

Women and Islam

Muslim scholars maintain that the supremacy of men over women was undisputedly the accepted way of living and the rule in pre-Islamic Arabia. The Quran came to support it by providing that “men are the managers of the affairs of women for that God has preferred in bounty one of them over another, and for that they have expended of their property”,¹ and that “women have such honourable rights as obligations, but their men have a degree above them”.² Based on these verses, the ulama did not make any changes to men’s supremacy compared to jahiliyya as the social, political, and economic structures of jahiliyya had a decisive role in shaping laws regarding women.³ The economic structure with financial dependency in pre-Islamic Arabia continued after the introduction of Islam. Women were generally not capable of surviving the harsh conditions without the physical strength and power of a man, and the Quran accepted the financial superiority of men. Consequently, the right to guardianship of underaged children was afforded men, as women did not have the economic capacity to take care of them. The permission of choosing a husband for an underage girl comes from the same premises; the financial burden of the family would decrease with one less child to feed. The blood-money of a woman was half that of a man, as the economic loss was greater if the breadwinner of the family was killed. The unchanged economic conditions after Islam led to the endorsement of not only blood money but other economically disadvantageous interpretations in Islamic law,⁴ while simultaneously introducing property rights and the right to inheritance for females.

1 Quran 4:34.

2 Quran 2 228.

3 Jonathan Berkey, *The Formation of Islam: Religion and Society in the Near East, 600–1800* (New York: Cambridge University Press, 2003).

4 Abbas Mehregan, “Islam-Arabic Culture and Women’s Law: An Introduction to the Sociology of Women’s Law in Islam”, *International Journal for the Semiotics of Law* Vol. 29 (2016), p. 416.

1 The Pre-Islamic Status of Women According to Muslim Sources

Muslim scholars refer to the period before Islam as a period of barbarism and ignorance in which the Arabs were bound by tradition and precedent,⁵ and the tribes followed polytheistic religions and worshipped many gods, goddesses, demons, animals and even stones.⁶ Agriculture and trade were the main means of earning a livelihood; however, another method of creating considerable wealth was through plundering. Invasions and warfare between tribes, was completely determined by the economic gains in the Arabian Desert which had limited economic resources.⁷ The socio-political, economic, and moral structure of this era consisted of disunited semi-nomadic tribes with no central authority to bind them together. In the tribal form of society, the tribe was recognized as the social and political unit and played the role of a state in desert communities. Different tribes had different social traditions and cultural customs.⁸ Individual identity was rejected in favor of the collective identity of the tribe who made decisions about individual issues.⁹ Decisions made by tribal leaders were binding on all those within the tribe,¹⁰ and women could never undertake the control and management of the tribe.¹¹ For the individual, this meant the absence of legal protection outside of the tribe, the lack of a developed concept of criminal justice and the reduction of crimes to torts.¹² Affiliation to a tribe meant protection for its members, but also punishment if they violated the value system of the

5 Subhi Rajab Mahmasani, *Falsafat Al-Tashri fi Al-Islam, the Philosophy of Jurisprudence in Islam*, trans. Farhat Ziadeh (Leiden: Brill, 1961) p. 15 and Schacht, *An Introduction to Islamic Law*, p. 17.

6 Jeri Altnu Sechzer, "Islam and Women: Where Tradition Meets Modernity: History and Interpretations of Islamic Women's Status", *Sex Roles* Vol. 51, Nos. 5/6 (2004), p. 265.

7 Ahmed El-Ashker and Rodney Wilson, *Islamic Economics: A Short History* (Leiden: Brill, 2002), p. 8; Kim, Sarang, "Reconciliation among the Bedouin", *St Frances Magazine* Vol. 1, No. 5 (2009), p. 4.

8 Some norms retained their validity and importance even in today's Arab societies, see Sarang, "Reconciliation among the Bedouin", pp. 1–14.

9 Berkey, *The Formation of Islam*.

10 Tareq Y. Ismael and Jacqueline S. Ismael, *Government and Politics of the Contemporary Middle East: Continuity and Change* (Abingdon: Routledge, 2011), p. 45.

11 Mehregan, "Islam-Arabic Culture and Women's Law", p. 412.

12 Since the tribe was considered responsible for the actions of its members, blood feuds were lessened by the institution of blood-money. All these institutions and features, more or less, modified Islam and left their traces in Islamic law. See Schacht, *An Introduction to Islamic Law*, p. 7.

tribe.¹³ Disputes between two persons from different tribes often led to conflict between the tribes.¹⁴

The law of personal status and family, inheritance and criminal law, was dominated by the ancient Arabian tribal system and was different in cities.¹⁵ The customary law of the Bedouins, who constituted the majority of the Arabs, differed from the laws of cities such as Mecca and Medina.¹⁶ Mecca was a trading city, and it is likely that Mecca and other towns such as Medina possessed more sophisticated laws than those of the Bedouins.¹⁷ Muslim scholars maintain that the social structure of Arabia was patriarchal, where women were subordinated to men in the tribe, family, and society. Having sons was profoundly preferred as “many daughters were often viewed as a lack of virility”.¹⁸ Female infanticide was common since the pre-Islam Arabs were disgraced with the birth of a girl.¹⁹ Women were generally seen as consumers and as an economic and social burden.²⁰ The period is usually described by the frequency of divorce and loose unions, since “promiscuity” characterized the relations of sexes in pre-Islamic Arabia.

On the other hand, it is also said that women were strictly controlled, due partly to the endless threat of kidnapping by raiders. The norms in the closed tribal society prevented women from any interaction with male strangers within or outside of the tribe. Women enjoyed no rights whatsoever, or if they did, it was negligible as their status was low.²¹ They had no independent identity as they were subjugated to their nearest male relative, who treated them like a commodity, not only by being enslaved but also, since they could be inherited, like a possession.²² They could be sold in marriage, and because

13 Donna Bowen, “Islamic law and the position of women”, in *Islam and social policy*, ed. Stephen P. Heyneman (Nashville: Vanderbilt University Press, 2004), p. 50.

14 Sarang, “Reconciliation among the Bedouin”, pp. 1–14.

15 Schacht, *An Introduction to Islamic Law*, p. 7. It appears as if polygyny was not practiced in Mecca or Medina. It is suggested that Meccan men might have contracted temporary marriages with tribal women who stayed with their own people, see Gertrude Stern, *Marriage in Early Islam* (London: Royal Asiatic Society, 1939), pp. 62, 66, 70, 73; cited in Mernissi, *Beyond the Veil*, pp. 29–31.

16 Although primitive in character, the customary law of the Bedouins, was by no means simple in its rules or application. For example, penal law was reduced to questions of compensation and payment.

17 Schacht, *An Introduction to Islamic Law*, p. 6.

18 Donald Lee Berry, *Pictures of Islam: A Student's Guide to Islam* (Macron: Mercer University Press, 2007), p. 7.

19 Quran 16:58–59.

20 Mohd Umar, *Bride Burning in India: A Socio Legal Study* (New Delhi: Publishing, 1998), p. 8.

21 Stowasser, “The Status of Women in Early Islam”, p. 15.

22 Engineer, *The Rights of Women in Islam*, p. 20.

the tribe's honor was linked to the woman's chastity and fidelity, their behavior was rigorously controlled, as they were considered unreliable and untrustworthy in matters concerning testimony.²³ Marriage usually occurred within the tribe, where the marriage of paternal cousins was preferred, and the male members decided who they could marry.²⁴

The predominant form of marriage was contractual, which Islam retained with improvements for women. However, various forms of abusive marriage occurred. The oldest son would be entitled to marry his father's wife after the father had died. If he was willing to marry her, he would throw a cloth over her and inherit her. He could also prevent her from marrying anyone else, and upon her death, he would inherit her wealth.²⁵ If there was no son, the next male kin of the deceased was granted the same rights.²⁶ She could only free herself from him by paying a suitable compensation. The mutual exchange of wives also occurred, as well as the exchange of daughters and sisters. Another form of marriage, which was extremely rare among Arabs, but did still occur, involved the husband asking his wife to have sexual intercourse with another man in order to get pregnant. Usually, this only occurred when a man was impotent, and generally, the wives were sent to men who were known for their bravery. Some argue that these marriages were a kind of business, as slave-girls were sent to these men so they could give birth to healthy children which they could employ themselves, or sell in the market. The practice of men who captured women and married them, against their will, also occurred. A man also had the right to marry his female slave, and could choose to free the children that were conceived, keep them as slaves or accept them as his children.²⁷ While marrying an adoptive son's wife was forbidden in pre-Islamic Arabia, it came to be allowed by the Quran, causing an uproar among the people. Islam did not find anything wrong with such marriages since the Quran maintained that there is no blood relation between the adopted son and the adopter, as the adopter is not the natural father.²⁸

23 Mernissi, *The Veil and the Male Elite*. See also, Mehregan, "Islam-Arabic Culture and Women's Law", p. 410.

24 Keddie, *Women in the Middle East*, p. 18.

25 Engineer, *The Rights of Women in Islam*, p. 24.

26 Abdur Rahim, *Muhammadan Jurisprudence* (Lahore: Mansoor Book House, 1995), pp. 7–9 and Rahman, "Status of Women in the Quran", pp. 38–39.

27 A majority of Muslim jurists argue that the prohibition also applies to *zawaj al-badal* marriages, as there is no mahr paid in either case, see Engineer, *The Rights of Women in Islam*, pp. 24–25.

28 Quran 33:37.

The practice of having many wives in order to build relationships with other tribes was common. Men had the right of unrestricted polygyny, whereas women had no right to divorce or inheritance.²⁹ Men had an absolute right over women in matters of divorce and could take her back for up to three divorces. After the third divorce, he did not have any rights over her. After he had divorced her three times the husband could only remarry his wife if she first freely married and divorced another man. Divorce occurred by declaring, "go back to your parents" or "I separate you" and "your robe is on your shoulder" or "I liberate you". It could also occur that a man might vow to leave his wife for a period of time, during which he would not go near her as a form of punishment.³⁰

1.1 *The Pre-Islamic Status of Women According to Historical Sources*

Despite how the situation for women has been described by some Muslim scholars, it was not quite so bad, at least, not for all women. What can be determined about the status of women before the advancement of Islam is that women had different statuses in different contexts in the same society. Women who lacked the economic or social standing suffered abuse, exploitation, and marginalization. Women were treated differently, not just because of their gender but because of their social and economic status.³¹ However, the Muslim claim that women as a group were treated poorly before Islam is a mere religious claim, not confirmed by the few historical accounts of that period. Most of the information pertaining to jahiliyya has come from sources under the censorship of Muslim believers, who wish to disparage everything that preceded Islam.³² Jahiliyya was and is portrayed as a state of corruption and immorality, the opposite of the Islamic ethos, and basically reduced to a set of morally negative features.³³ Even with the scarce evidence available, it is known that both matriarchal and patriarchal systems existed, which imply fundamental differences in the position of women and their structural relations.³⁴

In the matrilineal case, the marriage took place at the home of the woman who also had the right to dismiss her husband. Women stipulated their rights

29 Esposito, *Women in Muslim Family Law*, p. 48.

30 There were instances where men divorced their wives as many times as they wanted to and also took her back as many times as they wanted to. See Engineer, *The Rights of Women in Islam*, pp. 26–29.

31 Wiebke Walter, *Women in Islam* (Princeton: Winer, 1993), pp. 90, 115.

32 Ghada Karmi, "Women, Islam and Patriarchalism", in Moghissi, *Women and Islam*, p. 172.

33 Nadia Maria El Cheikh, *Women, Islam and Abbasid Identity* (Cambridge: Harvard University Press, 2015), p. 18.

34 Smith, *Kinship and Marriage in Early Arabia*, pp. 77 ff, 156, 172.

within the marriage, ensuring that they would live with their husbands for as long as they wanted to and could initiate divorce if they wanted to. One method of divorce among Bedouins involved women changing the direction of the entrance to the tent when she wanted to divorce her husband. When the husband saw this, he knew that his wife had divorced him and would not go to her, as the tent was the property of the woman. This was obviously not something ordinary women could do, as the ability to decide the conditions of marriage and the dissolution of the marriage was a consequence of their high status in society.³⁵

There was no single fixed institution of marriage: instead, a variety of types of union were practiced by men and women. Even polyandry, where a woman has two or more husbands, was practiced.³⁶ Women would frequently remarry as soon as they were divorced, and if the woman was pregnant at the time of remarriage, the child would belong to the new husband.³⁷ A “waiting period” for women before remarriage was not observed.³⁸ Physical paternity seems to have been unimportant, and any offspring belonged to the mother’s kin group, by contrast to what was introduced with Islam.³⁹

There were examples of women being landowners, and both publicly and officially registered as owners in legal documents. Their capacity to stand in court on behalf of her party was recognized, as well as having the right to inherit. Women were able to initiate legal documents without the need for a guardian. There are also examples of women who acted in the capacity of a judge in conflict resolution. Queens, goddesses, and female prophets, as well as upper-class women, enjoyed high status and legal rights and privileges. Queens were depicted in coins, draped in long garments girdled at the waist. Public life was typically restricted to specific religious activities such as priestesses or worshippers for women, whereas men dominated other public domains such as legal and political fields.⁴⁰ Several female goddesses were held in considerable

35 Engineer, *The Rights of Women in Islam*, p. 27.

36 Sechzer, “Islam and Women: Where Tradition Meets Modernity”, p. 267.

37 Karmi, “Women, Islam and Patriarchalism”, p. 173.

38 Stern, *Marriage in Early Islam*, pp. 61–62 and 172–173.

39 Mernissi, *Beyond the Veil*, p. 27.

40 There were, however, transactions that were restricted to women; women were not allowed to have legitimate heirs to their tombs. Also, while women were known to pass inheritance to their children, it seems as if their daughters were restricted from owning their inheritance by hereditary title, which may be a formula related to male inheritance. Hatoon al-Fassi, *Women in pre-Islamic Arabia: Nabataea* (Oxford: Archaeopress, 2007), pp. 38–65. In Roman Code, the guardian, was known as the tutor, and was usually the father if the woman was unmarried, or the husband if she was married. For widows, the guardianship was transferred to her son, a practice that still occurs in Saudi Arabia.

esteem by the pre-Islamic Arabs. 'Uzza, Manat, and al-Lat, are the best known of these, to whom many shrines existed. These are the same goddesses that are mentioned in the alleged satanic verses.

The existence of such cults, suggests, that society was originally structured on a matriarchal or matrilineal foundation.⁴¹ From such an outlook it becomes evident that the verses relevant to the position of women were meant to maintain a patriarchal family, with a purpose of eliminating or altering some customs that were seen as detrimental to the stability of the family, as perceived by Islam.⁴² In those cases, it is apparent that Islam restricted or modified the freedoms, activities, and roles that some of the women in jahiliyya had experienced.⁴³

Jahiliyya women participated actively in society, a habit that necessarily carried over into early Muslim society; after all, these were the people who, by conversion and by conquest, became the first Muslims. Until the latter years of Muhammad's ascendancy, and perhaps later for women other than his wives, women mingled freely with men; even in the last years of Muhammad's life they were not veiled, except his own wives.⁴⁴

Many customs, where women had more rights, were abolished, in favor of a type of marriage which unmistakably favored men in matters of divorce, polygamy and the custody of children. By denouncing all other forms of marriage as fornication,⁴⁵ Islam confirmed the transition from a society with matriarchal

See Jane F. Gardner, *Women in Roman Law & Society* (London: Croom Helm, 1986), p. 5 and Riet van Bremen, *The Limits of Participation: women and civic life in the Greek East in the Hellenistic and Roman periods* (Amsterdam: Dutch monographs on ancient history and archaeology, J. C. Gieben, 1996), pp. 205–208. Certain Greek and Roman women were not perceived as having legal standing or capacity in public affairs and the Roman court expected a woman to be represented by a guardian. There are instances of women having guardians that were not fathers or husbands, see al-Fassi, *Women in pre-Islamic Arabia*, p. 54.

41 Karmi, "Women, Islam and Patriarchalism", p. 172.

42 Susan Spector, *Themes in Islamic Studies: Women in Classical Islamic Law: A Survey of the Sources* (Boston: Brill, 2009) p. 24.

43 Ahmed, "Women and the Advent of Islam", p. 670.

44 Mernissi, *Women and Gender in Islam*, p. 68.

45 Leila Ahmed argues that "the fact that in prohibiting adultery and sexual misconduct generally Islam was outlawing previously accepted practices is presumably among the reasons for the otherwise surely extraordinary Koranic ruling (4:16) that four witnesses should be produced to convict anyone of these crimes. The ruling suggests both that those engaging in practices being designated by Islam as sexual misconduct were engaging in them with some openness (the openness appropriate to relatively accepted rather

structures to an exclusively patriarchal system.⁴⁶ There is no evidence to indicate that the type of polygyny as endorsed by Islam was a practice in Medina, and if there were occurrences of the practice before Muhammad's initiative, it was not common.⁴⁷ This was the crucial point in changing the relations between sexes, and Islam confirmed and legitimized the patriarchal structure, through a set of regulations which placed the man as the head of the family and society.⁴⁸

... it becomes difficult not to conclude that the absolute empowerment of men in relation to women in all matters relating to sexuality and offspring and the disempowerment of women (and thus the complete transformation of his [Muhammad] society's mores in the areas of the relation between the sexes) was also itself one of Muhammad's prime objectives. In import, and indeed explicitly, Koranic verses do recognize women's rights to equality in marriage for example, 'they [wives] have rights corresponding to those which husbands have, inequitable reciprocity' [2:229], and the Quran's directive to this effect is sufficiently distinct for most schools of Islamic law to grant women the right to be empowered, by marriage contract, to initiate divorce or stipulate their marriage conditions, including monogamy. Nevertheless, the type of marriage Islam was setting up as the norm for that early society evidently was one in which women were disempowered.⁴⁹

Islam replaced the jahilite woman with the Muslim woman, who, with the patriarchal interpretations of the verses in the Quran, is almost the opposite of her predecessor, which eventually led to the seclusion of women.⁵⁰

2 The Wives of Muhammad

To examine the changes that would overtake women in Islamic Arabia, the lives and marriages of two of Prophet Muhammad's wives, Khadija and Aisha,

than 'immoral' or prohibited practices) and that Mohamad realized that such practices could not be instantly eradicated." See Ahmed, "Women and the Advent of Islam", p. 670.

46 Karmi, "Women, Islam and Patriarchalism", p. 174.

47 Watt, *Muhammad at Medina*, pp. 277–279; Stern, *Marriage in Early Islam*, p. 62.

48 Smith, *Kinship and Marriage in Early Arabia*; Watt, *Muhammad at Medina*, pp. 272–73.

49 Ahmed, "Women and the Advent of Islam", p. 678.

50 Ahmed, *Women and Gender in Islam*, p. 62.

provide great examples. It was jahiliyya society that shaped the conduct and opportunities of Muhammad's first wife Khadija, whereas Aisha, born to Muslim parents, is part of the transition period and in some aspects her life reflects jahiliyya as well as Islamic practices.⁵¹ During this period, women enjoyed a more independent role, and it is difficult to see how this could have happened unless there had been a tradition of female independence before the introduction of Islam.⁵²

2.1 *Khadija*

Pre-Islamic Arabia was familiar with female entrepreneurs. Muhammad's great-grandfather Hashim met his wife on a trading mission, where she traded on her account through instructions to agents.⁵³ Muhammad's great-grandmother accepted Hashim's marriage proposal on the pre-nuptial terms that she retained control over her property and had the right to divorce at will.⁵⁴ When the Prophet's father married his mother, he remained with her only for three days since she stayed with her tribe. Muhammad's father died while his mother was pregnant with him, but Muhammad was raised and taken care of by her until her death. It was only after her death that Muhammad's father's kin took charge.⁵⁵ Muhammad's grandfather had him taken from his mother's clan only with difficulty.⁵⁶

Muhammad, like his great-grandfather, married a businesswoman. Khadija was a wealthy widow who employed Muhammad to oversee her caravan which traded between Mecca and Syria.⁵⁷ She belonged to Mecca's social elite and was described as a "woman of honour and power and a hirer of men".⁵⁸ She was fifteen years older than Muhammad, and educated to a higher standard as she could read and write, unlike Muhammad, who was illiterate. She had been married twice before she proposed marriage to Muhammad. From her first marriage, she had two sons, and she was entrusted with her second husband's daughter when he died.⁵⁹ Khadija is particularly important in the story of

51 Ibid., pp. 665–691.

52 Karmi, "Women, Islam and Patriarchalism", p. 173.

53 Benedikt Koehler, "Female Entrepreneurship in Early Islam", *Economic Affairs* Vol. 21, No. 2 (2011), p. 93.

54 Muir, *The Life of Mohammad from Original Sources*, p. CXIII.

55 Ibn Sa'd, *Kitab al-Tabaqat, Biographien*, 9 vols., ed. E. Sachau (Leiden: Brill, 1904), cited in Mernissi, *Beyond the Veil*, p. 31.

