

Islamic Origins:
A Study of Shari'ah's Compatibility with International Human Rights Standards
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Throughout the past few years, the human rights situation throughout the world has become an issue of immense prominence within popular international discourse. More increasingly brought into the limelight through the exposure of violations and promotion of universal standards as outlined in the Universal Declaration and other United Nations covenants, the human rights situation within the Arab world in particular has provoked great outcry with regard to the perceived clash between Islam and international norms. The Middle Eastern region, which is already host to countless aberrations from international human rights standards across the board, possesses enormous disparities in terms of gender equality and treatment of women within the home. These abuses of human rights are qualified under shari'ah law and thereby enforced throughout society on religious grounds. In reality, however, the shari'ah in place in many countries is not reflective of core Islamic values and instead constitutes a collection of antiquated interpretations influenced by patriarchal male jurists and foreign interactions. Thus, women's official rights pertaining to marriage within shari'ah law become significantly more compatible with international human rights standards when examined not in the context of practical application, but by virtue of *ijtihad* and Islam's original sources and tenets, as illustrated in the case studies of Saudi Arabia, Tunisia, and Egypt.

Across the global sphere, there exist a number of official documents outlining international human rights standards pertaining to relevant women's issues. A document which lies at the basis of all human rights discourse, the Universal Declaration of Human Rights makes

the explicit statement: “All human beings are born free and equal in dignity and rights.”¹ This statement is made without stipulation or qualifier, outlining quite clearly the equality that should exist unilaterally between men and women. This document also puts forth more specific standards as well, apportioning men and women “equal rights as to marriage, during marriage, and at its dissolution.”² The United Nations International Covenant on Civil and Political Rights supports the claims put forth in the Universal Declaration, reaffirming the “equality of rights and responsibilities of spouses as to marriage [and] during marriage...”³ A variety of other documents appeal to the Universal Declaration and the UN Covenant and possess extensive clauses asserting gender equality in the household and within the marriage contract. The Programme of Action of the International Conference on Population and Development in 1994 states that there should exist “shared responsibilities for the care and nurturing of children and maintenance of the household,” saying more specifically that “male responsibilities should be emphasized with regard to child-rearing and housework. Greater investments should be made in appropriate measures to lessen the daily burden of domestic responsibilities, the greatest share of which falls on women.”⁴

Both the Declaration on the Elimination of Discrimination against Women and the Convention on the Elimination of all Forms of Discrimination against Women avow these same principles, recognizing the need to ensure that men and women possess equal rights in all stages

¹ The Universal Declaration of Human Rights is a lengthy document produced by the United Nations in 1948. Its aim is to provide a comprehensive list of human rights that can transcend cultures and geographic boundaries – an enumeration of rights that each individual is guaranteed simply by virtue of being human. The document covers all areas of rights from freedom to speech and religion to family rights to criminal protections.

See United Nations, *Universal Declaration of Human Rights*, (1948) Article 1. In *A Thematic Guide to Documents on the Human Rights of Women*, Eds. Gudmundur Alfredsson and Katarine Tomasevski (The Hague: Martinus Nijhoff Publishers, 1995) 71.

² *Universal Declaration of Human Rights* Article 16.

³ *International Covenant on Civil and Political Rights* (United Nations, 1966) Article 23(1).

⁴ United Nations, *Programme of Action of the International Conference on Population and Development* (1994) Articles 4.1 and 4.11. In *A Thematic Guide to Documents on the Human Rights of Women*, Eds. Gudmundur Alfredsson and Katarine Tomasevski (The Hague: Martinus Nijhoff Publishers, 1995) 26-27.

of marriage and parenthood. These rights must begin at the inception of marriage, and should extend through its duration and potential dissolution.⁵ Indeed, each of the countless documents and conferences working toward the protection and enhancement of women's rights rests on the same underlying premise of complete "gender equality in all spheres of life" and "equal participation of men and women in all areas of family and household responsibilities, including family planning, child-rearing, and housework."⁶ These assertions of parity within the household and marriage contract presuppose the accuracy of the Universal Declaration of Human Rights' original statement of equality without regard to gender; if both sexes truly are equal, impartiality within the familial sphere should naturally follow.

In stark contrast to these international human rights documents, the corresponding official documents within the Arab world are less explicit in their proclamations of equality. Many of their stipulations are intentionally left vague or indeterminate – subject to the whims of a governing body ground in shari'ah. The Draft Arab Charter on Human Rights, for instance, qualifies its statement of equality between genders as applicable on the basis of Islamic shari'ah. In the international documents, this equality exists merely on the grounds of being human and is not subject to the same justification in accordance with religious law. Moreover, the Arab Charter's clause on family law makes no mention of men and women possessing equality in the household or when rearing children, and states that "the laws in force regulate the rights and duties of the man and women as to marriage, during marriage and at its dissolution."⁷ The document thereby allows itself great leeway in terms of implementation, as its stipulations must solely be applicable to the "laws in force," which remain entirely undefined and open to each

⁵ Gudmundur Alfredsson and Katarine Tomasevski, Eds., *A Thematic Guide to Documents on the Human Rights of Women*, (The Hague: Martinus Nijhoff Publishers, 1995) 66.

⁶ *Programme of Action of the International Conference on Population and Development* Article 4.26.

⁷ Council of the League of Arab States, *Arab Charter on Human Rights* (Cairo: 1994) Article 33.

leader's interpretation. The Cairo Declaration on Human Rights in Islam is another compelling depiction of the nebulous nature of human rights within the Arab world. The marriage clause in this document is a pithy two-line statement that awards no specific rights to women nor provides any statement of equality in the household:

The family the foundation of society, and marriage is at the basis of its formation. Men and women have the right to marriage, and no restrictions stemming from race, colour or nationality shall prevent them from enjoy this right.⁸

Article 6 does declare woman “equal to man in human dignity” and says that she “has rights to enjoy as well as duties to perform,” but the document makes no further mention of the specifics of these rights or duties. This ambiguity, coupled with the statement that “the husband is responsible for the support and welfare of the family,” leaves plenty of room for seemingly legalized female subjugation and mistreatment within society. Equality, as provided for in the Arab Charter and the Cairo Declaration, exists merely as an abstract notion; it is not intrinsic as in the UN documents, but subject to each individual leader's interpretations and tangible manifestations of shari'ah law within his own country.

