

**Critical Analysis of the Saudi Commercial Arbitration Law Position on the
Appointment of Women As Arbitrators: Obstacles and Solutions**

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ABSTRACT

This thesis explores the evolution of the Saudi Commercial Arbitration law and the legal challenges related to recognising and enforcing commercial arbitral awards. Moreover, it sheds light on international treaties concerning commercial arbitration law and the role of women, especially the ones to which Saudi Arabia is a signatory. The role of women in the Saudi judicial system has become more visible and effective. Currently, they are licensed lawyers and legal academics. Nonetheless, one of the issues the thesis examines regarding Saudi arbitration law is that it remains unclear whether women are legally allowed to become arbitrators. The law remains silent, which makes it subject to interpretation. Some interpretations limit arbitration to men, while others open it up to women. The thesis suggests that the involvement of women as arbitrators has to be legally clarified to avoid unnecessary confusion and put forth the requirements for arbitration licenses for women. That way, the Saudi commercial arbitration law clarifies that the parties to arbitration in the Kingdom can choose an arbitrator regardless of gender. It concludes by offering a prescription which spans from repealing and replacing the current commercial arbitration law to amending article fourteen of the law to clarify the issue, to triggering the international treaties on arbitration to which Saudi is a signatory by clarifying that the gender of an arbitrator is not restricted in Islamic law. Therefore, the Saudi commercial arbitration law recognises the role of women in arbitration. Any of the three proposals can serve the purpose and assist the Saudi commercial arbitration law to become more inclusive as it aspires to achieve the objectives of the Kingdom's 2030 vision.

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GLOSSARY

CEDAW: Convention on the Elimination of All Forms of Discrimination against Women.

GCC: Gulf Cooperation Council.

SAL 2012: The Saudi Arbitration Law enacted in 2012.

SAL 1983: The Saudi Arbitration Law enacted in 1983.

CHAPTER ONE: INTRODUCTION

1.1. Motivation

Gender diversity in international arbitration has been considered as a significant challenge and has provoked varying debate amongst legal scholars. Remarking on the state of gender diversity in international arbitration in 2003, Sarah Francois-Poncet was of the considered view that international arbitration is a field significantly dominated by men.¹ Whilst it is notable that in 2003, there was a lack of data that particularly pointed to the underrepresentation of women in international arbitration, available data now vividly indicates that women are a minority amongst the pool of international arbitration practitioners.

Data analysed from the International Centre for the Settlement of Investment Disputes (ICSID) in 2009 indicated that out of 250 arbitration disputes, a meagre 4% of the arbitrators appointed were female.² A similar analysis of the representation of women arbitrators at the London Court of International Arbitration (LCIA) in 2011 indicated that only 6.5% of the arbitrators appointed were women. Available data from the Stockholm Chamber of Commerce in the same year similarly pointed out a 6.5% representation of women in arbitrator appointments.³ More recent statistics points out that there has been a steady increase of the participation of women in international arbitration. According to the dispute resolution statistics released by the International Chamber of Commerce (ICC) in August 2021 for the 2020 period, the participation of women arbitrators stood 23% up from 21.1% in 2019. The LCIA casework report for 2020 similarly recorded a growth of the appointment of women arbitrators which stood at 33% up from 29% the previous year.⁴ However, despite these notable strides to improve the representation of women, there has been concern amongst scholars that

¹ Snoor Mohammed Amin Najmaldin, 'Diversity and International Arbitration Law; A review of its development' <www.bibliomed.org/mnsfulltext/197/197-1597913520.pdf?1638881613> accessed 30 November 2021.

² *ibid.*

³ *ibid.*

⁴ Archismita Raha, Shreya Jain, Juhi Gupta, 'Growing Gender Diversity in International Arbitration: A Half Truth?' (Kluwer Arbitration Blog, September 28, 2021) <<http://arbitrationblog.kluwerarbitration.com/2021/09/28/growing-gender-diversity-in-international-arbitration-a-half-truth/>> accessed 29 November 2021.

there has emerged a diversity paradox in which there is ‘an apparent inability to translate the concerns with respect to lack of diversity in international arbitration into actual appointments in individual cases.’⁵

The steady growth of the participation of women in international arbitration as witnessed in arbitral institutions such as the LCIA and the ICC could be understood to have been positively influenced by increased lobbying amongst various groups/individuals/organisations aimed at improving women participation in international arbitration. For instance, the adoption of the Equal Representation Pledge (ERA Pledge) in 2016 has been significant in influencing the participation of women in international arbitration as current records indicate that there are more than 4700 signatories to the ERA Pledge.⁶ The significance of the ERA Pledge lies in its objective to include members of the international arbitration community to take pledges aimed at increasing the appointment of women arbitrators on a basis of equal opportunity.⁷ Apart from the ERA Pledge, the adoption of the Convention on the elimination of All Forms of Discrimination against Women (CEDAW) in 1979 has also been influential in the recognition and adoption of women rights in the political, civil, social, cultural and economic spheres. This is particularly significant as CEDAW requires State parties to adopt legislative as well as other measures to prohibit the discrimination of women in all sectors.⁸

Despite the advancements made by organizations such as the ERA Pledge and the operation of progressive conventions such as CEDAW, the lack of parity between women and men in arbitrator appointments in international arbitration has been considered by scholars to nonetheless persist. This state of affairs has provoked claims that there exists a privileged class of elite male arbitrators that are repeatedly selected for major international arbitration cases. Douglas Pilawa argues that these claims have gone as far as alluding that repeat appointments of this elite club of male arbitrators has been sustained by, ‘a corrupt inner circle of lawyers and arbitrators who trade

⁵ *ibid.*

⁶ *ibid.*

⁷ Victoria Clark, ‘Diversity in International Arbitration: A call to action’ (*Thomson Reuters*, March 5 2020) <http://arbitrationblog.practicallaw.com/diversity-in-international-arbitration-a-call-to-action/> accessed 30 November 2021.

⁸ Convention on the Elimination of All Forms of Discrimination Against Women (adopted 18 December 1979, entered into force 3 September 1981) A/RES/34/180.

appointments for financial gain and professional prestige.’⁹ In light of these arguments it could be considered that such repeat appointments of particular male arbitrators challenges the progressive advancements made by the ERA Pledge and CEDAW in promoting the participation of women at the international arbitration stage.

Two schools of thought have emerged from the above state of affairs. On one hand, there are proponents that advocate that the regulation of the arbitration process is necessary to drive and realize gender diversity in international arbitration. On the other hand, there are parties that advocate for caution as such regulation could be seen to amount to meddling with the freedom of parties to appoint their preferred arbitrators by paying regard to the principle of party autonomy. Douglas Pilawa argues that it is notable that party autonomy is an attractive attribute in international arbitration and it has contributed to the success of international arbitration as mechanism for dispute resolution for cross country disputes.¹⁰ As such, it could be argued that the continued measures to promote gender diversity at the international arbitration level is confronted by significant challenges that point out that the implementation and realization of gender parity requires more effort to be invested both at the international and national stage.

During the pre-Islamic period in countries in the Arab Peninsula, historical accounts point out that women suffered discrimination and their position in society was viewed as being lesser as compared to men. However, with the emergence of Islam at the end of the sixth century, the Quran brought with it corrective measures to the existing discriminatory practices by enforcing equal standards between men and women with regards to social, civil, and political rights.¹¹ Saudi Arabia, being one of the Gulf countries has based its legal system on Sharia /Islamic law. Sharia is basically comprised of the Quran and Sunnah. Saudi Arabia’s constitution known as the Basic Law of Governance identifies the Quran as the foremost and authoritative law whilst the Sunnah is recognized by the Saudi Basic Law of Governance as the second primary

⁹ Douglas Pilawa, ‘Sifting Through the Arbitrators for the Woman, the Minority, the Newcomer’ (2019) 51(1) Case Western Reserve University School of Law Scholarly Commons 395 <<https://scholarlycommons.law.case.edu/cgi/viewcontent.cgi?article=2549&context=jil>> accessed 13 May 2021.

¹⁰ *ibid.*

¹¹ Mona AlMunajjed, *Women in Saudi Arabia Today*, (Macmillan Press Ltd. 1997) 28.

source of Law.¹² In light of the fact that Sharia is the foundational framework for the Saudi Arabian legal system, statutes, regulations, policies and decrees that are issued by the Saudi Arabian Government have to conform to Sharia principles as well as other policy considerations.

Saudi Arabia has endeavoured to take steps to eradicate discrimination against women by ratifying CEDAW in 2000 as well as by issuing several government decrees and orders that affirm and recognize women rights.¹³ However, despite these steps, there is a significant lack of participation of women as arbitrators and judges. This is largely based on the fact that some of the Saudi Arabian jurists adopt a restrictive stance with respect to how they interpret Sharia principles thus resulting in the underrepresentation of women at the in the arbitration and judiciary. In illustrating the lack of women in these key sectors, Saudi Arabia (at the time of carrying out this research) has never appointed a woman as a Judge whilst the first female arbitrator was appointed in 2016.¹⁴

The restrictive attitude of Muslim jurists to limit the participation of women as arbitrators and judges could be challenged as a contradiction given that the Quran in itself, being the authoritative source of law in Saudi Arabia, has no express provision that bars the appointment of women to judicial positions. Instead of adopting a narrow interpretation of the Quran, authors such as Engy Abdelkader argue that some Muslim jurists have relied on a wide interpretation of Quranic verses to limit the participation of women in arbitration and judicial positions.¹⁵

Whilst the wide interpretation of the Quran has been argued to limit the participation of women as judges and arbitrators, other sectors in Saudi Arabia such as the Shura (Consultation) Council have witnessed more participation of women. This was enabled through a royal decree issued in 2013.¹⁶ Women have also been allowed to work as Public Prosecutors in Saudi Arabia from 2018 and the appointment of Saudi Princess

¹² Basic Law of Governance (Saudi Arabia) art 1.

¹³ Samal al-Agha, 'Female Judges in Saudi Arabia, Hope Versus Reality' (2021) 37(3) Arab Law Quarterly.

¹⁴ *ibid.*

¹⁵ Engy Abdelkader, 'To Judge or Not to Judge: A Comparative Analysis of Islamic Jurisprudential Approaches to Female Judges in the Muslim World (Indonesia, Egypt and Iran)' (2014) 37 Fordham Int'l L.J. 309 <<https://ir.lawnet.fordham.edu/ilj/vol37/iss2/2>> accessed 21 June 2023.

¹⁶ al-Agha (n 13).

Reema bint Bandar as the Saudi's Ambassador to the United States is indicative of a shift in women taking up more leadership roles in Saudi Arabia.¹⁷ As such, there is need for a critical evaluation to establish the reasons as to why the gender progressive reforms in various sectors have not yet extended to the arbitration sector. Similarly, the lack of gender parity has also been witnessed in the judiciary as no woman has ever been appointed as a Judge.

The Saudi Arbitration Law was adopted in 2012 and is significant in the discourse concerning the participation of women in the Kingdom. Notably, the former 1983 Saudi Arbitration Law implied an exclusion of women as arbitrators given that the Implementation Rules of 1985 made use of the pronoun 'he' thus implying that an arbitrator was required to be a male.¹⁸ The Saudi Arbitration Law 2012 makes no provision for the requirement of gender in listing the qualifications of an arbitrator under article 14. Instead, the qualifications provided are that an arbitrator should be of full legal capacity, have good conduct and reputation as well having an bachelor's degree in Sharia or Civil law if the arbitration is made up of a sole arbitrator.¹⁹ However, despite the fact that the Saudi Arbitration Law 2012 contains no provision or language that limits the appointment of women as arbitrators, there was still concern amongst scholars whether an award issued by a female arbitrator or the appointment of a woman as an arbitrator might be subject to appeal given the restrictive interpretation of Sharia that might be adopted by Muslim jurists from the Hanbali school.

There have been criticisms shared amongst scholars that the Saudi Arbitration Law 2012 does not provide closure with regards to the participation of women as arbitrators. Unlike the Implementation Regulations 1985 that implicitly required an arbitrator to be male, the Implementation Regulations (2017) have not provided an equivocal position that dictates a woman can be arbitrator. This has been considered to create

¹⁷ *ibid.*

¹⁸ 'Implementing Regulations of the Arbitration Law' (issued by Royal Decree No 7/2021/M of 09/08/1405H, 1985) (Saudi Arabia).

¹⁹ Saudi Arbitration Law 2012 (Saudi Arabia) article 14.

room for contention amongst conservative Muslim jurists that adopt a restrictive interpretation of Sharia to limit the participation of women as arbitrators.²⁰

This study seeks to establish the legislative intent of dropping the gender requirement given that the Saudi Arbitration Law 2012 contains no gender restrictive language in listing the qualifications of an arbitrator. Given that the Saudi Arbitration Law 2012 is not explicit on the participation of a woman as an arbitrator, this has created room for opposition amongst conservative jurists who contend that the appointment of a woman as an arbitrator offends the principles of Sharia. This contention was seen following a party appointment of the first female arbitrator in 2016. This appointment was challenged by the disputing party to the arbitration.

Whilst the Court of Appeal did not object or oppose the appointment of Ms. Shaima Aljubran, it is probable that similar cases will be met with the same resistance. On one hand, religiously conservative authors such as Abdulrahman Baamir argue that it is a settled position in Saudi Arabia that Sharia ruling cannot allow for the appointment of a woman as an arbitrator or as a judge.²¹ On the other hand, Islamic jurists such as Ibn Hazm and Hasan al-Basri hold the position that there is no text contained in the Quran or Sunnah that explicitly bars women from participating as judges or arbitrators.²² This research seeks to critically assess these varying arguments in establishing the issues and challenges facing the participation of women as arbitrators in Saudi Arabia.

At the heart of the limitation on the participation of women as arbitrators and judges in Saudi Arabia appears to be rights restrictive views by Muslim jurists which are founded on the Quran and Sunnah. A reading of the existing key legislation in Saudi Arabia such as article 28 of the Basic Law of Governance requires the State to facilitate job opportunities to every able person and it goes further to require the State to enact legislation that protects workers and employers.²³ From this provision, it is apparent that there exists a contradiction between legislative instruments and the interpretation

²⁰ Mohamed Mahayni and Zaid Mahayni, 'Saudi Arabia: An Overview of The New Implementing Regulations To The Saudi Arbitration Law' (*Mondaq*, 2017) <www.mondaq.com/saudiarabia/arbitration-dispute-resolution/601494/an-overview-of-the-new-implementing-regulations-to-the-saudi-arbitration-law> accessed 25 November 2021.

²¹ The decision of the First Commercial Court under the Administrative Court of Appeal in the Eastern Province, for case (C-3022) on 1436 AH.

²² al-Agha (n 13).

²³ *ibid*.

of Sharia by Muslim jurists with regards to the participation of women as arbitrators and judges.

This study seeks to establish the genesis of the rights restrictive stance adopted by Islamic jurists so as to better understand the foundational principles that inform these views. It is notable that proponents of the rights restrictive stance have paid significant regard to the Sunnah by evoking a hadith by Abu Bakra who recalled the words of the Prophet that concerned the participation of women in leadership positions. The hadith states that the Prophet stated that a nation that grants authority to a woman to rule them will not succeed.²⁴ The Prophet is said to have been referring to the appointment of a woman to rule Persia. This hadith is particularly significant in the sense that it is widely respected by Muslim jurists and hadith scholars on the basis that its transmission is considered unbroken and authentic given that it was given directly by Prophet Muhammad to Abu Bakrah. Scholars such as David Solomon Jalajel emphasizes that this hadith 'is the soundest and strongest hadith concerning women in leadership in the legal works under survey.'²⁵

Whilst the above hadith has been central theological tenet that has been used by jurists to limit the participation of women as arbitrators, this research seeks to critically discuss the criticisms this hadith has faced. This includes criticisms such as that of scholars such as Abou El Fadl who challenges its validity by arguing that the words of the Prophet were not a general prohibition by the Prophet on women rather, it was a general view held by the Prophet concerning the political situation of Persia.²⁶ Further, this study seeks to analyse why this hadith has remained prominent and effective despite the criticisms levelled by scholars that oppose its validity and the manner of its applicability. Such an analysis is warranted especially considering that this hadith has continued to earn respect from Muslim jurists from across the traditional Muslim schools. One of the justification this study considers is that whilst Muslim jurists are allowed to challenge the completeness or transmission of a hadith, questioning the integrity of a Companion of the Prophet is considered to be a violation of a theological

²⁴ David Solomon Jalajel, *Women and Leadership in Islamic Law: A Critical Analysis of classical Legal Texts* (Routledge 2017) 27.

²⁵ *ibid* 3.

²⁶ *ibid*.

tenet.²⁷ As such, whilst appreciating that the hadith by Abu Bakrah is considered to be properly transmitted, Muslim jurists cannot on a point of theological obligation, question the integrity of Abu Bakrah. However, this study considers the views of Abou el Fadl who raises significant criticism regarding the content of the hadith and argues that by using the hadith to limit the participation of women to leadership positions, the interpretation adopted by Muslim jurists is entirely subjective and it would mean that it is applicable to all women at any point in time.

Given the above considerations, it is apparent that despite the efforts taken by Saudi Arabia to achieve gender equality through the ratification of CEDAW in 2001, there is still progress to be made. Given the lack of express provisions under the Saudi Arbitration Law (2012) that recognize the participation of women arbitrators coupled with gender restrictive interpretation adopted by Muslim jurists, this research considers and analyses additional steps /methods that could to be taken to ensure a greater participation of women in arbitration.

In light of the foregoing, this study seeks to critically analyse the various legal challenges that limit the appointment of female arbitrators. Whilst some of these challenges could be drawn from legislative instruments such as the Saudi Arbitration Law, an analysis of the application and interpretation of Sharia on the appointment of women as arbitrators is similarly crucial. With respect to legislative instruments, this research focuses on the Saudi Arbitration Law 2012 and the Saudi Arbitration Law 1983 and the impact these two legislations have had on the appointment of women as arbitrators. Further, this research adopts a comparative outlook of these two legislations to assess how they differ and relate to each other with regards to the participation of women as arbitrators in the Kingdom.

The appointment of the first female arbitrator in Saudi Arabia in 2016 provoked debate relating to the place of women in the Saudi legal system. Some of the issues that arose during the hearing is the proposition by Muslim jurists and scholars that the requirements imposed on judges should also be imposed on arbitrators. As such, the cultural and religious limitation barring women from being appointed as judges similarly extends to arbitration. Authors such as Abd al-Hamid Mayhoub oppose the appointment of women as Judges on the basis that an interpretation of Sharia would

²⁷ ibid 49.

render such appointments as an affront to the practice of male guardianship. This practice dictates that men take the role of protecting women as well as preserving their dignity. According to Mayhoub, male guardianship cannot be sustained if a woman is appointed as a Judge on the basis that a courtroom would contain various types of men with differing morals, thus imposing there is a need to protect women from such exposure.²⁸

Further, this study considers and critically discusses the religious justification given by scholars that oppose the appointment of women as Judges. These scholars and Islamic jurists adopted the position that neither the Prophet nor any of the *khalifats* nor their successors have entrusted women with the administration of justice or the governance of a country. This indicates that women are unfit for countries' governance and judicial authority. Thus, being indisputably male is a stipulation.²⁹ Conversely, this study considers the views of proponents of the participation of women as arbitrators and judges who argue that there is historical evidence that points to notable participation of women in positions that had an element of public power.

In light of this, this study seeks to examine the history of the Saudi Arabian legal system as well as the history that relates to the leadership role of women during and after the time of Prophet Muhammad. This will be helpful in establishing whether historically, the prevailing legal system recognized the participation of women in leadership positions such as to render current practices and beliefs as a deviation from past practice. Such analysis is relevant towards better understanding the origin of the non-participation of women as judges whilst appreciating that the same gender restrictive practices, beliefs, customs, interpretations are considered to also apply to arbitrators.

Against this backdrop, the thesis intends to provide a insight prescription concerning the role of women in the judicial system, primarily as arbitrators of commercial disputes.

²⁸ al-Agha (n 13).

²⁹ *ibid.*

1.2. Aim and Objectives

The aim of this thesis is to critically study the Saudi Arbitration law in regards to the women's legal status in arbitration. The study's main objectives will include:

- Firstly, a critical analysis of the significance of the role of women in arbitration at the international level. This analysis will aim to discuss the benefit of having women in arbitration, the challenges faced as well as solutions devised to counter these challenges. The overall aim of this analysis is to apply lessons drawn from the international level so as to offer best practices that Saudi Arabia can utilize so as to better the participation and inclusion of women in international commercial arbitration.
- Secondly, an evaluation of the historical context of Saudi Arabia's judicial and legal systems. This is in light of the fact that it is necessary to evaluate how historical developments in Saudi Arabia and the Arab Peninsula had a significant role in shaping the legal and judicial system of the Kingdom. Further, an understanding of Saudi Arabia's legal and judicial system is necessary in better understanding key terms and structures as well as the requirements necessary for the appointment of a Judge or an arbitrator. A critical discussion that analyses the impact of the French legal system following the fall of the Ottoman Empire in 1922 aims to show that Saudi Arabia's legal system has not developed in isolation rather, there has been significant influence of the French legal system on its legal framework.
- Thirdly, a critical analysis that focuses on views and evidences amongst Muslim jurists and scholars with regards to the status of women within Sharia. This objective seeks to critically discuss divergent views that either accept or reject the involvement of women in leadership positions within the context of Sharia. This is whilst appreciating that traditional schools differ in their interpretation of Sharia that relate to the appointment of women as arbitrators and judges. Whilst the Hanbali school jurists have largely bent towards interpreting and following prior teachings that exclude the participation of women in leadership positions. The Maliki school although has jurists such as Ibn Hasm, Ibn Jarir al-Tabari and Hasan al-Basri that hold the view that women may be appointed as judges as long as they meet the statutory requirements for

these positions.³⁰ As such, it becomes necessary to evaluate the reasons that inform the differing views amongst these Muslim jurists to establish the root causes that underlie the exclusion of women to appointments as judges and arbitrators.

- Fourthly, a critical analysis the status of women as arbitrators in Saudi Arabia by focusing on discussions relating to the institutional and legislative changes in Saudi Arabia that affect the participation of women as arbitrators. Further, this study aims to highlight religious, social, and cultural reasons that limit the participation of women as judges and arbitrators. An additional objective under this section is a critical discussion of the role of women as arbitrators during the pre-Islamic era. This is so as to establish whether women played the role of an arbitrator during this early period so as to clarify whether the current prevailing interpretations and beliefs that limit the role of women as arbitrators is a deviation from practices during the pre-Islamic period.

1.3. Research Questions

The primary research question that forms the foundation of this study is, *what is the state of the appointment of women as arbitrators under Saudi Arabian law?* This study seeks to critically discuss this main research question by adopting several secondary research questions that aim to substantiate the primary research question.

The following secondary research questions are addressed in respective chapters:

- 1) What is the significant role of women in arbitration from an international perspective?
- 2) What is the importance of the historical context of Saudi Arabia's legislation and judicial framework?
- 3) What is the legal status of women within Sharia in accordance to Sharia law implemented in Saudi Arabia?
- 4) What is the status of the participation of women as arbitrators in Saudi Arabia?

³⁰ al-Agha (n 13).

1.4. Related Works

A study is relevant and justified if it seeks to fill a gap in the existing literature works. In the case of this study, there are various gaps in the legal literature that critically examines both SAL 2012 and SAL 1983 in regards to the place of women in Arbitration practice in the KSA. The central focus of this study is on the place of women in arbitration practice in Saudi and most of the researchers who have published work previously on arbitration have not focused on this matter. Most of the researchers have investigated the award of arbitration or compared SAL 2012 to other international arbitration standards such as UNICTRAL. Therefore, with SAL 2012 being approved in 2012 by the Saud Council of Ministers, there has been a lack of sufficient discussions in regards to the ambiguous nature of the law on the qualification of arbitration and in effect the right of women in arbitration. Therefore, this thesis will be distinctive and unique in its contribution to the arbitration practice literature in KSA.

The current literature on Arbitration in Saudi Arabia is presented below;

Baamir in 2010 published the book '*Shari'a Law in Commercial and Banking Arbitration*' in six chapter analyses how the commercial and banking disputes are settled under the arbitration laws in Islamic regimes. The central focus of the book is on the Saudi Legal systems which serves as the representative of Sharia law in the banking and commercial arbitration practices. The book's strength lies in the relevant comparisons between the settlement of disputes in the banks across UAE and Egypt.³¹ The book offers a strong insight on the Sharia law in commercial and banking arbitration where the laws, main principles and sources of the Islamic Sharia are introduced. Therein, the Baamir explores the uncertainties in the 1983 SAL system and examined the possible alternatives that can aid in resolving the domestic and international arbitration challenges. Further, the book discusses the law and practice of arbitration during the pre-Islamic era up to the emergence of the four traditional schools of jurisprudence. Whilst discussions on the development of arbitration is useful, this study seeks to go further and establish the role that women played during

³¹ Abdulrahman Yahya Baamir, *Shari'a Law in Commercial and Banking Arbitration: Law and practice in Saudi Arabia* (Ashgate Publishing Limited 2010) 14.

the development of arbitration during the pre-Islamic era as well as during the era of prophet Muhammad. This is with the aim of analysing the historical events that eventually established the religious dogma within Islam that women are prohibited from participating as arbitrators.

Bhatti published the book '*Islamic Law and International Commercial Arbitration*, 2018) to determine the intersection between the contemporary commercial arbitration and the Sharia laws to understand the tension that may arise between these two different legal approaches. The author develops procedural and evidentiary rules in Sharia and then examines the consequences of making stipulations on the qualifications of arbitrators based on their gender and or religion. In the book, there is an extensive examination and evaluation of the prohibitions against the *riba* and *gharar* (interest and uncertainty respectively) under the Sharia laws and how these impact the arbitral agreements, awards, and public policies.³² Several international conventions are examined, but the book's strength lies in the use of case studies from the Asian International Arbitration Centre or the formerly known as Kuala Lumpur Regional Centre for Arbitration. Whilst this book covers the relationship between contemporary commercial arbitration and Sharia, this study focuses on Saudi Arabia as a State whose legal system is wholly based on Sharia. Whilst there are countries in the Middle East that adopt a mixed legal system comprising of civil law and Sharia, Saudi Arabia being an Islamic State, subjects international commercial arbitration as well as other legislation to Sharia. Article 7 of the Basic System of Governance establishes Sharia as the foundational law of the Kingdom with the government being required to draw its authority from Sharia in conducting all administrative affairs. As such, this study seeks to examine and critically discuss the interrelationship between Sharia and the practice of international commercial arbitration with emphasis on its influence on the participation of women as arbitrators.

The other book on Arbitration was published in 2006 by Samir Saleh (*Commercial Arbitration in the Arab Middle East, Shari'a, Syria, Lebanon, and Egypt*, 2006) who examined the domestic commercial arbitration practices on an international scale under the Arabic Sharia Law. The researcher does not mention KSA in the study, but the book offers an insight on arbitration law in Islamic Laws. However, in the recent

³² Maria Bhatti, *Islamic Law and International Commercial Arbitration* (Routledge 2019).

editions of the book, arbitration laws and practices in KSA and other Arabic countries have been addressed.³³ However, the edition was published before the implementation of SAL 2012, so his discussion leaves a gap in literature based on the updated laws on arbitration in KSA. As such, this study seeks to go further to address the influence of the Saudi Arbitration Law 2012 on the participation of women as arbitrators.

The Arbitration Agreement and its Independence, 2009, a book by Al-Sawage takes a more in-depth look at the arbitration agreements under Saudi laws using a critical analytical and practical examination of these agreements. Like many of the other books published it takes on a comparative approach between the international law practice and the Islamic laws, with a focus on the SAL, but fails to address the issue of women in arbitration, an aspect that this study seeks to cover.

The book (*Arbitration in the Kingdom of Saudi Arabia*) published by Al-Bijjad in Arabic provides an extensive investigation of the nature of arbitration in Saudi Arabia with a focus on SAL. The book is a good reference for students who are first introducing themselves to the Saudi Arbitration Law because the thoroughly addresses aspects of arbitration under the law. However, the book was published in 1997, so it provides an overview of the old SAL law of 1983 hence for someone who seeks to focus on the current practices on SAL, the book may not provide an updated focus on pertinent issues facing arbitration in KSA.³⁴ However, for students who want to compare the two SAL laws, the book provides a good starting point for students to understand the beginning of the arbitration provisions in the KSA. In the book, Al-Bijjad reiterates that there is a lack of legal resources in Saudi Arabia on arbitration. Therefore, he called on scholars and the legal experts to produce legal studies that clarify the rules of arbitration in Saudi Arabia. It is within the context of there being scarcity of research into various arbitration rules that this research seeks to further analyse the nature of arbitration under the Saudi Arbitration Law 2012 whilst contrasting its developments against the Saudi Arbitration Law 1983 so as to better understand how these two legislations have influenced the participation of women as arbitrators.

³³ Samir Saleh, *Commercial Arbitration in the Arab Middle East, Jordan, Kuwait, Bahrain, & Saudi Arabia*, (3rd edn, LexGulf Publishers 2011).

³⁴ Al-Bijjad, *Arbitration in the Kingdom of Saudi Arabia* (Riyadh Institute of Public Administration Publications 1997).

Al-Ammari and Martin (2014) in *Arbitration in the Kingdom of Saudi Arabia* investigated the review of the components of the SAL 2012 which they argue is based on the UNICTRAL Model Law modified accordingly to avoid any violation of the Sharia practices within the KSA.³⁵ The researchers also conduct an analysis of the SAL 1983 and the international arbitration practice as well as the recognition and enforcement of the international arbitration awards that has been done in Saudi Courts. It further examines how these decisions have been influenced by Sharia and the implementation of the new arbitration law. Whilst discussions on the recognition and enforcement of arbitral awards have been well discussed in the book, this study seeks to go further and examine the influence of Sharia on international arbitration awards. This is within the context of understanding whether public policy considerations could be used to trump the principle of party autonomy and effectively prohibit the participation of women as arbitrators.

Nesheiwat and Al-Kwasawneh (2015) in their journal *Saudi Arbitration Law: A Comparative Examination of the Law and Its Effect on Arbitration in Saudi Arabia* presented a framework for the new updated Saudi Arbitration Law 2012. The researchers reiterate on the importance of a cautionary approach when cultural, laws and practices are taken into account. Therefore, the study provides a comparison of the legal provisions of the SAL 2012 as compared to the SAL 1983 and the United Commission in International Trade Law (UNICTRAL) Model Law.³⁶ The study also examined the efficiency, justice, and societal values. Whilst this journal focuses on the Saudi Arbitration Law 2012 and the influence of culture and other practices, this study goes further in seeking to establish whether the operation of Saudi Arbitration Law 2012 is limited by religious or cultural doctrines to an extent that the participation of women in arbitration is influenced. Such an analysis will be useful in analysing the various points of influence including religious and cultural doctrines that may affect the participation of women as arbitrators.

In *The Rising Tide of Change: Saudi Arabian Women In Dispute Resolution* – by Amnah Abahussain (2020) the changing platform for women in Saudi Arabia is

³⁵ S Al-Ammari and A Timothy Martin, 'Arbitration in the Kingdom of Saudi Arabia' (2014) 30(2) *Arbitration International* 387.

³⁶ Faris Nesheiwat and Ali Al-Khasawneh, 'The 2012 Saudi Arbitration Law: A Comparative Examination of the Law and Its Effect on Arbitration in Saudi Arabia' (Santa Clara Law Digital Commons 2015) < <https://digitalcommons.law.scu.edu/scujil/vol13/iss2/5/>> accessed 21 June 2023.

addressed. The researcher, takes on a topic that has not been addressed previously by other researchers by examining the place of women in Dispute resolution in KSA. The author contends that the recent years has seen change and improved opportunities for women to pursue higher education. However, Abahussaini cautions that the extent of progress is affected by the conservatives who do not want women empowerment.³⁷ Whilst Abahussain discusses the role of Saudi Arabian women in arbitration by focusing on the views and perspectives of Muslim jurists who contend women should be prohibited from acting as arbitrators and judges, this study seeks to get to the genesis of these views from a historical perspective. In adopting this historical perspective, this study seeks to establish what was the role of women in leadership, adjudication, and arbitration during the pre-Islamic era as well as during the reign of Prophet Muhammad. Further, this study seeks to analyse whether from the history of the role of women in leadership and arbitration, this history had any influence on the religious dogma present in the Sunnah that has been interpreted by conservative Islam jurists to mean that Sharia prohibits the participation of women as arbitrators.

Hossein Kamaly (2019) in the book *A history of Islam in 21 Women* seeks to provide a historical account of Islam through interlinked episodes of the biographical sketches of 21 notable women in Islam.³⁸ The aim of the researcher is to shed light on the role of women in the history of Islam in the context of political and religious leadership. The motivation of the researcher is that in light of the fact that women greatly shaped the history of Islam, there is need to provide a documented account of the central place they occupied in the development of Islam. For the purposes of this study, there is particular focus of Aisha, daughter of Abu Bakra who was married to Prophet Muhammad in the later 623. Aisha's active role in religious and political leadership during and after the death of Prophet Muhammad is particularly significant as the researcher highlights that the Prophet is quoted as to have advised Muslim faithful to consult Aisha on religious matters. The researcher points out that following the Prophet's death, Aisha continued to have both religious and political influence and she is reported to have rejected the treatment of women as symbolic barriers to connection with God. The researcher points out that the political leadership of Aisha was more

³⁷ Abahussain Amnah, 'The Rising Tide of Change: Saudi Arabian Women In Dispute Resolution' (2018) 73(2) Dispute Resolution Journal.

³⁸ Hossein Kamaly, *A history of Islam in 21 Women* (OneWorld Publications 2019).

pronounced during the Battle of the Camel. Given that the hadith that limits the participation of women to leadership positions was brought up by Abu Bakrah following the Battle of the Camel, the researcher argues such hadith should be treated with caution. Whilst the researcher focuses largely on the role of women in leadership during the reign of Prophet Muhammad, this study seeks to better understand whether the religious doctrines applied during this period regarding the participation of women in leadership have changed over the years or whether they have remained consistent. Whilst such an analysis has not been probed by this researcher, this study will seek to analyse the genesis of the religious doctrines that under Sharia that prohibit the participation of women as arbitrators as well as the criticisms and justifications applied by scholars in discussing these religious doctrines.

In the book *Women in Saudi Arabia Today*, the researcher Mona AlMunajjed (1997) extensively discusses the status of Arab women under Islamic law.³⁹ The researcher argues that to better understand Saudi Arabia's social structure particularly the status of women, it is crucial to study the relationship between existing Islamic thought and its connection to society. The researcher is of the view that in light of increasing concern requiring the inclusion of women in the social and economic agenda of the Kingdom, their inclusion as drivers of social and economic development is necessary in a rapidly evolving society such as Saudi Arabia. The researcher analyses literature emanating from social and ideological schools that either argue for or against the participation of women in social and political positions. There is an examination by the researcher of the quality of the lives of Saudi Arabian women in traditional society so as to establish their social reality. This has been achieved by an evaluation of ideas, beliefs, and personal experiences of Saudi women so as to better understand how cultural, religious and traditional values influence their status in society. Whilst this researcher undertakes to highlight and discuss the various notions and experiences of Saudi Arabian women to determine how these factors are influential on their social status, there is still need to determine whether these social factors can be shaped to positively influence the participation of women as arbitrators in Saudi Arabia. This study seeks to develop and critically discuss this consideration.

³⁹ AlMunajjed (n 11).

Frank E. Vogel (2000) in the book *Islamic Law and Legal Systems*, the researcher considers that in light of the fact that Islamic law plays a central role in the constitution, religion, legislation and history of Saudi Arabia, there is need to better understand the Kingdom's legal system.⁴⁰ The researcher also studies the process of application of Islamic law in Saudi Arabia in light of the fact that there is little known literature on the subject and this has hindered an informed appreciation of the legal systems through which Islamic law is applied. The researcher argues that continued interpretive division towards the law in Saudi Arabia weakens our understanding of Islamic religion, history, and Muslim societies in general. Whilst such an analysis by this researcher on is insightful in shedding light on the design and content of Saudi Arabia's legal framework, this study seeks to cover unexplored areas that are significant in substantiating the main research question. This will involve an analysis of the history of Saudi Arabia's legal and judicial systems, as well as fielding discussions on how this historical background in the formation of Saudi Arabia's legal system has influenced the participation of women as arbitrators.

Douglas Pilawa (2019) in his journal *Sifting Through the Arbitrators for the Woman, the Minority, the Newcomer* examines the debate and criticism that surround the process of choosing/selecting an arbitrator in International Arbitration.⁴¹ The researcher considers that there exists an ethical obligation by counsel to provide a client with an arbitrator that would offer the best chance of succeeding in an international arbitration dispute. He argues that this ethical obligation results in the selection of well-known arbitrators with a proven track record thus creating a tension with proponents of gender equality that call for the inclusion of more women in international arbitration appointments. The researcher argues that calls to regulate the appointment process so as to promote the participation of women arbitrators infringes on the principle of party autonomy. The researcher further argues that surveys and reports by international arbitration institutions that show that there is a lack of diversity in arbitrator appointments are unconvincing. He argues that arguments that justify the inclusion of more women in international arbitration are unsupported as they do not point out the actual benefits that would arise as a result of gender diversity in international arbitration. According to the researcher, it would be more beneficial to

⁴⁰ Frank Vogel, *Islamic Law and the Legal System: Studies of Saudi Arabia* (Brill 2000).

⁴¹ Pilawa (n 9).

indicate how gender diversity could help solve other problematic areas in international arbitrations such as lengthy arbitration proceedings and high arbitration costs. He points out that once clients and relevant parties notice the collateral effect of gender diversity, there would be a significant increase in diversity of arbitrator pools thus resulting in sustainable health for the entire international arbitration system. The researcher offers valuable insight as to how the challenges of participation of women as arbitrators at the international level are more intricate and as such require equally intricate solutions. However, this research seeks to form a critical understanding of the suggested solutions so as to devise novel solutions that ought to be considered in promoting the participation of women as arbitrators globally.

1.5. Research Methodology

The analysis of the participation of women as arbitrators in international commercial arbitration provokes thematic issues that concern values, international and domestic practices, institutional frameworks, real or perceived biases that influence the participation of women as arbitrators at the international arbitration stage. Further, an analysis that juxtaposes these thematic issues to Saudi Arabia as a case study would similarly involve an analysis of the Kingdom's legal framework, the implication of Sharia to such an exceptional legal system as well as a historical analysis of factors that have influenced the development of Saudi Arabia's legal system. An analysis of such social factors renders quantitative/scientific methods of inquiry as unhelpful and inappropriate. The use of qualitative research methods has been preferred for this study as it best captures, religious narratives, cultural attitudes, and the legal framework that altogether influence the participation of women as arbitrators internationally as well as in Saudi Arabia. Under the qualitative research method, this study makes use of documentary research method, case study methods, historical analysis, and critical research methodology.

With regards to documentary research methods, this research has utilized documents such as books, journals, research papers, statutes, constitutions, cases, surveys, web based materials, statutes, international conventions, constitutions and government decrees/orders. The preference of such documentary sources is informed by the fact

that most of these sources were readily available physically in libraries as well as through access to electronic sources.

This research also adopted the case study method which falls under the category of qualitative research methods. The case study method was essential in that it offered an opportunity for an in-depth study of the inclusion of women as arbitrators in Saudi Arabia. Being one of the Gulf countries, Saudi Arabia is an exceptional case study in that its legal system is wholly based on Sharia unlike other Middle Eastern nations that have parallel legal systems with one being based on Sharia and the other being based on legislative instruments. The position of Saudi Arabia as the top performer among the Gulf countries with regards to the advancement of women rights according to the *Women Business and the Law* report by the World Bank provides a basis for studying whether such progressive steps have been extended to women in arbitration.⁴² Given that the case study method involves a careful and complete observation of a social unit, it provides an essential prism to view Saudi Arabia's legal framework as well the influence of Sharia on the legal framework.

A historical perspective has also been adopted to analyse: the position of women in the pre-Islamic era, the role of women in leadership positions in the early years of Islam as well as the historical development of the Saudi Arabian legal system. The study has also adopted a critical research methodology which is library based in chapters two, three, four and five. The approach allows a researcher discuss and critically analyse precedents, historical records, treaties and legislation. The critical analysis of these document is done using different approaches. The first is the exploratory method which is used to explore the issues that have contributed to the current position of women in Saudi's arbitration practice. The explanatory approach is used to provide the justification and reasoning behind the current challenges facing women arbitrators. Third, the study also uses gathering of information through field work to gain an insight of the rules and regulation of arbitration practices for women in Saudi Arabia. This will be done by gathering information and reviewing of different court decisions to determine the different schools of thoughts in regards to women's practice in arbitration in KSA especially the recent hearing that led to the appointment of a woman arbitrator. The primary focus during the collection of data is to understand

⁴² al-Agha (n 13).

the perceptions, the justification, and the provisions of the Sharia Law and the different *Fiqh* schools.

The process of gathering data is done from the three major types of sources in legal practice; the primary resources, secondary resources, and dictatorial resources. Primary sources include the laws, statute, law reports and cases while the secondary sources include articles, journals, books, thesis and dissertations, internet, and reputable newspaper reports. The primary sources of information will encompass the SAL 1983 and SAL 2012, the UNICTRAL Model Law on International Commercial Arbitration and international standards, case laws, court hearings and decisions, and legal commentaries. The analysis countries such as Malaysia, Indonesia and Egypt will be used. By focusing on arbitral case laws and awards, in KSA and these other countries, an understanding of the reasoning and justification for the women arbitrators in the ASD practice will be sought. In the process, a wide range of legal documents and other written literature including academic material, legal documents, journals, books, and legal magazines will be reviewed.

1.6. Thesis Structure

- **Chapter one:** This entails the introductory chapter of the study that lists the background and motivation of the study, aims and objectives, research questions, research methodology as well as a presentation of the contribution makes to the existing body of knowledge.
- **Chapter two:** This chapter seeks to address the significance of the role of women in arbitration on a global level. Firstly, one of the aims of discussing the significance of the participation of women is so as to establish the benefits their participation holds as well as establishing the challenges women face in such participation. The chapter also explores material on gender inequality in general across sectors, to derive a better understanding of the lack of gender diversity in Saudi Arabian arbitration panels. In providing a broader context for the systemic and cultural barriers that might prevent women from entering and advancing in male-dominated fields, the chapter aims to explore politics, education, and business to identify common patterns and underlying factors that contribute to the underrepresentation of women in high-level positions.

This will also inform potential solutions and strategies in the chapter to increase gender diversity in arbitration and address the broader issue of gender inequality in society.

Subsequently, this chapter seeks to analyse and discuss the historical role women have had in dispute resolution at the global level as well as further analysis on solutions devised to promote the role of women in international arbitration.

- **Chapter three:** This chapter seeks to critically analyse the state and historical background of Saudi Arabia's judicial and legal systems. A historical perspective is adopted in this chapter on the premise that a historical analysis will put into perspective the development of Saudi Arabia's legal and judicial system. In this context, one of the issues this chapter seeks to discuss is the role of women in political and leadership activities during the era of Prophet Muhammad. Further, this chapter seeks to analyse the views held by Muslim jurists and contemporary scholars regarding the appointment of women to judicial positions. The chapter also examines the definition, nature, and content of Sharia as it is applied in Saudi Arabia as well as a further analysis on the traditional Fiqh schools that advance varying views regarding on the participation of women as arbitrators. The chapter also considers and examines the provisions of Islam relating to the qualifications of a judge and an arbitrator in a bid to analyse the interrelationship of these two judicial positions under Sharia. Finally, there is also critical discussion on the impact of the French legal system on the development of Saudi Arabia's legal and judicial system in a bid to address the research question that seeks to establish the state of Saudi Arabia's judicial and legal system given that to an extent, the French code has influenced the make-up of the legal system in the Kingdom.
- **Chapter four:** This chapter seeks to establish the status/place of women within the context of Sharia. To this end, there is an overview of discussions that seek to establish what is the historical and present role of women as leaders in Islam. These discussions are addressed to the research question that requires an evaluation of the role of women as leaders in Islam. Further, this chapter seeks to critically analyse the position of Sharia regarding the appointment of women

as arbitrators and these includes analysis of hadith and the opinion of Muslims jurists that concern the appointment of women as arbitrators. There is also further analysis of the position of fiqh/traditional schools with regards to various views that either promote or reject the participation of women as arbitrators and judges. Lastly, this chapter contains discussions that seek to establish whether there are evidences and possibilities under Sharia for the appointment of female arbitrators.

- **Chapter five:** This chapter contains a critical discussion of the status of women as arbitrators in Saudi Arabia with respect to institutional and legislative changes and developments that affect the participation of women as arbitrators. These discussions seek to address the research question as to how women are recognized in Saudi Arabia's legal framework. Further, this chapter will contain discussions on the role of women as arbitrators during the pre-Islamic era. Various issues and perspectives by scholars and jurists are also discussed with regards to the participation of women in Saudi Arabia's judicial system. There is also an overview of the role of Saudi Arbitration Law 2012 and Saudi Arbitration Law 1983 in regulating the participation of women as arbitrators. There are further discussions on how legislation that govern the enforcement and validity of foreign arbitral awards affect the participation of women as arbitrators in Saudi Arabia. This chapter also discusses the influence of legislation that governs the enforcement and validity of foreign arbitral awards. The influence and effect that public policy considerations under Sharia have over the participation of women as arbitrators is an issue that is deliberated upon in this chapter. Further, there are discussions on the influence of Enforcement Law 2013 on the participations of women as arbitrators in Saudi Arabia. Lastly, there are discussions that seeks to evaluate what are the cultural and socio-economic traditions that affect the participation of women as arbitrators in Saudi Arabia. The discussions in these sections ultimately address the research question that seeks an elaboration of what is the status of the participation of women as arbitrators in Saudi Arabia.
- **Chapter six:** The chapter will provide a summary of the study and the main findings concluded, besides the contributions and the recommendations regarding the appointment of women arbitrators in the Kingdom of Saudi

Arabia. These recommendations would hopefully lead to practical solutions that will enhance the role of women within the field of arbitration, both in the Kingdom of Saudi Arabia and beyond.

CHAPTER TWO: THE SIGNIFICANCE OF WOMEN IN ARBITRATION INTERNATIONALLY

2.1. Introduction

It is a widely recognised fact that arbitration panels in international arbitration have tended to be dominated by men. The type of people at the grassroots level and those at the upper echelons in the field of arbitration are pretty obvious, leading to concerns about how this gender disparity can be countered and addressed. The growing recognition of arbitration has similarly led to balanced arbitration panels that consist of representatives with substantial practising experience and presumably possessing the required competencies and capabilities to handle the disputes before them. However, the field of arbitration is consistently confronted with issues of segregation that concern the male gender having dominance and the female gender missing out.

In this chapter, the focus will be on establishing the position of women in different professions before narrowing it down to their role in international arbitration whilst covering issues relating to the benefits of women in arbitration, the challenges facing them in this field as well as the solutions available to enhance their participation in arbitration. The chapter aims to answer the question, ‘What is the international significance of the role of women in international arbitration?’ This question entails evaluating the benefits of having women in arbitration and critically considering their challenges. In addition, this chapter delves into materials on gender inequality across sectors to better comprehend the insufficient representation of different genders in arbitration panels within Saudi Arabia. Putting into perspective the structural and cultural impediments that impede women’s entrance and success in industries with a predominance of males, the chapter aims to explore politics, education, and business to identify common patterns and underlying factors contributing to women's underrepresentation in high-level positions. Ultimately, the chapter will also inform potential solutions and strategies to increase gender diversity in arbitration and address the broader issue of gender inequality in society.

Further, this chapter discusses the role of international instruments such as the Convention on the Elimination of All Forms of Discrimination Against Women

(CEDAW) in promoting the participation of women in arbitration. Given that Saudi Arabia is a party to CEDAW, albeit with reservations, this chapter evaluates to what extent CEDAW can positively impact Saudi Arabia's legal framework to promote women's participation in arbitration. The findings of this research will contribute to the discussion on enhancing the involvement of women as arbitrators in Saudi Arabia. This is particularly important because any proposed solutions need to be specifically tailored to Saudi Arabia.

2.2. The Existence Oof Gender Inequality Across Professions in General

'Women are the most underutilised economic asset in the world's economy.' — Angel Gurría, Secretary-General, OECD.⁴³

In the context of evaluating different occupations, it's crucial to discern to what extent each one recognises and incorporates women's contributions or whether they diminish their importance within the professional environment. A vital part of this discourse involves exploring the perceived equality of men and women in their professional roles and the unique value brought forth by women. This conversation must be examined alongside ongoing societal debates and shifts that underscore the need for expanding women's representation within traditionally male-dominated hierarchies. Indeed, discussions on gender equality and women's empowerment in the workplace should involve both perspectives: one emphasising equality and similarities and the other highlighting the unique contributions of women. These perspectives are not mutually exclusive and can contribute to the broader goal of achieving gender equality and promoting women's participation in professional settings.

However, the potential bureaucratisation of some professions has further triggered the inequitable treatment of women in different occupations. According to various historians, numerous women throughout history have adhered to societal norms related to their innate caring and nurturing tendencies, which resulted in their entrance into different professional sectors open to them, including education, medicine, research

⁴³ US Congress Senate Committee on Foreign Relations, *Women in development: Looking to the future: Hearing before the Committee on Foreign Relations, United States Senate, Ninety-eighth Congress, Second Session, June 7, 1984* (US Government Publishing Office 1984).

science, and social work.⁴⁴ Consequently, this helped them contest the dominant narrative of gender bias in their respective fields.

Over the last several decades, women have made strides in different professions and domains. Tracing back to the 1950s and 1960s, women faced significant barriers to entry into careers such as law, medicine, and government institutions. Despite their high qualifications and education, women were denied opportunities solely because of gender. This discriminatory practice persisted until the twentieth century.⁴⁵ Substantially, the social and ideological barriers and stereotypes led them to adopt occupations with the least social and economic status and were non-professionalised (i.e., midwifery and office work).⁴⁶ Nevertheless, starting in the 19th century, feminist organisations in both England and America endeavoured to challenge the prevailing belief that women should be separate from men.⁴⁷ They advocated for equal recognition within different professions, voicing their argument for equal opportunities. Such movements demonstrate that although women have always worked, a changing attitude regarding their place in the workforce gives them financial independence, forces them out of the home, and upends the conventional division of labour.⁴⁸ As a result, paid labour outside of the household enhances women's status in the world of work.

Despite overall increasing presence of women in the workforce,⁴⁹ the Catalyst Report 2020 reveals a decline in their global representation, dropping to 47.1% from 50.9% in 1990, while men's contribution remains at 74.7%.⁵⁰ This gender gap is attributed to

⁴⁴ AMM Boudet, P Petesch, and C Turk, *On Norms and Agency: Conversations about Gender Equality with Women and Men in 20 Countries* (World Bank 2013).

⁴⁵ W Leal Filho and others, *Gender Equality* (Springer 2021).

⁴⁶ Patricia Albjerg Graham, 'So Much to Do: Guides for Historical Research on Women in Higher Education' (1975) 76 Teachers College Record 421.

⁴⁷ National Women's History Alliance, 'History of the Women's Rights Movement' (2023) <<https://nationalwomenshistoryalliance.org/history-of-the-womens-rights-movement/>> accessed 29 May 2023.

⁴⁸ International Labour Organization and Inter-Parliamentary Union, 'Women and Work: Seminar for Members of Parliamentary Bodies Dealing with Gender Equality and Committees Addressing Labour Issues' (2007) <http://archive.ipu.org/pdf/publications/womenwork_en.pdf> accessed 20 June 2023.

⁴⁹ Jacobs Pearl and Schain Linda, 'Professional Women: The Continuing Struggle for Acceptance and Equality' (2009) <https://digitalcommons.sacredheart.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1000&context=cj_fac> accessed 20 June 2023.

⁵⁰ Catalyst Report, 'Women in the Workforce: Global (Quick Take) - Labor Force Participation' (2021) <www.catalyst.org/research/women-in-the-workforce-global/> accessed 20 June 2023.

structural and cultural restrictions, particularly evident in liberal professions such as accounting, law, notary, engineering, architecture, and medicine. These professions require high qualifications and specialized training, often aligned with conservative values and traditional organizational structures, leading to resistance towards change, innovation, and certain gender attitudes. As a result, senior positions within these professions continue to be plagued by gender issues, stereotypes, and inequality.^{51,52}

Similarly, when assessing the role and participation of women in professions significantly dominated by men, feminist social theorists, social scientists, activists, and historians have argued that societal-wide male hegemony is endorsed through patriarchal and capitalist interests and privileges.⁵³ Moreover, both vertical and horizontal segregation cause disparities in the workforce.⁵⁴ Vertical segregation pertains to the assignment of men to high-quality jobs with elevated status and higher remuneration, while horizontal segregation refers to the allocation of men to specific job types based on their characteristics, such as manual labour and women being assigned more to nonmanual jobs as understood by Lippa and colleagues.⁵⁵

This definition of segregation and its impact on the distribution of jobs is valuable to recognise women's significance and the challenges and efforts that pioneering women in history have faced in standing against male hegemony in different professions.

⁵¹ Mara Del Baldo, Adriana Tiron-Tudor and Widad Atena Faragalla, 'Women's Role in the Accounting Profession: A Comparative Study between Italy and Romania' (2018) 9(1) Administrative Sciences 2

<www.researchgate.net/publication/329900225_Women%27s_Role_in_the_Accounting_Profession_A_Comparative_Study_between_Italy_and_Romania> accessed 31 December 2021.

