing/platform/plat1.htm#statement As of 21 April 2003
38 www.un.org/womenwatch/daw/beijing/platform/plat1.htm#objectives As of 21 April 2003
of concern.\textsuperscript{38} Review of the national reports show that profound changes in the status and role of women have occurred in the years since the start of the United Nations Decade for Women in 1976. Women have entered the labour force in unprecedented numbers, increasing the potential for their ability to participate in economic decision making at various levels, starting with the household.\textsuperscript{39}

Despite much progress, responses from Member States indicate that much more work needs to be done with regard to implementation of the Platform for Action. Two major areas - violence and poverty - continue to be major obstacles to gender equality worldwide. Globalisation has added new dimensions to both areas, creating new challenges for the implementation of the Platform, such as trafficking in women and girls, changing nature of armed conflict, and the growing gap between nations and genders.\textsuperscript{40}

\subsection*{2.2.5 Finally a separate women’s convention}

Soon after the establishment of the U.N. a need to specify women’s rights in a separate convention was acknowledged, and efforts were being made already in 1946 to draft a women’s charter. Unfortunately the CHR rejected this.\textsuperscript{41} It wasn’t until 1974 that the work on what would become CEDAW began, although the idea had existed much longer.

The draft Convention was met by a large lack of consensus, reflecting the many remaining obstacles to women’s advancement. By late 1979, strong differences still remained, but the Convention was finally adopted by the General Assembly that year, by a vote of 130 to none, with 11 abstentions.\textsuperscript{42} It was clear, however, that the overwhelming vote in favour did not reflect general satisfaction with the agreement; nearly 40 countries had expressed reservations on specific provisions.\textsuperscript{43}

CEDAW is the first international legal instrument to define discrimination against women, a description to be found in Article 1, stating that discrimination against women is “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

\textsuperscript{38} These 12 areas are: poverty, education, health care, violence, armed conflict, economy, decision-making, lack of respect for, and insufficient mechanisms to promote the advancement of women, stereotyping, inequalities in the management of natural resources, and persistent discrimination against and violation of the rights of the girl child.
\textsuperscript{39} www.un.org/womenwatch/daw/followup/bfbeyond.htm As of 21 April 2003
\textsuperscript{40} www.un.org/womenwatch/daw/followup/bfbeyond.htm As of 21 April 2003
\textsuperscript{41} Swedish Ministry for Foreign Affairs/SIDA, A Handbook on CEDAW, 2000, p.7
\textsuperscript{42} The abstaining States were Bangladesh, Brazil, Comoros, Djibouti, Haiti, Mauritania, Mexico, Morocco, Saudi Arabia and Senegal. U.N. Doc. A/34/830 18 December 1979.
rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field." \(^{44}\)

CEDAW is also unique due to its requirement that Governments work to eliminate discrimination against women not only in the public sphere, but in private life as well. \(^{45}\)

As of March 2003, 171 countries – almost ninety per cent of the members of the United Nations – are party to the convention, and an additional 3 have signed the treaty, binding them to do nothing in contravention of its terms. \(^{46}\)

The many reservations accompanying the ratifications of the treaty involves 11 different articles. While the largest number of reservations refers to the role of the International Court of Justice in arbitration disputes, the largest number of substantive reservations concerns the provisions on the elimination of discrimination in marriage and family in Article 16. \(^{47}\)

There was a need for CEDAW already in 1946 and there certainly is now.

2.2.6 Means of control

The obligations of a state that has ratified CEDAW are very clear. According to the Convention, States Parties shall take all appropriate measures, including legislation, to guarantee women the exercise and enjoyment of human rights and fundamental freedoms. They shall also embody the principle of equality in their national legislation and ensure its practical realisation. \(^{48}\)

2.2.6.1 The Committee on the Elimination of Discrimination against Women

The Committee on the Elimination of Discrimination against Women met for the first time in 1982. Its main task, as described in article 18 of CEDAW is to consider reports submitted by Governments concerning “legislative, judicial, administrative or other measures” adopted to comply with the Convention, and also to submit reports that “may indicate factors and difficulties affecting the degree of fulfilment of obligations.” \(^{49}\) States that are parties to the Convention are obliged to report within one year of ratification, and subsequently every four years, on the steps they have taken...

\(^{44}\) UN Treaty Series, vol.1249, No. 20378, p.13
\(^{45}\) The United Nations and the Advancement of Women 1945-1996, p. 42
\(^{46}\) www.un.org/womenswatch/daw/cedaw/states.htm as of 30 March 2003
\(^{47}\) The United Nations and the Advancement of Women 1945-1996, The United Nations Blue Book Series, Volume VI, New York, p42, Reservations also concern articles 1, 2, 4, 5, 7, 9, 10, 11, 13 and 15.
\(^{48}\) CEDAW articles 2 and 3
\(^{49}\) Ibid p.43, CEDAW art.18
towards full implementation, and of the obstacles they face.\textsuperscript{50} The Committee examines the States’ reports, enters into a constructive dialogue with the State party and makes concluding comments, expressing the concerns of the Committee. The Committee also plays an important role in making States parties withdraw their reservations to core provisions of CEDAW, especially articles 2 and 16.\textsuperscript{51}

The Committee issues general recommendations that provide detailed guidance on different articles of CEDAW, and the steps necessary to comply with them. These recommendations are non-binding, but important, since they help to influence Governments to take steps towards full implementation.\textsuperscript{52}

\subsection*{2.2.6.2 The Optional Protocol}

On October 6\textsuperscript{th} 1999, the General Assembly adopted the Optional Protocol to CEDAW, which entered into force on 22 December 2000, and called on all States parties to the Convention to become party to the new instrument as soon as possible.\textsuperscript{53}

The Protocol contains two procedures, a communications procedure and an inquiry procedure. The communications procedure allows individuals, or groups of individuals, to submit claims of violations of the rights put forth in CEDAW, committed by a State party under whose jurisdiction they fall. Communications will not be considered unless all domestic remedies have been exhausted, or if they are anonymous.\textsuperscript{54}

The inquiry procedure enables the CEDAW Committee to investigate indications of grave or systematic violations against the rights set forth in CEDAW committed by a State party. The inquiry procedure shall be conducted confidentially and in cooperation with the state concerned. The Protocol allows States upon ratification or accession to declare that they do not accept the inquiry procedure, otherwise no reservations are allowed.\textsuperscript{55}

Under the communications procedure, the CEDAW Committee will be able to say what is required from States in individual circumstances, helping States to better understand the meaning of the obligations they have undertaken by acceding to CEDAW. The Optional Protocol should also encourage States to implement CEDAW to avoid complaints being made against them.\textsuperscript{56}

\begin{itemize}
\item \textsuperscript{50} Ibid p53
\item \textsuperscript{51} \url{www.un.org/womenwatch/daw/cedaw/reservations.htm} 16 April 2003
\item \textsuperscript{52} Ibid p54
\item \textsuperscript{53} Optional Protocol to the Convention on Elimination of All Forms of Discrimination against Women, General Assembly resolution A54/4, 6 October 1999. .As of March 2003: 75 signatories and 49 parties.
\item \textsuperscript{54} Optional Protocol to CEDAW, articles 2-4
\item \textsuperscript{55} Optional Protocol to CEDAW, articles 8, 10, 17
\item \textsuperscript{56} \url{www.un.org/womenwatch/daw/cedaw/why.htm} 16 April 2003
\end{itemize}
2.2.6.3 The interstate procedure

According to article 29 of CEDAW, two or more State parties can refer disputes about the interpretation and implementation of CEDAW to arbitration. If the dispute is not settled, it can be referred to the International Court of Justice.

This procedure is subject to a large number of reservations and has never been used.\(^5^7\)

2.2.6.4 Other enforcement mechanisms for women’s human rights

Other means to enforce CEDAW and the human rights put forward therein are, for example, the procedures to seek information from governments established by the Special Rapporteur on Violence against Women, the CSW Communications Procedure, enabling CSW to receive confidential communications about discrimination against women. The procedure is merely a source of information for the CSW and has no links to the legal framework of CEDAW.\(^5^8\)

Furthermore, there is the First Optional Protocol to the ICCPR, allowing individuals to submit written communications to the Human Rights Committee. Article 26 of the ICCPR provides that all people are equal before the law. The Human Rights Committee has decided that the scope of article 26 is not limited to civil and political rights; it can therefore be used to challenge discriminatory laws whether or not they relate to civil and political rights.\(^5^9\)

The Procedure for Dealing with Communications relating to Violations of Human Rights and Fundamental Freedoms, often referred to as the 1503-procedure, was adopted by ECOSOC in 1970. It authorizes the Sub-Commission on Prevention of Discrimination and Protection of Minorities to consider all communications that appear to reveal a consistent pattern of gross violations of human rights, and refer to the CHR particular situations, which then can become the subject of an ad hoc committee. The procedure of the committee is confidential.\(^6^0\)

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\(^{60}\) ECOSOC resolution 1503 of 27 May 1970
3  Marriage and Family relations

3.1  Introduction

States have very different legislation on the marital status of women. Regulations that stipulate the legal age of marriage, the legality of polygamy, and conditions for remarriage and divorce rights often have discriminatory effects on women. These provisions do in many cases exist alongside constitutional guarantees of equality and non-discrimination. 61

On the one hand, the family can be the source of positive and caring values where individuals bond through mutual respect and love. On the other hand, it can be a social institution where labour is exploited and male sexual power is violently expressed. The negative images of the self, which often inhibit women from realizing their full potential, may be linked to familial expectation. 62

3.2  Drafting history

CEDAW article 16 was subject to thorough discussions before the draft article finally was adopted by the CSW by 21 votes to 0, with 2 abstentions. 63 Some governments suggested that a separate convention should be drawn up to cover women’s legal and marriage rights, or that they should be mentioned in CEDAW as well as being the subject of a separate convention, while others rather sought to limit these rights by forwarding arguments that consideration should be given to various States’ family laws and the religious provisions therein. 64

The inclusion of a sub-paragraph or article on violence against women was not discussed during the drafting process.

