

# Muslim Family Law and Practices: Perspectives CEDAW

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**Abstract:** Equality and justice in the Muslim family law are the necessary elements as these uses a holistic framework that integrates Islamic teaching, universal human rights, national constitutional guarantees of equality, and lived realities of women and men. Islam and human rights collectively argues for equality within the Islamic legal system. As such, recognizes the compatibility between concepts of equality and justice in Islam and in international human rights standards, including the Convention on the Elimination of All forms of Discrimination Against Women (CEDAW) adopted in 1979. Many states parties to the CEDAW Convention assert that they cannot fully implement CEDAW because it is in conflict with *Shari'ah*, or that laws or practices cannot be changed because they are divine or based on the Qur'an. The full implementation of CEDAW is possible, as the principles of equality, fairness and justice within CEDAW and Islam are fully compatible and reform of laws and practices for the benefit of society and the public interest (*maslahah*) has always been part of the Muslim legal tradition. This study attempts to provide an overview of the general approach of the equality principles, including responses to several of the common arguments or justifications made by traditional scholars and their disciples about why they fail to fully implement the provisions of CEDAW in Muslim family laws.

**Keywords:** human rights, justice, equality, discrimination, shari'ah

## Introduction

The human rights standards guarantee all women a voice in defining their culture. Although women in most cultures and other religions also suffer discrimination, it is troubling the extent to which

women's roles within the Muslim family have become politicized, with women and family laws becoming symbols of cultural authenticity and carriers of religious tradition.<sup>1</sup>

Advocates are troubled by the fact that many states parties to the CEDAW Convention assert that they cannot fully implement CEDAW because it is in conflict with *Shari'ah*<sup>2</sup>, or that laws or practices cannot be changed because they are divine or based on the Qur'an. The full implementation of CEDAW is possible, as the principles of equality, fairness and justice within CEDAW and Islam are fully compatible and reform of laws and practices for the benefit of society and the public interest (*maslahah*)<sup>3</sup> has always been part of the Muslim legal tradition.

The main issues examined within these documents included, but were not limited to: dower (sometime used interchangeably with dowry);<sup>4</sup> child marriage, forced marriage, and choices of marriages; divorce; property rights within marriage and its dissolution; inheritance; violence against women within the family (e.g. marital rape); obedience; guardianship; custody; levirate (practice of requiring a man to marry his brother's widow); and the ability to pass nationality to foreign spouses and/or children. These topics are derived from the rights and obligations related to marriage and family law relations contained in the CEDAW Convention<sup>5</sup> and its related documents, namely article 16 of the CEDAW convention and its corresponding General Recommendation number 21 on equality and family relations (1994)<sup>6</sup>. while the rights and obligations related to family laws and practices under the CEDAW Convention are primarily articulated in this article and general recommendation, here the holistic nature of

the CEDAW Convention I means that other articles e.g., article 1 (discrimination); article 2 (state obligation); article 5 (customs and stereotypes); article 9 (nationality); article 15 (equality before law), as well as general recommendations and statements by the CEDAW committee (e.g., the 1998 statement on reservations<sup>7</sup>, also relate to family laws and practices.

This paper provides an overview of the general approach of the equality principles, including responses to several of the common arguments or justifications made by traditional scholars and their fans about why they fail to fully implement the provisions of CEDAW in Muslim family laws.

### **Responses to Justification for Non Implementation of CEDAW**

#### ***Shari'ah is the principal source of law defining rights, duties, and responsibilities of men and women***

Scholars among Muslim community provide a variety of justifications for why they can not fully implement some or all of the provisions of CEDAW. Below are responses to the main arguments that relate to Islam or Muslim laws, and to point the way to the possibilities of equality and justice in Islam. They expressly state that 'Shari'ah' is the primary source of legislation and/or is the principal source for defining men and women's rights, duties and responsibilities. They view *Shari'ah* as divine law that is monolithic, unitary, fixed, and unchangeable.

While *Shari'ah* is the revealed law, *fiqh*<sup>8</sup> is the human attempt to understand the *Shari'ah* which can take the form of positive laws, legal rulings and jurisprudence. In the holistic approach, while *Shari'ah* may be a principal source of law, the human attempts to understand it and articulate it as positive laws must be grounded in universal human rights standards, constitutional guarantees of equality and non-discrimination and lived realities of men and women today. The confusion today lies in the misuse and misunderstanding of terminologies.<sup>9</sup>

Ibn Qayyim al-Jawziyyah wrote, "The fundamental of *Shari'ah* are rooted in wisdom and

promotion of the welfare of human beings in this life and the hereafter. *Shari'ah* embraces justice, kindness, the common good and wisdom. Any rule that departs from justice to injustice, from kindness to harshness, from the common good to harm, or from rationality to absurdity can not be part of *Shari'ah*, even if it is arrived at through individual interpretation."<sup>10</sup>

The values and principles of equality, justice, love, compassion, and mutual respect which are the primary objectives within the *Shari'ah* should drive the development of all Muslim laws and practices.