Justified through appeals to shari'ah, much of the Arab world does not adhere to international human rights standards with regard to women. Contrary to widespread belief, however, this concrete demonstration of shari'ah is not necessarily representative of original Islamic principles and values. Indeed, a great deal of present-day shari'ah law is based upon centuries of interpretation of the Qur'an, Sunna, and hadith, as well as historical interactions, colonialism, social policy, and schools of jurisprudence which have been primarily dominated by males.⁹ Societies throughout history have wrestled with their patriarchal backdrops, visible not only in the struggles within the Arab world but in Western nations as well. Women did not

⁸ Islamic Conference of Foreign Ministers, *The Cairo Declaration of Human Rights in Islam* (Cairo: 1990) Article 5.

⁹ Shaheen Sardar Ali, *Gender and Human Rights in Islam and International Law: Equal Before Allah, Unequal Before Man?* (Boston: Kluwer Law International, 2000) 42.

receive the right to vote in the United States, for instance, until the 1920s and, even today, face some inequalities with regard to salary. Patriarchy, it seems, is a persistent issue throughout the world, one which may continue to present challenges to gender equality for years to come. The Middle East exemplifies these issues, with the 2007 Arab Human Rights Report characterizing the region as one of the foremost sights of human rights abuses toward women.¹⁰

The dichotomy between international human rights standards and the situation within many countries is particularly difficult to combat amidst an area where such practices are defended under the auspices of Islam. Nevertheless, injustices toward women across the Middle East possess religious justification only as related to shari'ah in its current form of practice. In scholar Theresa Saliba's words: "...it is not Islam per se that oppresses women, but, rather, the continuity of patriarchal values within nationalist and religious ideologies that limits women's agency."¹¹ Many Arab governments feed off of these patriarchal interpretations of Islam and use them to support further subjugation of women and ensure a monopoly of power within the country. Much of society itself blindly accepts present-day shari'ah as religious tradition and thereby justifies continued male domination in both the public and private spheres.¹²

Upon further analysis and investigation of the original sources of Islam – the Qur'an, Sunna, and hadith – it becomes quite apparent that institutionalized shari'ah constitutes an often "significant breach" of the Prophet Muhammad's original revelations and examples.¹³ Like the Qur'an itself, modern application of Islamic family laws must be put into context; these laws and

¹⁰ The Arab Human Rights' Organization, *The Report of the Arab Human Rights' Organization on the State of Human Rights in Arab Countries* (2007) 280.

¹¹ Therese Saliba, Carolyn Allen, Judith A. Howard, Eds., *Gender, Politics, and Islam*, (Chicago: The University of Chicago Press, 2002) 4.

¹² Ali 42.

¹³ Javaid Rehman, "The Sharia Islamic Family Laws and International Human Rights Law: Examining the Theory and Practice of Polygamy and Talaq," in *International Journal of Law, Policy and the Family* 21:1 (Oxford University Press, 2007) 109.

practices are not infallible nor are they necessarily ground in religious truths. In many cases, “women have...been deprived even of the basic human rights advocated by Islam itself.”¹⁴

More and more, feminists are advocating a return to the divine sources of Islam as a means of securing greater social freedoms, arguing that a true Islamic system of governance should be rooted in the core elements of the religion itself, not in centuries worth of interpretation and outside influence.¹⁵

The Qu’ran is revered as the collection of God’s revelations to Muhammad throughout the 7th century CE. As opposed to a book of law, the Qur’an constructs a moral and ethical ideal, serving as a “book of moral persuasion and revelation” intended to inspire a life of moral conviction and guidance.¹⁶ The verses are not organized in chronological order and are instead distributed in a somewhat ad hoc manner, having been acquired over a period of twenty years in varying circumstances. Together, the verses present a number of “specifically contextualized” prescriptions for man’s idealized state of being, thereby warranting a full and thorough reading of the text. Individual verses cannot be accurately interpreted on their own or without adequate knowledge of their *asbab al-nuzul* (circumstances of revelation). Changing conditions over the course of the period of revelation resulted in contradictory verses that warrant reassessment by *naskh* (abrogation), whereby the later verses cancel out the former.¹⁷ Such a process awards the Qur’an an acknowledgment “that the history of civilizations is cumulative and evolutionary,” constituting an embedded fluidity and gradualism that allows for the prospect of future evolution.¹⁸

¹⁴ Haifaa Jawad, *The Rights of Women in Islam: An Authentic Approach* (New York: Palgrave, 1998) 15.

¹⁵ Saliba 24.

¹⁶ Fazlur Rahman, *Major Themes of the Qur’an* (Minneapolis: Bibliotheca Islamic, Inc., 1989) 59.

¹⁷ Rahman 74.

¹⁸ Rahman 59.

The Qur'an has within it an underlying sense of egalitarianism, as men and women are repeatedly declared to have originated from a "single person," meant from the outset to "dwell with [each other] (in love)." (7:189)¹⁹ Another verse declares similarly: "And among His signs is this, that He created for you from among yourselves that you may dwell in tranquility with them, and He has put love and mercy between your (hearts)..."(30:21)²⁰ Still one more *sura* states: "You are the offspring of one another."²¹ The preponderance of verses proclaiming man and woman's equality support the notion that Islam, at its very essence, instills both genders with comparable value and qualities of human nature. In the words of a popular hadith: "All people are equal, as equal as the teeth of a comb. There is no claim of merit of an Arab over a non-Arab or of a white over a black person. Only God-fearing people merit a preference with God. Thus men and women are equal."²² Despite these expressions of equality, there are other verses which appear to favor men over women.

One of the most controversial verses in the Qur'an, verse 4:34, is frequently used to support the notion that Islam treats women as submissive to men and supports physical abuse as punishment for wrongdoing. The verse, however, possesses a number of interpretations of key words and phrases, some of which cast women in a much more negative light than others. Linda Bogaert provides a partial translation based on that of Yusef Ali that reads:

Men are the **{qawwam}** of women, because Allah has given the one more than the other, and because they support them from their means. Therefore the righteous women are **{qanitat}**, and guard in the husband's absence what Allah would have them guard. As to those women on whose part ye fear **{nushuz}**, admonish them first, then refuse to share their beds, and finally **{adriboo}** them.²³

¹⁹ Mohammed Ali Syed, *The Position of Women in Islam: A Progressive View* (Albany: State University of New York Press, 2004) 27.