56 Watt, *Muhammad at Medina*, p. 375.

57 For a brief overview of her life, see Resit Haylamaz, *Khadija – The First Muslim and the Wife of the Prophet Muhammad* (New Jersey: The Light, Inc., 2007).

58 Ibn Sa'd, *Kitab al-Tabaqat*, 8:9.

59 Haylamaz, *Khadija*, p. 29.

Islam because of her significance to Muhammad: “her wealth freed him from the need to earn a living and enabled him to lead the life of contemplation that was the prelude to his becoming a prophet, and her support and confidence were crucial to him in his venturing to preach Islam”.⁶⁰ She was the first person to declare her faith to the Prophet and thereby becoming the first Muslim.⁶¹ The Prophet described her as “the best among the women (of this nation)”.⁶²

While having two wives simultaneously was not an unusual practice in the society that the Prophet lived in, it was a practice that was new to the Prophet following the death of Khadija. This led scholars to speculate that there was a marriage contract between them, specifying that the Prophet would not take another wife during her lifetime.⁶³

Khadija’s economic independence, her marriage to a man many years younger than herself and her monogamous marriage all reflect the traditions in jahiliyya rather than Islamic practices.⁶⁴ The fact that there were wealthy women, such as Khadija, even before the rise of Islam, suggests that women who came from a prominent Arabian family were able to own property and run their affairs, without the interference of men.

2.2 Aisha

After Khadija’s death, Muhammad’s aunt suggested that Muhammad should take wives.⁶⁵ It is soon after these marriages that the Quranic verse permitting polygyny is revealed.⁶⁶ Aisha was the six-year-old daughter of Muhammad’s

60 Ahmed, *Women and Gender in Islam*, p. 42.

61 Even before she married Muhammad, she had dreams and could see signs of his prophet hood. On one occasion, she saw a strong light coming into to her house. She told this to her mentor who told Khadija that he believed it to be the light of the Prophet. See Haylamaz, *Khadija*, p. 50. See also, Muhammad Abduh Yamani, *Umm al-Mu'minin Khadija bint Khuwaylid Sayyidatun fi Qalb al-Mustafa* (Damascus: Mu'assasat al-Ulum al-Quran, 2002), p. 26.

62 “Mary, the daughter of ‘Imran, was the best among the women (of the world of her time) and Khadija is the best among the women (of this nation)”, Al-Bukhari, *Sahih*, Hadith 3432.

63 Nabia Abbott, *Aishah, the Beloved of Muhammad* (Chicago: University of Chicago, 1942), p. 3; Maxinne Robinson, *Mohamad*, trans. Ann Carter (New York: Penguin Books, 1971), p. 55.

64 Ahmed, *Women and Gender in Islam*, p. 42.

65 Supposedly, when Muhammad had asked whom he should marry, his aunt had suggested “Aisha if he wanted a virgin ... and Sawda if a non-virgin”. Muhammad replied that she could speak with both of them. Quote taken from Ahmed, *Women and Gender in Islam*, p. 49. See also, Abbott, *Aishah*, p. 55.

66 The verse was revealed after the battle of Uhud (625 C.E.), where a large number of Muslim men were killed and many women were therefore widowed. Encouraging men to marry more than one woman was beneficial for the Muslim community as it was also

closest supporter, and later on the first caliph, Abu Bakr. When the Prophet asked for permission from Abu Bakr to marry Aisha, Abu Bakr replied: "but you are my brother", the Prophet replied, "you are my brother in the religion of God and the Qur'an, but she is halal to me".⁶⁷ There is no suggestion that anyone thought the marriage would be inappropriate because of the age difference. In the early days of Islam, the Khawariji,⁶⁸ opposed the practice of concubines and the marriage of young girls, even though the Prophet himself owned a concubine and married Aisha when she was about nine.⁶⁹ They argued that God had allowed specific privileges to the Prophet and that those privileges were not permitted for other men.⁷⁰ Aisha appears to have had issues on this matter

a way of preventing women from returning to jahiliyya types of relationships, see Ahmed, "Women and the Advent of Islam", p. 680. See also, Quran 4:4.

67 Nicolas Awde, *Women in Islam: An Anthology from the Qur'an and Hadiths* (Richmond: Curzon Press, 2000), p. 92. See also, Al-Bukhari, *Sahih*, Book, 7, Hadith 12. It is said that Aisha realized that she was married (that is, that the marriage agreement had been concluded) when her mother called her in from her games with her friends and told her she must stay indoors. But she did not ask to whom. When Aisha was no more than nine or ten, Abu Bakr, asked Muhammad why he was delaying consummation of the marriage. When Muhammad replied that he was yet unable to provide the marriage portion, Abu Bakr forthwith provided it himself. The marriage was consummated in Aisha's father's house in Sunh: "my mother came to me and I was swinging on a swing ... She brought me down from the swing, and I had some friends there and she sent them away, and she wiped my face with a little water, and led me till we stopped by the door, and I was breathless [from being on the swing] and we waited till I regained my breath. Then she took me in, and the Prophet was sitting on a bed in our house with men and women of the Ansar [Medinians] and she sat me on his lap, and said, 'These are your people. God bless you in them and they in you'. And then the men and women rose immediately and went out, and the Prophet consummated the marriage in our house." Ahmed, *Women and Gender in Islam*, pp. 49–51.

68 The Khawariji movements arose in 657 C.E. after the death of Muhammad and the dispute over political leadership that followed. They are considered to be the first and oldest inspiration for the doctrine of political Islam, see Nazih Ayibu, *Political Islam: Religion and Politics in the Arab World* (New York: Routledge, 1993), p. 96. For an overview of the Khawariji, see Crone, *Medieval Political Thought*, chapter 5, and for their theory on the caliphate, see Sir Thomas Arnold, *The Caliphate* (Oxford: Clarendon Press, 1924), pp. 188–189.

69 Her age at marriage has been widely debated. See Kecia Ali, *The Lives of Muhammad* (Cambridge: Harvard University Press, 2014), pp. 157–158.

70 In the Khawarij's view, the majority of Muslims were deviating from the straight path. The Khawarij felt that they alone had been entrusted with the true version of Islam and that it was their religious duty to disseminate it. The Khawarij was a short-lived sect in Islamic history, but their position on apostates and their generous interpretation on *tafkir*, declaring Muslims as non-believers and consequently deserving death. Their rhetoric has survived and is the basis for several modern radical movements. Elie A. Salem, *The Political Theory and Institutions of the Khawarij* (Baltimore: John Hopkins University Press, 1956),

when the Prophet announced that he had received a revelation allowing him to enter into marriages not permitted other men. She declared that “it seems to me your Lord hastens to satisfy your desire!”⁷¹ At the end of his life, the Prophet was married to several wives, more than the maximum four as established by the Quran.⁷²

Aisha had a special status among Muhammad’s wives and became Muhammad’s undisputed favorite. When rumors spread that Aisha had committed adultery, Muhammad’s dismay prevented him from prophesying. Slandering of her chastity called forth verses in the Quran where she was vindicated in the verses which describe the punishment of adultery, but also the punishment for someone who falsely accuses one of adultery:⁷³

And those who cast it up on women in wedlock, and then bring not four witnesses, scourge them with eighty stripes, and do not accept any testimony of theirs ever; those -- they are the ungodly.⁷⁴

Aisha was often present at battlefields to support those engaged in battle and actively participated in political and public life.⁷⁵ Soon after Muhammad’s death, the Muslim community began consulting her on Muhammad’s ways, and her explanations were used to settle ideas of practices and even points of law.⁷⁶ She is one of the renowned and credible narrators of hadiths and is known to have completed and corrected hadiths which were reported

p. 86. See also, Al-Misri, Abu Hamza, *The Khawaarij and Jihad* (Birmingham: Makhtabah al-Ansar, 2000); Jeffrey Thomas Kenney, *Heterodoxy and Culture: The Legacy of the Khawarij in Islamic History* (Ann Arbor: U.M.I., 1991); Jeffrey Thomas Kenney, *Muslim Rebels: Kharijites and the Politics of Extremism in Egypt* (Oxford: Oxford University Press, 2006) and Patricia Crone, *God’s Rule: Government and Islam* (New York: Columbia University Press, 2006).

71 Ibn Sa’d, *Kitab al-Tabaqat*, 8:112.

72 Annemarie Schimmel, *And Muhammad is His Messenger: The Veneration of the Prophet in Islamic Piety* (Chapel Hills: University of North Carolina Press, 1985), p. 50.

73 Spellberg, *Politics, Gender, and the Islamic Past*, p. 3.

74 Quran 24:4.

75 Sayeh & Morse Jr., “Islam and the Treatment of Women”, pp. 322–323 and accompanying footnotes. For an account of the life of Aisha see Abbott, *Aishah* and Spellberg, *Politics, Gender, and the Islamic Past*. It is argued that her status has to do with the fact that it was because of her there were revelations disclosing the punishment for slander and the verse declaring that it was acceptable for Muslims to perform ablution with sand or earth when there was no water. See Haylamaz, *Aisha*, pp. 105–115.

76 Ahmed, *Women and Gender in Islam*, p. 73.

erroneous or insufficient. These corrections often led to the construction of hadiths with different meanings and significance.⁷⁷

Although Aisha lived in a period which is perceived as ideal in the Muslim imagination, her legacy is a source of great controversy. For Sunni, she is a role model for women, but her participation in the first battle between Muslims and her involvement in politics is cause for disagreement.⁷⁸ The Shia blame Aisha for opposing Ali's claim to the caliphate and for taking part in the battle against Ali. Some commentators view the conflicts between Aisha and Fatima, the daughter of Muhammad, as an extension of political conflicts outside the house, especially after his death. Aisha was portrayed as prone to jealousy and intrigue, which became the driving force for all her actions and decisions. As part of this hostile environment, Aisha used her knowledge of hadiths as a political tool to give legitimacy to one issue over the other.⁷⁹ Other commentators contest a view that Aisha was involved in intrigue and political conflict, arguing that because of her age, it is not likely that she had so much power to influence decision-making. Aisha's participation in the Battle of the Camel is described as a short period of political participation, where she, upon defeat, withdrew herself from the political arena.⁸⁰ Another commentator justifies her participation by blaming the companions of the Prophet for drawing Aisha into the conflict.⁸¹

Because of her position, her attitude toward the troubles of women was considered to be an advantage for women in general. Aisha became a consultant for women; women visited her, confessed their problems, and were given advice by Aisha on how to handle their situation.⁸² One woman came to Aisha, telling her that she had been under her husband's control for several years and that he wanted to divorce, but at the same time, he did not want her to marry someone else. Therefore, he would take her back before the waiting period

77 See Hoda Elsadda, "Discourses on Women's Biographies and Cultural Identity: Twentieth-Century Representations of the Life of A'isha Bint Abi Bakr", in *Feminist Studies* Vol. 27, No. 1 (2001), p. 54.

78 Spellberg, *Politics, Gender, and the Islamic Past*.

79 For this line of argument, see Abbot, *Aishah*.

80 The Battle of the Camel, so called after the camel that Aisha sat on while exhorting the soldiers to fight, was one of a series of battles between Ali and various political factions which opposed his accession to the caliphate. For Aisha's part in this battle, as well as in the events leading up to it, see Wilfred Madelung, *The succession to Muhammad: A study of the early caliphate* (Cambridge: Cambridge University Press, 1997), p. 147 ff.

81 Abbas Mahmud Al-Aqad, *Fatma Al-Zahra' wa Al-Fatimiyyun*, 2nd ed., (Beirut: Dar Al-Kitab Al-Arabi, 1967), p. 135.

82 Haylamaz, *Aisha*, p. 25.

finished. Aisha told this to the Prophet, who later received a verse declaring that “divorce is twice; then honourable retention or setting free kindly.”⁸³ The verse made it clear that the second declaration of divorce meant that the husband and wife had separated and therefore, it was forbidden for a man to return to a wife he had divorced three times. The only exception was if the wife was to remarry, divorce, and then marry her former husband again.⁸⁴ On another occasion, Aisha was visited by a woman who told her that her husband had divorced her by declaring that she was like his mother’s back. Once again, Aisha told the Prophet, who had a revelation which bans the tradition of divorcing women by declaring “be as my mother’s back.”⁸⁵

3 The Influence of Islam on Women

Although it is argued that the Prophet Muhammad expressed commendable sensitivity in his attitude towards women and how they were treated during his lifetime, religious scriptures, such as the Quran, manifested themselves in cultures of sexual inequality and “male-dominated societies often harnessed even just and egalitarian norms laid down for women in divine scriptures to perpetuate their hold.”⁸⁶ The ethical aspects of the Quran emphasize equality between men and women and justice, but it is maintained that equality in society would most likely not have been well received, as these aspects would have been too radical for the newly converted Arabs. From that perspective, modest alterations to the status of women as presented by Islam seem logical, if compared to the social and economic roots as described by Muslim theologians. Islam was not able to remove the patriarchal clan or the tribal system, and so, women’s status that related to the clan and tribalism was not changed.⁸⁷ However, if compared to the contextual factors of a matrilineal society, it is obvious that Islam affirmed a patriarchal structure to the vast disadvantage of women.

Furthermore, the Islamic tradition came to construct the woman in primarily sexual terms and as the source of chaos, *fitna*. The claims about women’s

83 Quran 2:229.

84 Haylamaz, *Aisha*, p. 26.

85 Quran 58:2.

86 There are several traditions that describe how the Prophet felt about his first wife, see Walther, *Women in Islam*, p. 104; Engineer, *The Rights of Women in Islam*, p. 1 and Tucker, *Women, Family, and Gender in Islamic Law*, p. 3.

87 Mehregan, *Islam-Arabic Culture and Women’s Law*, p. 412.

seductiveness and claims of female temptresses are not literally found in the Quran, but rather, upheld by hadiths: there was no “fitna more harmful to men than women”.⁸⁸ The tension and conflict regarding the portrayal of women span “the whole spectrum from the saintly to the evil and unclean”.⁸⁹ Women were the embodiment of seduction and a threat to a healthy, exclusively, male public social order, legitimizing the modesty laws such as gender segregation, the seclusion of women and veiling, implemented in early Muslim societies.⁹⁰ The portrayal of women as a “moral hazard, deceiving and tempting decent men” began to emerge.⁹¹ The construction of the female as a seductress went

88 Abdullah Al-Bukhari, *Kitab al-Jami'a al-Sahih*, 4 vols. ed. M. Krehl (Leiden: Brill, n.d.) p. 419.

89 Stowasser, “The Status of Women in Early Islam”, p. 29. During the lifetime of Muhammad, men and women used to perform ablution together, see Al-Bukhari, *Sahih*, Book 4, Hadith 59. Regulations concerning men and women group prayers had its roots in specific notions about the transmission of ritual impurity that originated in the first half of the seventh century. Women were considered as ritually pure in the sense that the water they used remained usable for ritual ablution or ritual bathing and their walking in front of a worshipper did not affect whoever was praying. One approach, most common in Mecca, held that a menstruating woman contaminates water and invalidates the prayers of men and women if she walks in front of them, see Sadeghi, *The Logic of Law Making in Islam*, p. 51. Prayer was considered void if the men and women praying next to each other said the same prayer. However, there was no problem with men and women praying next to each other and no problem if the woman by the man's side was not praying at all, as there was a report of the Prophet praying while Aisha was sleeping at his side, despite the fact that the garment he wore touched her. Aisha narrated that “it is not good that you people have made us (women) equal to dogs and donkeys. No doubt I saw Allah's Messenger praying while I used to lie between him and the Qibla and when he wanted to prostrate, he pushed my legs and I withdrew them”, see Al-Bukhari, *Sahih*, Book 8, Hadith 166. In Basra, the view was that women contaminate water and invalidate prayers for men, regardless of whether they are menstruating or not, see Marion Katz, *Body of Text* (Albany: State University of New York Press, 2002), pp. 149–150. Women could, however, not contaminate other women, as women could not be further contaminated. This view did disappear, as Basra did not itself give rise to a successful school of law. It did, however, later influence other jurists, see Behnam Sadeghi, “The Traveling Tradition Test: A Method for Dating Muslim Traditions”, *Der Islam* Vol. 85, No. 1 (2008), pp. 213–219. See also Quran 2:222–223.

90 Al-Mawdudi saw the female body as fitna and argued that women should be confined to the home because their entry to the public domain would cause immorality of such proportions as those leading to the decline and fall of the once mighty Greece. See Ahmad I, “Cracks in the ‘Mightiest Fortress’: Jamaat-e-Islami's changing discourse on women”, *Modern Asian Studies* Vol. 42 (2012), p. 556.

91 Eli Alshech, “Out of sight and therefore out of mind: Early Sunni Islamic modesty regulations and the creation of spheres of privacy”, *Journal of Near Eastern Studies* No. 66 (2007), p. 267.

so far in some societies that people avoided using a woman's name or called her by an alternate man's name in public, presumably, as her name was not fit to be disclosed in public. The understanding was also that a woman's voice was a private part that must be concealed.⁹²

The worst characteristics of men constitute the best characteristics of women; namely, stinginess, pride, and cowardice. For if a woman is stingy, she will preserve her own and her husband's possessions; if she is proud, she will refrain from loose and improper words to everyone; and if she is cowardly, she will dread everything and will therefore not go out of her house and will avoid compromising situations for fear of her husband.⁹³

Many of the modesty laws that were implemented were a tool for restricting the dangerous sexual powers of women to ensure the sexual morality of men (although Islamic legal theory came to give men extensive sexual privileges), which was necessary to achieve a social order where men could be active parts of society.⁹⁴ This was, in turn, connected to the view that the woman's modesty was linked to the social status and honor of the family. Given these presumptions, Muslim scholars created safeguarding mechanisms, such as dress codes, in order to restrict the possibility of the woman putting her or—more importantly—the honor of her family, in question; marriage constituted a common means of cementing social and economic bonds, and imposing a dress code helped to shield the family's social standing.⁹⁵ The seclusion of women in society led to an Islamic legal discourse based on legalism and literalism, where the view on women was to confine them in the home.⁹⁶ However, the Quran does not advocate the veil or segregation; instead, it focuses on sexual modesty for both sexes,⁹⁷ as the “purpose of Islam is chastity, emanating

92 Haifaa G. Khalafallah, “Precedent and Perception: Muslim Records That Contradict Narratives on Women”, in *Journal of Women of the Middle East and the Islamic World* Vol. 11 (2013), p. 109.

93 Abu Hamid Al-Ghazali, *Marriage and Sexuality in Islam*, trans. M. Farah (Kuala Lumpur: Islamic Book Trust, 2012), p. 78.

94 Adis Duderija, “The Custom (‘urf) Based Assumptions Regarding Gender Roles and Norms in the Islamic Tradition: A Critical Examination”, *Studies in Religion* Vol. 45, No. 4 (2016), p. 590.