Based on the twin principles of freedom of choice and equality within the marriage, article 16 clearly sets out the framework for marriage and family relations. 65

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64  Hof p.170
65  E/CN.4/2002/83, Integration of Human Rights of Women and the Gender Perspective – Violence against Women,
3.3 CEDAW article 16

Article 16 is very comprehensive and will here be dealt with sentence by sentence.

1. **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:**

Most States parties report that national constitutions and laws comply with the Convention, but in reality custom, tradition and enforcement failure contravene it.\(^66\)

Family violence is prevalent in all societies. Within family relationships women of all ages are subjected to violence of all kinds, including battering, rape, other forms of sexual assault, mental and other forms of violence.\(^67\)

Women who have traditionally performed their roles in the private or domestic sphere have long had those activities treated as inferior. As such activities are invaluable for the survival of society, there can be no justification for applying different or discriminatory laws or customs to them.\(^68\)

   **a) The same right to enter into marriage;**

   It was proposed that this paragraph also should contain the right not to marry, but after objections the proposal was withdrawn.\(^69\)

   Polygamous marriages contravene a woman’s right to equality with men, and can have such serious emotional and financial consequences for her and her dependants that such marriages ought to be discouraged and prohibited.\(^70\)

   **b) The same right freely to choose a spouse and to enter into marriage only with their free and full consent;**

A woman’s right to choose a spouse and enter freely into marriage is central to her life and to her dignity and equality as a human being.\(^71\) Forced marriage in order to strengthen family links, protect family honour and cultural ideals, is a common occurrence in many societies. Forced marriage

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\(^{66}\) General Recommendation No.21, p.15  
\(^{67}\) General Recommendation No.19, p.23  
\(^{68}\) General Recommendation 21 of CEDAW, UN 1994, p.11 and 12  
\(^{69}\) Rehof, p.173  
\(^{70}\) General Recommendation 21 of CEDAW, p.14  
\(^{71}\) General Recommendation 21 of CEDAW, p16
is a marriage conducted without the valid consent of both parties, and must not be confused with arranged marriage, which operates successfully within many communities. Forcing a victim of rape to marry the perpetrator is common in many societies.\textsuperscript{72}

c) \textit{The same rights and responsibilities during marriage and at its dissolution;}

The application of common law principles, customary or religious law, rather than the principles contained in CEDAW, have wide-ranging consequences for women since they invariably restrict their rights to equal status and responsibility within marriage. Such limitations often result in the husband being accorded the status of head of household and primary decision maker.\textsuperscript{73} Adequate performance of “wifely duties” is required for a woman in order to avoid physical and emotional threats. In the majority of countries criminal law can be invoked for assault in marriage, but not for rape.\textsuperscript{74}

In some societies, the difficulties and the humiliation a divorced woman faces keeps many women in hostile marriages.\textsuperscript{75} As in UDHR, divorce is not mentioned in CEDAW, and article 16 does not specify what kind of dissolution it refers to. The prohibition of divorce in conjunction with permission of polygamy can be discriminatory since the men can marry several women, but the women will neither have the possibility to divorce, nor to marry a second person. This situation will clearly violate the equal rights of the spouses.\textsuperscript{76}

d) \textit{The same rights and responsibilities as parents, irrespective of their marital status, in matters relating to their children; in all cases the interests of the children shall be paramount;}

The children of unions where the parents are not married do not always enjoy the same status as those born in wedlock and the father often fail to share the responsibility for his children.\textsuperscript{77}

Women that have to bear and raise children alone often find their personal development affected since their right of access to education, employment and other activities becomes restrained.\textsuperscript{78}

e) \textit{The same rights to decide freely and responsibly on the number and spacing of their children and to have access to the}

\textsuperscript{72} Report of the Special Rapporteur on Violence against Women, E/CN.4/2002/83, pt. 57f
\textsuperscript{73} General Recommendation 21 of CEDAW, p.17
\textsuperscript{74} Report of the Special Rapporteur on Violence against Women, E/CN.4/2002/83, pt. 62
\textsuperscript{76} Alfredsson & Eide, p.337
\textsuperscript{77} General Recommendation No.21, p19
\textsuperscript{78} General Recommendation.No.21, p.21
information, education and means to enable them to exercise these rights;

Historically, the main duty of women has been to bear children. The protection of women’s reproductive rights have however not been a high priority. Lack of control over their sexual and reproductive lives and poor quality health care result in the violation of this right.

The decision to have children or not must not be limited by spouse, parent, partner or Government. Women must have access to information about contraceptive measures and their use, and be guaranteed sex education and family planning services.\(^7^9\)

\textit{f) The same rights and responsibilities with regard to guardianship, wardship, trusteeship and adoption of children, or similar institutions where these concepts exist in national legislation; in all cases the interests of the children shall be paramount;}

The principle of granting parents equal status, especially when they are not married, is not always observed by States parties. Often, the children of such unions do not enjoy the same status as those born in wedlock and, where the mothers are divorced or living apart, many fathers fail to share the responsibility of care and maintenance of their children.\(^8^0\)

\textit{g) The same personal rights as husband and wife, including the right to choose a family name, a profession and an occupation;}

When a woman is obliged to change her name on marriage or at its dissolution, she is denied the right to choose her name and to preserve her individuality and identity.\(^8^1\)

\textit{h) The same right for both spouses in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property, whether free of charge or for a valuable consideration.}

Any law or custom that in the division of property grants a man a right to greater share, often based on the premise that the man alone is responsible for the support of the women and the children of his family is discriminatory and will have a serious impact on a woman’s practical ability to divorce her husband, to support herself or her family and to live in dignity as an independent person.\(^8^2\) Lack of economic independence forces many women to stay in violent relationships.\(^8^3\)

\(^7^9\) General Recommendation No.21, p.22, see also CEDAW article 10 (h).
\(^8^0\) General Recommendation No.21, pt.19
\(^8^1\) General Recommendation No.21, p.24
\(^8^2\) General Recommendation No.21 p.28
\(^8^3\) General Recommendation No. 19, p.23, see also CEDAW article 15 (2).
2. The betrothal and the marriage of a child shall have no legal effect, and all the necessary action, including legislation, shall be taken to specify a minimum age for marriage and to make the registration of marriages in an official registry compulsory.”

In many societies, young girls are prepared for marriage from a very early age, the reasons being to guarantee virginity and a longer reproductive period. Domestic law routinely prescribes younger ages for marriage for women than for men. The Committee on the Rights of the Child insists that child marriage and child bearing by girl children must stop, and that the minimum age for marriage should be equal for both sexes.

Early marriage deprives girls of an education and limits their opportunity to have roles outside the home. It prevents women from developing skills that bring them social or economic independence. Generally, early marriages result in early and prolonged childbearing, which can undermine the health of both mothers and children.

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85 A Handbook on CEDAW, p.36
4 Violence against women

4.1 Violence against women - a rookie on the human rights agenda

The issue of violence against women has only recently found its place on the international human rights agenda. Violence against women takes many forms, which are now recognized as major impediments to the rights of women to participate fully in society. This represents a major shift in perception since 1979, when CEDAW was adopted. CEDAW contains no specific provision on gender-based violence, but the CSW and the CEDAW Committee have made clear that this issue is fundamental to the provisions of the Convention.87

4.1.1 Background

The Nairobi Forward-looking Strategies for the Advancement of Women from the World Conference of 1985 recognized violence against women as an obstacle to the achievement of equality, development and peace, and recommended states to combat it, and that a full implementation of CEDAW would lead towards elimination of violence against women.88

In 1989, the Committee recommended that States should include information on violence and how to deal with it in their reports. This was affirmed in 1992 by General Recommendation No.19, which stated that violence against women was a form of gender discrimination under CEDAW, and that the full implementation of the Convention required states to take positive measures to eliminate all forms of violence against women.89 There have been no objections to General Recommendation No.19.

In 1993, the Declaration on the Elimination of Violence against Women (hereinafter referred to as DEVAW) was adopted by the General Assembly. The Declaration affirms that violence against women violates and nullifies women’s enjoyment of human rights and fundamental freedoms, and is concerned about the long-standing failure to protect those rights.90

87 Ibid p55
89 General Recommendation No.19, p.2 and 4
The issue of violence against women is one of the critical areas of concern of the Beijing Declaration and Platform for Action.  