#### ***Cannot implement if inconsistent or in conflict with Islam/Shari'ah***

Many of the statements can be distilled into the simple argument that they cannot implement some or all of the CEDAW provisions if those provisions are inconsistent with 'Islam' or 'Shari'ah'. In many cases, they identify specific issues such as polygamy, inheritance, age of marriage, etc. for which they argue that laws are practices cannot be changed because of specific verses in the Qur'an or specific *Hadith*<sup>11</sup> that relate to that issue. Islam and Islamic law are not monolithic. There always have been multiple understandings and interpretations of Islamic law. *Ikhtilaf*<sup>12</sup> which means disagreement, difference of opinion and diversity of views, especially among the experts of Islamic law, is widely recognized and respected in the Islamic tradition.<sup>13</sup> Islamic jurisprudence has been developed through multiple schools of law (*Mazhab*),<sup>14</sup> with different views in every school.

However, *fiqh* ruling on the family became literal expression of the classical jurists' understanding of Islam's revealed text and their notions of justice, gender relations, and legal theories which reflected the social and political realities of their age. In that world, patriarchy and slavery were part of the fabric of society, seen as the natural order of things and a way to regulate social relations. The concept of gender equality and human rights - as we mean them today - had no place and little relevance to the classical jurists' conceptions of justice. The idea of human rights and gender equality belong to the modern world. The ideas of equal rights for women and equality in the family

are among, to use the *fiqh* idiom, the 'newly creates issues' (*masa'il mustahdatha*) that pose a challenge to Islamic legal thought.

Modern Islamic scholars of Islamic jurisprudence are reviving the traditional tools and methodologies in order to re-read and understand Islamic sources and use classical jurists principles such as *Ikhthilaf* (diversity within Islamic law and *fiqh*) *Istihsan*<sup>15</sup> (adopting the idea or principle that is better, more useful), *Maslahah* (choosing that which benefits the public interest or common good), *Ijthihad*<sup>16</sup> (exerting effort to form an independent judgment on a legal question), *Maqasid al Shari'ah*<sup>17</sup> (the objectives of the *Shari'ah*) to develop solutions for the 'newly created issues'. If 'Islam is the solution', if Islam is relevant for all times, and if Islam is supposed to bring justice, then it is legitimate and imperative for us to engage with women's rights activists and scholars to search for new solutions to the conflicts and tensions that arise as a result of the disconnect between women's lived realities and Islamic law as traditionally defined.

***Islam provides superior or sufficient justice for women or complementarity of rights and duties between men and women.***

On a historical level, Islam was incredibly advanced in providing revolutionary rights for women and uplifting women's status in the seventh century. Many of the revelations in the Qur'an were by nature reformed oriented, transforming key aspects of pre Islamic customary laws and practices in progressive ways in order to eliminate injustice and suffering. The Prophet Muhammad received a series of revelations, each revelations building on or superseding customary laws.<sup>18</sup> Thus the reforms took place in the early years of Islam are clearly progressive, changing with the needs of the society.

Many Muslim people justify inequality between men and women in laws and practices, especially those relating to financial rights, stating that men and women have complementarity or reciprocity in terms of their rights and obligations, especially in marriage. The argument is that husbands have a duty to give dower to the wife upon marriage and to provide maintenance for the wife and children during the

marriage, while women have no legal obligation to support their husbands or families even if they are wealthy. Therefore, the laws are constructed to give men additional rights-double shares of inheritance, unilateral right to divorce in relation to their additional responsibilities, while women have additional responsibilities -full obedience to their financial benefits they receive. Many authorities in Muslim societies do not consider this discrimination, but rather reciprocal or complementary obligations.