95 Alshech, “Out of sight and therefore out of mind”, pp. 288–289.

96 Farooq, “Analogical Reasoning (Qiyas)”, p. 171.

97 While the verses in the Quran define a specific code of conduct for Muslim women, the Quran (24:30) also commands men to “cast down their eyes and guard their private parts”, suggesting that the principle of modesty is equally applicable to women and men. The difference lies in the fact that women are asked to use an outer garment to cover their

from within men and women, and *not* imposed through closed doors”.⁹⁸ There was no veil nor segregation of the sexes during the Prophet’s lifetime,⁹⁹ but the Quran had specific demands for the wives of the Prophet, urging them to “remain in your houses; and display not your finery, as did the pagans of old”.¹⁰⁰ Those rules only applied to the wives of the Prophet, because of their special status. The wives of Muhammad are known as the “Mothers of the Believers”, and are regarded as favored by God and blessed with rare powers and extraordinary capabilities.¹⁰¹ The wives did not have the right to re-marry after the death of the Prophet, and they did not inherit either, unlike Muslim women in general.¹⁰²

Segregation and veiling had roots deeper than Quranic injunctions and were most likely strongly linked to class, being a symbol of honor or status.¹⁰³ The practice of veiling seemed to have been part of the pre-Islamic society, and by introducing segregation, the already established norms of seclusion in ancient patriarchal cultures of Byzantium and Persia were in some regards borrowed. A contributing factor to the seclusion of women, in a society where owning slaves was common, was that the dress code applied only to free women as a marker of social status.¹⁰⁴ While it is not known how the rules on seclusion and veiling spread to the rest of the community, it is likely that the rules related to the wives of the Prophet, were used as an example to bring about their general adoption.¹⁰⁵

bosom, while men are not to expose the area of their body from the navel to the knee. See Jawad Syed, “A historical perspective on Islamic modesty and its implications for female employment”, *Equality, Diversity and Inclusion: An International Journal* Vol. 29, No. 2 (2010), p. 150–166 and Rahman, “Status of Women in the Quran”, p. 40.

98 Taha, *The Second Message of Islam*, p. 141.

99 It is narrated that: “I came to the Prophet with some other women, to offer our pledge to him. He said to us: ‘(I accept your pledge) with regard to what you are able to do. But I do not shake hands with women.” See Al-Bukhari, *Sahih*, Vol. 4, Book 24, hadith 2874.

100 Quran 33:32–33.

101 Quran 33:6, 33:30–34.

102 Quran 33:50–53. Azizah Al-Hibri argues correctly that the Quran specifies that the Prophet and his wives are not like other men and women. The wives of the Prophet were not allowed to remarry after his death, while there are no restrictions on Muslim women in general. In fact, widows and divorcees are encouraged to remarry. The justification that the Prophet had several wives, is therefore, according to Al-Hibri, not valid. See “*A Study of Islamic Herstory: Or how did we ever get into this mess?*”, p. 216.

103 Rahman, “Status of Women in the Quran”, p. 41.

104 See Quran 33:50–60.

105 Ahmed, “Women and the Advent of Islam”, p. 684.

Over time, legal, political, and economic developments in the Muslim world merged into an Islamic legal tradition upholding gender inequality.¹⁰⁶ To understand this stance, women's roles, rights, and obligations as articulated in the Muslim world at various critical junctures in the history of Islam, will be described to determine how this position was constructed and developed. Therefore, the Quranic view on women will be presented briefly with a focus on the ethical aspects of the Quran, marriage, sexual relations, fornication and adultery, testimony, compensation for death, inheritance, divorce, public office, and veiling.

3.1 *The Ethical Voice*

While women came to be seen as the cause of the sins of man, the ethical voice of the Quran makes no distinction between the sexes in the verses describing the creation of man and woman, the spiritual and moral obligations of both sexes, and rewards and punishments.¹⁰⁷ In Islam, there is no human hierarchy, as both genders share the same origin:¹⁰⁸

He created you of a single soul, then from it He appointed its mate¹⁰⁹ ... it is He who produced you from one living soul, and then a lodging-place, and then a repository. We have distinguished the signs for a people who understand.¹¹⁰

The Bible holds two versions of the creation of humans: one refers to the simultaneous creation of male and female,¹¹¹ while the other describes the creation of Adam followed by the creation of a female, from his *tsela'*, usually translated

¹⁰⁶ Barbara Stowasser argues that concurred territories influenced the interpretations of Islamic law and is an important reason for the decline of women's status, see *Women in the Qur'an: Traditions, and Interpretation* (Oxford: Oxford University Press, 1994), p. 23.

¹⁰⁷ See Rahman, "Status of Women in the Quran"; Esposito, *Women in Muslim Family Law*; Al-Hibri, "A Study of Islamic Herstory: Or how did we get into this mess?"; Mernissi, *Women and Islam*; An-Naim, *Toward an Islamic Reformation*; Riffat Hassan, "An Islamic Perspective" in *Women, Religion and Sexuality*, ed. Jeanne Belcher (Geneva: WCC publications, 1990) and Stowasser, "The Status of Women in Early Islam". See also Quran 3:195; 4:125; 4:40; 5:10–11; 5:72; 32:19–20; 33:35; 45:22; 49:11 and 49:13.

¹⁰⁸ Azizah Al-Hibri, "Muslim Women's Rights in the Global Village: Challenges and Opportunities", *Journal of Law and Religion* Vol. 15 (2001), p. 46.

¹⁰⁹ Quran 39:6.

¹¹⁰ Quran 6:98. See also 4:1; 7:189; 16:72; 30:21; 49:13; 53:45; 75:39; 78:8; 50:7 and 51:49.

¹¹¹ Genesis 1:26–27.

as a rib.¹¹² The Quran, on the other hand, describes the creation of the first woman as simultaneous to that of the first man.¹¹³

Adam and Eve are also held equally responsible for the disobedience and consequent expulsion from paradise:

Said He, 'Go thou forth from it, despised and banished. Those of them that follow thee -- I shall assuredly fill Gehenna with all of you.' 'O Adam, inherit, thou and thy wife, the Garden, and eat of where you will, but come not nigh this tree, lest you be of the evildoers.' Then Satan whispered to them, to reveal to them that which was hidden from them of their shameful parts. He said, 'Your Lord has only prohibited you from this tree lest you become angels, or lest you become immortals.' And he swore to them, 'Truly, I am for you a sincere adviser.' So he led them on by delusion; and when they tasted the tree, their shameful parts revealed to them, so they took to stitching upon themselves leaves of the Garden. And their Lord called to them, 'Did not I prohibit you from this tree, and say to you, "Verily Satan is for you a manifest foe"?' They said, 'Lord, we have wronged ourselves, and if Thou dost not forgive us, and have mercy upon us, we shall surely be among the lost.' Said He, 'Get you down, each of you an enemy to each. In the earth a sojourn shall be yours, and enjoyment for a time.' Said He, 'Therein you shall live, and therein you shall die, and from there you shall be brought forth.' Children of Adam! We have sent down on you a garment to cover your shameful parts, and feathers; and the garment of god-fearing -- that is better; that is one of God's signs; haply they will remember¹¹⁴ ... And whosoever does a righteous deed, be it male or female, believing, we shall assuredly give him to live a goodly life; and We shall recompense them their wage, according to the best of what they did.¹¹⁵

Unlike the Biblical story of Eve's creation from man's rib, the expulsion from the Garden of Eden because of the woman, and that woman was not created solely from the man,¹¹⁶ the verse in the Quran describes no such differentiated

112 For a feminist discussion of the interpretation of Genesis 2, see Phyllis Tribble, who argued that since the word *adam* was ambiguous in the biblical text, the first human was one creature incorporating two sexes, "Depatriarchalizing in Biblical Interpretation", *Journal of the American Academy of Religion* No. 41 (1973), pp. 30-48.

113 Quran 4:1, 7:189, 16:72, 35:11, 30:21, 39:6, 42:11 and 49:13.

114 Quran 7:18-26.

115 Quran 16:97.

116 Bible, Genesis 2:4-3:24.

blame on man and woman.¹¹⁷ Instead, the verse affirms an account of their equal shares of the responsibility.¹¹⁸ Despite the differences between the Bible and the Quran, Muslim patriarchal exegeses have interpreted the creation of woman as secondary to a man, reflecting the local tradition in hadiths,¹¹⁹ even though in the case of conflict between the Quran and the Sunnah, the former prevails.¹²⁰ Stripped from patriarchal interpretations, it becomes apparent that the Quran does not differentiate between the man and woman in their creation. Any interpretation upholding such a view should consequently be void.

The Quran further obligates and rewards men and women by affirming that:

And the believers, the men and the women, are friends one of the other; they bid to honour, and forbid dishonour; they perform the prayer, and pay the alms, and they obey God and His Messenger. Those -- upon them God will have mercy; God is All-mighty, All-wise. God has promised the believers, men and women, gardens underneath which rivers flow, forever therein to dwell, and goodly dwelling-places in the Gardens of Eden; and greater, God's good pleasure; that is the mighty triumph.¹²¹ Men and women who have surrendered, believing men and believing women, obedient men and obedient women, truthful men and truthful women, enduring men and enduring women, humble men and humble women, men and women who give in charity, men who fast and women who fast, men and women who guard their private parts, men and women who remember God oft -- for them God has prepared forgiveness and a mighty wage.¹²²

The verse, as such, refers equally to the moral obligation of men and women in the requirement of propagating for what is good and disseminating what is wrong. It also demonstrates that men and women are judged based on the

117 See Riffat Hassan, who describes how the Quran does not include a verse stating that Eve was created from Adam's rib, rather it entered the Islamic tradition and its interpretations from the Hebrew Bible, "Made from Adam's Rib: The Woman's creation Question", *Al-Mushir Theological Journal of the Christian Study Center* No. 27 (1985), pp. 124–155.

118 Riffat Hassan, "Challenging the Stereotypes of Fundamentalism: An Islamic Feminist Perspective", *The Muslim World* Vol. 91, No. 1 (2001), pp. 56–57.

119 Jane I. Smith and Yvonne Y. Haddad, "Eve: Islamic Image of Women", *Women's Studies International Forum* Vol. 5 (1982), pp. 135–144.

120 Mohammad H. Kamali, "Law and Society. The Interplay of Revelation and Reason in the Shariah" in Esposito, *Women in Muslim Family Law*, p. 59.

121 Quran 9:71–72.

122 Quran 33:35. See also 40:17; 74:38 and 61:64.

same criteria. The verse was revealed when women asked the Prophet why the Quran addressed only men, when women too were believers.¹²³ Women felt neglected as the rewards of Paradise are described for male believers, and are rather uncommon for women.¹²⁴ It is narrated that women were jealous of men's paradise when Umm 'Umarah Al-Ansariyyah "came to the Prophet and said: 'I do not see but that everything is for the men, and I do not see anything being mentioned for the women.'"¹²⁵ So the following verse was revealed:

and that He may admit the believers, men and women alike, into gardens underneath which rivers flow, therein to dwell forever, and acquit them of their evil deeds; that is in God's sight a mighty triumph; and that He may chastise the hypocrites, men and women alike, and the idolaters men and women alike, and those who think evil thoughts of God; against them shall be the evil turn of fortune. God is wroth with them, and has cursed them, and has prepared for them Gehenna -- an evil homecoming!¹²⁶

Instead of providing for differentiation between men and women, the verse provides for differentiation between believers and non-believers. Paradise is promised on equal terms to men and women, as long as they are believers and submit to the will of God.¹²⁷

3.2 *Marriage*

Many Muslim feminists identify the Islamic marriage as patriarchal,¹²⁸ as it transfers the rights to a woman and her sexuality from "her tribe to men".¹²⁹ Previous chapters have described how sixth and seventh century Arabian Peninsula customs regarding matrimony, where some tribes practiced matrilineal and matrilineal marriage, where women initiated and ended marriages and were entrusted with the permanent custody of their children. For these tribes, the Quran consolidated a patrilineal marriage practice in which women

¹²³ Syed, *The Position of Women in Islam*, p. 14.

¹²⁴ For verses interpreted to be meant for the male believers see Quran 37:40–49; 44:51–55; 52:17–20; 44:54–59; 55:70–77; 56:37–40 and 78:31–34.

¹²⁵ Hasan (Darussalam), Vol. 5, Book 44, Hadith 3211.

¹²⁶ Quran 48:5–6.

¹²⁷ Quran 33:35.

¹²⁸ The word most commonly used for marriage in Islam is *nikah*, literally meaning sexual intercourse. As a legal term, it represents the contract which makes sex lawful in relationships. The only other legitimate means of engaging in sexual relations, has been permitted to men who have concubines, or female slaves.

¹²⁹ Ahmed, *Women and Gender in Islam*, p. 62.

lost their previous status and advantages. At the same time, the Quran did outlaw some abusive marriage practices relatively common at the time of the Prophet, such as the son inheriting the father's wife when he passed away. Joseph Schacht, for example, argues that the legal position of women is not an unfavorable one. While "she is considered inferior to the man and has fewer rights and duties from a religious point of view ... but as regards the law of property and obligations, the woman is equal to the man; the matrimonial regime is even more favorable to her in many respects".¹³⁰

The Quran encourages marriage, which is considered an act of worship, by those who have reached a marriageable age,¹³¹ and includes verses describing suitable marriage partners,¹³² proper marriage arrangements¹³³ and the rights and duties of the husband and wife.¹³⁴ Marriage in Islamic law is also considered a legal contract between two parties with the legal capacity to contract.¹³⁵ Rules of suitability vary in importance in different schools and function to prevent mismatches between the bride and a groom who is her inferior. Suitability is only an issue for the groom, as no rules prevent a male from marrying an unsuitable bride, as "men are not degraded by cohabitation with women who are their inferiors".¹³⁶ While women have the right to

130 Joseph Schacht notes that a woman is not executed if she commits apostasy, but forced, by imprisonment and beatings, to return to Islam. She equals half a man when it comes to blood-money, evidence, and inheritance, and her position is less advantageous in matters related to marriage and divorce, and because, on certain grounds, the husband has the right to correction. See *An Introduction to Islamic Law*, pp. 126–127.

131 When a person reaches marriageable age differs for the different schools of thought, the earliest being 9 years for a girl and twelve years for a boy. For a review of the marriage age in Islam, see Asaf Fyze, *Outlines of Muhammadan Law* (London: Oxford University Press, 1964) and Abdul Hasan Ali ibn Abu Bakr al-Marghinani, *The Hedaya or Guide – A commentary on the Mussulman Laws*, trans. by Charles Hamilton (New Delhi: Islamic Book Trust, 1982). Marriage was also encouraged to men by the Prophet: "O young men! Whoever among you has the ability should marry, for it restrains the eyes and protects chastity", see Ibn Hajar al-Asqalani, *Fath al-Bari*, cited in El Fadl, *Speaking in God's Name*, p. 206, n. 72.

132 Quran 2:220, 4 22–23.

133 Quran 2:235.

134 Quran 4:34.

135 The contracting parties can only be between a man and a woman, as same sex marriages are not recognized. There is a requirement of religious adherence, in order for the marriage to be valid. Muslim women are only allowed to marry Muslim men, whereas Muslim men could also marry a "woman of the book." For the Sunni, this means Christian and Jewish women, while some Shia jurists also allow for Zoroastrian women to be married to a Muslim man.

136 Quoted from Kecia Ali, "Marriage in Classical Islamic Jurisprudence", in *The Islamic Marriage Contract: Case Studies in Islamic Family Law*, eds., Asifa Quraishi and Frank E. Vogel (Cambridge: Harvard University Press, 2008), p. 16.

enter into marriage, Muslim family law generally upholds that the groom concludes the legal contract with her legal guardian and accepts to pay the dower, *mahr*.¹³⁷ Whereas in pre-Islamic times, the father of the bride (or other male relatives) appropriated the dower, Islam makes the woman the sole recipient of the dower.¹³⁸

Although women are permitted to conclude contracts connected to, for example, property,¹³⁹ marriage is seen as fundamentally distinct from other transactions, as marriage establishes the sexual lawfulness otherwise forbidden to women. "Those who believed that a woman could not conclude a marriage contract on her behalf or for someone else linked this incapacity to the woman's inability to convey licit sexual access to herself or another woman through marriage."¹⁴⁰ Therefore, a guardian, *wali*, is needed for a marriage contract. Marriage, whether considered a sacrament or a contract, legitimizes sexual intercourse, granting men and women the right to sexual pleasure, where the husband's central right is to derive sexual pleasure from his wife, and to that end, he may control her mobility, since Islamic marriage law links the wife's mobility with the duty to be sexually available at all times to the husband.¹⁴¹ To obtain his due from her, he may compel her to perform ablution after her menstruation,¹⁴² may take her with him when he travels; and may

137 Schacht, *An Introduction to Islamic Law*, p. 161. There are detailed rules with regard to dowry and when the woman becomes the owner of the full dower. She may refrain from sexual intercourse until she has received the dower. See Sachiko Murata, *Temporary Marriage (Mut'a) in Islamic Law* (London: The Muhammadi Trust, 1987), pp. 14–16.

138 Ali, *Gender and Human Rights in Islam and International Law*, p. 60. Verse 4:20 also prohibits forcing one's wife to remit the dower in a will entitling the husband the dower.

139 Once a woman reaches puberty, she has the complete and independent possession of her property. Not her father nor her husband has any right to the ownership, enjoyment or the disposal of her property. She is considered to have full legal capacity as far as her private property is concerned, see Tucker, *Women, Family, and Gender in Islamic Law*, p. 25.

140 Ali, *Marriage and Slavery in Early Islam*, p. 46.

141 Duderija, *Maqasid al-Sharia*, p. 197. Hadiths adds far-reaching implications to the obligation of a wife to be available for her husband's sexual desires, describing that the wife should be willing to enact in intercourse on a camel should the husband want to, or if he requests her, to lick her husband's wounds to show her obedience, see El Fadl, *Speaking in God's Name*, pp. 210–218; Tucker, *Women, Family, and Gender in Islamic Law*, p. 40. Penetration is however forbidden during menstruation, see Ibn Qudama, *al-Kafi fi fiqh Ahmad ibn Hanbal* (Beirut: Dar al-Kutub al-'Ilmiyya, 1994), 3:82. See also Ibn al-Naqibi, *Reliance of the Traveler*, p. 526; 'Allama Hilli, *Tahrir al-ihkam (ahkam) al-shariyya 'ala al-mahdab al-imamiyya* (Qom: Maktab al-Tawhid, 1999), 3:482.

142 Ibn Qudama, *al-Kafi fi fiqh Ahmad ibn Hanbal*, 3:82. See also, Ibn al-Naqibi, *Reliance of the Traveler*, p. 526; Hilli, *Tahrir al-ihkam*, 3:482.

forbid her from leaving his home.¹⁴³ While the Prophet advocates marriage as commendable and her husband should give the woman her full share of sexual pleasure,¹⁴⁴ the wife is required not to reject the husband's bed. Hadiths add the obligation of a wife to be available for her husband's sexual desires.¹⁴⁵ Marital rape is not recognized, and the husband may enjoy her whenever he wishes "so long as he does not harm her".¹⁴⁶

The rights and responsibilities of the wife are considered equal to those of the husband, but they are not identical. While the woman has the exclusive right to manage property before, during, and after marriage, and each party retains his or her separate property upon divorce,¹⁴⁷ inequalities emerge as the husband becomes the protector of the wife. The stipulation in the Quran that provides that men are the managers of the affairs of women came to encompass all areas of life.¹⁴⁸ The husband has a financial maintenance obligation during the marriage, such as providing for his wife and a specific period after the divorce.¹⁴⁹ Unlike the payment of mahr, which becomes obligatory as a result of the marriage contract, the payment of support only becomes mandatory as a result of the marriage contract and the obedience of the wife. A husband has no legal obligation to support his wife if she is not obedient.¹⁵⁰ A wife is not required to obey her husband if he demands "un-Islamic" acts from her.¹⁵¹ Besides housing, wives are entitled to maintenance from the husband, meaning that he is obligated to supply her with food and clothing, although there is no textual evidence to support such a narrow definition of maintenance.¹⁵² It is understood that "when a woman surrenders herself into the custody of her husband, it is incumbent upon him thenceforth to supply her with

143 The Maliki's hold that she must be allowed to visit her close kin, see Khalil ibn Ishaq al-Jundi, *Maliki law: Being a Summary from French Translations of the Mikhtasar of Sidi Khalil*, transl. F. X. Ruxton (Westport: Hyperion, 1980), p. 148.