### 4.1.2 Special Rapporteur on violence against women

The concern with the continuing violence against women led to the appointment of a Special Rapporteur in 1994. The objectives of the Special Rapporteur are to seek information on violence against women from, among others, Governments, treaty bodies and non-governmental organizations, and to recommend measures at regional, national and international levels on how to eliminate violence and its causes.

### 4.1.3 Defining violence against women

Violence against women is, according to DEVAW article 1, “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, weather occurring in public or private life.” Gender-based violence is defined by the CEDAW Committee as “violence which is directed against a woman because she is a woman or which affects women disproportionately.”

Violence against women can be divided into three categories. First, violence committed by the state, which includes violence against women in detention as well as violence against women in situations of armed conflict. Secondly, violence in the community, including for example rape, sexual assault and harassment, trafficking in women, prostitution, pornography and labour exploitation. The third category is violence in the family, including incest, infanticide, traditional practices etc.

Gender-based violence can include breaching specific provisions of CEDAW, regardless that those provisions do not mention violence.

### 4.2 Domestic violence

The CEDAW Committee refers to domestic violence as “one of the most insidious forms of violence against women.”

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91 [www.un.org/womenwatch/daw/beijing/platform/plat1.htm#concern](http://www.un.org/womenwatch/daw/beijing/platform/plat1.htm#concern) “Critical areas of concern” pt. 44 As of May 2003
93 DEVAW, General Assembly resolution 48/104, 20 December 1993
94 General Recommendation No. 19, pt. 6
96 General Recommendation No. 19, pt. 7
97 General Recommendation No. 19 p.23
4.2.1 Scope of domestic violence

There are many types of domestic violence, and the victims range from children to elderly, servants and wives, the last being the most frequent. According to DEVAW article 2, domestic violence is to be understood to encompass, but not be limited to “(p)hysical, 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…”

Many traditional practices also fall within the scope of domestic violence. For example selective abortion, malnutrition, childhood marriage, widow burning, virginity tests, and as mentioned above, female genital mutilation and dowry-related violence.\(^{98}\)

4.2.2 Causes of domestic violence

The Preamble of DEVAW locates the roots of violence against women in the “historically unequal power relations between men and women”.

Among the other causes discussed one can mention the inequality in the general structures of society, and in the family, which accept male dominance and female submissiveness. Another cause is the economic and social factors where studies point to unemployment and low wages as causes of domestic violence, since they in their turn often lead to stress and frustration. Violence does however also exist in wealthier circles.

The discussions also encompass the prevalence of alcohol and drug abuse by the perpetrator, violence as a learned behaviour, where childhood abuse leads to a violent behaviour as an adult. Certain cultural factors may also precipitate violence against women.\(^{99}\)

In the past, the State and the law intervened with regard to violence in the home only when the violence became a public nuisance. In recent times however, the approach to law has changed, and States are reaching into the privacy of the home. States are now increasingly being held responsible for human rights offences committed within the home. States are required to prevent as well as punish crimes of violence which take place in the private sphere.\(^{100}\)

Sadly, the permissive attitude of the past still prevails. The seriousness of the crime is rarely acknowledged, and many countries do not recognise

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\(^{100}\) E/CN.4/1995/42, 22 November 1994, pt. 70
them as such in their laws. The inaction of governments is perhaps the
greatest cause of violence against women.  

4.2.3 Consequences and remedies

Since there is very little statistics on violence against women it is difficult to
estimate its consequences. It is clear however, that fear is an immediate
consequence, which will lead to limited movement and independence.

Serious health problems are another consequence. Besides physical injuries,
women who have been abused are subject to depressions and personality
disorders.

Violence prevents women from participating fully in the life of the family
and in society, and prevents both society and women from reaching their
full potential.

The CEDAW Committee has made recommendations to States parties on
how to eliminate violence against women. For example, States should
ensure laws to give adequate protection to all women, encourage research
on the subject, take measures to ensure that the media respect women,
introduce education and information programmes to eliminate prejudices,
provide effective complaint procedures and remedies, establish support
services for victims and remove the defence of honour in regard to the
assault or murder of a female family member.

DEVAW clearly states in its article 4 that “States should condemn violence
against women and should not invoke any custom, tradition or religious
consideration to avoid their obligations with respect to its elimination”.

103 General Recommendation No. 19, pt.24
5  Shari’a – the sources of divine law

A basic understanding of Shari’a and the religious structures of Islam is essential for the following discussion. In this chapter a brief history of the development of Islamic law will be given, and the most important issues in relation to this thesis will be explained.

5.1 Sources and early development

5.1.1 What is Shari’a?

To understand the meaning of Shari’a, it is necessary to clarify a few things concerning Islam. The word Islam means “surrender” or “submission”, that is to say to the will of God. For a Muslim believer, the purpose of life is not simply to affirm but to actualize, not simply to profess belief in God but to realize God’s will. In comparison with Christianity you could say that emphasis within Christendom lie on orthodoxy, or correct doctrine or belief, while Islam’s emphasis lie on orthopraxy, or correct action. Of course without precluding the importance of faith.104

The literal meaning of Shari’a is “the road to the watering hole”, the clear, right, or straight path to be followed. In Islam it came to mean the divinely mandated path that Muslims were to follow.105 By the end of the eighth century an agreement between the different legal schools106 was reached that Shari’a should consist of four sources, the Quran, the Sunna of the Prophet, consensus (ijma) of the community, and analogical reasoning or deduction (qiyas).107 Although these are the sources recognised by the majority of the Muslim community, a fifth source should also be mentioned since this is still in use in countries confessing to Shi’i Islam.108

Purists of all eras, including many contemporary “fundamentalists”, have made a distinction between the divine Shari’a, defined as God’s comprehensive and perfect design for His community, and a humanly produced Shari’a, or, more precisely, the corpus of knowledge known as Fiqh, a necessarily flawed attempt to understand and implement that

105 Ibid p79
106 The legal schools of Sunni Islam. See XX
107 Esposito, p78
108 See 3.1.3 for an explanation of Shia Islam.
design.\textsuperscript{109} Thus, Shari’a can be explained as the source, or the principles, from which Islamic law, Fiqh, is derived.\textsuperscript{110}

5.1.1.1 The Quran

The Quran is the primary source of God’s revelation, principles and values, but it is not a law book. The meaning of the word Quran is recitation, and it is believed to have been revealed to the Prophet Muhammad under a period of 22 years. About five hundred of the 6666 verses in the Quran are concerned with law, many of them covering matters of prayers and ritual. Approximately eighty verses treat legal topics in the strict sense of the term: crime and punishment, contracts and family law.\textsuperscript{111}

Muslim jurists are faced with questions concerning the abrogation or repeal of the legal efficacy of certain verses of the Quran in favour of other verses.\textsuperscript{112} The content of some of the later verses appear contradictory to the earlier ones, and since the Quran is the primary source of Islamic law, the question of legal validity of every verse therein is crucial.\textsuperscript{113} (återkom till denna princip vid disk om polygami)

5.1.1.2 The Sunna of the Prophet

The belief that Muhammad was inspired by God to act wisely led to the acceptance of his example, or Sunna, as a supplement to the Quran, and thus, a material of the law. The Sunna includes what the Prophet said, what he did, and those actions that he permitted. The records of Prophetic deeds transmitted and preserved in tradition reports are called hadith.\textsuperscript{114}

Hadith literature is surrounded by controversies due to the question of their authenticity. The reason for this is that while State authorities collected the texts of the Quran soon after the death of the prophet, the Hadith were kept in a narrative tradition. It is also a historical fact that numerous of the Hadith were generated to reinforce societal norms and political expediency.\textsuperscript{115}

Recently, Muslim feminists, recognizing the importance of Hadith to Islamic law and custom have suggested the use of feminist Hadith criticism since they view the scholars of the past as men locked in a patriarchal society. The Moroccan feminist Fatima Mernissi heads a project which aims among other things to collect and disseminate hadiths supporting women’s

\textsuperscript{109} Messick, Brinkley, *The Calligraphic State – Textual Domination and History in a Muslim Society*, 1993, University of California Press, p17
\textsuperscript{110} Al Haj A.D Ajijola, *”What is Shariiah”*, New Delhi, 2002, p14
\textsuperscript{111} Esposito p77, Ali, p20
\textsuperscript{112} This is known as the principle of nashh
\textsuperscript{113} Ali, p20
\textsuperscript{114} Esposito, p80f
\textsuperscript{115} Ali, p21f

29
rights. She has also used neo-traditional methods to undermine the authority of misogynist hadiths.\textsuperscript{116}

### 5.1.1.3 Ijma - Consensus

After the death of Muhammad, consensus developed as a natural process for solving problems and making decisions – one followed the majority opinion. Despite attempts to define Ijma as this general consensus, classical Islamic jurisprudence defined this in a more restricted sense, namely that the religious authorities should act in behalf of and guide the entire Muslim community.\textsuperscript{117}