²⁰ Syed 27.

²¹ Jawad 5.

²² Ali 50.

²³ Linda Bogaert, "Does verse 4:34 allow a superior husband to beat his inferior, disobedient wife?" *Koran Titles* <<http://www.flwi.ugent.be/cie/bogaert/bogaert4.htm>>.

The words remaining in Arabic constitute those that are typically utilized against women in some interpretations. It is in this way that the Qur'an gains its mutability, as each of the disputed words also possesses an alternate interpretation that holds true to its original statements of gender equality. "*Qawwam*," commonly translated as "superiors," is derived from a root taken to mean "to care after or look after." As such, the beginning of 4:34 may just as easily be stating that men should solely look after their wives, not that they are superior.

Taken in the context of the time, women had not yet been given the opportunity to provide for themselves or maintain a household. Men had to take care of women by virtue of necessity, not out of an inherent hierarchical difference. Rahman declares this dependent role to be "purely functional...such dependence is no longer necessarily true, and thus, in a new sharia, male guardianship over women should be terminated," for women now possess more opportunities for economic freedom and protections.²⁴ Islamic scholar Muhammad Abduh provides further support for Rahman's premise, stating that the laws pertaining to religious duties (*ibadat*) "by nature lie beyond interpretive change, [but] the laws on social transactions (*muamalat*) by nature require interpretation and adaptation by each generation of Muslims in light of the practical needs of their age."²⁵ Taken as such, man's role as caretaker of women should be readjusted with modernization and women's opportunity for self-support.

Each of the remaining words in the verse (*qanitat*, *nushuz*, *adriboo*) also possesses an alternative derivation according to its specific root. The root of *qanitat*, commonly taken to mean "submissive," is solely used throughout the Qur'an in reference to spiritual submission. *Nushuz*, while perhaps referring to a woman's misconduct, could just as easily connote mutual hostility in the marriage. Finally, the term *adriboo* – whose meaning has typically been taken to imply

²⁴ Yvonne Yazbeck Haddad and John L. Esposito, Eds., *Islam, Gender, and Social Change* (New York: Oxford University Press, 1998) 39-41.

²⁵ Haddad 34.

physical abuse – possesses a root whose meanings are quite manifold, ranging from “to beat” to “to avoid, ignore, or leave.”²⁶ The significance of verse 4:34 therefore changes drastically depending on one’s interpretation. Utilizing these alternative translations, the once-controversial verse can be read as follows:

Men are the **caretakers** of women, because Allah has given the one more than the other, and because they support them from their means. Therefore the righteous women are **submissive to Allah** and guard in the husband's absence what Allah would have them guard. As to those women on whose part ye fear **marital discord**, admonish them first, then refuse to share their beds, and finally **leave** them.²⁷

Given contextualization and this specific interpretation, women are not declared as submissive to their husbands, nor are they advised to be beaten. This deconstruction of verse 4:34 is merely one illustrative example of the importance of reinterpretation and consideration in the context of *asbab al-nuzul* within the Qur’an.

Taken in its historical context in comparison to pre-Islamic Arabia, the Qur’an was extraordinarily revolutionary in its treatment towards women. Prior to the advent of Islam, women “were deemed to be chattels” – objects to be bought and sold at the whims of the male figures of society. Once acquired, the “wife was the property of the husband” and possessed no legal or social rights whatsoever.²⁸ The Qur’an was revolutionary in not only eradicating existing conventions and customs that had forced women into submission, but also in “conferr[ing] rights on women in the seventh century that women in the West were unable to obtain until quite recently.”²⁹ No longer treated on par with slaves, women were given status and the ability to possess property. Within the family, the positions of husband and wife were completely

²⁶ Bogaert.

²⁷ Bogaert.

²⁸ Rehman 113.

²⁹ Ann Elizabeth Mayer, *Islam and Human Rights: Tradition and Politics* (Boulder: Westview Press, 1999) 98.

reconfigured such that both parties had to give their consent in the contract.³⁰ Women began to be treated as people and not objects to be bartered and purchased, implying “recognition of a degree of women’s autonomy and volition.”³¹ One of the more significant reforms from pre-Islamic Arabia further eradicated the former “marriage of dominion” through awarding the woman full control over the dowry, which had formerly been deemed property of her father. This change in ownership over the dowry is a tangible manifestation of the somewhat broader enhancement of women’s rights in the family, beginning with the abolition of the *muta* or temporary marriage.³²

Prior to Islam’s development, there existed over ten forms of marriage (permanent, *Nikah al-Zainaab*, *Zawaj-al-Badal*, *Nika al-Dayzan*, etc.), nearly all of which disregarded women’s opinions or rights as a human being. While Islam did still allow for a master to marry his slave, nearly all of the other forms of marriage were no longer permissible as “the Prophet Muhammad unified the multiplicity of pre-Islamic modes of sexual mores of sexual unions by outlawing all but one form of marriage, namely marriage by contract.”³³ Women were thereby protected from haphazard marriages of convenience where they would have formerly been physically taken advantage of before being cast out again, awaiting the sale to another “buyer.” Within the Qur’an, women were declared to be the “twin halves of men,” and were forbidden to be forced into marriage.³⁴ Although the male guardian did still have to elicit his approval, the marriage could not take place without both the husband and wife’s consent as well: “A previously married woman shall not be married till she gives her consent nor should a virgin be married till her

³⁰ Mayer 98.

³¹ Ali 60.

³² Ali 31.

³³ Ali 60.

³⁴ Jawad 7.

consent is sought.”³⁵ If a woman was forced into matrimony against her will or was not satisfied with the situation, the issue could be brought to court. Hadith provides a useful example in which “Khansa’ bint Khidam al-Ansariyya said that her father married her to someone when she was a woman who had already been married. She did not like this state of affairs, so she went to the Prophet and he revoked the marriage contract for her.”³⁶ In this way, although the man remained the symbolic head of the household, the woman was given new abilities to interfere should he misuse his power.³⁷ Complete and utter reform could not occur automatically or all at once, but this development set a precedent for women’s gradual augmentation in power and status within marriage.