⁵² Hannah Brenner, 'Expanding the Pathways to Gender Equality in the Legal Profession' (2014) 17(2) Legal Ethics

<www.researchgate.net/publication/265340686_Expanding_the_Pathways_to_Gender_Equality_in_the_Legal_Profession> accessed 20 June 2023.

⁵³ National Women's History Alliance, 'History of the Women's Rights Movement' (2023) <<https://nationalwomenshistoryalliance.org/history-of-the-womens-rights-movement/>> accessed 29 May 2023.

⁵⁴ Kirsti Rawstron, 'Diverging Paths: Occupational Sex Segregation, Australia, and the OECD' (2012) <<https://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.676.5747&rep=rep1&type=pdf>> accessed 20 June 2023.

⁵⁵ Richard Lippa, Kathleen Preston and John Penner, 'Women's Representation in 60 Occupations from 1972 to 2010: More Women in High-Status Jobs, Few Women in Things-Oriented Jobs' (2014) <<https://journals.plos.org/plosone/article?id=10.1371/journal.pone.0095960>> accessed 28 May 2023.

2.2.1. Benefits of Achieving Gender Equality Across All Sectors

One of the main benefits of gender equality is its positive impact on social and economic prospects. Research shows that nations with higher economic equality levels tend to have lower crime rates, better health outcomes, higher levels of social trust, and more cohesive communities.⁵⁶ Most notably, higher economic stability and growth levels, along with increased social mobility and educational attainment, correlate with economic equality.⁵⁷ Therefore, securing gender equality in all sectors can help to foster a more stable, prosperous, and nonviolent society.

Another significant advantage of equality is its effects on mental health and well-being. Research indicates that encounters with discrimination and inequity tend to exacerbate mental health conditions such as depression and anxiety.⁵⁸ Conversely, promoting equality and minimising discrimination can enhance mental health outcomes for individuals and communities. For example, research shows that people of colour have increased self-esteem and reduced psychological stress due to living in more equal states.⁵⁹ Therefore, actively encouraging equality contributes to the enhancement of well-being for both individuals and society as a whole. Promoting gender diversity in arbitration panels can help create a sense of value, respect, and support for all individuals in society.

Furthermore, promoting equality across all sectors plays a vital role in addressing social justice and fear issues. Historically, women, people of colour, and other marginalised community members have faced discrimination and marginalisation in multiple spheres of life.⁶⁰ By actively promoting equality and combating discriminatory behaviours and attitudes, we can create a just and fair society that

⁵⁶ Kate E Pickett and Richard G Wilkinson, 'Income Inequality and Health: a Causal Review' (2015) 128 *Social Science & Medicine* 316.

⁵⁷ Jochen Hartwig, 'Jochen Hartwig Recommends 'In It Together: Why Less Inequality Benefits All' by OECD' in Bruno S Frey and Christoph A Schaltegger (eds), *21st Century Economics* (Springer 2019).

⁵⁸ Elizabeth A Pascoe and Laura Smart Richman, 'Perceived Discrimination and Health: a Metaanalytic Review' (2009) 135 *Psychological Bulletin* 531.

⁵⁹ David Williams, 'Stress and the Mental Health of Populations of Color: Advancing Our Understanding of Race-related Stressors' (2018) 59(4) *Journal of Health and Social Behavior* 466.

⁶⁰ Mark L Hatzenbuehler and others, 'Structural Stigma and All-cause Mortality Among Sexual Minorities: Differences by Sexual Behaviour?' (2020) 244 *Social Science & Medicine* 112463.

provides equal opportunities and resources while reducing social exclusion.⁶¹ Ultimately, the promotion of gender equality fosters a welcoming and inclusive society for all people.

In conclusion, promoting gender equality not only has positive impacts on social and economic prospects but it also improves mental health and well-being while addressing social justice issues. By securing gender equality in all sectors, we can foster a stable, prosperous, and nonviolent society, enhance the well-being of individuals and communities, and create a welcoming and inclusive culture for all people.

2.2.2. Causes of Inequality: A General Overview

Gender inequality has complex and multifaceted causes influenced by social, cultural, economic, and political factors. Gender stereotypes and traditional gender roles, encompassing societal expectations and behaviours attributed to individuals based on their gender identity, serve as prominent catalysts for inequality.⁶² These stereotypes and roles can impose limitations on women, hindering their access to resources such as education, employment, and other opportunities, consequently reinforcing gender-based discrimination. Moreover, violence against women and sexual harassment, along with these other factors, combine to foster an atmosphere of fear and limits women's agency in society.⁶³

Gender inequality is influenced by economic factors, as evidenced by the wage disparity between women and men. Women are often paid less than their male counterparts, leading to overrepresentation in low-paying positions.⁶⁴ Discrimination and bias contribute heavily to this gender pay gap. Still, it is also the result of structural

⁶¹ Todd D Nelson (ed), *Handbook of Prejudice, Stereotyping, and Discrimination* (2nd edn, Psychology Press 2015).

⁶² Joseph K Kim, Crystal M Harold and Brian C Holtz, 'Evaluations of Abusive Supervisors: The Moderating Role of the Abuser's Gender' (2022) 43 *Journal of Organizational Behavior* 465.

⁶³ UN Women, 'Beyond vulnerability to gender equality and women's empowerment and leadership in disaster risk reduction: Critical actions for the United Nations system' (2021) <www.unwomen.org/en/digital-library/publications/2021/11/research-paper-beyondvulnerability-to-gender-equality> accessed 31 May 2023.

⁶⁴ World Economic Forum, 'Global gender gap report 2021' (2021) <www.weforum.org/reports/global-gender-gap-report-2021/> accessed 31 May 2023.

barriers such as a lack of affordable childcare and poor legislation that limits women's professional advancement. Moreover, gender inequality is closely intertwined with poverty and economic standing, as women face heightened vulnerability to financial instability and disparity, placing them at a greater risk of experiencing poverty.⁶⁵

Politics plays a significant role in perpetuating gender inequality by marginalising women in political arenas and disregarding their perspectives in discussions related to politics.⁶⁶ Consequently, women face obstacles in advocating for their rights and exerting influence on policy-making processes, thereby reinforcing discriminatory practices rooted in gender within legislation and law enforcement. Furthermore, cultural, and religious norms that reinforce gender inequality and restrict women's rights and freedoms pose additional challenges to achieving gender equality.⁶⁷ Addressing the systemic and interconnected factors contributing to gender inequality requires a holistic approach rather than isolated efforts.

Therefore, any efforts to promote gender equality should comprehensively address the underlying causes of gender inequality, such as addressing harmful cultural norms, granting access to education, and training opportunities, implementing work-life balance policies, and encouraging women's political participation and leadership.

2.2.3. The Implications of Gender Inequality

Gender inequality has significant effects at the individual, communal, and societal levels. First, one of its most alarming effects is on women's health and well-being. UN Women suggests that gender inequality and discrimination become barriers to healthcare services, worsening women's mental health and chronic illnesses.⁶⁸ One

⁶⁵ Canadian Women's Foundation, 'The Facts about Women and Poverty in Canada' (6 April 2022) <<https://canadianwomen.org/the-facts/womens-poverty>> accessed 31 May 2023.

⁶⁶ Til Wykes and Jo Evans, 'Gender Diversity in the Journal of Mental Health—How Are We Doing and What Do We Need to Do?' (2020) 29 *Journal of Mental Health* 493.

⁶⁷ Norwegian Ministry of Foreign Affairs, 'Freedom, Empowerment and Opportunities: Action Plan for Women's Rights and Gender Equality in Foreign and Development Policy 2016-2020' (OECD, 2016) <www.oecd.org/dac/gender-development/Norway_Action%20Plan%20for%20Women%E2%80%99s%20Rights%20and%20Gender%20Equality_2016-2020.pdf> accessed 31 May 2023.

⁶⁸ World Bank, 'Gender Equality for Development' (10 November 2021) <www.worldbank.org/en/research/dime/brief/dime-gender-program> accessed 31 May 2023.

other factor is that gender inequality can restrict women's opportunities for economic and educational advancement, which significantly lowers their income. It perpetuates a cycle of disadvantage that individual women, their families, and communities may find difficult to break.

Second, gender inequality significantly influences the stability of social and political systems. As previously mentioned, women often face underrepresentation in politics, resulting in exclusion from decision-making processes.⁶⁹

Consequently, policies and laws created under such circumstances fail to address the needs of the entire population. In situations where gender inequality intersects with other forms of discrimination and marginalisation, this dynamic has the potential to amplify social conflicts and political instability. Ultimately, it can restrict women's complete engagement in society and the economy, thereby constraining their potential contributions.

Undoubtedly, the economic contribution of women is crucial for sustainable development, considering that they constitute half of the global population. It is imperative to address gender inequality to ensure equal opportunities for women and their involvement in driving economic growth.⁷⁰ Additionally, gender inequality exacerbates environmental problems such as climate change by preventing women from participating in decision-making processes and exacerbating pre-existing vulnerabilities. Therefore, addressing gender inequality is essential to achieving a just and equitable future in addition to being a matter of justice and human rights.⁷¹

Lastly, gender inequity has lasting adverse effects on future generations. When girls and young women are denied equal opportunities compared to boys and young men, it hampers their personal growth, development, and societal contributions.⁷² This restriction of opportunities can lead to a loss of valuable skills, innovation, and creativity, which in turn can hinder economic progress and overall development.

⁶⁹ Elisabeth Porter, 'Women, Political Decision-making, and Peace-building' (2003) 15 *Global Change, Peace & Security* 245.

⁷⁰ Danan Gu, Kirill Andreev and Matthew E Dupre, 'Major Trends in Population Growth Around the World' (2021) 3(28) *China CDC Weekly* 604.

⁷¹ OECD, 'Development Finance for Gender-Responsive Climate Action' (OECD Development Cooperation Directorate 2022) ch 3, 25.

⁷² OECD, 'Gender Equality in Education, Employment and Entrepreneurship: Final Report to the MCM 2012' (2012) <www.oecd.org/employment/50423364.pdf> accessed 31 May 2023.

Moreover, since discriminatory attitudes and behaviours are often transmitted from parents to children, gender inequality tends to persist across generations. Therefore, it is vital to address gender inequality in order to foster a fair and just society that nurtures the potential of every individual, regardless of their gender, and enables the progress of individuals, communities, and societies as a whole.

2.3 Gender Inequality and the Manifestation of the Unjustifiable Gender Gap in the Legal Profession

2.3.1 Gender Inequality and Discrimination

Globally, there is widespread acknowledgement and strong disapproval of discrimination in employment. However, despite consistent advocacy and demands for its eradication, discriminatory practices continue to persist within labour markets.⁷³ There are various forms of discrimination based on race, religion or sex, and their manifestations differ across and within states.⁷⁴ Even in countries where equal opportunity practices are practised, discriminated groups do not enjoy equal employment status as the members of the dominant groups.⁷⁵

According to the International Labour Organization (ILO) Discrimination Convention of 1958,

*Discrimination is the distinction, exclusion, national extraction, or social origin which has the effect of nullifying or impairing equal opportunity or treatment in employment or occupation (ILO, No. 111).*⁷⁶

⁷³ Manuela Tomei, 'Discrimination and equality at work: A review of the concepts' (2008) 142 International Labour Review <<https://onlinelibrary.wiley.com/doi/10.1111/j.1564913X.2003.tb00538.x>> accessed 31 April 2023.

⁷⁴ *ibid.*

⁷⁵ Garry Canepa, 'The Myth of Equal Opportunity' (2018) Northeastern University Political Review 21 December <<https://nupoliticalreview.org/2018/12/21/the-myth-of-equal-opportunity/>> accessed 31 May 2023.

⁷⁶ International Labour Organization (ILO), 'Discrimination (Employment and Occupation) Convention' (Convention No 111, 1958)

Discrimination, therefore, refers to the differences in the treatment of individuals in the workplace based on their characteristics, such as race or sex, irrespective of whether the person's profile matches the requirements of a particular job. The differences in the treatment of individuals limit their access to opportunities and benefits that are available to others in society. Despite the well-established efforts and movements to address discrimination and gender disparity, full equality between genders worldwide remains largely aspirational and still confronts gender inequalities in different professions. In some domains, this inequality is blatant, with no effective measures being taken to address them, while in certain other fields, it may be less apparent but still unenviable. This imbalance stems from the influence of patriarchy and gender segregation, which have historically been used to justify the association between professions and gender roles. Consequently, these factors have hindered the necessary re-evaluation of professionalism and the adoption of gender-neutral approaches in practice.⁷⁷

The inclusion of gender equality provisions in various international documents such as the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights (ICCPR), the Convention on the Political Rights of Women, the Vienna Declaration and Programme of Action (VDPA), and UN General Assembly resolutions 66/130 highlights the importance of women's equal participation. Particularly, Article 7 of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) specifically requires states to eradicate discriminatory practices against women, ensuring their equal access to public office and the performance of public duties, including in the judiciary, on par with men.⁷⁸

Over the past few decades, there has been a noticeable rise in the representation of women within the legal profession across various regions of the world. In 1950, Erwin Griswold, the Dean of Harvard Law school stated:

⁷⁷ Anne Witz, 'Professions and Patriarchy' (1992)

<www.taylorfrancis.com/books/mono/10.4324/9780203167786/professions-patriarchy-anne-witz> accessed 31 May 2023.

⁷⁸ Economic and Social Commission for Western Asia (ESCWA), 'Policy Brief Women in the Judiciary: A Stepping Stone towards Gender Justice' (2018) <<https://archive.unescwa.org/publications/women-judiciary-gender-justice-arab-countries>> accessed 31 May 2023.

Most of us have seen women from time to time in our lives and have managed to survive the shock. I think we can take it, and I doubt that it will change the character of the school or even its atmosphere to any detectable extent.⁷⁹

In the past, women faced frequent barriers in pursuing certain careers because society believed they were fundamentally different. Even when women were eventually granted entry into these professions, they were still expected to adapt to existing systems that had not been properly adjusted to include them.⁸⁰

According to The Alliance Council, gender disparity and inequality seem to prevail in all professions and industries globally but with major influence in male-dominated domains including law—firms, governmental agencies, public offices, information technology, science and finance and in domains with sexual boundaries that may unreasonably impact women (i.e. legal community).⁸¹ The prevalence of gender disparity is not restricted to deprived or underdeveloped sectors of society but is also obvious in the sectors where there are amiable conditions for growth and development. Research and reports have suggested that professions and institutes capitalising on diversity and inclusion have been found to perform 87% times better.⁸² Like other professions, the legal community is confronting these inequalities and is still in the phase to mitigate the invidious biases and challenges. The systematic domination of male fraternity in board rooms or courts/tribunals reveals the blindfold and irony underlying the personified juridical structure.

The dearth of women in a diverse group of lawyers and prestigious positions within the legal field, such as attorneys and arbitrators, is a clear indication of an ongoing global gender disparity. This phenomenon aligns with the fact that women are not well represented or valued in potential leadership roles and other high-quality jobs,

⁷⁹ Erwin Griswold, 'Developments at the Law School' (1950) 10 Harvard Law School Year Book cited in Deborah L Rhode, 'Gender and Professional Roles' (1994) 63(1) Fordham Law Review 39.

⁸⁰ Deborah L Rhode, 'Gender and Professional Roles' (1994) 63(1) Fordham Law Review 39.

⁸¹ Payel Chatterjee and Vyapak Desai, 'Is Increasing Gender and Ethnic Diversity in Arbitral Tribunals a Valid Concern?' (2020) <http://arbitrationblog.kluwerarbitration.com/2020/03/01/is-increasinggender-and-ethnic-diversity-in-arbitral-tribunals-a-valid-concern/?doing_wp_cron=1592718604.5869250297546386718750> accessed 3 June 2023.

⁸² Erik Larson, 'New Research: Diversity + Inclusion = Better Decision Making At Work' (*Forbes*, 21 September 2017) <www.forbes.com/sites/eriklarson/2017/09/21/new-research-diversity-inclusion-better-decision-making-at-work/> accessed 1 June 2023.

including those in education, health, social sciences, and political sciences.⁸³ Alarming, the work of Demeter and Colleagues shows that rampant gender inequality in the legal profession is not only affecting women but the entire legal profession.⁸⁴ The juridical structure within the legislative field, which is in charge of enforcing the law, supports discrimination and sexism, and it seems to lack awareness in effectively addressing the problem of inequality among its members. According to Susan Sturm, the increasing exclusion of women from arbitration at the international level highlights a problem within the institutions and professions responsible for addressing inequalities and exclusion.⁸⁵ These entities are failing to effectively address and promote women's equality, potential, and significance.⁸⁶ Women in the United States (US) face greater barriers to developing their professional lives than men do, and despite the fact that more women than men have been attending law schools over the past three decades, they still face barriers to advancing to partnership and leadership positions in firms.^{87,88} Between 2006 and 2017, the equity of women partners in the legal fields grew by only two per cent.⁸⁹ Women in the legal professions struggle to strike a balance between the demands of high-status occupations and their domestic duties. The professional careers of men and women are shaped differently by organisational structures designed to regard gender as an individual attribute or a social identity, practice environments like the size of the businesses, and personal life events

⁸³ World Economic Forum, 'Global Gender Gap Report 2016' (2016) <https://www3.weforum.org/docs/GGGR16/WEF_Global_Gender_Gap_Report_2016.pdf> accessed 1 May 2023.

⁸⁴ DR Demeter, P Eastal and N Nelson, 'Gender and International Commercial Arbitrators: Contributions to Sex Discrimination in Appointments' (2015) 4 Transnational Dispute Management Journal <www.transnational-dispute-management.com/article.asp?key=2240> accessed 20 June 2023.

⁸⁵ Susan Sturm, 'Lawyers and the Practice of Workplace Equity' [2002] Wisconsin Law Review 277.

⁸⁶ Rhode (n 80).

⁸⁷ Deborah A O'Neil, Margaret E Brooks and Margaret M Hopkins, 'Women's Roles in Women's Career Advancement: What Do Women Expect of Each Other?' (2018) 23(9) Career Development International <www.researchgate.net/publication/326750250_Women%27s_roles_in_women%27s_career_advancement_what_do_women_expect_of_each_other> accessed 31 May 2023.

⁸⁸ Gabriele Pickert and Joyce Sterling, 'Gender Still Matters: Effects of Workplace Discrimination on Employment Schedules of Young Professionals' (2017) 6(4) Laws <www.researchgate.net/publication/321326783_Gender_Still_Matters_Effects_of_Workplace_Discrimination_on_Employment_Schedules_of_Young_Professionals> accessed 31 May 2023.

⁸⁹ National Association for Law Placement, 'Equity Partners in Law Firms' (2019) <www.nalp.org/0419research> accessed 31 May 2023.

like marriage and parenthood.⁹⁰ Additionally, it states that constraints on both the internal and external levels, such as roles and responsibilities connected to family life, the environment, customs, and preconceptions, make it more difficult for women to advance in their professional careers than it is for males.⁹¹

Since 2018, the number of women practicing as solicitors in the U.K. has exceeded that of men.⁹² However, men still predominantly hold leadership positions within the field, meaning that women's experiences and qualifications are not consistently reflected in the leadership roles they occupy. In the UK unconscious bias was cited for the limited number of women in senior positions in law firms including the women's inability to fit with the 'traditional male stereotype leader of being strong, decisive, and assertive.'⁹³

Global progress in terms of human development in areas of infant mortality, life expectancy and female literacy has risen in the last three decades in MENA countries.⁹⁴ Similarly, women are also experiencing positive trends on economic, political, and decision-making fronts.⁹⁵ However, despite the educational gains, women are yet to experience greater empowerment and participation in public life. One way to address these challenges is by having more women in the judiciary to create a more favourable environment for women and address the structural and social obstacles within the legal

⁹⁰ Gabriele Pickert and Joyce Sterling, 'Gender Still Matters: Effects of Workplace Discrimination on Employment Schedules of Young Professionals' (2017) 6(4) *Laws* <www.researchgate.net/publication/321326783_Gender_Still_Matters_Effects_of_Workplace_Discrimination_on_Employment_Schedules_of_Young_Professionals> accessed 31 May 2023.

⁹¹ Anita Racene, 'Development of Women's Career Pattern in Relation of Employment' (2014) 2(1) *Baltic Journal of Career Education and Management* 16.

⁹² Tom Baker, 'The Future is Female: Women Lawyers Outnumber Men in UK as the In-House Boom Continues' (*Legal Business*, 29 May 2023) <www.legalbusiness.co.uk/blogs/the-future-isfemale-women-lawyers-outnumber-men-in-uk-as-the-in-house-boom-continues/> accessed 29 May 2023.

⁹³ Law Society of England and Wales, 'Influencing for Impact: The Need for Gender Equality in the Legal Profession - Women in Leadership in Law Report: Findings from the Women's Roundtables' (2019) <www.law.ox.ac.uk/sites/files/oxlaw/influencing_for_impact_-_the_need_for_gender_equality_in_the_legal_profession_-_women_in_leadership_in_law_report.pdf> accessed 28 June 2023.

⁹⁴ OECD, 'Women in Public Life – MENA Brochure' (2018) <www.oecd.org/mena/governance/women-in-public-life-mena-brochure.pdf> accessed 29 May 2023.

⁹⁵ *ibid.*

system that hinder their access to legal rights. By placing the responsibility for gender equality on the courts, women can have a better chance of overcoming these barriers.⁹⁶

The OECD identified the major barriers to women serving in judicial positions as gender stereotypes and attitudinal barriers to their suitability and experiences and customary and religious law traditions.⁹⁷ In the Middle East and North Africa (MENA) region, there has been an increase in the representation of women in the judiciary over the past few decades. Currently, women make up 25% of jurists in the region. However, it's important to note that the level of representation varies across different countries in the MENA region. Lebanon has the highest number of women judges at 49.3% in 2018, in Algeria female judges were 48% in 2017, Tunisia had 43.1%, Morocco has 23,5% women judges, Bahrain, 9%, Jordan at 22%, Syria, 17.5% and Palestine 17.8% in 2018 respectively.⁹⁸ In the Gulf countries, women judges are rarer with some countries having no females at the highest levels of the legal systems.⁹⁹ Gulf countries such as the UAE, Saudi Arabia, Kuwait, and Egypt have less than 1% women judges, 4 female judges in the UAE and only 22 female deputy prosecutors in Kuwait.¹⁰⁰ These trends are linked to the perception that judges and prosecutors are hazardous professions and inappropriate for women. As seniority increases in the judiciary, there is a noticeable decrease in the proportion of women holding positions. This means that as women progress to higher courts, their representation diminishes. To illustrate this, Tunisia's Court de Cassation, which is the highest court in the country, has only 28% women compared to the representation of 56% women in its lowest-level courts.¹⁰¹

Increasing gender diversity in arbitral tribunals is a valid concern because it is believed by several scholars that the legitimacy of international courts and tribunals relies on their diversity and inclusiveness.¹⁰² Hence, a lack of women judges in courts raises questions about their legitimacy. According to Nienke Grossman, the legal and judicial

⁹⁶ National Association for Law Placement, 'Equity Partners in Law Firms' (2019) <www.nalp.org/0419research> accessed 31 May 2023.

⁹⁷ OECD (n 94).

⁹⁸ ESCWA (n 78).

⁹⁹ OECD (n 94).

¹⁰⁰ ESCWA (n 78).

¹⁰¹ OECD (n 94).

¹⁰² L Hodson, 'Gender and the International Judge: Towards a Transformative Equality Approach' (2022) 35 *Leiden Journal of International Law* 913.

systems exhibit a bias towards men, favouring them over women when it comes to dispute resolution.¹⁰³ This bias is evident in international courts, where efforts are being made to recognise the important role of women in prominent legal practices like arbitration. The aim is to address the low representation of women as judges in international courts, which undermines the legitimacy of these courts from both normative and sociological perspectives. By excluding women, who bring democratic value to the table, so-called impartial institutions like international courts perpetuate this exclusion, posing a risk to their overall legitimacy, as it associates authority primarily with male arbitrators and considers them more qualified than their female counterparts.

2.3.2. Gender Inequality and Judicial Appointment

In courts where States are mandated by the statute to take sex into account when nominating or voting for judges, the representation of women was higher as is the case with the ICC (47%), ECHR (29%), African Court on Human and People's Rights and the *ad litem* benches of ICTR and ICTY.¹⁰⁴ In these courts, 32% per cent of judges were women in mid-2015, indicating a fair representation, but where a fair representation was not required, women made up only 15% of the bench.¹⁰⁵ In the recent election of the International Court of Justice (ICJ), only three female candidates were submitted to the final candidate list by the UN Secretary-General.¹⁰⁶ Since its inception, ICJ has only had 4 judges out of the total 108 judges with women currently representing only 20% of the 15 judges on the ICJ bench.¹⁰⁷ Another survey was

¹⁰³ Nienke Grossman, 'Sex on the Bench: Do Women Judges Matter to the Legitimacy of International Courts' (2012) 12(2) Chicago Journal of International Law <<https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1367&context=cjil>> accessed 28 June 2020; Nienke Grossman, 'Achieving Sex-Representative International Court Benches' (2016) 110(1) American Journal of International Law. See also Cecily Rose, 'Justifying Arguments About Selection Procedures for Judges at International Courts and Tribunals: A Response to Nienke Grossman' (2016) 110(86) AJIL Unbound.

¹⁰⁴ Nienke Grossman, 'Shattering the Glass Ceiling in International Adjudication' (2006) 56(2) Virginia Journal of International Law 75.

¹⁰⁵ *ibid.*

¹⁰⁶ E Edroma, 'Promoting Gender Equality in the Judiciary' (*United Nations Development Programme*, 5 July 2019) <www.undp.org/blog/promoting-gender-equality-judiciary> accessed 16 June 2023.

¹⁰⁷ Jarpa Dawuni, 'Disrupting Global Patriarchy: Why Gender Diversity at the International Court of

conducted on eleven internationally recognised adjudicatory bodies surveyed in May and June 2010 including mainly the International Court of Justice (ICJ), the International Tribunal for the Law of the Sea (ITLOS), the African Court on Human and Peoples' Rights (ACHPR), the InterAmerican Court of Human Rights (IACHR), the International Criminal Court (ICC), the European Court of Human Rights (ECHR), and the European Court of Justice (ECJ). The male fraternity was found to be significantly overrepresented, with only 21% female representation reported. This lack of female judges was particularly notable at ITLOS, where there were no women judges until May 2010. Similarly, the ICJ had a very low presence of women judges. The ECJ, following the trend of ITLOS and ICJ, had the second-lowest number of women judges, with only 15% of permanent female judges in May 2010.¹⁰⁸ Given the esteemed status of these judicial bodies, it is crucial to ensure equal gender representation in international courts to ensure the court's legitimacy (based on fairness, impartiality, adherence to state policies, transparency, coherence with democratic norms, and social legitimacy). This would not only help to uphold and reflect their normative and social legitimacy but also validates their authority in the eyes of key stakeholders such as states, non-governmental organisations, international organisations, and the international community.¹⁰⁹

2.3.3. The Gender Pay-Gap and Gender Discrimination in the Legal Profession

International human rights law acknowledges gender discrimination as a violation of one's fundamental human rights. In 1979, the United Nations Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) defined gender discrimination as:

Justice Matters for Africa and the World' (2020)
 <<http://opiniojuris.org/2020/11/17/disrupting-global-patriarchy-why-gender-diversity-at-the-international-court-of-justice-matters-for-africa-and-the-world/>> accessed 28 June 2023.

¹⁰⁸ Nienke Grossman, 'Sex Representation on the Bench and the Legitimacy of International Criminal Courts' (2011)
 <www.ohchr.org/Documents/HRBodies/HRCouncil/AdvisoryCom/Submissions/Annex2UBSL.pdf>
 accessed 15 June 2020.

¹⁰⁹ Allen Buchanan and Robert O Keohane, 'The Legitimacy of Global Governance Institutions' (2006) 20(4) Ethics & International Affairs
 <https://www.researchgate.net/publication/227654269_The_Legitimacy_of_Global_Governance_Institutions> accessed 17 June 2020.

any distinction, exclusion, or restriction made on the basis of sex with the effect or purpose of impairing or nullifying the recognition, enjoyment, or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, and other fields.¹¹⁰

Since various legislation and human rights agreements worldwide prohibit gender discrimination or any other forms of unequal treatment based on gender, it is vital to maintain gender parity in the legal profession in order to support a fair and inclusive society. As explained, there are many more advantages for the whole society than the individual rights granted by gender equality. Notably, Hakim makes the case that gender equality in employment encourages a more diversified and dynamic workforce, which in turn leads to improved productivity and innovation.¹¹¹ Nandamuri and colleagues note that if women were equally involved in the workforce as men, it would lead to a significant boost in the global economy. By the year 2025, this increased participation could result in a 26% growth, which is equivalent to a staggering \$28 trillion. To put it into perspective, this amount is almost the same as the combined gross domestic products (GDPs) of the United States and China.¹¹²

Moreover, the American Bar Association emphasises that achieving gender parity and involvement in legal institutions not only establishes equality within the profession but also sets a standard for justice and the rule of law.¹¹³ In turn, gender equality can effectively decrease instances of discrimination and violence directed towards individuals based on their gender. Additionally, gender equality plays a crucial role in challenging and dismantling stereotypes and biases that perpetuate exclusion and

¹¹⁰ Barbara Holland-Cunz and Uta Ruppert, 'Convention on the Elimination of all Forms of Discrimination Against Women, New York, 18 December 1979' in Barbara Holland-Cruz and Uta Ruppert (eds), *Frauenpolitische Chancen globaler Politik: Verhandlungserfahrungen im Internationalen Kontext* (Springer 2002).

¹¹¹ Catherine Hakim, *Key Issues in Women's Work: Female Diversity and the Polarisation of Women's Employment* (Psychology Press, 2004).

¹¹² Purna Prabhakar Nandamuri, Vijayudu Gnanamkonda, and Chakravarthi Koundinya 'Social Economics and Women Entrepreneurship—A Competency Approach' (2019) 9(5) *Theoretical Economics Letters* 1235.

¹¹³ Allison E Laffey and Allison Ng, 'Diversity and Inclusion in the Law: Challenges and Initiatives' (*American Bar Association*, 2 May 2018)

<www.americanbar.org/groups/litigation/committees/jiop/articles/2018/diversity-and-inclusion-in-the-law-challenges-and-initiatives/> accessed 31 May 2023.

discrimination. Looking beyond the scope of human rights, securing gender equality is essential for the attainment of the Sustainable Development Goals (SDGs), particularly considering the significant impact of women's involvement in achieving these goals.¹¹⁴ It is important to note that Saudi Arabia and many Gulf countries are signatories to these goals. By actively working towards gender equality, these countries can contribute to the overall achievement of the SDGs and create more inclusive and sustainable societies.

The legal profession worldwide often experiences a gender gap and imbalance, which has been extensively studied. This unjustifiable gender gap in the legal profession is caused by several factors, including unconscious bias, stereotyping, and discriminatory practices.¹¹⁵

A key cause of women's exclusion in the legal and policy-making structures is unconscious bias.¹¹⁶ Unconscious biases are deeply embedded opinions and beliefs that people have without being aware of them. These biases can influence how decisions are made, which can result in discriminatory practices. For instance, research has demonstrated that unconscious biases in the United States affect how judges evaluate female attorneys, which results in less favourable outcomes for female attorneys in court.¹¹⁷ Similarly, due to unconscious biases and stereotypes about women's leadership potential, women in the United Kingdom are less likely to be appointed as Queen's Counsel, the most senior barristers.¹¹⁸

¹¹⁴ UN Women, 'Why Gender Equality Matters at All SDGs: An Excerpt of *Turning Promises into Action: Gender Equality in the 2030 Agenda for Sustainable Development*' (2018) <www.unwomen.org/sites/default/files/Headquarters/Attachments/Sections/Library/Publications/2018/SDG-report-Chapter-3-Why-gender-equality-matters-across-all-SDGs-2018-en.pdf> accessed 29 May 2023.

¹¹⁵ Whitney Woodington, 'The cognitive foundations of formal equality: Incorporating gender schema theory to eliminate sex discrimination towards women in the legal profession' (2010) 34 *Law and Psychology Review* 135.

¹¹⁶ International Labour Organization, 'ACT/EMP Research Note – Breaking Barriers: Unconscious Gender Bias in the Workplace' (2017) <www.ilo.org/wcmsp5/groups/public/---ed_dialogue/---act_emp/documents/publication/wcms_601276.pdf> accessed 31 May 2023.

¹¹⁷ Connie Lee, 'Gender Bias in the Courtroom: Combating Implicit Bias Against Women Trial Attorneys And Litigators' (2019) 22 *Cardozo Journal of Law & Gender* 229.

¹¹⁸ Work Foundation, 'Balancing the scales: A study into the under-application by women for appointment as Queen's Counsel' (2017) <www.lancaster.ac.uk/media/lancasteruniversity/content-assets/documents/lums/work-foundation/BalancingthescalesupdatedMOAAccess.pdf> accessed 31 May 2023.

Lack of access to mentoring and sponsorship opportunities in the legal profession is one more factor causing gender inequality. Mentoring and sponsorship are essential for career advancement in the legal profession, but women frequently encounter obstacles when trying to take advantage of these opportunities. For instance, research in Canada revealed that women lawyers were less likely to have access to mentorship opportunities than their male counterparts, which resulted in fewer opportunities for career advancement.¹¹⁹

Discriminatory practices are another factor that contributes to gender inequality within the legal profession. As an example, discriminatory practices and cultural and societal norms and expectations in the Middle East frequently prevent female lawyers from participating in court proceedings.¹²⁰ Moreover, due to institutional biases and discriminatory practices women can be excluded from the pool of potential candidates. The International Association of Women Judges conducted research revealing that women's promotion to judicial positions is hindered by non-transparent and unaccountable selection processes.¹²¹ Therefore, cultural, and social prejudices pose substantial obstacles to achieving gender parity in international courts' judiciary.

The lack of diversity among potential candidates for international courts sustains gender inequality. For example, the International Criminal Court (ICC) has a scarcity of representatives from the Global South, with the majority of its judges coming from Western European nations.¹²² This lack of diversity has the potential to perpetuate structural prejudices and contribute to the underrepresentation of female judges in international courts.

As a knock-on effect, poor gender representation also contributes to distrust and scepticism of the legal system. Studies have shown that diverse legal teams are more

¹¹⁹ Law Society of British Columbia, 'On the Path to Equity for 'Women in Law: Roundtable April 29, 2022' (2022) <www.lawsociety.bc.ca/Website/media/Shared/docs/initiatives/Women-Roundtable-2022.pdf> accessed 31 May 2023.

¹²⁰ Ann Elizabeth Mayer, 'Cultural Particularism as a Bar to Women's Rights: Reflections on the Middle Eastern Experience' in Ann Elizabeth Mayer, *Women's Rights Human Rights* (Routledge 1995) 176-188.

¹²¹ Susan Glazebrook, 'The International Day of Women Judges' (*International Association of Women Judges*, 21 February 2022) <https://iawj.org/content.aspx?page_id=5&club_id=882224&item_id=73249> accessed 31 May 2023.

¹²² Neus Torbisco Casals, 'The Legitimacy Of International Courts: The Challenge Of Diversity' (2021) 53(4) *Journal of Social Philosophy* 491.

effective in handling intricate legal issues and obtaining favourable outcomes.¹²³ Gender inequality within the legal system can result in unfair biases and oversights, reducing the quality of legal decisions and contributing to public dissatisfaction with the justice system. Additionally, a predominantly male judiciary may struggle to consider the female perspective and experiences when making legal decisions.¹²⁴ Consequently, this could lead to legislative choices that further marginalise and disadvantage women by inadequately addressing issues like gender-based violence and discrimination.

Therefore, gender imbalance in the legal profession has significant implications for both individuals and society. It can limit women's advancement in the workplace, erode public trust in the legal system, and perpetuate broader societal injustices. To establish a fair and equitable legal system that benefits everyone, it is crucial to promote gender parity within the profession. One effective approach is to prohibit discriminatory practices and actively encourage the recruitment and retention of legal professionals from diverse backgrounds, ensuring a range of perspectives are represented.

2.4. The Role Of Women in International Commercial Arbitration and the Case For Diversity

Over the years, global society has made progress towards including women in the global business arena. This shift is a result of moving away from outdated and patriarchal practices. Factors such as the increasing competitiveness of international markets, modern regulatory frameworks promoting gender inclusion, and the growth of cross-border trade have highlighted the importance of diversity.¹²⁵

One area of particular interest is women's participation in international commercial arbitration. This field is often considered an exclusive circle consisting of a small

¹²³ *ibid.*

¹²⁴ Harlan Grant Cohen and others, *Legitimacy and International Courts* (CUP, 2018).

¹²⁵ The World Bank and World Trade Organization, 'Women and Trade: The Role of Trade in Promoting Women's Equality', (2020) <www.wto.org/english/res_e/publications_e/women_trade_pub2807_e.htm> accessed 16 June 2023.

number of elite lawyers and renowned arbitrators.¹²⁶ This situation has raised questions about the lack of diversity within this closed circle, considering that these lawyers and arbitrators are frequently chosen for high-profile arbitration cases.

The question of diversity in international arbitration is an intricate one given the principle of party autonomy that forms the bedrock of arbitration. Parties have the unique advantage in arbitration of choosing an arbitrator that they prefer. As such, whilst calls for diversity by including more women in arbitrator appointments can be viewed positively, there is an immediate risk that the principle of party autonomy stands threatened should outside forces regulate the arbitrator selection process. This calls for a careful balance and consideration of these competing interests and further requires that the desire for the inclusion of women in arbitration appointments does not offend the foundational principle of arbitration which is party autonomy.¹²⁷

2.5. The Gender Gap in Arbitration Panels Dispute Resolution Panels/Arbitration Courts – A General Overview

Although possessing impressive skills and experience, female arbitrators face disadvantages due to their gender. Notably, they encounter difficulties when deciding to participate in complex and high-profile disputes. An article from the International Institute for Conflict Prevention and Resolution discusses the efforts to enhance gender diversity in arbitration panels.¹²⁸ While there has been a positive trend towards appointing more women arbitrators globally, women still make up only a quarter of appointed arbitrators. This indicates an underrepresentation of women in the field of arbitration. The reports shows that institutions have played a significant role in increasing the representation of women on arbitral tribunals. However, parties have the potential to make an even larger impact on gender diversity due to their greater number of appointments. This implies that parties, who are responsible for selecting

¹²⁶ Umika Sharma, 'The Invisible Stigmatisation of Female Practitioners in International Arbitration' (2021) 17 (SI3) International Journal of Law in Context 371.

¹²⁷ Pilawa (n 9).

¹²⁸ International Council for Commercial Arbitration, 'Report of the Cross-Institutional Task Force on Gender Diversity in Arbitral Appointments and Proceedings 2022. Update' (ICCA Reports No 8, 2022) <https://cdn.arbitration-icca.org/s3fs-public/document/media_document/ICCA-Reports-no-8-Gender-Diversity-2022-update.pdf> accessed 31 May 2023.

arbitrators in many cases, may have a role in perpetuating or mitigating gender bias in appointments. Additionally, the data indicate that respondent parties have a greater likelihood of appointing women arbitrators. While it suggests that there may be some progress in addressing gender bias in appointments, as respondent parties are more inclined to select women, further data is needed to draw definitive conclusions about the role of claimant and respondent parties in appointing arbitrators and whether respondent parties are a larger source of repeat appointments of women arbitrators.

The disparity in gender representation is also evident in the types of roles played by arbitrators. Women are underrepresented as tribunal chairs, with only slightly more than a quarter of chair appointments being women in 2021, while three-quarters were men. This disparity indicates a potential bias in assigning leadership roles within arbitral tribunals. Regarding the nationality of women arbitrators appointed by participating Task Force members, the data from 2021 indicate that a significant majority, nearly half, were from Western Europe or the United Kingdom. Women from Asia, Latin America and the Caribbean, and the USA and Canada were also well-represented in the appointments. On the other hand, women from Australia and New Zealand, the Middle East, and Africa were the least represented among the appointments surveyed in that year. Overall, the data suggest that while progress has been made in increasing the representation of women arbitrators, there is still a gender bias in appointments. Efforts should continue to address this bias and promote greater gender diversity in the field of arbitration.

The Journal of Empirical Legal Studies, which reveals that 80% of contemporary disputes are resolved through arbitration rather than traditional litigation. This indicates a growing demand for arbitration services as an appealing alternative that offers a faster, more cost-effective, and discreet way of resolving conflicts, avoiding the complexities involved in filing a lawsuit. Subsequently, the proliferating number of expected litigants is now oriented towards arbitrators. Hence, this increased demand for arbitration also gravitates towards having experienced and proficient neutrals, but those involved in dispute resolution have directly complained about the missing link, particularly in terms of gender on the arbitration panel pointing out the ‘same short list of mediators and arbitrators to choose from, consists mainly of older white males’.¹²⁹

¹²⁹ International Institute for Conflict Prevention & Resolution, ‘Old, White and Male: Increasing

As a result, most of the courts have witnessed the number of women on the bench being constant or declining over time.¹³⁰

Simply knowing that there is a gap between an inclusive community and equal representation is not enough to overcome gender inequality in the legal field. It requires actual and enduring actions. In order to achieve genuine inclusion and diversity in professions, we must eliminate the stereotypes associated with the abilities and qualities that women possess. The lack of representation, undervaluation, and underutilisation of women in high-quality positions should be improved through legal initiatives that address the unequal distribution of women's roles and contributions in the professional sphere. Understanding women's role in peace-making and conflict can confirm their significance in arbitration panels. Additionally, gaining insight into the articles of CEDAW supports women's equal rights to participate in various domains, including civil, political, economic, social, and cultural aspects. This missing link will be exemplified in the following section.

2.5.1. Historical Role of Women in Dispute Resolution/Arbitration Across Different Regions

Susanna Hoe and Derek Roebuck, in their publication 'Women In Disputes: A History of European Women in Mediation and Arbitration', emphasise the significant role of women in arbitration and legal disputes.¹³¹ They thoroughly discuss the extensive contributions and active participation of women, regardless of their social status, in arbitral processes. The authors highlight the importance of recognising the legitimacy of these processes and acknowledge both titled and untitled women for their involvement. Highlighting women's role both as parties and as peacemakers in the dispute resolution process, the publication has set out the role of women over a span of four thousand years across Europe. Addressing the critics of women's role and

Gender Diversity in Arbitration Panels' (2015) <<https://www.cpradr.org/news-publications/articles/2015-03-03--old-white-and-male-increasing-gender-diversity-in-arbitrationpanels>> accessed 28 June 2020.

¹³⁰ Nienke Grossman, 'Shattering the Glass Ceiling in International Adjudication' (2006) 56(2) Virginia Journal of International Law 75.

¹³¹ Susanna Hoe and Derek Roebuck, *Women in Disputes: A History of European Women in Mediation and Arbitration* (Holo Books 2018).

practice, the argument presented in the book notifies the significance of women who belong to different social classes in the arbitration process, with those with the highest rank being the most active in this legal sphere of dispute resolution.

The titled and untitled women in Europe were assessed from different regions of Europe, specifically in Medieval England and Anglo-Saxon England, where women had been found engaged in the role of peace weavers due to their proclivities to settle disputes, and maintain peace within families, rules, disputed parties, countries, and counties.¹³²

In addition to European history, American Women have come a long way to get their rights addressed in the legal field facing a large gap in late 1985 when it comes to their roles being acknowledged in both professional opportunities and legal practices.¹³³ Louise Barrington,¹³⁴ a trailblazer for women's inclusion in arbitration in America, strongly advocates the implementation of a quota system for women's appointments to committees and panels as a means to increase female representation in the field of arbitration.¹³⁵ The number of women doubled from 50 to 100 in CIArb¹³⁶ (Chartered Institute of Arbitrators) from 2009 to 2012, compared to 0% in the 2011 Latin America Arbitration conference, manifesting the efforts directed by pioneers like Louise Barrington, who aim at bringing the percentage of women to 50% in America and international legal representation and arbitration¹³⁷.

In the Arab world, there is a significant and unexplored opportunity to utilise the valuable human resources of women in the realms of dispute resolution, legal procedures, and arbitration. While the Arab region shares similarities with other

¹³² *ibid.*

¹³³ Louise Barrington, 'Then and Now: A Quarter Century of Women in Arbitration' (2012) 5(1) New York Dispute Resolution Lawyer <<https://nysba.org/app/uploads/2020/03/DRSNewsSpr12.pdf>> accessed 26 June 2020.

¹³⁴ *Louise Barrington* is a well-known certified and chartered arbitrator and accredited mediator, legally qualified in Ontario, New York and England. Barrington possess international experience in the areas of commercial/corporate law, employment and insurance law

¹³⁵ Louise Barrington, 'Then and Now: A Quarter Century of Women in Arbitration' (2012) 5(1) NYSBA

<http://www.aculextransnational.com/pdf/LB_2012_05_Then_and_Now_Quarter_Century_of_Women_in_Arbitration.pdf> accessed 26 June 2020.

¹³⁶ The Chartered Institute of Arbitrators CIArb is a developed professional membership organisation representing the interests of alternative dispute resolution practitioners globally

¹³⁷ Brittany Kirwan, 'Courageous Steps Forward For Women in Arbitration' (*Silicon Valley Arbitration and Mediation Center*, 15 July 2015) <<https://svamc.org/courageous-steps-forward-for-women-in-arbitration/>> accessed 26 June 2020

regions in terms of discussions around women's rights, there is a clear lack of adequate attention and action towards enhancing women's participation in key leadership positions such as parliaments, executive bodies, and courts. These vital national institutions continue to have notably low representation of women, indicating a need for greater focus and efforts to address this disparity.

The background of the Arab region in terms of gender equality and the role of women in different domains has its own unique social, cultural, and historical experiences. The legal system in the Arab region has been influenced by both the Ottoman Empire and European colonialism, resulting in a framework that has been shaped by various historical interventions. Scholars often assert that the region's colonial history has played a significant role in the development of gender inequality, discriminatory attitudes towards women, and the concentration of power in the hands of men.¹³⁸ In contemporary times, the legal proceedings and tribunals in the Arab region have been reflecting a nuanced reaction towards arbitration. Arab states have recognised the benefits of arbitration and have increasingly engaged in the practice as petitioners. Nevertheless, Arab states still show a preference for male arbitrators and representatives.¹³⁹

For being ranked as the second-lowest region globally on the Gender Empowerment Measure by United Nations Development Program (UNDP);¹⁴⁰ and is ranked as the lowest region by the Inter-Parliamentary Union (IPU)¹⁴¹ in terms of women's participation in parliaments, the Arab region is still confronting persistent setbacks due to discrimination against women and the marginalisation of their role in parliaments, legislation and practice.¹⁴² Nevertheless, in recent years, Arab countries have experienced significant changes in their political, economic, and social spheres,

¹³⁸ S V R Nasr, 'European Colonialism and the Emergence of Modern Muslim States' in John L Esposito (ed), *The Oxford History of Islam* (OUP 2016) ch 13, 549 <<https://www.scribd.com/doc/243660671/European-Colonialism-and-theEmergence-of-Modern-Muslim-States>> accessed 26 June 2020.

¹³⁹ United Nations Development Program, 'The Arab Human Development Report 2005: Towards the Rise of Women in the Arab World' (2005) <<https://hdr.undp.org/system/files/documents/rbasahdr2005enpdf.pdf>> accessed 17 June 2023.

¹⁴⁰ United Nations Development Program, 'The Arab Human Development Report 2005: Creating Opportunities for Future Generations' (2005) <<https://hdr.undp.org/system/files/documents/rbasahdr2005enpdf.pdf>> accessed 31 May 2023.

¹⁴¹ *ibid.*

¹⁴² Rowaida Al Maaitah and others, *Arab Women: Challenges and Opportunities* (Routledge 2011) 17-31.

with the aim of moving beyond binary divisions.¹⁴³ Regional arbitration centres are being established in many Arab states, and numerous cases of international arbitration have been seen linked to the Arab World to address women's exclusion from the facet of imperative institutional roles including court and arbitration.¹⁴⁴ Arab states are making significant efforts to enhance their performance in promoting women's rights.

One way they are doing this is by endorsing and ratifying various international agreements and conventions. Among these, the most notable are the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW),¹⁴⁵ Beijing Platform for Action 1995¹⁴⁶ and Sustainable Development Goals (SDGs). In a bid to address issues of advancing the place of Arab women, the Arab leaders, for the first time, voiced their concern for women's empowerment at the Arab Summit in Tunisia in 2004. The goal is to empower women to effectively fulfil their roles in political and legal systems and implement initiatives such as gender quotas. These efforts aim to ensure that women have equal and meaningful participation in decision-making processes across various domains.¹⁴⁷

Having set the chronological development of perception and efforts of different regions towards women's inclusion in the legal domain. Keeping in view women's rights to equal participation, the following section will reflect on various dimensions to validate the inclusion of women in arbitrator panels. Throughout history, women have faced challenges in establishing themselves in the field of international arbitration. However, there have been numerous impressive examples of women's contributions and achievements in resolving disputes. This historical journey spans from ancient and middle times to the 18th century, highlighting the factual evidence

¹⁴³ United Nations Development Program, 'The Arab Human Development Report 2005: Creating Inter-Parliamentary Union, 'Women in National Parliaments' (2019) <<https://hdr.undp.org/system/files/documents/rbasahdr2005enpdf.pdf>> accessed 26 June 2020.

¹⁴⁴ Cherine Foty, 'The Evolution of Arbitration in the Arab World' (*Kluwer Arbitration Blog*, 1 July 2015) <<https://arbitrationblog.kluwerarbitration.com/2015/07/01/the-evolution-of-arbitration-in-the-arabworld/>> accessed 26 June 2020.

¹⁴⁵ United Nations Development Fund for Women, 'Progress of Arab Women' (2004) <<https://iknowpolitics.org/sites/default/files/paw2004-intro-eng20table20of20contents2c20foreword.pdf>> accessed 26 June 2020.

¹⁴⁶ Madiha El Safty, 'Beijing+15 The Shadow Report' (2009) <<https://ngocswny.files.wordpress.com/2010/02/beijing-15-final-completed-version-to-new-york-with-cover-all-another-version.pdf>> accessed 26 June 2020.

¹⁴⁷ Nadia Halim Suliman, 'Political and Civil Participation of the Arab Women: An Essential Constituent in Sustainable Development' (Third Arab Organization Conference, Tunis, 2010).

of women's involvement in arbitration and emphasising their equal empowerment and active participation in legal scenarios.

2.5.2. Gender Bias in Arbitral Decisions and the Need for Gender Diversity

Arbitration has become increasingly popular for resolving civil disputes in recent decades. Historically, the majority of arbitrators in employment cases have been men, resulting in limited attention to gender-related issues.¹⁴⁸ However, this is now changing as female participation in arbitration at all levels is on the rise.

Brian Bemmels provides a literature review of gender effects in arbitration decisions.¹⁴⁹ He mentions, in 1979, Rosenberg's study on the relationship between arbitrators' gender discrimination and their arbitral awards.¹⁵⁰ The study's results concluded that despite arbitrators' claims in favour of gender equality, their awards often supported discriminatory practices. However, this part of the paper is not concerned with the issue of arbitrators sanctioning gender discrimination but instead aims to focus on the arbitrators' treatment of cases of alleged discrimination at work and more specifically on the potential discrimination by arbitrators in their cases where discrimination is not the subject issue.

Over the years, there has been an increase in empirical work investigating the role of gender in arbitration. However, the flood of studies has clouded their ultimate purpose and watered down the results. Often, these studies include few women and do not correctly control for intervening variables.¹⁵¹ There have been several weaknesses identified in studies that claim preferential treatment of women in arbitration.

¹⁴⁸ Stephen M Crow and James W Logan, 'Arbitrators' Characteristics and Decision-Making Records, Gender of Arbitrators and Grievants, and The Presence of Legal Counsel as Predictors of Arbitral Outcomes' (1994) *Employee Responsibilities and Rights Journal* 169.

¹⁴⁹ Brian Bemmels, 'The Effect of Grievants' Gender on Arbitrators' Decisions' (1988) 41(2) *ILR Review* 251.

¹⁵⁰ W J Bigoness and P B DuBose, 'Effects of Gender on Arbitrators' Decisions' (1985) 28(2) *The Academy of Management Journal* 485.

¹⁵¹ John Hagan, Ilene H Nagel and Celesta Albonetti, 'The Differential Sentencing of White-Collar Offenders in Ten Federal District Courts' (1980) 45 *American Sociological Association* 802.

In 2011, Bui, Borgida, and Girvan examined the impact of gender bias on arbitration decisions.¹⁵² The study included 96 professional arbitrators and 212 undergraduates who were asked to either support or overturn a termination decision in two dummy arbitrations. Additionally, one of the groups was held accountable to the other for the award. The gender of the parties varied in both arbitrations and was shown to influence the given award. Experience proved an important variable as the undergraduates were more likely to rule against the women, favouring them for awards. Given that the professional arbitrators did not follow the same pattern, it can be concluded that this effect is mitigated with professional experience. The accountability variable also proved significant in determining a more equal decision-making process. Hence, experience and accountability reduce gender bias in arbitration.¹⁵³

In reviewing these studies, one can argue that, contrary to previous assumptions, the parties' gender has little bearing on arbitration outcomes. Research by Rodgers and Helburn conducted in 1985 suggests that men received more favourable treatment, however Bemmels found the opposite in 1988. This reveals that arbitrators treat male and female parties more or less equally. Alternatively, one might consider the influence of the arbitrator's personal values on arbitral proceedings and awards.