The payment of dower and support after divorce is an obligation of the husband, and the husband has the right to divorce, just as the wife has her independent financial security and her full rights to her property and is not required to pay her own property as for the question of equality of rights and responsibilities during marriage and its dissolution, the *Shari'ah* honors women and makes the man responsible for the financial support of the women, whether his wife, daughter, mother or sister, not requiring the wife to support either herself or her family, even if she is wealthy. All the property she owns is for her alone and she is not required to provide for anyone.<sup>19</sup>

There is huge disconnection between the law and practice, the logic of reciprocity does not reflect reality for most men and women today. Thus the argument about reciprocal arrangements is a legal fiction grounded in medieval period *fiqh* thinking that remains rigid in spite of the changed realities. Nowadays it is common to hear of family stories where it is the daughter who financially, physically and emotionally takes care of ageing parents until their deaths, and yet it is the irresponsible son who still receives double shares of inheritance. Since privilege is linked to responsibility, should not the irresponsible man lose his privilege when he fails to carry out his burden?

In traditional Muslim societies, men had greater rights but were expected to shoulder greater responsibilities, while women had fewer rights but were expected to shoulder fewer responsibilities. Today while a man's traditional responsibilities are reduced, their traditional rights have not changed; and while

women's responsibilities have increased, their traditional rights have not changed. Furthermore, complementary can not be confused with true equality. We must respond to biological and socially created differences between men and women that result in women's asymmetrical experience of disparity and disadvantage in a way that achieves true equality of opportunity and equality of results.<sup>20</sup>

Understanding of justice and injustice changes over time. The specific legal rules of the Qur'an are conditioned by the socio- historical background of their enactment. Given a different time and context, what was once considered just may today be considered just, may today be considered unjust. What is eternal, is the social objectives and moral principles explicitly stated or strongly implied in the message. The challenge today is how to ensure that the eternal principles of justice and equality remain the outcome of our laws and practices.

#### ***Culture, customs or traditions including minority rights prevent full implementation***

Culture, customs, or traditions are often used as an excuse for not fulfilling international obligations. The consequence of such argument is that women's rights are sacrificed in favor of a vague notion of 'culture'. (Thus fuels for dichotomization of culture and women's rights, and often results in discrimination and inequality before the law). This can be seen in the fact that reservations to article 16 of CEDAW but not to similar article in other human rights treaties such as article 23(4) of the ICCPR.

It is important to recognize that Islam, culture and practices are not isolated but exist within context where there are multiple cultures and multiple rights demands from different social groupings. Islam is interpreted differently according to locally prevailing customs.<sup>21</sup> Here my opinion is that a multi lengthen approach is the most effective way to ensure equality and justice. It is also essential to see religion, human rights standards, constitutional guarantees and lived realities as complementary rather than separate. It is not acceptable to reject CEDAW principles based on a patriarchal understanding of a verse from Qur'an, or ignore the devastating effects resulting from a modern

social phenomenon using respect for a traditional practice as a justification.

#### **Responses to Specific Issues**

Support for equality and justice for such specific family laws issues from four interrelated approach;

- ❖ Islamic sources and its jurisprudence
- ❖ International Human Rights
- ❖ National laws and Constitutional guarantees of equality; and
- ❖ Lived Realities.

From these sources there are for each of several different key issues in family life as well as rights based laws related to that issues from a variety of countries. Because constitutions, laws, and policies differ dramatically, here I will not outline laws and constitutional guarantees of equality. However, constitutions may similarly provide for the domestication of international law including treaties as well as fundamental rights such as rights to a family. These may be useful tools in expanding the understanding of obligations regarding equality and non discrimination within the constitutional framework. Thus the constitutional and legal framework guaranteeing equality should be considered on the following issues.

#### ***Child marriage***

The problem of child marriage combines analysis of the Islamic legal tradition on minimum age of marriage, norms set forth in international human rights documents and sociological and medical data about the realities of early marriage and its detrimental effects on girls and young women. The Qur'an does not provide any specification for age of marriage.<sup>22</sup> This indicates that a person must have sufficient judgment and maturity to marry and attaining the age of majority alone is not sufficient.<sup>23</sup> However, attempts to set a minimum age of marriage at eighteen for both men and women have often met with resistance from conservative religious authorities, claiming that this is 'Un-Islamic'. Commonly the example of the Prophet Muhammad's marriage to Aishah is used to justify child marriage. However, the question arises as to why

the Prophet's marriage to Aishah is used as model while his marriage to Khadijah, a widow fifteen years older than him, or his marriage to other widows and divorcees ignored as exemplary practices.<sup>24</sup>

It is well understood that universal human rights standards guard against marriage for children under the age of eighteen. States have a duty to protect children who are generally defined as persons below the age of eighteen.<sup>25</sup> Children have right to education, and early marriage can be a major impediment to this.<sup>26</sup>

Equating the age of majority with the age of puberty and/or rationality (*Baligh*) as is traditionally done, fixes adulthood at too young an age. The concept of adulthood, maturity and the roles of husband or wife are dramatically different today than they were during the classical era when the rules of *fiqh* were solidified. Socially the role of wife/mother/parent/adult was vastly different to what it is today, what with changes in education, careers, the structure of the family, etc. as well as the psychological, economic, social, and biological functions of being a wife and mother. This translates into decrease in family support for young brides as they try to cope up with the challenges of married life. In addition, the onset of puberty is no indication of sufficient maturity for marriage.