Islam’s inherent gradualism is also quite apparent through an examination of the practice of polygamy. Although the Qur’an does not expressly forbid the practice, it did institute a number of restrictions that, at the time, marked a dramatic shift in the treatment of women. Not only does the Qur’an limit the number of wives to four, but it also clearly states that a man must be able to treat each of his wives fairly:

If you fear that you will not deal fairly by the orphans, marry of the women, who seem good to you, two or three or four; but if you fear that you shall not be able to deal justly with them, then only one or one that your right hands possess. That will be more suitable, to prevent you from doing injustice. (4:3)³⁸

While not suitable with many people’s modern conceptions of proper conduct, this verse severely hindered much of the rampant marriage and subsequent disparaging treatment of women that had previously occurred. Qur’anic opinion of polygamy takes on an even more liberal meaning when this verse is considered in tandem with verse 4:129: “You will never be

³⁵ Jawad 34.

³⁶ Nicholas Awde, Trans. and Ed., *Women in Islam: An Anthology from the Quran and Hadiths* (Surrey: Curzon Press, 2000) 71.

³⁷ Awde 70.

³⁸ Mary Ali, “Who Practices Polygamy?” <<http://www.guidedones.com/metapage/frq/polygamy.htm>>

able to deal justly between wives however much you desire (to do so).”³⁹ Taken together, verses 4:3 and 4:129 imply the impossibility of exercising polygamy and equitable treatment of all wives simultaneously and some “theologians opine that... therefore, polygamy is as good as banned.”⁴⁰ Such an interpretation acknowledges the Qur’an’s intrinsic gradualism. Progress does not occur overnight; a blatant forbiddance of polygamy would have been too radical a change after centuries of its permissibility. Accordingly, the Qur’an was constructed in such a way that its verses implied a need for constant development over time. Restrictions limiting the number of wives and requiring equitable treatment were effective immediately, but, according to moderate interpretations, these stipulations were meant to continually evolve over time. The specific historical context of the revelations relating to polygamy shed further light on the situation, suggesting that polygamy may have only been advised under specified circumstances:

All the commentators of the Quran agree that the fourth chapter (sura), particularly these verses, were revealed immediately after the Battle of Uhud, to guide Muslims when, due to the martyrdom of about ten percent of Muslim males during the battle, the number of women was much greater than the number of men. According Muhammad Ali (1951) the Quranic permission given to Muslim males to have more than one wife was given under these peculiar circumstances of Muslim society having a considerably reduced male population. This permission... was conditional on doing justice to all of them and particularly in relation to their property.⁴¹

Between verses 4:3 and 4:129 and an understanding of historical circumstances, the Qur’an implies the near impossibility of acquiring a relationship that is both polygamous and fair – a reflection, perhaps, of the intention for an eventual full-out ban of the practice.

Aside from improvements for women when entering into marriage, early Islam also enhanced equality within the home. Qur’anic verse 2:187 declares: “...they are (like) an apparel for you and you are an apparel for them,” thereby fostering a union ground in mutual

³⁹ Ali.

⁴⁰ Syed 43.

⁴¹ Syed 43.

dependency and cohabitation.⁴² While the male remained the head of the household as was customary at the time, the Qur'an did not intend for such a relationship to be a dictatorship; men and women were created from the same source after all. Support for the equitable status of the sexes is derived from the Prophet's example as well. His own wives Khadija and Aisha were extremely strong figures in the development and promulgation of the Islamic community, with Aisha even playing a role on the battlefield.⁴³ More specifically pertaining to household affairs, there is a hadith that reads as follows: "I asked Aisha: 'What did the Prophet use to do about the house?' She answered: 'He would do chores for his family and then, whenever he heard the call for prayer, he would go out to pray.'"⁴⁴ Despite his prescribed hierarchical role as caretaker, the Prophet recognized the limitations of this status and saw no need to exercise absolute authority over every aspect of the home. Instead, he split the burden and took part in practices often stereotypically assigned to the female, "help[ing] women with housework and mend[ing] his own clothes."⁴⁵ The Prophet's approach to family matters is quite monumental and revealing given the hierarchical way in which household roles were eventually interpreted and enacted in practice in countries like Saudi Arabia. Moreover, the shared responsibilities were yet another demonstration of women's dramatic and transformative shift from chattel to *person* after the advent of Islam.

The Qur'an also greatly enhanced women's rights as pertaining to the dissolution of marriage. Representing one of the more controversial issues within Islamic thought at the present, divorce is much more clearly defined when it comes to Islam's original tenets. In reality, much of the current human rights abuses associated with divorce stem not from the time of

⁴² Jawad 13.

⁴³ Haddad xii.

⁴⁴ Awde 110.

⁴⁵ Jawad 13.

Prophet Muhammad but from the development of formalized Islamic law in the years following his death. While not expressly forbidden by any means, divorce is neither recommended nor encouraged. Still, both the Qur'an and hadith do acknowledge the need for some sort of mechanism of separation should irreconcilable marital conflicts arise. At this stage, the Qur'an advocates intercession or adjudication utilizing representatives from not only the husband's side of the family, but from the wife's as well: "If you fear a breach between them twain, appoint (two) arbiters, one from his family, and the other from hers." (4:35)⁴⁶ Already awarding women more equitable treatment through this balanced arbitration, the Qur'an further eroded pre-Islamic misogyny in verse 2:229 which reads: "Divorce (is permissible) only twice, then either maintain (them) in honor or let (them) go in kindness."⁴⁷ As advocated by the Prophet, these three divorces were not to occur simultaneously on the same occasion.⁴⁸ The abusive practice of "*talaq bid'i* or *talaq thalatha fi majlisin wahidin* (triple divorce in one sitting) is an innovation introduced after the death of the Prophet Muhammad... There is no mention of the triple *talaq* in the Qur'an and Hadith."⁴⁹ Before these limitations were implemented, men could repetitively divorce and remarry their wives as many times as they wanted without stipulation – a practice which severely objectified women and left them unable to adequately exercise control over their lives. This unbridled means of divorce was severely reigned in during the time of the Prophet, as the number of permissible divorces was capped at three.

Additionally, in order to guard against rash and impetuous actions on the part of the husband, the Qur'an instituted the notion of '*Iddat* – a waiting period lasting the length of the wife's three menstrual cycles. Only at the end of the '*Iddat* does a divorce become irrevocable.

⁴⁶ Syed 59.