### 5.1.1.4 Qiyas - Analogical reasoning

As a source of law, Qiyas comes into operation in matters, which have not been covered by a text of the Quran or Hadith, nor determined by the consensus of opinion.\textsuperscript{118} Throughout the development of Islamic law, reason has played an important role for interpreting law. When faced with new situations or problems, a similar situation can be sought in the Quran and the Sunna of the Prophet. The key is the discovery of the effective cause or reason behind a rule. If a similar reason can be identified in a new situation or case, then the Shari’a judgement is extended to resolve that case as well.\textsuperscript{119}

### 5.1.1.5 Ijtihad – Independent juristic reasoning

In the literal sense, Ijtihad implies striving hard or strenuousness. Technically it means exercising independent juristic reasoning to provide answers, or to form an opinion on a rule of law when the Quran and Sunna are silent on a particular subject. This is done by applying Qiyas to the Quran and the Sunna. A person qualified to carry out Ijtihad is known as mujtahid. It is in Ijtihad that the Islamic legal doctrine was meant to find its evolutionary path.\textsuperscript{120}

### 5.1.2 From dynamic to static law in 632-1300

With the death of the Prophet Muhammad in 632, the Muslim Community was suddenly cut off both from further Quranic Revelations and from the Prophet’s own practice. That is, from further elaborations of the two sources mainly thought of as “secure knowledge”. Thereafter, the community

\textsuperscript{117} Esposito p85
\textsuperscript{118} Ali, p23
\textsuperscript{119} Esposito, p83
\textsuperscript{120} Ali, p23 and Hamdi, p.15
confronted the problems of developing a more detailed corpus of rules and procedures while continually adjusting to new social realities.121

By the middle of the tenth century the schools of law had already developed their basic jurisprudential procedures and had elaborated a considerable body of legal materials.122 But henceforth and until the thirteenth centuries the standard of legal reasoning declined. Often, the dependence on analogy from individual cases drew attention from the more important principles of law, and was unable to provide a rigid cadre of rules for the regulation of social, familial, and commercial matters. The possibilities for individual interpretation and selection of numerous jurists combined with the discretion of judges in the application of the law gave Islamic law almost boundless flexibility in practice.123 By 1300 only the four major schools, the Hanafi, Shafi‘i, Maliki and Hanbali, had survived. The Hanafi, Maliki and Shafi‘i schools agreed that scholars of later generations were not free to give personal or independent interpretations of the law, and declared the “gate of Ijtihad” to be closed forever. The Hanbali school and a minority of Shafi‘i writers never accepted this,124 and continued to uphold the authority of every legal scholar to use rational and independent judgement in legal questions.125

The body of principles collectively known as Shari‘a do not form a homogenous entity as these depend on interpretations of the sources, particularly the Quran and the Hadith, influenced by cultural and ethnic differences, historical contexts, colonial pasts, the sect or school of jurisprudence that a particular community subscribes to, as well as political and economic policy.126

5.1.3 Different interpretations

5.1.3.1 Sunni and Shia

Islam has two major divisions: Sunni and Shi‘a. Sunni Muslims constitute 85 percent of the world’s Muslims; Shi‘a about 15 percent. The name Sunni comes from their self-designation as ahl al-sunna wal jamaa, meaning “those who follow the Prophets example and thus belong to his community”.127 Sunni Muslims believe that Muhammad died without designating a successor, instead, he was succeeded by four caliphs, chosen by the elders, who all had been the Prophet’s companions earlier: Abu Bakr, ‘Umar, ‘Uthman and Ali. Their rule is especially significant for Sunni

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121 Messick, p. 17
123 Lapidus, p. 194
124 "The principle of taqlid": obedience to the established teachings.
125 Lapidus, p. 193
126 Ali, p. 42
127 Esposito, p. 4 and 53
Muslims since it, together with the period of Muhammad, is considered to be the normative period to which Muslims have looked back to for inspiration and guidance.\footnote{128 Esposito, p. 37f}

The Shi’a, or the party of Ali, is generally defined as those Muslims who believe that Ali, cousin and son-in-law of Muhammad was the Prophets chosen successor but was denied his proper place. The Shi’a recognize a biological and spiritual line of leaders of the Muslim Community, called Imams, whom are believed to have descended from the Prophet through his daughter Fatima and Ali.\footnote{129 Roded, p. 58} The Imam is not considered to be a prophet, but is divinely inspired and sinless. He is both a political leader and a religious guide.\footnote{130 Esposito p. 45} Since the Shi’a Muslims regard the Imam as the supreme legal interpreter, they reject Ijma and Qiyas as legal sources.\footnote{131 Esposito, p. 85} According to most Shi’is, the last imam went into occultation 874 and will reappear when God deems it appropriate.\footnote{132 Roded, p. 58f} In the absence of the Imam, qualified religious scholars serve as his representatives. The Shi’a have also elaborated their own hadith and law.\footnote{133 Lapidus, p. 116, Esposito, p. 85}

In the past, tensions between Shi’is and Sunnis ran high. In modern times, however, the call for the renewal of friendly relations between the two has grown and differences have been minimized. Nevertheless, certain practices unique to the Shi’is are repugnant to Sunnis. The most outstanding is Shi’i recognition of a form of contractual, temporary marriage in which the woman receives remuneration, a practice regarded illegal by the Sunnis. Shi’ism has also been viewed as an oppositional, popular and more emotional strain of Islam as opposed to the legalist bent of Sunni scholars.\footnote{134 Roded, p. 59}

\subsection*{5.1.3.2 Schools of law}

Shari’a has its origin in the efforts of reform of existing legal standards in the seventh century. This task was not the work of a single group; it was carried out in many different regions, by men who in each place formed a school of law.\footnote{135 Lapidus, p. 102f} The travels of scholars and students in search of hadith, and the appointment of provincial judges introduced the schools into new provinces.\footnote{136 Lapidus, p. 164} By the eleventh century, everyone was considered to be a member of one of the schools of law on the basis of birth, city or region.\footnote{137 Lapidus, p. 177}
The principal Sunni schools are the Hanafi, Shafi'i, Maliki and Hanbali. Through the law schools, the scholars, commonly known as *ulama*, organized higher education and trained teachers and judicial administrators.\(^{138}\) The Hanafi and Hanbali schools were both Iraqi in origin, while Shafi'i first developed in Egypt and the Maliki school in the Egypt/Northern African region.\(^{139}\)

Shi'a Islam has also generated its own schools, or sects; Jafari, Ismaili, Zaydi, Usuli, Akbari and others.\(^{140}\)

### 5.2 Shari'a of today

Notable about the Islamic world of today is the neo-Islamic movement or the Islamic revivalism, sometimes in the form of extremism. Well known movements are the Muslim Brotherhood and the Hizbullah, working towards a reimplementation of shari'a based laws.\(^{141}\) Islamic revivalism is reflected in an increased emphasis on religious observances, religious literature, television and radio programs and the growth of new Islamic associations.\(^{142}\) Islamic movements range from moderates who work within existing political systems to violent revolutionaries; from open membership to secret cells; and from democratic to totalitarian.\(^{143}\)

Although revivalists advocate for change through ijtihad, the majority of them tend to accept past practice and are only taking the initiative to change areas not already covered by Islamic law.\(^{144}\)

In spite of the fact that neo-Islamic movements in the Arab world have received a great deal of scholarly attention in recent years, their ambiguous and changing positions on women’s roles in Islamic society has only begun to be studied.\(^{145}\)

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\(^{138}\) Lapidus, p. 253  
\(^{139}\) Lapidus, p. 164f  
\(^{140}\) Esposito, p. 85f  
\(^{142}\) Esposito, p. 156  
\(^{143}\) Esposito, p. 165  
\(^{144}\) Esposito, p. 154  
\(^{145}\) Roded, p. 257
6 Three Country Examples

6.1 Tunisia

6.1.1 Historical background and political situation

Tunisia achieved formal independence from France in 1956. The same year, Islamic courts, which used to preside over family law cases, were abolished. This was followed by the closure of the centre of Islamic learning, new liberal laws that granted women the right to marry without a guardian, equality between men and women with regard to divorce, and prohibition of polygamy and the wearing of the hijab. President Bourguiba’s religious reforms were so complete that social observers in the 1960’s questioned whether Tunisia might have entered a post-Islamic age.\footnote{Hamdi, Mohammed Elihachmi, \textit{The Politicisation of Islam: A Case Study of Tunisia}, 1998, Westview Press, p. 13, p. 158}

Socialism was introduced by President Bourguiba in 1961, based on the claim that the Prophet’s companions were socialists even before the term was invented. Corruption and inefficiency soon led to public outcry, and the economic failures and extreme secularism opened the way for the Tunisian Islamic movement.\footnote{Hamdi, p. 7ff, p. 27f}