Early marriage of girls under the age of eighteen is a form of violence.<sup>27</sup> Such heavy burdens on young girls often lead to marital problems and subsequent marital breakdown and/or divorce.

### ***Freedom to choose if, when and whom to marry***

The issues of consent in marriage relates both to whether the two parties to the marriage must give their consent to be married and whether anyone else must give consent for the marriage to take place. Under Muslim family laws, a woman is required to have a legal guardian (*Wali*)<sup>28</sup> who has the authority to contract a marriage on her behalf. Thus, adult women do not have the legal capacity to contract their own marriage. At one point in Muslim history, the requirement of a *wali* applied to both boys and girls,

and in some schools of law, both the mother and the father could hold guardianship.<sup>29</sup> Today, however, it is applied only to girls and held only by men.

There are no verses in the Qur'an or evidence in the way of Prophet that explicitly stipulate guardianship as a condition for the marriage contract. Ibn Rushd (d.1198 C.E.), a well respected classical Muslim jurist stated that it is well known that during the lifetime of the Prophet there were many people without a guardian, but no one has reported the prophet to have acted as guardian to conclude a marriage on their behalf, nor has he, in fact, authorized others to represent him in that capacity.<sup>30</sup>

In the absence of injunctions or evidence in the Qur'an or the *Sunnah*, the *Hanafi* position on guardianship which states that the *wali* is required only for marriages involving minor boys and girls, and that no *wali* is needed for the marriage of a competent adult women. The doctrine of *Ijbar*<sup>31</sup>, under which the guardian has the right to determine a spouse and compel a word to marry, is still practiced in some countries. There is no authority in the Quran or the way of the Prophet for the doctrine of *Ijbar*.<sup>32</sup> A number of human rights instruments including the Universal Declaration of Human Rights,<sup>33</sup> the CEDAW convention,<sup>34</sup> and the Beijing Platform for Action,<sup>35</sup> guarantee both the right to enter into marriage after free and full consent by both parties and the right to freely choose a spouse.<sup>36</sup>

Taking away a woman's ability to contract her marriage and giving it to a *wali* prevents a woman from exercising her legal capacity at all, let alone on the same level as a man. In addition, international human rights instruments validate a woman's right to freely choose her spouse and the ability to consent are essential for equality between men and women. In term of social realities supporting freedom to choose if, when, and whom to marry requiring the consent of *wali* has a negative impact on a woman's autonomy, independence and self esteem.

Requiring a guardian to grant his consent to a marriage even for women who are legal adults in all other aspects of their lives makes women perpetual minors. Requiring a male guardian also devalues a

women's ability to actively and powerfully participate in public and political life. Guardianship does not protect women from difficulties in marriage including divorce, domestic violence and health risks such as HIV/AIDS. If they are able to commit themselves to marriage without needing a guardian's protection and permission, they might be better able to choose compatible spouses.

### ***Polygamy***

One of the main issues that arise in CEDAW with Muslim family laws is that of polygamy. Here the argument is that polygamy is clearly stated in the Qur'an or the *Shari'ah*. Actually, the polygamy means that "a person who have more than one spouse". It is divided in to two categories; polygene in which a man have more than one wife. Other one is polyandry in which women have got more than one husband. People normally treat polygamy means generally, a man have more than one wife. But polygamy means both having more than one spouse. Since Islam promotes monogamy and only permits polygamy as an alternative in exceptional circumstances. It's only mentioned in the glorious Qur'an;

"...marry women of your choice. Two, or three, or four; but if ye fear that ye shall be, able to deal justly (with them), then only one, or that which your right hand possess. That will be more suitable, to prevent you from doing injustice."<sup>37</sup>

The statements "marry only one" is given in the glorious Qur'an than any other religious books. In pre Islamic Arabia man had several wives. Some people had hundreds of wives. Islam put on upper limit polygamy and maximum four. If any one else can have more than one wife only one condition that equal justice between two, or three, or four. Otherwise only one. And the glorious Qur'an says that it is very difficult for man to be just between wives.<sup>38</sup> So the polygene is the exception, not the rule. Many people think that Islam says it should compulsory marry more than one wife. The polygene falls in the middle categories of permissible in Islam.<sup>39</sup> There is no statement in any *hadith* or the glorious Qur'an which says that if the man marries more than one wife, he is the better person than who have got marry one wife. It

was in this context that polygamy was tolerated in Islam: to provide for the welfare of widows and the orphaned.