⁴⁷ "Divorce and Respect for the Law." <<http://www.balagh.net/english/quran/light/002/229.htm>>

⁴⁸ Maulana Muhammad Ali, "The Treatment of Women in Islam," AAILL (UK) <<http://www.islamic-book-depot.org.uk/women.pdf>>

⁴⁹ Syed 64.

Although pre-Islamic Arabia possessed a form of *'Iddat* as well, the lack of limitation on divorce allowed the husband to “revoke his decision as many times as he chose during the waiting period.”⁵⁰ Islam’s combination of *'Iddat* and the newly-incorporated regulations on number rendered it much more sympathetic to women. Verse 2:231 further expounds on *'Iddat*:

When you divorce women, and they fulfill the term of their (iddat), either take them back on equitable terms or set them free on equitable terms; but do not take them back to injure them, (or) to take undue advantage. If anyone does that, he wrongs his own soul. (2:231)⁵¹

If and when divorce was deemed irrevocable, the Qur’an instituted other mechanisms for ensuring the divorced wife’s protection and continued care. For example, men were obligated to pay alimony to their former wives: “For divorced women, maintenance (should be provided) on a reasonable (scale). This is a duty on the righteous” (2:241).⁵² Moreover, the Qur’an also allotted certain circumstances in which women could instigate divorce as well. While still not completely equitable, the Qur’anic changes with regard to divorce were certainly a welcomed step in the right direction in comparison to pre-Islamic practices.

As a whole, the original Islamic sources – as derived from both the Qur’an and the Prophet’s example – were monumental in their proclamations of egalitarianism, provisional reforms, and ingrained sense of gradualism with regard to future development. Religious scholar Shaheen Sarder Ali elaborates on the formation of gradualism, stating his opinion that Islam’s “hierarchical structure [at] the basis of relations between men and women” was merely a construct of its historical context. He continues: “[The Qur’an] also preached, in its ethical voice... the moral and spiritual equality of all human beings. Arguably, therefore, even as it instituted a sexual hierarchy, it laid the ground, in its ethical voice, for the subversion of the

⁵⁰ Maulana Ali.

⁵¹ Syed 60.

⁵² Syed 61.

hierarchy.”⁵³ Indeed, it can be reasoned that this hierarchy was always intended to erode over time. The advice included within core Islamic doctrine was imparted to the Prophet under specified contexts and should thus develop and modify itself with the changing circumstances. Time itself is not stagnant and likewise, Islamic social mores should not be either.

The process of continued interpretation is known within Islamic discourse as *ijtihad* and occurred quite readily among legal scholars in the initial years after Islam’s inception. In the 10th century CE, however, “a consensus gradually established itself that from that time onwards, no one could be deemed to have the necessary qualifications for independent reasoning in religious law,” thereby leaving the future of Islamic legal discourse to be determined on the basis of these somewhat antiquated decisions.⁵⁴ Combined with the Qur’an’s intrinsic gradualism, this process of persistent interpretation provides one of the most promising avenues for establishing gender equality within the Arab world. Consequently, *ijtihad*’s cessation as a legal process has been extremely problematic with regard to women’s rights in Islamic law, leaving women’s status as it was institutionalized in the 10th century.

In stark contrast to their dramatic improvements in status with the advent of Islam, women witnessed a regression in treatment in the years following the Prophet’s death. The “egalitarian message of early Islam was conveniently forgotten” as Islamic jurisprudence developed into a field that was entirely male-dominated and therefore subject to patriarchal interpretations.⁵⁵ As a result, jurists interpreted basic Islamic principles in accordance with their own biases toward women at the time – interpretations which eventually became entrenched within the four schools of Sunni law. Ali summarizes this process in his article, stating that “in

⁵³ 87 Ali

⁵⁴ J. Schacht, “Law and Justice,” Cambridge Encyclopedia of Islam, Vol II, part VIII
<<http://www.fordham.edu/halsall/med/schacht.html>>

⁵⁵ Saliba 67.

the broader pragmatic framework, the articulation of the shari'ah principles and the classical Islamic family laws is therefore no more than the expression of values advanced by these jurists in the second and third century of the Muslim calendar."⁵⁶ Patriarchal juristic tendencies, however, were not the only factors affecting the degradation in women's rights in the years following the Prophet's death. European colonialism and the ensuing onset of modernity had a significant impact on prevailing societal views toward women. Interactions with outside societies fostered the adoption of non-Arab prejudices, as "custom, rather than divine laws, shaped... the social fabric of society and governed people's attitudes towards women and marriage. The outcome has been a steady deterioration in the status of women as far as their marital rights are concerned."⁵⁷ Women were more expansively forced into marriages against their will and denied the opportunity to seek divorce or legal redress for instances of mistreatment.⁵⁸ Much like her existence in pre-Islamic times, the wife was treated akin to a piece of property as male superiority again prevailed within the home.

While there were naturally exceptions to this broad trend, widespread attitudes toward women underwent a dramatic shift in the wake of colonialism, male juristic interpretations, and general social and economic circumstances. When legally-sanctioned *ijtihad* came to a halt in the 10th century, Islamic shari'ah had already grown to encompass the prevailing derogatory attitudes toward women and the collection of discriminatory practices that came along with such opinions. It is somewhat ironic that shari'ah – a legal system supposedly ground in Islamic principles – actually strays quite far at times from the true attitudes and prescriptions of the Qur'an and Prophetic examples with regard to women.

⁵⁶ Rehman 112.

⁵⁷ Jawad 37.

⁵⁸ Jawad 37.

These somewhat convoluted and abstract ideas are made tangible through an examination of marriage rights within Saudi Arabia, Tunisia, and Egypt – three countries in which shari’ah plays an integral role. Saudi Arabia possesses one of the most extensive and pervasive systems of oppression with regard to women across the Arab world. The first line of the Saudi Basic Law declares the constitution “the Almighty God’s Book, the Holy Qur’an, and the Sunna (Traditions) of the Prophet (PBUH).”⁵⁹ Saudi Arabia’s system of governance, however, is not based upon Islamic precepts themselves, but instead, the strict Hanbali school of shari’ah law – a system whose male-dominated interpretations take an enormously literalist approach to the Qur’an and Hadith and make up the core elements of the country’s legal and judicial precedents. Upholding shari’ah as the preeminent guiding force allows for greater freedom on the part of the ruler to execute law as he sees fit, for “shari’ah is not readily available and accessible to laypeople, nor is it a codified set of rules.”⁶⁰ The Hanbali school does not permit *ijma* (consensus of the people) in making decisions, but relies on the interpretations of the religious jurists. In this way, mistreatment and suppression of women both inside and outside the private sphere can easily be justified on religious grounds without anyone easily able to argue otherwise.