With the rise of legal arbitration, one can observe some individuals making a name for themselves in tribunals worldwide. Powerful international cases often involving large sums or implicating political ramifications tend to attract these high-profile arbitrators.¹⁵⁴ There are a number of claims that international arbitration represents a private club for a few elite arbitrators, which contributes to views that the system is biased and reduces autonomy and freedom. Returning to the issue of gender parity, evidence from ICC cases between January and November 2016 shows that only one in five arbitrators were women. As another example, in 2017 only 16% of appointments for arbitration at the ICSID were from women.¹⁵⁵ According to Lucy Reed, the low levels of diversity in the appointment of women is due to the need for

¹⁵² Tanya Bui, Eugene Borgida and Erik Girvan, 'Gender Bias in Arbitration Decision-Making' [2011]

¹⁵³ Jennifer S Lerner and Philip E Tetlock, 'Accounting For The Effects Of Accountability' (1999) 125 *Psychological Bulletin* 255.

¹⁵⁴ Pilawa (n 9).

¹⁵⁵ Lucy Greenwood and C Mark Baker, 'Getting a Better Balance on International Arbitration Tribunal' (2012) 28(4) *Arbitration International* 653.

caution, habit and bias.¹⁵⁶ Cautious behaviour regarding arbitration leads to the selection of arbitrators with the most experience. Given that this pool is very limited and only offers a few female arbitrators, the selection process inadvertently reproduces gender bias.¹⁵⁷ Additionally, women and diverse professionals who are new to an arbitration often face discrimination from different standards of evaluation and implicit bias as practitioners tend to select arbitrators who mirror their own gender, age, or background.¹⁵⁸

The American Arbitration Association notes that women are severely underrepresented in panels that tackle complex, high-profile disputes. Female arbitrators are often relegated to disputes in so-called ‘feminine areas’ like family law or employment.¹⁵⁹ The International Centre for Settlement of Investment Disputes (ICSID) had a low representation of women arbitrators, with only 7% being female.¹⁶⁰ Moreover, the participation of women in ICSID arbitrations displayed a double asymmetry. Specifically, two prominent women, Stern and Kaufmann-Kohler, accounted for 75% of all female appointments, indicating a significant concentration of opportunities for women in the hands of a few individuals. However, a more recent and comprehensive study, including non-ICSID cases up until 2017, has indicated that the proportion of female arbitrators has risen to 11%. Despite this, the overall trend hasn't changed significantly, with Kaufmann-Kohler and Stern responsible for 57% of all appointments of female arbitrators. The top 25 female arbitrators in investment treaty arbitration form an exclusive group, having all arbitrated more than one case, and they represent 86% of all appointments of female arbitrators. Conversely, the other

¹⁵⁶ Lucy Greenwood and C Mark Baker, ‘Is the Balance Getting Better? An Update on the Issue of Gender Diversity in International Arbitration’ (2015) 31(3) *Arbitration International* 413.

¹⁵⁷ Apoorva Patel, ‘Implicit Bias in Arbitrator Appointments: A Report from the 15th Annual ITAASIL Conference on Diversity and Inclusion in International Arbitration’ (*Kluwer Arbitration Blog*, 7 May 2018)

<<https://arbitrationblog.kluwerarbitration.com/2018/05/07/implicit-bias-in-arbitrator-appointments-a-report-from-the-15th-annual-ita-asil-conference-on-diversity-and-inclusion-in-international-arbitration/>> accessed 31 December 2021.

¹⁵⁸ Lucy Greenwood and Sapna Jhangiani, ‘Women’s Voices Matter: the Case for the Extinction of Manels’ (*Kluwer Arbitration Blog*, 22 September 2020) <<https://arbitrationblog.kluwerarbitration.com/2020/09/22/womens-voices-matter-the-case-for-the-extinction-of-manels/>> accessed 19 May 2023.

¹⁵⁹ International Institute for Conflict Prevention & Resolution (n 125).

¹⁶⁰ Malcolm Langford, Daniel Behn and Laura Létourneau-Tremblay, ‘Empirical Perspectives on Investment Arbitration: What Do We Know? Does It Matter?’ (ISDS Academic Forum Working Group 7 Paper, 15 March 2019).

32 female arbitrators have only been appointed once in an investment treaty arbitration case.

2.5.3. Limitations to the Representation of Women on Arbitral Panels

Anderson, Jerman, and Tarrant¹⁶¹ of Morrison & Foerster wrote a compelling piece outlining the demand and supply-side problems that limit gender diversity on arbitration panels. From the supply-side, the authors identify several limitations the first of which relates to the lack of female legal professionals. There is a dearth of high-ranking female legal professionals which narrows the pool of potential arbitrators. Lucy Greenwood, a renowned researcher on the issue of gender parity in arbitration, identifies the problem as being a leaky pipeline wherein equal numbers of women and men enter the legal profession, but the women are slowly drained away leaving few female leaders in the field.¹⁶² Greenwood argues that there are many reasons for this drain including '[o]ffice climate, difficulties in managing dual careers, lack of female role models and mentors, lack of flexible work options and attitudes to flexible working, differential in earnings between spouses and discrepancies between the treatment of male and female associates'.¹⁶³ Greenwood emphasises that these issues need to be addressed in order to retain female professionals within law and encourage a more diverse representation within arbitral panels.

Furthermore, repeat appointments complicate the matter in that parties are more likely to hire experienced arbitrators¹⁶⁴ – most of whom are older, white, European/North American men. Other than reproducing gender imbalances, repeat appointments are a weakness to the field of international arbitration for several reasons. Firstly, repeat appointments are the consequence of solicited-feedback loop that produces a market.

¹⁶¹ Gemma Anderson, Richard Jerman and Sampaguita Tarrant, 'Diversity in international arbitration' (*Morrison Foerster*, 1 March 2020). <[https://uk.practicallaw.thomsonreuters.com/w-019-5028?transitionType=Default&contextData=\(sc.Default\)&firstPage=true](https://uk.practicallaw.thomsonreuters.com/w-019-5028?transitionType=Default&contextData=(sc.Default)&firstPage=true)> accessed 19 May 2023

¹⁶² Lucy Greenwood, 'Women in disputes: what can be done about the leaky pipeline?' (*Commercial Dispute Resolution*, 6 November 2017). <www.cdr-news.com/categories/arbitration-andadr/featured/7721-women-in-disputes-what-can-be-done-about-the-leaky-pipeline> accessed 19 May 2023.

¹⁶³ *ibid.*

¹⁶⁴ Anderson, Jerman and Tarrant (n 161).

for lemons.¹⁶⁵ Greenwood describes the solicited-feedback loop as being when parties solicit information about prospective arbitrators, but the respondent feels compelled to give feedback that might suit the expectations of the solicitor. This creates a market for lemons because the respondent might overvalue an experienced candidate. Secondly, repeat appointments produce the ‘halo effect’ whereby repeated recommendations of a certain candidate tend to highlight certain qualities to the detriment of others, and to the point where this candidate tends to outshine others in their halo of recommendations.¹⁶⁶ This obscures true and measured comparisons of potential candidates. Finally, each arbitration case differs materially, factually, and jurisprudentially from the next. As such, the appointment of the same arbitrator for numerous arbitration cases would imply that an arbitrator may be appointed even in the instance where their credentials do not necessarily fit into a particular case. Douglas Pilawa argues that this contradicts common knowledge that each arbitration case is unique, and so belies the need to appoint the same arbitrators each time.¹⁶⁷ The diversification of arbitral tribunals should be encouraged to achieve inclusivity of able and better suited women arbitrators.

Repeat appointments that favour men are also due to the lack of visibility and information about female arbitrators.¹⁶⁸ Arbitration is a highly confidential process. Arbitration awards are usually not available to public scrutiny, and even in instances where they are publicised, the names of arbitrators are removed. Furthermore, parties, lawyers, and firms may hold individual directories of potential arbitrators, but these are not shared publicly and are often compiled from experience and word-of-mouth recommendations which often fail to include female candidates. Greenwood and Jhangiani also note that the lack of female visibility goes beyond representation on arbitral panels; arbitration conferences are also a key area in which professionals may advertise themselves and their experience, but these conferences often fail in equal gender representation.¹⁶⁹ The authors suggest that enabling women to enhance their

¹⁶⁵ Lucy Greenwood, ‘Tipping the balance – diversity and inclusion in international arbitration’ (2017) 33 *Arbitration International* 99.

¹⁶⁶ Lucy Greenwood, ‘Moving Beyond Diversity Toward Inclusion in International Arbitration’ in Axel Calissendorff and Patrik Schöldström (eds), *Stockholm Arbitration Yearbook 2019* (Wolters Kluwer, 2019).

¹⁶⁷ Pilawa (n 9).

¹⁶⁸ Anderson, Jerman and Tarrant (n 161).

¹⁶⁹ Greenwood and Jhangiani ‘Women’s Voices Matter’ (n 158).

visibility through speaking opportunities is a crucial strategy for altering perception and expanding the pool of potential candidates for appointments.¹⁷⁰

When examining the demand side, Anderson, Jerman, and Tarrant note that the main causes of gender imbalance lie with party autonomy and appointing parties who often fail to account for female arbitrators.¹⁷¹ Party autonomy remains a foundational pillar in arbitration; an appointment process that is proper has the ability of maintaining and safeguarding the rights of parties in the course of an arbitration. However, this process of opaque and subject to the individual biases and stereotypes of the parties involved. Greenwood notes that parties often select arbitrators based on word-of-mouth, nationality, and legal education.¹⁷² As previously discussed, word-of-mouth leads to repeat recommendations which undermine the arbitration process and reduce gender parity. Equally, nationality and legal education have little bearing on an arbitrator's experience and subjective qualities suitable to each particular case. Greenwood recommends instead that parties should make clear, detailed, and descriptive lists of the qualities they expect in an arbitration to seek these out rather than relying on repeat recommendations.¹⁷³ Additionally, she suggests that parties should request summaries of arbitrators' previous awards – with appropriate redactions – in order to properly review their experience and capabilities.¹⁷⁴

Anderson, Jerman, and Tarrant argue that appointing parties also play an important role in gender through their arbitral recommendations.¹⁷⁵ Arbitral institutions, parties' inhouse counsel, external lawyers, and co-arbitrators may all advise on potential candidates. Arbitrational institutions and legal firms – that supply in-house counsel – are taking a greater stand to support diversity, but the authors argue that external lawyers and co-arbitrators have the greatest influence over the choice of candidates. Their filtering process is often opaque, unscrutinised, and subject to the same weakness of repetition that hinder the supply of arbitrators. However, Greenwood disagrees with this argument¹⁷⁶. She notes that arbitral institutions have taken great steps to publicise

¹⁷⁰ *ibid.*

¹⁷¹ Anderson, Jerman and Tarrant (n 161).

¹⁷² Greenwood, 'Tipping the balance' (n 165).

¹⁷³ Greenwood, 'Women in Disputes' (n 162).

¹⁷⁴ Greenwood, 'Tipping the balance' (n 165).

¹⁷⁵ Anderson, Jerman and Tarrant (n 161).

¹⁷⁶ Greenwood, 'Tipping the Balance' (n 165).

their arbitral recommendations and ensure gender parity. Instead, she lays the brunt of the problem within the parties themselves who are still highly subject to individual bias. Whether the fault lies with arbitral institutions or parties, the main issue affecting the demand for female arbitrators is a lack of visibility and support for female candidates in order to boost their presence in arbitral recommendations.

2.5.4. Benefits of Women in Arbitration

The previous sections have indicated that the issue of gender disparity in arbitration is prevalent, with women being underrepresented in international arbitrary practices. The benefits of diversity are crucial for fair and effective arbitration processes.

Gender parity is fundamental to arbitration for several reasons. As we have already established, gender equality presents a great benefit to society and particularly to the modern workplace. Arbitrators should be diverse in order to support their diverse disputants. Burt and Kaster¹⁷⁷ also note that arbitration organisations require diversity to address the disputants' various grievances and the causes thereof. Hence, identity is important, but arbitrators' capabilities including experience, knowledge, and innovation are the most important factors.

Given that arbitration typically acts as an alternative to court proceedings, there is a need to guarantee democratic representation on arbitration panels as one would expect in the judiciary.¹⁷⁸ For example, if a Muslim woman seeks arbitration for a harassment case against her white male manager, she might challenge the arbitral award given by a panel of white male arbitrators. However, if another woman were present on the panel, the disputant might be more accepting of the panel's decision given that it is more reflective of her gender positionality.¹⁷⁹ This thought experiment shows the

¹⁷⁷ Chatterjee Patel and Desai Vyapak, 'Is Increasing Gender and Ethnic Diversity in Arbitral Tribunals a Valid Concern?' (*Kluwer Arbitration Blog*, 1 March 2020) <<https://arbitrationblog.kluwerarbitration.com/2020/03/01/is-increasing-gender-and-ethnic-diversity-in-arbitral-tribunals-a-valid-concern/>> accessed 24 May 2023.

¹⁷⁸ Rhode (n 80).

¹⁷⁹ H C Alvarez and M W Friedman, 'What Should Parties Expect From Arbitrators And What Should Arbitrators Expect from Parties?' (2009) 24 ICSID Review Foreign Investment Law Journal 39.

salience of gender representation in disputants' validation of arbitral proceedings.¹⁸⁰

Additionally, having a more diverse selection of arbitrators is better for disputants when deciding whom to hire. Given that the pool of potential arbitrators is so homogenous, disputants do not have the option to select those with different personal backgrounds.¹⁸¹ Hence, if arbitration is to account for the diversity of human experience, then the potential pool of arbitrators should be as heterogeneous as possible, allowing disputants to precisely select those professionals who would suit their needs.

Moreover, by supporting diverse arbitrators, innovative solutions can be developed, given individuals' unique experience and professional knowledge. This is a great benefit to the arbitral process and disputants. Petillion argues that disputants benefit from choosing arbitrators based on suitability rather than gender or ethnicity.¹⁸² Moreover, the increased inclusion of women in arbitration contributes to a more comprehensive and well-rounded perspective. Research indicates that female arbitrators' presence and active involvement promote fairness and effectiveness in the arbitration process, potentially influencing the panel's decisions positively.¹⁸³

Studies have investigated how the gender of arbitrators and those involved in disputes impact the decisions made by the panel. According to one study, male arbitrators tend to display a bias favouring female disputants, with a significant margin of nearly 75%.¹⁸⁴ On the other hand, further research indicates that female arbitrators exhibit less bias and demonstrate greater equality in their decision-making.¹⁸⁵ These findings reinforce the importance of selecting more women to participate in arbitration panels

¹⁸⁰ Sasha A Carbone and Jeffrey T Zaino, 'Increasing Diversity Among Arbitrators: A Guideline to What the New Arbitrator and ADR Community Should Be Doing to Achieve This Goal' (2012) 212 NYSBA Journal 33.

¹⁸¹ Sylvia Noury, 'We Need More Diversity in Arbitration' (*Law.com International* 23 March 2022) <www.law.com/international-edition/2022/03/23/we-need-more-diversity-in-arbitration/> accessed 22 June 2023.

¹⁸² Flip Petillion, 'Choosing an Arbitrator' (*Thomson Reuters Practical Law* 2013) <[https://uk.practicallaw.thomsonreuters.com/w-018-5399?transitionType=Default&contextData=\(sc.Default\)&firstPage=true](https://uk.practicallaw.thomsonreuters.com/w-018-5399?transitionType=Default&contextData=(sc.Default)&firstPage=true)> accessed 22 June 2023.

¹⁸³ *ibid.*

¹⁸⁴ Brian Bemmels, 'Gender Effects in Discharge Arbitration' (1988) 42 ILR Review 63.

¹⁸⁵ Stavros Brekoulakis, 'Systemic Bias and the Institution of International Arbitration: A New Approach to Arbitral Decision-Making' (2013) 4(3) *Journal of International Dispute Settlement* 553 <<https://academic.oup.com/jids/article-abstract/4/3/553/2911856>> accessed 22 June 2023.

in order to ensure fairness in the entire arbitration process, including the outcomes and awards granted.

Furthermore, evidence suggests that expanding female representation in arbitration helps reduce the complications associated with group decision-making. Korn found that groups tend to provide stricter decisions than individuals.¹⁸⁶ This is likely because individual decision-making is more accountable than group decisions, in which the collective decision-making process obscures personal accountability.¹⁸⁷ The situation is worsened by bias if all the panellists share the same background and experience.

However, the inclusion of women in this process tends to minimise these effects. Evidence from the corporate sphere suggests that managerial decisions are more balanced and less risky if there is a diverse set of leaders within the company.¹⁸⁸ Further studies show the departmental benefits of female leaders.¹⁸⁹ Hence, including women in arbitration panels will reduce bias and risky decision-making, ensure greater accountability and equality in the arbitral process, and support strong, motivational female leadership in the field.

As mentioned before, the inclusion of more diverse arbitrators on panels may produce novel outcomes; women, in particular, have been shown to improve stressful arbitral proceedings. Research has recently been conducted to examine the impact of stress on the performance of male versus female arbitrators.¹⁹⁰ The results show that men, under stress, are less fair and empathetic than their female counterparts. Hence, in a stressful employment-arbitration, such as a case of harassment, a female arbitrator is better positioned to empathise with the disputant and identify deception than her male counterparts.¹⁹¹ Additionally, studies show that stress can accentuate women's

¹⁸⁶ Jane Byeff Korn, 'Institutional Sexism: Responsibility And Intent' (1995) 4(1) *Texas Journal of Women and the Law* 83.

¹⁸⁷ *ibid* 90.

¹⁸⁸ Alexa A Perryman, Guy D Fernando and Arindam Tripathy, 'Do Gender Differences Persist? An Examination of Gender Diversity on Firm Performance, Risk, and Executive Compensation' (2016) 69(2) *Journal of Business Research* 579 <www.sciencedirect.com/science/article/abs/pii/S0148296315002143> accessed 22 June 2023.

¹⁸⁹ Greenwood and Baker (n 156).

¹⁹⁰ International School of Advanced Studies (SISSA), 'Male, Stressed, And Poorly Social' (*EurekAlert*, 17 March 2014) <<https://www.eurekalert.org/news-releases/631969>> accessed 12 March 2019.

¹⁹¹ Nora A Murphy, Judith A Hall and C Randall Colvin, 'Accurate Intelligence Assessments In Social Interactions: Mediators And Gender Effects' (2003) 71(3) *Journal of Personality* 465.

arbitrational qualities while it has the opposite effect in men who tend towards egoism and detachment when under pressure.¹⁹² Given that arbitration is often a highly stressful procedure, this evidence would support the greater inclusion of women on arbitrational panels. Female inclusion would help to guarantee a more empathetic process and the deliverance of a more satisfying outcome to disputants.

There is further evidence that innate female characteristics are well-suited to arbitrational proceedings. Some studies have revealed that women are more sensitive to uncertainty and doubts in group decision-making situations¹⁹³, meaning that they could identify potential weaknesses in the arbitrational process. Women have also been shown to consider the value of time and money.¹⁹⁴ This would suggest that female arbitrators would be more sensitive to the monetary and temporal costs associated with arbitration that are borne by the disputants. Hence, including more women in the panel would be a great benefit to disputants. Finally, women are more conscious of the impact of their decisions, so female inclusion would ensure more fairness and consideration in arbitration.

Debates in the realm of legal theory have also posited that women may be better placed to reflect a perspective of care in arbitrational proceedings.¹⁹⁵ Feminist legal theorists have challenged the notion of the 'reasonable man' on the basis that it employs masculine metaphors, follows male standards and perceptions, and that – historically – women have been excluded from the discussion of reasonableness. The psychologist Carol Gilligan has proposed instead to employ a perspective of care, which derives from her work examining women's moral development.¹⁹⁶ Gilligan's research determined that women are socialised within an ethic of care that prioritises duty, responsibility, and interdependence. Men are more often socialised into a justice perspective that prioritises rights, individualism, and reciprocity. Gilligan therefore proposes that the issue of the reasonable man could be overcome by instead employing a perspective of care, derived from female perspectives and experiences. This is just

¹⁹² *ibid.*

¹⁹³ Acedo Lizárraga and others, 'Factors That Affect Decision Making: Gender And Age Differences' (2009) 7(3) *International Journal of Psychology and Psychological Therapy* 381.

¹⁹⁴ Clyde Scott and Elizabeth Shadoan, 'The Effect Of Gender On Arbitration Decisions' (1989) 10 *Journal of Labor Research* 429.

¹⁹⁵ Alan D Miller and Ronen Perry, 'The Reasonable Person' (2012) 323 *New York University Law Review* 362.

¹⁹⁶ Carol Gilligan, *In A Different Voice: Psychological Theory and Women's Development* (HUP 1982).

another way in which the inclusion of women in arbitration panels has the opportunity of providing novel and alternative viewpoints which may offer better solutions for disputants.

2.5.5. Initiatives to Promote Gender Parity in Arbitration

There have been a number of initiatives created to rectify the gender imbalance within arbitration. Most notable and public of these has been the Equal Representation in Arbitration (ERA) Pledge which was formulated by international arbitration players in 2015 to address the under-representation of women in international arbitration tribunals.¹⁹⁷ Signatories pledge to provide a diverse list of arbitral candidates, advise parties to appoint female arbitrators where appropriate, gather and publicise the gender statistics of their appointments, and support mentoring and training of young female candidates. Available data indicates that as of 27 November 2020, the ERA Pledge had received 4,458 signatories which includes institutions and individuals, 18% of which are from arbitral firms.¹⁹⁸ However, there are concerns that many signatories do not seem to have organised viable action plans to address the gender inequality within their firms, revealing to their signing to be a shallow promise rather than a genuine commitment to change.¹⁹⁹ Despite this, there is promising evidence that most firms have actively contributed to redressing gender parity given the sharp increase of women's presence in arbitral tribunals since 2015.²⁰⁰

Efforts have also been made to combat the lack of transparency and available information regarding potential female arbitrators. International arbitration professionals acknowledge that the opaqueness of data about potential arbitrators is a severe limitation within the field.²⁰¹ Arbitral institutions acknowledge that, by availing

¹⁹⁷ Anderson, Jerman and Tarrant (n 161).

¹⁹⁸ Ashley Jones and Stephanie Mbonu, 'The ERA Pledge surpasses 4,000 signatories' (*Practical Law Arbitration Blog*, 28 May 2020) <arbitrationblog.practicallaw.com/the-era-pledge-surpasses-4000-signatories> accessed 20 May 2023.

¹⁹⁹ Charlotte Strandberg, 'Guest Blog: Gender Diversity in Arbitral Tribunals: The Challenges Ahead' (International Chamber of Commerce, 9 December 2021) <<https://iccwbo.org/news-publications/guests-blog-speeches/guest-blog-gender-diversity-in-arbitral-tribunals-the-challenges-ahead>> accessed 20 May 2023.

²⁰⁰ Jones and Mbonu (n 198).

²⁰¹ Pilawa (n 9).

this information, these institutions attract more arbitration cases. It follows then that publicising information on the performance of arbitrators would shed much needed light on the subjective qualities a party would seek from a potential arbitrator, thereby attracting more cases to these institutions and increasing overall transparency.

A number of efforts have been made towards this end. Several arbitrator databases – such as the Global Arbitration Review’s Arbitrator Research Tool (ART), Arbitrator Intelligence Questionnaire (AIQ), the ERA Search Committee – have been developed to collect information and feedback on potential arbitrators, and compile this in a clear and cost-effective manner.²⁰² These databases have been found to be some of the most effective tools to redress the issue of gender parity in arbitration by supporting and promoting female arbitrators. Publications about the professional qualities and experiences of arbitrators help improve the visibility of female arbitrators and make the selection process less biased towards repeat appointments.

Individual institutions are also supporting this transparency by publicising the names of their sitting arbitrators. The International Chamber of Commerce (ICC) publishes the names and nationalities of arbitrators sitting in their tribunals, identifies the chairpersons in tribunals, and notes whether the arbitrator was appointed by a party or by the Court.²⁰³ These efforts reflect great strides towards promoting greater transparency and availability of information regarding potential arbitrators that will help rectify the gender imbalance of arbitral panels.

Finally, there are several organisations that have emerged to support women in arbitration. Arbitral Women is an extensive organisation that was established in 2005 to support and promote female arbitrators.²⁰⁴ One of their key contributions to the field has been their Unconscious Bias seminar and Diversity Toolkit workshop which have been seminal in helping to address gender and diversity imbalances within arbitration. Furthermore, Arbitral Women host extensive networks of female arbitrators that

²⁰² Anderson, Jerman and Tarrant (n 161).

²⁰³ ‘ICC Court Announces New Policies to Foster Transparency and Ensure Greater Efficiency’ (*International Chamber of Commerce*, 5 January 2016) < <https://iccwbo.org/news-publications/news/icc-court-announces-new-policies-to-foster-transparency-and-ensure-greater-efficiency/> > accessed 22 June 2023.

²⁰⁴ Mirèze Philippe, ‘Walk the Talk! The Arbitralwomen Experience’ (*ArbitralWomen*, March 2020) < https://login.arbitralwomen.org/uploads/2020/04/Walk-the-Talk-Arbitration_ru_N2_17_March_2020.pdf > accessed 20 May 2023.

particularly support young or pregnant professionals that might require further help in navigating career hurdles. Additionally, it was a member of Arbitral Women – Silvia Noury of Freshfields Bruckhaus Deringer – who helped devise the ERA. There has been a proliferation of these sorts of organisations in subsequent years, and they represent a great support to female arbitrators. Equally important are organisations like Alliance for Equality in Dispute Resolution which foster male support for gender parity in arbitration.²⁰⁵ There is a growing call within the field for men to take greater action in support of their female colleagues.²⁰⁶ Taken in combination, these efforts represent a bold and assertive effort to achieve gender equality within arbitration across the globe.

2.6. The Impact of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) on the Inclusion of Women in the International Panel

The United General Assembly adopted the Convention of the Elimination of All Forms of Discrimination against Women (CEDAW) in 1979. CEDAW has so far been ratified by 187 out of 194 countries. The countries not party to CEDAW include Iran, Palau, Somalia, Sudan, South Sudan, Tonga, and the United States.²⁰⁷ Article 3 of CEDAW provides that states ought to take action,

in all fields, in particular in the political, social, economic, and cultural fields, all appropriate measures, including legislation, to ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men.²⁰⁸

The CEDAW treaty stands out among human rights agreements because it goes beyond simply requiring states to respect rights. Instead, it demands a transformation

²⁰⁵ Greenwood, ‘Moving Beyond Diversity’ (n 166).

²⁰⁶ Strandberg (n 200).

²⁰⁷ GSDRC Applied Knowledge Services, ‘Legal framework and access to justice’ <<https://gsdrc.org/topic-guides/gender/legal-framework-and-access-to-justice/>> accessed 31 May 2023.

²⁰⁸ Convention on the Elimination of All Forms of Discrimination Against Women (n 8).

in society, both in the public and private realms, as well as in people's minds. Merely enacting laws that ensure equal treatment between men and women is insufficient. States that are party to CEDAW must actively strive for gender equality in both form and substance, and they must also eliminate harmful gender stereotypes held by individuals.²⁰⁹

2.6.1. The Role of Provisions of CEDAW in Promoting the Inclusion of Women in the International Panel

Whilst considering that women constitute on average 20% of those appointed to arbitral institutions such as the LCIA, ICC and ICSID, CEDAW is an instrumental convention in influencing the appointment of women arbitrators. Article 3 of CEDAW particularly provides that states ought to take appropriate measures such as the use of legislation to guarantee and advance women's rights. The formulation of national legislation to advance greater participation of women would subsequently be instrumental in increasing the number of women appointed to judicial offices as well influence greater participation of women in the corporate world. This, in turn, would help improve the background, experience and portfolio that would be considered by in-house counsel or parties to arbitration in the selection of an arbitrator. According to Douglas Pilawa, it is generally accepted that if a skilled lawyer has the option to choose between an arbitrator who has a favourable track record in their field of law and a new, unknown arbitrator, they would likely opt for the one with a proven track record on their side.²¹⁰ In line with the principle of party autonomy, it is an attorney's ethical obligation to ensure that his/her client has the best chance of success. As such, to avoid a collision between the principle of party autonomy and efforts taken to diversify arbitral tribunals, CEDAW places a middle ground that women arbitrators can benefit from through increased participation and advancement of women's rights.

Article 7(b) requires State Parties to take appropriate measures to ensure that women are on equal terms with men by guaranteeing the right of women, 'to participate in the

²⁰⁹ Neil Englehart and Melissa Miller, 'The CEDAW Effect: International Law's Impact on Women Rights' (2014) 13(1) *Journal of Human Rights* 22.

²¹⁰ Pilawa (n 9).

formulation of government policy and the implementation thereof and to hold public office and perform all public functions at all levels of government.’²¹¹ An analysis of the effects of CEDAW carried out by Neil Englehart and Melissa Miller indicates that the ratification of CEDAW by State Parties has a positive effect on women’s political rights. As such, Article 7 of CEDAW is instrumental in achieving this effect. Notably, analyses that have previously been carried out on the impact of the International Covenant on Civil and Political Rights (ICCPR) and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) pointed out that these conventions have not had any significance on human rights and in some instances, they have had negative effects on human rights.²¹² As such, the importance of CEDAW as an effective convention amongst other human rights conventions cannot be understated.

Article 8 goes further to require State Parties to ‘take all appropriate measures to ensure to women, on equal terms with men and without any discrimination, the opportunity to represent their governments at the international level and to participate in the work of international organisations’²¹³ This provision will counter the challenge of underrepresentation of women at arbitral institutions such as the ICSID, which hears cases requiring the representation of governments, and in which, as of 2017, women arbitrators held only 24% of appointments.²¹⁴

A proper understanding of Articles 7 and 8 requires these articles to be read with CEDAW’s Framework Articles such as Articles 1-5 and Article 24. These provisions impose obligations on State Parties to take measures in the form of legislation, policies and programs aimed at advancing women's rights to inter alia:

- Eliminate both direct and indirect discrimination;
- Embody in their national laws and constitutions; principles of equality and non-discrimination and take measures against individuals and organisations

²¹¹ CEDAW (n 8).

²¹² Englehart and Miller (n 210).

²¹³ CEDAW (n 8).

²¹⁴ Meg Kinnear and Otylia Babiak, ‘International Investment Arbitration Needs Equal Representation’ (Centre for International Governance Innovation, 9 April 2018) <www.cigionline.org/articles/international-investment-arbitration-needs-equal-representation/> accessed 27 May 2021.

that discriminate against women through prescribing laws and sanctions to address such discrimination;

- Use all appropriate measures to realise the advancement of women in all sectors.
- Remove social and cultural prejudices against women, and gender stereotypes as well as the removal of perceived inferiority and superiority complex of either sex; and to
- Implement the concepts of formal and substantive equality.²¹⁵

Whilst the concept of formal equality would require the formulation of legislation, policies and the ratification of gender equality conventions such as CEDAW, the concept of substantive equality requires that women are not only offered equal opportunities but also an equal footing as compared to their male counterparts as well as an environment that enables women to attain the benefits offered by relevant legislation and policies that prescribe the equitable standards to be met.²¹⁶

2.6.2. Evaluating the Effects of CEDAW

Firstly, whilst appreciating the value offered by CEDAW provisions, an evaluation of the criticisms levelled against State Parties to CEDAW offers crucial insight. State Parties to CEDAW have been emphasised for ratifying the convention but fail to make substantive efforts to achieve compliance. Such countries have been emphasised for making easy changes to policy but failing to come up with enabling legislation to enforce/establish such changes. An example given of this situation is that

a country might make changes to which there is little political opposition-for instance removing legal prohibitions on women working in certain industries-but then failing to make more politically costly

²¹⁵ Hanna Beate Schöpp-Schilling, 'The Role of the Convention on the Elimination of All Forms of Discrimination Against Women and its Monitoring Procedures for Achieving Gender Equality in Political Representation' (International Institute for Democracy and Electoral Assistance (IDEA)/CEE Network for Gender Issues Conference, 22–23 October 2004).

²¹⁶ CEDAW (n 8).

changes like guaranteeing equal pay for equal work in those industries.²¹⁷

As such, it is important for State Parties to go a step further to ensure that in implementing the provisions of CEDAW, these steps are substantive and not cosmetic.

Secondly, a consideration applied to the positive effects CEDAW has on women's social and political rights is because some signatory State Parties already have impressive records about women's rights. However, a study carried out by Englehart and Miller indicates that the improvements in the political rights of women were experienced by State Parties after the ratification of CEDAW. With regards to an evaluation of the state of women's political rights, this study details that,

the trend line for CEDAW parties moves steadily, if gradually, upwards, beginning at 1.77 in 1981, and ending at 1.98 in 2006...from 1981 through 2006, a total of 150 countries ratified CEDAW, so that lower performing countries in the non-parties category migrated over time into the states-parties category. Despite this migration, the mean political rights score for CEDAW parties continued to rise, suggesting that even low-performing countries were making improvements in women's political rights after joining the treaty.²¹⁸

Whilst the above statistics are impressive concerning advancements made by State Parties in the area of political rights, available statistics indicate that the advancements made in social rights by State Parties are largely stable.²¹⁹ These statistics indicate that 'the trend line remains basically stable despite the fact that low-performing states are gradually being added over time. This suggests that CEDAW has a modest but real positive effect on women's social rights in countries that are low-performing prior to ratification.'²²⁰

From the above evaluation of CEDAW's effects on the political and social rights of women, it can be seen that the ratification of CEDAW has a significant impact on

²¹⁷ Englehart and Miller (n 210).

²¹⁸ *ibid* 32.

²¹⁹ *ibid*.

²²⁰ *ibid*.

women and these improvements will further increase should State Parties continue to fully implement and abide by CEDAW provisions.

Lastly, it is worth considering whether the improvements witnessed in the social and political rights of women are a result of global trends that tend to bend towards the promotion of women's rights and as such, that these improvements may not be a result of the ratification of CEDAW. The global trend that indicates an increasing role of States to promote women's rights falls under the 'world polity' literature which contends that States tend to conform their domestic behaviours and institutions according to international practices.²²¹ However, the study carried out by Englehart and Miller points out that whilst world polity literature influences domestic behaviour, 'CEDAW ratification remains positive and significant as well, indicating that the treaty continues to have separate, independent effect in ratifying countries, apart from the global trend.' This analysis emphasised the significant impact and influence CEDAW has on the political and social rights of women. The framework in State Parties achieving the obligations under CEDAW has been considered to rest on three key principles:

- a. The obligation to respect by enforcing and attaining equality in laws and policies;
- b. The obligation to protect by guarding women against direct and indirect discriminatory practices; and
- c. The obligation to fulfil CEDAW by upholding equitable standards for both men and women and the removal of gender discrimination in the social and economic spheres.²²²

In light of the above, the attainment of substantive equality could be achieved if State Parties to CEDAW observed these three principles and it has also been argued that to attain substantive equality, States need to transform their economic and social institutions. This includes 'the beliefs, norms and attitudes that shape them, at every

²²¹ *ibid.*

²²² Sustainable Development Goals Knowledge Platform, 'Committee on the Elimination of Discrimination against Women (CEDAW)' <<https://sustainabledevelopment.un.org/index.php?page=view&type=30022&nr=108&menu=3170>> accessed 27 May 2023.

level of society, from households to labour markets and communities to local, national and global governance institutions.’²²³

While CEDAW urges member states to abolish gender bias and ensure equality in all life aspects, the principle of party autonomy in arbitration, permitting parties to decide arbitrators, arbitration rules, the seat of arbitration, and governing law, may counteract efforts to boost gender diversity in arbitration panels if the predilection is towards male arbitrators. To reconcile this dichotomy and achieve substantive equality, various initiatives can be implemented by institutions and states: institutions can establish policies promoting gender diversity, such as setting female arbitrator quotas, providing training and mentorship programs, and keeping a diverse arbitrator roster.²²⁴

Moreover, institutions can also alter norms and attitudes by conducting awareness campaigns, training, and events emphasizing the importance of diversity in arbitration, thereby influencing the selection of more female arbitrators. State parties to CEDAW can adopt laws mandating or advocating for arbitration panel diversity while respecting party autonomy. Institutions and states can enhance transparency in arbitrator appointments by publishing gender-based statistics, highlighting areas for improvement.²²⁵ Lastly, states and institutions can also endorse good practices, acknowledging entities appointing female arbitrators or those with robust diversity policies. Through these actions, we can foster gender diversity in arbitration while honouring party autonomy. However, it necessitates continuous efforts and a readiness to challenge established norms and practices.

2.6.3. The Role of the Committee on The Elimination of Discrimination Against Women in Advancing Women’s Rights

²²³ *ibid.*

²²⁴ Mareike Fröhlich, Tatjana Jevremović Petrović and Jelena Lepetić, ‘Gender, Business and the Law’ in Dragica Vujadinović, Mareike Fröhlich and Thomas Giegerich (eds), *Gender-Competent Legal Education* (Springer 2023) <https://link.springer.com/chapter/10.1007/978-3-031-14360-1_19> accessed 12 June 2023.

²²⁵ Bryan Cave Leighton Paisner, ‘Diversity on Arbitral Tribunals: Are We Getting There?’ (BCLP, 12 January 2023) <www.bclplaw.com/en-US/events-insights-news/diversity-on-arbitral-tribunals-are-we-getting-there.html> accessed 12 June 2023.

The Committee on the Elimination of Discrimination against Women comprises independent experts on women's rights and the function of the body is to monitor the implementation of CEDAW. One of the key roles of the CEDAW Committee is to make recommendations to State Parties on issues facing women. The CEDAW Committee has adopted 30 General Recommendations as of January 2014.²²⁶ Among these are General Recommendations 5, 8, 23 and 25 that call for increased inclusion and participation of women in public and political areas. The General Recommendations assist State Parties in the implementation of CEDAW by giving interpretations of the Convention.²²⁷

Notably, Article 1 of the General Recommendations adopted by the CEDAW Committee emphasised a section of the preamble to CEDAW that states that

Recalling that discrimination against women violates the principles of equality of rights and respect for human dignity, is an obstacle to the participation of women, on equal terms with men, in the political, social, economic, and cultural life of their countries, hampers the growth of the prosperity of society and the family and makes more difficult the full development of the potentialities of women in the service of their countries and humanity.²²⁸

This provision captures the aspirations of CEDAW and the CEDAW Committee and places an obligation on State Parties to work towards ending the discrimination against women in the social, political, economic, and cultural spheres.

Article 15 of the General Recommendations goes further to place an obligation on State Parties to emphasise temporary special measures to give effect to Articles 7 and 8 of the CEDAW Convention. The temporary measures recommended include,

recruiting, financially assisting and training women candidates, amending electoral procedures, developing campaigns directed at equal participation, setting numerical goals and quotas, and targeting women

²²⁶ United Nations Human Rights Office of the High Commissioner, 'General Recommendations: Committee on the Elimination of Discrimination Against Women' <www.ohchr.org/EN/HRBodies/CEDAW/Pages/Recommendations.aspx> accessed 29 May 2023.

²²⁷ Schöpp-Schilling (n 216).

²²⁸ UNCEDAW, CEDAW General Recommendation No. 23: Political and Public Life [1997] A/52/38 <www.refworld.org/docid/453882a622.html> accessed 17 June 2023.

for the appointment to public positions such as the Judiciary or other professional groups that play an essential part in the everyday life of all societies.²²⁹

This recommendation fills a crucial gap in countering the challenge of repeat appointments in International Commercial Arbitration by increasing the number of women as first-time arbitrators in leading arbitral institutions. Further, by improving the inclusion of women in the Judiciary, this would significantly improve the experience, visibility and background needed in considering the appointment of an arbitrator.

However, whilst the above temporary measures are desirable in affirming women's rights and the participation of women in the national and international arena, the CEDAW Committee emphasised that temporary measures should not be confused with general measures/policies. As such, the CEDAW Committee requires that State Parties determine a period for the application of temporary measures and that this duration should be determined by functional results rather than by the passage of time.²³⁰ This offers a more pragmatic approach towards the realisation of greater participation of women as it holds State Parties to account by requiring the implementation of these measures.

Critics of the implementation of temporary measures have raised the issue of merit and qualification of the women being appointed to the public and private sectors. The criticism here is that in achieving increased participation of women in these sectors, their qualification and merit is overlooked to achieve gender equality-hampering the quality of service being offered in the public and private sectors.²³¹ These criticisms have also been raised at the international arbitration level that in considering which arbitrator to appoint, a client will simply want to choose the 'best' arbitrator, irrespective of their gender- a right guaranteed under the principle of party

²²⁹ General Recommendations Adopted By The Committee on The Elimination of Discrimination Against Women, 'General Recommendation No.23: Political and Public life' <https://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/1_Global/INT_CEDAW_GEC_4736_E.pdf> accessed 29 May 2021

²³⁰ Schöpp-Schilling (n 216).

²³¹ *ibid.*

autonomy.²³² In responding to an international arbitration survey, an anonymous commentator emphasised the best arbitrator view by stating that,

when asked by a client to select an arbitrator, the desirability of promoting diversity is the last feature on anyone's mind. We are not being asked to make a statement, we are asked to pick the best person for the job.²³³

In responding to the criticisms on merit and qualification, the CEDAW committee considers that 'merit' and 'qualification' ought to be culturally determined and assessed to establish whether there exists gender bias. Further, the CEDAW Committee recommends that in making appointments in the Public and Private sectors, State Parties ought to take into account qualification, merit as well as the principles of democratic fairness and electoral choice.

Whilst there are other notable human rights treaties, it is notable that CEDAW has had a significant impact on the political and social rights of women. The legal framework established under CEDAW such as the General Recommendations of the CEDAW Committee and the application of quotas and temporary reforms tend to explain the successes CEDAW has achieved. However, there is a need to improve the willingness and commitment of State Parties to achieve substantive equality and as a result, increased participation of women at the national and international level. It is worth considering that the international arbitration community stands to benefit from the impact of CEDAW on women's rights and women's participation.

2.7. The Existence of Gender Inequality in Arbitration within Saudi Arabia

For women in the legal profession, encouraging gender diversity in arbitration panels in the Middle East can have significant advantages. These advantages include more opportunities for professional advancement, more equitable legal decisions, and

²³² Line Bareiro, 'Between Legal Equality and de Facto Discrimination: Recommendations of the Committee on the Elimination of Discrimination against Women (CEDAW) for the States of Latin America and the Caribbean' (UN ECLAC 2018) <www.cepal.org/sites/default/files/publication/files/44071/S1800187_en.pdf> accessed 17 June 2023.

²³³ Pilawa (n 9) 417.

greater representation and visibility of women in leadership positions. Women have historically faced significant barriers to equality in the legal profession in several Middle Eastern nations. In any case, promoting gender diversity in arbitration panels can assist in addressing these issues and encourage more gender parity in the legal profession. For instance, the government of the United Arab Emirates (UAE) has made a concerted effort to promote gender diversity in the legal profession, including in arbitration. Women now make up a significant share of the nation's legal professionals as a result, and they are increasingly represented in leadership positions.²³⁴

Additionally, promoting gender diversity in arbitration panels can aid in the creation of opportunities for women to advance professionally. This is especially crucial in nations where women have historically been underrepresented in leadership positions. For instance, in some countries, promoting gender diversity in the legal profession has been highlighted as a top priority for the government since it can ensure that women have equal opportunities for career advancement. A gender-diverse panel can aid in promoting more equitable judicial decisions. Women may have distinct perspectives and experiences that can help ensure that legal decisions take into account the particular circumstances of all parties concerned. This is the case with women. For instance, having a female arbitrator on the panel in family law cases may help ensure that women's rights and interests are protected and that legislative decisions are made with an understanding of the challenges faced by women in society.²³⁵

2.7.1 The Benefits of Gender Equality in Arbitration within Saudi Arabia

Upholding gender diversity in arbitration panels in Saudi Arabia may be very beneficial for women working in the legal profession. These advantages include increased opportunities for professional advancement, more equitable legal decisions, and better representation and visibility for women in leadership positions. Women have historically faced significant barriers to equality in the legal profession in Saudi

²³⁴ Beibei Zhang, Third Party Funding for Dispute Resolution: A Comparative Study of England, Hong Kong, Singapore, the Netherlands, and Mainland China (Spring 2021) 159.

²³⁵ Oxford Business Group, 'The Report: Saudi Arabia 2019' <<https://oxfordbusinessgroup.com/reports/saudi-arabia/2019-report>> accessed 31 May 2023.

Arabia. However, recently the government has taken action to promote gender diversity in the legal profession, particularly in arbitration. For instance, the Saudi Arabia Ministry of Justice announced in 2019 that it will let women operate as notaries, a profession that had previously only been open to men.²³⁶ Additionally, the government has established a program for legal training for women to promote greater gender diversity in the legal profession.

Encouraging gender diversity in arbitration panels can assist in addressing these issues and fostering more gender equality in the legal profession. A gender-diverse panel, for instance, might help guarantee that legal decisions take into account the particular circumstances of all parties concerned, including women. This is especially crucial in cases involving family law since it can help ensure that women's rights and interests are protected to have a female arbitrator on the panel.²³⁷

Another advantage of encouraging gender diversity in arbitration panels in Saudi Arabia is that it can aid in the eradication of stereotypes and biases related to gender in the legal profession.²³⁸ This may result in more fair legal decisions since arbitrators are less likely to base their decisions on bias. Furthermore, having a gender-diverse panel can help dispel the myth that certain legal fields are masculine or feminine and foster an environment that is more open and accepting for women in the legal profession. This can help solve the existing underrepresentation of women in the industry by encouraging more women to pursue careers in arbitration.

Promoting gender diversity on arbitration panels in Saudi Arabia may have significant advantages for all women, including those directly affected by the case, those who work as arbitrators, and those who are not directly involved in the case but are nonetheless impacted by its outcome. A gender-diverse panel can help guarantee that the perspectives and experiences of the women who are directly impacted by the case are taken into account. Such a panel is especially crucial in the context of Saudi

²³⁶ Nouf Alsuwaida, 'Women's Education in Saudi Arabia' (2016) 12(4) *Journal of International Education Research* 111.

²³⁷ Cécile Bourreau-Dubois and others, 'Does Gender Diversity in Panels of Judges Matter? Evidence from French Child Support Cases' (2020) 63 *International Review of Law and Economics* 105929 <www.sciencedirect.com/science/article/abs/pii/S0144818820301423> accessed 12 June 2023.

²³⁸ International Council for Commercial Arbitration, 'Report of the Cross-Institutional Task Force on Gender Diversity in Arbitral Appointments and Proceedings: 2022 Update' (ICCA Reports No 8) <https://cdn.arbitration-icca.org/s3fs-public/document/media_document/ICCA-Reports-no-8-Gender-Diversity-2022-update.pdf> accessed 31 May 2023.

Arabia, where women have historically faced significant challenges. A female arbitrator, for instance, can guarantee that women's rights and interests are protected and that legal decisions take into account their particular circumstances in cases involving family law.²³⁹ This can aid in promoting gender equality and lowering the likelihood of gender-based discrimination.

Encouraging gender diversity can help women who work on arbitration panels by promoting diversity in leadership roles. Promoting gender diversity in arbitration panels will help Saudi Arabia, where women have historically been underrepresented in leadership positions, address this inequality, and encourage more gender parity in the legal profession. Additionally, having more women on arbitration panels might promote greater sensitivity and gender awareness in legal decision-making, resulting in more equitable outcomes.²⁴⁰

Gender diversity on arbitration panels can aid in promoting more representation and visibility for women in the legal profession for women who are not directly involved in the case. This can aid in challenging gender stereotypes and promoting more gender equality across society. Additionally, a gender-diverse panel can demonstrate that the panel is committed to reaching fair and equitable decisions and can help promote public trust and confidence in the arbitration process.²⁴¹

Promoting gender diversity in arbitration panels may have broader social repercussions. Promoting gender diversity on arbitration panels in Saudi Arabia, Saudi Arabia can help challenge gender stereotypes and advance gender equality throughout society. This can help create a more varied and inclusive society where people are judged on their abilities and qualifications rather than their gender.²⁴² Saudi Arabia may serve as an example for other countries in the region and encourage progress

²³⁹ Oxford Business Group (n 236).

²⁴⁰ Ula Cartwright-Finch, 'Is increasing gender and ethnic diversity in arbitral tribunals a valid concern and should arbitral institutions play a greater role in ensuring diversity?' (Cortex Capital 2019) www.cortexcapital.org/files/ugd/92060d_c0f194d8b22c4fefa325b4ede64770e1.pdf accessed 21 June 2023.

²⁴¹ Alhanouf A Alsolami, *Reconsidering Dispute Resolution in Saudi Arabia: A Comparative Study of Consumer Arbitration and Class Action's Mechanism* (UC Berkeley 2019).

²⁴² Paola Profeta, 'Gender Equality in Decision-Making Positions: The Efficiency Gains' (2017) 52(1) *Intereconomics* 34 <www.intereconomics.eu/contents/year/2017/number/1/article/gender-equality-in-decision-making-positions-the-efficiency-gains.html> accessed 12 June 2023.

toward greater gender equality by promoting gender diversity in leadership positions within the legal profession.

Upholding gender diversity in arbitration panels is not without its difficulties. There may be opposition to the idea of promoting more gender diversity in the legal profession in Saudi Arabia. One further factor is that implementing gender diversity policies may face practical difficulties, such as a lack of qualified female arbitrators or a reluctance among some legal professionals to collaborate with women. But Saudi Arabia may assist in advancing toward a more equitable and inclusive legal system by recognising the benefits of gender diversity and trying to address these issues.

Additionally, encouraging gender diversity in arbitration panels might help women in Saudi Arabia find opportunities for professional advancement.²⁴³ A gender-diverse panel, for instance, may provide women with valuable networking opportunities and exposure to senior members of the legal profession, both of which can advance their careers. Lastly, opportunities at the entry level may arise when the top levels of a profession become more diverse.²⁴⁴

2.7.2. Application of CEDAW

Saudi Arabia ratified CEDAW in 2001 and as such, is obliged to end all forms of discrimination against women as stipulated by Articles 7 and 8 of CEDAW. Article 2(a) of CEDAW further requires Saudi Arabia as a State Party, to, ‘embody the principle of the equality of men and women in their national constitutions or other appropriate legislation if not yet incorporated therein and to ensure, through law and other appropriate means, the practical realisation of this principle.’²⁴⁵ However, despite this provision and other enabling provisions under CEDAW calling for effective measures to end discrimination against women, Saudi Arabia entered reservations in the ratification of CEDAW that states that ‘in case of contradiction

²⁴³ McBride D, ‘Women in the Legal Profession: The Pathway to Change’ (*Women of Influence* May 2012) <https://www.womenofinfluence.ca/2012/05/06/women-legal_profession-the-pathway-to-change/> accessed 16 June 2023.

²⁴⁴ Battaglini M, Harris JM and Patacchini E, ‘Interactions with Powerful Female Colleagues Promote Diversity in Hiring’ (2023) 41(2) *Journal of labor economics* <<http://dx.doi.org/10.1086/720392>> accessed 16 June 2023.

²⁴⁵ Convention on the Elimination of All Forms of Discrimination Against Women (n 8).

between any term of the Convention and the norms of Islamic law, the kingdom is not under obligation to observe the contradictory terms.’²⁴⁶ This reservation places Saudi Arabia in conflict with the provisions of CEDAW and further, article 19(c) of the Vienna Convention on the Law of Treaties provides that where a reservation is incompatible with the purpose and object of a treaty, then it violates international law.²⁴⁷ This is on the basis that reservations that run contrary to the objects of a treaty might have the effect of rendering an international obligation meaningless.²⁴⁸

Article 5 of CEDAW particularly requires State parties to ‘modify the social and cultural patterns of conduct of men and women with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or superiority of either of the sexes or on stereotyped roles for men and women.’²⁴⁹ It follows then that the interpretation of Sharia and Hadith by jurists to oppose the appointment of women in judicial positions, including arbitrator positions, requires these religious prejudices to be modified as they assign a superiority complex to a man to the disadvantage of women. Whilst the appointment of 50 public prosecutors by the Saudi Arabian government is laudable, the requirement imposed by Article 2(a) of CEDAW calling for the national constitution and legislation to embody the principle of equality of both men and women has not fully realized. Moreover, while Article 14 of the New Arbitration Law does not prohibit the appointment of a female arbitrator, there is a need for the legislation to be reworded to deliberately assert that an arbitrator can be appointed irrespective of their gender to ensure the Saudi Arabian achieves a practical realisation of the principle of equality in arbitration law.

2.7.2.1. Application of the General Recommendations of the CEDAW Committee

The Saudi Arabian Government is obligated by Article 15 of the General Recommendations to make use of temporary measures to realise the objectives set out in Articles 7 and 8 of CEDAW. An effective temporary measure that could be adopted

²⁴⁶ Sandra Day O’Connor, ‘Commentary: Women and Islamic Law’ in Anver E Emon, Mark Ellis and Benjamin Glahn (eds), *Islamic Law and International Human Rights Law* (OUP 2012) 305.

²⁴⁷ Convention on the Elimination of All Forms of Discrimination Against Women (n 8).

²⁴⁸ *ibid.*

²⁴⁹ *ibid.*

through targeting women for judicial positions and other professional groups such as arbitral bodies. This research considered that the use of such a temporary measure could help counter the challenge of repeat appointments in international commercial arbitration as this would increase the number of women in the leading arbitral institutions. Further, this temporary measure would help build the background and experience of women in judicial offices and as such, offer them much-needed visibility for arbitrator appointments.

Given the Saudi Arabian commitment to the CEDAW, it is hoped that this commitment will be reflected in all aspects of the legal framework, including the Saudi Arbitration Law (SAL), to ensure it does not contain discriminatory provisions. An in-depth discussion of this issue will be presented in a later chapter of this thesis.

2.8. Conclusion

This chapter explores an overview of the challenges facing women, not only in the legal profession but also across other sectors. The chapter established that women are increasingly participating in different professional fields worldwide. However, the presence of women in senior or top-level management in traditionally ‘male-dominated’ areas such as law, medicine, engineering, accounting, and other liberal professions is low and discriminatory to women. In the legal profession, women are being discriminated against, more so in the top legal positions such as arbitrators and jurists. Women face significant discrimination in the field of international arbitration.