In the present day it is extremely difficult if not impossible for one person to treat multiple wives equally and justly.<sup>40</sup> Thus, reformation should suggest that polygene should be even more restricted than it was in the situation discussed in the Qur'an. One possibility for limiting polygene is to allow the existing wife an option for obtaining a divorce on the ground of the husband's polygene. This is not a new interpretation or innovation. On the contrary, it is supported by traditional practices from the early days of Islam is recognized by the *Hanbali* school of law which is often regarded as the most conservative school among the four schools in Islamic Jurisprudence.<sup>41</sup>

In terms of human rights standards, polygene is incompatible with the fundamental human rights principle of equality between men and women,<sup>42</sup> contravenes the CEDAW article 1 definition of discrimination and violates a women's right to equality. This polygene as practiced today is largely harmful to women and children, even if it is not widely practiced in our society. Essentially polygene can often result in inequality between the multiple wives, as one wife will have more seniority and power, both economic and psychological, or be favored by the husband within the household. For these reasons and more, being in a polygamous relationship also violates a women's right to dignity.<sup>43</sup>

Polygene can also have detrimental effects on children as additional wives often result in more children who must share limited amounts of their father's resources and time. It can also promote low social and economic status among the women especially if they are financially depends on the husband in the first place. Finally, it is no longer necessary for men to marry widows or orphans to protect them, since women in the twenty first century are able to provide and care for themselves or seek assistance from the state and other state actors.

### ***Financial issues and obedience***

CEDAW study states that inequalities in certain laws were not discrimination, but reflected complementary obligations and rights under the *Shari'ah*, namely that the husband is required to maintain his wife while the wife can keep any income or wealth for herself.<sup>44</sup> The argument sidesteps the reciprocal aspect that a woman is required to be obedient to their husbands in return for maintenance such that her failure to obey (*nushuz*)<sup>45</sup> could lead to her losing maintenance or not receiving backdated maintenance in divorce proceedings.

It is a legal fiction maintained to keep women under control and in positions of obedience. The logic behind the law needs to be reconsidered and the Qur'an and the *Sunnah* provide concepts to do this. The Prophet's first wife, Khadijah, was a successful independent business woman. The Prophet supported his wife's business activities, showing respect for women who serve as equal in the financial aspects of a marriage. The term *nushuz*, or disobedience, is used both for women<sup>46</sup> and for men<sup>47</sup>.

Human rights standards, especially under CEDAW, both explicitly and implicitly provide for equality between man and women in terms of financial issues. These include that men and women should have the 'same rights and responsibilities during marriage and its dissolution',<sup>48</sup> and the same rights 'in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property.'<sup>49</sup> in terms of social realities, When both partners in marriage do not have equal capacity and responsibility to contribute to and make decisions about the union, it can lead to adverse effects for the party who has less power in the relationship, generally the wife.

### ***Inheritance***

Inheritance rights are crucial for Muslim women because distribution and control of property and assets significantly affect their ability to enjoy stable and fulfilling lives and to exercise other rights. Without assets derived from inheritance, women are disadvantaged cannot lead independent lives, and

cannot even ensure that they and their families can support themselves.

In current inheritance laws which are based on traditional inheritance rules developed by classical Muslims jurists, the provisions are unequal on the basis of gender. Under one aspect of traditional inheritance rules, sons receive double the share of inheritance of daughters. The underlying assumption and rationale from such provisions is that men have the duty and responsibility of providing for the family. This creates a cyclical argument, however: men have greater inheritance rights because they need to provide for the family; men need to provide for the family because they have greater inheritance rights.

The traditional Muslim rules of inheritance, though derived from the basic structure set out in the Quran were then elaborated and systematized by the various schools of law through jurisprudential methods and interpretations. In terms of universal human rights standards, states parties to the CEDAW Convention are responsible for ensuring that men and women enjoy inheritance rights in law and that women are able to enjoy these rights in fact – that they actually receive the property they have inherited, that they are not compelled to give up their rights by other members of their families, etc.<sup>50</sup>

In terms of the lived realities of women, family structures in modern times have vastly changed. Whereas hundreds of years ago, extended families spent their lives in close proximity and women might have relied on male heirs to support them, the rise of the nuclear family and decline of close relations with extended family networks means that extended families can no longer serve as reliable support mechanisms.