Whereas other countries attempt to institutionalize some form of gender equality (at least nominally), “the Saudi Basic Law altogether avoids the topic of equality in rights, thereby obviating the need to stipulate the kinds of inequalities and discriminatory treatment that the Saudi law intends to perpetuate.”⁶¹ In terms of family law, in particular, Saudi Arabia is especially rigid in its treatment of women. Article 9 of the Basic Law of Saudi Arabia declares the family to be the “kernel of Saudi society,” stating that “its members shall be brought up on the basis of the Islamic faith, and loyalty and obedience to Allah and to guardians...[with]

⁵⁹ “Precarious Justice,” Human Rights Watch, 24 March 2008 <<http://www.hrw.org/en/node/62304/section/6>>

⁶⁰ “Precarious Justice.”

⁶¹ Mayer 85.

respect for and implementation of the law... as the Islamic faith stipulates.”⁶² The text of this article is a microcosmic depiction of the broader deeply-entrenched connections between religion and law institutionalized within Saudi Arabia. This relationship, however, is quite ambiguously defined; the exact stipulations of the Islamic faith are not outlined, nor are the specificities of the law itself. In this regard, Saudi Arabia’s system of governance remains ground in a set of elusive principles, subject to the opinions and interpretations of the elite minority. Scholar Ann Elizabeth Mayer goes as far as to say that the “Basic Law accommodates the Saudi system of gender apartheid... employ[ing] appeals to Saudi family values and premodern Islamic law in order to maintain the traditional patriarchal family structure and to keep women subordinated and cloistered within its confines.”⁶³ Saudi Arabian Hanbali law essentially deprives Saudi Arabian women of most – if not all – of their rights as human beings, ranging from their ability to move freely without a guardian or drive a vehicle to the right to exercise free will in choosing a partner in marriage. In contradiction with the Qur’an’s verses stating the need to seek the approval of *both* partners in marriage, Saudi Arabian women possess no say in the decision and the marriage contract is negotiated by the husband and the bride’s guardian.⁶⁴ Once she enters into a marriage, a woman’s rights do not improve, but often take a turn for the worse.

Indeed, Amnesty International concludes that although the “will of the state controls almost every aspect of women’s daily life” within both the private and public spheres, human rights violations are perhaps at an absolute low as pertaining to the family.⁶⁵ Generally speaking, Qur’anic verse 4:34 proclaiming the husband the head of the household is upheld without

⁶² Basic Law of Saudi Arabia (1992) Article 9. In “Saudi Arabia: Basic Law of Government,” The Middle East Information Network <http://www.mideastinfo.com/documents/Saudi_Arabia_Basic_Law.htm>

⁶³ Mayer 122.

⁶⁴ Dawoud Sudqi El Alami and Doreen Hinchcliffe, *Islamic Marriage and Divorce Laws of the Arab World* (London: Kluwer Law International, 1996) 6.

⁶⁵ “Saudi Arabia: Time is long overdue to address women's rights,” Amnesty International (2000) <<http://asiapacific.amnesty.org/library/Index/ENGMDE230732000?open&of=ENG-2MD>>

stipulation, resulting in an often overly-domineering or even abusive relationship between man and wife. *Talaq bid'i* is an accepted practice, thereby allowing men the freedom to bring about divorce whenever he so desires – a blatant disregard for the Qur'an's prescribed waiting period. The woman, on the other hand, may only request divorce before a court of law under specified conditions, most of which are nearly impossible for her to prove (i.e. “absence of conjugal rights, extreme cruelty, infidelity, etc”).⁶⁶ Evidence aside, many women are not even aware of the proper proceedings for divorce due to the lack of codified rules on the matter. An Amnesty International report quotes Dr 'Abdullah bin Sultan al-Sabi'i as describing the complexities of the situation as follows: “Women fear divorce and to be without a husband and to be accused of destroying her home... She is also forced by her family into accepting the situation [of domestic violence] because marriage in our country is a tie between two families... in addition, our tribal society know each other and women fear scandals.”⁶⁷ In the instances where divorce does occur, mistreatment of women continues even in its aftermath through limitations on child custody and male monetary support. Thus, women's difficulties in divorce are further compounded by rampant social disparagement and pressure to retain a relationship, even if it is the source of physical harm for the wife.

The issue of domestic violence in Saudi Arabia is quite sensitive within international human rights discourse. Naturally, the activities within each individual Saudi home cannot be fully documented or monitored, and with a lack of officially published statistics or reporting on the matter, human rights organizations have had difficulty uncovering enough concrete evidence to satisfy Saudi Arabian authorities. In a country where women's personal statements possess little to no merit, individual revelations – no matter how horrifying – offer very little in the way

⁶⁶ “Saudi Arabia: Time is long overdue to address women's rights.”

⁶⁷ “Saudi Arabia: Time is long overdue to address women's rights.”

of instigating change. As such, domestic violence goes largely undocumented and remains a silent yet brutal crime. Amidst a network of social demands, “the wife may sacrifice herself...for the formal stability of their children.”⁶⁸ Nevertheless, the results of such silence are often tragic. Amnesty International interviewed one victim who explained that her husband would frequently “slap [her] simply because [she] was not quick enough to provide him with a glass of water. The beating continued and [she] used to get admitted to the hospital for bruises and serious bleeding.”⁶⁹ There are, however, some Saudi Arabian women who have sought to challenge the status quo, albeit to little avail. The courageous Rania al-Baz “broke the wall of silence [in April 2004] when she allowed photographs to be made public of her battered face” and actively sought retribution for her suffering. While certainly revolutionary, al-Baz’s efforts have not had enormous impact in Saudi society. A Freedom House assessment proclaims:

Despite the outpouring of interest and sympathy that the disclosure evoked, the al-Baz incident may not have established a precedent for other women to come forward, or have changed social attitudes toward domestic violence. The outcome of the al-Baz case illustrates how powerful these social constraints continue to be for women and how domestic violence continues to be viewed as a family matter.⁷⁰

The explanation behind continued perpetuation of these human rights abuses lies largely in the relationship between shari’ah and law. Religion remains closely tied to the abuses of women’s human rights as a way of providing a means of justification that will resonate deeply within the society. The official and informal spheres therefore become mutually reinforcing entities; religion is utilized as a tool to ensure society’s general support and self-enforcement of these practices.⁷¹ In this way, Islamic jurists and leadership have established a framework in which reform is extremely difficult. Even if shari’ah becomes codified and documents are made to

⁶⁸ “Saudi Arabia: Time is long overdue to address women's rights.”