144 The wife's sexual rights are acknowledged, but enforcement mechanisms are uncommon. See al-Marghinani, *Al-Hedayah*, 2nd ed. transl. C. Hamilton (Karachi: n.p., 1989), 1:579.

145 El Fadl, *Speaking in God's Name*, pp. 210–218; Tucker, *Women, Family, and Gender in Islamic Law*, pp. 401–402.

146 Ibn Qudama, *al-Kafi fi fiqh Ahmad ibn Hanbal*, 3:82–83. See also, Ibn al-Naqib, *Reliance of the Traveler*, pp. 525–526; Hilli, *Tahrir al-ihkam*, 3:482 and 3:528; al-Marghinani, *Al-Hedayah*, 1:61.

147 Esposito, *Women in Muslim Family Law*, p. 24.

148 Quran 4:34.

149 Al-Hibri, "Muslim Women's Rights in the Global Village", p. 47; Esposito, *Women in Muslim Family Law*, p. 26.

150 Murata, *Temporary Marriage (Mut'a)*, pp. 16–17.

151 Ibid.

152 Al-Haskafi, *Durr-ul-Mikhtar*, transl. B. M. Dayal (New Delhi: Kitab Bhavan, 1992), p. 316.

food, clothing, and lodging, whether she be a Muslim or an infidel, because such is the precept both in the Koran and in the traditions; and also, because maintenance is a recompense for the matrimonial restraint",¹⁵³ or that "maintenance is compensation for her confinement".¹⁵⁴ The confinement of the wife also entitles her to an exclusive dwelling just for her enjoyment:

It is incumbent upon a husband to provide a separate apartment for his wife's habitation, to be solely and exclusively appropriated to her use, so as that none of the husband's family, or others, may enter without her permission and desire, because this is essentially necessary to her, and is, therefore, her due the same as maintenance, the word of God appoints her a dwelling house as well as a subsistence: and as it is incumbent upon a husband to provide a habitation for his wife, so he is not at liberty to admit any person to a share in it, as this would be injurious to her, by endangering her property, and obstructing her enjoyment of his society ...¹⁵⁵

Women hardly know of the right to have their own space, and Muslim scholars have not directly been in any rush of informing women of or requiring men to uphold this right.¹⁵⁶ However, this privilege is easily circumvented by the husband as the property where they reside is his property. He could withhold any visitors to his property, be that her family or acquaintances.¹⁵⁷

Although not a unanimous standpoint, a majority of the jurists uphold that the wife does not have a legal obligation to nurse her offspring or to perform household service.¹⁵⁸ The husband has no legal obligation to care for his wife if she should fall sick, although some scholars argue that there is a religious duty to do so.¹⁵⁹ "A sick wife who, on account of her failing health, is unable to discharge her marital duties has no legal right to maintenance by the husband."¹⁶⁰ Marital duties, in this regard is related to her duty to be sexually available.¹⁶¹

¹⁵³ Al-Marghinani, *Al-Hedaya*, p. 392.

¹⁵⁴ Al-Haskafi, *Durr-ul-Mikhtar*, p. 316.

¹⁵⁵ Al-Marghinani, *Al-Hedaya*, p. 392. See also, Al-Haskafi, *Durr-ul-Mikhtar*, p. 322.

¹⁵⁶ Farooq, "Analogical Reasoning (Qiyas)", p. 167.

¹⁵⁷ Al-Marghinani, *Al-Hedaya*, p. 402.

¹⁵⁸ Quote taken from Ali, "Marriage in Classical Islamic Jurisprudence", p. 12.

¹⁵⁹ Farooq, "Analogical Reasoning (Qiyas)", p. 169.

¹⁶⁰ Hammudah A. Al-Ati, *The Family Structure in Islam* (Indianapolis: American Trust Publications, 1977), p. 151.

¹⁶¹ Hamilton however argues that "If a woman falls sick in her husband's house, she is still entitled to a maintenance. This is upon a principle of benevolence, as *analogy* would suggest that *she is not entitled* to maintenance, where she falls sick so far as to be incapable of

Yet, marriage is described as a source of joy and comfort for both partners. Verses, while directed to men, describe relationships based on love and mercy:

And of His signs is that He created for you, of yourselves, spouses, that you might repose in them, and He has set between you love and mercy. Surely in that are signs for a people who consider.¹⁶² It is He who created you out of one living soul, and made of him his spouse that he might rest in her. Then, when he covered her, she bore a light burden and passed by with it; but when it became heavy they cried to God their Lord, 'If Thou givest us a righteous son, we indeed shall be of the thankful.'¹⁶³ Permitted to you, upon the night of the Fast, is to go in to your wives; -- they are a vestment for you, and you are a vestment for them.¹⁶⁴

Nevertheless, Islamic marriage laws generally do not consider notions of marriages based on mutual terms between men and women; rather, it focuses on the male role as provider.¹⁶⁵ Commenting on this verse, Fakhr al-Din al-Razi (d. 1210), affirms that the phrase "He created for you" is an indication that God created women for the convenience of men, but also that women, unlike men, were not intended to be considered as subjects of the commands of the law. For al-Razi, women were given moral obligations only to benefit men.¹⁶⁶

3.2.1 Temporary Marriages

The temporary marriage, *mut'a*, legitimizes sex for a specific period time and was practiced in early Islam and today by Shia Muslims. The Sunni and the Shia agree that temporary marriages were allowed but disagree on the reasons it was permitted. The Shia maintain that since temporary marriages were allowed for by the Prophet, it cannot be forbidden.¹⁶⁷ Sunni Muslims don't deny that this form of marriage was permitted, but argue that it was prohibited by the Prophet after having allowed it during certain battles. The *mut'a* marriage was generally practiced during long journeys to legalize sexual intercourse to

admitting her husband to the conjugal embrace, since in this case she cannot be deemed in custody for the purpose of enjoyment." See Al-Marghinani, *Al-Hedaya*, p. 396.

162 Quran 30:21.

163 Quran 7:189.

164 Quran 2:187.

165 Duderija, *Maqasid al-Sharia*, p. 201.

166 Fakhr al-Din Muḥammad b. 'Umar al-Razi, *Mafatih al-Ghayb*, 6 vols. (Cairo: al-Maṭba'ah al-Miṣriyah al-'Amiriyah, 1862) 5:185. See also, Fadel, "Is Historicism a Viable Strategy for Islamic Legal Reform?", p. 37.

167 Spectorsky, *Women in Classical Islam*, pp. 93–94.

avoid the offense of *zina*, unlawful sexual intercourse.¹⁶⁸ The Sunni argue that the verse permitting a temporary marriage was abrogated by another verse, “prosperous are the believers ... [who] guard their private parts save from their wives and what their right hands own”.¹⁶⁹ As described, a verse which abrogates another verse must be revealed after it. The verse establishing the temporary marriage was revealed after the Prophet had emigrated to Medina and the abrogation as claimed by the Sunni is not correct. However, the practice was also banned by the second caliph ‘Umar who declared that he would punish anyone who would practice it. The Shia maintain that ‘Umar forbade *mut’a* with regard to himself, and even if ‘Umar’s prohibition was based on *ijtihad*, it is reviewed as baseless, as *ijtihad* cannot overrule what was permitted in the Quran.¹⁷⁰

The Shia schools of law discuss temporary marriages in as great a detail as permanent marriage. Unlike permanent marriages, a man may have as many *mut’a* wives as he wishes, as there are no numerical restrictions.¹⁷¹ The *mut’a* marriage is a contracted marriage valid during a specific period, and although marriages of a day or less are seen as undesirable, they are not prohibited.¹⁷² If the contract does not include a period, most Shia jurists hold the view that the marriage is then regarded as a permanent marriage. Like permanent marriage, there is a marriage contract which can be concluded between the man and the woman, their representatives, or their fathers. The temporary marriage contract must specify *mahr*, which the woman can request at the beginning of the marriage, and although the woman is not entitled to maintenance, the contract may include such provisions. The contract may also include provisions regulating the number of sexual acts, or if they occur at day or night time. There is no inheritance unless specifically included in the marriage contract. Also, like permanent marriage, marrying someone outside the “people of the book” is not allowed for men, and women are only allowed to marry Muslim men.¹⁷³

Fatima Mernissi describes the *mut’a* marriage as historically giving women as much freedom as the man and also implied a different set of paternity rules

168 Ann Black, Hossein Esmaeili, Nadirsyah Hosen, *Modern Perspectives on Islamic Law* (Cheltenham: Edward Edgar, 2013), p. 122.

169 Quran 23 1–6.

170 Murata, *Temporary Marriage (Mut’a)*, pp. 56–59.

171 Ziba Mir-Hosseini, “A Woman’s Right to Terminate the Marriage Contract Law”, in *The Islamic Marriage Contract*, eds. Asifa Quraishi and Frank E. Vogel (Cambridge: Harvard University Press, 2008), p. 218.

172 Black, Esmaeili, Hosen, *Modern Perspectives on Islamic Law*, p. 122.

173 Murata, *Temporary Marriage (Mut’a)*, pp. 30–46.

than those that Sunni Muslim marriages were otherwise based on. She maintains that the children of such marriages belonged to the mother, and had the right to inherit their father's property.¹⁷⁴ The Shia however, uphold that the child belongs to the father, even in a mut'a marriage, however, he does have the possibility of denying the child.¹⁷⁵ While women are given as much freedom as men to engage in temporary marriages, mut'a is also argued to be a form of prostitution, as the sole function of this type of marriage is the sexual enjoyment of the woman, for which the man has to pay a certain amount of money or property.¹⁷⁶ In some works, women who engage in mut'a marriages are referred to as a "rented woman".¹⁷⁷ The definition of rental in Islamic Shia law is "to gain possession of a benefit in exchange for a specified sum".¹⁷⁸ This definition is also applied to temporary marriages.¹⁷⁹

3.2.2 Polygyny

Polygyny is considered to be legitimized both by the Quran and the Sunnah, as the Prophet engaged in several polygynous marriages after the death of his first wife, Khadija. Because this type of marriage is acceptable in the Quran and endorsed by the Prophet's life, traditionalists uphold the view that polygyny can never be prohibited.¹⁸⁰ Polygyny is permitted under the condition that the husband treats his wives justly. For traditional Sunni jurists, treating wives justly meant that the husband needs to provide residence, food, and clothes to all the wives, and an equal share of his time, which necessarily does not consist of fairness in sexual relations.¹⁸¹ As long as he can meet these requirements, he is to be considered just and may marry up to four women, whereas strict monogamy is imposed on women.¹⁸²

174 Mernissi, *Beyond the Veil*, p. 37 and Engineer, *The Rights of Women in Islam*, p. 24.

175 The waiting period here consists of two menstrual periods. If she were to marry the same man in a new temporary marriage, no waiting period is needed. If the husband should die, the waiting period is instead four months and ten days. The date of expiry is included in the marriage contract, and when the term expires, the marriage ends. It can also be renewed through a new contract, though the woman is still bound by the 'iddah period. See Murata, *Temporary Marriage (Mut'a)*, p. 44–56.

176 Ibid., 28.

177 The term used in Arabic is musta'jara.

178 Ja'far ibn Muhammad ibn Sa'id, *Shara'i al-islam* (Beirut: n.p., 1930), p. 233.

179 Murata, *Temporary Marriage (Mut'a)*, p. 28.

180 Black, Esmaeili, Hosen, *Modern Perspectives on Islamic Law*, p. 122.

181 Khalil ibn Ishaq al-Jundi, *Mukhtasar al-Allama Khalil fi fiqh al-Imam Malik* (Beirut: Dar ar-Kutub al-Ilmiyya, 2004), p. 88; al-Jundi, *Maliki law*, p.118; Ibn Qudama, *al-Kafi fi fiqh Ahmad ibn Hanbal*, 3:88; Hilli, *Tahrir al-ihkam*, 3:588 and Ali, "Marriage in Classical Islamic Jurisprudence", chapter 3.

182 Al-Hibri, "A Study of Islamic Herstory: how did we ever get into this mess?", p. 216.

Give the orphans their property, and do not exchange the corrupt for the good; and devour not their property with your property; surely that is a great crime. If you fear that you will not act justly towards the orphans, marry such women as seem good to you, two, three, four; but if you fear you will not be equitable, then only one, or what your right hands own; so it is likelier you will not be partial.¹⁸³ You will not be able to be equitable between your wives, be you ever so eager.¹⁸⁴

The practice of polygyny as such was not introduced by Islam, since it already existed in pre-Islamic societies, where men could have an unlimited number of wives. While Islam did limit the practice of polygyny, it also authorized the practice by allowing it in the first place.¹⁸⁵ It is, however, argued that Islam gradually wanted to change the practice. The restriction of limiting the number of wives to four is seen as the first step, where the final goal was the absolute prohibition of the practice.¹⁸⁶ It is argued that the verses above need to be read in conjunction with each other, where a combined reading of the verses leads to an implied prohibition of polygyny in Islamic law.¹⁸⁷ This view was historically held by the Mu'tazilis, who maintained that a husband could never treat wives equally and that the verse only allowed for polygyny in cases of orphan girls and their widowed mothers.¹⁸⁸ Reading the verses, it is easy to determine that polygyny is allowed

183 Quran 4:2–3. When the verse was revealed in the Quran, men who were married to more than four women were advised by the Prophet to keep four and divorce the rest of them, see Engineer, *The Rights of Women in Islam*, p. 22.

184 Quran 4:129.

185 Commentators also uphold that these verses were revealed after the Battle of Uhud, in a time where many men were killed, and women surpassed the number of men, see Jeri Altneu Sechzer, "Islam and Women: Where Tradition Meets Modernity: History and Interpretations of Islamic Women's Status", *Sex Roles* Vol. 51, No. 5/6 (2004), p. 268.

186 Zehra F. Arat, "Women's Rights in Islam: Revisiting Quranic Rights", in *Human Rights: New Perspectives, New Realities*, eds. Adamantia Pollis and Peter Schwab (Boulder: Lynne Rienner Publishers, 2000).

187 See Al-Hibri, "A Study of Islamic Herstory: how did we ever get into this mess?", p. 216 and Rahman, "Status of Women in the Quran", pp. 45–49. The Prophet himself, for example, did not allow his son-in-law Ali to take another wife, until he divorced his daughter Fatima, see Engineer, *The Rights of Women in Islam*, p. 159. See also, Al-Bukhari, *Sahih*, Vol. 7, Book 62, No. 157.

188 On the issue of dealing equally with wives in polygynous marriages, they included love and tenderness as a requirement, which they argued would be impossible to accomplish, see Amira Mashour, "Islamic Law and Gender Equality: Could There be a Common Ground?: A Study of Divorce and Polygamy in Sharia Law and Contemporary Legislation in Tunisia and Egypt", *Human Rights Quarterly* Vol. 27, No. 2 (2005), p. 570. See also, Muhammad Sharif Chaudry, *Human Rights in Islam* (All Pakistan Islamic Education Congress, 1993) and Syed, *The Position of Women in Islam*, p. 43.

under specific circumstances, to help orphans,¹⁸⁹ and the possibility of marrying several women cannot be seen as the rule, but rather as the exception.¹⁹⁰ It is rather interesting that the doctrine of naskh seems not to have been used by the jurists when it comes to the case of polygyny. Especially since the principle of God gradually revealing the way towards how Muslims should behave is upheld in other issues. Had the jurists consistently applied the doctrine of abrogation, then polygyny would have been forbidden as the Quran conditioned the practice by the terms of equal and just treatment of wives, which it affirms is impossible to achieve.¹⁹¹ Thus, Islamic law, albeit not acknowledged, could be seen, in this aspect, as an arbitrary construction to ensure that the sexual needs of men are satisfied, even though there is nothing in the verse to suggest that the verse permits men to take wives to satisfy sexual urges.

While classical Islamic law allows for polygyny, most Muslim states have, nonetheless, introduced measures to restrict the practice. Tunisia and Turkey have prohibited polygyny, on the basis that the Quran calls for a ban by referring to the phrase that a husband cannot treat wives equally.¹⁹² Other states have allowed for marriage contracts that include a stipulation where the first

189 Asma Barlas argues that the verse “serves a very specific purpose: that of securing justice for female orphans”, *Believing women in Islam*, p. 190.

190 Engineer, *The Rights of Women in Islam*, pp. 157–158.

191 While traditionalists argued that treating wives just means dividing the number of nights between them, and protecting the sick, older, or barren wife from divorce, reformists advocated for the restriction and even abolition of the practice as the particular social conditions that existed at the time of the Prophet, were no longer prevalent in current societies, see Helmut Gärje, *The Quran and its Exegesis: Selected texts, with Classical and Modern Muslim Interpretations* (London: Routledge, 1976), pp. 252–261. This approach was suggested by Muhammad ‘Abduh, who argued that polygyny would lead to greater harm and corruption for society. ‘Abduh proposed that the original teachings of the Quran actually encouraged monogamous relationships, based on the verse that declared that the husband must treat wives equally. For ‘Abduh, the verse was impossible to achieve, see Esposito, *Women in Muslim Family Law*, p. 248. By the 19th century, several works were introduced by Muslim scholars, challenging the traditional view on polygyny, see Mumtaz ‘Ali, *The Rights of Women* (Lahore: n.p., 1898); Tahir al-Haddad, *Our Women in Islamic Law and in Society*, transl. Ronak Husni and Daniel L. Newman (London: Routledge, 2007). Al Haddas’ ideas manifested themselves in the 1956 Tunisian Personal Status Law, where polygyny was forbidden. See also, the two works of Qasim Amin, *The Liberation of Women: and, The New Woman, Two Documents in the History of Egyptian Feminism* (Cairo: American University Press, 2000) and *The New Women: Document in the Early Debate on Egyptian Feminism* (Cairo: American University Press, 1996).

192 The gradualist approach has more recently been used to restrict the practice of polygyny. For instance, the 1917 Ottoman Family Law included stipulations to limit polygyny, by requiring the first wife to consent to the husband marrying another wife and by including the right to divorce if the husband takes another wife, see Article 38, 1917 Ottoman Family

wife needs to give her permission for the husband to take another wife, established the requirement for a court to review the financial means of the husband to be able to provide for a new wife (and eventually more children) and by questioning the husband on how he intends to treat his wives equally. Such courts allow for a second wife should the first wife be infertile, incapable of engaging in sexual relations, illness or mentally impaired. The view is that it is fairer and kinder and that the first wife is better off remaining in the marriage with a co-wife, rather than the husband divorcing her and being left on her own.¹⁹³ Western countries have also legally recognized polygynist marriages lawfully contracted in countries where the practice has been allowed for.¹⁹⁴

3.3 *Sexual Relations*

While in pre-Islamic Arabia—where women could engage in multiple sexual relationships—interpretations of the Quran which would allow women, and not men, to assert sexual rights over herself, were rejected by free men.¹⁹⁵ Yet, the Quran prescribes “corrupt women for corrupt men, and corrupt men for corrupt women; good women for good men, and good men for good women”.¹⁹⁶ Purity and chastity are seen as a function of conduct and a person’s behavior; it is prescribed similarly to both men and women.¹⁹⁷ Purity is not prescribed by the absence of sex; rather, the Quran controls sexual relations by making them lawful during the marriage.¹⁹⁸ On the other hand, Islam only allows for permissible sexual relationships through marriage for women.¹⁹⁹ Men are permitted a sexual license completely forbidden for women; besides the right to marry up to four women, they may also have an unlimited number of concubines.²⁰⁰

Code. The right to divorce if the husband takes another wife is now an established notion, however, the schools of law still maintain that a marriage contract cannot include terms that forbid polygyny. For a brief overview of the justifications of states in restricting the practice of polygyny, see Rehman, “The Sharia, Islamic Family Laws and International Human Rights Law”, pp. 108–12. There is, however, evidence that the practice still does continue in these countries, where the wives have no rights under the civil law, see Black, Esmaeili, Hosen, *Modern Perspectives on Islamic Law*, p. 123.