These changing norms also mean that the arguments about men supporting their families, and thus being entitled to larger shares of inheritance than their sister or other female relatives, hold little weight in the modern era. Scholars and the defenders of traditional inheritance rule often advise families that they can use gifts during their lifetime as more fair and equal way to distribute property. This indicates that

these religious leaders believe that rule of inheritance are not fair and equal for sons and daughters. Such diverse practices to ensure that justice is done in the division of inheritance demonstrate a need to reform the traditional rules to make them consistent with Islamic legal, religious and ethical sensibilities.

## Conclusion

There are diverse historical, cultural, social, political and economic differences that clearly influence the implementation of Muslim family law among in our community. There is also the ideological divide between traditional scholars, on one side, and modernist or reformist scholars, on the other. We can find many variants in the practice in respect of family laws. The hard core problem in this respect started with the adoption of the Convention on the Elimination of Discrimination against women (CEDAW) which is based on the idea of universality of women's rights.

Many of the justifications rely on the simplistic excuse that the laws and practices are based on 'Shariah' and are therefore immutable, or that customs, traditions and culture prevent any immediate change. However, A more holistic way of viewing equality within the family by integrating Islamic teaching, universal human rights, national constitutional guarantees of equality and non discrimination and the lived realities of women and men in dynamic and evolving process.

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- <sup>1</sup> 'Because Muslim family laws are regarded by many Muslim to be derived directly from the teaching of the religion, this makes reform particularly difficult. Those determined to preserve the status quo conflate human understanding of God's message with the divine word itself, thus interpreting women's demands for reform towards equality and justice as demands to change the divine message.'
- <sup>2</sup> *Shari'ah* literally means 'water', 'source', and 'the way', 'the path'. The path or way is given by God to human beings, the path by which human beings search God's will. Commonly misinterpreted as 'Islamic Law', *Shari'ah* is not restricted to positive law per se but includes moral and ethical values and the jurisprudential process itself.
- <sup>3</sup> This is the basic principle of Mailiki method of *Istislah*. Fourteenth century jurist Abu Ishaq al-Shatibi defined it as the primary objective of *Shari'ah*. According to him, *maslahah* relates to the five basic needs that the law aims to protect: life, faith, reason, property, family.
- <sup>4</sup> 'Dower, or *mahr*, is a key concept in Muslim family laws. Dowry or the goods that a bride takes with her to the marital home is not a concept recognized in Islamic Jurisprudence. The tendency to confuse dower and dowry or use them interchangeably in English is a matter of language.'
- <sup>5</sup> Available at <http://www2.ohchr.org/english/law/cedaw.htm>.
- <sup>6</sup> Available at <http://www2.ohchr.org/english/bodies/cedaw/comments.htm>.
- <sup>7</sup> Report to the committee on the Elimination of Discrimination against Women, Eighteenth and nineteenth CEDAW Session, A/53/38/Rev.1 (1998), available at <http://un.org/womenwatch/daw/cedaw/reports/18report.pdf,pp.47-50.>
- <sup>8</sup> *Fiqh* literally means 'understanding', 'knowledge'. The science of understanding *Shari'ah*; also used to refer to the huge amount of literature produced by Muslim jurists.
- <sup>9</sup> 'The multiplicity of position and opinions between and even within the different schools of law constitutes the rich body of what should more accurately be called the 'Islamic legal tradition', rather than 'Islamic law'. The various positions and opinions were developed by jurists, independent of states, and were not defined by or applied through state mechanism.'
- <sup>10</sup> Ibn Qayyim al-Jawzzyah, *I'lam al-Muwaqqi'in*, Vol.03, 1<sup>st</sup> Ed., Cairo: Sa'ada, 1955, p.01.
- <sup>11</sup> *Hadith* is distinguished from *Sunnah*, which means normative practice. A *hadith* is a report about what Prophet Muhammad said about something, practiced or approved, or did not disapprove a certain thing. A science of *hadith* criticism was developed to examine the normative value of a *hadith* and about the reliability of a *hadith*. The jurists and the collectors of *hadith* differed in their criteria about the normative of a *hadith*.
- <sup>12</sup> *Ikhtilaf* means diversity in opinion including in divergent legal rule.
- <sup>13</sup> For more detailed information on *Ikhtilaf*, see Mauhammad Khalid Masud, '*Ikhtilaf al-Fuqaha: Diversity in Fiqh as a Social Construction*', in: *Wanted: Equality and Justice in the Muslim Family*, edited by Zainah Anwar, Kuala Lumpur (2009).
- <sup>14</sup> 'A particular 'school' of religious law or thought. In the second and third century, groups of jurists appeared in different Islamic cites which later came to be known as madhhabs/mazhab or school of law. Out of more than nineteenth, eight schools have survived: Hanafi, Hanbali, Maliki, Shafi'i, Ja'afari, Zaydi, Ibadi and Zahiri.
- <sup>15</sup> *Istihsan* literally means to regard something 'good', 'approval', and 'consent'. A method of legal reasoning in which a discretionary opinion is taken in breach of strictly analogy. The *Hanafi* jurists describe it as a method of *Qiyas* when a jurist prefers one analogical conclusion to the other in view of the common good.
- <sup>16</sup> Literally means 'effort', 'endeavor', diligence, Independent reasoning to arrive at a legal principle. *Ijtihad* is an essential process of legal reasoning, responsible for the growth of Islamic law. The necessary qualifications for the exercise of *ijtihad* are: knowledge of the source, legal methods, and scholarly integrity. The person who qualified to exercise *ijtihad* is called *mujtahid*.
- <sup>17</sup> *Maqasid al-Shari'ah*: The basic objectives of *Shari'ah*; the five main objectives are considered to be life, faith, reason, property and family. Other mentioned include justice, human dignity and economic development. This doctrine stressed that the primary objective of the *Shari'ah* is human welfare. The fourteenth century Spanish Maliki jurist, Abu Ishaq al-Shatibi who expounded this doctrine has been very popular in modern Islamic legal thought.
- <sup>18</sup> 'Sometime later revelations advanced earlier revelations, providing guidance to the new community as new challenges and problems arose.'
- <sup>19</sup> United Arab Emirates State party report, U.N. Doc. CEDAW/C/ARE/1 (2008), p.17., Furthermore, see Saudi