⁶⁹ “Saudi Arabia: Time is long overdue to address women's rights.”

⁷⁰ “Saudi Arabia.” Freedomhouse.org. <<http://www.freedomhouse.org/template.cfm?page=182>>

⁷¹ “Saudi Arabia: Time is long overdue to address women's rights.”

restrict discrimination and injustice toward women, these changes will likely be only nominal in nature, as the larger traditions will still remain entrenched in the Hanbali religious ideals of Saudi society.

Although Islam is declared the official religion of the country, Egypt's system of governance and law is not ground in shari'ah to the same extensive degree as is Saudi Arabia's system. For one thing, Egyptian law is largely codified, unlike Saudi Arabia's less tangible network of mores and customs. Women's political and economic rights, for example, are protected in official texts. Despite these regulations, the government exercised minimal responsibility over familial and marital law and subsequent treatment of women within the home. This discrepancy is quite ironic: "In contrast to a public domain which, in theory, supported the universal rights of all citizens, personal status laws were left to bear the marks of cultural difference and gender inequality."⁷² More recently, however, Egypt has displayed some commitment to reform. After years of upholding the gendered hierarchies outlined in circumstantial 10th century shari'ah law, Egypt instituted a number of changes to its Personal Status Code in 2000 and 2004. These amendments allowed for such freedoms as independent travel rights, increased opportunities for monetary support after divorce through the establishment of family courts and the Family Insurance Fund (Articles 10 and 11), and (perhaps most notably) the ability to "file for a no-fault divorce called a 'khul,' which enables the wife to divorce the husband without his consent."⁷³ This right was the first of its kind to be awarded in the Middle East and represented a significant change in Egyptian society and marital relations. Nevertheless, these legal developments are difficult to implement within a society where even the enforcement officials remain entrenched in patriarchal norms. A 2008 American University

⁷² Haddad 89.

⁷³ Aya Batrawy, "New Family Laws: A Success Story?" Inter Press Service News Agency (2008) <<http://ipsnews.net/africa/nota.asp?idnews=44281>>

in Cairo study revealed that the “new courts continue to reflect gender inequality and biases against women, and that the new system is limited in its ability to strengthen the legal rights of women.”⁷⁴ Outside of divorce and travel rights, women remain immensely susceptible to domestic violence and sexual harassment, with some statistics citing a rate of at least two rapes an hour.⁷⁵ Long-lasting change, it seems, cannot persist unless reforms are qualified within society’s accepted values and customs.

Despite these challenges, however, reform is not impossible and Tunisia serves as an illuminating example of the capacity for change within an gradualist Islamic framework. Tunisia’s legal doctrines are the most progressive out of any of the Middle Eastern countries, containing numerous provisions to ensure men and women’s equal rights. The 1956 Code of Personal Status (*Majallat al-Ahwal al-Shakhsiyya*) not only declares polygamy outright illegal (Article 18), but puts into place other stipulations expressly confining divorce to court and permitting women to instigate such a dissolution as well (Articles 30 and 31). Moreover, Article 3 provides for equity within the marriage contract, proclaiming that “Marriage shall only be contracted with the consent of both spouses and it is essential for the validity of the marriage that it be witnessed by two trustworthy witnesses and that a dower be specified for the wife.”⁷⁶ The Code of Personal Status, unlike the Saudi Basic Law, directly provides for the equality of men and women within the legal and judicial spheres. Transcending the ambiguity contained in the Cairo Declaration, Article 6 of the Tunisian Code of Personal Status quite clearly declares: “All citizens have the same rights and the same duties. They are equal before the law.”⁷⁷ This

⁷⁴ Batrawy.

⁷⁵ Amnesty International USA, “2008 Report for Egypt,” Amnesty International (2008) <<http://www.amnestyusa.org/annualreport.php?id=ar&yr=2008&c=EGY>>

⁷⁶ Erwin I.J. Rosenthal, *Islam in the Modern National State* (Cambridge: University Press, 1965) 336.

⁷⁷ “Women’s Rights,” *Human Rights in Tunisia: Options and Accomplishments* <<http://www.tunisieinfo.com/documents/options/chapter3.html>>

assertion does not leave room for debate – women do not merely possess “certain” undefined duties as in the Cairo Declaration, but have the identical rights and duties as men. The Code further provides for the organization of the home in accordance with these same shared rights.⁷⁸

Since 1956, Tunisia has introduced a variety of other reforms designed to further emphasize men and women’s equality and award women more opportunities to enhance and exercise their de jure rights. As pertaining to marriage and the home, specifically, the 1993 amendments expunge the prior statement that “the woman must obey her husband,” instead proclaiming the need for husband and wife to “treat each other with kindness and considerations, and assist each other in the management of the household and the affairs of their children.”⁷⁹ The 1993 reforms also allowed for greater freedoms for married minors and a court-sanctioned program to ensure alimony payments in the event of divorce.⁸⁰ Moreover, the reforms seek to subjugate patriarchal jurist biases through demanding “that judges receive training in the field of women’s rights and that specialists be trained in personal status and in sociological and psychological matters.”⁸¹ Three years later in 1996, President Ben Ali espoused further protections with regard to child support payments and also provided for both husband and wife’s abilities to own and share of property.⁸² The 1997 reforms continued to strengthen the child support apparatus to allow women even more unencumbered access to funds for extended periods of time.⁸³ Given these continued efforts at not only instituting egalitarian policies but enhancing them as well, the prospects for continued reform remain strong.

⁷⁸ “Women and Civil Rights,” Tunisia Online <<http://www.tunisiaonline.com/women/index.html>>

⁷⁹ “Women and Civil Rights.”

⁸⁰ “Women’s Rights.”

⁸¹ “Women and Civil Rights.”

⁸² “Women’s Rights.”