193 Ibid., 121–122.

194 These marriages have been recognized in various western countries such as England, Australia and Sweden. Polygynist marriages entered into in the West are not recognized.

195 Ali, *Marriage and Slavery in Early Islam*, p. 14.

196 Quran 24:26.

197 Barlas, “*Believing Women*” in *Islam*, p. 153.

198 Quran 24:33.

199 Syed, *The Position of Women in Islam*, p. 27.

200 Quran 4:25. See also 4:3; 4:24; 23:5–6; 24:31; 33:50 and 70:29–30. Karmi, *Women, Islam and Patriarchalism*, p. 170.

O Prophet, We have made lawful for thee thy wives whom thou hast given their wages and what thy right hand owns, spoils of war that God has given thee, and the daughters of thy uncles paternal and aunts paternal, thy uncles maternal and aunts maternal, who have emigrated with thee, and any woman believer, if she give herself to the Prophet and if the Prophet desire to take her in marriage, for thee exclusively, apart from the believers -- We know what We have imposed upon them touching their wives and what their right hands own -- that there may be no fault in thee; God is All-forgiving, All-compassionate.²⁰¹

There was an instance, a few years after the Prophet died, where a Muslim woman took one of her male slaves as a partner. She mentioned this to 'Umar, stating "that ownership by the right hand made lawful to me what it makes lawful to men". 'Umar declared that this was not a correct interpretation and while he did not punish her for illicit sex, he forbade her from ever marrying any free man. The slave was also ordered not to approach her and was sold. Besides the fact that 'Umar restricted this woman's right to marriage (which is encouraged in Islam and seen as part of submitting to the will of God), of relevance is his reasoning; he responds that her position is not of a man. In other words, 'Umar settles that women do not have the same sexual prerogatives as men.

Furthermore, it is argued that there are verses in the Quran that permit a reading suggesting that women are allowed to be treated as the sexual property of men:

Decked out fair to men is the love of lusts -- women, children, heaped-up heaps of gold and silver, horses of mark, cattle and tillage. That is the enjoyment of the present life; but God -- with Him is the fairest resort.²⁰²

Asma Barlas maintains that "although women are included among men's 'lust' on earth, this is a list of what men covet, not what God *wants* them to covet, which is nearness to God".²⁰³ Barlas argues that this verse emphasized the primacy of the afterlife over this life; its purpose is not to establish that women are property. It is somewhat difficult to agree with Barlas' interpretation of this verse, as it appears as if the last part of the verse "that is the enjoyment of the present life" is not taken into consideration. While there is nothing in the verse that suggests that women (or any of the other listings) are property or should

²⁰¹ Quran 33:50.

²⁰² Quran 3:14. See also 2:223.

²⁰³ Barlas, *"Believing Women" in Islam*, p. 161.

be considered property, it does speak of the lusts of men.²⁰⁴ The verse does acknowledge that women are an enjoyment, although the forms of it are not described.

With the Quran describing women as objects of enjoyment, hadiths elevated the view of women having a superior sexual desire, one that God counterbalanced with higher levels of modesty. Women as *fitna* were further exemplified by hadiths warning men of women: "the life of this world is sweet and green, and verily Allah has appointed you as His vice-regents in it so that He may see how you act. So beware of the world and beware of women. For certainly, the first trial (*awwal fitna*) of Banu Isra'il was through women".²⁰⁵

3.4 *Fornication and Adultery*

We have established that men and women have different rights regarding sexual relations. The Quran also contains verses regarding the punishments of engaging in illegitimate sexual relationships:

Such of your women as commit indecency, call four of you to witness against them; and if they witness, then detain them in their houses until death takes them or God appoints for them a way. And when two of you commit indecency, punish them both; but if they repent and make amends, then suffer them to be; God turns, and is All-compassionate.²⁰⁶

Jurists were not in agreement of what these verses implied; some scholars argued that the first part exclusively applies to women, while the second part includes both genders. Others argued that the first part dealt with fornication, the latter, adultery. The penalty of adultery as prescribed in these verses was considered to be temporary and abrogated for the following verse:²⁰⁷

The fornicatress and the fornicator -- scourge each one of them a hundred stripes, and in the matter of God's religion let no tenderness for them seize you if you believe in God and the Last Day; and let a party of the believers witness their chastisement. The fornicator shall marry none but a fornicatress or an idolatress, and the fornicatress -- none shall marry her but a fornicator or an idolator; that is forbidden to the believers.²⁰⁸

²⁰⁴ Barlas argues that the Quran does not, in any context, designate a human being (even a slave) as another's property, see "*Believing Women*" in *Islam*, pp. 161–164.

²⁰⁵ Muhammad Ibn Yacub Al-Kulayni, *Kitab al-Kafi* (Beirut: Manshurat al-Fajr, 2007), 5:203.

²⁰⁶ Quran 4:15–16.

²⁰⁷ Burton, *The Sources of Islamic Law*, pp. 124–125.

²⁰⁸ Quran 24:2–3.

The verse carries a fixed penalty, *hadd*, of a hundred lashes for the crime of adultery.²⁰⁹ There is no difference based on gender affecting the punishment since it is regarded that men and women have the same moral capacity for making decisions. Thus, the same standard for judging them is applied in cases concerning adultery.²¹⁰

Hadiths prescribed stoning as the punishment for adultery. More correctly, however, would be to understand these traditions as describing instances where stoning was prescribed as punishment.²¹¹ The practice was incorporated from the Jewish tradition and applied to the Jews, as stoning was part of the Torah. "Some Jews came to the Messenger of Allah and mentioned to him that a man and women of their number had committed fornication. The Messenger of Allah asked them: What do you find in the Torah about stoning? They replied: We disgrace them and they should be flogged. 'Abd Allah b. Salam said: You lie; it contains (instruction for) stoning. So they brought the Torah and spread it out, and one of them put his hand over the verse of stoning and read what preceded it and what followed it. 'Abd Allah b. Salam said to him: Lift your hand. When he did so, the verse of stoning was seen to be in it. They then said: He has spoken the truth, Muhammad, the verse of stoning is in it. The Messenger of Allah then gave command regarding them, and they were stoned to death."²¹² Another tradition describes 'Umar referring to a verse not included in the Quran: "Umar b. al-Khattab gave an address saying: Allah sent

209 Hadd means limit and in legal terms it meant the mandatory punishments established by the Quran. Islamic criminal law has three broad categories of crimes based on punishments, *hudud* or *hadd*, *tazir* and *qisas*. Hudud crimes of theft, robbery, apostasy, alcohol consumption, unlawful sexual intercourse and false accusations of unlawful sexual intercourse all carry a fixed penalty, see Baderin, *International Human Rights Law and Islamic Law*, p. 73. Hudud crimes can only be forgiven by God, thus diya is not accepted in these cases, see Mutaz M. Qafisheh, "Restorative Justice in the Islamic Penal Law: A Contribution to the Global System", *International Journal of Criminal Justice Science* Vol. 7, No. 1 (2012), pp. 487–491. Tazir punishments are up to the discretion of the judge, and involves crimes such as embezzlement, perjury, sodomy, usury, breach of trust, abuse, bribery, and other similar transgressions against God, see Susan C. Hascall, "Restorative Justice in Islam: Should Qisas Be Considered a Form of Restorative Justice?", *Berkeley Journal of Middle East & Islamic Law* Vol. 4 (2011), p. 55. Lastly, qisas cover acts of corporal violence, such as murders, non-fatal bodily injuries and unintentional killings, see mad Abd al-Aziz al-Alfi, "Punishment in Islamic Criminal Law", in *The Islamic Criminal Justice System*, ed. M. Cherif Bassiouni (London: Oceana publications, 1982), p. 230.

210 Barlas, "Believing Women" in *Islam*, p. 140.

211 For a description of other traditions where stoning was applied and how the jurists incorporated them into the corpus of Islamic law, see Burton, *The Sources of Islamic Law*, pp. 128–158.

212 Sunan Abi Dawud 4446, Book 40, hadith 96.

Muhammad with truth and sent down the Books of him, and the verse of stoning was included in what He sent down to him. We read it and memorized it. The Messenger of Allah had people stoned to death, and we have done it also since his death. I am afraid the people might say with the passage of time: We do not find the verse of stoning in the Books of Allah, and thus they stray by abandoning a duty which Allah had received. Stoning is a duty laid down (by Allah) for married men and women who commit fornication when the proof is established, or if there is pregnancy or a confession. I swear by Allah, had it not been so that the people might say: 'Umar made an addition to Allah's Book, I would have written it (there).'²¹³ Stoning is unmentioned in the Quran, nevertheless, some jurists implied that these traditions abrogated the verses in the Quran.²¹⁴

In the instance a husband should accuse his wife of adultery, her oath would be enough to prevent punishment:

And those who cast it up on their wives having no witnesses except themselves, the testimony of one of them shall be to testify by God four times that he is of the truthful, and a fifth time, that the curse of God shall be upon him, if he should be of the liars. It shall avert from her the chastisement if she testifies by God four times that he is of the liars, and a fifth time, that the wrath of God shall be upon her, if he should be of the truthful.²¹⁵

If there are no witnesses to the adultery, the woman's oath is to be counted as the testimony of four women,²¹⁶ which implies that the woman's oath trumps the husband's accusation.²¹⁷ However, this is the only instance where a woman's testimony outweighs or is equal to that of a man.

²¹³ Ibid.

²¹⁴ Burton, *The Sources of Islamic Law*, pp. 128–158.

²¹⁵ Quran 24:6–9.

²¹⁶ In the unlikely situation of four men testifying that a woman committed fornication, the testimony of four women affirming that the accused woman is still a virgin, is suffice to doubt, and obligates the judge to not prescribe a hadd punishment, see Scott C. Lucas, "Justifying Gender Inequalities in the Shafi'i Law School: Two Case Studies of Muslim Legal Reasoning", *Journal of the American Oriental Society* Vol. 129, No. 2 (2009), p. 256.

²¹⁷ The couple is then forbidden to each other forever, without divorce. If the man were to repent his allegation, he is liable to the punishment of false accusation. The couple would still be forbidden to each other, but should there be children in the relationship, the child would again be considered legitimate, unlike if the man does not repent, where the child is then considered illegitimate. See Murata, *Temporary Marriage (Mut'a)*, p. 25.

3.5 *Testimony*

While women have the same financial independence as men and are considered to be able to manage property and wealth on their own, their testimony is not equal to that of a man. The Quran describes the value of the testimony of a woman by requiring it to be corroborated by another woman when testifying about financial transactions. The verse has laid the foundation for the common-held notion that a woman's testimony is worth half that of a man's. Although this incapacity of women to give evidence is only specified in financial transactions, by analogical reasoning, it has been extended so that a woman's corroborating testimony is only allowed in cases regarding financial matters,²¹⁸ and completely excluded in an array of cases such as marriage, divorce and hadd cases.²¹⁹

O believers, when you contract a debt one upon another for a stated term, write it down, and let a writer write it down between you justly, and let not any writer refuse to write it down, as God has taught him; so let him write, and let the debtor dictate, and let him fear God his Lord and not diminish aught of it. And if the debtor be a fool, or weak, or unable to dictate himself, then let his guardian dictate justly. And call in to witness two witnesses, men; or if the two be not men, then one man and two women, such witnesses as you approve of, that if one of the two women errs the other will remind her; and let the witnesses not refuse, whenever they are summoned. And be not loth to write it down, whether it be small or great, with its term; that is more equitable in God's sight, more upright for testimony, and likelier that you will not be in doubt. Unless it be merchandise present that you give and take between you; then it shall be no fault in you if you do not write it down. And take witnesses when you are trafficking one with another. And let not either writer or witness be pressed; or

218 For the corroborating verses used to disqualify women from testifying in non-financial cases, see Quran 65:2 and 5:106.

219 Ali, *Gender and Human Rights in Islam and International Law*, p. 72. All those areas involve matters related to the body and its status. The Hanafi accept women's testimony in all cases, even capital cases. Issues dealing solely with the female body, allow for the testimony of two women, without the corroboration of a man's testimony, see Mohammad Fadel, "Two Women, One Man: Knowledge, Power and Gender in Medieval Sunni Legal Thought", *International Journal of Middle East Studies* Vol. 29 (1997), p. 194. The main difference between the Hanafi and the Shafi'i school of law, is that the Hanafi assume that female testimony is allowed, until proven otherwise, while the others assume that female testimony is invalid, unless proven otherwise, see Lucas, "Justifying Gender Inequalities in the Shafi'i Law School", pp. 252, 254.

if you do, that is ungodliness in you. And fear God; God teaches you, and God has knowledge of everything.²²⁰

The phrase “or if the two be not men, then one man and two women” could easily have been interpreted as meaning women were allowed to testify only if two men were not available, however, on the basis of consensus, it was agreed that women’s testimony in financial cases was always permitted, despite the number of men available to testify.²²¹ While it might not seem like it, in this case, consensus expanded the rights of women. Nevertheless, the verse as such, links the possibility to err to female witnesses, and suggests that women are more prone to error than men. Thus, the need for a second female to corroborate the first woman’s testimony. That the Quran appears to imply the testimony of a single woman is less trustworthy than that of a man, was confirmed by various exegetes throughout Islamic history, where it was argued that the reason women were more prone to error than men lay in their nature.²²² A famous and historically significant hadith with a strong chain of transmitters quotes the Prophet Muhammad saying that women were inherently inferior to men, in matters of religion and intelligence.²²³ Asked how they were weak in religion, the Prophet declared that “‘because when you menstruate, you are required neither to pray nor fast.’ In response to why women are inferior in intelligence, the Prophet declared ‘is not your evidence (in a court) half of the value of men’s evidence?’ The woman replied, ‘yes.’ The Prophet said, ‘this is because of the deficiency of a woman’s mind’ ”.²²⁴

The established rule of the 2:1 ratio in cases where women have been permitted to testify and if it is generally applicable to all cases tried in court has been called into question.²²⁵ What we can read from the verse is that any relevance to the courtroom is only implicit, as the verse in the Quran is not specifically directed to judges, but parties to a financial transaction.

Islamic procedural law assigns to gender an important role in determining who can participate in the judicial process, to what extent, and in

220 Quran 2:282. See also, 2 221; 2:282; 24:30; 4:3; and 4:34.

221 Lucas, “Justifying Gender Inequalities in the Shafi’i Law School”, p. 253.

222 Fakhr al-Din al-Razi, *al-Tafsir al-kabir*, 32 vols. (Cairo: Al-Matba’a al-Baha’iyya al-Misriyya, 1938), 7:122; Sayyid Qutb, *Fi zilal al-qur’an*, 6 vols. (Cairo: Dar al-Shuruq, n.d.), 1:336.

223 For a detailed argument that this hadith is forged based upon classical and modern sources, see Khadija al-Bitar, *Fi naqd al-Bukhari ... kana baynahu wa-bayn al-haqq hijab* (Morocco: Dar al-Nashr al-Maghribiyya, 2003), pp. 61–72.

224 Al-Bukhari, *Sahih*, Book 52, hadith 22.

225 Wadud, *Quran and Woman*, pp. 85–86.

what capacity, it also provides a rich site for the exploration of the relationships governing knowledge, power, and gender in medieval Muslim legal thought. Any adequate understanding of the obstacles limiting the admission of female testimony in Islamic law must first come to terms with the manner in which legal discourse attempted to differentiate what I call “political” discourse from “normative” discourse. The former was embodied in those statements which, if admitted, would lead to some immediate, binding consequence, usually in favour of one party and against another. Moreover, the beneficiary of this statement could seek to have it imposed on the losing party in the event of the latter’s non-compliance. A witness’s testimony and a judge’s verdict are both political because the consequences of each are immediate, tangible, and binding, irrespective of the consent of the party who contests either the fact presented by the witnesses or the rule of law applied by the judge. Normative discourse, on the other hand, if admitted, established a universal norm or fact, but only *potentially* affects tangible interests. Muslim jurists used the terms *shahada* (testimony) and *hukm* (verdict) to distinguish discourse that had political consequences from the normative discourse that was described with the terms *riwaya* (narration) and *fatwa* (non-binding legal opinion).²²⁶

Mohammad Fadel argues that in the political context, witnesses exercise power over the parties of the lawsuit, which bind the third party, in contrast to narration, which binds everyone according to Islamic legal theory. Paradoxically, the nature of women does not affect a woman’s credibility when the speech falls within the normative discourse. In the context of narration, or the interpretation of the law, which is also considered to be normative, the statement of one person, regardless of gender, is sufficient, as long as the person is considered credible. This implies that “something other than a woman’s general ability to gain, preserve, and communicate knowledge to others must have been behind the decision to reject her uncorroborated statements in the particular context of testimony before a judge. Had there been a natural quality inherent in women rendering their statements more unreliable than those of men, then the law should have consistently discriminated against the statements of women, whether in the normative or in the political domain.”²²⁷ In other words, the criteria upon which the truthfulness of speech is evaluated differs

²²⁶ Fadel, “Two Women, One Man”, p. 188.

²²⁷ *Ibid.*, 189.

due to context in Islamic law. Speech that falls in the normative category, are not subject to the discriminatory rules of testimony:

Maleness and freedom are not required of the *mufti*, just as is the case for the narrator ... because the *mufti* is taken to be one reporting the law in a manner non-specific to a person, and in this respect, he is like a narrator, not a witness. Moreover, his *fatwa* is non-binding, in contrast to a judge's [verdict].²²⁸

Hadiths narrated by women, like Aisha, were considered to have the same authenticity as those narrated by a man. There was no questioning of the validity of the report based on the gender of the narrator. Similarly, because fatwas are considered normative speech, gender is not relevant to the construction of a valid legal opinion. Most interestingly, for the same reason, a woman providing expert testimony before a court, is considered to fall within the normative discourse. The argument is that they are providing objective relevant information, not testifying.²²⁹ Such testimony would not need to be corroborated by another expert, male or female. Maliki jurists did not even allow for a rebuttal of the expert opinions made by men or women.²³⁰

Shihab al-Din al-Qarafi (d. 1285), argued that in the context of narration, the narrator has little interest in lying as he is affected by the universalness of the tradition. While mistakes or lying could be made when narrating, such mistakes can nevertheless be corrected, unlike during trial where the consequences of false testimony could be so severe, that it could lead to the loss of property, limb or life. As the outcome of the ruling would not affect the witness, it is more likely that the witness would not remember everything correctly, because the witness has no interest in the outcome. The chance to prove that the testimony was false is almost non-existent, according to al-Qarafi. For this reason—the suspicion about the reliability of the witness—gives rise to the requirement of a second witness to corroborate the first witness's testimony, as it was likely that the losing party would hold a grudge against the witness because their testimony would be the reason for their loss. Because the witness exercises authority over them, al-Qarafi argues that the losing party would not respect the court's decision if the witness were a woman. Two women were therefore required by the law, to reduce the blow to the male pride, and

²²⁸ Ibid., 190.

²²⁹ Ibn Hisham, *al-Mufid li-l-hukkam fi ma ya'rid lahum min nawail al-ahkam* (Cairo: Arab League Manuscript, n.d.), no. 35, 54a.