In international courts, the number of women serving as arbitrators is typically less than 20% compared to male arbitrators. In the Middle East and North Africa (MENA) region, the representation of women in the judiciary is notably low. Particularly in Gulf countries, women hold less than one percent of the highest legal positions. Male dominance in arbitration stems from many years of experience in the arbitration field as compared to women who just entered the previously male-only field less than half a century ago. Arbitration practice often relies on established networks of influential individuals, commonly referred to as ‘old boy’s networks.’ Unfortunately, these networks tend to perpetuate a lack of gender diversity in the appointment of arbitrators, hindering the opportunities for women to serve on tribunals. The reasons behind this

inequality include implicit biases, gender stereotypes, women's perceived lack of experience, and the prevailing male dominance in the field of arbitration. Consequently, the appointment of female arbitrators is severely impeded. Despite their significant potential in these areas, this persistent issue denies women the chance to contribute their valuable skills and perspectives to peace negotiations and conflict resolution. Women can bring fairness, justice, and quality to the arbitration process. They can also improve diverse thinking in regard to decision-making processes solving the issue of group thinking common among individuals with the same traits. To solve the challenges facing female arbitrators, efforts should be placed on mentoring, developing improved profiles to promote career advancement and visibility, and adopting identification tools.

Dealing with implicit bias and gender stereotypes is also crucial in promoting gender equality. Given the foregoing, this chapter has sought to address itself the research question by discussing the significance of the role of women in arbitration at a global level by considering the place of women in international arbitration, as well as potential solutions that can be applied to counter the gender disparity. The role of CEDAW has also been considered to discuss how its provisions can be applied to Saudi Arabia's legal framework in line with the main research question that seeks to discuss the appointment of women as arbitrators under Saudi Arabia law. Overall, this chapter identified gender disparity in the representation of women in international arbitration due to the women's lack of experience in international arbitration, male dominance, and implicit bias. Therefore, from a general perspective, the representation of women in arbitration is low; hence it raises the question of the legal frameworks that have been put in place, including the arbitration laws and their stipulations on the place of women in the judicial and legal systems. The next chapter will address the case of Saudi's legal system and arbitration laws to answer this question.

CHAPTER THREE: SAUDI ARABIA AND HISTORICAL BACKGROUND OF THE SAUDI JUDICIAL AND LEGAL SYSTEMS: SHARIA LAW APPLIED IN THE SAUDI SYSTEM

3.1. Introduction

In this chapter, a historical background of Saudi Arabia's judicial and legal systems is provided. The chapter seeks to answer the question of how Saudi's judicial and system has been shaped and influenced by the historical development of the country since the times of Prophet Muhammad. This analysis is helpful given that by understanding Saudi Arabia's legal and judicial history, such a historical perspective will improve the understanding of how Saudi Arabia's legal system has developed through time. Further, such a historical perspective will point out how in the course of the development of Saudi Arabia's legal framework, the participation of women as arbitrators has been affected. As such, an analysis of Saudi Arabia's judicial and legal system requires an explanation of how applied in the Saudi System, including the key terms and structures, besides the requirements to be fulfilled ensuring the eligibility of a judge and an arbitrator.

3.2. Overview of Saudi Arabia and its Development

Saudi Arabia is a vast desert country occupying approximately 860,000 square miles.²⁵⁰ Most of the country is made of great sand deserts and wilderness covered by jumbled lava beds and gravel. The country's population is distributed along the three belts which corresponds to the geographical and historic divisions with half of the population living in the Hijaz and Asir regions forming the mountainous belt along the Red Sea. The Hijaz and Asir regions were combine during the 1920 including the holy cities of Mekka and Medina.²⁵¹ The second population belt is made of the archipelago oases extending from Hail to Kherj in Riyadh, the Capital of Saudi. This forms the

²⁵⁰ Fahad Khelaif, 'Islamic Law and the Judiciary: Developments in Saudi Arabia in the 20th Century' (DPhil thesis, School of Oriental and African Studies, University of London 1996).

²⁵¹ *ibid.*

power base of the Najd of the House of Saud. The last belt is located near the coast of the Gulf and reaches the Heradth oasis. The Eastern province region as the third belt is commonly referred to, was combine in 1913 and is the main region where the oil field facilities are located. The three main belts are separated by vastly thinly inhabited spaced with results in many sub-regions which historically contributed to the populace division into two sub-groupings.

Saudi Arabia's essential character is shaped by religion as it moves and evolved through its history evolving through time, personalities, and events. The same is true for Islam which begun fourteen centuries ago demanding for the submission of all in the manner in which ideas, forms, ethics and worship is manifested. The Quran sustains Islam and, though not a law book, provides the means with which the Islam practitioners analyse the words and deeds of Prophet Mohammed and his companions for guidance on the right actions. The Quran and the Sunnah therefore, form the systems of behaviour and direction for the Sharia serving as the code of law for the state of Saudi Arabia.²⁵² Unlike other religions, Islam does not differentiate between religious and state laws as it forms the complete system of social morality by defining ways that man should live if he seeks to act in the ways of God.

Mohammad, the founder of Islam was born in 570 A.D and was orphaned at an early age. He was a member of the Guraysh tribe. The irreligious practices of his people upset him and led him to seek religious seclusion in a cave outside Mecca before being chosen by the Almighty God through a Message by Angel Gabriel that,

Proclaim! [or Read!] in the name of thy Lord and Cherisher, Who created
man, out of a [mere] clot of congealed blood: Proclaim! And thy Lord, He
Who taught [the use of] the pen, taught man that which he knew not. Ray, but
man cloth transgress all bounds, in that he looked upon himself as
self-sufficient. Verily, to thy Lord is the return [of all]. (Quran, XCVI: 1-8)

Hijrar the journey to Medina in 1962 forms the primary date and event when Islam was established as Prophet Mohammed was transformed from a visionary to a statesman and conqueror following his organization of the growing Islam community.

²⁵² Peter Mansfield, *The New Arabians* (1st edn, Ferguson Publishing Company 1981) 21.

The period led to the development of the Islamic law together with social and political order²⁵³. Between the seventh and the thirteenth century, Islam created a new empire ruled by powerful local caliphates following the leadership approach of the Prophet and were referred to as the Rashidun caliphs loosely translated as the rightly guided Caliphs.²⁵⁴

In 661, Medina's primacy came to an end as the Umayyad's consolidated and spread the influence of the Arab culture to other civilizations including Spain lasting till 750 A.D where the Abbasid age of Islam lasted till 1258 A.D where other forces beyond Islam prevailed.²⁵⁵ This included the Persians and the Turks resulting in tensions between the Arab and non-Muslim communities. Different sects were then formed as diversity of opinions increased. Codification of Prophet Mohammad's oral tradition was done marking the Abbasid era as the time of massive changes and upheavals at the time.²⁵⁶

Subsequently, when King Abd Al-Aziz completed the annexation of the Hijaz, the judicial system in the region was still in its embryonic stages by standards of the Muslim countries apart from the Hijaz who had been influenced by the Ottoman reform. However, these reforms were felt mainly in Jidda and Mekka. However, such reforms were ended by Sharif Husayn of Mekka after the First World War.²⁵⁷ Consequently, the abolishment of the Ottoman civil code led to the grievances amongst the townsmen. However, the tribal system was strengthened as the tribal customary law was retained. This was freed from any interference from the criminal and civil jurisdiction. However, the advent of King Al-Aziz led to the total eradication of the Ottoman imprint on the laws.

3.3. A Historical Analysis of the Saudi Arabian Legal System

The need for countries to enact legal systems based on their respective cultural and religious beliefs is crucial for the proper functioning of a State. The absence of laws to

²⁵³ Ahmed A Al-Ghadyan, 'The Judiciary in Saudi Arabia' (1999) 14(4) Arab Law Quarterly 332.

²⁵⁴ Khelaif (n 250) 5.

²⁵⁵ Richard C Martin, *Islam: A Cultural Perspective* (Prentice-Hall 1982) 23.

²⁵⁶ Khelaif (n 250) 6.

²⁵⁷ *ibid* 12.

govern human conduct as pointed out by Thomas Hobbes, is a state of anarchy. Notably, Hobbes in his publication, *Leviathan* in 1651, contends that the respect for political authority or to a sovereign by the people requires an additional motivation other than their own self-interest. This, he argues, can be achieved through the use of religion to shape human conduct. As such, Hobbes considers that religion, religious practices enacted into government institutions and society can be an instrumental means to achieve the respect for law and authority.²⁵⁸ The term ‘law’ has been defined as ‘the body of rules and principles of action which are binding upon civilized people and stated states in their relations with another.’²⁵⁹ However, Awad Ali Alanzi considers that to understand the law as a tool that regulates and preserves the conduct of a given society, the law should be understood in its ideal form.²⁶⁰ On the other hand, Alanzi contends that the term ‘legal system’ is incorrectly defined in courts as a non-technical legal phrase and that its correct interpretation should be that,

the concept of the legal system presumes the existence of a quantifiable union involving the characteristics of its laws and the manner in which they are applied. It may be assumed that attainment of a formal unity of laws and the manner in which they are applied.²⁶¹

It follows then than an understanding of the legal system of Saudi Arabia will on one hand, relate to the manner in which the law is applied and on the other hand, the characteristics of the laws. Awad Alanzi further considers that there exists an aspect of identity of legal systems where he contends that ‘the identity of a national legal system is meant to be an acknowledged procedure by which laws are codified within a specific legal classification of applicability and logic.’²⁶² It has been argued that the identity of Saudi Arabia has been forming way before the actual establishment of the Kingdom. Whilst Saudi Arabian legislators have worked to develop a modern legal

²⁵⁸ Stanford Encyclopedia of Philosophy, ‘Hobbes’s Moral and Political Philosophy’ (*Stanford Encyclopedia of Philosophy*, 2002) <<https://plato.stanford.edu/entries/hobbes-moral/>> accessed 1 July 2021.

²⁵⁹ Awad Ali Alanzi, ‘Exploring the Legal System in Saudi Arabia’ (2020) 11(2) *International Journal of Innovation, Creativity and Change* 114-115.

²⁶⁰ *ibid.*

²⁶¹ *ibid.*

²⁶² *ibid.*

identity, scholars consider that there has been a misconception that Saudi Arabia is classified strictly as a religious system.²⁶³

Whilst acknowledging that Sharia has a dominant influence in the Saudi Arabian legal system, it is notable that prior to the unification of the Saudi Arabian Kingdom, Sharia was still influential within the Arab Peninsula.²⁶⁴ The effect of the influence of Sharia on Saudi Arabia was that legal theories and legal debates were fashioned around the dictates of Sharia to come up with a unique jurisprudence to fit the needs of the country.

3.3.1. The Impact of the French Legal System on the Saudi Arabian Legal System

Following the fall of the Ottoman Empire in 1922 and the subsequent birth of the Saudi Arabian Kingdom, scholars consider that the French legal system had significant influence on Egypt and other Arab countries given the French occupation of these areas in the 18th and 19th centuries.²⁶⁵ The interest of the French in the Middle East can be traced back to the era of the Ottoman Empire in the 16th century when Francis 1 and Suleiman the Magnificent signed the capitulation treaties in 1535. Further, Maren Hanson provides a historical record pointing out that the,

French influence was further extended as France carved out her colonial empire in North Africa, as Napoleon occupied Egypt, and as French mandates were created in Syria and Lebanon. In the legal sphere, this influence was felt in the formation of indigenous legal institutions copied from the French. The French codified system of law was easily adapted to existing Islamic law and rapidly spread throughout the Middle East.²⁶⁶

In light of the significant influence of the French legal system as shown by Hanson, a historical analysis of the effect of this influence in the make-up of the Saudi Arabian legal system would offer valuable insight into the development of the judicial system

²⁶³ *ibid.*

²⁶⁴ *ibid.*

²⁶⁵ Alanzi (n 259).

²⁶⁶ Maren Hanson, 'The Influence of French Law on the Legal Development of Saudi Arabia' (1987) 2(3) *Arab Law Quarterly* 272.

in Saudi Arabia. Further, such a historical analysis would help defining the legal concepts adopted then, their evolution, ‘culminating in the establishment of legal institutions greatly influenced by the French civil law system while remaining essentially Islamic in nature.’²⁶⁷

In the year 1535, Francis I of France signed a treaty with Suleiman the Magnificent. The effect of this treaty is that it granted French commercial concession for an informal alliance with Suleiman the Magnificent. In return for the commercial concessions issued to Suleiman the Magnificent, the treaty included the recognition of Francis I as the protector of holy Christian places, and further, French consuls obtained exclusive jurisdiction in civil and criminal matters. Where a dispute arose between French and Ottoman subjects, they were submitted to Ottoman Islamic courts with safeguards being employed to protect French subjects.²⁶⁸ The treaty later became a blueprint for subsequent agreements entered into by European countries and they also established the rights of foreigners within the Ottoman empire. Notably, this practice is in line with Islamic law on the basis that Islamic law adopts the principle of personality of the law. This in effect, means that Islamic law is applied not on the basis of the territory but rather on ‘the basis of the origin, nationality, tribal or religious affiliation of the individual involved.’²⁶⁹ As such, it can be understood that by granting foreigners special treatment in the local jurisdiction, this was in line with Islamic legal principles.²⁷⁰

In 1804, the French Civil Code was promulgated, and France began the process of codification that spread throughout Europe. The influence of the Western powers started growing at the beginning of the 19th century and it spread through the entire Islamic Middle East. This influence manifested through the development of legal institutions. The Ottoman Empire during the 19th century, sought to align itself with Western powers for political reasons as can be seen from the benefit of concessions enjoyed by Suleiman the Magnificent. As a result, ‘the French Commercial Code,

²⁶⁷ *ibid* 275.

²⁶⁸ *ibid*.

²⁶⁹ *ibid*.

²⁷⁰ *ibid*.

Code of Civil Procedure, Penal Code and Code of Criminal Procedure were translated with few changes for use in the Empire.’²⁷¹

When the time came to codify the French Civil Code in the Ottoman Empire, there arose a controversy as to whether the compilation of a code of obligations should be based on the French code or on the principles contained under Sharia. Sharia principles prevailed as the applicable code of obligations for use in the Ottoman Empire and this became the first time in Islam when a State applied the principles of Sharia as law.

Sharia at the time was drawn from the *Majella*, otherwise known as the Book of Rules of Justice having been enacted in 1876 and it was split into 16 sections covering rules that regulated: contracts, certain categories of torts and procedural rules. However, the *Majella* did not cover private law sectors such as succession, divorce and marriage.²⁷² Hanson considers that at the time, Sharia could not be understood to be a code in the European sense given that Sharia was not an exhaustive statement of the law at the time but rather, ‘a non-exclusive digest of existing rules of Islamic law which, because of its religious nature, could hardly have an exclusive character.’²⁷³

Additionally, the influence of French law on Middle East States such as Egypt in the 18th and 19th century had the effect of making educational institutions such as Universities teach French law. As a result, Saudi Arabian scholars who studied in these countries came back to Saudi Arabia with training in French law thereby occasioning a duality of law in the country. Further, Alanzi points out that most of the advisors and consultants of the Saudi Arabian Kings were ‘Egyptians or Syrians either by birth, origin or education and countries profoundly influenced by the French legal system.’²⁷⁴ As a result, by way of advice or direction sought by the Saudi Kings, these advisors adopted Egyptian or Syrian laws which were heavily influenced by French law. However, there remained a requirement that such laws comply with the dictates of Sharia.

In illustrating the above influence of French law in the Saudi Arabian legal system, Saudi Arabia in 1966 enacted Royal Decree No. (M/6) dated 24/02/1386 which relates

²⁷¹ *ibid* 279.

²⁷² *ibid* 280.

²⁷³ *ibid*.

²⁷⁴ Alanzi (n 259) 117.

to the Regulation of Governing Bids in Government procurement and sales. This decree was initially a copy of the Egyptian Bid Regulation of 1957 which was translated from the French regulation of 1953.²⁷⁵ Further, Royal Decree No. (M/6) dated 22/03/1385 H enacted the Saudi Companies Law. The decree was drawn from the Egyptian Code which in itself, was drawn from the French Company law.²⁷⁶ The influence of French law as Alanzi argues, could also be drawn from the fact that Saudi Arabian government representatives relied on French law in the case of *Saudi Arabia v Arabian American Oil Company*.²⁷⁷ Whilst Saudi Arabia evidently seems to have been influenced by French law, some scholars have applied the consideration that Saudi Arabian law is still Islamic in the sense that the adopted decrees/laws are not in conflict with Sharia.

However, it is notable to appreciate that the adoption of French law into the Saudi Arabian legal system has brought with it conflict between Sharia and civil principles. For instance, Alanzi makes the point that Saudi Sharia Colleges have been unreceptive to teaching Civil law that has been legislated by the government but not included in the curriculum of the colleges. This has been occasioned by the fact that contemporary civil legal issues have been rendered irrelevant given the duality of the legal system. In elaborating this, Alanzi points out that,

Sharia Colleges focus on Islamic knowledge including Islamic jurisprudence (al-fiqh), Quranic interpretation (al-Tasfir), prophetic tradition (al-Hadith), and Arabic linguistics. The curricula are based on traditional Islamic jurisprudence books which were printed at least four hundred years ago...these books in this aspect, for example, encompass various categories of corporate commercial activities, such as contracts in the jurist books. The problem is that the types of corporations they were written for do not exist in contemporary Saudi Arabian business.²⁷⁸

²⁷⁵ *ibid.*

²⁷⁶ *ibid.*

²⁷⁷ *ibid.*

²⁷⁸ *ibid.*

As such, this conflict between French Civil law and Sharia points out that the adoption of French code in the Saudi Arabian legal system despite it not being in conflict with Sharia, has not completely converted some of the French code into a ‘pure’ Islamic law.

3.3.2. The adoption of a modern legal framework in Saudi Arabia

Prior to the promulgation of the Kingdom of Saudi Arabia in 1932, the Hijaz, Negd and other territories under the control of King Abdul Aziz adopted the legal structure and laws of the Ottoman Empire. The Constitution of the Kingdom of Hijaz established a Consultative Council with one of its mandate being the issuance of royal decrees which would frequently involve the translation of Ottoman legislation. The Commercial Code which was applicable to the maritime and commercial sectors was derived from the Ottomans and it is still applicable to date.²⁷⁹ However, it was not until 1958 that there was a significant introduction of modern legislation that occurred through the Council of Ministers that conformed the statute dated 4 May 1958. Between the period 1958 to 1968, the Council of Ministers had ‘issued more than 200 codes covering diverse matters in the field of both public and private law.’²⁸⁰ It is notable that most of these codes were influenced by French law whilst paying regard to the Sharia principle that foreign law must always conform to Sharia.

However, there exists exceptions to this requirement in light of public interest otherwise known as *al massalih al mursala* which allows the State to introduce new legislation in instances where it is for public good purposes that such a legislation is introduced. Further, the *Hanbali* school also propounds the Islamic principle that states that ‘all things not specifically prohibited are allowed’ with regards to commercial transactions and as such, advocates for the issuance of legislation in commercial transactions where the legislation in question has not been specifically prohibited.²⁸¹

When King Abdul-Aziz took control of the western province of Saudi Arabia known as Hijaz in 1924, he was in a position to consolidate the fragmented territories

²⁷⁹ Hanson (n 266).

²⁸⁰ *ibid* 288.

²⁸¹ *ibid* 289.

following years of protracted battles. King Abdul-Aziz, keen on unifying the nation, and embarking on a harmonious nation building process, built his political and legal endeavours around Islam as he saw that it would be suited to meet the aspirations of his people. Dr. Abdullah F. Ansary in explaining the deep regard King Abdul-Aziz had for Islam, points out that King Abdul-Aziz,

‘realized that Islam provided the only way to realize this long-sought future, reflecting its deep significance to the culture and history of the Arab Peninsula, and the feelings of its inhabitants. National unity was realized because King Abdul-Aziz applied the doctrine of Islam to public policy, justice, and all other fields of life. He succeeded in not only unifying the country, but also in proving the credibility of the Islamic solution and demonstrating its validity for his time and all times.’²⁸²

In making use of Islamic principles in governance, King Abdul-Aziz abided by the dictates of the Quran and Sunnah in implementing an Islamic principle of consultation. This culminated in the introduction of a National Council in 1924 which took on public affairs (save for foreign and military affairs) which were usually handled by the King.²⁸³ The National Council was replaced in August 1925 by the newly constituted ‘Makkah Consultative Council’ which unlike the National Council, possessed more powers as it oversaw the affairs in the areas of: communication, trade, education, municipal affairs, internal security and more importantly, the court system.²⁸⁴ The steps taken by King Abdul-Aziz to decentralize state functions from the monarchy to the Makkah Consultative Council culminated in the approval of a constitution of the Kingdom in August 1926. This constitution was known as the Basic Regulation for the Hijaz province and the effect it immediately had is that it affirmed in legislation, the Consultative Council among other councils such as the Administrative Councils, District Councils and the Village and Tribal Councils.²⁸⁵ The Basic Regulation offered the bedrock upon which King Fahad ibn Abdul-Aziz continued the further evolution

²⁸² Abdullah F Ansary, ‘A Brief Overview of the Saudi Arabian Legal System’ (*GlobaLex*, 2008) 1 <www.nyulawglobal.org/globalex/Saudi_Arabia.html> accessed 14 July 2021.

²⁸³ *ibid.*

²⁸⁴ *ibid.*

²⁸⁵ *ibid.*

of Saudi Arabia's constitution through the establishment of the following fundamental laws: the Basic System of Governance, the Consultative Council Law and the Regional law.²⁸⁶

3.3.2 The sources of law in Saudi Arabia

3.3.2.1 Islamic Sharia

At the outset, it is notable that Saudi Arabia principally derives its mandate from the Quran and the Sunna of the Prophet. These two sources act as the supreme law of the Kingdom of Saudi Arabia as all other laws are subject to these two sources. The Basic System of Governance which was inaugurated in 1992 being the most important constitutional document in Saudi Arabia, was vital as it entrenched by dint of article 7, Sharia as the foundational source of law in the Kingdom.²⁸⁷ Article 7 of the Basic System of Governance goes further to obligate the State to have the role to protect Islamic principles and to enforce Sharia.

Whilst appreciating the influence of French law on the Saudi Arabian law, it becomes necessary to evaluate Islamic Sharia as a source of law in Saudi Arabia. The influence of the pact between Francis I and Suleiman the Magnificent in the 16th century poised Ottoman law to be the favoured choice of Law in Saudi Arabia. This could be drawn from the historical perspective that after Hijaz was annexed by King Abdul Aziz in 1926, the Saudi Government issued an order that stated that,

the legal rulings of Ottoman law are still in effect up to the present for we have not issued our order for repealing them and setting down new ones in their place. Therefore, we accede to your suggestion concerning the continuance of the ruling of said laws.²⁸⁸

However, in 1927, another directive was issued by the Saudi Arabian government to the effect that all Sharia courts were to comply with Sharia principles by utilizing the

²⁸⁶ *ibid.*

²⁸⁷ *ibid.*

²⁸⁸ Alanzi (n 259) 119.

principles and teachings of all schools of Islamic jurisprudence without preferring one over another.

It is important to appreciate that Sharia in itself whilst being a source of Law in Saudi Arabia, it is not strictly speaking, an actual code of law. Meaning that it is not a codified legal system but rather, it offers direction, teaching, and guidance which a Muslim ought to follow. As stated by Awad Alanzi,

Sharia is a guidebook, a map, and a personal advisor rolled up into one neat little package. It is the essential life-book of every faithful Muslim. It is the supreme source of the Saudi laws, but it is not a law book. It makes suggestions, gives advices and points out human errors, but it is not a codified legal system.²⁸⁹

The operation of the sources of law in Saudi Arabia can be said to operate in a parallel fashion given that Sharia law and modern civil law are both applied in parallel to the legal system. Whilst on one hand, legislative acts adopted by the Legislature are applicable in courts, Sharia acts as the main source to fill the gap in instances where there is absence of legislative texts in a particular matter or to offer interpretation of legislative text where need be.²⁹⁰ The general rule applicable in Saudi Arabia is that a Sharia judge adjudicate cases before them without reference to precedents and further, a judge would not be limited to apply his judicial mind to a particular school of jurisprudence. This means that a judge is at liberty to apply Sharia texts such as the Quran and the sunna according to his own reasoning.²⁹¹

Whilst there have been successful attempts in other Muslim States to codify Sharia, such attempts have not been successful in Saudi Arabia. The challenge with codifying Sharia in Saudi Arabia is that given that the Quran and the Sunna are the substantive sources of law in the Kingdom, codification may in effect, render the teachings of one school of Islamic jurisprudence over another, impairing the flexibility that is enjoyed by Judges to arrive at just

²⁸⁹ Awad Ali Alanzi, 'Development of the Civil Legal System in Saudi Arabia' (2020) 23(4) Journal of Legal, Ethical and Regulatory Issues 1.

²⁹⁰ *ibid.*

²⁹¹ Abdulrahman Yahya Baamir, *Shari'a Law in Commercial and Banking Arbitration: Law and Practice in Saudi Arabia* (Ashgate Publishing Limited 2010) 14.

decisions. Abdulrahman Baamir is critical of the codification of Sharia as he points out that,

such strict adherence to one opinion might achieve equality but not equity. For laymen, codification might become a tool for emphasizing the differences among the Islamic schools; rather than encouraging the accommodation of different opinions and practices, codification would become, instead, in that case, a tool of segregation.²⁹²

It follows then that the benefits of the process of codification commonly witnessed in a good number western legal systems as well as other Islamic Sates, would be counter-productive for Saudi Arabia especially considering it is the only country among the Islamic States that has the Quran and the Sunna as the substantive source of legislation.

3.3.2.2. Ijtihad

As per the dictates of the Quran, sovereignty rests only with God. Given the parallel application of sharia and modern civil law as mentioned above, there are three foundational articles provided under the Basic Regulation of the Kingdom of Saudi Arabia (1992) that establish the sources of law in the Kingdom. Firstly, article 1 of the Basic Regulation of the Kingdom of Saudi Arabia (1992) affirms the position of the Quran as it provides that, ‘the religion of Saudi Arabia is Islam, its constitution is the Book of God Most High and the Sunna of His Prophet, may God bless him and give him peace.’²⁹³ Secondly, article 7 goes further to provide that the ‘rule in the Kingdom of Saudi Arabia draws its authority from the Book of God Most High and the Sunna of His Prophet. These two are sovereign over this Regulation and all regulations of the state.’²⁹⁴ This article establishes that there indeed exists a hierarchy among the sources of law in the Kingdom by placing the Quran and the Sunna of the Prophet as being the supreme sources. It follows then by dint of this article that where there is any inconsistency between the Basic Regulation (1992) or other regulations, the Quran and the Sunna of the Prophet will take precedence. The supremacy of the Quran and the

²⁹² *ibid.*

²⁹³ Basic Regulation of the Kingdom of Saudi Arabia 1992 (Saudi Arabia).

²⁹⁴ *ibid.*

Sunna are further emphasised by article 48 of the Basic Regulation of the Kingdom of Saudi Arabia provides that,

the courts shall apply in cases brought before them the rules of the Islamic sharia in agreement with the indications [or proofs] in the Book and the Sunna and the regulations issued by the ruler that do not contradict the Book or the Sunna.²⁹⁵

The common belief that binds the Muslim faithful is that between the period 610 and 632 CE, God revealed his law that was meant to govern human conduct and relation. This revelation took the form of the Quran which is understood as Muslims as the words of God given down from the Prophet.²⁹⁶ Notably, the Quran commands man to obey the Prophet and as such, his actions and words are considered as a secondary revelation from God which is known as *sunna*. A salient attribute of the *sunna* and its subsequent recognition as a source of law is aptly explained where he points out that *sunna*,

is known by the transmission from generation to generation of reports about the Prophet. Each report, is accompanied by a list of the persons who narrated it one to the other down through history, is called *hadith*. Together the hadiths become a scripture alongside the Quran, although of lesser status, since they do not represent the literal words of God, nor are they taken as unquestionably authentic.²⁹⁷

Scholars such as Jonathan A.C. Brown disagree with scholars such as Vogel as he contends that Hadith is considered by Muslims as the second major source of law apart from the Quran. Further, Jonathan points out that,

in effect, Hadith are arguably more important than the Quran. While the Quran is the foundation of authority in Islam it provides few legal injunctions. The details of Islamic law are far more commonly derived

²⁹⁵ Vogel (n 40).

²⁹⁶ *ibid*.

²⁹⁷ *ibid*.

from Hadith, and many tenets of Islamic theology and dogma come not from the Quran but from Hadith.²⁹⁸

The reasoning to support the importance of Hadith is that unlike the Quran which was compiled and standardized after the Prophet's life, Hadith dates back further as it began being set five centuries after the beginning of Islam.²⁹⁹

Whilst appreciating the existence of controversies and opposing views amongst scholars as to the place of hadith in the hierarchy of the sources of law in Islam, neither parties disagree on the place of the Quran as the supreme source of Law particularly in Saudi Arabia. This is whilst also recognizing that article 7 of the Basic Regulation of Saudi Arabia reinforces in legislation, the supremacy of the Quran.

It follows then that a Muslim faithful in Saudi Arabia is obligated to observe the dictates of the Quran and sunna. Learning from the Sharia and the Sunna has been considered as a struggle where Muslim faithful try to learn from these two sources of law. This is on the basis that whilst the law is perfect, man is not perfect. The process of 'striving' to understand the law is regarded as *ijtihad*. *Ijtihad* has been considered as the process through which scholars find law through the interpretation of the Quran and the sunna.³⁰⁰

In better understanding the law of Saudi Arabia, it is important to appreciate that in learning the law of Saudi Arabia, the people first pay regard to *fiqh* and not to legislation or to judicial precedent. *Fiqh* has been defined as the 'opinions of scholars who by their piety and learning have become qualified to interpret the scriptural sources and derive laws.'³⁰¹ These scholars are known as 'ulama' which means 'the possessors of knowledge.'³⁰² The opinions of the ulama is sought by a lay Muslim regarding a particular situation in which he/she feels needs advice or direction. In this context, such a scholar is termed as a *mufti* whilst the opinion he/she issues is termed as *fatwa*. The lay Muslim that seeks *fatwa* is at liberty to decide whether he/she will

²⁹⁸ Jonathan A C Brown, 'Hadith' (*Oxford Bibliographies Online*, 2017) <www.oxfordbibliographies.com/view/document/obo-9780195390155/obo-9780195390155-0030.xml> accessed 12 July 2021.

²⁹⁹ *ibid.*

³⁰⁰ Vogel (n 40).

³⁰¹ *ibid.*

³⁰² *ibid.*

follow the opinion given by the *fatwa*.³⁰³ In 1993, Saudi Arabia conferred the title of ‘Grand Mufti’ to Shaykh ‘Abd al-‘Aziz bin ‘Abd Allah Bin Baz. This practice could be traced back to the Ottoman Empire when the government would lend an official status to a *mufti*.³⁰⁴

3.3.2.3. The Application of Ijtihad in Saudi Arabia

The conflict witnessed between the parallel application of Sharia and Civil law in the Kingdom during the reign of King Abdul Aziz seems to have persisted as fatwas have been observed to at times run contrary to established case precedent. In exemplifying this conflict, Shaykh Bin Baz, was a highly regarded mufti and was approached officially and unofficially to issue fatwas on a wide range of issues.³⁰⁵ A common challenge witnessed in the handing down of fatwas by Shaykh Bin Baz concerned the practice of divorce by *talaq*. This is the Muslim customary practice in which a husband declares his wife as divorced. The issuance of *talaq* does not require it to be in writing, and neither does it require the presence of witnesses. A wife issued with *talak* is obligated to observe a three-month waiting period after which the separation will take effect and should the husband reconsider, he may retract the *talak* within this three-month period. The Quran provides that only two *talaks* may be issued and retracted by the husband only twice meaning that in the event he issues a third *talak*, the divorce is rendered final and irrevocable.³⁰⁶

The challenge witnessed in the issuance of *talak* issued by the husband especially during the time of the Prophet is that there was a common practice of husbands issuing three *talaks* at the same time. The question that arose in this instance where mufti was sought before Shayik Bin Baz is whether such a talk should be considered as a single or triple *talak*. The prevailing sunni view in this context is that the *talak* is regarded as triple and its effect is that it nullifies the marriage. However, despite this position, Shayik Bin Baz has issued fatwas that view this kind of *talak* as a single revocable

³⁰³ *ibid.*

³⁰⁴ *ibid.*

³⁰⁵ *ibid.*

³⁰⁶ *ibid.*

divorce.³⁰⁷ For instance, when a husband issues talak to a maximum of three talaks out of an aggravated or disturbed state of mind, the prevailing sunni practice is that the divorce is taken in its literal terms and it is as such, irrevocable. However, Shayik Bin Baz has issued fatwas that run contrary to this established position as can be seen from the following excerpt where his advice was sought,

Reader sent us a question, in which he says: I became extremely angry at my wife, because of a small thing she did, and after my anger subsided, my wife told me that I pronounced a divorce during my anger, a single [and therefore revocable] divorce. I sat down to remember if this divorce had issued from me, and then remembered it, but I was not sure of it completely. I do not have the intention of divorcing my wife, but my tongue slipped, and anger overcame me without any object, while I have confidence that my wife was not lying. I retracted the divorce at once.....I request from your Eminence your fatwa whether the divorce occurred...

Answer: The safer course is for you to count this divorce [toward a maximum of three divorces] and consider it having occurred. Because of what you wrote about remembering it and your confidence in the statement of your wife, in fulfilment of the Saying of the Prophet, 'One who is wary of dubious cases is delivered in his religion and his honours,' and his Saying, 'Leave what causes you doubt for what does not cause you doubt.'³⁰⁸

The above excerpt points to a departure from standard Sunni practice as well as court practice that has been applied for hundreds of years. The question that arises is whether a husband can follow the fatwa of Shayik Bin Baz even when such reliance is contrary to established practice. This is in light of the fact that disregarding standard Sunni practice which would consider a marriage issued with talak thrice as irrevocable.³⁰⁹ It is often expected that a State will place adherence to state-legislated or court enforced laws especially in the areas of private law such as divorce. It has been observed to

³⁰⁷ *ibid.*

³⁰⁸ *ibid.*

³⁰⁹ *ibid.*

‘enforce as valid the parties’ actions based on the fatwas of respected ‘ulama’, even when these fatwas are in contradiction to the courts’ own standard rules.’³¹⁰ observation of the practice of Saudi courts is that they uphold the fatwas of Shayik Bin Baz.³¹¹ The rules applied in Saudi Arabian courts have been found to be contained in books of Fiqh which were written by medieval ulama for over fourteen centuries. As such, it can be seen that the opinion of ulama might have made Fiqh into ‘a complex and diverse body of law.’³¹²

3.3. An Overview of the Judicial and Legal Regimes in Saudi Arabia

In 1913, King Abdul Aziz took control of the Hassa province which is along the Arab Gulf and as such, this paved the way for the evacuation of Ottomans from the Middle East. Following this event, a congress that was composed of religious scholars and tribal chiefs conferred King Abdul Aziz as the Sultan of Negd and all its annexed territories. King Abdul Aziz subsequently took control of Makkah and Medinah in 1925 and subsequently, he became the King of Hijaz in 1926. In 1927, King Abdul Aziz became the King of Hijaz and Negd and its Dependencies and on 18 September 1932 through Royal Decree No. 2716, the Kingdom of Hijaz and Negd and its Dependencies were replaced by the promulgation of the Kingdom of Saudi Arabia.³¹³

Soon thereafter, it was realised that the needs and beliefs of the people had to be taken into account for establishing the nations and developing the institutions for governance. Thus, it was realised that the Islamic system of governance which had historically existed in the Arabian Peninsula, must be continued.

The religious relevance of the Arabian Peninsula in Islam comes from, inter alia, the holy cities of Makkah and Medina. Makkah is a city located in the Sirat mountain range in Western Saudi, and is believed to be the place of birth of the prophet Muhammad, the founder of Islam, and where he received his first Quranic revelations. The relevance of the city in the Islamic faith is reflected from the fact that the Muslim

³¹⁰ *ibid.*

³¹¹ *ibid.*

³¹² *ibid.*

³¹³ *ibid.*

devout throughout the world, face towards the direction of Makkah while offering their prayers and. attempt a hajj or a pilgrimage at least once in their lifetimes. Only Muslims are allowed in this holy city. Medina, the second most holy city in Islam, is the place where the prophet Muhammad established a state governed by the Islamic or Sharia law and where his body is entombed. Just like Mecca, only Muslims are allowed to enter Medina. The introduction of Islam to Arabs had completely transformed their perspective about life, society, governance, and law. Given this in-depth inculcation of Islam in the lives of Arabs and the social existence in entire Arabian Peninsula, it was only natural that these Islamic beliefs were adopted in the legal, judicial, as well as the system of governance in the Kingdom of Saudi Arabia.

The adoption of Sharia' to regulate Saudi Arabia's legal and judicial framework has faced significant challenges given that there exists a dichotomy of law in Saudi Arabia. This is in light of the existence of Sharia and laws emanating from Saudi Arabia's statutes. The existence of two forms of law in Saudi Arabia could be partly attributed to the absence of a codified system of law even as Sharia remains to be the authoritative source of law with legislative statutes deferring to its authority. However, there were attempts by King Abdul Aziz to adopt reforms of Saudi Arabia's legal and judicial frameworks.³¹⁴ Whilst the efforts of King Abdul Aziz were frustrated by religious scholars who at the time, opposed these reforms in favour of religious conservatism as advanced by Ibn Hanbal, who called for the return of Saudi Arabian law to the Quran as a source of law.³¹⁵ This chapter seeks to discuss the reforms instituted by King Abdul Aziz on the legal and judicial framework of Saudi Arabia as well as other recent legislative reforms instituted by Prince Mohammed bin Salman in a bid to improve the efficiency of Saudi Arabia's Judiciary with a goal of eventually codifying the entire Saudi Arabian law.³¹⁶

In this chapter, an overview of the legal, judicial and arbitration in Saudi Arabia is discussed. The chapter purposes to answer the following question 'What is the state of Saudi legal system and Saudi Arbitration law?' To answer this main question, the

³¹⁴ George N Sfeir, 'The Saudi Approach to Law Reform' (1988) 36(4) American Journal of Competitive Law 729.

³¹⁵ *ibid.*

³¹⁶ Marwa Rashad, 'Saudi Arabia announces new judicial reforms in a move towards codified law', (Reuters, 2021) <www.reuters.com/article/us-saudi-judiciary-idUSKBN2A82E6> accessed 17 January 2021.

chapter sought to determine the state of the legal and judicial regime in KSA, how arbitration has developed in KSA and the status of women as arbitrators in KSA.

SECTION I: The Judicial System in Saudi Arabia

In this section, the judicial system in the Kingdom of Saudi Arabia is provided. The first section will look at the early efforts by King Abdul Aziz to reform the legal and judicial system of Saudi Arabia as well the development of the judicial system before the establishment of the modern Saudi Arabia whilst the second section deals with the issue of modern judicial system in the country. Addressing the historical development of the judicial system in Islamic States before the modern boundaries were created will provide an understanding of the current rules and regulations governing the judicial system in the modern state Saudi.

3.3.1. Early Efforts by King Abdul Aziz to Reform Saudi Arabia's Judicial and Legal Framework

Dr. Abdullah F. Ansary contends that the efforts by King Abdul Aziz to seize control of Hijaz and other fragmented territories in a bid to build a nation that is founded on Islam could be attributed to the deep regard the King had for Islam as an instrument of nation building.³¹⁷ However, scholars such as George N. Sfeir argue that King Abdul Aziz had aspired to the creation of a modern society in Saudi Arabia.³¹⁸ However, the ideology of King Abdul Aziz faced the resistance of the *ulema* and this opposition was present even before King Abdul Aziz incorporated Hijaz as part of Saudi Arabia. At this early point in time, the *ulema* were opposed to the Ottoman regulations in force in Hijaz on the basis that they subscribed to the ideology that the law should emanate from the Quran and not from foreign sources.³¹⁹

During the 1930s period, King Abdul Aziz embarked on ambitious reforms that were aimed at codifying the sources of Sharia by placing the four traditional schools in an

³¹⁷ Ansary (n 282).

³¹⁸ Sfeir (n 313) 731.

³¹⁹ *ibid.*

equal footing and as such, the source of one school of jurisprudence was held be equally valid as compared to another school.³²⁰ In an announcement published in *Umm al-Qura*, which was Saudi Arabia's official gazette, King Abdul Aziz issued orders that stated that Sharia judges were

not to be bound by the rules of one school of jurisprudence to the exclusion of all others, even where this would constitute a violation of the rights of a party who expects the decision to be made in accordance with the school of his affiliation.³²¹

As radical as this proposed reform was, the only exception that judges were to consider was that in making their decisions, the rulings of one school was not supposed to abrogate another school.³²² These reforms resulted in friction and conflict amongst these schools of jurisprudence in instances where different rulings were issued by the schools on the same matter. In such cases, through the appeal reforms introduced by King Abdul Aziz, a majority opinion that failed to be resolved by the Sharia courts was referred to the Judicial Supervisory Commission. Notably, the decision of the Judicial Supervisory Commission had the effect of binding all other courts in future cases which had a similar nature.³²³ Whilst these reforms were not realized given the opposition of the *ulema*, it is notable that had these reforms gone through, King Abdul Aziz would have effectively managed to create a system of precedent in Sharia courts. In pointing out the resistance of the *ulema* towards King Abdul Aziz's judicial reforms, George Sfeir states that the *ulema*,

‘(...) had their own agenda. Staunch adherents of the puritan Hanbali school and proponents of a return to the revealed sources of Sharia, they could not countenance the admissibility of other schools of jurisprudence, let alone the reform or codification of the Sharia. They not only opposed the King's reform plans but made sure that the Judicial Commission would issue a directive to Sharia judges to adhere to the Hanbali school in their adjudication of cases in all the courts of the Kingdom except where in the judge's discretion the

³²⁰ *ibid* 732.

³²¹ *ibid*.

³²² *ibid*.

³²³ *ibid*.

application of the Hanbali rule would result in undue hardship to a party or would be detrimental to the public interest.’³²⁴

Whilst the *ulema* managed to halt these judicial reforms, King Abdul Aziz nevertheless focused his reforms to the Sharia courts and as George Sfeir points out, King Abdul Aziz was instrumental in the introduction of administrative and procedural reforms in Sharia courts. Notably, these reforms created room for the enactment of the Judicature Act 1395/1975 which now governs the Sharia court system in Saudi Arabia. One of the significant reforms introduced by the Judicature Act regards the competency of Sharia court system and this is provided under article 26 of the Judicature Act. This provision stipulates that,

courts shall have jurisdiction to decide with respect to all disputes and crimes, except those exempted by law. Rules for the jurisdiction of courts shall be set forth in the Shari'ah Procedure Law Courts and Law of Criminal Procedure. Specialized Courts may be formed by Royal Order on the recommendation of the Supreme Judicial Council.³²⁵

George Sfeir considers that, the limitation of the jurisdiction of the Sharia courts contained under article 26 for disputes that are exempted by law amounts to a recognition that there exists a duality in the legal process in Saudi Arabia. Sfeir argues that this duality had been present in former years on the basis that, ‘regulations designated their own competent forum to settle disputes arising under them.’³²⁶ King Abdul Aziz through his reforms, sought to address this duality by codifying the sources of Sharia law as well as through the introduction of an appeal mechanism when conflict arises amongst the four schools of jurisprudence. However, these efforts faced stiff opposition by the *ulema* who sought to protect the religious ideology of the Hanbali school that basically called for the return to Sharia as a source of law in Saudi Arabia. Further, King Abdul Aziz’s effort to unify the judiciary through codification of Sharia was further hampered by the development of mixed courts in Saudi Arabia as George Sfeir explains that, ‘the development in practice of mixed courts, each with its own

³²⁴ *ibid* 733.

³²⁵ 'Law of the Judiciary' (issued by Royal Decree No.M/64, 14 Rajab 1395 of 23 July 1975) (Saudi Arabia)

<www.saudiembassy.net/law-judiciary> accessed 17 January 2021.

³²⁶ Sfeir (n 289) para 1.

jurisdiction and administrative affiliation.³²⁷ Whilst Sharia courts were placed under the Ministry of Justice, civil tribunals were placed under respective ministries and it is this apparent duality that George Sfeir argues is formally recognised by the exception contained under article 26 of the Judicature Act.

3.3.2. Modern Judicial System

Saudi's court system is governed by the Judiciary Act which organizes the court system into two main branches, the Shariah Courts, and the Board of Grievances.³²⁸ These bodies are further complemented by other adjudicative committees established through ministerial or royal decrees. The judicial system also comprises many quasi-judicial committees.³²⁹ The Shari'ah Courts are conferred with the jurisdiction over all judicial matters, such as criminal, civil disputes, family, real estate, etc.³³⁰

As per Article 46 of the Basic Law, the judiciary is an independent institution and 'there shall be no power over judges in their judicial function other than in this sense, King Abd's view the power of the Islamic Shari'a.' The Courts are required to apply 'the provisions of Islamic Shari'a, as indicated by the Quran and the Sunnah, and whatever laws not in conflict with the Quran and the Sunnah which the authorities may promulgate.'³³¹ The Courts mainly rely on the interpretation of Islamic Sharia law given by Four Schools of thought.³³² In case a dispute concerns a question of law regarding which the School of thought is silent, then the other three schools of Islamic jurisprudence i.e., Hanafi, Hanbali, Maliki, and Shafi, can be consulted.³³³

³²⁷ *ibid.*

³²⁸ Saudi Arabia Judiciary Act issued by Royal Decree No (M/78) dated 19/9/1428 A.H. 2007 (Saudi Arabia).

< www.wipo.int/edocs/lexdocs/laws/en/sa/sa052en.pdf > accessed 26 June 2023.

³²⁹ Mohammed I AlEisa, 'A Critical Analysis of the Legal Problems Associated with Recognition and Enforcement of Arbitral Awards in Saudi Arabia: Will the New Saudi Arbitration Law (2012) Resolve the Main Legal Problems?' (DPhil thesis, University of Essex 2016).

³³⁰ Al-Ghadyan (n 253).

³³¹ The Basic Law of Governance issued by Royal Decree No (A/90) dated 27th Sha'ban 1412 H 1992 (Saudi Arabia) article 48.

³³² AlEisa (n 329).

³³³ Al-Ghadyan (n 253).

A significant change was brought in the judicial structure of Saudi Arabia in 2007 with the introduction of the Law of the Judiciary, 2007 ('2007 Judicial Law')³³⁴ and the Law of the Board of Grievances, 2007 ('Board of Grievances Law'). In the era pre-2007, the hierarchy in each branch of the Court systems comprised two levels: (a) the trial courts; and (b) the courts of cassation in the General Courts system or the circuits in the administrative courts system.³³⁵ Through the legislative amendments brought in 2007, this hierarchical structure was changed tremendously. Post the 2007 reforms, the hierarchy in each branch of the Court systems now comprises the following levels: (a) the Courts of first instance; (b) the Courts of Appeal; (c) the Supreme Court; and finally (d) the Supreme Judicial Council.³³⁶ In 2012, the Execution Court was established to aid the process of enforcement of judicial decisions as well as arbitral awards.³³⁷ In 2021, Crown Prince Mohammed bin Salman announced a number of draft legislation that are aimed at improving the Judiciary's efficiency as well as improve its efficiency. It has also been reported that these recent reforms are aimed at codifying Saudi Arabia's system of law in a bid to modernize the Kingdom's legal system.³³⁸ The Saudi Arabian State Agency reports that there are four sets of laws. These laws are reported to include, 'the personal status law, the civil transactions law, the penal code of discretionary sanctions and the law of evidence.'³³⁹ With optimism grounded in our scholarly inquiry, we posit that these legislative reforms harbour transformative potential for the judicial sector in the Kingdom, serving as a catalyst for advancing the codification of Saudi law.

In this subsection, the chapter shall indulge in an analysis of both the branches of the judicial system, as well as discussions on how arbitration is an appropriate solution to the problem of overburdening of the Courts.

Before the specific courts within the different hierarchies of the judicial system are addressed, first the focus will shift to the historical development of the judicial system and the male dominance over the system.

³³⁴ Saudi Arabia Judiciary Act (n 328).

³³⁵ Razq Alrashidi, 'Saudi Administrative Contracts and Arbitrability' (DPhil thesis, University of Stirling 2017).

³³⁶ Saudi Arabia Judiciary Act (Saudi Arabia) article 9.

³³⁷ Enforcement law issued by Royal Decree No. (53/M) dated 13/8/1433H 2012 (Saudi Arabia).

³³⁸ Rashad (n 316).

³³⁹ *ibid.*

The Muslim jurists and scholars accepted the basic law Since Saudi is an Islamic state, its judicial system is developed from the Islamic law for the criminal and civil cases with the King being at the top of the legal system and also acts the final court of appeal and as a source of pardon.³⁴⁰ Under the Basic Law, In KSA, the court contains three major parts; the Shariah Courts that hears the majority of the legal system cases; the courts of First Instance including the Summary and General Courts and the Courts of Cassations and the Supreme Judicial Council.

The 1927 Royal Decree led to the inauguration of modern and sophisticated court systems which incorporates multiple judge courts and regular appeals. These courts operated in Makkah, Madinah, and Jeddah. In 1931 Royal order was issued on the provisions on the court procedures. Further, in 1938, the Shari Judicial Responsibility Law was promulgated which comprised of 282 articles which regulated the Shariah courts, their jurisdictions, their types, and their judgeship.

3.3.3. Shariah Courts

The first step towards regulating the Shari'ah Courts was taken in 1927 by the issuing of the Formation of the Shari'ah Courts Act.³⁴¹ Prominent amendments were brought subsequently in 1938³⁴², 1952³⁴³, 1975³⁴⁴, and finally, the latest and the current governing regulations of 2007³⁴⁵. The current hierarchical structure of the Shari'ah Courts in the descending order of hierarchy is: (i) the Supreme Judicial Council; (ii) the Supreme Court; (iii) the Courts of Appeal; and (iv) the Courts of first instances.

The Supreme Judicial Council is not an adjudicatory body but rather plays a supervisory and administrative role.³⁴⁶ It is concerned with, *inter alia*, the appointment, promotion, training, transfer, etc., of the judges.³⁴⁷ The membership of

³⁴⁰ The Embassy of the Kingdom of Saudi Arabia, 'Legal and Judicial Structure' <www.saudiembassy.net/legal-and-judicial-structure-0> accessed 31 December 2021.

³⁴¹ Royal Decree dated 18/2/1346H 1927 (Saudi Arabia).

³⁴² Royal Decree No. (3/1/32) dated 4/1/1357H 1938 (Saudi Arabia).

³⁴³ Approval No. (109) dated 24/1/1372H (14/10/1952) (Saudi Arabia).

³⁴⁴ Royal Decree No. (64/M) dated 14/7/1395H 1975 (Saudi Arabia).

³⁴⁵ The Law of Judiciary (Saudi Arabia) article 9.

³⁴⁶ The Law of Judiciary (Saudi Arabia) article 6.

³⁴⁷ *ibid*.

the Supreme Judicial Council comprises a chairman and ten members, which include judicial members as well as Government officials.³⁴⁸

The Supreme Court, as the name suggests, is the highest adjudicatory and appellate authority in the hierarchy of judiciary in the Kingdom. The members of the Supreme Court at Riyadh,³⁴⁹ are appointed by Royal Order based on recommendations made by the Supreme Judiciary Council.³⁵⁰ The chief judge of the Supreme Court holds the rank of minister.³⁵¹ The Supreme Court consists of a General Panel which undertakes two primary responsibilities: ‘(a) determining general principles in issues relating to the judiciary; (b) reviewing matters assigned to it by this Law or other laws.’ As per Article 11 of the 2007 Judicial Law, the Court’s powers extend beyond the Law of Procedure before the Shari’ah Courts and the Law of Criminal Procedure, and includes the authority to review the judgements of the lower courts to oversee the proper application of the provisions of Sharia Law.³⁵² The Supreme Court also has the responsibility to check that the laws issued by the King that do not contradict the principles of Sharia Law.³⁵³

One or more court of appeal is established in each province of the Kingdom of Saudi Arabia.³⁵⁴ The courts of appeal exercise through specialised panels³⁵⁵, namely jural panels, penal panels, family panels, commercial panels, and labour panels.³⁵⁶ Each panel, barring a penal panel, comprises three judges, with a chief judge. The latter, which ‘reviews cases of criminal homicide, amputation, stoning, or *qisas* (lex talionis retribution) in a case of criminal homicide or lesser injuries’, comprises five judges.³⁵⁷ The 2007 Judicial Law requires that a judge in a court of appeal shall hold a rank not

³⁴⁸ The Law of Judiciary (Saudi Arabia) article 5.

³⁴⁹ The Law of Judiciary (Saudi Arabia) article 10.

³⁵⁰ *ibid.*

³⁵¹ *ibid.*

³⁵² The Law of Judiciary (Saudi Arabia) article 11.

³⁵³ *ibid.*

³⁵⁴ The Law of Judiciary (Saudi Arabia) article 15.

³⁵⁵ *ibid.*

³⁵⁶ The Law of Judiciary (Saudi Arabia) article 16.