- Arabia's responses to the list of issues and questions, U.N. Doc. CEDAW/C/SAU/Q/2/Add.1 (2007), p.29.
- <sup>20</sup> IWRAP Asia Pacific, CEDAW Knowledge Centre, 'The Principle of Equality', available at <http://www.iwraw-ap.org/convention/equality.htm>.
- <sup>21</sup> 'However the fact that customs are dynamic, together with the principles discussed above that *fiqh* can change in accordance with the changing realities of time and place, provides an opportunity for change in laws and practices toward greater fulfillment of rights.'
- <sup>22</sup> See Surah 04. An-Nisah, verse No.06
- <sup>23</sup> 'Imam Abu Hanifah, the founder of the Hanafi School of *fiqh*, stated that in the absence of other evidence, a boy will be considered to have reached the age of majority at eighteen and girl at sixteen.'
- <sup>24</sup> 'Early Marriage', available at [http://www.sisterinislam.org.my/index.php?option=com\\_content&task=view&id=575&Itemid=298](http://www.sisterinislam.org.my/index.php?option=com_content&task=view&id=575&Itemid=298).
- <sup>25</sup> Convention on the Rights of the Child, Article 1: "For the purposes of the present Convention, a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier."
- <sup>26</sup> The Beijing Platform for Action (BPFA) and CEDAW General Recommendation number 21 outlines the negative consequences in terms of education, employment and health that early marriage can have on women, their families and their communities. Further see para 268, 274 (e) and 275 (b) (c) (d) of the BPFA.
- <sup>27</sup> "Social realities support an equal minimum age of marriage by identifying the many negative health, educational and economic consequences of early marriage for girls. Motherhood at very young age entails complications during pregnancy and delivery and a risk of maternal death that is much greater than average. The children of young mothers have higher levels of morbidity and mortality. Early marriage forces girls into sexual relations which can have serious psychological and physical health consequences. Furthermore, younger women often have less knowledge of their own bodies and less strength to stand up to their husband if they are sick, hurt, or face domestic violence."
- <sup>28</sup> Guardian (for marriage); regarded by some schools of law as the father or paternal grandfather who has authority to contract marriage on behalf of the bride.
- <sup>29</sup> Amira El-Azhary Sonbol, *Adults and Minors in Ottoman Shari'a Courts and Modern Law in Sonbol; Women, the Family and Divorce Laws in Islamic history*. Syracuse University Press (1966), pp.236-59.
- <sup>30</sup> Mohammad Hashim Kamali, *Islamic Law in Malaysia: Issues and Developments*, Kuala Lumpur: Ilmiah Publishers (2000), pp.112-13
- <sup>31</sup> *Ijbar* is the power to compel an unmarried woman (of any age) to marry someone of equal status, as recognized by certain schools of law; the power usually resides in the father or paternal grandfather.
- <sup>32</sup> As Mohammad Hashim Kamali states in his book, *Islamic Law in Malaysia*, "A perusal of the relevant evidence suggest that the power of constraint in marriage, known as *wilayat al-ijbar* has little support in the Quran and *Sunnah* and it is most likely to be rooted in social customs of the Arab society that survived and were eventually adopted by the (classical) jurists." In other words, it is a pre Islamic customs that was incorporated into *fiqh* by humans.
- <sup>33</sup> Universal Declaration of Human Rights, Article 16 (2): "Marriage shall be entered into only with the free and full consent of the intending spouses."
- <sup>34</sup> Article 16 (1) (b) of CEDAW calls for the elimination of discrimination against women in matters relating to marriage and family relations and equality between men and women by giving them "the same right freely to choose a spouse and to enter onto marriage only with their free and full consent."
- <sup>35</sup> Para 274 (e) of the BPFA requires government to take action to 'enact and strictly enforce laws to ensure that marriage is only entered into with the free and full consent of the intending spouses'.
- <sup>36</sup> International Women's Rights Action watch Asia Pacific, *The Right to Decide if, When and Whom to Marry: Obligations of the State under CEDAW and other International Human Rights Instruments*, Occasional Papers Series No.06 (2005), available at [http://www.iwraw-ap.org/aboutus/pdf/OPS\\_VI.pdf](http://www.iwraw-ap.org/aboutus/pdf/OPS_VI.pdf).
- <sup>37</sup> See Surah 04. An-Nisah, Verse No.03.
- <sup>38</sup> *Ibidem*, Verse No.129, "ye are never able to do justice between wives even if it is your ardent desire".
- <sup>39</sup> There are five categories of do's and Don'ts in Islam; Compulsory or obligatory, this is the first, Second is, recommended or encouraged, Third is, the permissible or allowed, Fourth is, not recommended or discouraged, And the last is, prohibited or forbidden category.
- <sup>40</sup> "There is also an authentic *hadith* that the Prophet forbade his son-in-law, Ali ibn Abi Talib from marrying another