²³⁰ Fadel, "Two Women, One Man", p. 196.

increase the chance of the losing party to abide by the court's decision.²³¹ Al-Qarafi also justifies the appropriateness of using two women to corroborate testimony with the common reference to the deficient minds of women, where he described women as having intellectual powers not far above animals.²³² Al-Qarafi's commentator, Ibn al-Shatt (d. 1323) proves the weakness of such arguments by referring to the fact that women were allowed to narrate hadiths. If women's minds are deficient, they are also deficient when narrating.²³³

'Ali ibn Khalil ibn Al-Tarabulusi (d. 1393), on the other hand, argues that the discriminatory stance on the laws of the testimony of women is a consequence of the social disorder that would arise if a woman were to leave her home to go to court and testify:

Our opinion is valid because a woman is equal to a man in that [characteristics] upon which the qualifications of testimony are based, and these are the ability to see, to be precise, to memorize, and to rehearse testimony because of the existence of the implement of this power, and it is reason, [that faculty] which distinguishes things and comprehends them and a speaking tongue. Thus, the testimony of women gives rise to overwhelming likelihood [of truth] and to certainty in the heart about the truth of the witnesses. This is in contrast to the testimony of women themselves, which is not accepted. Although their statements result in probability, the law did not take into account as a proof because they are forbidden to go out because that leads to disorder and corruption, and the cause of corruption must be removed. Thus, a male was required as one of two witnesses to prevent decisively the occurrence of corruption to the extent possible.²³⁴

According to al-Tarabulusi, gender is not a relevant factor when it comes to testimony, as Islamic law justifies the discriminatory rules of testimony as a means to preserve a society where women would not occupy the same space as unknown men.²³⁵ Interestingly, neither al-Qarafi, nor al-Tarabulusi use the

231 Ibid., 192. See also, Shihab al-Din al-Qarafi, *al-Furuq*, 4 vols (Beirut: Alam al-Kutub, n.d.), 1:6–1.7.

232 Shihab al-Din Aḥmad b. Idris al-Qarafi, *Nafa'is al-Uṣul fi Sharḥ al-Maḥṣul*, ed. 'Adil Aḥmad 'Abd al-Mawjud and 'Ali Muḥammad Mu'awwaḍ, 9 vols. (Riyad: Maktabat Nizar Muṣṭafa al-Baz, 1997), 9:4051 ("*al-niswan qarib min al-baha'im*").

233 Fadel, "Two Women, One Man", p. 192. Ibn Adb Allah Ibn Muhammad, known as Ibn al-Shatt, *Tahdhib al-furuq* (Beirut: Alam al-Kutub, n.d.), 1:6–7.

234 Fadel, "Two Women, One Man", p. 193.

235 Ibid.

verse in the Quran as the basis for their arguments. Instead, they are focused on describing the difference between the effects the deficient minds of women have on private and public matters and developing a legal doctrine around the existing structure of Islamic law. A structure that had made sure women were not to participate in the public sphere, where women were generally seen as intellectually inferior.

Ahmad Ibn al-Taymiyya (d. 1327) and Ibn Qayyim al-Jawziyya (d. 1350) on the other hand, rejected the division between both political and normative speech and argued that limiting a woman's testimony to financial matters was arbitrary. If a woman was considered reliable, she should be able to testify in all matters. They maintained that the verse in the Quran does not describe the testimony of a woman before a judge, but speaks of recording testimony in a case where there potentially could be a dispute regarding a financial matter in the future. Both of them argue that a judge must accept the testimony of a credible woman in the same manner as the testimony of a credible man. However, these arguments do not mean that Ibn al-Taymiyya and Ibn Qayyim viewed the testimony of men and women alike in all matters. Ibn Qayyim maintains that "the testimony of a man is superior to [that of] a woman because it is usually impossible for women to attend court sessions, and their memory and precision is less than that of males".²³⁶ Although al-Qayyim also upholds the notion that women are more likely to err than men, for him, it did not constitute a complete discrimination of the testimony of women.²³⁷

Like many other areas of Islamic law, while men are attributed virtues and rights, women must prove to be at the same level as men before they can enjoy the same virtues and rights attributed to men in general. Interestingly, it appears as if commentators have accepted the contradictory stance Islamic law has on women's testimony and tried to validate it by referring to speech and categorizing it differently. Transmission is considered to be gender-neutral while testifying validates discrimination. This is done, not by invoking legal arguments, but by maintaining sociological factors to help preserve a society upholding gender segregation to maintain the sexual modesty of its believers.

236 In his analysis of al-Qayyim, Mohammad Fadel argues that while al-Qayyim maintains that the issue at hand refers to the credibility of the witness and not the gender, and since it is more likely that a female witness will not be able to testify before a court because she lacks the same access to the public sphere than a man, individuals prefer men to testify as it is the most effective means of preserving rights, see "Two Women, One Man", pp. 198. See also, Ibn Qayyim al-Jawziyya, *I'lam al-muwaqqi' in bi-rabb al'alamin*, 3 vols., ed. Taha 'Abd al-Ra'uf Sa'd (Beirut: Dar al-Jil, n.d.), 1:95.

237 Fadel, "Two Women, One Man", p. 199.

What is also interesting is the vast difference between the schools of law in the absence of male witnesses. The opinions range from the testimony of the single woman, up to four women and are based on the values the schools of law have assigned women, and not on the merits of the Quran.²³⁸

3.6 *Compensation for Death*

Retaliation and financial compensation for death or injury, *diya*, were concepts deeply rooted in pre-Islamic society which also became part of Islamic law.²³⁹ The period before Islam was characterized by hostile relationship between tribes, which often led to personal revenge for homicide. Diya became a non-violent alternative in seeking revenge. Tribes usually had special funds for making diya payments, and while it was the relatives of the murderer who were obligated to pay the diya, the tribe supported the relatives, especially if they were not able to provide compensation.²⁴⁰ The concept of diya was integrated into Islam as a means of uniting tribes and making sure that entire tribes were not wiped out due to retaliation. Verses confirm that:

O believers, prescribed for you is retaliation, touching the slain; freeman for freeman, slave for slave, female for female. But if aught is pardoned a man by his brother, let the pursuing be honourable, and let the payment be with kindness.²⁴¹

It belongs not to a believer to slay a believer, except it be by error. If any slays a believer by error, then let him set free a believing slave, and blood-wit is to be paid to his family unless they forgo it as a freewill offering. If he belongs to a people at enmity with you and is a believer, let the slayer

²³⁸ The Hanafi conclude that the testimony of a single woman is sufficient, with the exception of a divorced woman who gives birth. The Hanbali attribute this position to Ibn Hanbal and accept a single woman's testimony in a small number of cases; see Ibn Qudama (d. 1223), *al-Mughni li-Ibn Qudama*, 10 vols. (Cairo: Maktabat al-Qahira, n.d.), 10: 136–37; Ahmad b. 'Abd Allah al-Ba'li (d. 1775), *al-Rawd alnadi sharh Kaf i al-mubtadi* (Cairo: al-Matba'a al-Salafiyya, n.d.), 529. Other opinions are: two women (Malik and Sufyan al-Thawri); two women or one midwife (al-Hasan al-Basri and Ibn 'Abbas); at least three female witnesses (Anas b. Malik and 'Uthman al-Batti); and finally, the requirement of at least four female witnesses (al-Shafi'i and 'Ata' b. Abi Rabah), see Lucas, "Justifying Gender Inequalities in the Shafi'i Law School", p. 254.

²³⁹ Lucas, "Justifying Gender Inequalities in the Shafi'i Law School", p. 242.

²⁴⁰ Compensations were usually made in the form of chattel, see Michael J. L. Hardy, *Blood Feuds and the Payment of Blood Money in the Middle East* (Leiden: Brill, 1963), p. 37. See also, Renat I. Bekkin, Islamic Insurance: National Features and Legal Regulations, *Arab Law Quarterly* Vol. 21, No. 3 (2007), p. 13.

²⁴¹ Quran 2:178.

set free a believing slave. If he belongs to a people joined with you by a compact, then bloodwit is to be paid to his family and the slayer shall set free a believing slave.²⁴²

And whoso slays a believer willfully, his recompense is Gehenna, therein dwelling forever, and God will be wroth with him and will curse him, and prepare for him a mighty chastisement.²⁴³

Classical Islamic law allows for the victim's family in homicide cases to kill,²⁴⁴ or harm the criminal,²⁴⁵ or receive financial compensation. In cases of unintentional killing or unintentional injury, only compensation is awarded,²⁴⁶ and in the cases of bodily injury, the victim or the victim's family has the option of pardoning the perpetrator. It is considered to be a compassionate religious act of charity, and according to the Quran, to be the best solution.²⁴⁷

The verse in the Quran, however, suggests that a free man cannot be retaliated for a slave and that only a woman can be killed in the retaliation of a woman. It is a hadith, concerning a letter the Prophet sent to the people of Yemen, which endorses that "a man can be killed [in retaliation] for killing a woman,"²⁴⁸ yet the compensation for a murdered woman is half of that of a

242 Quran 4:92.

243 Quran 4:93. A hadith prescribes diya for intentional homicides too: "Whoever kills a believer deliberately for no reason or a crime that he had committed, he should be killed (in retaliation), unless the family of the murdered person agrees to take diyah", see A.A. 'Asqalani, *Bulugh al-Maram*, Vol. 1 (Riyadh: Dar al-Faraq, 2003), p. 359.

244 See Quran 4.93. The death penalty is carried out by the state, see al-Alfi, "Punishment in Islamic Criminal Law", p. 230.

245 Quran 5:45.

246 Rudolph Peters, *Crime and Punishment in Islamic Law* (Cambridge: Cambridge University Press, 2005), pp. 38–53.

247 Quran 2:178.

248 Abu Ishaq al-Shirazi, *al-Muhadhdhab fi fiqh al-Imam al-Shafi'i*, ed. Muhammad al-Zuhayli, 6 vols. (Damascus: Dar al-Qalam; Beirut: al-Dar al-Shamiyya, 1992–1996), 5:10; Abu Bakr al-Bayhaqi, *al-Sunan al-kubra*, ed. Muhammad 'Atta, 11 vols. (Beirut: Dar al-Kutub al-Ilmiyya, 1999), 8:51–52; al-Rafi'i, *al-'Aziz*, 10 170–72; Zakariyya al-Ansari, *Asna al-matalib sharh Rawd al-talib*, ed. Muhammad Tamir, 9 vols. (Beirut: Dar al-Kutub al-Ilmiyya, 2001), 8:36; 'Abd Allah al-Sharqawi, *Hashiyat al-Sharqawi*, 4 vols. (Beirut: Dar al-Kutub al-Ilmiyya, 1997), 4 175; al-Ghazali, *al-Wasit fi l-madhhab*, ed. Ahmad Mahmud Ibrahim, 7 vols. (al-Ghuriya: Dar al-Salam, 1997), 6 277; 'Abd al-Karim al-Rafi'i, *al-'Aziz sharh al-Wajiz*, ed. 'Ali Mu'awwad and 'Adil 'Abd al-Mawjud, 13 vols. (Beirut: Dar al-Kutub al-Ilmiyya, 1997), 10:170–72; Ibn al-Farra' [al-Baghawi], *al-Tahdhib fi fiqh al-Imam al-Shafi'i*, ed. 'Ali Mu'awwad and 'Adil 'Abd al-Mawjud, 8 vols. (Beirut: Dar al-Kutub al-Ilmiyya, 1997), 7:22; al-Khatib al-Shirbini, *al-Iqna' f i hall alfaz Abi Shuja'*, found in Sulayman al-Bujayrimi, *Bujayrimi 'ala l-Khatib*, 4 vols. (Beirut: Dar al-Fikr, 1998), 4:160.

murdered man, according to all schools of Sunni and Shia law.²⁴⁹ The actual compensation under classical Islamic law is set to “a hundred camels” for a free Muslim man,²⁵⁰ but the schools vary on the compensation for a non-Muslim.²⁵¹ However, there is nothing in the verse to suggest that the life of a woman is financially worth half of a man’s; rather, such assumptions can be found in hadiths, and through consensus.²⁵² The same letter, establishing that a man can be killed in retaliation for killing a woman, is also said to have accepted that “the diya of a woman is half [the diya] of a man”.²⁵³ Yet, the hadith is challenged as the chain of transmitters were not considered to be sound in meeting the minimal standards for authenticity. While some jurists argued that the hadith did not contain such a sentence,²⁵⁴ others meant that there was a consensus reached on the discriminatory legal equation on diya.²⁵⁵ Through the application of analogical reasoning, it was argued that since women received half of what men receive in financial matters such as inheritance, her diya should also be half that of a man. Scholars who maintained that the diya of a woman should be the same as a man argued that the financial compensation was to serve as a substitute for requiring the killing or harming of the criminal. They compared the question to the diya for a foetus, which was the same, regardless of the gender, and maintained that the diya for women and men should be the same.²⁵⁶

There is, however, another verse in the Quran relevant to this discussion, which according to some jurists abrogates the earlier verses:

249 Lucas, “Justifying Gender Inequalities in the Shafi’i Law School”, p. 243.

250 Daniel Pascoe, “Is Diya a Form of Clemency?”, *Boston University International Law Journal* Vol. 34, No. 149 (2016), p. 156.

251 Hanafi and Hanbali hold that the blood money of a non-Muslim should be the same as that of a Muslim, whereas the Maliki hold that a non-Muslim’s price is one-half of the blood money for a Muslim. For the Shafi’i it is one-third and the Shia have an even lower threshold, see Pascoe, “Is Diya a Form of Clemency?”, p. 156.

252 Lucas, “Justifying Gender Inequalities in the Shafi’i Law School”, p. 243. See also, al-Mawardi, *al-Hawi al-kabir*, ed. Mahmud Matraji et al., 24 vols. (Beirut: Dar al-Fikr, 1994), 16:96; Taqi al-Din al-Hisni, *Kifayat al-akhyar f i hall Ghayat al-ikhtisar*, ed. Muhammad Haykal (Cairo: Dar al- Salam, 2005), 567 and Ibn al-Mulaqqin, *Ujalat al-muhtaj ila tawjih al-Minhaj*, ed. ‘Izz al-Din al-Badrani, 4 vols. (Irbid: Dar al-Kitab, 2001), 4:1554.

253 al-Mawardi, *al-Hawi al-kabir*, 16:96; al-Rafi’i, *al-Aziz*, 10:327; al-Hisni, *Kifayat al-akhyar*, 567.

254 Ibn al-Mulaqqin, *al-Badr al-munir*, 8:442; Ibn Hajar al-Asqalani, *al-Talkhis al-habir f i takhrij ahadith al-Rafi’i al-kabir*, ed. ‘Ali Mu’awwad and ‘Adil ‘Abd al-Mawjud, 4 vols. (Beirut: Dar al-Kutub al-‘Ilmiyya, 1998).

255 Scott C. Lucas argues that the evidence upon which such assumptions are based on is weak, see “Justifying Gender Inequalities in the Shafi’i Law School”, p. 246.

256 al-Mawardi, *al-Hawi al-kabir*, 16:96.

And therein We prescribed for them: 'A life for a life, an eye for an eye, a nose for a nose, an ear for an ear, a tooth for a tooth, and for wounds retaliation'; but whosoever forgoes it as a freewill offering, that shall be for him an expiation. Whoso judges not according to what God has sent down -- they are the evildoers.²⁵⁷

Verse 5:45 was the last to be revealed, thus abrogating the recourse to social and gender status.²⁵⁸ "By this approach, it may be argued that during its early stage, Islam tolerated recourse to 'social status', but phased it out subsequently."²⁵⁹ More interestingly, is that this verse does not even include the concept of diya, but speaks of "retaliation by way of charity", which has been interpreted to mean diya.²⁶⁰ Other scholars argue that verse 5:45 only prescribes 'life for life' for the people of the Book, that is, Jews and Christians, and does not apply to Muslims.²⁶¹ Such an interpretation is based on the opening of the verse, which declares "We prescribed for them". If such a recourse is accepted, the social and gender aspect of retaliation is not abrogated by this verse.²⁶² The claim that the verse only relates to non-Muslims is, however, contested by reference to hadiths where the Prophet prescribes that no group supersedes other groups.²⁶³

O People! Your Creator is one, and you are all descendants of the same ancestors. There is no superiority of an Arab over a non-Arab or of the black over the red, except on the basis of righteous conduct.²⁶⁴

Other scholars argue that verses are related to different scenarios; where verse 5:45 related to a particular tribe who used to exceed in avenging the death of

²⁵⁷ Quran 5:45.

²⁵⁸ I.U. Ibn Kathir, *Tafsir Ibn Kathir*, Vol. 1 (Cairo: Dar-al-Tayyibah, 1999), p. 489. The abrogation is also confirmed by referring to the practice of the Prophet, who ordered the killing of a Jewish man for killing a woman, see M. Al-Tabari, *Jami' al-Bayan fi Ta'wil al-Quran*, ed. A.M. Shakir, Vol. x (Beirut: Mu'assasat al-Risalah, 2000), p. 360.

²⁵⁹ Musa Usman Abubakar, *Gender Justice in Islamic Law: Homicide and Bodily Injuries* (Oxford: Hart Publishing, 2018), p. 79.

²⁶⁰ M. Bukhari, *Sahih Bukhari*, Vol. 9, Book 83, No. 20.

²⁶¹ Mohammad Salim El-Awa, *Punishment in Islamic Law: A Comparative Study* (Plainfield: American Trust Publication, 2000), pp. 72–73.

²⁶² Abubakar, *Gender Justice in Islamic Law*, p. 79.

²⁶³ M. A. Ibn al-'Arabi, *Ahkam al-Qur'an*, Vol. 11 (Beirut: Dar al-Kutub al-'Ilmiyyah, 2003), p. 128. See also, Al-Sarakhsi, *Al-Mabsut* (n12), Vol. xxvi, p. 106.

²⁶⁴ Mohammad H. Kamali, *Freedom, Equality and Justice in Islam* (Cambridge: The Islamic Text Society, 2002), p. 52.

one of their own. The verse rather restricted the transgression and dictated equality in retaliation between different tribes.²⁶⁵

The Shia adopted another approach based on caliph Ali's opinion on the matter, where killing a woman in retaliation for a man was not considered sufficient:

Ali said that it is necessary for the close relatives of the deceased woman to pay half of the *diyya* [if they execute the male killer in retaliation] in order to make the killing of the man equal to her killing. If a woman kills a man, [Ali] said, it is not sufficient for her to be killed in retaliation—the victim's heirs should receive half of the *diyya* in addition to her death.²⁶⁶

It becomes apparent that the discriminatory views on the financial aspects of retaliation are not prescribed by the Quran, rather it is by the application of analogy and through the consensus of the jurists, that such a position has been constructed.²⁶⁷

3.7 *Inheritance*

The Quran established the right to inherit, according to fixed shares,²⁶⁸ to family members that were “totally excluded under the earlier customary tribal tradition.”²⁶⁹ This was a progressive initial step, yet the women's right to inherit property appears to have been an unwelcome pronouncement to the people of Medina. Medina, being a predominantly agricultural community, found the division of land more complex than the commercial Meccans, where it seems that women inheriting property was a custom even before Islam.²⁷⁰ Nevertheless, the mere existence of verses in the Quran guaranteeing all women and not only those who had high social standing a minimum share was at the time, a great advancement of women's rights:²⁷¹

²⁶⁵ al-'Arabi, *Ahkam al-Qur'an*, p. 89.

²⁶⁶ al-Ghazali, *al-Wasit fi l-madhhab*, 6:277. The requirement that the female victim's family pays half the male diya if they opt for retaliation against a male murderer was reactivated in the Islamic Republic of Iran after the revolution, see Haleh Afshar, “Islam and Feminism: An Analysis of Political Strategies,” in *Feminism and Islam: Legal and Literary Perspectives*, ed. Mai Yamani (New York: New York University Press, 1996), pp. 201–3; and Shirin Ebadi, *Iran Awakening* (New York: Random House, 2006), pp. 112–18.

²⁶⁷ Lucas, “Justifying Gender Inequalities in the Shafi'i Law School”, p. 257.

²⁶⁸ Quran 4:7.

²⁶⁹ Abdulmajeed Hassan Bello, “Islamic Law of Inheritance: Ultimate Solution to Social Inequality against Women”, *Arab Law Quarterly* Vol. 29 (2015), p. 261.

²⁷⁰ Ahmed, “Women and the Advent of Islam”, p. 680.

²⁷¹ Ali, *Gender and Human Rights in Islam and International Law*, p. 59.