³⁵⁷ The Law of Judiciary (Saudi Arabia) article 15.

lower than the rank of an appeals judge.³⁵⁸ A court of appeal reviews appealable decisions rendered by the Courts of first instance.³⁵⁹

The Courts of first instances are established in provinces, counties, as well as districts as per their requirement. The first instance courts comprise³⁶⁰ general courts, penal courts, family courts, commercial courts, and labour courts. Every first instance court comprises one or more specialised panels which is composed of one or more judges, as determined by the Supreme Judicial Council.³⁶¹ The recently established commercial and labour courts hear disputes that were previously under the jurisdiction of specialized committees of the Ministry of Commerce and Industry, and the Ministry of Labour. This change was brought about in the light of questions being raised regarding the impartiality and independence of those committees operating under different ministries.³⁶²

As per the 2007 Judicial Law, in general, the Courts have jurisdiction as per ‘the rules governing the jurisdiction of courts set forth in the Law of Procedure before Sharia Courts and the Law of Criminal Procedure.’³⁶³ In case of a conflict of jurisdiction between the Courts and the Board of Grievances or any other judicial committee the Conflict of Jurisdiction Committee at the Supreme Judicial Council is the deciding authority.³⁶⁴

Generally, it can be summarized that Sharia courts are of general jurisdictions dealing with predominately criminal, family, and civil matters. The Sharia courts can be divided into four major categories. The first is the courts which have jurisdiction over the civil cases dealing with small claims with the disputed amounts not exceeding SR 8,000.³⁶⁵ The second is the courts of first instance which are adjudicated by one judge who has jurisdiction over the criminal and civil cases. The appellate courts have three

³⁵⁸ *ibid.*

³⁵⁹ The Law of Judiciary (Saudi Arabia) article 17.

³⁶⁰ *ibid.*

³⁶¹ The Law of Judiciary (Saudi Arabia) article 23.

³⁶² Ansary (n 282).

³⁶³ The Law of Judiciary (Saudi Arabia) article 25.

³⁶⁴ The Law of Judiciary (Saudi Arabia) article 27.

³⁶⁵ Abdulaziz I Al-Ajlan and Baker & McKenzie Limited, ‘Introduction to the Saudi Legal and Court Systems’ (Association of Corporate Counsel 2014) <<https://www.acc.com/resource-library/introduction-saudi-legal-and-court-systems>> accessed 24 June 2023.

judges and hear appeals from the judgments rendered by the courts of the first instance. Last is the Supreme Judicial Council which hears petitions from the appellate court judgments on legal rather than factual claims. The Supreme Judicial Council has two committees; the permanent committee with jurisdiction over capital punishments and the general committee that reviews the appellate judgements.³⁶⁶ The trial proceeding dependent on the evidence brought forth to support the claims under consideration and if there is no supporting evidence an oath may be taken by the defendant to establish a contrary position.

3.3.4. The Board of Grievance

The Board of Grievances ('Grievance Board') or *Diwan AL-Mazalim* is an independent administrative judicial body seated at the Capital, and it is under the direct supervision of the King.³⁶⁷ Even though there is uncertainty concerning the exact time of origin of the Grievance Board, it is certainly historically rooted in Islamic judicial system.³⁶⁸ The word *mazalim* in Arabic refers to a person who complains of having been grievously wronged, and the root verb *zalama* means 'to treat unjustly'. Thus, *AL-Mazalim* is to adjudicate litigation arising out of complaints of injustice, i.e., grievances.³⁶⁹ Some scholars believe that the institution of an administrative court is of Persian origin.³⁷⁰ Historically, the Grievance Board functioned as an administrative court and dealt with citizens' complaints against their administrators. Earlier, the caliphate or the Emperor himself dealt with these complaints, but, with the expansion of his Empire, the caliphate delegated some of his functions and duties. One of these duties to be delegated was the examination of his subjects' complaints. In the beginning, the duty was delegated to a single person, who examined the complaint and subsequently, advised the Emperor. However, with the multifold increase in the

³⁶⁶ *ibid.*

³⁶⁷ The Law of the Board of Grievances issued by Royal Decree No. (No. M/78) dated 19/9/1428 AH. (2007) <<https://www.wipo.int/edocs/lexdocs/laws/en/sa/sa051en.pdf>> accessed 31 December 2021.

³⁶⁸ Al-Ghadyan (n 253).

³⁶⁹ David E Long, 'The Board of Grievances in Saudi Arabia' (1973) 27 Middle East Journal 71.

³⁷⁰ Normon Anderson, *Law Reform in the Muslim World* (LUP, 1976).

number of complaints, an entire institution known as the ‘Board of Grievances’ was formed.³⁷¹

In the Kingdom of Saudi Arabia, too, the institution of a Grievance Board developed in a similar way. In the early days of the establishment of the Kingdom, King Abdulaziz, the founder of the country, used to deal with the complaints himself. However, with the expansion of the Governmental social and economic activities and thereby, increase in the number of Government departments and agencies, led to an increase in the number of complaints; and therefore, a channel of communication was required to be established between the King and the citizens.³⁷² Thus, the Grievance Board was established in 1954 under the name of the ‘Division of Grievances’ as a part of the department of the Cabinet.³⁷³ The Board of Grievances established under the Royal Decree No.7/138759 dated 1374H serving as an independent tribunal. The Division’s primary task was to investigate the complaints and write a report, including its expert opinion on the means of resolving each complaint and eventually, this report was presented to the King, who issued the final decision.³⁷⁴

In 1955, the Kingdom issued the Board of Grievances Act,³⁷⁵ which separated the Board of Grievances from the Cabinet and established it as a separate government department.³⁷⁶ Even under the 1955 Act, the Grievance Board continued to perform in an advisory capacity, investigating the complaints and making recommendations to the relevant Government Departments. The nature of the institution had significantly changed in 1982,³⁷⁷ when the Grievance Board was declared as an ‘independent administrative judicial board’,³⁷⁸ and since then, the Grievance Board has had great success in terms of its efficiency.³⁷⁹ The chairman was given the rank of a minister and

³⁷¹ Al-Ghadyan (n 253).

³⁷² *ibid.*

³⁷³ The Cabinet's Divisions Act issued by Royal Order dated 12/7/1373H 1954 (Saudi Arabia) article 17.

³⁷⁴ *ibid.*

³⁷⁵ Royal Decree No. 8(759/13/7) dated 17/9/1374H 1955 (Saudi Arabia).

³⁷⁶ The Board of Grievances Act, 1955, Art. 1.

³⁷⁷ The Board of Grievances Law Royal Decree No. (M/51) dated 17/7/1402H (1982).

³⁷⁸ *ibid* art. 1.

³⁷⁹ Nicholas Gould, ‘The Saudi Board Of Grievances’ (*Mondaq*, 24 October 2014) <www.mondaq.com/saudi-arabia/construction-planning/348490/the-saudi-board-of-grievances> accessed 31 December 2021.

in 1982, the current Board of Grievances Regulations was propagated pursuant to the Royal Decree M/51 dated 17/7/1402H.³⁸⁰

Initially, the Grievance Board had jurisdiction only on disputes against the Government of Saudi Arabia, but through the years, its jurisdiction had been widened substantially to include commercial disputes.³⁸¹ The Board of Grievances jurisdiction also expanded to include disputes where the government is a party including disputes on administrative rulings, government contracts and other administrative acts. It covered aspects such as challenges on administrative decisions, claims for compensations arising from contracts with the government, disciplinary cases brought by the Supervision and Investigation Authority, bribery and forgery, enforcement of foreign judgements, general jurisdiction referred by the Council of Ministers and suits brought by the government and independent public legal entities officials. Through the legal reforms brought about in 2007, one of the prominent changes had been to restore the jurisdiction of the Grievance Board to its original domain and transfer commercial matters to the commercial division of general Shari'ah Courts.³⁸² Therefore, in the current era, the Shari'ah Courts have jurisdiction over most of the civil, commercial and criminal disputes which were previously heard by the administrative committees linked to the Grievance Board.

The Board of Governance is composed of the Chairman, Vice-Chairman, Assistant Vice Chairman, judges with training in commercial law and Sharia law and administrative staff. The Chairman has the discretion to establish many tribunals as he thinks are needed and also determines the composition and jurisdiction of each tribunal. The Board of Grievances also establishes the procedures for the criminal, disciplinary and administrative tribunals. Appeals may be made within 30 days after the notice of decision which will be heard by a special examination tribunal appointed by the Chairman and consists of three members. The examination tribunal may uphold the decision, overturn it, or refer the case to the original tribunal to hear the case with comments. The Board's decisions are final and binding and do not need approval by higher authority demanding immediate enforcement.

³⁸⁰ Al-Ajlan and Baker & McKenzie Limited (n 365).

³⁸¹ *ibid.*

³⁸² *ibid.*

The judgements rendered by the Grievance Board have the same backing as that of a Court operating under the 2007 Judicial Law.³⁸³ As per Article 13 of the Board of Grievances Law, the Grievance Board has jurisdiction over disputes:

‘(a) relating to rights provided for in civil service, military service and retirement laws for employees of the Government and entities with independent corporate personality or their heirs and their other beneficiaries;

(b) regarding revocation of final administrative decisions issued by persons concerned when the appeal is based on grounds of lack of jurisdiction, violation of the principles of natural justice, including disciplinary decisions and decisions issued by quasi-judicial committees and disciplinary boards as well as decisions issued by public benefit associations. The administrative authority’s refusal to make a decision required to be made by it in accordance with the laws and regulations shall be deemed an administrative decision;

(c) Tort cases initiated against the administrative authority’s decisions or actions;

(d) Cases related to contracts to which the administrative authority is a party;

(e) Disciplinary cases filed by the competent authority;

(f) Other administrative disputes; and

(g) Requests for execution of foreign judgments and arbitral awards.’

Parallel to the Supreme Judicial Council established under the 2007 Judicial Law, an Administrative Judicial Council is established for the Grievance Board. The Grievance Board, akin to the Shari’ah Courts, comprises Courts at the following levels: (i) the High Administrative Court; (ii) the Administrative Courts of Appeal; and (iii) the Administrative Courts. The Courts under the Grievance Board do not have the jurisdiction to review disputes related to sovereign Acts, nor appeals against judgments rendered by General courts.³⁸⁴ The commercial circuits of the first-instance and appellate courts of the Board of Grievances have been transferred (with all their judges,

³⁸³ Royal Decree No. M/78 (n 309).

³⁸⁴ *ibid* art. 14.

cases, etc.) to the first-degree and appellate commercial courts under Shari'ah Courts.³⁸⁵

Apart from the reforms in 2007 which largely limited the jurisdiction of the Grievance Board,³⁸⁶ the institution of separate administrative Courts has lost its importance in light of the growing relevance of the arbitration process.³⁸⁷ Further, the enactment of a separate enforcement law has eliminated the role of the Grievance Board in matters of enforcement of foreign arbitral award.³⁸⁸ Thus, the Grievance Board which was once the most prominent institution in the Kingdom of Saudi Arabia, operates within a limited domain of jurisdiction.

3.3.5. Quasi- Judicial Committees

Aside from the courts, there are different special committees that have quasi adjudicatory jurisdictions. These committees include the Committee for Negotiable Instruments; The Commercial Agency Commission; The Committee for Combating Commercial Fraud; The Committee for Combating Cover-Up activities; The Customs Committee; The Committee for the Resolution of Securities Disputes ('CRSD'); The Committee for the Settlement of Banking Disputes (the 'SAMA Committee'), and The Labor Disputes Committees.³⁸⁹ SAMA was established in 1987 to look into banking disputes between the customers and their banks and to mediate settlements between the parties. By the Royal Order the SAMA Committees does not give the Shariah Courts and the Board of Grievances the jurisdictions over the claims that are brought against or by the banks. The Saudi Arabian Courts acknowledge testimonies as evidentiary in civil and commercial proceedings; hence they should be taken before the judge wherever requested by the disputing parties.³⁹⁰ The final decision of the

³⁸⁵ Ansary (n 282).

³⁸⁶ *ibid.*

³⁸⁷ AlEisa (n 329).

³⁸⁸ *ibid.*

³⁸⁹ Al-Ajlan and Baker & McKenzie Limited (n 365).

³⁹⁰ George Sayen, 'Arbitration, Conciliation, and the Islamic Legal Tradition in Saudi Arabia' (2003) 24

University of Pennsylvania Journal of International Law 905, 909.

judges is subject to writs of executions, but the judgments may be executed in commercial cases if the case is supported by uncontested documents.

These committees operate independently from the General Courts as well as the Grievance Board. These committees were established as a result of the judges from Sharia Courts as well as the Grievance Board, and their unwillingness to apply Government regulations, under the fear that the provisions under these regulations are not in strict compliance with the Islamic Laws.³⁹¹ Therefore, whenever a new regulation is issued, a committee is established to implement the relevant provisions.³⁹²

The quasi-judicial committees have jurisdiction over disputes concerning, *inter alia*, insurance, banking, investments, etc. Their jurisdiction is determined by the Royal Decree which constitutes the relevant committee, and they work under the supervision of the concerned Ministry of the Government.³⁹³ The relevance of these committees is to keep pace with the ever- evolving commercial needs of the Kingdom in line with the commercial developments across the world.³⁹⁴ These committees ease the workload on Shari'ah Courts and also provide the expert view in economic matters such as those concerning investment, finance, banking, trade. Currently, there are over seventy quasi- judicial committees,³⁹⁵ some prominent ones being the Committee for the Settlement of Banking disputes, the Committee for the Settlement of Tax disputes, the Committee for the Settlement of Investment disputes.

The quasi- judicial committees have been subject to criticisms due to the conflict of jurisdiction resulting from the lack of clarity about the nature of these committees, i.e., whether they should be considered judicial bodies or administrative bodies.³⁹⁶ Some scholars³⁹⁷ believe that specific committees can be divided as per their functions into judicial and administrative categories. For example, the Committee for the Settlement of Banking disputes performs judicial functions, while the Committee for the

³⁹¹ Ayoub M. Al-Jarbou, 'The Role of Traditionalists and Modernists on the Development of the Saudi Legal System' (2007) 21(3) Arab Law Quarterly 191.

³⁹² Al-Ghadyan (n 253).

³⁹³ AlEisa (n 329).

³⁹⁴ *ibid.*

³⁹⁵ AlEisa (n 329).

³⁹⁶ Mohammed A H Al Jarba, 'Commercial Arbitration in Islamic Jurisprudence: A Study of Its role in the Saudi Arabia Context' (Doctoral dissertation, Aberystwyth University 2001).

³⁹⁷ *ibid.*

Settlement of Customs disputes performs only a supervisory function.³⁹⁸ Not only this, there is some ambiguity surrounding the authority and the degree of appeal against the decision of these committees.³⁹⁹ As per Article 13 clause (b) of the Board of Grievances Law, the Grievance Board must be the competent forum for appeal.

3.3.6. Gender Diversity in the Saudi Arabian Judicial System

Whilst Saudi Arabia became party to the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW) on 7th September 2000, Saudi has taken many steps as noted by *Women Business and the Law*, a World Bank Report, which states:

Since 2017 the Kingdom of Saudi Arabia has progressed rapidly towards gender equality, ranking it the top performer and improver among the Gulf Cooperation Countries (GCC) and second in the Arab world. However, this progress has not resulted in gender diversification in the judiciary.⁴⁰⁰

The lack of diversity in the judiciary can be contextualized by the fact that it was not until 2006 that women were admitted to law schools and women graduating from these law schools could not practice law as public prosecutors until 2018 when it was allowed. Further, women were not allowed to practice as lawyers in courts until 2013 when the first female was registered as a Legal Trainee by the Ministry of Justice.⁴⁰¹ Despite the fact that a number of Arab and Islamic countries have appointed women as judges, Saudi Arabia to date, has never appointed a woman as a judge. Iraq appointed the first female judge in 1959, and between the period 1961 to 1976 Morocco, Tunisia, Lebanon, Yemen, Sudan, and Syria being Islamic states, have all appointed women as judges. In addressing the question as to why Saudi Arabia unlike these Arab/Islamic countries has not yet appointed a woman as a judge, authors

³⁹⁸ *ibid.*

³⁹⁹ AlEisa (n 329).

⁴⁰⁰ World Bank Group, *Women, Business and the Law* (International Bank for Reconstruction and Development and The World Bank 2020).

⁴⁰¹ Samal al-Agha, 'Female Judges in Saudi Arabia, Hope Versus Reality' (2021) 37(3) *Arab Law Quarterly* 2, para 1.

contend that this was due to religious conservatism.⁴⁰² The religious conservatism applied by Saudi Arabia barring women from being appointed as Judges is emphasised by authors such as Abdulrahman Yahya Baamir who points out that the non-appointment of women as Judges is not subject to discussion in Saudi Arabia as it is a requirement by Sharia that a woman cannot be appointed as a Judge. This religious constraint has been attributed by scholars to arise from a section of the Hadith that states, ‘when the Prophet heard the news that the people of Persia had made the daughter of Khosrau their Queen, he said, “Never will succeed such a nation as makes a woman their ruler”’. Muslim scholars that have taken a hard-line stance against the appointment of women as Judges consider that if these were the views of the Prophet, then it implies that a woman is inferior to a man and cannot as such, be granted a position of a judge. These scholars argue that the Prophet used general terms in warning against the appointment of women to a position of authority and as a result, the application of this Hadith is general in that it covers positions a woman would occupy such as judgeship or in any public authority. Further, authors such as Abd al-Hamid Mayhoub are critical of such appointments of women as judges as he contends that the position of Sharia and Sunnah is clear and that such appointments would contravene the practice of male guardianship as men are required to be the protectors of women and that they should preserve their dignity. Mayhoub further adds that such protection of women and the preservation of their dignity would not be achieved as a courtroom would contain men of all types who by nature, would have differing morals.

The severity of the resistance of the appointment of women as Judges in Saudi Arabia is evidenced by that, ‘there is general consensus that women are not suitable for judicial authority and it is sinful to charge her with such. The matter is not open for interpretation unless binding proof is had, for there is consensus on the matter.’⁴⁰³ This ruling was further buttressed by the historical fact that none of the *khalifats* or the Prophet himself ever appointed a woman to a position of public authority or judgeship. As such, implying women were unfit to hold governance positions and that the requirement for one to hold a position of authority, such a person had to be male.

⁴⁰² *ibid.*

⁴⁰³ *ibid.*

However, there are Islamic jurists that are opposed to such strict interpretation of the Quran and Sunnah that restrict the appointment of women as judges. These jurists include Ibn Hazm, Ibn Jarir al-Tabari, Hasan al-Basri and Ibn al-Qasim and they hail from the Maliki school. They contend that there is no text in the Quran or Sunnah that expressly provides that a woman cannot be appointed as a Judge. Further, they argue that as long as a woman fits the laid down requirements under Sharia of one being a Judge, they can hold such a position. These jurists support their position by pointing out that a reading of the Quranic *Surat al-Tawbah* places men and women on an equal footing as it states that, ‘the believing men and believing women are allies of one another. They enjoin what is right and forbid what is wrong and establish prayer and give *zakah* and obey Allah and his Messenger. Those- Allah will have mercy upon them.’⁴⁰⁴

The reasoning applied by jurists who oppose the appointment of women as Judges on the basis that neither the Prophet nor the *Khalifats* never appointed a woman as a Judge has been countered by jurists from the Maliki school who argue that such reasoning is not a sufficient justification where there is an absence of an explicit text in the Quran or Sunnah that bars women from being Judges. This position has also been supported by the former Grand Mufti of Egypt, Sheikh ‘Ali Jumah who argues that the appointment of women as judges is not contradictory to any Islamic precept and that the applicable requirement to a judge is that he/she should have a good grasp of the law and in implementing it, he/she should do so fairly.⁴⁰⁵

The lack of female appointees as judges in Saudi Arabia has led to efforts by some members of the *Shura* Council to recommend to the council the appointment of women as judges. Members such as Dr. Faysal Al-Fadhel, Dr. Lateefa al-Shaalan, and Atta al-Subaiti who served in the Islamic Affairs and Judicial Committee of the *Shura* Council, presented recommendations to the Council in 2018 and argued that this was in line the objectives of Saudi Arabia’s ‘Vision 2030’ that seeks to invest in the potential of women as well as their empowerment. Further, the availability of duly qualified female law graduates and the availability of judicial posts were additional considerations presented to the Council to consider the appointment of women as judges.⁴⁰⁶ These

⁴⁰⁴ *ibid.*

⁴⁰⁵ *ibid.*

⁴⁰⁶ *ibid.*

recommendations were rejected by the Council and a second recommendation presented to the Council on 9th June 2020 was also rejected. This is despite the fact that the second recommendation sought to have women appointed as judges only in the Personal Status Courts and not in other courts so as to convince the Council that such limited appointment would help kickstart the appointment of women as judges. For instance, on 1st July 2020, Kuwait promoted 8 women as judges after they had worked as investigators and prosecutors for 5 years.⁴⁰⁷ A holistic interpretation of Sharia and Sunnah is recommended in order to effectively address the non-appointment of women as judges in Saudi Arabia. The fact the Basic Law of Governance at article 28 provides that it is the role of the State to ensure that there is facilitation of job opportunities for every able person, this obligation directly extends to women and as such, the continued application of religious biases to bar the appointment of women as judges does not reflect the spirit and letter of the Quran, Sunnah, and applicable legislation.

3.3.7. The Principle of Party Autonomy and its Development in the Saudi Arabian Arbitration System

The principle of party autonomy has been highly regarded as a central pillar of an arbitration agreement. Scholars such as Mary Marvel consider that party autonomy especially in international arbitration is a quintessential feature of arbitration.⁴⁰⁸ Various definitions have been applied to the principle of party autonomy. Whilst scholars such as Abdulhay contend that party autonomy is ‘the freedom of the parties to construct their contractual relationship in a way they see fit’, Julian Lew opines that ‘party autonomy is the ultimate power determining the form, structure, system and other details of the arbitration.’⁴⁰⁹

Whilst these two definitions have varying notions as to the precise elements that constitute party autonomy, it is apparent they converge on the understanding that party

⁴⁰⁷ *ibid.*

⁴⁰⁸ Mary Jude Cantorias Marvel, ‘The Shape of Public Policy as a Limitation to Party Autonomy in International Arbitration – the Philippines and Singapore Experiences as Model Law Jurisdictions’ (SSRN, 2019) <<https://dx.doi.org/10.2139/ssrn.3467794>> accessed 24 June 2023.

⁴⁰⁹ *ibid.*

autonomy denotes that parties to an arbitration agreement have the liberty/freedom in the construct of the arbitration. The freedom of the parties extends to the applicable institutional rules governing the arbitration, the governing law, the place of the arbitration, the seat of the arbitration and most importantly for the discussion under this section, the choice and of the arbitrator. However, the application of the principle of party autonomy at the international arbitration level has been faced with significant hurdles mostly relating to the extent of the principle, the elements to be considered in constituting an arbitration agreement and whether the principle in itself, has any limitations imposed on it.⁴¹⁰

This section seeks to consider the perspective by scholars on the challenges/critique to the principle of party autonomy. Further, there is need to discuss the development and place of the principle of party autonomy within the context of Saudi Arabia's legal framework. The rationale of such an approach is to evaluate and critically discuss the status, operation and challenges associated with the choice of an arbitrator, given that it is one of the fundamental elements of party autonomy. These discussions are aimed at understanding the influence party autonomy has in the participation of women as arbitrators in Saudi Arabia.

3.3.7.1. The Interrelationship Between the Arbitration Agreement and Party Autonomy

The arbitration agreement is central to any discussion or evaluation of the principle of party autonomy. This is principally due to the fact that the principle of party autonomy derives its legitimacy from the arbitration agreement given that the agreement expresses the consent by the parties to arbitrate. As such, the concept of autonomy under the principle can be seen as first being mirrored by the arbitration agreement.

The importance and value of the arbitration agreement has been emphasised by scholars such as Marvel who states that:

⁴¹⁰ Sunday A Fagbemi, 'The Doctrine of Party Autonomy in International Commercial Arbitration: Myth or Reality' (2015) 6 *That Journal of Sustainable Development Law and Policy* 202.

The arbitration agreement is also the source of the arbitrator's authority to hear and decide the case submitted for arbitration (...) Parties may decide in their arbitration agreement what the issues may be considered arbitrable or what may be resolved by way of arbitration, the procedure to convene the tribunal and its composition....⁴¹¹

Sunday Fagbemi holds similar views as to the importance of party autonomy and he goes further to explain that another factor that underscores the importance of the arbitration agreement is when one considers that parties willing to be bound by an arbitration agreement should be left to devise their terms of engagement.

To this end, he is of the view that

The essential rule of the principle of arbitration is that where two parties freely enter into an arbitration agreement, there are a few restrictions on their freedom to formulate their own terms of the agreement or to design a process, which caters precisely to their needs.⁴¹²

The ability and freedom of parties to cherry pick and develop their terms of engagement under an arbitration agreement has been considered by scholars such as Margaret L. Moses as an ability by parties, to 'create their own private system of justice.'⁴¹³ As such, the private system of justice that arises is arbitration and Turki Alrajaan considers that the two major justifying principles in arbitration are party autonomy and liberty. He contends that these two principles are interrelated as he states that, 'the argument for arbitration begins with respect for private arrangements. Whether arbitration, as an alternative to litigation, is supported by the state, depends on the ideology and political will of the state. It crucially relies on the acceptance that private parties should be free to resolve their own disputes, provided they can do so in a way that does not harm society.'⁴¹⁴ Alrajaan's conception of the relationship between

⁴¹¹ Marvel (n 408) 2, para 3.

⁴¹² Fagbemi (n 410).

⁴¹³ Margaret L Moses, *The Principles and Practice of International Commercial Arbitration* (CUP 2008) 17.

⁴¹⁴ Turki Alrajaan, 'The Saudi Arbitration Law 2012 Assessed Against The Core Principles Of Modern International Commercial Arbitration: A Comparative Study With The Model Law and Scots Law' (DPhil thesis, University of Stirling 2017).

party autonomy and liberty is significant in the sense that he applies the exception that would limit the application of principles of liberty and party autonomy is that the contents and/or applicability of the arbitration agreement should not offend the state. As such, it becomes necessary to examine: the development and nature of the principle of party autonomy, its relationship to Islam and its relevance to the Saudi Arabian arbitration framework.

3.3.7.2. The Interrelationship between Autonomy and Islam

Prior to understanding the influence that party autonomy has on Saudi Arabia's arbitration framework, it is necessary to discuss the place that autonomy has in Islam. At the outset, it is notable that under Islam, the free will/liberty of an individual is an essential theological tenet. The choice of an individual is recognized and affirmed by the Quran which provides that, 'Surely Allah changes not the condition of a people, until they change their own condition.'⁴¹⁵ The Quran presents an individual with a choice of conforming to the religious precepts of Allah and it is entirely an individual's choice to be bound by these religious doctrines/laws. To this end, Alrajaan provides a significant emphasis as he states that, 'once Allah is accepted then autonomy becomes bounded by the demands of *Sharia*, and more closely resembles the social conceptions of autonomy that ethically constrain self-determination.'⁴¹⁶ As such, it can be argued that Islam affirms the notion of self-determination and the aspect of liberty in making choices by an individual. However, given that the result of an individual choosing to be bound by the precepts and doctrines of *Sharia*, this acts as a limitation to individual self-determination as *Sharia* principles will be applicable to a Muslim in entering any binding agreements such as arbitration agreements. Scholars such as Wilson highlight the limitation that autonomy has under *Sharia* as he contends that, 'the business decision-maker has free choice, but religious principles provide a framework for the appropriate exercise of that choice.'⁴¹⁷ As such it becomes necessary to consider the various limitations imposed on the principle of party autonomy by *Sharia*.

⁴¹⁵ The Holy *Quran*, chapter 98, verses 7-8.

⁴¹⁶ Alrajaan (n 414) 142, para 1.

⁴¹⁷ *ibid* para 2.

3.3.7.3. Sharia as a Limitation to the Selection of Arbitrators in Saudi Arabia

At the outset, it is notable that the selection of an arbitrator is one of the constitutive elements under the principle of party autonomy. Indeed, the liberty of the parties to the arbitration to select arbitrators is an attractive hallmark of arbitration. Parties are free to determine the number of arbitrators and further, parties can limit or extend the scope of the power of the arbitrator. The method by which such arbitrators are appointed is left entirely to the determination of the parties. The freedom enjoyed by the parties in the appointment process denotes how the principle of party autonomy has a significant influence in the appointment of arbitrators.

The Saudi Arbitration Law 2012 reflects these traditional concepts of party autonomy in the arbitrator appointment process. Authors such as Dr. Faisal Al-Fadhel agree that the element of choice of arbitrator is recognized under Saudi law. He states:

The parties are in principle free to choose their arbitrator.⁴¹⁸ They can appoint any person in whom they have confidence with legal capacity and required qualifications to act as arbitrators. They are also free to have their dispute arbitrated by a sole arbitrator or by more than one arbitrator provided that the number of arbitrators is uneven.⁴¹⁹

Whilst the Saudi Arbitration Law 2012 lists the requirements touching on the expertise, educational qualifications, impartiality, and the experience of a prospective arbitrator; these requirements are commonplace in a number of jurisdictions and legal regimes.

However, the contention that arises in relation to the choice of an arbitrator under Saudi Arabian law concerns questions on whether a woman can be appointed as an arbitrator. Remarking on the state of the Saudi Arbitration Law 1983 and its Implementation Regulations, Dr. Al-Fadhel considers that Saudi Law has no explicit regulation that limits the appointment of a woman as an arbitrator. However, he considers that the provision of the Quran that states that the testimony of a single man

⁴¹⁸ Faisal M Al-Fadhel, 'Respect for Party Autonomy Under Current Saudi Arbitration Law' (2009) 23 Arab Law Quarterly 31.

⁴¹⁹ *ibid.*

is equated to that of two women and argues that if the appointment of a woman arbitrator was likened to that of acting as a witness, then ‘it is unlikely that the courts in Saudi Arabia will accept an arbitration where a woman has acted as arbitrator.’⁴²⁰

Dr. Al-Fadhel also considers and is critical of justifications given by Muslim jurists to support the prohibition of women being appointed as arbitrators. He states that opponents of the appointment of women as arbitrators, ‘justify this exclusion by explaining that women were considered less knowledgeable than men in the [field of business matters].’⁴²¹ Notably, he adds that, ‘this may represent an accurate record of events surrounding the era in which the Sharia was revealed but, it is submitted, it does not provide a textual explanation for the particular rule. Some opined that women are not permitted to act as arbitrators as they do not possess ‘full legal capacity’ within the meaning of Article 4 of Saudi Arbitration Law.’⁴²² Despite these views, it is still apparent that proponents of the prohibition of women appointments in arbitration lack a particular law under Saudi Arabian law that explicitly bars the appointment of women as arbitrators.

However, authors such as Dr. Muheidab Al-Muheidab are of the view that whilst such views may lack the backing of express legislation, in practice, players in the commercial sector might not recognize arbitration awards issued by women. He argues that:

(....) the opinion of commercial circles has been considered in court competent to consider most kinds of commercial disputes, concerning woman’s arbitration. They have stated that they might do not recognize any arbitration award, in which a woman is the arbitrator, or anyone of arbitration commission members is a woman.⁴²³

Dr. Al-Fadhel argues that the reality pointed out by Dr. Al-Muheidab is mainly drawn from Sharia rules drawn from the Hanbali school of jurisprudence prior to the coming into force of the Saudi Arbitration Law 1983. According to Dr. Al-Fadhel, that under the Hanbali school of jurisprudence, the requirements imposed upon a judge were also

⁴²⁰ *ibid* 52, para 4.

⁴²¹ *ibid*.

⁴²² *ibid*.

⁴²³ *ibid* 53, para 2.

imposed on arbitrators and hence, it is likely that the reasoning of such rulings persisted over time.⁴²⁴ However, proponents of the participation of women as arbitrators argue that such practices should be abolished. They argue that such practices hailing from the Hanbali school should be eliminated on the basis that the justification for the non-participation of women during those earlier periods was based on their lack of capacity and experience.⁴²⁵ Given that this position is not the reality of present times, these proponents are of the view that such past practices should be abandoned to reflect the changes that occurred since, particularly on the empowerment and education of women. For instance, jurists from the Hanafi school of jurisprudence allow for the participation of women as arbitrators with the exception that the awards they issue should conform to Sharia principles.⁴²⁶ Whilst the participation of women as arbitrators is still an actively contested topic in Saudi Arabia, it is apparent that Sharia has the potential of limiting the participation of women as arbitrators. The views by Dr. Al-Muhediab are significant in the sense that they illuminate the attitude of commercial institutions and individuals in Saudi Arabia as being opposed to the participation of women in arbitration. Whilst Alrajaan argues that most of these views are drawn from the past practices from the Hanbali school of jurisprudence. As such, it is apparent that wide interpretation of Sharia in this context, has to a considerable extent, limited the principle of party autonomy particularly the freedom of parties to choose arbitrators.

SECTION II: The Legal System in Saudi Arabia

In the 21st century, it was a fundamental right and national moral duty for states to legislate the enactment of legal systems stemming from the cultural values and religious beliefs to prevent anarchy.⁴²⁷ He further argued that a legal system is an attempt to establish all-pervasive principles and traditional institutional structures with practices that permeate the system while lending it its distinctive character. The modern legal systems have greatly been influenced by the traditional canons as they

⁴²⁴ *ibid.*

⁴²⁵ Al-Fadhel (n 418).

⁴²⁶ Alrajaan (n 414).

⁴²⁷ Alanzi (n 259) 11.

provide an accurate portrayal of its identity as expressed in its court procedures, legislative processes, substantive customs, and dispute resolutions.⁴²⁸ Appreciating the identity of the legal system is reliant on the complete and precise register of the laws and the spirit of the systems and its commitment to the culture and practices of its legal institutions. Therefore, the national legal systems should be acknowledged as the procedure where the laws are codified within a specific legal classification of logic or applicability.

The Kingdom of Saudi Arabia is an Islamic theocracy and the governance is based on monarchy with the ruling Al- Saud family. The legal system of Saudi Arabia is derived from the Islamic Sharia Law, which is considered as the primary source of legislature. The Kingdom of Saudi Arabia does not have a written, well-defined Constitution, but in 1992, the Basic Law of Governance ('Basic Law') was issued which provides guidelines for governance of the State. As per Article 1 of Basic Law, Quran and Sunnah are the basis of the Constitution of Saudi Arabia. It reads:

The Kingdom of Saudi Arabia is a fully sovereign Arab Islamic State. Its religion shall be Islam and its constitution shall be the Book of God (Quran) and the Sunnah (Traditions) of His Messenger, may God's blessings and peace be upon him (PBUH). Its language shall be Arabic and its capital shall be the city of Riyadh.

Thus, the Basic Law grants primacy to Sharia law over all other laws and regulations derived from other sources. Further, Article 7 of the Basic Law reads as 'Governance in the Kingdom of Saudi Arabia derives its authority from the Book of God (Quran) and the Sunnah of his Messenger, both of which govern this Law and all the laws of the State.' These provisions signify the value of Islamic or Sharia principles in the legal system of Saudi Arabia.

To understand the legal system in Saudi Arabia, a historical perspective will be provided on the development of the kingdom's Basic Law. Islamic Sharia as has been earlier stated is the primary source of legislation in KSA as per its basic law⁴²⁹ which developed gradually over the Islamic history. The first notion of the basic law was first

⁴²⁸ Alanzi (n 259).

⁴²⁹ Basic Law of Government (1992). Royal Order No. (A/91) 27 Sha'ban 1412H – 1 March 1992 Published in Umm al-Qura Gazette No. 3397 2 Ramadan 1412H - 5.

heard from King Abdul al-Aziz after the long process of conquest and absorption when he issued an order to unify the Kingdom of Hijaz and Najd and their respective Dependencies under the designated Kingdom of Saudi Arabia. The seminal decree sought to assure the world and the Saudi's that the government was willing to fully partake in the modern forms of governance.⁴³⁰ He declared that the existing Council of Disputes was to begin drafting the basic law of governance though the urgency insinuated dissipated quickly as the next mention of the Basic Governance Law was in the 1990s when it was decreed in 1992.⁴³¹ One mention was made by King Saud, Abd al-Aziz's successor in 1962 where he also made several pronouncements that did not take root. Two committees; the *committee* was formed by King Faysal in 1964 but his assassination put an end to the committee; the *Shura* or the consultative council was also developed to formulate the basic law in 1980 but the committee did not bear any fruits. It was the Gulf crisis of 1990 that returned the sense of urgency as Saudi leadership was compelled to announce major reforms. However, despite passing the Basic Law, no meaningful changes or innovations in the governance practices and structures were introduced.⁴³²

The legislative system of the Kingdom of Saudi Arabia consists of the King, who is the monarch of the State, and his Council of Ministers. The legislative body in Saudi Arabia has the right to enact 'Nizam' or regulations, and not 'Qanoon' or Law. This is based on the idea that only the Almighty can legislate and thus, even the Monarch only has the power to regulate. The King of Saudi Arabia is vested with the legislative, executive, as well as the judicial authorities. Under Article 44 of the Basic Law, the division of the three arms of government is provided but the article concludes that the King is the final authority.⁴³³ The legislative powers vest in the Monarch in the form of Royal Orders. In the past, this legislative authority had been utilized to enact many prominent constitutional law provisions such as the Basic Law; the Shura Council

⁴³⁰ Alanzi (n 289) 23.

⁴³¹ Mohammed Al-Ghamdi and Paul J Neufeld, 'Saudi Arabia' in Damian Taylor (ed), *The Dispute Resolution Review* (10th ed, Law Business Research Ltd, 2018).

⁴³² Abdulaziz Ai-Fahadt, 'Ornamental Constitutionalism: The Saudi Basic Law of Governance' (2005) 30(347) *The Yale Journal of International Law Symposium: Nation-Building in the Middle East* 375 <<https://core.ac.uk/download/pdf/72839357.pdf>> accessed 24 June 2023.

⁴³³ Basic Law 1992 (Saudi Arabia) article 44

Law; the Provinces law; the Council of Ministers Law; and the Succession Commission Law.

The Law of the Council of Ministers is the governing law for the appointment and the office of the Council of Ministers. The Council of Ministers has legislative, executive as well as administrative functions. The Council of ministers comprises the King who heads the Council in the capacity of the Prime Minister of Saudi Arabia; the Crown Prince who is also the first Deputy Prime Minister; and the Cabinet ministers. As per Article 8 of the Law of the Council of Ministers, the Cabinet ministers are appointed by Royal Decree.

In addition to the Council of Ministers, an important legislative body is the Majlis Al-Shura or the Consultative Council ('Shura Council'). The Shura Council is a quasi-legislative body which performs duties as entrusted upon it under the Basic Law, and which was first established in 1992 through the Law of Shura Council. As per Article 3 of the Law of Shura Council, the Shura Council comprises one hundred and fifty members, with at least twenty percent of the membership reserved for women. The members are chosen by the King and they are persons with 'knowledge, expertise and specialties'. The meetings of the Shura Council are presided over by the speaker. This is a structure close to a legislative assembly in a democratic nation, with the term of a Shura Council being four years. Article 15 of the Law of Shura Council enlists the powers of the Shura Council which, inter alia, (a) to discuss and give its opinion on the general plan for economic and social development; (b) give its recommendation for the revision on any domestic as well as international laws and regulations; as well as discuss and recommend proposals regarding the functioning of various Government bodies and agencies. Furthermore, Article 18 of the Law of Shura Council mandates the opinion of the Shura Council before any domestic legislation is enacted or any international treaty or convention is signed or ratified by the Royal Decree. It reads as 'laws, international treaties and agreements, and concessions shall be issued and amended by royal decrees after being reviewed by the Shura Council'.

Another body which ensures that the legislative enactments abide by the principles of Sharia law being the basic source of law, is the Majlis hay'at kibar al-'ulama, or the Council of Senior Scholars ('Senior Council of Ulama'). The Senior Council of Ulama is considered the highest religious body comprising scholars from all four schools of

Sunni Islam. The Council was last appointed in 2008 with twenty- one members from four schools of Sunni Islam. The Council regularly advises the King on the matters of religion. In case adopting of a legislative enactment involves a prominent question of religion, advice is sought from the Senior Council of Ulama, which exercises its authority and grants its decision by issuing Fatwa. A fatwa is a religious interpretation on a point of Islamic law given by a legal scholar. Article 45 of the Basic Law recognizes the issuance of fatwas, and it reads:

The source for fatwa (religious legal opinion) in the Kingdom of Saudi Arabia shall be the Book of God and the Sunnah of his Messenger (PBUH). The Law shall set forth the hierarchy and jurisdiction of the Board of Senior Ulama and the Department of Religious Research and Fatwa.

In 2010, the King of Saudi Arabia, through the royal decree, restricted the right of issuance of fatwas to the officially approved religious scholars.

The legal system in Saudi Arabia, especially the existence of a specialized body to advise the State on the matters of Islamic Law, reflects the relevance placed on Sharia law in governing the State. Thus, the legislative enactments by Royal Decree are required to abide by the principles of Sharia Law. Not only the legal system, the relevance placed on the Islamic Sharia law for governance is reflected also on the institution of judiciary.

Overall, in Saudi Arabia, Saudi's constitutional order is distinct in that its legal system is founded on Sharia, or the Islamic law derived from the Holy Quran and the deeds and words of Prophet Mohammed (Sunna).⁴³⁴ Sharia is recognized as the primary source of law and the ultimate source of all the laws and authority extending to the constitutional embodiment of Saudi's legal system.⁴³⁵ Sharia is an adaptable system of law as it has covered transactions from ancient times and is still applicable even at present.⁴³⁶ The Sunna are interpreted by influential scholars in the Islamic Jurisprudence on issues which may be applied in any particular case. Alanzi notes that

⁴³⁴ Al-Ajlan and Baker & McKenzie Limited (n 365).

⁴³⁵ Abdulrahman Alfatta, 'The Impact of the Shari'ah on Foreign Direct Investment and Arbitration: The Case of Saudi Arabia and its Vision 2030' (DLaw thesis, University of Westminster 2019).

⁴³⁶ Al-Ajlan and Baker & McKenzie Limited (n 365).

the philosophy of Islam is not always binding of the opinions (*fatwa*) of the Muslim scholars on all matters pertaining to purely religious acts and viewpoints, however, these opinions are statutory as they are related to laws legislated by the government implying that *fatwa* can take a life of its own when taking into account the potential situations while the decisions made by judges demonstrate the authority of each judgment.⁴³⁷

The Saudi government issues statutes, regulations, circulars, decrees, and adoption of policy positions to supplement the Sharia, but the country lacks civil, commercial codes or comprehensive statements of contractual principles as these are left to Sharia. The statutory enactments made are subject to the court's interpretation and other regulatory agencies using the Sharia as a basis.⁴³⁸ The Saudi Courts and other adjudicatory authorities in general do not report their decisions as they are not considered to establish a binding precedent for future decisions in later cases which has in turn allowed the banking systems and local businesses to flourish.⁴³⁹ Under Article 8 of the Basic Law, a declaration is made *Shura* (consultation) acting as the system of governance and equality a stipulated in the Sharia laws to be followed.⁴⁴⁰

This section provided an overview of the legal system in Saudi Arabia. However, to understand the Saudi's legal systems called for an examination of the country's founding and the factors that led to the promulgation of the basic law in 1992 even though the Kingdom was unified in 1932. The unique nature of the kingdom that were unified; Najd and its Dependencies, which adopted a more traditional form of governance and the Hijaz which was more modernized in its governance structure led to the drafting of the Hijaz Constitution. However, the Kingdom relied over the years on the drafting of the Basic Law which is based on the Quran and the Hadiths that make Saudi's legal system unique. The next section will also examine the history of the arbitration system in Saudi Arabia.

⁴³⁷ Alanzi (n 259).

⁴³⁸ *ibid.*

⁴³⁹ *ibid.*

⁴⁴⁰ Musawah, 'Thematic Report on Muslim Family Law and Muslim Women's Rights in Saudi Arabia,' (69th CEDAW Session, Musawah 2018).

SECTION III: Sharia Law Applied in the Saudi System

3.3.7. Introduction

In this chapter Sharia law will be examined as applied in Saudi Arabia. In the previous chapter, it was established that in the Islamic Countries, the application of Arbitration law is largely influenced by the Quran and Sharia Laws. Further, it was also found that the ambiguous nature of the arbitration law regarding the issue of women was largely attributed to the wide religious interpretations. Therefore, this section will answer the question: What is the legal status of women within the sharia according to the Sharia Law in KSA? The major sub questions that are addressed include; what are the major Fiqh schools? What are the provisions of Islam on the judges and its judicial system? What is the role and acceptability of women arbitrators in Sharia? What is the view of scholars and rejectionists on position of women in arbitration? and What are the evidences and possibilities on female arbitrators?

3.3.8. Key Terms and Structures

3.3.8.1. What is Fiqh?

The term *fiqh* is the Arabic word for jurisprudence. Linguistically, Ibn Manzur has defined it in his most famous lexicon *Lisan Al Arab* as '[having] knowledge about something and understanding it, being clever'. In the Islamic legal system, the term *fiqh* is used to refer to the knowledge of legal rulings and the mastering of the methodology by which such rulings are obtained from their sources – usually the Quran and Sunnah.⁴⁴¹

Similarly, Shahid Muttahri maintains that since the second century after the Hijra, use of *fiqh* as a term for Islamic jurisprudence has become increasingly popular amongst

⁴⁴¹ Imran Ahsan Khan Nyazee, *Islamic Jurisprudence* (3rd edn, Lulu 2000).

Muslims, for whom it means ‘a precise and deep understanding’ of religious texts and their significance for human society.

Saudi Arabia judicial rulings are made on a case-by-case basis where judges have discretion on the interpretation and application of Islamic rulings based on the Hanbali School of jurisprudence. The four major school of *fiqh* accepted *tahkim*, but it was classified under the laws of agency and not the laws of contract where the procedure was conciliatory rather than judgement and *hakam* was perceived to be an agent of the parties rather an individual imposing judgement, but the *hakam* was still mandated to provide the same standard as judges leading to a system which bore resemble to litigation. In respect to enforceability, *tahkim* is significantly different from western arbitration largely because *tahkim* is not binding. Nonetheless, the four schools’ interpretation focused on different aspects regarding disputes that fall within the scope of arbitration and the binding nature of arbitral awards.⁴⁴²

3.3.8.2 Major Fiqh Schools or Madh-habs

According to John Burton,⁴⁴³ there is evidence that *fiqh* was first regionally organized with what he describes as ‘considerable disagreement and variety of views.’ Al Shafi’e wrote that ‘every capital of the Muslims is a seat of learning whose people follow the opinion of one of their countrymen in most of his teachings’.⁴⁴⁴

In the modern era, Sadiq Al-Mahdi, identified eight, recognized schools of Muslim jurisprudence.⁴⁴⁵ The Amman Message,⁴⁴⁶ a three-point ruling issued in November 2004 by 200 Muslim scholars from over 50 countries, officially recognizes those

⁴⁴² Mark Wakim, ‘Public Policy Concerns Regarding Enforcement of Foreign International Arbitral Awards in the Middle East’ (2008) 21(1) New York Law Review 32.

⁴⁴³ John Burton, *The Sources of Islamic Law: Islamic Theories of Abrogation* (EUP 1990) 13.

⁴⁴⁴ Joseph Schacht, *The Origins of Muhammadan Jurisprudence* (first published 1950, Oxford University Press 1950) 246.

⁴⁴⁵ Hassan Ahmed Ibrahim, ‘An Overview of al-Sadiq al-Madhi’s Islamic Discourse’ in Ibrahim Abu-Rabi’ (ed), *The Blackwell Companion to Contemporary Islamic Thought* (Wiley-Blackwell 2008) 172.

⁴⁴⁶ The Official Website of the Amman Message, ‘The Amman Message’ <http://ammanmessage.com/?option=com_content&task=view&id=91&Itemid=74> accessed 7 September 2018.

eight legal schools of thought as:

1. Hanafi (Sunni)
2. Maliki (Sunni)
3. Shafi'e (Sunni)
4. Hanbali (Sunni)
5. Ja'afari (Shia)
6. Zaidiyyah (Shia)
7. Ibadiyya
8. Zahiriyah

For the purpose of this thesis, only the first four Sunni schools will be explored in relation to the topic at hand. This is because the law which is under study is the Saudi Law 2012, for which the Sunni madh-habs are the only formal source of legislation.

Each of the four significant schools of Islamic *fiqh* epitomises a different geographical region, as each of them dominates a different part of the Islamic World, and to some extent indicates a different way of tackling legal enquiries ways of tackling legal enquiries, as they have done since the first two centuries of Islam. The teachings of these four schools have contributed significantly to what is known as Sharia, or Islamic law.

Various schools of *fiqh* which originated along landlines in Medina and Kufa (Iraq) later advanced around individual researchers or jurists.⁴⁴⁷ The four schools of *fiqh* that engage with interpreting Sunnah law are named after four distinct authors: Abu Hanifah (d. 767), founder of the Hanafi School; Malik ibn Anas (d. 795), founder of the Maliki School; Shafi'e (d. 819), founder of the Shafi'i School; and Ahmed ben Hanble the founder of (d. 855), the Hanbali School.⁴⁴⁸ Each School built up its own mythology by deciphering the Quran and Sunnah utilizing three procedures: *ijma*, meaning consensus over the legal matter at hand; *qiyas*, meaning analogy or

⁴⁴⁷ Sahih al-Bukhari 7099, Book 92, Hadith 50, vol 9, Book 88, Hadith 219.

⁴⁴⁸ G Makdisi, 'Legal History of Islamic Law and the English Common Law: Origins and Metamorphoses' [1985/1986] 34 Cleveland Law State Review 3.

comparison; and *ijtihad*, interpretation based on personal judgement in relation to numerous aspects of Muslim life, including dispute resolution.

The common factor between these schools of *fiqh* is that regardless of which school they belong to, all Islamic scholars acknowledge that the Quran and the Sunnah are the principal sources of Sharia and therefore whatever is expressed therein must be accepted by Muslims. The chief differences between the schools lie in the situations in which their conventions utilize the three methods of interpreting these sources i.e., *ijma*, *qiyas* and *ijtihad*.

The great jurists of Islam, Shafi'i, Abu Hanifah, Malik, and Ahmad ibn Hanbal, who in effect founded the four major *fiqh* schools, all understood the compound term *usul al fiqh*, or origins of *fiqh*, not as the general principles of Islamic law, but the first principles of Islamic understanding of life and reality. Those *faqih*s, or scholars, were, in their own time periods and regions, real encyclopaedists, masters of practically all the disciplines from literature and law to astronomy and medicine. They were themselves professional men who knew Islam not only as a law but as a system that encompasses each and every aspect of everyday life.

Before embarking on highlighting the differences in thoughts between the different jurisprudence, the issue of *ijtihad* will be addressed. *Ijtihad* refers to the rigorous interpretation of the Sunnah and the use of secondary sources as interpretive legal systems. The use of *Qiyas* contributed to the development of the *ijtihad* because it allowed that judgements could be made even if not necessarily sourced from scriptural texts but from reason and interpretation. The need for reasoning to be employed was borne from the high level of judicial discretion and the development of Islamic theory and practice. The judicial discretion, also referred to *istihsan* gave the Islamic judges the option to choose a solution, deemed as more equitable if he believes that it promoted public good as compared to the alternatives including the strict interpretation of the Sharia. In this regard *Istihsan* permits judges and scholars flexibility when interpreting the law which allows them to infuse elements which they deem as useful.⁴⁴⁹ Moreover, the concepts of *istihsan* and *ijtihad* paved way for the development of the major Fiqh schools with each claiming to provide the most authentic narration of the teachings of the Prophet. Going back to the issue of

⁴⁴⁹ Baamir (n 291) 266.

interpretation of the contract, the Prophet allowed for some contracts to be concluded with speculative clauses under certain circumstances permitting an exception to the general rule on the validity of contracts being conforming to the Sharia.

3.3.8.2a. Hanafi School

The Hanafi School legitimizes arbitration as a mechanism for resolving disputes on the basis that it is an important social need and simplifies disputes. Hanafi emphasises the importance of the contractual nature of arbitration while promoting the view that arbitration should be viewed as a conciliation between the different parties as opposed to judgement against one of the parties. The Hanafi differentiate between the three categories of the contract which covers the valid, invalid, or void. The Hanafis' categorization finds no basis in Sharia.⁴⁵⁰ An invalid contract under the Hanafi jurisprudence is one which is prejudicial to one party or one which allows the party in possession to gain an advantage over the other without fair consideration. The inclusion of the invalid or the *fasid* clauses in conflict in the contract or otherwise give one party an unfair advantage would render the contract void with profound implication in commercial arbitration as it would be separable from the main contract. Therefore, a local court would have the grounds to re-open a Saudi Arabian award on these merits and then determine the arbitration or the underlying agreement as null and void. However, in a foreign jurisdiction this would not be the case. In this case, the Hanbali's and the Hanafi's differ greatly on the issue of contracts as the Hanbali's are more liberal in regards to contracts.

Hanafi also promotes reason and equitable principles where decisions are enforced through binding nature of the contractual agreements to accent the arbitrator's decisions. In this sense, the award is similar to a compromise relying on the parties' willingness to abide by the decision. The Hanafi contend that the awards are characterized by the use of subjective opinions made in the absence of direct guidance from the Quran. In this sense, the decisions enforced by subjective opinions have less force as compared to a judge's decision who uses the rules enshrined in the Quran.