The battle between the authorities and the Islamists reached its peak in 1987 when the entire state apparatus was mobilised against the Islamists, today known as Al-Nahda.\footnote{The Arabic word \textit{Nahda} means renaissance.} Al-Nahda opposed the political and social grants to women in the Personal Status Code as being un-Islamic, but later changed to meaning that it was just part of a different school of law. That same year Bourguiba was overthrown by his own prime-minister Ben Ali, who adopted what looked like a more positive stand against Islam in general, but which eventually led to a total attack on Al-Nahda, forcing its leaders into exile.\footnote{Hamdi, p. 55ff, p. 65, p. 72}

According to Human Rights Watch, government critics and human rights activists were arrested or harassed and hundreds of political prisoners confined under harsh conditions during 2002. Media allowed almost no criticism of the government, and opposition parties were either banned or actively impeded, the chief target for repression being the Islamist movement Al-Nahda.\footnote{Human Rights Watch World Report 2002, p. 473}
The wives of suspected Islamists were harassed by the Police, and the leading independent women’s rights group was occasionally prevented from convening public meetings. In spite of this, Tunisian women have since independence made considerable advances towards equality with men.\textsuperscript{151}

### 6.1.1.1 Tunisian shari’a in marriage and family relations

Tunisia's legal system of today is based upon a combination of French civil law and Shari’a. The religious elite in Tunisia has historically belonged to the Hanafi school of law, although Malikis constitute the majority of the population.\textsuperscript{152}

Although considered a very secular state, the Tunisian Constitution declares in its first article that Islam is state religion, and in article 38 that the religion of the president must be Islam. In order to comply with this, President Bourguiba tried to define a form of Islam that could be compatible with his liberal aims, which were to be achieved through ijtihad.\textsuperscript{153}

The Law of Personal Status was inspired by unofficial draft codes of Maliki and Hanafi family law and has been extended to apply not only to Muslims, but also to all Tunisian citizens. A notable feature of the Law of Personal Status is that it states different minimum ages for marriage, 20 for males and 17 for females. During marriage are the spouses required to treat each other well and fulfil their marital duties “as required by custom and usage”.\textsuperscript{154}

Under Tunisian law polygamy is forbidden, and constitutes a criminal offence, rendering a man who married before his previous marriage was dissolved liable to a penalty of one year’s imprisonment.\textsuperscript{155}

### 6.1.2 Declarations and Reservations to CEDAW

Tunisia ratified CEDAW in 1985 with reservations to articles 9, paragraph 2; and 16, paragraph 1 (c), (d), (f), (g) (h), a declaration concerning article 15, paragraph 4, and a general declaration.

In its general declaration to CEDAW the Tunisian government declares that it will not take any decision to conform to CEDAW if such a decision would conflict with the provisions of chapter I of the Tunisian Constitution. The declaration to article 15, paragraph 4 is formulated in a similar way, stating

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\textsuperscript{151} Human Rights Watch World Report 2002, p. 476  
\textsuperscript{152} Lapidus, p. 699  
\textsuperscript{153} www.law.emory.edu/IFL/index2.html as of May 2003, Hamdi, p. 15  
\textsuperscript{154} www.law.emory.edu/IFL/index2.html as of May 2003  
that the article must not be interpreted in a manner which conflicts with the provisions of chapters 23 and 61 of the Personal Status Code.\textsuperscript{156}

Reservations have been made, first, to the provisions in article 9, paragraph 2 since it “must not conflict with the provisions of chapter VI of the Tunisian Nationality Code”. Secondly, Tunisia does not consider itself bound by article 16, paragraphs 1 (c), (d) and (f), and declares that paragraphs 1 (g) and (h) must not conflict with the provisions of the Personal Status Code concerning the granting of family names to children and the acquisition of property through inheritance. Last, Tunisia declares that it shall not be bound by article 29, paragraph 1, concerning the settlement of disputes between States Parties on the interpretation of the Convention, and goes on to consider that the disputes covered by article 29 should only be submitted to the International Court of Justice with the consent of all parties to the dispute.\textsuperscript{157}

\textbf{6.1.3 The implementation of CEDAW Article 16 in Tunisia}

According to the CEDAW Committee, discriminatory provisions, especially in the nationality law and the Personal Status Code, continues to be a concern. Although the Constitution provides for the equality of all citizens and the 1997 amendment to the Constitution introduced the concept of non-discrimination with regard to political parties, the Constitution does not contain a specific provision prohibiting discrimination against women and there is no definition of such discrimination in accordance with article 1 of the Convention, which prohibits both direct and indirect discrimination. The Committee is also concerned at the lack of legal remedies to ensure the Constitutional provision on equality is enforced or court decisions in which women have obtained redress for acts of discrimination.\textsuperscript{158}

Another concern is that there is a lack of systematic data collection on violence against women, including domestic violence. No specific legislation has been enacted to combat domestic violence and sexual harassment. The Committee is concerned that article 218 of the Penal Code provides that the withdrawal of a case by a victim terminates any proceeding.\textsuperscript{159}

\textsuperscript{156} Declarations, reservations, objections and notifications of withdrawal of reservations relating to the Convention on the Elimination of All Forms of Discrimination against Women, CEDAW/SP/1996/2, 8 February 1996

\textsuperscript{157} Declarations, reservations, objections and notifications of withdrawal of reservations relating to the Convention on the Elimination of All Forms of Discrimination against Women, CEDAW/SP/1996/2, 8 February 1996

\textsuperscript{158} Concluding Observation Tunisia CEDAW/C/2002/II/CRP.3/Add.6, pt.20 and 22

\textsuperscript{159} Concluding Observation Tunisia CEDAW/C/2002/II/CRP.3/Add.6, pt. 24
The CEDAW Committee urges Tunisia to withdraw its reservations, include a prohibition on discrimination against women in national law and to enact specific legislation on domestic violence.\textsuperscript{160}

6.2 Egypt

6.2.1 Historical background and political situation

Due to Britain’s long-standing presence in Egypt, and the continued British political influence despite nominal independence in 1922, Egyptian politics were dominated by the demands for national independence up until 1956. During this period the Muslim Brotherhood played a crucial role in rallying its support for the cause of national liberation.\textsuperscript{161}

Shari’a courts were integrated into the national court system in 1956, with separate judges for the legislation applicable to cases involving Copts and Muslims.\textsuperscript{162}

During the Nasser regime between 1956 and 1970, members of the Muslim Brotherhood were persecuted. The Nasser regime’s policy of creating martyrs was a decisive factor for the future of Islamist thinking and practice.\textsuperscript{163}

Nasser’s regime was followed by the nepotism of Sadat, focusing on ridding himself of the leftist wing. Sadat stopped the persecution of the Brotherhood, but also made a clear distinction between religion and politics. It was this distinction that eventually led to his assassination in 1981.\textsuperscript{164}

Sadat was succeeded by his Vice-president Hosni Mubarak, who has given Islamic movements far greater freedom in recent years, and the state seems to be willing to concede on certain issues in order to ease the pressure. Islamist sympathizers and especially members of the Muslim Brotherhood today work actively inside ministries, unions, syndicates and the media to get their message across.\textsuperscript{165}

Feminist activity in Egypt had started in the late 1880’s – a time of great national turbulence as a result of British colonial domination. The first Egyptian Women’s Union was set up in 1923. Soon after, the differences in strategies and ways of thinking between members became apparent, and led to the establishment of other associations. Today there are various groups

\textsuperscript{160} Concluding Observation Tunisia CEDAW/C/2002/II/CRP.3/Add.6
\textsuperscript{161} Karam, Azza M. Women, Islamisms and the State – Contemporary Feminisms in Egypt, 1998, Macmillan Press Ltd, p. 57
\textsuperscript{162} www.emory.law.edu/IFL/index_2.html
\textsuperscript{163} Karam, p.62
\textsuperscript{164} Karam, p.65ff
\textsuperscript{165} Karam, p.73f
formed around various issues. There are state-sponsored organizations, but those who are not find themselves hampered by laws that prohibit “any involvement in politics, or political activity”.  

6.2.1.1 Egyptian Shari’a in Marriage and Family relations

Article 2 of the Egyptian Constitution provides that Shari’a is “the principal source of legislation”, as amended on 22 May 1980, being a significant change from the Constitution of 1971, which had referred to Shari’a as only “a principal source of legislation”.  

Even though most Egyptian laws are to a large extent inspired by European legal systems – the only law that is quite explicitly based on the Shari’a is the Personal Status Law, which deals with marriage, divorce and custody of children. The Personal Status Law is a legal domain governed by the Shari’a according to the Hanafite school, which is the predominant school of law in Egypt.  

Article 11 of the Egyptian Constitution, which states that the State shall enable a woman to reconcile her duties towards her family with her work in society, appears to entrench the woman’s primary role as mother and homemaker, although the Egyptian Constitution guarantees equality of men and women.  

The Civil Code, article 280, states that recourse should be had to the most appropriate opinion from the Hanafi school in the absence of any textual provision in the legislation.  

The minimum marriage age is 18 for males and 16 for females. Polygamy is permissible as long as existing and intended wives are notified.  