woman unless Ali first divorced the Prophet's daughter, Fatimah, his existing wife. A great grand daughter of the Prophet, Sakinah Binti Hussayn, a grand daughter of Ali and Fatimah, put various conditions into her marriage contract including the condition that her husband would have no right to take another wife during their marriage.

<sup>41</sup> 'and it is accepted today in various Muslim countries, including among Muslim communities who are not followers of the Hanbali school, e.g, Jordan, Morocco, Egypt, Iran and some countries in South Asia too.'

<sup>42</sup> Article 16(1) (a) of the Universal Declaration of Human Rights and see also echoed article 16 (1) (a) and (c) of the CEDAW Convention with its General Recommendation number 21 Para 14.

<sup>43</sup> "She has no power or authority to overturn her husband's decisions, she can not make decision about the course of her own life, and she might feel degraded or belittled by the husband marrying an additional wife. If women are financially dependent on husbands and husbands are allowed to marry again without strict oversight of their finance, it leads to economic difficulties for the existing and subsequent wives. The idea itself of a man legally sanctioned to take another wife can be used as powerful threat and a means for the husband to control his wife."

<sup>44</sup> Egypt State party report, U.N. Doc. CEDAW/C/EGY/7 (2008), pp.75-6.

<sup>45</sup> *Nushuz* is the disruption of marital harmony by either spouse rather than a women's disobedience to the husband.

<sup>46</sup> See Surah 04. An-Nisah, verse No. 34

<sup>47</sup> *Ibidem*, verse No.128.

<sup>48</sup> Article 16 (1) (c) of the CEDAW Convention.

<sup>49</sup> Article 16(1) (h) of the CEDAW Convention and also read General Recommendation number 21.

<sup>50</sup> General Recommendation number 21 of the CEDAW Convention Para 28 and 35, Human Rights Committee General Comment Number 28, para 26, The Committee on Economic, social and Cultural Rights, General Comment number 16, Para 27 and also the Beijing Platform for Action Para 60(f).