⁴⁵⁰ *ibid.*

Hanafi holds that the arbitrator should be known to the disputants to increase the probability of conciliation and is the school that is most likely to recognize awards granted by non-Muslim arbitrators due to their view that arbitration by non-Muslim is not contrary to divine law. Hanafi adopted a different point of view from the scholars quoting Prophet Muhammad on the unsuitability of women in charge viewing women as judges as permissible.⁴⁵¹ Abu Hanifah claimed that anyone who possesses the qualifications of a witness can validly be a judge and as Quran in verse 2:282 allows women to be witnesses in commercial transactions, then they are also eligible to be judges.⁴⁵²

Hanafis have encouraged the appointment of female judges with Caliph Omar appointing a woman to serve as a bazaar-inspector of Medina with some of the pertinent tasks of the role being to judge between commercial disputes between merchants.⁴⁵³ The scholars of Hanafi believe that it is permissible to appoint women to certain positions in certain areas where they can serve as judges in matters where she could serve as a witness in matters except in *Hudud* (Penal Law) and *Qisas* (criminal law).⁴⁵⁴ However some scholars from Hanafi do not agree with this view claiming that appointing women to judicial positions is prohibited, but in case one is appointed, then her rulings would be binding. They agree on the gender requirement for qualification as a judge, but disagree on the validity of the judgement rules by female judges. They cite the Sharia laws as prohibition female judges in criminal and penal laws.⁴⁵⁵

3.3.8.2b. Maliki School

The Maliki schools hold that arbitration is the highest form of dispute resolution and relies on the use of consensus or *Ijma* between scholars, customs, *Sunnah*, *Qiyas*,

⁴⁵¹ Mutasim Ahmad Alqudah, 'The Impact of Sharia on the Acceptance of International Commercial Arbitration in the Countries of the Gulf Cooperation Council' (2017) 20 Journal of Legal Ethical and Regulatory Issues 1.

⁴⁵² *ibid.*

⁴⁵³ *ibid.*

⁴⁵⁴ Itamar Radai and Arik Rudnitzky, 'Citizenship, Identity and Political Participation: Measuring the Attitudes of the Arab Citizens' (The Konrad Adenauer Program for Jewish-Arab Cooperation 2017).

⁴⁵⁵ Alqudah (n 451).

Quran and the customary practice of the people of Medina as evidence on the application.⁴⁵⁶ This view is divergent from the international ethical standards on independence of arbitrators and free from bias. This school prioritizes harmonious relations. The school also dissuades the removal of arbitrators once the process commences even when there are justifiable doubts to the impartial ability or lack of requisite qualification and lack of mental or physical aptitude to complete the proceedings. Nevertheless, arbitration is preferable under this school of thought requiring an arbitrator with integrity, rules by conscience.⁴⁵⁷ This school is likely to recognize an award from non-Muslim unless is contrary to Sharia law.⁴⁵⁸ The school expressly prohibits the appointment of women as judges and arbitrators.

3.3.8.2c. Shafi School

This school relies on Muhammad ash-Shafi's methodology which prefers a judge to extricate himself from the case and allow the parties to attempt *sulh* to determine whether negotiation or conciliation can resolve the dispute with the judges only intervening if the parties disagree. This school balances between logic and tradition by referring cases to the Caliphate. The principles of the *Quran* and *Sunnah* are interpreted by the Shafi's, but *Qiyas* are not considered. Shafis do not consider women as eligible judges relying on the *Quran* 4:34 which states; 'men are qawwamuna (protectors) over women'.⁴⁵⁹ Many scholars from this school believe that Prophet Mohammad claimed that 'people will not prosper if they appoint a woman in charge of them'.⁴⁶⁰ Based on this statement, most Muslims scholars extended its use to prevent women from occupying public positions. Shafi views arbitrators as inferior to judges and their findings may be overturned by judges if they are not compliant to Sharia.⁴⁶¹ It is inflexible in the enforcement of contracts made by non-Muslim arbitrators.

⁴⁵⁶ Aseel Al-Ramahi, 'Sulh: A Crucial Part of Islamic Arbitration' (*LSE Working Papers*, 2008) <www.lse.ac.uk/law/working-paper-series/2007-08/WPS2008-12-Al-Ramahi.pdf> accessed 23 June 2023.

⁴⁵⁷ Alqudah (n 451).

⁴⁵⁸ Rawya Al-Zahhar, 'Women under Saudi Legal System' in Abdulla Al-Khunain et al (eds), *Judicial System in Saudi Arabia* (Center for Global Thought on Saudi Arabia 2015) 339.

⁴⁵⁹ Alfatta (n 435).

⁴⁶⁰ Alqudah (n 451).

⁴⁶¹ Alfatta (n 435).

3.3.8.2d. Hanbali School

This is the most conservative in the enforcement of Sharia and is based on the exegesis of Quran and *Sunnah*. It accepts the authenticity of the *Sunnah* and fully relies on the Quran.⁴⁶² It does not accept reasoning or logic when reaching a decision even though it is flexible on commercial matters where contracts are invalid only when they contradict its overall purpose. The qualification of arbitrators under this jurisprudence are similar to those of judges because it equates arbitration to litigation where the award is binding and cannot be appealed. Hanbali is the strictest and emphasizes on uncompromising literalism where the court needs to ensure that the arbitration proceedings are compatible with Sharia including the arbitrator being a Muslim man. The Sharia laws indicate that women cannot be appointed as arbitrators or judges and if appointed, then her award are non-binding. Hanbali asserts that women should not hold important roles in the community and interprets the *Hadith* as prohibiting women arbitrators and jurists.⁴⁶³ Nevertheless, the *Quran* does not have a statement prohibiting female judges or arbitrators; hence it can be argued that they can be appointed to the role. Moreover, in countries like Egypt women have proven to be beneficial to the wider community.⁴⁶⁴

The Hanbali's despite being the most rigidly bound to the Quran and the *Sunnah*, permits commercial practices which have not been expressly prohibited in the two texts. Therefore, their approach is most liberal to the issues of contracts which affirms the Muslim's sacred duty of honouring the obligations of a contract and the duty of the court or arbitrators to execute all the agreements set up in good faith.⁴⁶⁵ The Hanbali reiterate that under Sharia, a contract is valid it must have certain conditions. Consequently, arbitration clauses fall into two categories. The first is those which are necessary and appropriate to the contract and those which can be applied to

⁴⁶² Alqudah, (n 451).

⁴⁶³ *ibid*.

⁴⁶⁴ Alqudah (n 451).

⁴⁶⁵ Saba Habachy, 'Property, Right, and Contract in Muslim Law' (1962) 62 Columbia Law Review 450.

commercial transactions (*lex mercatoria*).⁴⁶⁶ The second one is the invalid arbitration clauses which contain usury or payment interests.

Overall, the four schools of thought acknowledge the importance of arbitration in dispute resolution, but only the Hanafi' acknowledge the role of women as judges or arbitrators, even though it prohibits them from penal and criminal law cases.⁴⁶⁷

3.3.8.3. The Relationship between Fiqh and Sharia

Sharia refers to the set of rules revealed by God to man to guide them and keep them in touch with God, each other, everyday life, and the environment. Sharia is the Arabic word for Law. Islamic Law is derived from the religious precepts of Islam, particularly the Quran and Sunnah. Sharia has been described as 'one of the major intellectual achievements of Islam'.⁴⁶⁸ In his book, *What Is the Sharia?*, Dupret argues that Sharia is not only 'a series of guidelines and prohibitions' but 'a concept invested with a whole range of meanings, from the virtuous attributes of an 'ideal' society to the confinement of particular elements to otherness and adversity'.⁴⁶⁹

On the other hand, fiqh refers to intelligence, knowledge and understanding of the asal-mulanya doctrine against the goals of the speaker and the talk.⁴⁷⁰ The study and interpretation of these meanings are what is referred to by *fiqh*. Nevertheless, the late Shaikh Mohammad Al Ghazali has criticized the overemphasis that Muslim scholars have put on the legalistic side of Islam at the expense of its other broader aspects.⁴⁷¹ However, in a legal context, this very overemphasis on Sharia is required of researchers who wish to explore and extract evidence for their legal arguments. Hence, Sharia is the body of law used by scholars of *fiqh* to derive and formulate rulings that can be supported either by the direct application of passages from the Quran and Sunnah or by utilizing the aforementioned *fiqh* tools to extract such rulings. Overall,

⁴⁶⁶ Alqudah (n 451).

⁴⁶⁷ Alfatta (n 435).

⁴⁶⁸ Bernard Lewis, *The Middle East: A Brief History of the Last 2000 Years* (Simon and Schuster 1995) 223.

⁴⁶⁹ Baudouin Dupret, *What Is the Sharia?* (Hurst 2018) 11.

⁴⁷⁰ Prawitra Thalib, 'Distinction of Characteristics Sharia and Fiqh on Islamic Law' (2018) 33 *Yuridika* 439.

⁴⁷¹ M Ghazali, *Kayfa Nata'amal ma'a al-Quran [How We Should Deal with the Quran?]* (2005) 156.

the sharia is the revelation from God which are eternal, immortal, and unchangeable whereas Islamic Fiqh comes from human reasoning as they attempt to interpret God's intent and is dynamic, flexible and fickle.⁴⁷²

3.3.9.3. A Brief Comparison between the Qualifications of a Qadi/ Judge and an Arbitrator

This section explores and separates the qualifications and requirements for a judge from the qualifications and requirements for an arbitrator. A judge must have certain requirements so as to justify their selection as a judge, whilst it should only be necessary for an arbitrator to hold a minimum standard of requirements to confirm their selection as an arbitrator.

The judiciary is a necessary institution⁴⁷³ that delivers justice to people and its use is deemed a right of people.⁴⁷⁴ Additionally, certain individuals are forced to settle disputes via the Judiciary, for instance a defendant when the claimant brings a lawsuit against them.⁴⁷⁵ Owing to their authority, judges must hold certain qualifications to make certain that disputes are solved. A judge therefore must be a Muslim adult of sound mind, with his hearing and sight, have the ability to speak and knowledge of Islamic law⁴⁷⁶ and also be a just,⁴⁷⁷ diligent⁴⁷⁸ and perceptive individual.⁴⁷⁹ Concurrently, Islamic arbitration is a different dispute resolution process to the judicial

⁴⁷² *ibid.*

⁴⁷³ Abdulrahman Bin Muhammad Bin Ahmed Bin Qudamh Almagdisi, *Al-Sharh Al-Kabir Ala Mtn Al-Muqnae* [The Great Explanation on Al-Moqnae Brief] (Muhammad Rashid Reda ed, Dar 'Alam al Kutub).

⁴⁷⁴ Ali Bin Ahmed Bin Mkram Alsaedi Aladawi, *Hashiat Al-Adawi Ala Sharh Kefaiat Al-Talib Alrabani* [The Explanation of Al-Adawi on Islamic Law] (Yusuf Muhammad Albiquae Ed. 1994).

⁴⁷⁵ Abdulmalik Bin Abdullah Bin Yusuf Bin Muhammad Aljwaini, *Nehaiat Al-Matlab Fi Deraiat Al-Mathhab* [The Conclusion of The Demands on The Understanding of Shafi School of Thought] (Dar Al-Minhaj 478 Hijri)

⁴⁷⁶ Abdulrahman Bin Muhammad Bin Auskar Albaqdadi, *Ershad Al-Salik Ela Ashraf Al-Masalik Fi Fiqh Al-Imam Malik* [Guiding the Diligences to The Jurisprudence of Islamic Law Based On Malikiah School Approach].

⁴⁷⁷ Mahmoud Bin Ahmed Bin Abdulaziz, *Al-Mohait Al-Burhani Fi Al-Fiqh Al-Noumani* [Islamic Law Jurisprudence According to The Hanafiah School of Thought] 5-6 (Abdulkarim Sami Aljoundi ed, 1st edn, 2004).

⁴⁷⁸ Albaqdadi (N 629)

⁴⁷⁹ Abi Alqasm, Muhammad Bin Yusuf, *Al-Taj Wa Al-Eklil Le-Mukhtasar Khalil* [The Explanation Of The Brief On The Muslim Scholar Khalil] (1stedn, 1994).

system and people are not required to settle their disputes via arbitration without the agreement of all the parties involved.⁴⁸⁰ Seeing as arbitration is an discretionary process regarding dispute resolution, the parties should have the right to choose their own arbitrators.⁴⁸¹ Likewise, some disputes are convoluted and require highly-qualified, experienced arbitrator to resolve them. Hence, parties should be entitled to decide on an arbitrator who has the required qualifications to settle a complicated dispute without requiring the arbitrator to hold the same qualification as a judge.

Nevertheless, permitting arbitration parties to choose their arbitrators without expecting the arbitrators to hold particular qualifications should not be considered unquestionable, or else the involved parties might select arbitrators who have insufficient knowledge of law. In turn, this could have an impact on the arbitration proceedings and the applicability of the awards if there is failure to apply the law correctly or the award does not satisfy the requirements of the procedure. Consequently, a balance should be achieved between the right of the parties to choose an arbitrator who has qualifications specific to their disputes, besides the need to settle disputes with an arbitrator who is able to apply the correct laws, support the proceedings and satisfy the formalities.

The latest SAL (2012) provides a balanced approach regarding the minimum standard of requirements for arbitrators and the right of the parties to choose arbitrators with specific qualifications. Article 14 declares that '[a]n arbitrator shall satisfy the following conditions:

- 1) [B]e of full legal capacity
- 2) [B]e of good conduct and reputation
- 3) [B]e a holder of at least a university degree in Sharia or law.

⁴⁸⁰ Al-Dousugi, Muhammed Bin Ahmed Bin Arafah, *Hashiat Al-Dousugi Ala Al-Sharah Al-Kabeer* [The Explanation of Al-Dousugi On Malikiah School Of Thought].

⁴⁸¹ *ibid.*

If the arbitration tribunal comprises more than one arbitrator, it is necessary that the chairman meet such requirements.⁴⁸² This article provides three components concerning the requirements for arbitrators.

Firstly, it is not essential for arbitrators to hold the qualifications of judges. Conversely, arbitrators are only required to possess minimum standards necessary to settle disagreements, which is full legal capacity alongside good conduct and reputation. Secondly, arbitration parties can decide on arbitrators with the preferred qualifications that fit determining the different matters as regards their disputes. Finally, arbitrators must use the applicable laws, maintain the arbitration proceedings and fulfil the formalities of the awards by way of requiring the sole arbitrator or the chairman to have a law degree.

It is worth noting that the final requirement safeguards the legitimacy of arbitration awards by ensuring that there is at least one arbitrator in the tribunal who has a background in law to apply the relevant laws and maintain the arbitration proceedings besides acquiring the formalities of awards to guarantee applicability. This particular requirement does not limit the parties from employing arbitrators with a law background, although it does allow the arbitration parties to hire arbitrators with either a background in law or another relevant background.

For example, in a disagreement pertaining to machines that have been disabled or damaged in a technology transfer transaction from a business to a consumer, parties might prefer to hire at least one engineer as an arbitrator providing the dispute is related to technical aspects and the performance of the machines that have been switched off. If the arbitral tribunal comprises three arbitrators and both parties employ an engineer as an arbitrator, the two engineers who are arbitrators must select a chairman with a law background to study the contracts, support the proceedings, acquire the formalities of the arbitration award, and apply the relevant laws.

Conversely, if the parties want to settle their dispute using a sole arbitrator, the parties should not appoint an engineer as their arbitrator. Despite the fact the nature of their disagreement relates to determining the performance of the disabled machines and an

⁴⁸² Saudi Arabia: the Law of Arbitration, Royal Decree No. M/34, 16 September 2012 <www.ilo.org/dyn/natlex/docs/ELECTRONIC/106647/130941/F850258061/arbitration.pdf> accessed 16 June 2023.

engineer is able to make this decision, an engineer might not have adequate knowledge of the relevant laws and the formalities of arbitration awards. Hence, the parties should employ an arbitrator with a background in law to guarantee that their disagreement is settled by way of the applicable law and fulfils the formalities of the arbitration awards. To complement the technical knowledge required in this case, the sole arbitrator is qualified to choose an engineer as an expert to provide an opinion on the performance of the disabled machines.

The requirements associated with the Saudi arbitration law concerning qualifications for arbitrators is the appropriate solution for modern Islamic arbitrations. It permits the arbitration parties to decide on their arbitrators with the preferred qualifications appropriate to the nature of their disagreement. Similarly, it gives validity to the arbitration awards by means of involving arbitrators with a background in law to continue the proceedings and satisfy the formalities of the awards, which in turn, ensures application.

3.4. Conclusion

At the outset, this chapter sought to critically analyse the development of the Saudi Arabian judicial and legal system so as to have a wholistic appreciation of the characteristics of Saudi Arabian laws, and the manner in which these laws are applied in the Kingdom. In addressing itself to the research question as to how Saudi Arabia's legal and judicial systems been affected by historical developments in the judicial and legal sectors, this chapter involved discussions on the early efforts of King Abdul Aziz to reform the judicial and legal framework of Saudi Arabia. The efforts of King Abdul Aziz to codify Sharia by placing the schools of jurisprudence on an equal footing were successfully opposed by the *ulema*. Despite the fact that these reforms at codification failed, it is notable that the existence of a dichotomy of law through the application of Sharia and legislative statutes has hindered efforts to unify Saudi Arabia's legal system. Nonetheless, the historical perspective of the developments of Saudi Arabia's judicial and legal system point to how these developments shaped the existing legal and judicial frameworks. The announcement by Crown Prince Mohammed bin Salman of judicial and legal reforms aimed at codification through the introduction of new sets

of laws are significant. However, it remains to be seen how exactly these proposed laws will achieve codification in Saudi Arabia or how they will impact/alter Saudi Arabia's legal and judicial framework. The hierarchy of Saudi Arabia's Judiciary was also discussed in a bid to discuss the structure of Saudi Arabia's judicial system. Further, the impact of the French legal system, has been discussed to show how this led to the establishment of legal institutions and legislation that were heavily influenced the civil law system yet these and the remarkable factor that despite this influence, these institutions remained essentially Islamic. This helps answer the research question as to how the Judicial System in the Kingdom of Saudi Arabia developed over time. There has also been discussion on the principle of party autonomy, its development and operation in Saudi Arabia. These discussions considered that whilst party autonomy is a fundamental principle in international commercial arbitration, its applicability particularly in Saudi Arabia is limited by Sharia principles with regards to the appointment of women as arbitrators. This analysis found that the Hanbali school of jurisprudence, has been a source that informs the views of Muslim jurists and scholars who oppose the participation of women as arbitrators. These discussions are useful in substantiating the main research question that seeks to establish the participation of women as arbitrators under Saudi Law. Finally, the research dealt with the importance of Sharia as a major source of law in Saudi Arabia as well as the major Fiqh schools and their subsequent effect on the working of the legal and arbitration system in Saudi Arabia.

The above areas covered by this chapter will be useful in better understanding the contents of chapter 4 which largely discusses the status of women under Sharia. For instance, the historical development covered by this chapter illuminates the discussion in chapter 4 as to the role women had in the historical development of Saudi Arabia's legal system. Further, chapter 4 discusses the interpretations of the Sunna as advanced by Muslim jurists in either arguing for or against the participation of women as arbitrators in a bid to analyse the issues surrounding the participation of women as arbitrators under Saudi Arabian law.

CHAPTER FOUR: CRITICAL ANALYSIS OF WOMEN'S LEGAL STATUS WITHIN SHARIA: VARIOUS VIEWS AND EVIDENCES

4.1. Introduction: A General View Concerning the Role of Women as Leaders in Islam

The current chapter aims to provide a critical analysis regarding women's legal status in accordance with Sharia and the different points of legal frameworks accepting or rejecting their involvement in leadership positions. Whilst the previous chapter dealt with the historical background of Saudi Arabia and its subsequent influence on its legal and judicial systems, this chapter seeks to address itself the research question that seeks to establish the legal status of women within Sharia in accordance with the Sharia law as implemented in Saudi Arabia. In substantiating this research question, this chapter will discuss the historical and present role of women as leaders in Islam. Further, discussions will include: an assessment on whether the justifications applied for the prohibition of women as arbitrators contravenes Sharia principles, the views of scholars either in support or against the appointment of women as arbitrators and lastly, an evaluation of whether there exists evidence or possibilities in the Saudi legal framework for the appointment of women as arbitrators.

These research questions are particularly important given that the rulings issued by Muslim jurists based on the Sunnah and Quran have resulted in the definition of the role of a woman in the Saudi Arabian society, including the prohibitions imposed on a woman in leadership positions. Authors such as Dr. Al-Fadhel have noted that most of these rulings are drawn from the Hanbali school of jurisprudence which he argues, continues past practices that are prejudicial to the participation of women as arbitrators.⁴⁸³ Notably, Al-Fadhel contends that the rules pertaining to arbitration before the adoption of the Saudi Arbitration Law 1983, emanated from the Hanbali school which provided that the requirements of a judge were the same requirements required of an arbitrator. As such, the justification given by the Hanbali school that a woman could not be a Judge due to lack of capacity or lack of experience, were held

⁴⁸³ Faisal M Al-Fadhel, 'Respect for Party Autonomy Under Current Saudi Arbitration Law' (2009) 23 Arab Law Quarterly 31.

to apply to arbitrators. It is within this context that this chapter seeks to establish whether there is an interrelationship between the challenges faced historically by women in leadership positions and challenges that might be faced presently by women in participating as arbitrators in Saudi Arabia. Despite progressive developments in the empowerment of women in education and other sectors, Dr. Al-Fadhel argues that these prohibited practices have persisted nonetheless, warranting calls by opponents to have these practices abolished as they do not reflect social and legislative changes adopted.⁴⁸⁴ Such discussions will help in substantiating the main research question that seeks to evaluate the appointment of women as arbitrators in Saudi Arabia.

This research considers that it is necessary to investigate the social position of women in the Arab State when Islam was at its inception stages. Notably, the role of women as members of the advisory council during the time of Prophet Muhammad is necessary. Particularly, women participated in the giving advice to the society, and some Muslim jurists argue that Prophet Muhammad affirmed the participation of women in leadership positions.⁴⁸⁵

In light of the recognition accorded to women in significant leadership roles at the early stages of Islam, Islamic scholars argue that the underrepresentation of the Saudi Arabian women in judicial roles might be a result of the wide interpretation of the Quran. These scholars argue that this has resulted in the adoption of 'extra-Islamic customs and traditions.'⁴⁸⁶ As such, this chapter analyses the social position of women in the emergence period of Islam is necessary to establish whether the prevailing treatment of women in leadership positions including judicial and arbitral positions, is a departure from historical practices by Prophet Muhammad and the Caliphates that succeeded him.

4.2. The Social Status of Women Under Islamic Law in the Early Years of Islam

⁴⁸⁴ *ibid.*

⁴⁸⁵ Samal al-Agha, 'Female Judges in Saudi Arabia, Hope Versus Reality' (2021) 37(3) Arab Law Quarterly.

⁴⁸⁶ Mona AlMunajjed, *Women in Saudi Arabia Today* (1st edn, Macmillan Press Ltd. 1997) 28, para 3.

At the outset, it is notable that the emergence of Islam at the end of the sixth century in the Arab Peninsula introduced women rights and privileges that were hitherto not enjoyed. In the pre-Islamic period, the social position of a woman was treated with disdain and historical accounts indicate that women faced discrimination and oppression. For instance, women in ancient Greece were viewed to be lesser than men and did not enjoy their civil rights and they could not inherit or own property.⁴⁸⁷ Further, decisions on who a woman would marry were done without her consent and her husband was in a position to manage her resources without her approval. These kinds of discriminatory practices were codified under Roman law which dictated that a woman could not enjoy any judicial rights.⁴⁸⁸ Al Dawalibi pointed out that under Roman law, a woman,

(...) was subjected by reason of her sex to perpetual guardianship- by her father during childhood and by her husband for the rest of her life. She was an object possessed and inherited by men and had no right to inherit wealth or property from her husband.⁴⁸⁹

Indeed, discrimination against women has persisted even in the 20th century and as such, requiring the need for international instruments such as the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) which principally aims to guard against the discrimination of women. The preamble of CEDAW notes that despite the existence of international instruments that promote human rights, human dignity and the equal rights of both women and men, the discrimination of women globally continues to exist.⁴⁹⁰ Notably, the signing and ratification of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) by Saudi Arabia on 7th September 2000 is in itself, an admission that the discrimination against women exists requiring measures that recognize and advance women rights.⁴⁹¹

⁴⁸⁷ AlMunajjed (n 486) 11, para 4.

⁴⁸⁸ *ibid.*

⁴⁸⁹ *ibid* 11, para 5.

⁴⁹⁰ Office of the High Commissioner of Human Rights, 'Convention on the Elimination of All Forms of Discrimination against Women' <www.ohchr.org/en/instruments-mechanisms/instruments/convention-elimination-all-forms-discrimination-against-women> accessed 23 June 2023.

⁴⁹¹ al-Agha (n 485).

The derogatory treatment towards the social status of women witnessed in Greece were similarly present in the Arab Peninsula during the Al Jahiliyya period, which preceded the introduction of Islam. For instance, when a woman gave birth to a girl, the society viewed such a birth as a disgrace to the society and as a result, female infanticide became a common practice amongst the Kindah, Rabi'a and Tamim tribes.⁴⁹² Female infanticide was justified on the grounds that parents would be relieved from the economic upkeep of the child as well as preventing shame from befalling the community. This shame was believed to arise in instances where a woman would be captured as a prisoner in times of war or where she became involved in prostitution.

Sexual permissiveness was commonplace during the Al Jahiliyya period as a man was allowed to marry more than ten wives, with women also being able to marry more than one man whilst husbands and wives were allowed to exchange their partners after entering into a mutual agreement known as *nikah al badal*.⁴⁹³ The practice of divorce was outrightly discriminatory on women as a man could terminate the marriage by uttering to a woman 'Go wherever you want' and once these words were spoken, a woman could not obtain any legal redress to undo the dissolution of the marriage.⁴⁹⁴

However, the emergence of Islam in the Arab Peninsula at the end of the sixth century saw the banning of female infanticide and sexual permissiveness. The Quran sought to establish the rights of women by correcting the inequality of prevailing laws that were discriminatory towards women. This was achieved through the enforcement of basic equal standards between men and women with respect to personal, social, civil and political rights.⁴⁹⁵ As a result, women were able to enjoy equal rights with men in religious and social activities such as attending prayers in Mosques as well taking part in the pilgrimage to Meccah.

4.2.1. The Role of Women in Political and Leadership Activities During the Era of Prophet Muhammad

⁴⁹² ibid 11, para 6.

⁴⁹³ ibid 12.

⁴⁹⁴ ibid.

⁴⁹⁵ ibid.

The participation of women in leadership roles under Islamic law has evoked divergent beliefs and views amongst Islamic jurists. On one hand, jurists opposed to the appointment of women to public office base their justification on various verses from both the Quran and Hadith in which they argue that the Prophet was opposed to the participation of women in leadership positions.⁴⁹⁶ On the other hand, a section of Islamic jurists argue that neither the Quran or Sunnah contain any express prohibition of the appointment of women to judicial offices.⁴⁹⁷ At the outset, it is notable that scholars such as David contend that Muslim jurists that are against the appointment of women to leadership positions rarely base their arguments/rulings on the Quran despite the fact that the Quran is the highest authoritative text in Islam. David emphasizes that ‘the majority of surveyed texts do not cite the Quran at all. In fact, there is only a single instance where a jurist cites a verse of the Quran as direct evidence for disallowing women’s leadership.’⁴⁹⁸

In light of these diverging views and whilst appreciating that the Quran and the Sunnah are the primary sources of law in Saudi Arabia, an evaluation of the role of women in public and political activities during the time of Prophet Muhammad would offer valuable insight. Such insight would be useful in ascertaining whether the Prophet acknowledged either expressly or impliedly, the role of women in public and political positions.

During the period of the establishment of the Islamic State, women across the Arabian Peninsula were involved in public affairs and defended Islam as the new religion. It can be argued that the defence of Islam by women amounted to engaging in political activity in contemporary terms. The support for an Islamic political system under Prophet Muhammad was achieved through the *bay’a*.⁴⁹⁹

Bay’a is an Islamic political institution through which a nation grants the reigning political system legitimacy. This is achieved through a pledge by the inhabitants of a nation, declaring their loyalty to a political system and its leader on the condition that

⁴⁹⁶ *ibid.*

⁴⁹⁷ *ibid.*

⁴⁹⁸ David Solomon Jalajel, *Women and Leadership in Islamic Law: A Critical Analysis of classical Legal Texts* (Routledge 2017) 27, para 4.

⁴⁹⁹ Haifaa A Jawad, *The Rights of Women in Islam: An Authentic Approach* (1st edn, MacMillan Press Ltd. 1998) 84.

the particular leader upholds Islamic principles. As such, Ares Baya is understood as a covenant entered into by three parties which include: the nation, the leader and Sharia. In explaining the relationship between these three parties, Jawad states that under the *bay'a*, the leader ought to be given allegiance by the nation or Umma and further, Sharia ought to be upheld by both the nation and the leader.⁵⁰⁰ In light of this the *bay'a* political system, Prophet Muhammad received pledges of allegiance from both men and women and notably, these pledges had no difference in content or responsibility accruing to either men or women. Prophet Muhammad received a pledge from a woman named Nusaiba bint Kab, who promised her participation in Jihad and as a result, she took part in wars alongside men.⁵⁰¹ The participation of Nusaiba and other women in offering their pledges to Prophet Muhammad denotes an important role played by women in political activity as they affirmed, respected and recognized the Islamic political system. The subsequent recognition by Prophet Muhammad of these pledges further underscores the importance of the political role played by women in affirming the Islamic system.

Women also participated in mutual consultation (*Shura*) which was used as a tool to achieve the objectives of Sharia. The exercise of mutual consultation/*shura* in an Islamic community varies according to the subject matter of the issue under consultation as well as the individual capability of a person to participate in such consultations.⁵⁰² In outlining the various individuals that could deal with particular matters under consultation, Jawad stated:

Regarding legislative matters concerning *Sharia*, consultation is required with scholars or the *Ulama*; regarding technical issues, consultation is mandatory with experts in these fields; for general issues concerning the whole nation, some form of consultation with every member of the community would be ideal.⁵⁰³

⁵⁰⁰ *ibid.*

⁵⁰¹ *ibid.*

⁵⁰² *ibid.*

⁵⁰³ *ibid* 85, para 2.

It is in the context of these various participation platforms that women were consulted during the era Prophet Muhammad where their advice (*mashwara*) was sought before conclusive decisions were reached.

4.2.2. An Overview of Notable Women Who Took Key Leadership Roles in the Early Days Of Islam

During various relevant periods in Islamic history such as; the emergence of Islam in Arabia in the seventh century, the era of Prophet Muhammad and during the reign of Caliphates that succeeded Prophet Muhammad, women took a key role in the development of Islam as a political system. The influence of the advice given by women in *Shura* played a significant role in the preservation of peace amongst the Islamic Community. For instance, Prophet Muhammad relied on the advice given by his wife, Umm Salama which resulted in the resolution of a significant issue that threatened to divide the Islamic community.⁵⁰⁴ Women took up leadership roles by participating in political, religious and social activities. This section seeks to analyse the role of notable women in the political, religious and cultural aspects of Islam in its early stages. Such an analysis will be helpful in contrasting the leadership roles Islamic women now assume to establish whether there exist similarities between these two periods or whether instead, there was a departure in the leadership roles carried out by women.

4.2.2.1. Aisha Daughter of Abu Bakr

By historical account, Aisha is said to have been married to Prophet Muhammad between late 623 CE and early 624 CE. She was married at an early age and the Quran makes reference to her, together with Prophet Muhammad's other wives as 'a mother to the believers.'⁵⁰⁵ It is notable that Prophet Muhammad is recognized for the training he gave to Aisha who was his third and youngest wife. She was trained to critique

⁵⁰⁴ Jawad (n 499).

⁵⁰⁵ Hossein Kamaly, *A History of Islam in 21 Women* (1st edn, Oneworld Publications 2019) 25, para 1.

religious matters and she was later appointed as a religious judge and further, the caliphate of Abu Bakr, Umar and Uthman recognized her as a religious authority. Given Aisha's wisdom and knowledge in religious matters, Prophet Muhammad recommended Muslims to emulate her wisdom and knowledge on religious matters.⁵⁰⁶

Aisha went on to participate in significant political events following the death of Prophet Muhammad as she became a political leader during the 'Battle of the Camel' which was against Ali ibn Abi Talib, being the fourth caliph. Ali ben Abi.⁵⁰⁷ Most of what is known about Aisha results out of her close proximity to Prophet Muhammad and this was evident given that after the death of Prophet Muhammad, she offered the Islamic community eyewitness reports of how he led the Islamic community on a range of issues as well as how he delivered justice and maintained peace and order between differing groups in Medina.⁵⁰⁸ After Prophet Muhammad's death, Aisha became the most influential amongst the Prophet's wives and importantly, she became a notable authority with regards to the Prophet's views on issues pertaining to women.⁵⁰⁹

Notably, historical accounts indicate that owing to her religious authority, Aisha commented on the Quran and she advised on the proper reading of phrases and words in the Quran. Hossein Kamaly in pointing out the influence of Aisha's religious leadership on hadith (which collectively make up the Sunnah), states:

Before its final compilation, commonly dated to the 650s, she may have had a partial or complete codex of the Quran prepared for herself. By the mid-ninth century CE, when Muslims took stock of hadith or reports about the sayings and conduct of the Prophet, some traced as many as 2,120 to Aisha herself, and 1,200 of these through her back to the Prophet. The numbers indicate her acknowledged position as one of the most prolific sources of eyewitness reports about the Prophet.⁵¹⁰

As such, Aisha's influence on the eventual composition of the Sunnah is significant and it follows then her leadership role in Islam underscores the fact that indeed, women

⁵⁰⁶ *ibid.*

⁵⁰⁷ AlMunajjed (n 486) 16.

⁵⁰⁸ Kamaly (n 505).

⁵⁰⁹ *ibid.*

⁵¹⁰ *ibid* 26, para 2.

leadership during the era of Prophet Muhammad was recognized and affirmed. Some historical records highlight a quote by Prophet Muhammad's approving Aisha's religious leadership as he advised, 'Get half of your religion from this ruddy-cheeked woman.'⁵¹¹

There are a number of key historical incidences that occurred during the era of Prophet Muhammad that elevated Aisha's position in the community, resulting in the community's confidence in her testimony of the Prophet's views after his death in 632 in Aisha's chambers. One of the historically notable incidents is termed as the *Slander affair/ the Necklace Incident*. The details of the incident are that it was a habit for the Prophet together with his companions to take their wives when they travelled out of Medina. In one such outing, Aisha was left behind by Prophet's caravan as she was looking for a necklace given to her by her mother. Historical sources record her as saying:

I checked my chest and noticed that the necklace of the Yemen beads which my mother had given me was missing. I went back to look for the necklace and missed the caravan when I came back. I never thought the men would leave without me. However, those who had mounted the litter on camelback had failed to realize I was not in it... Back then, women were small and did not weigh much. They had little to eat... I was small and light woman too... So, I wrapped myself in my sheet and lay down, falling asleep as I hoped for them to come back and get me.⁵¹²

After Aisha had been left behind, a young man who was travelling with the caravan came back for her and delivered her to Prophet Muhammad's home. Following this incident, men opposed to the Prophet sparked off rumours that there was inappropriate conduct between Aisha and the man that delivered her to the Prophet. Pre-Islamic Arabic custom prevailing at the time required the Prophet to beat his wife (Aisha) or divorce her on grounds of dishonour occasioned on the man and the marriage. However, despite these customary expectations, Prophet Muhammad is recorded as delivering God's reprimand against individual's that accuse married women of moral

⁵¹¹ ibid.

⁵¹² ibid.

transgression without the evidence of four eyewitnesses. As a result of Prophet Muhammad's reaction to Aisha's slanderers, this meant that Aisha was exonerated and Kamaly argues that, 'Aisha's exoneration and the denunciation of her slanderers elevated her position in the eyes of the community around the Prophet.'⁵¹³

As a result of this communal confidence in Aisha, the Muslim community accepted her testimony following Prophet Muhammad's death regarding who the Prophet preferred to be his successor in the event of his death. Whilst there has been disagreement amongst Islamic chroniclers as to which month was Prophet Muhammad's death, these chroniclers do not contest that Aisha's testimony of who the Prophet chose to succeed him was significant as it averted confusion and disagreement amongst the Muslim community. Aisha's role in influencing the political leadership of the Muslim community not only by virtue of her testimony but also by virtue of the public confidence she enjoyed in such matters, is a significant indicator of the central role a woman could play in the political and religious spheres in the Muslim community at the time.

Another historical incident that involved Aisha was the Battle of the Camel which happened at Bassra, a garrison town located in modern day Iraq, on 7th November 656. The Battle of Camel is significant as it resulted in a shared understanding between Shia Muslims and Sunni Muslims that women should not have a role in political leadership. This understanding arises from Aisha's decision to go against the ruling Caliph's decision prohibiting the community from going to war over the murder of Uthman, the third successor of Prophet Muhammad. In disagreeing with the ruling caliphate named Ali, Aisha sided with Uthman's kinsmen from the Quraysh tribe who sought to avenge Uthman's death. Aisha led an army of thirteen thousand men to take over the town of Basra located in modern day Iraq and she was accompanied by Talha and Zubayr who were two of Prophet Muhammad's companions. However, Ali defeated Aisha and her army but he is recorded for granting amnesty to those who surrendered and whilst Talha and Zubayr died in the battle, Ali is said to have, 'showed utmost respect for Aisha and sent her home unharmed.'⁵¹⁴

⁵¹³ Kamaly (n 505).

⁵¹⁴ *ibid* 30, para 1.

The outcome Battle of the Camel is historically consequential in that Aisha's actions in disobeying a ruling caliph was viewed as disrespectful by the Muslim community to the extent that a section of Shia Muslims hurled insults at Aisha. Although a greater number Sunnis and mainstream Shias are opposed to such insults, following the Battle of the Camel, both of these groups shared a common understanding that women should not be involved in political leadership.⁵¹⁵ Further, the battle was consequential given that the widely used hadith attributed to Prophet Muhammad which stated that, 'Those who entrust power [*mulk*] to a woman will never know prosperity' was brought forth by Abu Bakra in the aftermath of the battle.⁵¹⁶ Abu Bakra was one of Prophet Muhammad's companions and he had witnessed the Battle of the Camel and as a result, he recounted the Prophet's words which by application as part of Sunnah, have carried significant weight over time amongst Muslim jurists as a key justification in denying women participation in leadership roles.

Kamaly points out that, 'of the roughly 1,200 reports about the Prophet traced to her, only 174 appear in one of the canonical collections of Sunni hadith and a mere 54 in another. The Shia tradition usually downplays Aisha's reports altogether.'⁵¹⁷ However, despite these efforts to suppress Aisha's reports, her reports on Prophet Muhammad's life and teaching and practices regarding the role of women in leadership and politics continue to be relied on in the present day.

4.2.2.2. Arwa bint Ahmad Al Soulahiyyah

Islamic chroniclers and historians also record the political leadership of Arwas bint Ahmad Al Soulahiyyah who was crowned as the Queen of Yemen after the demise of her husband.⁵¹⁸ She is renowned for being one of the most prominent female leaders in the Muslim community and she had a significantly long reign as she governed Yemen for a period of 54 years. Despite her reign as Queen, Arwa wielded de facto political authority collectively for a period of 71 years. The 71 years de facto political authority Queen Arwa held is on the basis that in the beginning, she was a queen

⁵¹⁵ *ibid* para 2.

⁵¹⁶ *ibid*.

⁵¹⁷ *ibid*.

⁵¹⁸ Jawad (n 499).

consort together with her husband al-Mukarram bi Allah between the period 1067 to 1084. Further, she acted as queen regent to her son between the period 1084 to 1094 and following this period, she became Queen until she died in 1138.⁵¹⁹ There is common praise amongst historians and biographers over the leadership, personality and reign of Queen Arwa. Idris Imad al Din, a historian, described Queen Arwa as ‘a woman of great piety, integrity and excellence, perfect intelligence and erudition, surpassing men and how much more [than] women with no thought beyond the four walls of their chambers.’⁵²⁰ A description of individual characteristics attributed to Queen Arwa by Umara, who was also a historian, is that the Queen was,

Well-read and, in addition to the gift of writing, [she] possessed a retentive memory stored with the chronology of past time. Nothing could surpass the interlinear glosses, upon both verbal construction and interpretation, inserted in her own handwriting in the pages of books that she had read. Our Queen was decidedly a woman of high literary calibre.⁵²¹

Queen Arwa’s reign is distinguished from that of other rulers given her ability in maintaining good diplomatic relations with the Fatimid imam-Caliphs in Egypt who she paid allegiance to while at the same time, maintaining significant administrative independence and autonomy in Yemen.⁵²² Queen Arwa’s allegiance to the Fatimid empire could be explained on the basis that the Fatimid empire was the most powerful and influential empire in the region. As such, it made political and economic sense that Queen Arwa supported the Fatimids as Yemen was to a great degree, dependent on the Fatimid rule.⁵²³ As such, the political support Queen Arwa enjoyed in Yemen was attributed to the fact that Yemeni Ismailis were dependent on the Fatimid empire.

Notably, a second reason that necessitated the Yemeni Ismailis support to Arwa despite the fact that she was a woman was on the basis that they revered and held in high regard a Fatimid caliph named Al-Mustansir. In underlining the significant

⁵¹⁹ Shahla Haeri, *The Unforgettable Queens of Islam: Succession, Authority, Gender* (1st edn, 2020, CUP 2020) 82, para 1.

⁵²⁰ *ibid.*

⁵²¹ *ibid.*

⁵²² *ibid.*

⁵²³ Kamaly (n 505).

influence of Fatimid caliphs and more particularly Al-Mustansir over Ismaili Yemenis, Kamaly notes:

For them (Ismaili Yemenis) Al-Mustansir, or any other Fatimid caliph, was an infallible imam. His words, in any form whatsoever, were religiously binding on all believers in any place at any time. His ruling could only be altered by another imam.⁵²⁴

The respect and obedience Al-Mustansir's rulings enjoyed enabled two decrees he issued in favour of Queen Arwa to be abided by the Ismaili Yemenis. The first decree Al-Mustansir issued appointed Queen Arwa to the position of *hugga*, which was the highest position in the Yemen sector (*gazira*). As such, Queen Arwa became the official representative of the imam and she was the ultimate religious and political authority in Yemen.⁵²⁵ In reinforcing this decree, the second decree Al-Mustansir issued stipulated that disobeying Queen Arwa was religiously forbidden, further cementing her position as the religious and political leader in Yemen.⁵²⁶

Al-Mustansir's decrees elevating Queen Arwa to the highest religious rank in Yemen prompted religious literature that sought to justify the Al-Mustansir's decision which he viewed as wise, to appoint a woman to the position of *hugga*. Notably, one of the writers of such literature was al-Sultan al-Hattab who argued that ideally, the human body which he termed as an 'envelope' (*al-qumus al-basariyya al-gismaniyya*) carried no real importance in indicating a person's sex. Instead, al-Sultan al-Hattab argued that the criteria to be used to establish a person's real sex is through the evaluation of their actions and deeds. As such, a person could be considered to attain *dakar* (which is defined as the perfect interpretation of religion) even though they are female. al-Sultan al-Hattab used the reasoning in this literature to justify Queen Arwa's appointment as *hugga* to explain the evident contradiction between her sex and rank under Islamic custom and he emphasised that a person ought to be judged according to their knowledge and not by their sex.⁵²⁷

⁵²⁴ *ibid* 104, para 2.

⁵²⁵ *ibid* 99, para 1.

⁵²⁶ *ibid*.

⁵²⁷ Samer Traboulsi, 'The Queen Was Actually a Man: Arwa Bint Ahmad and The Politics Of Religion' (2003) 50(1) *Arabica* 96, 105.

However, there has been criticisms of the value Al-Sultan's argument by scholars such as Samer Traboulsi who contend that his argument was specifically formulated to 'provide a theological escape from the problem of Arwa's occupation of the highest religious rank.'⁵²⁸ Further, Samer Traboulsi emphasizes:

At the time, it was her (Arwa's) sex that caused most of the trouble for those who had interests in keeping the Sulayhids in power. The Fatimids exhausted every possible political and religious means to cover the queen's deficiency. Their politics of religion was behind the development of a new philosophy of the sexes by the people of the *da'wa* who were religiously bound to follow her.⁵²⁹

However, subsequent secularists rejected such philosophy and as such, the historical account of Queen Arwa has been relegated by Islamic chroniclers as Traboulsi argues that it is unlikely that whilst Islamists believe in the notion that religion is a significant part of the State, they are care unlikely to use the example of an Ismaili woman to justify such a notion. Nonetheless, Queen Arwa's rule of Yemen as *hugga* offers valuable insight as to the role a woman played in political and religious affairs and while her appointment could be understood to be politically motivated by the Fatimid empire, it is important to note that al-Hattab's arguments on the appointment of Queen Arwa to a religious post could be traced to pre-existing Ismaili concepts, pointing out that such arguments had a historical backing.

In light of these leadership roles in the political and judicial spheres, it is apparent that the participation of women in leadership positions was prevalent during the era of Prophet Muhammad as well as in the Ismaili community. Whilst women never participated as judges during Prophet Muhammad's era or his during the reign of the four Caliphates that subsequently succeeded him, authors such as Samal al Agha contend that this cannot be deemed as grounds barring women from being appointed to judicial office in light of the view that neither the Quran or the Sunnah expressly prohibit the appointment of women to judicial office.⁵³⁰ Another consideration advanced to explain the non-inclusion of women as Judges during the era of Prophet

⁵²⁸ *ibid* para 3.

⁵²⁹ *ibid* 107, para 2.

⁵³⁰ al-Agha (n 485).

Muhammad is that given the peace and security that prevailed during that time, there was not much need for judges to hear and determine disputes.⁵³¹

4.2.2.3. The Historical Status of Women in Islam: its Implication on Saudi Arabia's Legal Framework

The pre-Islamic period known as Al Jahiliyya (the time of ignorance) effectively denied the existence of the rights of women and the value of women in society was degraded and diminished. Mona AlMunajjed in pointing out how dire the situation was for women during this period, argues that female infanticide was a widespread practice. Mona AlMunajjed notably points out:

A man could divorce his wife just by saying the words of dismissal 'Go wherever you want', and she had no redress to law. A woman was an object to be inherited like money, but she could inherit nothing from her husband or her son.⁵³²

In light of the state of women rights in the pre-Islamic period, it is apparent that women had no known leadership role between this period whilst at the same time, rights pertaining to private law such as property, succession and marriage were severely discriminative against women. However, the emergence of Islam sought to defend the rights of women and it worked to bridge the differences between the rights of women and men by conferring an independent status on women.⁵³³ Female infanticide and sexual permissiveness prevalent in the former order were expressly banned by Islam whilst the killing of a woman was considered as an equal crime as to that of the killing of a man.⁵³⁴

The state of women rights during the pre-Islamic period provides crucial context as to the attitude of Islam, particularly the Quran towards recognizing and improving the rights and standing of women. According to AlMunajjed, 'the Quran lent support to basic equality between men and women by giving women equal rights with men (but

⁵³¹ *ibid.*

⁵³² AlMunajjed (n 486) 11, para 4.

⁵³³ *ibid.*

⁵³⁴ *ibid* 13, para 1.

not necessarily identical), be they personal, civil, social or political rights.’⁵³⁵ The Quran went ahead and mentioned women alongside men in its verses, denoting a sense of equality between the two genders. For instance, Al Ahzab, 33 verse 35 of the Quran reads,

‘For Muslim men and women,
For believing men and women,
For devout men and women
For true men and women
For men and women who are
Patient and constant, for men
And women who humble themselves,
For men and women who give
In charity, for men and women who fast,
For men and women who
Guard their chastity, and
For men and women who
Engage much in God’s remembrance
For them God has prepared
Forgiveness and great Reward.’⁵³⁶

Notably, it is from Quranic verses such as these that highlighted a religious and legal shift as to how women ought to be recognized and viewed in the Islamic era. It is in light of such Quranic verses that Prophet Muhammad expressed his own commentaries that further asserted the notion of the equality of men and women. Scholars note that

⁵³⁵ *ibid* 13, para 2.

⁵³⁶ *ibid* 11, para 3.

in the pilgrimage of farewell, prophet Muhammad stated that, ‘O People! Do take good care of women, you have rights over your women and they have rights over you.’⁵³⁷ Further, Prophet Muhammad is also reported to have stated that, ‘All people are equal, as equal as the teeth of a comb. There is no claim of merit of an Arab over a non-Arab, or of a white over a black person, or a male over a female. Only God-fearing people merit a preference with God.’⁵³⁸

These statements by the Prophet could perhaps be indicative of the reasons that founded his support and recognition of his wife Aisha who he trained to critique religious issues and notably, Aisha would later be appointed as a religious judge.⁵³⁹ The support Prophet Muhammad accorded Aisha as well as his attitude emphasizing the equality of man and woman before God could be seen as a reflection of the tolerance and the democratic nature during the pre-Islamic period.

Indeed, the role played by women such as Aisha and Queen Arwa in religious and political leadership is significant as it shaped the pre-Islamic ideology and beliefs regarding the role of women with some of most of these beliefs being respected and observed in the modern day. For instance, Abu Bakra’s recollection of the Prophet’s words regarding the rulership of the Persian people by a woman was brought up following the defeat of Aisha at the Battle of the Camel. This recollection eventually materialized into a well-respected and popular hadith that discourages the appointment of women to leadership positions such as judges/arbitrators in Saudi Arabia. Whilst considering that this research seeks to examine the views of contemporary scholars in supporting or opposing the appointment of women in leadership positions (including arbitration), authors such as Haeri argue that Aisha’s role at the Battle of the Camel was so significant that it consequently shaped the Islamic legal reasoning relating to the role of women in political and military leadership.⁵⁴⁰ Conversely, Haeri further argues that had Aisha won the Battle of the Camel:

The narrative of opposition to women’s political leaderships and military expeditions would have taken a different trajectory in Muslim societies- alas, history is written by the victors. The fact that she lost,

⁵³⁷ *ibid* 14.

⁵³⁸ Jawad (n 499).

⁵³⁹ Kamaly (n 505).

⁵⁴⁰ Haeri (n 519).

and with that the political legacy of her military misadventure and audacious political adventure against a ruling caliphwas 'ultimately transformed into a convenient component of the medieval construct which all women as threats to the maintenance of Islamic political order.⁵⁴¹

As such, the Battle of the Camel could be understood as a significant turning point of pre-Islamic legal reasoning that concerns the participation of women in leadership positions including the appointment of arbitrators and Judges.

There is significant and divisive debate amongst scholars over the authenticity of Abu Bakra's hadith recollecting the words of Prophet Muhammad. Authors such as Nabia Abbott states that it was unlikely such a statement was uttered by the Prophet given his known attributes of relying on the advice of his wives such as Khadijah and Umm Salamah.⁵⁴² Further, Abbott in his recollection of Abu Bakra's hadith dismisses it as a hadith which has been reported from a single source and as such, it is unreliable.

By projecting the prediction of doom to the Prophet Muhammad, Abu Bakra – or later commentators – made it possible for these eminent scholars to ignore the dubious origin of this hadith.⁵⁴³ Despite these significant criticisms, this particular hadith in the modern Muslim society, has been continuously relied on as a major justification to limit women from participating in leadership positions. Whilst appreciating that this hadith is part and parcel of Sunna, being one of the primary sources of law in Saudi Arabia, it is notable that the role of women such as Aisha during the pre-Islamic era, influenced the eventual composition of the Sunna despite the fact that this influence is used to justify religious and political ideologies that are against the participation of women in leadership positions.

As Haeri remarks, history is indeed written by the victors but nevertheless, the example of women leaders such as Aisha and Queen Arwa who are greatly admired in the Muslim world despite their misadventures and failures underscore a significant fact: their gender was not a deterrent factor in taking up leadership positions. This fact that has now come full circle with the adoption of domestic and international laws in Saudi

⁵⁴¹ *ibid* 72, para 2.

⁵⁴² *ibid* 73.

⁵⁴³ *ibid*.

Arabia that seek to promote the participation of women in leadership positions and whilst judicial and arbitrator appointments seem to be the next step for female inclusion in Saudi Arabia, significant ground has been covered nonetheless in other leadership areas.

Samal al-Agha emphasizes this point by arguing that by Saudi Arabia allowing women to work as Public Prosecutors, is in itself:

An admittance of the fact that (women) are accountable, competent, trustworthy because prosecutors act on behalf of the whole society, and they might be able to conduct investigations regarding various offences such as corruption, embezzlement, abuse of power and other serious crimes.⁵⁴⁴

4.3. The Acceptability of Women as Arbitrators in Sharia

At the outset, it is worth noting that the Saudi Arbitration Law 2012, the Saudi Basic Law of Governance and the Law of the Judiciary do not contain provisions that impose gender requirements for the appointment of an individual as an arbitrator or as judge.⁵⁴⁵ Whilst Article 1 of the Saudi Basic Law of Governance states that the Holy Quran and the Sunna are the constitution of the Kingdom of Saudi Arabia, the Quran does not in itself, contain a code of laws. Rather, the Quran expresses the guidelines and general principles on subjects that largely carry legal importance.⁵⁴⁶ Abdelkader argues:

The (Quran) is comprised of more than 6200 verses and less than one-tenth consists of legal material. Indeed, there are approximately 350 verses relating to matters of legal importance, such as prohibiting the custom of female infanticide or unrestricted polygamy. In fact, the crux of the text itself relates to belief, morality and spirituality.⁵⁴⁷

⁵⁴⁴ al-Agha (n 485).

⁵⁴⁵ *ibid.*

⁵⁴⁶ Engy Abdelkader, 'To Judge or Not to Judge: A Comparative Analysis of Islamic Jurisprudential Approaches to Female Judges in the Muslim World (Indonesia, Egypt and Iran)' (2014) 37 *Fordham International Law Journal* 309, 313.

⁵⁴⁷ *ibid* para 1.

In light of the fact that the Quran establishes general principles, the Sunnah, being the interpretation of the Quran by the Prophet through his words and deeds, works to further elaborate these legal principles. The Sunnah is contained in hadith which are the written narrations by Islamic chroniclers during the formative stages of Islam directly relating the Prophet's life, words and deeds.