God charges you, concerning your children: to the male the like of the portion of two females, and if they be women above two, then for them two-thirds of what he leaves, but if she be one then to her a half; and to his parents to each one of the two the sixth of what he leaves, if he has children; but if he has no children, and his heirs are his parents, a third to his mother, or, if he has brothers, to his mother a sixth, after any bequest he may bequeath, or any debt. Your fathers and your sons -- you know not which out of them is nearer in profit to you. So God apportions; surely God is All-knowing, All-wise.²⁷²

Although the verse clearly affirms that a woman has the right to inherit half a share compared to a man, there are scholars who argue that the verse is not discriminatory towards women. In the historical and social settings of that time, the laws on custody and inheritance reflected the economic realities,²⁷³ which placed the financial responsibility on men. As a consequence of women not being legally required to provide for the household while men are, they are entitled to a greater share as their financial burden is greater.²⁷⁴ Islamic law does not require women to share her resources in marriage, and she may seek dissolution of the marriage if her husband cannot meet the financial requirement of supporting her and the household. Women are not legally required to provide for anyone, not even themselves, while a husband's financial duties only increase when the family grows, since he is also financially responsible for the children. In some cases, the husband must also care for his parents and siblings.²⁷⁵ Thus, although a woman is entitled to inherit half a share, it is argued that because she receives her part from three different sources; the father, husband, and son, "this makes her share almost equal to man".²⁷⁶ But men also inherit from other sources, namely mother, wife, and daughter, which makes their totaling share greater than that of the woman's.²⁷⁷

272 Quran 4:11.

273 Esposito, *Women in Muslim Family Law*, p. 48.

274 Husband and wife inherit from each other according to set rules, where the only condition is a valid marriage contract. Consummation of the marriage is not required for the parties to inherit from each other, see Murata, *Temporary Marriage (Mut'a)*, p. 26. See also, Karmi, "Women, Islam and Patriarchalism", p. 171.

275 Bello, "Islamic Law of Inheritance: Ultimate Solution to Social Inequality against Women", pp. 270–272.

276 Perveen Shaukat Ali, *Human Rights in Islam* (Lahore: Aziz Publishers, 1980), p. 120.

277 For a detailed description of the Islamic law of inheritance see Muhammad A. Mannan, *Principles of Muhammadan Law* (Lahore: PLD Publishers, 1995), chapters 6–8 and Davis S. Powers, *Studies in the Quran and Hadith: the Formation of the Islamic Law of Inheritance* (Berkeley: University of California Press, 1985).

Nevertheless, it is argued, that while the shares of the man and the woman are not equal, “they are not necessarily unequal in the final analysis, even if they appear mathematically unequal”,²⁷⁸ as the wife, in addition to the woman’s inheritance share, also has the right to dower.²⁷⁹ Such a statement ignores the underlying view of how men and women are perceived which can be exemplified regarding the property they leave behind. Should a wife die without having any relatives, the husband inherits all of her property, whereas if the husband should die without any relatives, the wife is entitled to half of the property. The remaining half goes to the community treasury according to the Sunni schools. The Shia, however, hold that she inherits all the property.²⁸⁰

Furthermore, with the selective and arbitrary employment of the doctrine of abrogation, the jurists ensured that many of the financial rights afforded women in the Quran were substantially narrowed. By enforcing fixed shares of inheritance and applying the doctrine of abrogation, verses concerning the treatment of divorced women were connected to the treatment of widows:

And those of you who die, leaving wives, let them make testament for their wives, provision for a year without expulsion.²⁸¹

The verse establishes a year-long financial support for a widow, but was abrogated for a verse which was revealed later according to the jurists, which substantially reduced the widow’s maintenance period:

And those of you who die, leaving wives, they shall wait by themselves for four months and ten nights.²⁸²

The jurists viewed these verses in such conflict that they could not be implemented simultaneously. They came to interpret both verses to deal with the waiting period, *iddah*, while the first verse speaks of no such thing. It just concerns the financial provision made in favor of the widow. Furthermore, the assertion that the latter verse was revealed after the first verse is unsupported. When the verse granting women inheritance rights was revealed, it

278 Bello, “Islamic Law of Inheritance: Ultimate Solution to Social Inequality against Women”, p. 270.

279 Ali, *Gender and Human Rights in Islam and International Law*, p. 73.

280 Murata, *Temporary Marriage (Mut’a)*, p. 26. See also, al-Amili, *al-Rawdat al-bahiyya fi sharh al-lum’at al-Dimashqiyya*, p. 367.

281 Quran 2:240.

282 Quran 2:234.

was again assumed that it had replaced earlier verses, and the maintenance of the widow was abandoned, as the verse instead had established that the widow had a specified share of the deceased husband's estate. The rights of widows were tampered with, although the verses regulate specific issues, that could easily be implemented simultaneously. Basically, widows were originally both entitled to maintenance and accommodation for a whole year, only to be abrogated for the inheritance shares established by the Quran, while one right does not cancel out another right. The schools of law, however, came to adopt the procedure granting the same financial rights for divorced women and widowed women.²⁸³

Over time, the notion of the fixed inheritance share for women became the only share they were entitled to, disregarding any other scenarios.²⁸⁴ However, there are legal ways of getting around this prescription. The Quranic injunctions do not mean that the possibility of an enhanced share, a share equal to, or more than the share of a man is prohibited. A person may, by executing a valid gift deed, leave his/her entire wealth to a woman and a husband may, under a stipulation in the marriage contract, leave all of his possessions to his wife as part of the dower, since there is no maximum limit to what may be given as dower to a wife.²⁸⁵ The will also allows for another possibility to increase women's (but also other categories, such as those not legally required to inherit from the estate, such as Christian or Jewish widows) inheritance. Making a will is considered a religious duty in Islam and allows the testator to bequeath one-third of his net estate to whomever he sees fit, unless the other heir's consent to the testator to bequeath more.²⁸⁶ For the remaining two-thirds, Islamic law imposes the compulsory rules of fixed shares, and the will cannot include a bequest of inheritance to one of the legal heirs unless consented to by the other heirs.²⁸⁷ Some Muslim countries, however, do allow a bequest in favor of a legal heir, as long as the bequest does not exceed the

283 The underlying assumption is that the husband's property rights die with him. The jurists also make the connection that the verses dealt with pregnant women, and that the duty imposed on the property of the dead husband, could only be implemented if the widow did not leave the home. Furthermore, it was later argued that the fixed shares of inheritance, replaced other financial provisions for widows, see Burton, *The Sources of Islamic Law*, pp. 57–74.

284 Rahman, "Status of Women in the Quran", p. 45.

285 Ali, *Gender and Human Rights in Islam and International Law*, p. 59.

286 Bello, "Islamic Law of Inheritance: Ultimate Solution to Social Inequality against Women", p. 265–269.

287 Mohammad H. Kamali, "Islamic Family Law Reform: Problems and Prospects", *Islam and Civilizational Renewal* Vol. 3, No. 1 (2011), p. 47.

bequeathable one-third.²⁸⁸ The Shia allow for the testator to bequest one-third even without the consent of other heirs. The Islamic principle of selection, *takhayyar*, would allow for Sunni jurisdictions to adopt the more favorable inheritance laws of Shiite law, although it is not likely, due to the hostile feelings among the groups.²⁸⁹

3.8 Divorce

While divorce is allowed in Islamic law, it is highly disapproved of in the Quran which obligates men to treat women kindly or divorce them.²⁹⁰ Instead, Islam encourages reconciliation between the spouses.²⁹¹ While many of the pre-Islamic practices of divorce were abolished by Islam, classical Islamic law still gives the husband the unilateral right to dissolve the marriage, through the unilateral pronouncement of divorce known as *talaq*, without giving any cause and without the interference of the court.²⁹² The wife, on the other hand, needs to seek dissolution by referring her case to court and convincing the court that there are no ways of working out their differences and that she therefore needs to end the marriage.²⁹³ She must be able to prove her allegations.²⁹⁴ Legitimate reasons for the wife to end the marriage may be done by claiming fault on the husband's side, such as impotence, failure to consummate the marriage after a certain period of time has elapsed, detention or imprisonment of the husband, failure to provide financial support, insanity, or breach of the terms of the marriage contract, conversion or other rarely used processes, such as the husband taking an oath abstaining from sexual intercourse. The Maliki school also includes abuse, including physical, verbal, and emotional abuse, as a valid ground for the dissolution of the marriage initiated by the wife.²⁹⁵ In cases

288 Bello, "Islamic Law of Inheritance: Ultimate Solution to Social Inequality against Women", p. 266.

289 Kamali, "Islamic Family Law Reform", pp. 47–48.

290 Quran 2:229 and 65:1–2. The four Sunni schools of law have concluded that divorce is disapproved (*makruh*), when there is hope of reconciliation, see Abdur Rahman I. Doi, *Shari'ah Law: The Islamic Law* (Kuala Lumpur: A. S. Nordeen, 1984), p. 170.

291 Doi, *Shari'ah Law: The Islamic Law*, pp. 168–169. See also Quran 4:35.

292 Many Muslim countries have legislated certain procedural requirements that are needed to be fulfilled for the divorce to be valid.

293 Ali, *Gender and Human Rights in Islam and International Law*, p. 61.

294 Black, Esmaeili, Hosen, *Modern Perspectives on Islamic Law*, pp. 121–135.

295 Any of the spouses may annul the marriage immediately, if a spouse has certain specified physical or mental disabilities, which makes the continuation of the marriage difficult. The schools have different disabilities that allow for annulment to occur, see Murata, *Temporary Marriage (Mut'a)*, pp. 17–18. For a brief description of the legitimate reasons a wife can invoke in order to obtain a divorce, see Javadi, "The Sharia, Islamic Family Laws and International Human Rights Law", p. 118. See also, Quran 2:226–227.

where the woman initiates the divorce, the right to the dower can be returned to the husband in order to ransom herself from her husband.²⁹⁶

It is not lawful for you to take of what you have given them unless the couple fear they may not maintain God's bounds; if you fear they may not maintain God's bounds, it is no fault in them for her to redeem herself.²⁹⁷

In this case, the evidentiary requirements are less demanding as the wife does not need to establish specific grounds for divorce, besides having developed irreconcilable differences with her husband.²⁹⁸

After the pronouncement of talaq, a waiting period, *iddah*, of three months commences, where the husband must abstain from having sexual relations with his wife; before the divorce becomes final.²⁹⁹ During this period, the husband still needs to provide for his wife and children by allowing them to reside in their marital home.³⁰⁰

Divorced women shall wait by themselves for three periods; and it is not lawful for them to hide what God has created in their wombs; if they believe in God and the Last Day. In such time their mates have better right to restore them, if they desire to set things right. Women have such honourable rights as obligations, but their men have a degree above them; God is All-mighty, All-wise.³⁰¹

Men are given the right to choose to reconcile with his wife during this period. The decision is the husband's alone and does not require the wife's consent.

296 This type of divorce is referred to as *khul'*, and Sunni schools allow for a third party to initiate *khul'*. For example, the third party may offer the husband a sum in exchange for the husband to divorce his wife. The Shia maintain that this is forbidden.

297 Quran 2:229 and 4:128, See also Mashour, "Islamic Law and Gender Equality", p. 574.

298 Javaid, "The Sharia, Islamic Family Laws and International Human Rights Law", p. 118.

299 The waiting period for divorce differs between the schools, where different circumstances are taken in regard to how long the prescribed waiting period is. Marriages that have not been consummated do not initiate a waiting period. The Hanbali and Shia hold that there is no waiting period for a girl younger than 9 years old, while the Maliki and Shafi'i hold that if she was mature enough to participate in sexual intercourse, there is a three-month waiting period. The Hanafi require a three-month waiting period regardless. Sunni schools prescribe a three-month waiting period for a woman who has gone through menopause, while the Shia hold that in such cases it is not necessary. See Murata, *Temporary Marriage (Mut'a)*, p. 23.

300 Esposito, *Women in Muslim Family Law*, p. 36.

301 Quran 2:228.

The pronouncement of divorce is revocable throughout the iddah period and will be irrevocable once the period is over.³⁰² The period was included as a way of making sure that the woman was not pregnant before the divorce is final. The waiting period need not be considered if the marriage has not been consummated.³⁰³ After the dissolution of the marriage, the husband must pay his wife all her material rights, unless she has returned her dowry as described above. If the man wants to remarry the woman after the iddah period, it will be considered as a first marriage, with a new marriage contract and a new dowry.³⁰⁴

3.9 *Political Positions*

Islamic substantive law generally upholds that only men can hold public office. Thus, positions such as the head of state, or judges of an Islamic court is a realm restricted to women. Except the Hanafi's, all the Sunni schools of law had by the 14th century at the latest, excluded women from public office.³⁰⁵ Nevertheless, the Muslim world has seen several women in leading positions, such as former Prime Minister of Pakistan Benazir Bhutto, and women serve as judges in various countries.

There are no verses in the Quran that bar women from participating in public and political life. Hadiths, however, declare some professions, such as head of state, out of reach for the realms of women. The most significant hadith, which can be found in various versions, concludes that "those who entrust their affairs to women will never know prosperity".³⁰⁶ Unlike many other

302 The Quran limits the amount of times a husband may pronounce divorce and then take back his wife to two times, thereafter the divorce is considered final and irrevocable, see verse 2:229. The vow a husband could make about leaving his wife was limited to four months, whereas in pre-Islamic times there was no limit to this period. After that period, the husband had to take his vow back or divorce his wife, see Engineer, *The Rights of Women in Islam*, p. 29. The husband is not allowed to abstain from sexual relations with his wife for longer than four months. Should he do so, the wife has a valid divorce reason. The judge has the right to force the husband to stay in the marriage, should he refuse to, then the judge could grant the wife a revocable divorce. The Shia uphold that the judge may, by imprisonment or other means available, compel a husband to return to his wife or divorce her. See Murata, *Temporary Marriage (Mut'a)*, p. 24. The man is not allowed to re-marry the same woman until she is married to another, see Quran 2:230.

303 Quran 2:230 and 33:49.

304 Mashour, "Islamic Law and Gender Equality", p. 573.

305 Fadel, "Is Historicism a Viable Strategy for Islamic Legal Reform?", pp. 28–31. A minority of Muslim jurists allow for women to serve as judges, see Fadel, "Two Women, One Man", p. 196.

306 Al-Bukhari, *Sahih*, Vol. 4, p. 226.

hadiths manifesting misogynist views on women, this hadith is found in the most authoritative collections of the traditions of the Prophet.³⁰⁷ However, the placement of this hadith in the various collections where it can be found, profoundly effects the interpretation of the hadith and its implications. Al-Bukhari includes the hadith in two different chapters: "The Chapter of [Military] Campaigns, Section: The Prophet's Diplomatic Correspondence with Chosroe and Caesar" and "The Chapter of Civil Strife". Al-Tirmidhi includes it only in his "The Chapter of Civil Strife". For al-Bukhari and al-Tirmidhi, the hadith is connected to a specific incident. They put the hadith in a specific historical context related to diplomatic relations with Persia. The Prophet had given that reply when he was told that the Persian King Khosrow had died and his daughter had taken over the country as queen. Thus, it is argued that the comment from the Prophet should be viewed in the context of this specific woman, who was known to be authoritarian, and not be viewed as an absolute command for Muslims to adhere to at all times and all ages.³⁰⁸

Ibn Abi Shayba, on the other hand, places the hadith in the context of Aisha and the losing side of the first civil war.³⁰⁹ Many Basrans participated in the first civil war, and historical sources agree that the hadith was only narrated by Basrans. This fact allowed for many to view the hadith in relation to Aisha. The preceding hadiths in this collection described how the Prophet had prophesized that there would be a civil war and that the group rebelling would be led by a woman.³¹⁰ In this version of the hadith, Abu Bakr declares that he heard "never shall a folk prosper who delegate their affairs to a woman". Abu Bakr recalled the hadith at a moment when Caliph Ali entered Basra after defeating Aisha at the Battle of the Camel, years after the death of the Prophet. Allegedly Abu Bakr, who refused to take sides in the civil war, feared a reprimand from Caliph Ali.³¹¹ The compilation of hadiths from Ibn Abi Shayba falls within

307 For a description of the various collections of traditions where this hadith is found, see Fadel, "Is Historicism a Viable Strategy for Islamic Legal Reform?", pp. 10–13. Fadel therefore argues that the validity of the hadith is not a "readily available option." The hadith has, however, been questioned by Fatima Mernissi, see "A Feminist Interpretation of Women's Rights in Islam", in *Liberal Islam: A Sourcebook*, ed. Charles Kurzman (New York: Oxford University Press, 1998), pp. 112–120.

308 Hameed, *Mabadi-e-Nazam ul Hukam Al Islami*, pp. 876–878.

309 'Abd Allah b. Muhammad Ibn Abi Shayba, *Al-Kitab al-Musannaf Fi al-Ahadith wa'l-Athar*, ed. Muhammad 'Abd al-Salam Shahin, 9 vols. (Beirut: Dar al-Kutub al-'Ilmiyyah, 1995), 7:538.

310 Fadel, "Is Historicism a Viable Strategy for Islamic Legal Reform?", p. 27.

311 For further reading regarding this hadith see Rahim, *Muhammadan Jurisprudence*, pp. 58–65.

the category of *musannaf*, which, as previously described, hadiths that were collected during this era were not necessarily evidenced by a reliable chain of transmitters.³¹² Some scholars have questioned its authenticity and argue that Abu Bakr stands disqualified to narrate this hadith since he could not be regarded as a reliable transmitter of hadiths because he was convicted and flogged for false testimony by the second Caliph 'Umar.³¹³

Finally, Al-Nasa'i includes the hadith in the chapter entitled "The Chapter of the Rules [Applicable To] Judges". The chapter itself starts with the preface "The Prohibition Against Appointing Women to Rule". The placement of the hadith shows the different perception the compilers had of this hadith. While all of them narrate basically the same version, the implication of their understanding of the hadith and their placement of it in their texts leads to different perceptions of what the hadith suggests. Thus, impacting how the hadith came to be used by others to argue that women should not participate in public and political life.³¹⁴

While schools referred to this hadith to exclude women from holding public office, the Hanafi argued that because women have the right to testify in court, women could also act as judges in all cases where the testimony of women is accepted. They maintained that the hadith does not prohibit women serving in such capacities; it only prohibits the appointment of women. They differentiate between the moral and legal implications of the hadith, arguing that it creates a moral prohibition of the appointment of women to hold public office, but there is nothing that legally disqualifies women from serving in the capacity of a judge. Hanafi jurist Ibn al-Humam, argued that although the

³¹² Fadel, "Is Historicism a Viable Strategy for Islamic Legal Reform?", p. 21.

³¹³ Ibn al-Athir, *Usd al-Gharba*, Vol. 5, p. 38. See also, Mernissi, *Women and Islam*, p. 53. Khaled Abou Fadl also questions the reliability of the report, arguing that Abu Bakr had many reasons for forging it, see *Speaking in God's Name*, pp. 111–114. For a criticism of those questioning the validity of this hadith, see Fadel, "Is Historicism a Viable Strategy for Islamic Legal Reform?", pp. 41–42.

³¹⁴ Mohammad Fadel argues that "it is almost certain that the increasing formalization of legal education, along with the incorporation of legal debate and the formal study of legal controversy, was the catalyst for the ever-increasing reference to this hadith in legal treaties", see "Is Historicism a Viable Strategy for Islamic Legal Reform?", p. 24–29. He furthermore declares that "Abū Bakra's *ḥadīth* is a good example of how the framing of a text can play an important, even if subtle, role in determining how it is read and understood. Al-Bukhārī's decision to include this *ḥadīth* in the chapter of the Prophet's diplomatic correspondence, for example, or Ibn Abi Shayba's inclusion of it as part of the events of the first civil war, casts the *ḥadīth* in a substantially different light than al-Nasā'ī's decision to include it in the materials dealing with judges, to say nothing of the later *ḥadīth* encyclopaedias in which all (or most) contextual facts were edited out entirely". Ibid., 40.