A husband can exercise his right to divorce without having to declare any grounds for it. There are two forms of divorce: the irrevocable one and the revocable one. The former is effective on its occurrence while the revocable divorce is not effective until the lapse of three months. During this time the husband may reinstate his wife with or without her consent. The wife may obtain a revocable divorce on certain grounds, such as incurable defect of the husband, material or moral harm if the husband marries polygamously, non-payment of maintenance, or if the husband is imprisoned for more than three years. The Personal Status Law was amended in 2000, giving a

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166 Karam, p.101
168 Karam, p.144
169 CEDAW Concluding Observation Egypt 02/02/2001, p.325 and 332
170 www.emory.law.edu/IFL/index2.html as of May 2003
171 www.emory.law.edu/IFL/index2.html as of May 2003
172 Karam, Azza M, p. 146f
173 www.emory.law.edu/IFL/index2.html as of May 2003
woman the right to irrevocable divorce if she forfeits all her financial claims and returns the dowry. This has to be preceded by an attempt to reconcile the spouses, carried out by two arbitrators within a period of three months. The requirement of an attempt at arbitration and reconciliation is based on the Shari’a principles.\textsuperscript{174}

In case of divorce, mothers have custody of boys until they reach the age of 10, whilst girls remain in their mothers care until the age of 12. If the divorced mother remarries she loses custody of her children, who should then be placed in the custody of their maternal grandmother, or, if that is not feasible, their paternal grandmother, until they reach the age at which custody reverts to the father. The law seems to be implying that only women should look after young children.\textsuperscript{175}

The distinction between rape and other forms of violence against women (e.g. domestic violence) has yet to be made clearly and explicitly. Until recently, “rape” and “violence against women” have been used interchangeably, since no other form of violence against women has been distinguished or at least elaborated politically. The debate on punishment for rape within marriage is alien to Egyptian legal and cultural formulations.\textsuperscript{176}

Egyptian government encourages contraception, but when it comes to abortion Government policy is based on religious interpretations and pregnant women are only allowed a legal abortion if their health is threatened.\textsuperscript{177}

In May 2001 the State Consultative Council of Egypt dismissed the recent parliamentary plea to amend the 1975 Nationality Law. Under this law an Egyptian man can transfer his nationality to his children while an Egyptian woman can do so only under limited circumstances.\textsuperscript{178}

### 6.2.2 Reservations to CEDAW

Egypt ratified CEDAW in 1981, with reservations to articles 2, 9, 16 and 29.

To article 2, which require the States Parties to embody the principle of equality in national legislation and to establish legal protection of the rights of women, Egypt has put down a general reservation, stating its willingness to comply with it as long as it does not run counter to Shari’a.\textsuperscript{179}

\begin{thebibliography}{9}
\bibitem{Karam} Karam, p. 147
\bibitem{Karam1} Karam, p.169
\bibitem{Karam2} Karam, p. 173
\bibitem{HumanRights} Human Rights Watch World Report 2002, p. 539
\bibitem{CEDAW} CEDAW/SP/1996/2
\end{thebibliography}
The reservation to article 9 concerns the equal rights between men and women with respect to the nationality of their children. Egypt considers that the child’s acquisition of his father’s nationality is most suitable for the child, and that it is customary for a woman to agree, upon marrying an alien, that her children shall be of the father’s nationality.180

The reservation to article 16 is motivated with it being “out of respect for the sacrosanct nature of the firm religious beliefs that govern marital situations in Egypt and which may not be called in question”. Further, the government of Egypt states that there has to be an equivalence of rights and duties to guarantee true equality between the spouses, and that the wife’s rights to divorce is restricted due to the fact that the husband is obliged to maintain her while she retain full rights over her property.181

Finally, Egypt has made a reservation against article 29 concerning the submission to an arbitral body of any dispute that may arise between States concerning the interpretation of the Convention.182

6.2.3 The implementation of CEDAW Article 16 in Egypt

Since the Egyptian ratification of CEDAW in 1981, Egypt has submitted three reports to the CEDAW Committee, the last one examined in 2001.

In its Concluding Observation the Committee noted that the persistence of patriarchal attitudes with respect to the role of women and men in the family and in society limit the full implementation of CEDAW. A perception enhanced by the stereotypical portrayal of women in the media, which is likely to encourage discrimination and undermine any attempts at equality.183

The Shari’ a based laws accounted for in section 6.2.1.1 should of course also be considered as examples of failures to implement CEDAW article 16.

Apart from the legal examples above, the main concerns expressed by the CEDAW Committee are: The lack of a holistic approach to the prevention and elimination of violence against women, for example marital rape, violence against women in detention centres and crimes committed in the name of honour, the high number of early marriages of girls, and the continued legal authorization of polygamy.184

180 CEDAW/SP/1996/2
181 CEDAW/SP/1996/2
182 CEDAW/SP/1996/2
183 CEDAW Concluding Observation Egypt 02/02/2001, p.325 and 334
184 CEDAW Concluding Observation Egypt 02/02/2001, p.334, 352, 354
The Government of Egypt is urged by the Committee to conduct a survey to determine the extent of violence against women, and to assess the impact of existing measures to address the various forms of violence.

6.3 Yemen

6.3.1 Historical background and political situation

Yemen has, since ancient times, been a centre of an agricultural and state-organised society, ruled by the Zaydi Dynasty from 893 to 1962. Yemen entered the colonial age in 1839, when Britain seized the port of Aden. The north was incorporated in the Ottoman Empire between 1872 and 1918, but the British control in the south would not be lifted until 1967.

A military coup in 1962 established the Yemen Arab Republic in the north, and the British withdrawal five years later led to the creation of the People’s Republic of South Yemen, later the People’s Democratic Republic of Yemen. Relations between the two Yemens were strained, but began to improve by the early 1980’s.

In 1975 a commission of Shari’a jurists was created to participate in the legislative restatement of Shari’a materials in the Yemen Arab Republic. These legislative efforts were being initiated in a postcolonial era of questionings of Western values and reassertions of indigenous ones.

After almost 20 years, the Yemen Arab Republic of the north and the People’s Democratic Republic of Yemen succeeded in their unification attempts. A unity constitution was agreed upon in May 1990. It affirmed Yemen's commitment to free elections, a multiparty political system, the right to own private property, equality under the law, and respect of basic human rights.

In spite of this, the human rights record of Yemen is very poor; the government has failed to implement basic human rights in most areas. Reports of kidnapping of foreign tourists and diplomats are numerous, as are assaults on freedom of expression. Several journalists have been questioned and detained by security forces without charge, and opposition or independent newspapers have been targets of defamation suits brought by the Ministry of Information. Internet access is only available through a government company, and websites containing political content are blocked. The government also seems reluctant to take legal measures against private

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185 Lapidus, p. 668f
186 Messick p. 8
187 www.emory.law.edu/IFL/index2.html as of May 2003
188 Messick, p. 68
jails and prisons, mostly operated by prominent tribal and regional leaders.\textsuperscript{190}

6.3.1.1 Yemeni Shari’a in marriage and family relations

Yemenis are divided into two principal Islamic religious groups: the Zaidi school which is part of the Shi’a tradition, found in the north and northwest, and the Shafii school of Sunni Muslims, found in the south and southeast. The Zaidi school is comparatively unknown, having flourished mainly in Yemen. The differences between these two schools are minor.\textsuperscript{191}

The Constitution of Yemen, adopted in 1991, declares in its first two articles Yemen an “Arabic Islamic State” and Islam as the official state religion. Article 3 states that “Islamic Shari’a shall be the source of all legislation”. Article 31 states that women “have rights and duties, which are guaranteed and assigned by Shari’a and stipulated by law.”\textsuperscript{192}

The women of Yemen face institutionalised discrimination, especially in personal status and criminal law. Although women enjoy the same “general rights and obligations” as men under the constitution of Yemen, they face discrimination in national legislation. Under law 20/1992 on personal status, women are required to sue for divorce while men can divorce at will, and only a male guardian can contract marriage for women, who in turn have no way to give meaningful consent. Divorced mothers, unlike divorced fathers, lose custody of their children upon remarriage.\textsuperscript{193} The Personal Status Act goes on stating in its article 40 that the wife should obey the husband, that she must move in with him, permit him to have intercourse with her and not leave the home without his permission.\textsuperscript{194}

In 1999, the rarely enforced minimum marriage age of fifteen for women was abolished, and instead the onset of puberty was set as a requirement for consummation of marriage, interpreted by conservatives as the age of nine.\textsuperscript{195} An amendment to the personal status law to introduce a minimum age – eighteen years – for marriage was introduced in 2001, but the proposal has not been passed by the parliament.\textsuperscript{196}

\textsuperscript{192} www.emory.law.edu/IFL/index2.html as of May 2003
\textsuperscript{194} E/CN.4/2002/83, pt.84
\textsuperscript{195} Human Rights Watch World Report 2001: Yemen: Human Rights Developments
\textsuperscript{196} Human Rights Watch World Report 2002, pt. 483
6.3.2 Reservations to CEDAW

Yemen has declared that it does not consider itself bound by article 29, paragraph 1, relating to the settlement of disputes concerning the application or interpretation of the convention.\textsuperscript{197}

6.3.3 The Implementation of CEDAW Article 16 in Yemen

The former Democratic Yemen ratified CEDAW in 1984, and when South Yemen and Northern Yemen became one single state in 1990, it acceded to the Convention. The latest periodic report was submitted to the CEDAW Committee by Yemen in 2002.