However, some hadiths have been a cause of disagreement amongst Islamic jurists who differ on the authenticity, relevance and application of a given hadith. The interpretation of the Quran and Hadith is an exclusive function of Islamic jurists who have been trained on the same. There is as such, need to evaluate the interpretation of Islamic jurists on general principles from the Quran and Hadith given that as a result of this interpretation of the primary sources of Islamic law, three main lines of arguments arise.

The first line of interpretation also known as gender rights restrictive interpretation, involves arguments that are against the appointment of women to judicial positions. The second argument adopted by Islamic jurists is an interpretation that creates a moderate position between prohibiting and permitting the appointment of women to judicial positions. The third line of interpretation also known as rights empowering interpretation adopted by jurists concerns interpretations that justifies the appointment of women to judicial positions. This section discusses these interpretations and the arguments that surround them in evaluating the ability of a woman to be appointed as a Judge or an arbitrator.

Notably, the discussion under this section regarding interpretations that are either for or against the appointment of women to judicial positions proceeds on the premise that, the requirements of a judge under Sharia are not materially different from those that apply to arbitrators. As such, interpretations that limit or promote the appointment of a woman as a Judge should be taken to also be applicable to female arbitrators. Moreover, authors such as Abdelkader point out that judges in the early years of Islam seems 'to have been males who successfully served as tribal arbitrators.'⁵⁴⁸

⁵⁴⁸ ibid 318, para 2.

4.3.1. Views Relating to the Appointment of Women to Judicial Positions

An examination of the divergent views by Muslim jurists as well as scholars is particularly important given that there exists no explicit provision in the Sunnah or Quran that bars women from participating as judges or arbitrators. As such, the lack of an explicit probative text has created room for various and divergent interpretations by Muslim jurists on the Quran and Sunna. Such an examination is also helpful in providing an understanding of how the historical practice of the Hanbali school that prescribed the same requirements of a judge to an arbitrator. As such, such analysis will be helpful in pointing out how the interpretations of Muslim jurists in the absence of an explicit prohibition under Sharia, affects and influences the participation of women as judges and arbitrators.

4.3.1.2. The Rights Restrictive Views: Arguments Against the Appointment of Women to Judicial Positions

i. Quran: Surah al-Nisa (4), verse 34

Whilst the Quran by virtue of Article 1 of the Saudi Basic Law of Governance is identified as the foremost and authoritative source of law, Muslim jurists have rarely used the Quran as a source to support their arguments opposing the appointment of women to judicial positions. One of the rare instances where the Quran has been used to support such an argument was drawn from *Surah al-Nisa (4), verse 34* which states:

Men are responsible (*qawwamun*) for women because God has favoured some over others and because they spend out of their property; the good women are therefore obedient, guarding the unseen as God has guarded; and (as to) those on whose part you fear desertion, admonish them, and leave them alone in the sleeping-places and beat them; then if they obey you, do not seek a way against them; surely God is High, Great.⁵⁴⁹

⁵⁴⁹ Jalajel (n 498).

The Islamic jurist al-Mawardi from the Shaf'i school cited this verse in arguing that women cannot hold judicial authority on the basis that men are responsible over women as God has favoured a man over woman by virtue of his intellect and opinion. Al-Mawardi takes the favour granted by God to mean their intellect and opinion and as such, he concludes that a woman cannot hold judicial authority as this will place a woman in a position of responsibility over a man.⁵⁵⁰ It is notable that al-Mawardi is the only jurist from the Shaf'i traditional school that adopts this kind of an argument and further, no other jurists from the other schools surveyed by David Solomon Jalajel, uses the Quranic verse cited by al-Mawardi to disallow women from holding judicial authority.⁵⁵¹

Further, in writing a biography of the Islamic jurist al-Shaf'i, Al-Bayhaqi quotes a significant argument raised by al-Shaf'i in light of the above verse, relating to the ability of a woman to lead men in prayers. Whilst this quote does not directly relate to judicial authority, it is helpful in denoting Al-Shaf'i's attitude towards the ability of a woman to hold a position of responsibility over a man. Al-Shafi argues that,

If someone were to say: 'a slave is disfavoured', [the reply would be:] likewise the free man can be disfavoured. Then it is possible that someone could come along who is favourable to him. It might be that the slave is better than the free man. He might come into circumstances where he will be manumitted and become a free man, but under all circumstances he is one of the men. The woman will never be, in any circumstance, anything but a woman with someone from among the men responsible over her in the generality of her affairs.

From this excerpt, it is evident that Al-Shafi understood *Surah al-Nisa (4), verse 34* of the Quran to impose outrightly, that a woman could never be held to be responsible over a man. However, David Solomon Jalajel points out that in making the above argument, Al-Shaf'i makes reference to the verse but he fails to cite it. Jalalel contends that as a result of this omission, Al-Shaf'i 'is able to discuss the implications of God making men responsible for women without being encumbered by the verse's context. His language is careful, referring the matters of responsibility and authority to prayer

⁵⁵⁰ *ibid.*

⁵⁵¹ *ibid* 27, para 1.

leadership while avoiding any sweeping generalisations that would strip women of their legal agency altogether.’⁵⁵²

Indeed, Al-Shaf’i’s arguments contradict other rulings made by the Shafi school where a woman has been found to be a legally independent agent.⁵⁵³ This is whilst appreciating that *Surah al-Nisa (4), verse 34* of the Quran does not state or provide for the responsibility of a man over a woman in the generality of her affairs and this perhaps explains why al-Shaff’i does not cite the verse as he makes his arguments.

Unlike al-Shaf’i’s hesitance in directly citing the Quran in making arguments that effectively disallow the participation of women to the judiciary, al-Mawardi makes an assumption from *Surah al-Nisa (4), verse 34* of the Quran that the favours alluded to therein refer to intellect and opinion and as such, ‘he concludes that the disparity between men and women in these qualities is severe enough to prevent women from holding any leadership position over men.’⁵⁵⁴ The understanding of responsibility/*qawaamun* attributed to al-Mawardi has been considered by scholars such as Jalajel to include positions of authority generally.⁵⁵⁵ However, al-Mawardi’s argument did not reappear in any Shaf’i legal texts, principally on the basis that subsequent jurists understood the verse to only relate to marriage rather than to leadership and judgeship positions.⁵⁵⁶

Notably, al-Mawardi later reversed his earlier argument by limiting its scope to refer only to the duties of a husband to his wife in a marriage. In his significant departure from an argument he advanced, Jalajel points out that al-Mawardi went as far as, ‘taking certain scholars to task for using the verse as evidence to prohibit a woman from disposing her own money without her husband’s permission.’⁵⁵⁷ As such, al-Mawardi was opposed to the application of the verse to issues outside the responsibilities a husband owed his wife, indicating that indeed, the Quran does not contain an expressly stated verse that prohibits the appointment of women to judicial or leadership positions. Given that the arguments of al-Mawardi were abandoned by

⁵⁵² *ibid* 27, para 4.

⁵⁵³ *ibid* 29, para 2.

⁵⁵⁴ *ibid* 30, para 1.

⁵⁵⁵ *ibid*.

⁵⁵⁶ *ibid*.

⁵⁵⁷ *ibid* 33, para 2.

jurists from the Shaf'i school, and further, that these arguments did not appear in the other schools, it is reasonable to hold the position that an interpretation leaning on al-Mawardi in the context of the appointment of women as Judges was a flawed interpretation of the Quran.

ii. *Quran: Surah al-Baqarah' (2) Verse 282*

This Quranic verse relates to commercial transactions and it is deemed the longest Quranic verse. The Hanbali school jurist Ibn Qudamah cites a section of this verse in faulting the appointment of women to judicial positions. The verse states that,

And to call to witness, from among your men, two witnesses. And if two men be not (at hand) then a man and two women, of such as you approve as witnesses, so if one of them errs the other can remind her.⁵⁵⁸

Ibn Qudamah does not make an argument that this verse directly prohibits the appointment of women to judicial positions rather, he places an emphasis on the likelihood of women to err. In light of this verse, Qudamah contends that women generally, 'are deficient in intellect, lacking in opinion, and unsuited to be present in the assemblies of men,' and as a result are not suited to hold judicial positions.⁵⁵⁹ Subsequent Hanbali jurists such as al-Zarakshi have maintained the argument taken by Ibn Qudamah but notably, Hanbali jurists fail to cite *Surah al-Baqarah' (2) Verse 282* in supporting Qudamah's arguments.

As such, the question arises why Hanbali jurists would be opposed to the appointment of women to judicial positions on the strength of Qadamah's arguments yet he was categorical that his contention was not directly derived from the interpretation of the verse. This is in light of the fact that the verse was limited in application as it referred to the forgetfulness of women in relation to commercial contracts. Whilst there are no ready answers, it is apparent that the continued application of this Qadamah's interpretation of the verse outside its intended scope to challenge the appointment of

⁵⁵⁸ ibid 27, para 3.

⁵⁵⁹ ibid 27, para 4.

women as judges, is a discriminatory application that results in negative inferences not intended by the Quran.

Further, the application of such an interpretation outside the purview intended by the Quran. Nonetheless, the admission by Ibn Qudamah that *Surah al-Baqarah* (2) Verse 282 does not directly limit the appointment of women as judges, reinforces the argument held by author such as Abdelkader that the Quran does not contain explicit verses that prohibit such appointments. In emphasizing this point, Abdelkader points out that, ‘indeed, detractors have adopted an expansive reading of the singular verse to support patriarchal notions about female competency, valuation and intellect more generally.’⁵⁶⁰

4.3.2.2. The Sunnah

Article 1 of the Saudi Basic Law of Governance lists the Sunnah as the second primary source in the Kingdom. Islamic jurists have not resorted to interpreting the Quran to prohibit the appointment of women as judges, rather, these jurists have substantially relied on the Sunnah to arrive at their rulings. In highlighting the significance of the Sunnah to the interpretations made by Islamic jurists.⁵⁶¹

Given the strength of the Sunnah to be a sufficient basis under which Islamic jurists issue legal rulings, it is considered that a significant number of rulings especially those concerning the appointment of woman as judges are derived by the Sunnah which is in the form of hadith literature. However, in light of the fact that an individual hadith can vary from one narrator to the next, it has been a source of disagreement in light of differing notions, over its application, context and relevance. In emphasizing this point, Ibn Taymiyah, is quoted as stating that, ‘no one possessing sense has ever claimed that the report of every individual bequeaths knowledge.’⁵⁶² This section critically discusses significant hadith that have been evoked to prohibit the appointment of women as judges.

⁵⁶⁰ Abdelkader (n 546) 324, para 2.

⁵⁶¹ Jalajel (n 498) 37-38.

⁵⁶² *ibid* 39, para 1.

i. *Hadith from Abu-Bakrah*

The hadith by Abu-Bakrah, a companion of Prophet Muhammad recollecting the words of the Prophet when Persia had appointed the daughter of Khosrau as a ruler, has been used by the four Islamic schools as the primary textual evidence in prohibiting women to judicial and other leadership positions. After the Battle of the Camel where Aisha was defeated by Ali, Abu Bakra is reported to have stated:

God benefitted me during the days of the [Battle of the] Camel with words I had heard from God's Messenger, after I had almost joined in the fight on the side of the companions of the Camel. When God's Messenger had heard that the Persians appointed Khosrau's daughter to rule them, he said: 'A people who grant a woman authority to rule them will not succeed.'⁵⁶³

Given the weight the four schools attach to this hadith in prohibiting the appointment of women to judicial positions, it is necessary to evaluate the validity of this hadith, its application as well as criticisms directed towards it. With regards to its validity, the hadith is deemed by scholars such as David to enjoy enormous respect for its authenticity within the ranks of the Sunni Islam. Given that the hadith was given directly from Prophet Muhammad to his companion Abu-Bakrah, the transmission of this hadith is considered by Islamic jurists to be unbroken. In emphasizing its validity, Jalajel points out:

No jurist or hadith scholar would have any reason to object to it. It is supported by other corroborative transmissions, all going back to Abu-Bakrah. Indeed, it is the soundest and strongest hadith cited with reference to women in leadership in the legal works under survey.⁵⁶⁴

However, despite the validity and high regard this hadith enjoys within the four traditional Islamic schools, some contemporary scholars casts doubt on the interpretative validity of the hadith.

⁵⁶³ *ibid* 49, para 3.

⁵⁶⁴ *ibid*.

Despite the criticisms, this hadith has continuously been held to be authentic by Islamic legal scholars from the four schools. A key reason recognised by jurists from across these schools is that all the Companions of prophet Muhammad are deemed to be just. Moreover, whilst jurists are allowed to challenge the memory of a Companion or the completeness of the transmission of a hadith, Jalajel points out that faulting the integrity of a Companion is deemed by Sunni Muslims to be a ‘violation of a theological tenet.’⁵⁶⁵ As such, given that the hadith by Abu Bakrah is deemed to have been completely transmitted, it cannot be challenged on grounds of the integrity of Abu Bakrah as this would be a breach of a theological tenet.⁵⁶⁶

Abou El Fadl raised a significant criticism challenging the validity of the hadith in its application to the appointment of women as judges. Abou El Fadl argues that the hadith was not a general prohibition by the Prophet on women but rather, it was a general comment over the political situation of Persia. As such, Abou El Fadl contends that the context of the Prophets words do not impose a prohibition or command specifically against women and that where such an inference is made, then the interpretation becomes entirely subjective as it would be applicable to all women at any time and place.⁵⁶⁷

ii. *Hadith by ‘Abd Allah.b Umar*

‘Abd Allah.b Umar narrates this verse which was stated by Prophet Muhammad in relation to the discussion concerning the intellect of a woman and a woman’s deficiency in religion. Prophet Muhammad is recorded to have stated:

As for the deficiency in intellect, the testimony of two women equals the testimony of one man. This, then, is the deficiency in intellect. She spends many a night without offering prayers, and she abstains from fasts during Ramadan. This, then, is the deficiency in religion.⁵⁶⁸

⁵⁶⁵ *ibid.*

⁵⁶⁶ *ibid.*

⁵⁶⁷ *ibid.*

⁵⁶⁸ *ibid* 57, para 1.

Hanafi jurists such as al-Babarti and al-Zayla'i use this hadith in discussing the role and value of women as witnesses. Notably, they make reference to this hadith in pointing out that women are not suited to hold position of authority.

However, the interpretation of this hadith by Islamic jurists to prohibit the appointment of women to judicial positions has been seen to be done in broad terms given that the hadith does not expressly state that women are deficient intellectually to hold judicial positions. As such, jurists have been seen to invite the use of this hadith as a universal maxim that speaks to the state of a woman's intellect and in prohibiting the appointment of women to judicial posts, this has been achieved by supporting the hadith with Abu Bakrah's hadith. The effect of such an interpretation is that women are deemed through the reasoning of jurists, to lack be intellectually deficient and as such, this reinforces the position that they should not be entrusted with positions of authority. It is evident that such an interpretation is entirely subjective as it goes beyond the context in which the Prophet spoke about a woman's intellect.⁵⁶⁹

4.3.2.3. Opinions from the Four Traditional Schools Prohibiting Women from Being Appointed as Judges

The first view is that masculinity is a mandatory condition for those individuals who would assume responsibility for being a judge or an arbitrator. According to Maliki Schools, women cannot serve as qadi. The strongest opinion in the Shafi school does not place being male as a condition for being a qadi supported by the Hanafis basing their views on the women's rights to give testimony (*shhadad*).⁵⁷⁰ The competency of the qadi is similar to that of the witness and a male is not a prerequisite of a *qadi*.⁵⁷¹ Moreover, Al-Marghinani also held the opinion that women were permitted to act in all cases except in *hudud* and *qisas*. Therefore, if a woman can take the position of a Qadi, then she should also be an arbitrator.

⁵⁶⁹ *ibid* 59.

⁵⁷⁰ Alqudah (n 570).

⁵⁷¹ Mohammad Ismath Ramzy and Simin Ghavifekr, 'Women Quazi in a Minority Context: An Overview of Sri Lankan Experience' (2019) 9(1) *Societies* 13.

Moreover, the scholars opposing the appointment of women consider men as protectors of women and regard them as their subordinates.⁵⁷² This view has been expressed by scholars from the Maliki, Shafi'i and Hanbali schools and by some Hanfis scholars who based their interpretation of verse 4:34 of the Quran which states:

Men are the protectors and maintainers of women because Allah has made one of them excel over the other, and because they spend out of their possessions (to support them).

Thus righteous women are obedient and guard the rights of men in their absence under Allah's protection. As for women of whom you fear rebellion, admonish them, and remain apart from them in beds, and beat them. Then if they obey you, do not seek ways to harm them. Allah is Exalted, Great.⁵⁷³

This led scholars to understand that women's guardianship is limited to men because men are the financial providers and enjoy the ultimate legal rights.⁵⁷⁴ They also believe that men have superior mental ability, power and patience; hence have to supervise women and plan their responsibilities and duties and this understanding led men to prohibit women from being appointed as judges.⁵⁷⁵

The opponents also cite several hadiths opposing women's superiority over men. One is the claim that women are weak in reason and religion excluding them from appointment as judges.⁵⁷⁶ Some other claims included logical arguments to prove the differences between men and women with some claiming that judicial administration may result in injuries to unborn children, maternity leave causes interruptions to the courts' administration and menstrual periods make women nervous, unstable and leads to sudden changes in their decisions.⁵⁷⁷

⁵⁷² Aldusuqi Mohamed Arafa, *Dar Al-Fiker*, s 4, 4. Cited in Mahmud Omar Mahmud, page 113. See also Khaled Alkhadeer, *Hakum Al-Islam about Arbitration*, 128.

⁵⁷³ Ramzy and Ghavifekr (n 571) 9.

⁵⁷⁴ *ibid.*

⁵⁷⁵ Alqudah (n 570).

⁵⁷⁶ Ramzy and Ghavifekr (n 571).

⁵⁷⁷ *ibid.*

Opponents of women acting as judges also cite as evidence another verse of the Holy Quran that reads:

And stay in your houses, and do not display yourselves like that of the times of ignorance, and perform As-Salat (Iqamat as-Salat), and give Zakat and obey Allah and His Messenger. Allah wishes only to remove Ar-Rijs (evil deeds and sins, etc.) from you, O members of the family (of the Prophet SAW), and to purify you with a thorough purification.⁵⁷⁸

Scholars have interpreted this verse as Allah commanding women to stay at home. According to some lexicographers, the word *qarna* in the original text is derived from *qarar*, meaning ‘to settle down, to stick firmly’; others argue that it derives from *waqar*, meaning ‘to live peacefully, to sit with dignity’. In either case, the verse emphasises that a woman’s real sphere of activity is the home; she should carry out her functions within that sphere peacefully, and she should leave the house only when there is a genuine need to do so.

Finally, supporters of this view argue that appointing females as judges will result in *ikhtilat*, the intermingling of the genders through accidental encounters on the street, in shops and workplaces etc., which can have a significant impact on the status of females which has been ensured by Islam.⁵⁷⁹

4.4. Moderate Views between Prohibiting and Permitting the Appointment of Women as Judges

The moderate opinion advanced here is that masculinity is not a prerequisite for appointment to the role of judge. This opinion is endorsed by Hanafis and Ibn Gasim from the Maliki School. Espousers of this opinion see no reason for restricting females from becoming judges in matters other than those that involve punishment and discipline. Scholars from the Al-Thahyrya and Hanfi schools accept that masculinity

⁵⁷⁸ Muhammed Mohsin Khan (tr), *The Noble Quran in the English Language* (Dar-us-Salam Publications 2011).

⁵⁷⁹ *ibid.*

has never been a requirement for appointment as a judge.⁵⁸⁰ This view is bolstered by a range of evidence.

Firstly, supporters of this view refer to the Sacred Quranic verses, particularly verse 58 of the An-Nessa ('Women') Surah:

Lo! Allah commanded you that ye restore deposits to their owners, and, if ye judge between mankind, that ye judge justly. Lo! Comely is this which Allah admonished you. Lo! Allah is ever Hearer, Seer.⁵⁸¹

In this verse, the summon inclinations to perform *amanat*.⁵⁸² As the next phrase in the verse suggests, this amounts to not betraying a confidence and judging justly. The Arabic pronoun used to address the subject of Allah's orders in this verse is generic, incorporating both males and females. This feature is highly significant, as linguistic aspects of the Quran are regarded most seriously due to the legislative power of the words contained in this Holy book. Subsequently, scholars who do not accept that women can assume the role of judges interpret these words to mean that both males and females are commanded not to betray confidences given to them and to pass judgment in a reasonable way.

Another piece of evidence used to support this strand of opinion is that Omar Ibn Alkhatib (may Allah bless him) designated a woman to be the market assessor. Consequently, if resistance to appointing female arbitrators rests on the words of the Prophet (peace be upon him), that 'A people who make a woman their ruler will never be successful', this can be countered by the argument that the Prophet's intention (peace be upon him) was to allude to an Islamic Caliphate. This reasoning is confirmed by the maxim of the Prophet that the woman is the guardian of her husband's money. Scholars from the Maliki School allow that women can be caretakers or guardians unless there is unequivocal content that precludes her from assuming such responsibilities.⁵⁸³ Those who support this view argue that gender does not prevent

⁵⁸⁰ Al-Mawardi, *The Sultan Roles* (2nd edn, Dar Alraqem Ibn Alraqem 2016) 116.

⁵⁸¹ Khan (n 578)

⁵⁸² The act of leaving an amount of money or other objects with an honest person to store it safely, until the owner asks for it.

⁵⁸³ Mahmud Omar Mahmud, 116 citing Ibn Hazem Ali Ibn Ahmed ben Saeed, *Almuhtalaa* (Dar Al-Afaq Aljadeeda) s 9, 492.

women from becoming judges as long as they possess other qualifications.⁵⁸⁴ This is a major view of the Hanafi scholars who allow women judges to administrate, not part, but the entire Sharia except criminal and Penal law.⁵⁸⁵ According to Ibnu Qassim, women could serve as judges in all cases except in Hudud.⁵⁸⁶ For Al Albani, it is permissible for women to be appointed as judges allowing them to make legal decisions in all affairs of Sharia Law. that there is clear no evidence in Sharia that prohibits women from attaining the post of Qadi a view held by Muhammad al-Ghazzali and other significant scholars who strongly believe that women should be appointed as judges. Moreover, in the 73rd conference of National Fatwa Committee Council in Malaysia, it was held that women could be appointed as Shariah Court judges except for *hudud* and *Qisas*.⁵⁸⁷

Thirdly, advocates of this view note that the Prophet Mohamed consulted Amu Salama (may Allah bless her) in Al-Hudaybiya on a minor pilgrimage when his companions declined to evacuate *ihram*. This ceremony is accompanied by ritual cleansing and the donning of the special garments worn by Muslims when performing a minor or major pilgrimage. Amu Salama prompted the Prophet Mohammad to perform the evacuation of *ihram* before them and to butcher Al-Hadi (to forfeit a creature). Prophet Mohammad (PBUH) did as she prompted, and his companions followed his lead. This provides clear confirmation of the astuteness of Amu Salama and shows how Prophet Mohammad heard her out.

Fourthly, Hanafi jurists have been seen to take a moderate position with regards to the appointment of women as judges. Hanafi jurists such as Ibn Jarir al-Tabari and Ibn Hazm have not explicitly given arguments that entirely prohibit the role of a woman as judge while at the same time, they have not explicitly allowed such appointments. However, both of these jurists share a common understanding that women can act as judges in financial matters. Imam Abu Hanifah mirrored the moderate position held by Ibn Jarir al-Tabari and Ibn Hazm whilst interpreting verse 2:282 of the Quran that relates to the ability of women to act as witnesses in commercial transactions. As such, Abu Hanifah reaches the conclusion that women hold credentials necessary for being

⁵⁸⁴ Ramzy and Ghavifekr (n 571) 9.

⁵⁸⁵ *ibid.*

⁵⁸⁶ *ibid.*

⁵⁸⁷ Ramzy and Ghavifekr (n 571).

appointed as judges and as a result, the requirement of being male is not a requirement to holding the position of a judge. However, in adopting a moderate position, Abu Hanifah makes the argument that women as judges, cannot adjudicate on matters that relate to legal punishment on the basis that they lack the necessary credentials.⁵⁸⁸

Finally, noting that Aisha (may Allah bless her) drove the armed forces in Aljamal (camel) battle, proponents of this view argue that if women were not allowed to take up leadership positions, Aisha would not have been able to lead an army. Thus, given that she did learn how to lead men into battle, she is likely to have had the capacity to as assuming the role of a judge, because as a leader she would have had to resolve conflicts between her followers. Moreover, she is known to have had a tremendous knowledge of Sharia; if Sharia prohibits women from being judges, Aisha would not have assumed that position.

Nevertheless, The Shafi Schools had alternative conditions or requirements for qadi where while a person appointed to serve as a qadi should be male, a hakam should not necessarily be male.⁵⁸⁹ Al-Fatwa al-Hindiyyah further emphasizes that female arbitrators are allowed in disputes on property and issues relating to women.⁵⁹⁰

4.5. Opinions Justifying the Appointment of Women to Judicial Positions

These opinions maintain that there are no restrictions whatsoever on women serving as judges. This view differs from Opinion 2, which restricted women from being judges in matters that require punishment and discipline. The view stems from the lack of evidence on from the Islamic traditions that women have no rights in Shura or which forbids their involvement in matters that are adjudged by men. This opinion was shared by Ibn Hazm Althahry, Ibn Jareer Altabri and by some of the Hanafies. Ibn Hazm, for example, said that ‘a woman can be a judge’, while Omar Ibn Alkhattab, the second Caliphate, appointed a woman (Al-Shifa Bent Abdul Allah) as a minister of trade.

⁵⁸⁸ al-Agha (485).

⁵⁸⁹ *ibid.*

⁵⁹⁰ Rafidah Mohamad Cusairi and Mahdi Zahraa, ‘Conditions and Qualifications of a Mediator-arbitrator in the Resolution of Family Disputes,’ (2015) 2(2) Journal of Islam and Science 2.

Ibn Jareer Altabari maintains that women can act as *muftis*, and hence there is no reason to prohibit them from acting as judges as well.⁵⁹¹ It is worth mentioning that a *mufti* is entrusted with interpreting Sharia law. Cleveland maintains that *muftis* historically have been known to rank over *qadis*,⁵⁹² as they give an authoritative legal opinion on which judges base their decisions in any legal case. Similarly, Peter's points out that judges were to consult the *muftis* appointed to their courts whenever a case was not totally clear to them.⁵⁹³ If the problem was not solved, the case had to be submitted to the Grand Mufti, whose *fatwa* was binding on the *qadi*.

Throughout the millennium and a half during which Islam has been in existence, numerous scholars have believed that, as per the Prophet's Sunnah and Hadith, a woman can serve as a judge. The Prophet Mohammad said, 'All of you are a shepherd, and you are all responsible for your flock, the prince is a shepherd, the man is a shepherd of his household, and the woman is a shepherd of her husband's house and children'.⁵⁹⁴ It was on this basis that the Malikis allowed women to be guardians of self, children, house, and husband's possessions.⁵⁹⁵ The argument can then be made that if women can be guardians, there is no reason why they should not be arbitrators. To prove this point, Maliki scholars used the analogy, or what is known as *qiyas*, as a tool with which to compare arbitration to guardianship. To illustrate, *qiyas* is a system used by Muslim scholars to compare all aspects of an unaddressed issue in Sharia and weigh them against a similar issue which has been previously addressed and has an established and accepted ruling. In this case, Malikis took the matter of guardianship as the subject with an established ruling and used it to deduce a ruling on the unaddressed matter of whether the position of a judge can be held by a woman. They then assert that women can become jurists, but their arguments are based on the role

⁵⁹¹ Iyad Zahalka, 'A Female Qadi Appointed in the Sharia Court: Religious Law and Public Opinion' (*Dayan*, 15 October 2017) <<https://dayan.org/content/female-qadi-appointed-sharia-court-religious-law-and-public-opinion>> accessed 23 June 2023.

⁵⁹² William L Cleveland and Martin Bunton, *A History of the Modern Middle East* (Westview Press 2016) 561.

⁵⁹³ Rudolph Peters, 'Islamic and Secular Criminal Law in Nineteenth-Century Egypt: The Role and Function of the Qadi' (1997) 4(1) *Islamic law and Society* 70–90.

⁵⁹⁴ Khaleej Times, 'The Importance of Being a Responsible Muslim' (*Khaleejtimes* 15 June 2007) <www.khaleejtimes.com/opinion/the-importance-of-being-a-responsible-muslim> accessed 23 June 2023.

⁵⁹⁵ *ibid.*

of an arbitrator as equal to an agent and not a judge which allows women to act as an agent and arbitrator.⁵⁹⁶

It is also important to note that based on the basic principles of Sharia, ‘all things are originally deemed permissible as long as there is no Sharia text that prohibits them’ means that scholars who allow women to act as judges are not mandated by the Sharia to provide evidence to support their views, but their opponents should provide evidence to prove the prohibition of the appointment of women judges.⁵⁹⁷ As there is no clear ban on appointing women as arbitrators either in the Quran or in the Hadith, the practice should be allowed. As evidence for this logic, scholars cite the verse in the Holy Quran in which Allah commands all people, regardless of gender, to judge justly:

Indeed, Allah commands you to render trusts to whom they are due and when you judge between people to judge with justice. Excellent is that which Allah instructs you. Indeed, Allah is ever Hearing and Seeing.⁵⁹⁸

Further support for Opinion 3 is provided by the fact that the prophet Mohammad took advice from his wife, Umm Salmah. After the truce of Hdaybiyah, the Prophet ordered his companions to sacrifice the animals they had brought with them for that purpose and to shave their heads. They seemed reluctant to do so, however, and did not rise to obey his command. When Umm Salamah saw the situation, she suggested that he should not speak about the subject to anyone, but simply leave the tent and offer the sacrifice and shave his head himself. Then he would see the effect of his action. He did so, and what she expected to happen then occurred: all the companions followed suit.⁵⁹⁹

Women are also recognized for their role and opinion in decision-making processes using the example of Prophets and their Companions. Moreover, the Prophet consulted Aisyah on issues affecting women and other conducts and treatments with his family. The prophet also consulted the opinions of his daughter Hafsa.⁶⁰⁰ Moreover, Caliph

⁵⁹⁶ Cusairi and Zahraa (n 590).

⁵⁹⁷ Ramzy and Ghavifekr (n 571).

⁵⁹⁸ Mohsin Khan (tr), *The Noble Quran in the English Language* ch 4 verse 58 An-Nisaa Surah.

⁵⁹⁹ Muhamed Al Bukhari, *Sahaih Al Bukhari* (Dar Ibn Kathir 1993) 642.

⁶⁰⁰ *ibid.*

Umar acknowledged the role of women in Shura where the Prophet's wife Aisha issued verdicts and opinions and was incomparably an expert among the companions and one of the main points of resort regarding issues on Islamic jurisprudence.

These commentaries stories demonstrate clearly that the Prophet took the advice of his wife, which led to a successful outcome. Scholars who support the appointment of female judges argue that this story and others like it provide evidence for their position. This story implied that the Prophet himself had trust in women's judgment given that he took his wife's advice on a religious issue. In Islam, religion is linked to law; thus, if women can advise on religious matters, they can also give advice or provide opinion on legal issues by measurement (Qiyas).

Not only that but, since the dawn of Islam when the Prophet served as a shepherd to his flock with his *sahaba* emulating him after his death, women were considered capable of issuing *fatwa* (Sharia Law), provided they had been properly trained, taught and knew the Quran and the Hadith through memorization and continued searching for new knowledge and re-examining practice during the era of the Prophet and the Rightfully Guided Caliphs. Haddad, the Grand Mufti of the United Arab Emirates (UAE), argued that since issuing *fatwas* implies advising individuals about the laws of God, any individual who has the requisite learning should be entitled to do so. Referring to a verse from the Quran that requires individuals who think about God's laws to share the information they have with others, Haddad stated, 'These instructions from the Quran include everyone, male or female.' It follows that if women can issue a *fatwa*, there should be no reason to exclude them from public office in general.

Moreover, the arguments cited by the opponents of female Qadis (Qudath) are refuted by the supporters of women judges with claims from the Quran and Hadiths which have instructions and guidance on family disputes rather than insubordination to men making these justifications improper.⁶⁰¹ Mohammad Fadel studied the quoted hadith that folk who appoint women to rule them shall never prosper and claims that the claim vindicates Prophet Muhammad's claim of prophecy rather than rejecting female leadership in the judiciary. Therefore, citing this hadith is inadequate according to

⁶⁰¹ *ibid.*

Fadel as women leadership in Muslim society has never been questioned more so in daily life, to only be questioned in regards to Islamic legal affairs.⁶⁰²

4.6. Conclusion

The purpose of this chapter was to critically analyse and evaluate the legal status of women within Sharia by examining various views and evidences concerning the same. Further, this chapter sought to analyse whether the prevailing legal framework in Saudi Arabia allows for the participation of women as Judges given that the same considerations and requirements imposed on prohibiting women to be judges are similar to those imposed on women in arbitration. This is helpful in determining and evaluating the role of a women as an arbitrator in Saudi Arabia. As concluded, the Hanabali Fiqh school, is inflexible and mostly reject modern views and interpretation of Islam. Among the four Islamic schools of jurisprudence, it is the most inflexible towards the issue of women serving as arbitrators or judges, whereas the Maliki and Hanafi support women in arbitration position though the Hanafi's are the most supportive of women serving as either jurists or arbitrators.

In regards to the provisions of Islam on the place of women as judges it is evident that the Sunna Sharia and the Quran have not prohibited women from occupying any positions with evidence from Prophet Mohammad accepting women's opinions and embracing their decision-making skills (his wife) indicating Islam's acceptance of women as leaders and jurist as the Prophet and Umar Caliph accepted women as Qiyas. The lack of prohibition of the appointment of women as Judges under the Quran is further reinforced by the fact that attempts to give verses of the Quran such an interpretation has failed. Jurists such as al-Mawardi who argued that the disparity between a woman's and man's intellect prohibits a woman from being appointed as a Judge, later reversed his arguments and restricted it to only refer to the duties of a man to his marriage. This can be attributed to the position that the Quran does not contain explicit verses that prohibit the appointment of women as judges.

⁶⁰² Mohammad Fadel 'Is Historicism a Viable Strategy for Islamic Law Reform? The Case of Never Shall a Folk Prosper Who Have Appointed a Woman to Rule Them' (2011) 18(2) Islamic Law and Society 131.

The basic principle is that women are not prohibited from occupying high positions in a society, except the case of Great Imama. However, the Great Imama is a position that does not exist at the present time. Nowadays it is not the duty of the president of the state or the head of the political party to lead Muslims in prayers, but there are imams (religious men who lead people in pray and deliver speeches in particular occasions like Friday speech or Eids) who their job is lead people when praying.

Therefore, from this chapter, it can be concluded that whilst there is no clear evidence from the Quran prohibiting women from occupying positions in the judicial system, the Sunnah through the citing of various hadiths, has been the source of justification by some of jurists in issuing rulings that prohibit the appointment of women as Judges. This is on the basis that the Sunnah is a strong textual authority and jurists have considered it to be sufficient as a basis of handing down rulings.

CHAPTER FIVE: THE PARTICIPATION OF WOMEN AS ARBITRATORS IN SAUDI ARABIA: AN ANALYSIS OF STATUS OF WOMEN AS ARBITRATORS IN SAUDI ARABIA

5.1. Introduction

This chapter seeks to critically analyse and discuss the status of women as arbitrators in Saudi Arabia. Whilst considering the previous chapter sought to analyse the legal status of women within Sharia, the focus on this chapter is aimed at inter alia, discussing institutional and legal changes in Saudi Arabia as well as discussing the legal framework that establishes and governs the practice of arbitration in the country. Some researchers have investigated political and social factors and how these factors have contributed to a lack of gender balance and consequently the under-representation of female within the judiciary⁶⁰³.

The paradigms put forward have differed in the underlying assessment of the relationship between female empowerment to the representation of females in the judiciary. Some scholars have argued that the approach taken by women to the legal system is in contrast to the male-centred values, as women are more likely to focus on issues such as the rights of minority and oppressed segments of the society.⁶⁰⁴ Therefore, increased representation of women in the judiciary would translate into a transition in the practice and results of the justice system⁶⁰⁵. Further, such participation would also have a jurisprudential effect in that it will result in a change as to how the law is interpreted in that there would be fewer arguments holding the position that women should not be appointed as arbitrators.

In regards to career judges, the competitive examinations work in favour of women, but in the upper levels of the judiciary, gate keeping is tighter where most positions are accessed and enacted in gendered lines which means that aside from the formal

⁶⁰³ Kathy Laster and Roger Douglas, 'Feminized Justice: The Impact of Women Decision Makers in the Lower Courts in Australia' (1995) 12(1) Justice Quarterly 177.

⁶⁰⁴ Mohammad Fadel, 'The True, the Good and the Reasonable: The Theological and Ethical Roots of Public Reason in Islamic Law' (2008) 21(1) Canadian Journal of Law & Jurisprudence 5.

⁶⁰⁵ Dorothy M Stetson and Dorothy E McBride. *Women's Rights in the USA: Policy Debates and Gender Roles* (Taylor & Francis 1997).

barriers, there are informal obstacles which may be difficult to understand. Networks are closed off to women with their own networks being weak and less assertive as compared to the men. There is also some evidence of women judging differently in terms of how they handle the witnesses and victims during the procedures, their communications style, writing style and their perception and reception of their judicial opinions may be varied.⁶⁰⁶ There are also cases where women's authority as judges are questioned where they are seen as less likely to be impartial even with hard empirical facts pointing to women being less prone to corruption and bribery.⁶⁰⁷

In the judicial system, some issues warrant further attentions including the intersectional discrimination of judges at the gender interface, marital status or ethnicity.⁶⁰⁸

A different viewpoint that explains the underrepresentation of women in the judiciary especially within Islamic countries has got little to do with the gender diversity. Instead, the underrepresentation, and in some cases the absence altogether of women as arbiters and judges within Islamic countries is based on the theological vision of the female gender role,⁶⁰⁹ influenced by the religious values.

The aim of this chapter is to critically discuss the state of women as arbitrators in Saudi Arabia with respect to the institutional and legislative developments that affect the participation of women as arbitrators in the Kingdom.

The structure of this chapter is the following. The first section analyses the recognition of women as arbitrators according to the SAL with a historical overview. The subsequent section of this chapter analyses the changes in the external (political, economic and legal) environment in Saudi Arabia including the introduction of Saudi Arbitration Law 2012 and Vision 2030 as the factors that have led to appointment of the first female arbitrator. The analysis forms the basis of providing conclusions at the end of the chapter. There are also further discussions under this section of the role of

⁶⁰⁶ Ulrike Schultz, 'Sexism in Law and the Impact of Gender Stereotypes in Legal Proceedings', *Fight for the Public Space: When Personal is Political* (South Caucasus Regional Office of the Heinrich Boell Foundation 2016), 97.

⁶⁰⁷ Ulrike Schultz & Tabeth Masengu. 'Women and Judicial Appointments' (2020) 27(2) *International Journal of the Legal Profession* 113.

⁶⁰⁸ Michael Grech, 'Review Article: Feminism in Islam?' (2014) 17(3) *Implicit Religion* 349.

⁶⁰⁹ Amal Treacher, 'Reading the other women, feminism, and Islam' (2003) 4(1) *Studies in Gender and Sexuality* 59.

Saudi Arbitration Law 2012 and Saudi Arbitration Law 1983 in regulating the participation of women as arbitrators in Saudi Arabia.

The influence that legislation governing the enforcement and validity of foreign arbitral awards is also discussed under this chapter with an aim of analysing how such legislation affects or is related to the participation of women as arbitrators in Saudi Arabia. An analysis of the legislation governing enforcement in Saudi Arabia is particularly significant given that the Kingdom recently adopted the Enforcement Law (2013) and further did away with the *Board of Grievances* which was equipped with enforcement powers that included re-trying the arbitral award. This analysis seeks to establish whether the legal framework under the Enforcement Law (2013) limits or promotes the participation of women as arbitrators and whether the awards issued by women arbitrators could face challenges during the enforcement stage.

5.2. The Recognition of Women as arbitrators in Saudi Arabia

Over the years, much like the society we live in has strived towards achieving gender equality through the adoption of both national and international instruments that are geared towards promoting gender equality and preventing the discrimination against women on their social, civil, political, cultural and economic rights. At the global stage, notable international instruments such as the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), the Universal Declaration of Human Rights (UDHR) have principally sought to realize gender equality as well as confronting persistent challenges that work to discriminate against women. The world of arbitration is no alien to this revolution. Many scholars have raised their voices to make the field of arbitration more gender inclusive.⁶¹⁰ Some Islamic scholars are of the view that whether the Islamic laws allow women to serve as judges determines whether or not the women can act as arbitrators.⁶¹¹ The focus will be on reviewing the recognition of women as arbitrators by going back to the pre-Islamic era, and the

⁶¹⁰ Deborah Rothman, 'Gender Diversity in Arbitrator Selection' (2011) 18 Dispute Resolution Magazine 22.

⁶¹¹ *ibid.*

provision of SAL 1983 and SAL 2012.⁶¹² In this section, we shall trace the role of women as arbitrators through the years in the Kingdom of Saudi Arabia.

5.2.1. Women as Arbitrators in the Pre-Islamic Era

As stated earlier in Section 3.2.1, *Sulh*, being the resolution of conflict through conciliation, was practiced in the tribal Arab society where soothsayers, chieftains, healers and influential noble-men were indispensable as arbitrators.⁶¹³ Being chosen as an arbitrator dependent on the authority and stature of the men serving as sanctions for their verdicts. Al-Ramahi uses the terms sons of the tribes who referred to their leaders such as the father, uncles or cousins to help each other in resolving conflicts.⁶¹⁴ He further argues that the tribesmen were familiar with arbitration of the father and his sons. Moreover, the *hakam* was chosen for his personal qualities, and reputation.⁶¹⁵ The *hakam* is expressly referred to using male pronouns ‘he’ ‘his’ or ‘him’ showing that the *hakam* were male. However, whilst the discrimination of women was apparent during this period, authors such as Abdulrahman Yahya Baamir points out that women were appointed as arbitrators. The participation of women such as Hind bint Alkhas, Jam’a bint Habis and Sahar bint Loukman as arbitrators shows the notable role women played as arbitrators in the resolution of tribal conflicts.⁶¹⁶

During the pre-Islamic era also known in Arabic as al-jaheliyah, the control of Arabia was exercised through various tribal ruling systems given that there was a lack of laws and regulations that governed the people. Individuals or parties differing over a tribal matter sought recourse to arbitration voluntarily and the validity of the arbitral award greatly depended on the attendance of parties to the arbitration. As such, this meant

⁶¹² Faris Nesheiwat and Ali Al-Khasawneh, ‘The 2012 Saudi Arbitration Law: A Comparative Examination of the Law and Its Effect on Arbitration in Saudi Arabia’ (Santa Clara Law Digital Commons 2015)
<<https://digitalcommons.law.scu.edu/scujil/vol13/iss2/5/>> accessed 21 June 2023.

⁶¹³ Kamarudin B Ahmad, ‘The Qualifications and Role of the Qadi in Kedah, Malaysia’ (MPhil thesis, University of St Andrews 1992).

⁶¹⁴ Aseel Al-Ramahi, ‘*Sulh*: A Crucial Part of Islamic Arbitration’ (*LSE Working Papers*, 2008)
<www.lse.ac.uk/law/working-paper-series/2007-08/WPS2008-12-Al-Ramahi.pdf> accessed 23 June 2023.

⁶¹⁵ *ibid.*

⁶¹⁶ Abdulrahman Yahya Baamir, *Shari’a Law in Commercial and Banking Arbitration: Law and practice in Saudi Arabia* (Ashgate Publishing Limited 2010) 14.

that it was possible for an individual/ tribe to abscond the arbitration proceedings essentially hampering the enforcement of the award. However, despite this challenge, losing parties opted to voluntarily enforce the arbitral award as failure to do so was to an extent, viewed as a violation of the existing tribal customs and further, the execution of an award granted by an arbitrator was a desired practice to avoid tribal conflicts or wars.⁶¹⁷ The arbitration process during the pre-Islamic period was simpler, non-binding and less structured. Abdulrahman Yahya points out:

The arbitration agreements were simple and spontaneous: the agreement was not in writing; and that arbitration was similar to conciliation because the purpose behind the whole process was to reach an agreement and settle the dispute by any amiable solution, not to give a binding judgment.⁶¹⁸

Despite the informality of the arbitration process, it is apparent that some of the essential elements of an arbitration process presently recognized are mirrored in the pre-Islamic arbitration framework. For instance, parties identified issues to be arbitrated on and went ahead to select the seat of the arbitration, the arbitrators to preside over the matter and they also agreed on the time of the arbitration.⁶¹⁹

Despite its informal structure and the lack of enforcement mechanisms, the arbitration process in the pre-Islamic era was effective in settling disputes that largely related to issues of leadership, honour, water, grazing and inheritance. The establishment of arbitration during the emergence of Islam was founded on the existing concept of arbitration during the pre-Islamic era and these practices were applied to local customs and practices.⁶²⁰ It is notable that during the pre-Islamic period the role of women as arbitrators in the settlement of disputes was common. As such, it is arguable that the establishment of the arbitration system during the emergence of Islam effectively propounding through hadith the non-participation of women as arbitrators was a departure of the prevalent practice during the pre-Islamic period.

⁶¹⁷ *ibid.*

⁶¹⁸ *ibid* 47, para 4.

⁶¹⁹ *ibid.*

⁶²⁰ *ibid.*

5.2.2. The Development and Prominence of Arbitration during the era of Prophet Muhammad

Through the era of emergence and rise of prominence of Islam in the Arab Peninsula, arbitration continued to be a prominent method of dispute resolution. The prominence of *tahkim* in the pre-Islam society was practiced in the Arabian Peninsula even as Islam was founded. The *Quran* is cited on several occasions even though there are specific provisions in the book on the rules on arbitration though it directs the followers to use it. For instance, in regard to marriage, the *Quran* states;

If ye fear a breach between them twain (i.e., husband and wife) then appoint (two) arbiters, one from his family, and the other from hers; if they wish for peace, God will cause their conciliations, for God hath full knowledge and is acquainted with all things.⁶²¹

The Quran further claims:

You should always refer disputes to God and to his Prophet. And obey Allah and his messenger; And Fall into no disputes, lest you lose heart and your power to depart; and be patient and persevering, for Allah is with those who patiently persevere.⁶²²

The Quran indicates that disputes should be resolved by *Allah* and his Prophet Muhammed would act as arbitrators. In fact, it is believed that the Prophet Muhammad himself arbitrated the dispute between the branches of Quraysh tribe during the renovation of Ka'aba, concerning the right to re-insert the Black Stone of Mecca post the renovation.⁶²³ This dispute played a crucial role in the development of Sharia law.⁶²⁴ In the Treaty of Medina, the first ever charter signed within the Muslim community under the guidance of the Prophet Muhammad, also envisioned arbitration

⁶²¹ Quran 4:35

⁶²² Quran 4:59

⁶²³ Saud Alammari and A Timothy Martin, 'Arbitration in the Kingdom of Saudi Arabia' (2014) 30(2) Arbitration International 387.

⁶²⁴ *ibid.*

as the preferred method for dispute resolution for the Muslim residents of Medina.⁶²⁵ Prophet Muhammed acted as a *Hakam* because he was honest and trustworthy. Muhammed acted as both a prophet and *Hakam* to unify the nation by appointing himself as a decisive leader especially when he began to administer the Caliphate because the *Hakams* were a threat to him as they relied on customary laws which was contrary to the principles of classic Islam. The *Hakams* also relied on divine revelation in their judgment processes which was at odds with the teachings of Mohammad. In this sense, Islam transformed arbitration though it still contained pre-Islamic concepts. Arbitration is still a voluntary process as Muhammad was reluctant to impose judgements preferring to request the parties to mediate to aid in resolving disputes and would also propose *sulh*, where only judgment would be imposed as a last resort.⁶²⁶ In this case when two Believers quarrel, then peace should be made between them with justice and fairness with parties willing legal proceedings based on their honesty. The Prophet Muhammed held the belief that trial could be tainted and subverted by man's nature; hence should be avoided if possible leading to the preference for conciliation processes before judgments.⁶²⁷ *Sulh* is a settlement where a third party is not necessary for dispute resolution, is an agreement reached before the court, and is used in respect of existing disputes. On the contrary, *tahkim* requires a third party, binds the parties without the intervention of a court and is used in respect to prospective and existing disagreements.⁶²⁸

Even in the holy text of Quran, arbitration is prescribed as the preferred mode of settlement of disputes in family matters.⁶²⁹ In the Quran, it is explicitly stated about the resolution of family disputes that 'If you fear dissension between a married couple, send forth an arbiter from his family and an arbiter from her family. If they desire reconciliation, God will bring them together.'⁶³⁰ In the matters involving politics and Government affairs as well, Quran and Sunnah prescribe arbitration for dispute

⁶²⁵ Saleh Mubarak Bin Abbadi, 'Arbitration in Saudi Arabia: The Reform of Law and Practice' (SJD dissertation, Penn State Law 2018).

⁶²⁶ George Sayen, 'Arbitration, Conciliation, and the Islamic Legal Tradition in Saudi Arabia' (2003) 24 University of Pennsylvania Journal of International Law 905, 909.

⁶²⁷ Al-Ramahi (n 614).

⁶²⁸ *ibid.*

⁶²⁹ Abdul Hamid El-Ahdab and Jalal El-Ahdab, *Arbitration with the Arab Countries* (3edn, Kluwer 2011).

⁶³⁰ Alammari & Martin (n 623).

settlement. In fact, the most prominent dispute in the political arena settled by arbitration was a dispute between Ali Bin Abi Taleb and Mu'awiyah Bin Abi Sufyan.⁶³¹

5.2.3. Women as Arbitrators in the Saudi Arbitration Law, 1983

The SAL 1983 and the 1985 Rules prescribed certain criteria and qualifications for arbitrators to be appointed under the 1983 Legislation. As per Article 4 of the SAL 1983, an arbitrator is required to be 'experienced', 'of good conduct and reputation' and 'full legal capacity'. In case of appointment of multiple arbitrators, they shall be in odd numbers so that it is easy to arrive at a final decision in case of a stalemate. Further, as per Article 12 of the SAL 1983, 'a request to disqualify the arbitrator may be made for the same reasons for which a judge may be disqualified'. Therefore, in conclusion, apart from the qualifications mentioned in Article 4 of the 1983 Law, an arbitrator must stand the test of qualifications for a judge under Sharia Law. In addition to qualifications mentioned in the SAL 1983, the 1985 Rules prescribe that if the arbitral tribunal was composed of more than one arbitrator, the chairman must be knowledgeable in Islamic law, business practices, and the customs and traditions of Saudi Arabia,⁶³² and must not have any interest in the case.⁶³³

Even though on the face of it, the 1983 Legislation and Regulations are impartial regarding gender of the arbitrator, scholars⁶³⁴ agree that it was implied that an arbitrator could only be a Muslim male. This is based on the language employed in the 1985 Rules. Article 3 of the 1985 Implementing Rules read as (interpreted from Arabic): 'The arbitrator shall be a Saudi national (*masculine form*) or Muslim expatriate (*masculine form*) from the free profession section or others.'

However, it is important to note that the language employed by SAL 1983, is not reflective of the provision of the law, but as Islamic laws are guided by the

⁶³¹ Ahdab and Ahdab (n 329).

⁶³² Implementation Rules 1985 (Saudi Arabia) article 3

⁶³³ Implementation Rules 1985 (Saudi Arabia) article 4

⁶³⁴ Alwalid Alalshaikh, 'The 2012 Arbitration Reform in the Kingdom of Saudi Arabia: An Examination of the 2012 Arbitration Law Reform' (Kent Academic Repository 2017) <<https://kar.kent.ac.uk/61055/>> accessed 24 June 2023.

interpretation of Sharia by the different Islamic jurisprudence, there are differences in how this law is interpreted with the majority three of the four schools (Maliki, Hanbali and Shafi) choosing to associate the term Muslim National or expatriate with only masculine forms which is different from the Hanafi's interpretation which goes to show that the Sharia in itself does not prohibit the appointment of female arbitrators nor refers to the Islamic Nationals as only the male forms.⁶³⁵ Rather, the interpretation of the SAL 1983 preventing the appointment of women can be attributed to the hardline choice by the Islamic Jurisprudence to exclude women from the arbitral positions through their interpretation of Sharia. This language employed by the Maliki, Hanbali and Shafi jurisprudence shows clear gender bias not only on the part of the Legislature, but, by extension, was reflective of the bias prevalent in the society. The practice of enforcement during that time showed that the Courts in Saudi Arabia were engaged in the practice of refusing the enforcement of arbitral awards issued by a tribunal with female arbitrators.⁶³⁶ In fact, the Courts used to consider the arbitrator's gender as a part of public policy.⁶³⁷ However, this insistence on gender or, for that argument, the religion of the arbitrator essentially violates the principle of party autonomy by restricting the parties option of appointing the arbitrators they deem fit for the subject matter of the dispute at hand. This is in contrast with the international arbitration practices and more flexible Western laws regarding arbitrator qualifications.⁶³⁸

5.2.3.1. Qualifications of an Arbitrator under Islamic Law

⁶³⁵ Ahmad Q Farah and Hattab, Rasha M, 'The Application of Shari'Ah Finance Rules in International Commercial Arbitration' (2020) 16(1) Utrecht Law Review 117<https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3637377> accessed 24 June 2023.