Quran affirms that women are deficient in comparison to men, the deficiency is not so grave as to strip women of political capacity altogether. Deficiency is a feature attributed to women as a class, not as an absolute individual state. Thus, women's capacity to serve as a judge can be assessed.³¹⁵ Again, Islamic law sets conditions on women's capability depending on their capacity. While it incapacitates women as a whole, whereas men do not need to prove their capabilities.

Contradicting such a standpoint are the verses in the Quran describing Bilquis, the Queen of Sheba, and praising her rule. This verse is used by scholars to overturn or dismiss the relevance of Abu Bakr's version of the hadith:³¹⁶

I found a woman ruling over them, and she has been given of everything, and she possesses a mighty throne ...³¹⁷ She said, 'O Council, pronounce to me concerning my affair; I am not used to decide an affair until you bear me witness.' They said, 'We possess force and we possess great might. The affair rests with thee; so consider what thou wilt command.'³¹⁸

The Quran never provides any introductory information about the Queen of Sheba, and since pre-Islamic historical sources refer to her,³¹⁹ it is generally held that the audience of the Quran was familiar with her, so she did not need any introduction.³²⁰ The Quran never directly or indirectly condemns

³¹⁵ Ibid., 33.

³¹⁶ For a description of modern Muslim jurists' revisionist treatment of the hadith, see Fadel, "Is Historicism a Viable Strategy for Islamic Legal Reform?", pp. 32–35.

³¹⁷ Quran 27:23.

³¹⁸ Quran 27:32–33.

³¹⁹ The Queen of Sheba, in particular, is claimed by both Yemeni and Ethiopian legend since stories in both regions say that she lived there. Hadith and the Islamic tradition in general, say that Sheba (Saba') was in Yemen.

³²⁰ The Old Testament offers a brief account of her visit to Solomon's kingdom and is a major scriptural source of Queen Sheba (see 1 Kings 10 and 2 Chronicles 9). In this narrative, her visit is described as a diplomatic mission, from one head of state to another. Her immense wealth and gifts to Solomon are described, but unlike in the Quran, Solomon accepts her gifts but does not ask her to accept monotheism. There is no mention about a romantic relationship between the two. The Old Testament describes her as an independent agent and public figure. It is only later that Jewish sources highlight her gender and the perceived threat to the natural order that an independent, powerful woman would present. She is portrayed as symbolically masculine as a result of excessive body hair, who becomes symbolically feminine when—at Solomon's bequest—her body hair is removed. She loses her power and independence when Solomon lies with her, consequently falling under his dominance and restoring the natural order of things. According to some reports, she then bears a child—Nebuchadnezzar—who later destroys the temple in Jerusalem and sends the Jews into exile.

the Queen of Sheba, a woman, for taking on a position of political leadership.³²¹ Although a powerful monarch, her model of leadership differs as she preferred diplomacy over warfare.³²² The Quran describes how she counsels her chieftains before deciding to engage in war, and that the chieftains submit to her judgment.³²³ It is the only Quranic account of a female as the head of a state.³²⁴ If Islamic commands were set against women as heads of state or holding any other political office, then the Queen of Sheba would not have been presented in such a manner in the Quran.³²⁵ However, given the broad understanding and accounts of men's superiority and the deficient minds of women by various scholars, the story of Bilquis "was viewed as anomalous and had to be neutralized by references to male superiority. Abu Bakr's hadith was especially useful in achieving this goal".³²⁶ Some scholars argued that Bilquis was the leader of non-believers. Thus, the verse has no significance for Muslims. Instead, it was upheld that the Islamic rule on the issue can be found in Abu Bakr's hadith.³²⁷

3.10 *Veiling*

The institution of veiling and its obligation to women has been widely debated. Quranic injunctions are generally vague and require modesty in behavior from men and women. Veiling and seclusion were practices upheld by Christian upper-class women in 6th century Najran. In some cultures, such as the Greek, only married women wore the veil.³²⁸ There was also a connection between the veil and the goddesses of fertility, like Ishtar and Demeter. Women would veil in the cycle of the seasons, marking their mourning, as a symbolism of hiding during the dead or mourning period, and unveil when they revive in spring following the rhythm of changing seasons and life.³²⁹ Muslim upper-class women also started to veil themselves in public, but exactly when Muslim

321 Amina Inloes, "The Queen of Sheba in Shi'a Hadith", *Journal of Shi'a Islamic Studies* Vol. 5, No. 4 (2012), p. 425.

322 Quran 27:34.

323 Quran 27:32–33.

324 The story of the Queen of Sheba and Sulayman is one of the lengthier narratives in the Quran, spanning from Quran 27:15 to 27:44.

325 Ali, *Gender and Human Rights in Islam and International Law*, p. 55.

326 Fadel, "Is Historicism a Viable Strategy for Islamic Legal Reform?", p. 38.

327 Abu Ḥayyan Muḥammad b. Yusuf, *Tafsir al-Baḥr al-Muḥit*, ed. 'Abd al-Razzaq Mahdi, 8 vols. (Beirut: Dar Ihya' al-Turath al-'Arabi, 2002), 7:87.

328 H. Cassimatis, 1985, "Imagerie et Femme", *La Femme dans le Monde Méditerranéen I, Antiquité* (Lyon: CNRS, Maison de l'Orient, No. 10), pp. 19–28.

329 al-Fassi, *Women in pre-Islamic Arabia*, p. 47.

women generally started to veil themselves cannot be pinpointed.³³⁰ Reports describe that society at that time was constructed in such a manner that unveiled women could be assumed to be harassed and would be confronted.³³¹ Verses in the Quran declare that Muslim women, including women belonging to the Prophet's household, must "draw their veils close to them" when they go out so that they can be recognized as virtuous and not be harassed.³³²

Veiling also symbolized marriage with the Prophet,³³³ and his wives were asked to remain behind a curtain, *hijab*, when believers visit them at home.³³⁴ Many of the verses referring to the practice of seclusion or veiling for Muhammad's wives occurred after his wedding to Zeinab bint Djahsh. Some of the wedding guests stayed in Zeinab's room conversing, and some of the hands of men touched the hands of Muhammad's wives, more specifically, Aisha's hand touched 'Umar's.³³⁵ According to Aisha, 'Umar had urged Muhammad to seclude his wives, to guard them against the insults of "hypocrites".³³⁶ Another account describes 'Umar maintaining the necessity of the seclusion of Muhammad's wives as Muhammad's success was bringing different kinds of visitors to the mosque,³³⁷ and many would try to approach his wives to enlist their assistance in receiving a favor from the Prophet.³³⁸ It is narrated that "the wives of the Prophet used to go to Al-Manasi, a vast open place (near Baqi' at Medina) to answer the call of nature at night. 'Umar used to say to the Prophet 'Let your wives be veiled,' but Allah's Apostle did not do so. One night, Sauda bint Zam' a wife of the Prophet went out at 'Isha' time, and she was a tall lady. 'Umar addressed her and said, 'I have recognized you, O Sauda.'

330 Eleanor, A. Doumato, "Hearing Other Voices: Christian Women and the Coming of Islam", *International Journal of Middle East Studies* Vol. 23, No. 2 (1991), pp. 177–199.

331 Barbara Stowasser, *Women in the Quran, Traditions and Interpretations* (Oxford: Oxford University Press, 1994), pp. 91–92.

332 Quran 33:59–60.

333 "During the Prophet's and Safiyya's wedding feast, some of the Muslims asked: 'Will she be one of the Mothers of the Faithful – or just a concubine of his?' Others replied: 'If he veils her, then she is one of the Mothers of the Faithful, but if he does not then she has become a concubine for him.' When it was time to saddle up and depart, the Prophet made a place for Safiyya to ride behind him, and he spread the veil." Quote taken from Awde, *Women in Islam: An Anthology from the Qur'an and Hadiths*, pp. 88–89. See also, Al-Bukhari, *Sahih*, Book 5, hadith 370.

334 Quran 33:53.

335 Quran 33:54. Ibn Sa'd, *Kitab al-Tabaqat*, 8:126; see also, Abbot, *Aishah*, pp. 20–24.

336 Ibn Sa'd, *Kitab al-Tabaqat*, 8 125–127: Ibn Hanbal, *Musnad*, 6 vols. (Beirut: al-Maktab al Islami lil Tiba'a wa'l nashr, 1969), 6:271.

337 Abbot, *Aishah*, p. 25.

338 Watt, *Muhammad at Medina*, p. 285.

He said so, as he desired eagerly that the verses of Al-Hijab may be revealed. So Allah revealed the verses of 'Al-Hijab'.³³⁹ Another hadith describes 'Umar declaring that: "And as regards the (verse of) the veiling of the women, I said, 'O Allah's Apostle! I wish you ordered your wives to cover themselves from the men because good and bad ones talk to them.' So the verse of the veiling of the women was revealed. Once the wives of the Prophet made a united front against the Prophet and I said to them, 'It may be if he (the Prophet) divorced you, (all) that his Lord (Allah) will give him instead of you wives better than you.' So this verse (the same as I had said) was revealed".³⁴⁰ Based on this hadith, it has been suggested that the Prophet gave the option of divorce for his wives once the new behavioral rules were established.³⁴¹

The Quran advocates "they cast down their eyes and guard their private parts".³⁴² Barbara Stowasser argues that the difference between the commentators of the traditionalists—Abu Ja'far Muhammad ibn Jarir al-Tabari (d. 923), Abdallah ibn Umar al-Baydawi (d. 1286) and Ahmad ibn al-Khafaji (d. 1659)—on this verse indicate how Muslim women were forced to disappear behind the veil, "not only physically but as a symbol of their invisibility from public life".³⁴³ While Tabari argued that veiling does not include the face, half of the forearm, eye makeup, rings, bracelets and dyes, Baydawi interprets the verse as "*let them lower their gaze* before the men at whom it is not lawful to look, and *let them guard their private parts* by veiling them, or by bearing of (or guarding against) fornication. The lowering of the glances is presented because the glance is the messenger of fornication. And let them not display of their adornment such as jewellery, dress, make-up – let alone the parts where they are worn or applied – to those to whom such display is not lawful ... what is meant by adornment is the place where adornment is put (or worn) ..."³⁴⁴ Furthermore, Baydawi argues that the prohibition of display does not include the face and hands as "this applies to prayer only, not appearance, because the whole body of a free woman is pudendal, and it is illicit for anyone (except the husband or the dhawu mahram)³⁴⁵ to look at any part of her except by necessity such

339 Al-Bukhari, *Sahih*, Book 8, hadith 53.

340 Al-Bukhari, *Sahih*, Book 44, hadith 3318.

341 Stern, *Marriage in Early Islam*, pp. 114–115. See also, Quran 33:28–29.

342 Quran 24:30.

343 Stowasser, "The Status of Women in Early Islam", p. 27.

344 Stowasser, "The Status of Women in Early Islam", pp. 26–27.

345 A man and woman cannot lawfully enter into a contract of marriage including a father, brother, son, uncle (whether paternal or maternal), grandfather (whether paternal or maternal). Her husband is *mahram*.

as (medical) treatment, or the bearing of witness".³⁴⁶ Al-Khajafi further reinforces this restrictive interpretation by justifying the complete "disappearance" of women behind the veil declaring that "the whole body of the women is pudendal, even face and hand, without exception". Al-Khajafi argues that interpreting this verse is "command of exception from the established rule, which applies to such exceptional circumstances as the giving of evidence in law courts and medical treatment only".³⁴⁷ One of the most conservative contemporary Muslim scholars, Abu al-A'la al-Mawdudi, argues that segregation will prevent "loose western morals" from slowly becoming a part of Islamic society, and will be a method of keeping the family intact. Mawdudi claims that Islam detests women leaving home unless it is absolutely necessary to earn a living.³⁴⁸

Arguably, Quranic injunctions show that there was a need for some ground rules for male-female interaction, as the statements on modesty imply that there was no segregation between the sexes and that veiling did not occur. If segregation of sexes existed, there would have been no need for a rule on how sexes should be behaving. While originally, hijab referred to the curtain that separated the Prophet's wives from inappropriate male visitors in their homes; it later became associated with the concealment outside the home and became the word for the covering garment worn by women outside of the home. As his wives were targeted by disbelievers and mistreated, the wives started wearing the veil as a means of protection.³⁴⁹ Ultimately, the wives of Muhammad were the first women whose lives would begin to be constrained.³⁵⁰ One can question why the Quran imposed on women this responsibility, and why women had to suffer the consequences of men not behaving, but that is an issue that has not been discussed in the Islamic tradition.

346 Stowasser, "The Status of Women in Early Islam", pp. 26–27.

347 Quotes taken from Ali, *Gender and Human Rights in Islam and International Law*, pp. 76–77.

348 Abdul A. Mawdudi, *Purdah* (Lahore: Islamic Publications, 1997), pp. 235–239.

349 Bruce Lawrence, *The Quran: A Biography* (London: Atlantic Books, 2006), chapter 3. They were instructed to "draw their cloaks close around them. That will be better, so that they may be recognized and not annoyed". See Quran 33:59.

350 Many nomadic women maintained their traditional freedom of movement and less restrictive dress codes even after conversion to Islam, see Karen Armstrong, *The Gospel According to Women: Christianity's Creation of the Sex War in the West* (London: Tree Books, 1986); Amr Abdalla, "Principles of Islamic Interpersonal Conflict Intervention: A Search Within Islam and Western Literature", *Journal of Law and Religion* Vol. 15, No. 1–2 (2000), pp. 151–184; Bernard Lewis, *Islam from the Prophet Muhammad to the Capture of Constantinople* (London: Macmillan, 1976).

3.11 *The Consequences of the Death of the Prophet on the Status of Women*

It is after the death of the Prophet, and under the rule of the third caliph 'Umar, that many of the rules on segregation and the veiling of the Prophet's wives were expanded to include all Muslim women. Many religious, civil and penal ordinances were initiated,³⁵¹ including the punishment of stoning for adultery.³⁵² 'Umar apparently complained about the different customs of marriage and attitudes towards polygyny in cities such as Medina and Mecca. He stated that before coming to Medina "we the people of Quraysh [Mecca] used to have the upper hand over our wives, but when we came among the Ansar [Medinians], we found that their women had the upper hand over their men, so our women also started learning the ways of the Ansari women. One day I became angry with my wife, so when she started talking back to me, I rebuked her, and she said: 'What bothers you about that? By Allah! The wives of the Prophet talk back to him, and one of them may stay away from him a whole day until the night?'"³⁵³ The women of Medina were supposedly more assertive, and one Medinian woman offered herself in marriage to Muhammad, only to withdraw the accepted offer when her disapproving family pointed out that she could never put up with co-wives.³⁵⁴ At the time of Muhammad's arrival in Medina, it is said that the Meccans were accustomed to beating women, who supposedly "did not complain of it" and "did not consider it an attack on their dignity".³⁵⁵ The Medinians did not beat their women, which resulted in a clash of cultures, as Meccan women started to feel that they should not be beaten.³⁵⁶

Several traditions describe 'Umar as a harsh man, both in public and private and who physically assaulted his wives:

Once 'Umar asked the leave to see Allah's Messenger in whose company some Quraishi women were talking to him and asking him for more

351 In the field of penal law, 'Umar even went beyond the scope of the Quran and imposed sanctions, such as punishing authors of satirical poems directed against rival tribes with flogging. The punishment of having the hands of a thief cut off was mostly replaced with flogging, as it was difficult to enforce a punishment unknown to the ancient Arabs, see Schacht, *An Introduction to Islamic Law*, p. 18. See also, Vago, *Law and Society*, pp. 184–186.

352 Ahmed, "Women and the Advent of Islam", p. 689.

353 Al-Bukhari, *The Translation of the Meaning of Sahih*, 7:88.

354 Ibn Sa'd, *Kitab al-Tabaqat*, 8:107–108.

355 Muhammad Al-Talbi, *Ummat Al-Wasat: Al-Islam Wa Tahaddiyat Al-Mu'asira* (Tunis: Ceres Edition, 1996), p. 119.

356 Rachel M. Scott, "A Contextual Approach to Women's Rights in the Qur'an: Readings of 4:34", *The Muslim World* Vol. 99, No. 1 (2009), p. 70.

financial support raising their voices. When 'Umar asked permission to enter the women got up (quickly) hurrying to screen themselves. When Allah's Messenger admitted 'Umar, Allah's Messenger was smiling, 'Umar asked, 'O Allah's Messenger! May Allah keep you in happiness always.' Allah's Messenger said, 'I am astonished at these women who were with me. As soon as they heard your voice, they hastened to screen themselves.' 'Umar said, 'O Allah's Apostle! You have more right to be feared by them.' Then he addressed (those women) saying, 'O enemies of your souls! Do you fear me and not Allah's Messenger?' They replied. 'Yes, for you are a fearful and fierce man as compared with Allah's Messenger.' On that Allah's Messenger said (to 'Umar), 'By Him in Whose Hands my life is, whenever Satan sees you taking a path, he follows a path other than yours.'³⁵⁷

Conditions for women began to deteriorate under the rule of 'Umar and continued with his successors. He encouraged and supported the movement to exclude women from partaking in different aspects of public life. 'Umar sought to confine women to the home and prevent them from attending mosques and prohibited men to enter through the door reserved for women in the mosque.³⁵⁸ As he was unsuccessful in deterring women from the mosque, he instituted segregated prayers instead, appointing separate imams for each sex.³⁵⁹ Unlike Muhammad, who had appointed a woman to act as imam for her household, which included men and women, 'Umar appointed a male imam for women.³⁶⁰ He also prohibited Muhammad's wives from going on pilgrimage. There are no

357 Al-Bukhari, *Sahih*, 3294, Book 59, hadith 103.

358 Abbott, *Aishah*, p. 88. See also Daif (Al-Albani), *Sunan Abi Dawud*, Book 2, hadith 74. It is reported that 'Umar heard the Prophet saying "if we left this door for women (it would have been better) ... 'Umar did not enter (the door) until his death", see (Al-Albani), *Sunan Abi Dawud*, 2146, Book 12, hadith 101. It was also narrated that the Prophet said, "if your women ask permission to go to the mosque at night, allow them", see Al-Bukhari, *Sahih*, Book 10, hadith 256. Another tradition declares that "One of the wives of 'Umar (bin Al-Khattab) used to offer the Fajr and the 'Isha' prayer in congregation in the Mosque. She was asked why she had come out for the prayer as she knew that 'Umar disliked it, and he has great *ghaira* (self-respect). She replied, 'What prevents him from stopping me from this act?' The other replied, 'the statement of Allah's Apostle: 'do not stop Allah's women-slaves from going to Allah's Mosques' prevents him", see Al-Bukhari, *Sahih* 900, Book 11, hadith 24.

359 On the issue of women praying with men, see Sadeghi, *The Logic of Law Making in Islam*, pp. 50–75.

360 Ibn Sa'd, *Kitab al-Tabawat*, 8:335; Gertrude Stern, "The First Women Converts in Early Islam", *Islamic Culture* Vol. 12, No. 3 (1939), p. 299.

records of the opinions of the wives regarding these rules, but, 'Uthman, the fourth caliph, revoked them, allowing Muhammad's wives to go on pilgrimage and revoked the arrangement of separate imams. Men and women were again allowed to be in the mosque; however, women were to be held back while men left the mosque.³⁶¹ 'Uthman's restoration of some liberties was a brief exception to the religious, political, and societal changes moving inevitably in the contrary direction.³⁶²

Essentially, the process for the improvement of the status of women, as established to some extent by the Quran and in the practice of Muhammad, was curtailed as soon as the Prophet died. Starting from the period of the Caliphs, and thereafter with the different schools of law, female participation in public life was severely restricted. Interpretations of Islamic law came to be based on the premises of protecting the chastity of women, which for these jurists, gradually became tantamount to segregation of the genders and the veil itself. Seclusion of women became the norm to maintain female morality, as women came to be portrayed as temptresses.³⁶³

361 Ibn Sa'd, *Kitab al-Tabawat*, 5:17.

362 Ahmed, "Women and the Advent of Islam", p. 690.

363 Sayeh & Morse Jr. "Islam and the Treatment of Women", p. 324.