The Committee expressed its concern with the many discriminatory legal provisions, for example in the Penal Code, where a husband who kills his wife in relation to adultery is not charged with murder. The Committee is also concerned that the 1999 amendment to the Law of Personal Status has led to further discrimination against women in the family by denying women the right to equality in marriage and divorce.\textsuperscript{198}

Further, the Committee notes with concern the high rates of early marriages and high maternal mortality rates.\textsuperscript{199}

The Committee urges the State party to review existing legislation and amend discriminatory provisions affecting women’s rights within the family in order to bring them into harmony with the Constitution and the Convention, to raise the minimum age of marriage for girls, and to develop health programmes to reduce maternal mortality.\textsuperscript{200}

The Committee recommends that the State party conduct research into the extent of violence against women and girls and collect data on all forms of violence, including violence committed within the family. With regard to the practice of female genital mutilation, the Committee calls on the State party to enhance its activities to eradicate this harmful, traditional practice, especially through awareness-raising campaigns.\textsuperscript{201}

\textsuperscript{197} CEDAW/SP/1996/2, 8 February 1996
\textsuperscript{198} Concluding Observation Yemen CEDAW/C/2002/EXC/CRP.3/Add.6/Rev.1, pts.15 and 21
\textsuperscript{199} CEDAW/C/2002/EXC/CRP.3/Add.6/Rev.1, pts. 25, 27
\textsuperscript{200} CEDAW/C/2002/EXC/CRP.3/Add.6/Rev.1, pts. 24, 26, 28
\textsuperscript{201} CEDAW/C/2002/EXC/CRP.3/Add.6/Rev.1, pt. 30
6.4 A Comment on the Three Country Examples

With common denominators such as all having been parts of the Arab Empire and later dominated by the British and the French under the colonial era, these three countries, although all being referred to as “Arabic”, are not very much like the other.

6.4.1 The reservations to CEDAW

Article 28, paragraph 2, of CEDAW adopts the impermissibility principle contained in the Vienna Convention on the Law of Treaties. This means that reservations to CEDAW are not permitted if they run counter to the object and purpose of the Convention.

Article 2 and 16 are considered by the Committee to be core provisions of the Convention. Article 2 is viewed as central to the object and purpose of CEDAW, and that States parties which ratify it do so because they believe that discrimination against women in all its forms should be eliminated, and that the strategies set out in article 2 should be implemented. The CEDAW Committee also remains convinced that reservations to article 16, whether lodged for national, traditional, religious or cultural reasons, are incompatible with the Convention and should be reviewed and modified or withdrawn. This view is also held by several states parties to the Convention who have objected to these reservations.

6.4.1.1 Remarks regarding Tunisia, Egypt and Yemen in this context

Egypt has entered a general reservation to article 2 of CEDAW, although the Egyptian constitution prohibits discrimination. The constitution does, on the other hand, also promote the principles of Shari’a as the basis for all laws.

The reservations of Tunisia are the most encompassing when compared to Egypt and Yemen, but are not explicitly based on Shari’a. The reservation refers however to chapter 1 of the Tunisian constitution, which states that Islam is state religion.

Yemen has posed no reservations to the core provisions of CEDAW, but does on the other hand show great failure in its implementation of it, much due to the conservative laws based on Shari’a. The government of Yemen seems to make the suggestion that the divine nature of its constitution and other laws grants them the right to ignore human-made laws such as CEDAW.

6.4.2 Remarks on some of the Cultural practices in the family that violate women’s rights

FGM is believed to have started in Egypt some 2,000 years ago, and is still practiced there and in Yemen. Even though FGM predates Islam, religious reasons are sometimes given for its continuation.\textsuperscript{203}

Women are often seen to embody the honour of the men to whom they “belong”, and as such their virginity and chastity must be guarded. Honour killings are reportedly taking place in both Egypt and Yemen. Both countries Penal Codes allow for a defence to be based on honour. Honour crimes are not confined to Muslim communities only, and cannot be considered to be of Islamic origin. Alarmingly, the number of honour killings is on the rise as the perception of what constitutes honour and what damages it widens.\textsuperscript{204}

From a CEDAW point of view, I find it interesting that none of these countries have made any reservation against article 5 of the Convention. Article 5 states that all States Parties shall take measures to modify social and cultural patterns, and work towards an elimination of prejudices and customary practices based on the idea of inferiority or superiority of either of the sexes.

The gist of this is that since these practices are not necessarily assignable to Islam, there is no reason for them to be safeguarded by it either.

\textsuperscript{203} E/CN.4/2002/83, pt.12, 14
\textsuperscript{204} E/CN.4/2002/83, pt.21, 28, 34, 35
7  CEDAW and Shari‘a – a realistic match?

The previous chapters have provided a background to Islamic law and Women’s rights. We have also taken a closer look at the implementation of CEDAW article 16 in Tunisia, Egypt and Yemen. With this in mind, we will now go on to discussing how, and if, CEDAW and Shar‘ia can coexist.

7.1 The Human Rights tradition within Islam

The individualism characteristic of Western civilization was a fundamental ingredient in the development of human rights concepts. Individualism, however, is not a characteristic feature of Muslim societies or Islamic culture. At the rise of Islam, the mainstream Islamic thought tended to stress not the rights of human beings, but rather their duties to obey God’s perfect law, through which justice would be achieved. Still today one finds this emphasis on duties.

In writings on the relationship Islamic-International law, many Muslims have espoused a wide range of opinions on rights – from the assertion that international human rights are fully compatible with Islam, to the claim that international human rights are products of alien western culture, representing values repugnant to Islam.

Although Islamic countries as member States to the U.N. has ratified many of its conventions and undertaken binding legal obligations, their dissatisfaction at what they perceive as a secularisation or westernisation of international human rights instruments is evident. CEDAW has evoked particularly strong objections from many Islamic countries on the basis that some of its provisions contain values and pronouncements that are contrary to the Shari‘a. A clear manifestation of this objection is the amount of reservations made to CEDAW in the name of Shari‘a.

Muslims in the 1980’s produced a large literature trying to define were Islam stands on human rights and comparing Islam and international human rights. The very existence of this literature, and the frequent reference to international human rights even by Muslims who quarrel with these show that international human rights concepts exists not only outside Islamic culture.

205 Mayer, p.43ff
206 Mayer, p.6
207 Ali, p. 1f
208 Mayer, p.9
It is difficult to maintain that Muslim countries are outsiders to the present system of international law. Muslim countries have, without exception, joined the international community under United Nations auspices; they have agreed to be bound by international law. Muslim nations, like other nations, contribute to the formulation of international law in working with other countries in the UN, and in drawing up and ratifying treaties and conventions. 209

Except when it comes to CEDAW, there has been little to distinguish the responses of the governments of Muslim countries to international human right’s principles from those of non-Muslim nations. Muslim countries have uneven records of ratifying the major HR conventions, and the dissimilarities in the patterns of ratification and non-ratification indicate that, from the governmental perspective, there is no single, definitive interpretation of Islamic rights principles standing in the way of accepting international human rights. 210

7.2 The Right to Religion and Culture

Despite all international norms and standards, the tension between universal human rights and culture is a part of the everyday life of millions of people. Cultural markers and cultural identity that allow a group to stand united against a more powerful majority often entail restrictions on the rights of women. 211

UDHR article 18 states that everyone has the right to freedom of religion, and that this right includes the freedom to manifest that religion in “teaching, practice, worship and observance”. This right is to be exercised by individuals, not by governments over its subjects. International law does not accept that fundamental human rights may be restricted or permanently curtailed by reference to the requirements of any particular religion. 212

The Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief states that discrimination on the grounds of religion shall be condemned as a violation of human rights and fundamental freedoms. 213

7.2.1 State Responsibility

States are responsible for bringing their domestic law and practice into conformity with their obligations under international law to protect and

209 Mayer, p.10
210 Mayer, p.11
211 E/CN.4/2002/83, pt.1 and 5
212 Mayer, p.65
213 Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, General Assembly resolution 36/55 of 25 November 1981
promote human rights. This responsibility does not only apply to laws enacted by state organs, but also to those of religious or customary sources. This means that all inconsistencies between international human rights law and national religious and customary laws have to be removed. 214

Article 4 of the DEVAW states that “States should condemn violence against women and should not invoke any custom, tradition or religious consideration to avoid their obligations with respect to its elimination”. 215

7.3 Are the Rights in CEDAW article 16 Customary International Law?

7.3.1 Character of Customary International Law

The fundamental significance of a norm’s customary character is that the norm binds states that are not parties to that particular instrument. 216

According to the Statute of the International Court of Justice, the Court shall apply international custom as evidence of a general practice accepted as law, when settling disputes submitted to it. 217

For the establishment of a customary rule, several requisites have to be fulfilled. First, there has to be a sufficient degree of state practice by a number of states concerning a situation falling within the domain of international relations. Secondly, there has to be a repetition of that practice over a considerable period of time. Thirdly, the practice has to be consistent with prevailing international law, and finally, there has to be general consent in the practice by other states. 218