⁸³ “Women’s Rights.”

Perhaps more compelling than the provisions themselves, however, are the ways in which these reforms are justified by virtue of Islamic law. After all, Article 1 of the Tunisian Constitution declares it an Islamic state; though shari'ah courts were abolished in 1956, the state still remains committed to Islamic principles and values at the root of its practices.⁸⁴ The amendments to the Personal Status Code and subsequent confirmations of gender equality were not instituted as secular reforms, but were “accompanied by copious notes designed to show their provenance from and compatibility with Hanafi shari'ah law. Thus, Article 3, [which] makes marriage dependent on the mutual consent of both partners,” is justified on the basis of original Qur'anic principles and Prophetic example proclaiming the same need for mutual support.⁸⁵ Similarly, child support mechanisms find direct support in the Qur'an as well (verse 2:241).

The Tunisian Personal Status Code also directly appeals to the notions of *ijtihad* and gradualism within Islamic sources. The Qur'an's prescriptions regarding gender roles and relations were presented with a specific context in mind, meant to adapt and revolutionize as those background circumstances changed as well. Tunisian Islamic reformists took this gradualism to heart and modified their interpretations of shari'ah accordingly. Polygamy, for instance, was not fully outlawed in the Qur'an, but was intended to eventually reach such a point over time. In accordance with this need for reinterpretation and modification of shari'ah, the Tunisian Personal Status Code takes a gradualist stance and forbids polygamy. This forceful statement represents a refusal to remain acquiescent to the antiquated 10th century juristic interpretations that permitted such a practice:

The rationale behind the law is that the present social, economic, and political conditions place an irrefutable presumption of monogamous Muslim marriages: the condition of justice and equity amongst wives is perceived not only in an economic and financial

⁸⁴ “Republic of Tunisia,” Emory Law <<http://www.law.emory.edu/ifl/legal/Tunisia2.htm>>

⁸⁵ Erwin 336.

sense, but also from the perspective of love, affection and emotional attachment which cannot be distributed equally in a polygamous relationship.⁸⁶

In this regard, Tunisia has become a paragon for women's rights reform within the Middle East, as its efforts have occurred through *ijtihad* and the reinterpretation – not the forfeit – of shari'ah Islamic law. Rather than rely on past, often misogynistic, conceptions of shari'ah developed with the influence of outside cultural interactions and patriarchal interpretations, Tunisian jurists appeal directly to the core principles and teachings of the religion itself as they stood at the outset.

Algeria and Morocco have also attempted similar reforms of Islamic family law through reliance on Islam's original sources, though not to the same extent as in Tunisia. Algeria's constitution proclaims Islamic shari'ah the basis of its system of governance, primarily basing itself on the Sunni Maliki school. For years, women's rights within marriage and the family were regulated by a personal status code that upheld many of the 10th century prejudices and impediments to gender equality. In 2005, however, Algerian leadership amended the document to advocate equal rights in terminating betrothals (Article 5), protections against forced marriages (Article 13), and joint responsibilities within the home and with regard to children (Article 36).⁸⁷ The reforms also allowed women the freedom to consummate their own marriage contracts, albeit under supervision of a *wali*, or chaperone.⁸⁸ Algeria, in these ways, is in the process of attempting reform through targeting the essence of shari'ah itself and expanding its scope: "Article 222 [contains a] provision for reference to the shari'ah in the absence of a provision in the law. The effect is that, rather than being restricted to a single school, judges are able to seek an appropriate solution ... from any of the sources of shari'ah, including the primary

⁸⁶ Rehman 117.

⁸⁷ El Alami 40.

⁸⁸ Bureau of Democracy, Human Rights, and Labor, "Algeria," *International Religious Freedom Report 2005*, U.S. Department of State (2005) <<http://www.state.gov/g/drl/rls/irf/2005/51596.htm>>

sources – the Qur'an and Sunna.”⁸⁹ The 2005 Algerian amendments, while not as expansive or drastic as those in Tunisia, are certainly a step in the right direction for women and family law.

Morocco's 2004 changes in its Personal Status Code (*Moudawana*) are a bit more on par with Tunisia's reforms and, similarly, the original Islamic tenets from the time of the Prophet Muhammad. Included in the modified *Moudawana* are provisions for “joint responsibility” between husband and wife, self-guardianship of the wife, no legal obligations to husband, minimum age for marriage (identical for both males and females), and opportunities for the wife to initiate divorce. While polygamy is not outlawed as it is in Tunisia, Moroccan family laws do place the practice under “stringent legal conditions, making [its implementation] nearly impossible.”⁹⁰ Tunisia, Morocco, and Algeria's recent reforms represent a concerted effort to reclaim women's equality and freedoms while still not relinquishing Islamic ideals. While still not completely adherent to the Universal Declaration of Human Rights and other such documents, the reforms bring shari'ah much more in tune with international human rights standards preaching equality of gender within the home and with regard to divorce .

Across the Middle East as a whole, there exists profound difficulty in implementing de facto human rights reform within countries so deeply imbued with conceptions of shari'ah law propagated by Islamic jurists and political leaders. The proclaimed practices and rules contained within many established schools of Islamic law have often proved difficult to reconcile alongside international human rights documents, resulting in gross violations with regard to women's rights in much of the Arab world. Nevertheless, United Nations standards are not completely out of reach and countries such as Tunisia, Algeria, and Morocco have demonstrated their ability to

⁸⁹ El Alami 39.

⁹⁰ “Morocco Adopts Landmark Family Law Supporting Women's Equality,” Women's Learning Partnership (2004) <<http://www.learningpartnership.org/ar/node/587>>

implement reforms that bring their countries more in accordance with these international norms. Their new family laws aim to return to Islam's roots and reevaluate traditional doctrine in light of changing times, rather than unconditionally accept *shari'ah* practices as absolute and immutable. Indeed, *shari'ah*, in many cases, does not provide an accurate representation of core Qur'anic principles, nor does it allow for any sort of gradualist approach to the texts. Tunisia, Algeria, and Morocco's modifications collectively provide for a reaffirmation of the practices outlined in original Islamic sources upholding ideas of joint familial responsibility, mutual consent and equality within the home, and the mutual right to divorce, among other things. In this way, religion and international law are able to coexist; it was not Islam itself that wrought clashes with women's rights, but *shari'ah* as it came to be interpreted over time.

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