A customary rule does not arise and exist once and for all. It has to be confirmed repeatedly by State practice and accompanied by opinio juris. If the substance of State practice change, so will the content of the customary rule. 219

215 DEVAW, General Assembly resolution 48/104 of 20 December 1993
217 Statute of the International Court of Justice, art.38 (1) (b)
219 Villiger, Mark E, Ibis, p. 61
7.3.2 Applied to CEDAW article 16

Customary international law is in general quite difficult to prove, and to establish a principle in customary international law that prohibits all kinds of discrimination on grounds of gender would be very difficult. There is however a few authors that support the existence of such a principle, but its scope would be problematic and controversial.\(^{220}\)

The determination of whether CEDAW article 16 is a part of customary international law depend on several factors, such as the degree of unanimity of its adoption, the intention of the supporting governments, and the existence of contrary state practice.\(^{221}\) Although a great number of states have ratified CEDAW, the amount of reservations to it, and to article 16 in particular, makes it difficult to argue that CEDAW has become such a norm.\(^{222}\)

On the other hand there are suggestions that the UDHR has entered the status of customary international law, which would include the right to equality, the right to marry and the right to equal rights in marriage and divorce.\(^{223}\)

CEDAW article 16.2 concerning child marriage might constitute an exception since the Convention on the Rights of the Child is the most widely ratified Convention in the world, indicating international consensus on the norms contained in its provisions.\(^{224}\)

7.3.2.1 Domestic Violence

Many cultural practices in the family involve “severe pain and suffering” and may be considered “torture like” in their manifestation. The right to be free from torture is considered by many scholars to be jus cogens, meaning that it is a basic principle of international law which states are not allowed to contract out of.\(^{225}\)

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\(^{222}\) Hossain, Sara, “Women’s Rights and Personal Laws in South Asia”, in Human Rights of Women – National and International Perspectives, edited by Rebecca J. Cook, University of Pennsylvania Press 1994, p. 485. For a discussion of whether the reservations can be seen as a strategy directed at internal political opposition see Jonas Svensson \(^{223}\) Mayer, p. 64


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7.4 The work of the CEDAW Committee – consistency and efficiency

In my opinion, being the monitoring body of CEDAW, the CEDAW Committee faces a great challenge, and great responsibility as the main instrument with which to support and pressure States parties to the Convention in their implementation efforts. In order to do this efficiently, it is important that the work of the CEDAW Committee is consistent.

In the cases of Tunisia, Egypt and Yemen, the Committee address the problems of discriminatory provisions in the national law of each country and also give examples of such provisions. This seems to be done without regard to the reservations made by Tunisia and Egypt, since the non-compliance with these articles is commented upon anyway.

The length of the Concluding Comments are approximately the same, and there are both pro’s and con’s with regard to that. A longer comment would be able to address the various issues in detail and with more depth. Today, the issues at concern are merely being introduced and then urged to be acted upon. I believe that the few pinpointed law provisions serve as good examples but do not reflect the scope of discriminatory laws in that particular country. On the other hand it is not the Committee’s job to rewrite the laws of these countries.

There seems to be a general consensus that the advancement of women will only bring good to the world. In spite of this, there is a reluctance to support this struggle fully, even within the U.N. According to CEDAW article 20, shall the Committee meet for a period of “not more than two weeks annually”, while the Committee on the Rights of the Child, Committee on the Elimination of Racial Discrimination, and the Committee against Torture has no such time limit. This lack of resources is a factor that indeed should limit the efficiency and affect the monitoring ability of the Committee in a negative way.226

Even though no sanctions exist to control the implementation of CEDAW, it is clear that the Convention and its Committee has an important role to play in the process of achieving equality. Most states have established Women’s Commissions with the, at least official, goal to implement CEDAW in respective country, and these commissions will hopefully lead the way towards change. Four years might seem as a long time in between meetings with these countries, and the members of the Committee changes. But the

226 Convention on the Rights of the Child, Article 43 (10), International Convention on the Elimination of All Forms of Racial Discrimination, Article 10, Convention against Torture and Other Cruel or Inhuman or Degrading Treatment or Punishment, Article 18 (2) and 18 (2)(4)
establishment of a good contact, and the encouragement from the Committee will, is my belief, in time achieve goals set.
8 Conclusion

In this thesis I have tried to look at family relations, marriage in particular, and the consequences they might bear with them for women when different interpretations of Shari’a is applied.

I think it is important to bear in mind that all these problems should be seen as interrelated. Discrimination and violence within the family prevents women from participating fully in society, which in turn leads to economic dependence, forcing many women to stay in a destructive relationship since there are no other options. Different factors, such as education, the role of today’s advanced technology and health aspects continue to affect women’s lives everywhere.

8.1 CEDAW and Shari‘a – in the hands of the interpreter

No state is free to violate the universal human rights of its subjects on the grounds of national sovereignty, although nations’ sovereignty of course must be respected. Saying that Shari’a is incompatible with Women’s rights is a far too easy way to answer the complicated question of how, and if, Shari’a can be fitted into a human rights realm.

Attempts by governments to justify their rejection of international human rights on the basis that they clash with Shari’a principles, and can therefore not be implemented, are weak. These governments have long ago given up their right to continue a discussion of this kind since they already have shown their acceptance of human rights law in various ways. For example by having joined and worked in the U.N. and by ratifying conventions and declarations, among them the international bill of rights. International human rights law would become quite undermined if a leader of a state suddenly could proclaim that the state no longer is to be bound by the conventions it has signed.

It is clear that the laws and practices criticized by the CEDAW Committee and accounted for in previous chapters, are violations of international human rights law. That these laws and practices should be changed in order to comply with CEDAW and other human rights instruments ratified by them are self-evident. Claims that human rights are a western concept, applicable to westerners only, and similar suggestions are preposterous – no one has forced neither Tunisia, Egypt nor Yemen to sign CEDAW.

In entering Shari‘a based reservations, many Muslim states treat Islamic law as if it were a supernatural religious law that binds them, whereas in reality, the Shari‘a laws on the national level does not necessarily have any resemblance with those of other states, as the cases of Yemen, Egypt and
Tunisia well have shown. Moreover, these three countries do not make reservations to the same provisions of CEDAW, again indicating that they have dissimilar opinions regarding which articles of CEDAW that conflict with Islamic law.

Even though the reservations of Egypt and Tunisia should be considered incompatible with CEDAW, they can also be seen as a statement, where the actual ratification of CEDAW clarifies that the aim and will of the State Party is to implement it, but also shows awareness with its failure and difficulties in achieving that aim immediately. The case of Yemen is however, in my opinion, an insult to CEDAW, women and human rights in general.

It is true that there is no constituency to be found in the reservations against CEDAW, but it is evident however that there is a reaction to the issue of women’s emancipation throughout the Arabic world of today. This reaction has its roots in a historical, male need to control his family, and in particular the sexuality of the women close to him, but isn’t necessarily Islamic. The destruction of this view is one of the most vital aims of the human rights movement of today.

When the Shari’a based laws of for example Yemen constitutes a breach of human rights, we allow an entire religion to take the punishment for this. According to several Muslim scholars and human rights activists, Islam is a religion that confirms the international human rights laws. It is the individual states that should be criticized for their application of the Shari’a, not the Muslim community.

As for the so favoured image of Arabic societies as a religious entity, I believe that I have shown the opposite. It is my opinion that any human rights violation in these countries is blamed upon Islam, and that such accusations are false. Of course it is all a matter of interpreting Shari’a sources, and here we have some good examples: the Tunisian government claims to be secular, but still uses their interpretations of Shari’a to justify their law making; for example the ridding of the hijab and prohibition of polygamy. In the case of Yemen, the constitution is based upon Shari’a, and personal status and penal code claims religious sources. In both Egypt and Yemen, the provisions restricting women from equal rights within the family and in marriage are products of the interpretations of Shari’a.

Many practices that are discriminatory to women do not have an Islamic origin, but are being treated and promoted as if they did. Therefore, they should be separated from Islam and even condemned as opposing it. It is clear that it is the interpreters and/or the political leaders who are responsible for the inequalities based on Shari’a that constitutes everyday life for millions of women. If promoted, or even sanctioned, by respective governments, the rights in CEDAW article 16 could provide an excuse for both men and women for not following the discriminatory customs and traditions their society lives by.
The conservative elite of countries such as Yemen and Egypt, hide behind a fictive shield of Islam, claiming a divine equality, while in reality the victims of these violations against international human rights law has no shields to protect them from their own governments, husbands and fathers.

The question of how to effect changes in practice are however not one of the objectives of this thesis, but the use of ijtihad should be able to bring discriminatory Shari’a laws into compliance with the rights under CEDAW article 16.

Interpretations of Shari’a are many, and new, female interpreters are starting to make their voices heard, questioning the older interpretations. Hopefully, in the not so distant future, the respect for women and their human rights will be shown not only in the words of God, but also by the men in power to change existing laws.
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