⁶³⁶ Osama Abdullatif Rabah, 'The Saudi interpretations of capacity, public policy and awards being set aside in the country of origin in the refusal of arbitral awards under Article V of the New York Convention 1958, With Reference to French and English Legal Systems' (DPhil thesis, University of Stirling 2018).

⁶³⁷ Mohammed I AlEisa, 'A Critical Analysis of the Legal Problems Associated with Recognition and Enforcement of Arbitral Awards in Saudi Arabia: Will the New Saudi Arbitration Law (2012) Resolve the Main Legal Problems?' (DPhil thesis, University of Essex 2016).

⁶³⁸ Sameer Saleh, *Commercial arbitration in the Arab Middle East: A Study in Shari'a and statute Law* (Graham & Trotman, 1984).

The various schools of Islamic jurisprudence and, by extension, various scholars are divided on the required qualifications for arbitrators under Islamic law.⁶³⁹ The qualifications for arbitrators under schools of Islamic Law depends largely on the role and the position assigned to the arbitrators under these schools.⁶⁴⁰

As per the Maliki school, the qualifications for an arbitrator is the same as those for a judge.⁶⁴¹ Thus, in addition to being an adult Muslim with a sound mind, the arbitrator is required be a male and possess senses of justice and perception, and knowledge of Islamic law and rules.⁶⁴² The appointment of an arbitrator who lacks the above mentioned qualifications is invalid.⁶⁴³ The requirements under the Shafi School of jurisprudence are the same as the Maliki School. Under the Hanafiah School, the arbitrators are put at the same pedestal as the judges and therefore, required to stand the test of the qualifications of judges.⁶⁴⁴ Thus, the arbitrator must be an adult Muslim with a sound mind.⁶⁴⁵ In addition to these, the arbitrator is required to possess the understanding of the subject matter to discharge the role. Further, if the arbitrator lacks one of the abovementioned qualifications, the role becomes that of a mediator instead of that of an arbitrator.

As opposed to this, the scholars are divided on the aspect of qualifications for arbitrators under the Hanafi School.⁶⁴⁶ Some scholars are of the opinion that the arbitrators are required to possess the qualifications of judges and thus, must be an adult Muslim male with sound mind, justice, diligence, and knowledge of Islamic law and rules⁶⁴⁷. On the other hand, some scholars subscribe to the opinion that the

⁶³⁹ Abdullah Bin Mahmoud Bin Maudud Al-Mousali, *Al-Ekhtiar Letallil Al-Mukhtar* [The Choices of Hanafiah School Of Thought] (Turath for Solutions 2013).

⁶⁴⁰ Muhammad ibn Ahmad al-Sarakhsi, *Kitab al-mabsut* (Dar al-Ma'arifah 1993) 111.

⁶⁴¹ Shams Aldain Muhammad Bin Muhammad Bin Abdulrahman and Mwahib Al-jalil Fi Sharh Mukhtasar Khalil, *The Study On The Research Of The Muslim Scholar Khalil* (Dar al-Fikr 1992) 86.

⁶⁴² *ibid.*

⁶⁴³ *ibid.*

⁶⁴⁴ *ibid* 199.

⁶⁴⁵ Muhammad Ra'af Othman, *Al-Fiqh Al-Islami: According to the Hanafi Madhab* (2edn, Angelwing 1994).

⁶⁴⁶ *ibid.*

⁶⁴⁷ Muwaffaq Al-Din Abu Muhammad 'Abd All Ibn Qudamah, *Al-kafi fi fiqh al-imam ahmad ibn hanbal* (Turath For Solutions, 2013).

arbitrators are not required to possess the above-mentioned qualifications.⁶⁴⁸ Muhammad Bin Al- Othimain, a scholar of the Hanbali school, states:

The arbitrators decide specific disputes for specific people and their authorities and jurisdictions are limited. Judges who are appointed by governments have jurisdictions and authorities to decide people disputes whether they consent or not and, therefore, they are required to possess the qualifications. Therefore, the arbitrators are not required to possess the qualifications of judges. Thus, why must the arbitrators be required to possess the qualifications of arbitrators?⁶⁴⁹

Thus, in conclusion, the mandatory or prescribed qualifications for arbitrators depend on different schools of Islamic jurisprudence. Dr. Abdulmajed Alrajhi, a legal scholar, vehemently argues that the mandatory qualifications for the arbitrators must not be the same as those for judges. He states that ‘judges must possess certain requirements to validate their appointments as judges, while arbitrators should only be required to possess a minimum standard of requirements to validate their appointment as arbitrators.’⁶⁵⁰ On one hand, he argues that while the judiciary is a necessary institution and some disputes are to be mandatorily resolved through the judiciary, judges are required to possess certain qualifications to ensure that they are highly competent. On the other hand, ‘arbitration is an alternative dispute resolution mechanism to the judicial system’ and the parties have autonomy to resolve their disputes through arbitration.⁶⁵¹ Further, some disputes are complex and technical and subsequently, require experts in the subject matter as arbitrators. Therefore, parties should have the freedom to select arbitrators with the specific qualifications necessary to resolve such a complex dispute without requiring those arbitrators to possess the same qualifications of judges.⁶⁵²

⁶⁴⁸ Maryam Ibrahim and Ali Hussein Abbas, ‘The Jurisprudential Selections of Imam Musa Al-Hijawi (D. 968 AH) in Tashahhud and Peace: From His Book Al-Iqnaa Fi Al-Fiqh of Imam Ahmad Bin Hanbal: A Comparative Study’ (Resmilitaris, 2022) <<https://resmilitaris.net/menu-script/index.php/resmilitaris/article/view/572>> accessed 24 June 2023.

⁶⁴⁹ Muhammad Bin Saleh Bin Muhammad Al-Othimain, *Al-sharah Al-momta’a Ala’a Zad Al-mostaqna’a* [The Persuasive Explanation on Hanbali School of thought], (1st edn, 2007).

⁶⁵⁰ *ibid.*

⁶⁵¹ *ibid.*

⁶⁵² *ibid.* 73.

5.2.3.2. Challenging the Validity of Arbitral Awards under Saudi Arbitration Law 2012

Whilst one of the ways parties to arbitration proceedings benefit from the protection of party autonomy by having their say in the appointment of their respective party appointed arbitrators, article 50 of the Saudi Arbitration Law (2012) provides grounds upon which the validity of an arbitral award can be challenged.⁶⁵³ The grounds for challenging the validity of an award include instances where:

- a. An arbitration agreement is non-existent or where such an arbitration agreement is considered by a competent court to be null and void or revocable;
- b. A party to the arbitration proceedings is incompetent;
- c. One of the parties is unable to present their defence as a result of not being notified over the appointment of an arbitrator or the arbitration proceedings;
- d. The arbitral award has excluded the application of statutory rules agreed upon by the parties to the arbitration over the subject of the dispute;
- e. The constitution of arbitral tribunal or the appointment of the arbitrator is done in a manner that violates the Saudi Arbitration Law 2012 or the arbitration agreement;
- f. The arbitral award deals with matters not covered by the arbitration agreement. However, this provision makes provision for the separation of the parts of the award that are covered by the arbitration agreement such that only sections/parts not covered by the arbitration are nullified; and
- g. The arbitral tribunal fails to take into account sections of the award that affect its content or in instances where the award is based on false arbitration proceedings affecting it.⁶⁵⁴

In light of the above statutory challenges over the validity of an arbitral award, with respect to the participation of women as arbitrators, a party can rely on article 50 (e) to dispute the appointment of a female arbitrator. However, such a challenge is limited

⁶⁵³ Saudi Arbitration Law 2012 (Saudi Arabia) article 50.

⁶⁵⁴ Saudi Arbitration Law 2012 (Saudi Arabia)

to appointments that contravene the provisions of Saudi Arbitration Law 2012 or the arbitration agreement. As such, given that the Saudi Arbitration Law 2012 does not contain gender restrictive provisions, it is apparent that party autonomy under this provision is guaranteed as parties can proceed to appoint a woman as an arbitrator.

Whilst article 50(e) does not present any challenge on the principle of party autonomy, article 50 (2) provides that a competent court presiding over challenges to the validity of the award can invalidate an arbitral award if it the award is contrary to Islamic Sharia and public policy/order in the Kingdom.⁶⁵⁵ The challenge presented by this provision is that public policy in Saudi Arabia is considered by scholars to include Islamic Sharia. Further, these public policy principles cannot be precisely defined by the Saudi courts. Dr. Ahmed A Altawyan argues that the lack of precise definition of public policy is attributable to two factors. Firstly, there is lack of enough published cases sufficient to establish a clear definition of what public policy in Saudi Arabia entails. Secondly, Dr. Altawyan argues that even in the event where there were sufficient cases available, the fact that the *stare decisis* is not applicable nor recognized in Saudi courts, might render it hard to predict the outcome of future cases.⁶⁵⁶ Dr. Altawyan further states:

The Ijtihad as applied in the Saudi court without binding precedent thus provides the court with the power to refuse any award if the court considers the award to be against public policy or Islamic Sharia, even if the subject is not settled among Muslim jurists.⁶⁵⁷

This was witnessed in Case No. 33375/1 of year 1424 h where a Saudi court refused to enforce a foreign judgment worth USD 50.69338. The justification given by the court for the non-enforcement was that the judgment was based on singing and music contrary to the Quran and the Sunnah.⁶⁵⁸ In the same line, it remains to be seen whether a challenge to the validity of an award on public policy or against Sharia grounds can invalidate the appointment of a woman as an arbitrator despite the existence of the principle of party autonomy. Whilst the issue in perspective here is validity and not

⁶⁵⁵ *ibid.*

⁶⁵⁶ Ahmed Altawyan, 'Arbitral Awards Under the Saudi Laws: Challenges and Possible Improvements' (2017) 3(1) International Journal of Law and Interdisciplinary Legal Studies.

⁶⁵⁷ *ibid* 23, para 2.

⁶⁵⁸ *ibid.*

enforcement, this case is helpful nonetheless as it offers a crucial outlook on the attitude of the Saudi courts over issues such that are forbidden by either the Quran and Sunnah.

It is also critical to look at the issue of recognition of women arbitrators as a public policy matter. In Article V(2) (b) of the New York Convention, there are clear provisions that the member states are not required to recognize non-domestic arbitral awards that are contrary to the state's public policy. Similar provisions are also made in Article 37(2) of the Riyadh Convention which extends to the public policy exemptions but differentiates between the public policy and Islamic public policy.

Under the New York Convention and the Riyadh Public Convention, public policy is not clear, but it is generally accepted that the international public policy covers a narrower scope as compared to the domestic public policy because domestic policies of states adopting the convention vary and put together, fold a large scope than the public policy ideas which are universally and internationally accepted by the states parties to a specific convention. The New York Convention also seeks to eliminate pre-existing obstacles in enforcement which vitiates the broad reading of the public policy defence.

An inherent issue that arises with regards to public policy is on whether the local courts should put it into effect to reject the enforcement differentially to the domestic awards vis-à-vis foreign awards. Born argues that a narrower concept of public policies should be applied in foreign awards than domestic ones.⁶⁵⁹ However, the public policy exemption in the New York Convention goes against the grain of the international community who derive security from being signatories to the convention. The security provided by the New York Convention is nullified under the public policy permitting KSA to reject arbitral awards which contradict its public policy.

Therefore, by consenting to the New York Convention, Saudi Arabia got a vehicle for modernising its international dispute resolutions, but at the same time, Article V(2)(b) of the New York Convention gives it a safe harbour where the country does not have to recognize an arbitral award that is adjudged to offend the public policy of Saudi

⁶⁵⁹ Gary Born, *International Arbitration: Law and Practice* (Kluwer Law International 2012) 403.

Arabia.⁶⁶⁰ Therefore, Article V (2) (b) allows Saudi Arabia to accomplish its needs to modernize itself in the international community and to maintain its history and religious beliefs.⁶⁶¹ Notably, Article V(2)(b) has elicited two types of reactions from States. On one hand, there are States that narrow the scope of this provision so as to ensure that the objectives of the Convention to achieve the uniform enforcement of arbitral awards. In *Parsons and Whitmmore Overseas Co., Inc. v Societe General de L'industrie du Papier*, the United States Second Circuit Court of Appeals sought to adopt a narrow application of article v(2)(b) so as to enforce an arbitral award against an American company. Notably, the court held that ‘the Convention’s public policy defence should be construed narrowly. Enforcement of foreign arbitral awards may be refused on this basis only where enforcement of such an award would violate the forum country’s most basic notions of morality and justice.’⁶⁶² On the other hand, there are States that apply a broad application so as to protect national interests as was the case with Saudi Arabia in Case No. 33375/1 of year 1424 h.⁶⁶³

The major point of contention is that what falls under Saudi’s public policy is not clear because of the inextricable link between Sharia and public policy. Nevertheless, there are considerations that public policies in KSA go beyond sharia to concepts such as royal prerogative, interests, customs and public morals.⁶⁶⁴ Baamir and Banteka brings forth the argument that Saudi’s refusal to enforce foreign arbitral awards due to public policy which implied that it covers a wide area of practice that may be unknown to foreign arbitrators and applying non-Saudi lex arbitri.⁶⁶⁵ Critics have come forward to criticize Saudi’s ‘modernization’ of the arbitration resolution regimes which also adopting a safe harbour for it to electively enforce arbitral awards which they perceive as being contrary to its public policies. Therefore, going back to the issue of women’s recognition of female arbitrators, the argument provided by Guseloglu is most appropriate. He argues,

⁶⁶⁰ New York Convention 1958, art. V(2) (b), 21 U.S.T. at 2520, 330 U.N.T.S. at 42.

⁶⁶¹ Kristin T Roy, ‘The New York Convention and Saudi Arabia: Can a Country Use the Public Policy Defense to Refuse Enforcement of Non-Domestic Arbitral Awards?’ (*The Fordham Law Archive of Scholarship and History*, 2023) <<https://ir.lawnet.fordham.edu/ilj/vol18/iss3/9/>> accessed 24 June 2023.

⁶⁶² Altawyan (n 656).

⁶⁶³ *ibid.*

⁶⁶⁴ *ibid.*

⁶⁶⁵ Baamir (n 616) 230, 251, 255.

Saudi Arabia is required to: ...implement a more transparent case law and codify the established Sharia rules categorically in order to avoid any arbitrary practice, encourage consistent rulings and secure legal certainty. If the rules are persistently applied in this transparent manner, necessary precautions may be taken by the arbitrators, such as rendering an award that is separable in its parts which may potentially be considered to be in violation of Saudi Arabian public policy rules so that the rest of the award remains executable.⁶⁶⁶

In regard to the rules on the place of women in arbitration, Saudi's laws are ambiguous as there is no clear provision on the gender of the arbitrators. Therefore, the enforceability of arbitral awards issued by female arbitrators may be denied under public policy claims where the opponents may argue that a female arbitrator goes against the country's public policy.⁶⁶⁷

5.3.1. Women as Arbitrators in the Saudi Arbitration Law, 2012

Similar to its 1983 counterpart, the SAL 2012 stipulates certain qualifications for arbitrators. These qualifications are 'full legal capacity', 'good conduct and reputation',⁶⁶⁸ and an additional qualification for a bachelor's degree in Sharia or Civil law for the sole arbitrator, if the arbitral tribunal is composed of one arbitrator, or for the chairman, in case the arbitral tribunal is composed of more than one arbitrator.⁶⁶⁹ Therefore, the arbitrators are no longer required to possess the qualifications of judges; instead, arbitrators are only required to possess a minimum standard necessary to resolve disputes.

⁶⁶⁶ Abdulkadir Guzeloglu, 'The Role of Shari'a Law on the Enforcement of Arbitral Awards in the Kingdom of Saudi Arabia' (*Lexology*, 2016) <www.lexology.com/library/detail.aspx?g=71e501f7-8552-45fd-8797-077fa25e88a3> accessed 23 June 2023.

⁶⁶⁷ Abdulrahman Alfatta, 'The Impact of the Shari'ah on Foreign Direct Investment and Arbitration: The Case of Saudi Arabia and its Vision 2030' (DLaw thesis, University of Westminster 2019).

⁶⁶⁸ Saudi Arabia: the Law of Arbitration, Royal Decree No. M/34, 16 September 2012 <www.ilo.org/dyn/natlex/docs/ELECTRONIC/106647/130941/F850258061/arbitration.pdf> accessed 16 June 2023.

⁶⁶⁹ *ibid.*

Notably, an important and implied required qualification for an arbitrator in the 1983 Law which, apparently has been done away with the SAL 2012 was the gender requirement. The current law does not stipulate any gender requirements for arbitrators, nor does it contain any language that prohibits a woman from serving as an arbitrator. This led many scholars to believe that the requirement of the arbitrator to be a male has been done away with.⁶⁷⁰ However up until the case concerning Ms. Shaima Aljubran, which is discussed in detail in the latter section, there has been an ambiguity concerning whether the gender requirement of the arbitrator was still prevalent and because of this condition, any award rendered by a female arbitrator would be susceptible to appeal.

While impliedly, by not employing the same language as was in the 1985 Implementing Rules, and in changing the qualifications for an arbitrator and in omitting to include the requirement to be a male, the legislative intent of dropping the gender requirement can be concluded. However, the legislature had not fully utilized the opportunity of explicitly declaring the omission of the gender requirement. This window for ambiguity led to the appeal against the arbitral order, as discussed in greater details in the latter section.

It is worth mentioning that the controversy on the issue of gender among the arbitrators still went unresolved in the Implementing Regulations issued on May 2017 after SAL 2012 came into effect. The Implementing Regulations came into effect after they were published on the Saudi Official Gazette on June of 2017. Under the new provisions, there are a number of issues which are not certain. On the issue of gender and religion of the arbitrators the new regulations provide the previously hoped for closure. As indicated earlier, the SAL 2012 does not provide a clear-cut provision on the gender of the arbitrators. Unlike the SAL 1985 implementation regulations which led to the expectations that an arbitrator should be a Muslim or Saudi male; SAL 2012 only stipulates that the arbitrator or chairperson be a university degree holder. In this regard, the faith-based requirement was officially dropped. However, with the release of the Implementation Regulations in 2017, there is a general non-equivocal provision on the

⁶⁷⁰Abdulmajed Alrajhi, 'Islamic arbitration and reformulating principles concerning roles of arbitrators, appointment of women arbitrators and enforcement of arbitral awards in light of modernity and change of culture in the islamic world' (Faculty of the Washington College of Law of American University 2017).

admissibility of the gender of arbitrators which inherently leaves room for different interpretation by some parties, as was the case in SAL 1983.⁶⁷¹ The Implementation Regulation does not provide closure on the issue of gender and religion of the arbitrators despite it being one of the most controversial issues in the Muslim world more so in regards to the place of women in arbitration. Prior to the Arbitration Law enacted in 2012, there was an implied explicit requirement that arbitrators be either Saudi National or a Muslim Expatriate which was interpreted to mean that the arbitrators should be purely male. It is therefore, against this background that the most notable feature of the 2012 SAL law was that it does not require the arbitrators to be Saudi or Muslim but states that the chairperson needs a degree in law or Sharia which indicates that the faith-based stipulation was officially abandoned. Despite this seemingly being an improvement from the 1983 SAL and the 1985 Implementing Regulations it is still generally ambiguous which leaves room for different interpretation by the different Islamic Jurisprudence.

There are two possible explanations for the failure of the SAL 2012 to provide clarity and certainty on the issue of gender equality in arbitration. The first is that the new law deliberately ignored the issue, adding nothing significant to the previous law on the assumption that by reformulating Article 3 of the 1985 Rules could be interpreted as implicit confirmation by the Saudi Legislator of a gender bias similar to that of SAL 1983. Like its predecessor, SAL 2012 has been critiqued for its failure to align with international practice. Moreover, simply avoiding this issue by failing to introduce it in SAL 1983 and ignoring it does not resolve the issue because new challenges have arisen to arbitral awards as a direct result of SAL 2012 ambiguity. These challenges have left room for doubt and enabled various interpretations to emerge depending on the interests of the interpreter.

The second possible explanation is that gender was an obvious issue in relation to the previous law (SAL 1983) and one which prompted much discussion and debate about the right of women to be appointed arbitrators. In adopting a new law, the Legislator therefore erased all reference to the separation between men and women in this matter.

⁶⁷¹ Mohamed Mahayni and Zaid Mahayni, 'Saudi Arabia: An Overview Of The New Implementing Regulations To The Saudi Arbitration Law' (*Mondaq*, 2017) <www.mondaq.com/saudi-arabia/arbitration-dispute-resolution/601494/an-overview-of-the-new-implementing-regulations-to-the-saudi-arbitration-law> accessed 23 June 2023.

While this might be the correct interpretation of the new law, nevertheless the legislator still must provide clarity to prevent further challenges which might impact confidence in the practice of arbitration in the Saudi Arabia.

Even when the language of the current law is neutral in this regard, many legal scholars are of the opinion that women are prohibited from being appointed as arbitrators and that the awards rendered by tribunals with female arbitrators are susceptible to annulment or refused enforcement.⁶⁷² For instance, Baamir states that ‘In accordance with Sharia ruling, women cannot be appointed as judges or arbitrators. This is not a matter for discussion in Saudi Arabia.’⁶⁷³ Another commentator, Cyril Chern, states that: ‘It should also be taken into consideration that Saudi Arbitration Law does not allow non-Muslims to act as arbitrators in domestic arbitrations or even international ones. Neither does it allow women to act as arbitrators.’⁶⁷⁴

However, despite the neutrality of the SAL 2012, several legal scholars assume and speculate that women are prohibited from being arbitrators or that arbitration tribunal awards with women arbitrators may be annulled. One such author is Abdulrahman Yahya Baamir, who argued that in accordance with Sharia ruling, women cannot be arbitrators.⁶⁷⁵

The argument brought by Yahya Baamir brings about the inherent differences between the western legal systems and the Sharia in its source, legitimacy and method of reform.⁶⁷⁶ The Sharia is a comprehensive approach to social norms, and life beyond simple religious rules. Within the Sharia are specific provisions to commercial transactions covering aspects such as the sanctity of a contract, the principle of *pacta sunt servanda*,⁶⁷⁷ acting in good faith, prohibition of uncertainty and adoption of

⁶⁷² Mulhim Hamad Almulhim, ‘The First Female Arbitrator in Saudi Arabia.’ (Kluwer Arbitration Blog 2018) <<https://arbitrationblog.kluwerarbitration.com/2016/08/29/the-first-female-arbitrator-in-saudi-arabia/>> accessed 23 June 2023.

⁶⁷³ Baamir (n 616).

⁶⁷⁴ Cyril Chern, *The Law of Construction Disputes* (3rd edition, Routledge 2013).

⁶⁷⁵ Baamir (n 616).

⁶⁷⁶ Ahmad Q Farah and Rasha M Hattab, ‘The Application of Shari‘Ah Finance Rules in International Commercial Arbitration’ (2020) 16(1) Utrecht Law Review 117.

⁶⁷⁷ Mary B Ayad, ‘Harmonisation of International Commercial Arbitration Law and Sharia, The Case of Pacta Sunt Servanda vs Order Public – The Use of Ijtihad to Achieve Higher Award Enforcement’ (2009) 6 Macquarie Journal of Business Law 93.

alternative methods in resolving disputes on private commerce such as arbitration, mediation and conciliation.

However, the views of those opposing the appointment of women are not in line with the Quran and the Sunnah do not which contains no express stipulation that prohibits women from being appointed as arbitrators and judges. Indeed, much of the legal reasoning opposed to such appointments derives validation from the Sunnah in form of hadiths such as that of Abu Bakrah recalling the words of Prophet Muhammad over the rulership of the Persia by a woman. Another matter comes into play in regard to the issue of women as arbitrators. This is the issue of public policy which applies in KSA and the U.S in regard to the recognition of the awards and their enforceability in regards to the issue of public policy.

Whilst the lack of clarity in the SAL 2012 leaves room for legal uncertainty on the place of women in arbitration and the issue of enforceability of the awards issued by female arbitrators.

5.4. Participation of Women as Arbitrators in KSA: Issues and Perspectives

5.4.1. Institutional and Legal Changes in KSA

The most dominant school of jurisprudence in Saudi Arabia is the *Hanbali*. Notably both the Saudi Arbitration Law 1983 and the Saudi Arbitration Law 2012 are greatly influenced by the *Hanbali* school. Given that the Sunnah together with the Quran are recognized by Article 1 of the Saudi Basic Law of Governance as the Constitution of the Kingdom, the interpretation of these primary sources of law by Muslim jurists from the Hanbali school of law was and still is consequential to the application of the Saudi Arbitration Law. It is apparent from section 4.2 of this research that the interpretation applied by Muslim jurists to limit the participation of women as arbitrators has largely been founded on the interpretation of the Sunnah and not the Quran. The consequence of the interpretation of the Sunnah by Muslim jurists is that it has resulted in the limitation of the application of both the Saudi Arbitration Law 1983 and the Saudi Arbitration Law 2012 with regards to the participation of women as arbitrators. Article 3 of the 1983 Saudi Arbitration Law provides that, ‘The Arbitrator shall be one of the

citizens of the country or a foreign Muslim. In appointing Arbitrators, their head shall be well-versed with Islamic principles, commercial laws, norms and tradition currently applicable in the Kingdom of Saudi Arabia.⁶⁷⁸ Whilst an evaluation of Article 3 of the Saudi Arbitration Law 1983 does not reveal an explicit prohibition of the appointment of women as arbitrators, the statute provided that a party seeking enforcement of an arbitral award had no assurance for enforcement if the award in question violated Sharia based public policy.⁶⁷⁹ This is particularly important whilst considering the effect and place of the popular hadith by Abu Bakra which according to author such as Haeri, ‘has continued to be the major religious justification for excluding women from the public domain in contemporary Muslim societies.’⁶⁸⁰ The central place hadith and by extension, Sunnah, occupies in Saudi Arabia’s legal framework as a primary source of law would permit an understanding that hadith such as Abu Bakra’s (given the strength of its transmission and the respect the hadith enjoys) is more likely to be part and parcel of public policy within the context of Saudi Arabia. It is also notable that the interpretation of the Hanbali school of jurisprudence of the hadith from Abu Bakrah and other relevant hadith have been applied broadly to limit the appointment of women as arbitrators under the old draft of SAL1983.

This consequently means that public policy considerations are wholly based on Sharia law and as such, international arbitration agreements fall under the scope of application of Sharia. As a result, the arbitration agreement would eventually be subject to Sharia law despite the well-recognized principle of party autonomy in arbitration. Further, the Hanbali school of jurisprudence required that an arbitrator ought to have the same qualification as judge.

As per the interpretation of the Hanbali school, a judge had to be a Muslim male and by implication, an arbitrator was required to meet the same requirement. Where there was failure to meet this requirement such as in instances where the arbitrator presiding over an arbitration is female, the enforcement of an award emanating from such proceedings was considered by the Saudi courts to be a ground for the refusal for such

⁶⁷⁸ Saudi Arbitration Law 1983 (Saudi Arabia).

⁶⁷⁹ Annah Abahussain, ‘The Rising Tide of Change: Saudi Arabian Women In Dispute Resolution’ (2018) 73(2) Dispute Resolution Journal.

⁶⁸⁰ Shahla Haeri, *The Unforgettable Queens of Islam: Succession, Authority, Gender* (1st edn, CUP 2020) 74, para 1.

an award as it contravened public policy considerations under Sharia.⁶⁸¹ Whilst the Saudi Arbitration Law 2012 sought to correct the deficiencies of the 1983 Saudi Arbitration Law, on the narrow subject of gender, SAL 2012 does not explicitly prohibit the appointment of a woman as an arbitrator. In setting down the requirements of an arbitrator, article 14 of the Saudi Arbitration 2012 provides that an arbitrator should be legally competent, of good conduct and behavior and hold a degree in Islamic or legal studies.⁶⁸²

Further, the application of hadith to limit the appointment of women as arbitrators provokes legal debate regarding the apparent conflict of laws given that a number of legislations in Saudi Arabia express equal gender considerations in matters of work appointments. For instance, Article 28 of the Basic Law of Governance provides that, ‘The State shall facilitate job opportunities for every able person and enact laws to protect the worker and the employer.’⁶⁸³ Further, article 10 of the Basic Law of Governance further provides that, ‘the State shall aspire to promote family bonds and Arab-Islamic values. It shall take care of all individuals and provide the right conditions for the growth of their talents and skills.’⁶⁸⁴ The implication of these provisions point to an evident legal position under Saudi Arabian law that in terms of work opportunities, the State is obligated to ensure equal working opportunities and further, the State is also obligated by dint of article 10 of the Basic Law of Governance to promote proper conditions for the growth of the skill of individuals.

Having in mind articles 10 and 28 of the Basic Law of Governance, read together with article 14 of the Saudi Arbitration Law that lacks any gender prohibitive requirement for the appointment of an arbitrator. This conflict has been further extended in light of the fact that article 3 and article 12 of the Saudi Arbitration Law 1983 which in effect, imposed the requirement that an arbitrator ought to be a Muslim male, these same provisions have been omitted from the Saudi Arbitration Law 2012.

On one hand, authors such as Samal al-Agha argue that the absence of gender restrictive language in article 14 of the Saudi Arbitration Law clearly points out that a woman can be appointed as an arbitrator in Saudi Arabia. On the other hand, author

⁶⁸¹ *ibid.*

⁶⁸² al-Agha (n 588).

⁶⁸³ *ibid.*

⁶⁸⁴ *ibid.*

such as Abdulrahman Yahya Baamir adopt a strict religious interpretation by pointing out that a woman cannot be a judge under Sharia, and as a result, the same considerations apply to female arbitrators. Baamir states:

These days the issue being raised within the Kingdom...asking for women to be given the right to become arbitrators and even Judges. Such an issue seems to be more about social nature than about legal or religious matters, as it relates to the common culture and traditions that are important sources of public policy in modern Saudi law.

Moreover, customs and practices are sources of Islamic law just as any fatwa, ijihad or ijma' and should fit within the overall social order.⁶⁸⁵

Baamir further argues that what can be said about female arbitration within the context of customs and practices of Saudi law, can be applied to other issues/areas where the participation of women is restricted. To this end, Baamir argues that the appointment of women as judges in Saudi Arabia is a not a negotiable matter and in extension given the context of his arguments, the same restrictions apply towards women participating in arbitration.

Mutasim Alqudah argued that the legal and institutional changes in Saudi Arabia in the contemporary environment indicate the adoption of a relatively more tolerant interpretation of Islam⁶⁸⁶. The changes (e.g., introduction of Saudi Arbitration Law 2012) is seen to promote the principles of equality, justice and interest whereby a woman should not be deprived of any position or opportunity based on their gender. In the same line, the changes adopted by the Saudi Arbitration Law 2012 by relinquishing gender restrictive provisions interpreted from SAL 1983 have to be understood within the context that Saudi Arabia ratified the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) in 2001.

Saudi Arabia as a state party to CEDAW, is notably, by article 3 of the convention to commit:

⁶⁸⁵ Baamir (n 616) 28, para 6.

⁶⁸⁶ Mutasim Ahmad Alqudah, 'The impact of sharia on the acceptance of international commercial arbitration in the countries of the gulf cooperation council.' (2017) 20 Journal of Legal Ethical and Regulatory Issues 1.

In all fields, in particular in the political, social, economic and cultural all appropriate measures, including legislation, to ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on.⁶⁸⁷

The role of CEDAW to imprint a legislative, social and political shift in the appointment of women to various positions cannot be understated. For instance, Article 7(b) requires State Parties to take appropriate measures to ensure that women are on equal terms with men by guaranteeing the right of women, ‘to participate in the formulation of government policy and the implementation thereof and to hold public office and perform all public functions at all levels of government.’⁶⁸⁸

Whilst appreciating that the Sunnah is a primary source of law in Saudi Arabia by dint of Article 1 of the Basic Law of Governance, the interpretation of hadith by Muslim jurists that might arguably prohibit the appointment of women arbitrators presents a situation where there is an evident conflict of laws in Saudi Arabia between the Sunnah and national and international legal instruments. In tackling this apparent conflict of laws, Saudi Arabia made reservations to its ratification of CEDAW which states that in case of contradiction between any term of the Convention and the norms of Islamic law, the kingdom is not under obligation to observe the contradictory terms.⁶⁸⁹

5.5. A Comparative Analysis between the 1983 Saudi Arbitration Law and The 2012 Saudi Arbitration Law Relevant the Participation of Woman As Arbitrators

5.5.1. Background

The 2012 Saudi Arbitration Law sought to correct certain deficits of the 1983 Saudi Arbitration law. Whilst the 1983 Saudi Arbitration was interpreted to require that arbitrators should be Muslim Males, Law provided that arbitrators should be Muslim

⁶⁸⁷ GSDRC Applied Knowledge Services, ‘Legal Framework and Access to Justice’ <gsdrc.org/topic-guides/gender/legal-framework-and-access-to-justice/> accessed 21 September 2021.

⁶⁸⁸ CEDAW 1981 article 7(b)

⁶⁸⁹ O’Connor Sandra ‘Islamic Law and International Human Rights Law’ (2012) Commentary: Women and Islamic Law 305.

males, article 14 of the 2012 Saudi Arbitration Law sought to correct this position by not applying a gender requirement to the appointment of an arbitrator.⁶⁹⁰ The 2012 Saudi Arbitration was intended by its drafters to reform and adapt arbitration to international standards and to this end, it was based on the UNCITRAL Model Law. The 1983 Saudi Arbitration law subjected arbitration to supervision by the national courts in a bid to ensure that the arbitration proceedings conform with Sharia principles. This supervision was achieved through the intervention of the national courts at the beginning of the arbitration proceedings and during the enforcement of the arbitral award. The involvement of the court persisted even after Saudi Arabia ratified the New York Convention in 1994 and Saudi Arabia justified the refusal to enforce awards that did not conform to Sharia by relying on the public policy exceptions to the New York Convention as provided under article 5(2)(b).⁶⁹¹ This is particularly significant as the participation of women as arbitrators is widely recognized by Islamic scholars and jurists to be a contravention of the Sunnah and as such, it is possible to anticipate that their appointment might be limited on the basis that it is contrary to public policy.

This particular challenge of intervention of national courts has been further complicated by the fact that in Saudi Arabia, Sharia is not a codified law and as such, while both the 1983 and 2012 Saudi Arbitration Law regulate arbitral transactions, these laws will always defer to Sharia. Authors such as Nesheiwatt and Al-Khawasneh argue that, where there is an inconsistency between national legislation and Sharia or instances where legislation is silent, the Sharia will take precedence.⁶⁹²

The 1983 Saudi Arbitration Law together with its Implementing Regulations of 1985 were considered to be wholly based on Sharia principles and whilst the adoption of the Saudi Arbitration Law 2012 sought to bring up arbitration law to international standards, the influence of Sharia remains a critical fact that continues in principle to limit the participation of women as arbitrators. Nesheiwatt and Al-Khawasneh

⁶⁹⁰ Faris Nesheiwat and Ali Al-Khasawneh, 'The 2012 Saudi Arbitration Law: A Comparative Examination of the Law and Its Effect on Arbitration in Saudi Arabia' (2015) 13 Santa Clara Journal of International Law 443.

<<https://digitalcommons.law.scu.edu/scujil/vol13/iss2/5/>> accessed 21 June 2023.

⁶⁹¹ *ibid.*

⁶⁹² *ibid.*

elaborate the influence of Sharia by arguing that, ‘all laws in Saudi Arabia exist under a penumbra of Shari’a.’⁶⁹³

5.5.2. Choosing an Arbitrator under the 1983 Saudi Arbitration Law

Article 14 of the Saudi Arbitration Law that sets out the requirements of an arbitrator does not contain gender restrictions as was the case in the 1983 Saudi Arbitration Law.⁶⁹⁴ However, scholars are divided on the meaning of Article 14 in considering whether women can be appointed as arbitrators. On one hand, authors such as Nesheiwatt and Al-Khawasneh have considered that it is not clear whether by implication, the stipulation of Article 14 of the Saudi Arbitration Law 2012 means that women can be appointed as arbitrators.⁶⁹⁵ On the other hand, Al-Agha disagrees and argues that, ‘article 14 of the law that clarifies the conditions of appointment does not stipulate a specific gender; it applies to both men and women with no discrimination.’⁶⁹⁶ However, article 15(3) of the Saudi Arbitration Law seems to support the argument by Al-Agha as it provides that courts must observe the agreement between the parties that concern the characteristics of an arbitrator, their nationality and qualifications on the basis that these requirements do not contravene the law.⁶⁹⁷ As such, it could be argued that the appointment of a woman as an arbitrator is not in contravention to the Saudi Arbitration Law 2012 given the lack of gender prohibitive language under article 14. However, there are concerns by authors such as Al-Fadhel that the justifications applied by Muslim jurists to prohibit the participation of women as arbitrators are derived from historical rulings from the Hanbali school.⁶⁹⁸ Given that these rulings precede the commencement of the Saudi Arbitration Law 1983, and whilst considering that SAL 1983 is presently obsolete, it is also notable that the Act did not contain explicit provisions that prohibited the participation of women as

⁶⁹³ *ibid* 445 para 2.

⁶⁹⁴ Samal al-Agha, ‘Female Judges in Saudi Arabia, Hope Versus Reality’ (2021) 37(3) *Arab Law Quarterly* 288.

⁶⁹⁵ Nesheiwatt & Al-Khawasneh (n 690).

⁶⁹⁶ al-Agha (n 694).

⁶⁹⁷ Nesheiwatt & Al-Khawasneh (n 690).

⁶⁹⁸ Faisal M Al-Fadhel, ‘Respect for Party Autonomy Under Current Saudi Arbitration Law’ (2009) 23 *Arab Law Quarterly* 31.

arbitrators.⁶⁹⁹ As such, it could be argued that the prohibitive interpretations that are used to limit the participation of women as arbitrators could be attributed to the interpretation of the rulings by the Hanbali school. In the same line, it could consequently be argued that the weight attached by jurists to the prohibition of women acting as arbitrators finds its justifications not only from the lack of gender descriptive language under article 14 of the Saudi Arbitration Law 2012 but rather, the from the historical interpretations of Sharia by jurists which in turn has had significant, if not greater influence.

The 1983 Saudi Arbitration Law had no provisions that dealt with the application of substantive foreign law to an arbitration dispute. The Saudi Arbitration Law 2012 sought to correct this position as article 38 allows parties to apply substantive foreign law to a given dispute. However, there is an exception under article 38 that requires that in the application of substantive foreign law to a dispute, such an application should not contravene Sharia principles.⁷⁰⁰ Further, whilst the Saudi Arbitration Law 1983 made no provision for parties to apply institutional procedural rules to the arbitration, the new arbitration law permits parties to agree to apply institutional procedural rules. However, this is on the basis that the application of these procedural rules does not contravene Sharia principles.

In emphasizing that the new arbitration law cannot be in contravention of Sharia, Cyril Chern is of the view that, despite the stipulations of article 14 of the Saudi Arbitration Law 2012, ‘it should also be taken into consideration that Saudi Arbitration Law does not allow non-Muslims to act as arbitrators in domestic arbitrations or even international ones. According to Chern, whilst article 14 does not contain any prohibitive language that would prohibit a woman from acting as an arbitrator, or require an arbitrator to be a Muslim, the application of these statutory requirements do not hold any water on the basis that they contravene Sharia principles. Whilst there is no express hadith nor Quranic verse that would limit the participation of women as arbitrators, it is probable that scholars such as Chern adopt restrictive and religiously

⁶⁹⁹ *ibid.*

⁷⁰⁰ *ibid.*

conservative approaches by relying on the wide interpretation of hadith by Muslim jurists to limit women participation in arbitration.’⁷⁰¹

Despite the significant changes the Saudi Arbitration Law 2012 has made in comparison to the 1983 Saudi Arbitration Law and whilst paying regard that SAL 1983 is no longer in operation. In this context, Nesheiwatt and Al-Khawasneh argue that, ‘even though the issue of finality of arbitration has been enhanced, yet not fully settled, the parties intending to enforce an arbitral award in Saudi Arabia would be well advised to select arbitrators who are well-versed in the principles of the Sharia as normally applied in Saudi Arabia, even if the parties choose to exercise their right to apply a non-Saudi law to the dispute.’⁷⁰²

5.5.3. Appointment of First Female Arbitrator in KSA (2016)

At the outset, it is notable that Saudi Arabia has in the recent past, taken considerable steps to further women rights in the country. Saudi Arabia’s ratification of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) in 2001, the admission of women to law schools in 2006 as well the adoption of the Saudi Arbitration Law 2012 are instances of the notable steps the country has taken. The World Bank’s Report named *Women Business and the Law* ranks Saudi Arabia as the top performer amongst Gulf Cooperation Countries (GCC) with regards to progress made in advancing gender equality.⁷⁰³ However, despite these progressive steps taken, gender diversification has hardly been seen in the appointment of arbitrators as well as Judges.

However, on 10th May 2016, The Saudi Administrative Court of Appeal in Damman for the first time in the history of Saudi Arabia, approved the appointment Ms. Shaima Aljubran as the first female arbitrator in Saudi Arabia.⁷⁰⁴ The arbitral dispute was of a commercial nature involving Sewak Co. Ltd as the plaintiff and Beijing Co. Ltd as the defendant.⁷⁰⁵ The plaintiff asked the Saudi Administrative Court of Appeal to order

⁷⁰¹ Almulhim (n 672).

⁷⁰² Nesheiwatt & Al-Khawasneh (n 690).

⁷⁰³ al-Agha (n 694).

⁷⁰⁴ Almulhim (n 672).

⁷⁰⁵ Appeal Case No. 3022/Q [2014].

the defendant to commence arbitration proceedings. by dint of Article 15(2) of the Saudi Arbitration Law (2012). This provision provides that,

if the parties to the arbitration do not agree on the procedures of choosing the arbitrators, or one of the parties violated them, or the appointed arbitrators do not agree on some matter where agreement is required, or if the other fails to perform what is entrusted to him in this regard, the competent court undertakes- at the request of whom is concerned about acceleration- to do the procedure, or the required work, unless it is provided in the agreement for how to complete this procedure or work.⁷⁰⁶

In relying on the above provision, the Court of Appeal in Dammam accepted the suit and fixed a hearing date between the two parties for the appointment of arbitrators by each party. The respondent then appointed Ms. Shaima Aljubran as its arbitrator whilst the Claimant its respective arbitrator. However, the two party appointed arbitrators could not agree on the appointment of the presiding arbitrator.⁷⁰⁷ As such, the court intervened to appoint the Chairman of the tribunal by dint of article 15(2) of the Saudi Arbitration Law (2012) and subsequently, the court confirmed and approved the formation of the arbitral tribunal as it was constituted. Whilst the appointment of Ms. Shaima Aljubran as a female arbitrator was not an issue of determination before the Court of Appeal in Dammam, the court was presumed to implicitly accept her appointment as a female arbitrator by approving the formation of the arbitral tribunal.

Further, article 15(4) of the Saudi Arbitration Law 2012 provides that a decision issued by a designated court over the appointment of an arbitrator as provided under Article 15(1) and 15(2) is considered as final and cannot be appealed.⁷⁰⁸ Further, given that Saudi Arabia does not conform to the judicial precedent present in common law regimes, the decision of the Court of Appeal in Dammam is not binding on other courts and as such, it is probable that the court's reasoning will be followed in subsequent cases. To this end, scholars such as Siraj Bargawi point out that in Saudi Arabia, 'the philosophy of judicial activism Itjihad is present, pursuant to which judges have the

⁷⁰⁶ The Saudi Arbitration Law Royal Decree No M/34 (Saudi Arabia) article 15(2)

⁷⁰⁷ Almulhim (n 672).

⁷⁰⁸ *ibid.*

freedom to implement their orientation under Sharia and then provide interpretation as to the verdict.’⁷⁰⁹

As such, it remains to be seen whether in the exercise of judicial activism Saudi Arabian judges enjoy, would result in Sharia application that promotes the appointment of women as arbitrators. It is probable that where the enforcement of an award is issued in the arbitration that involved Ms. Aljubran as an arbitrator, a judge might consider the process to be a violation of public policy considerations. Siraj Bargawi cautiously lauds the decision of the Court of Appeal in Dammam as such a decision could possibly be undone during enforcement stages or during the stages of challenging the validity of an arbitral award by dint of article 50 of the Saudi Arbitration Law (2012). He states that, ‘if one of the judges in the Enforcement Court is Conservative and follows the absolute prohibition ideology, the losing party may appeal solely based on the fact that one of the arbitrators was a woman. In that case, the judge could refuse to enforce the award, because one of the arbitrators is a woman.’⁷¹⁰ Such a situation might run contrary to the developments Saudi Arabia has made to improve its legislative, social, political and economic framework. Enforcement of arbitral awards is a critical attribute in which an arbitration derives its legitimacy as a proper judicial recourse.

Despite the wording of the Saudi Arbitration Law (2012) and its neutrality, some legal scholars continue to assume that women should be prohibited from becoming arbitrators and that the awards provided by tribunals comprising of female arbitrators should not be enforced and be subject to annulment⁷¹¹. A similar argument is made by Abdulrahman Tahya Baamir, made a similar argument who emphasised the Sharia law to argue that women are prohibited from holding the position as a judge or an arbitrator and therefore, the issue of under-representation of female arbitrators in Saudi Arabia should not even be a matter of discussion⁷¹²

⁷⁰⁹ Siraj Bargawi, ‘Obstacles Making the Saudi Arbitration System an Ineffective ADR Method’ (LLM thesis, Indiana University Robert H McKinney School of Law 2016).

⁷¹⁰ *ibid* 34 para 2.

⁷¹¹ Jalal El Ahdab, and Ruth Stackpool–Moore, ‘Arab Arbitration v. International Arbitration? The Case for a Reconciliation’ (2008) 25(2) *Journal of International Law* 275.

⁷¹² Baamir (n 616).

5.5.4. Enforcement of Foreign Arbitral Awards in Saudi Arabia

An understanding of Saudi Arabia's background with regards to the enforcement of foreign arbitral awards offers helpful insight as to the history and state of enforcement of arbitral awards in the Kingdom. For instance, discussions on the role and power that the *Board of Grievances* wielded by being able to re-try an arbitral award where it contravened Sharia principles; points to how the enforcement process faced significant challenges. As such, an evaluation of the practice, attitude and philosophy of the enforcement courts is vital in anticipating how arbitration awards which have women participating as arbitrators can be treated. Whilst Saudi Arabia might face the risk of an arbitration award being challenged by an enforcement court should it have a woman participating as an arbitrator, internationally, arbitral institutions have recently been witnessing an increase of gender diversity in arbitral tribunals.⁷¹³

5.5.4.1. Background

In 1994, Saudi Arabia became a signatory to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention). Whilst the New York was historically instrumental in shaping the relationship between countries in the enforcement of arbitral awards, it is notable that in 1983, Saudi Arabia had already ratified the Riyadh Agreement for Judicial Cooperation (Riyadh Convention). Being a convention amongst several Arab States, the Riyadh Convention sought to further judicial cooperation amongst Arab States. This judicial cooperation extended to the recognition and execution of foreign judgments and arbitral awards amongst these Arab States.⁷¹⁴

⁷¹³ International Council for Commercial Arbitration, 'Report of the Cross-Institutional Task Force on Gender Diversity in Arbitral Appointments and Proceedings 2022. Update' (ICCA Reports No 8, 2022) <https://cdn.arbitration-icca.org/s3fs-public/document/media_document/ICCA-Reports-no-8-Gender-Diversity-2022-update.pdf> accessed 31 May 2023.

⁷¹⁴ STA Law Firm, 'United Arab Emirates: Enforcement of Arbitral Awards in Saudi Arabia' (*Mondaq*, 2020) <<https://www.mondaq.com/arbitration-dispute-resolution/891538/enforcement-of-arbitral-awards-in-saudi-arabia>> accessed 4 October 2021.

Whilst Saudi Arabia was party to these two conventions, the enforcement process previously faced significant challenge in light of the fact that there was a *Board of Grievances* that had the authority of reviewing the merits of awards issued. The practice was that a party intending to enforce an arbitral award in Saudi Arabia was required to apply to the *Board of Grievances* for review of the award to ensure that the award was in line with Sharia. The *Board of Grievances* had the responsibility of enforcing judgments that did not contravene Sharia and in the event that they were contrary to Sharia, the *Board of Grievances* had the authority to carry out re-trials of the arbitration award.⁷¹⁵

Further, article 15(4) of the Saudi Arbitration Law 2012 provides that a decision issued by a designated court over the appointment of an arbitrator as provided under Article 15(1) and 15(2) is considered as final and cannot be appealed.⁷¹⁶ Further, given that Saudi Arabia does not conform to the judicial precedent present in common law regimes, the decision of the Court of Appeal in Dammam is not binding on other courts and as such, it is probable that the court's reasoning will be followed in subsequent cases. To this end, scholars such as Siraj Bargawi point out that in Saudi Arabia, 'the philosophy of judicial activism Itjihad is present, pursuant to which judges have the freedom to implement their orientation under Shari'a and then provide interpretation as to the verdict.'⁷¹⁷

As such, it remains to be seen whether in the exercise of judicial activism Saudi Arabian judges enjoy, would result in Sharia application that promotes the appointment of women as arbitrators. It is probable that where the enforcement of an award is issued in the arbitration that involved Ms. Aljubran as an arbitrator, a judge might consider the process to be a violation of public policy considerations. Siraj Bargawi cautiously lauds the decision of the Court of Appeal in Dammam as such a decision could possibly be undone during enforcement stages or during the stages of challenging the validity of an arbitral award by dint of article 50 of the Saudi Arbitration Law (2012). He states that, 'if one of the judges in the Enforcement Court is Conservative and follows the absolute prohibition ideology, the losing party may appeal solely based on the fact that one of the arbitrators was a woman. In that case,

⁷¹⁵ *ibid.*

⁷¹⁶ *ibid.*

⁷¹⁷ Bargawi (n 709).

the judge could refuse to enforce the award, because one of the arbitrators is a woman.’⁷¹⁸ Such a situation might run contrary to the developments Saudi Arabia has made to improve its legislative, social, political and economic framework. Enforcement of arbitral awards is a critical attribute in which an arbitration derives its legitimacy as a proper judicial recourse.

Despite the wording of the Saudi Arbitration Law (2012) and its neutrality, some legal scholars continue to assume that women should be prohibited from becoming arbitrators and that the awards provided by tribunals comprising of female arbitrators should not be enforced and be subject to annulment⁷¹⁹. A similar argument is made by Abdulrahman Tahya Baamir, made a similar argument who emphasised the Sharia law to argue that women are prohibited from holding the position as a judge or an arbitrator and therefore, the issue of under-representation of female arbitrators in Saudi Arabia should not even be a matter of discussion⁷²⁰

5.5.4.2. The Adoption of the Enforcement Law (2013) and its Effect on the Participation of Women as Arbitrators in Saudi Arabia

The Saudi Enforcement Law came into effect in 2013 following the enactment of the Saudi Arbitration Law (2012). Established by Royal Decree No. M/53, the Enforcement Law (2013) essentially replaced the provisions of the 1989 Rules of Civil Procedure that were used before the *Board of Grievances*. The Enforcement Law (2013) applies to both domestic and international arbitration awards.⁷²¹

Prior to the enactment of the Enforcement Law, awards did not require enforcement by the court on the basis that the Hanbali school of thought considered that an award was already enforceable as it has the characteristics of a judgment of the court. The intervention of a judge was only sought when a party to the arbitration was not willing to enforce an arbitral award that had been issued.⁷²² However, despite this position held by the Hanbali school, parties usually brought awards before the *Board of*

⁷¹⁸ *ibid* 34 para 2.

⁷¹⁹ El Ahdab and Stackpool–Moore (n 711).

⁷²⁰ Baamir (n 616).

⁷²¹ *ibid*.

⁷²² *ibid*.

Grievances for the enforcement of foreign and domestic arbitral awards. The *Board of Grievances* was criticized for having lengthy and rigid enforcement procedures and this could be attributed to the fact that its sole mandate was not the enforcement of awards but it also had other functions such as the resolution of commercial issues facing Saudi courts and this resulted in repetitive delays.⁷²³ Notably, the *Board of Grievances* had the authority to review the merits of an award to ensure that it complied with Sharia and there was a possibility that an award could not be recognized or enforced if an arbitrator was not compliant with the principles of Sharia.⁷²⁴

The case of *Jawadel Intl v Emaar Property* is particularly significant in that it was widely criticized as the *Board of Grievances* re-examined the merits of the award issued and dismissed the award on the basis that it was not Sharia compliant.⁷²⁵ The facts of the case are that Jawadel International commenced arbitration proceedings against Emaar Property in 2006 before a three- member arbitral tribunal with the seat of the arbitration being in Saudi Arabia. Jawadel International sought damages amounting to US\$1.2 billion on the grounds that Emaar had breached the terms of a joint venture agreement entered into by the two parties by partnering with a third party. The arbitral tribunal dismissed the claim by Jawadel International and the company was asked the legal costs of Emaar Property. When the award was submitted to the *Board of Grievances* for enforcement, the merits of the case were re-examined and the Board not only annulled the award but also ordered Emaar Property to pay more than US\$ 250 million in damages to Jawadel.⁷²⁶ This case not only threatened the sanctity of the arbitration process but it also went ahead to substitute an award issued with its own award on damages- effectively negating the essence of the arbitration process in the name of aligning the award to Sharia principles.

It is against this backdrop that the Enforcement Law (2013) was adopted to regulate the enforcement process as well as guard against the excesses of the now defunct *Board of Grievances*. With regards to public policy, article 2 of the Enforcement Law

⁷²³ STA Law Firm (n 714).

⁷²⁴ Jones Day, 'The New Enforcement Law of Saudi Arabia: An Additional Step toward a Harmonized Arbitration Regime' (Jones day, 2013) <<https://www.jonesday.com/en/insights/2013/09/the-new-enforcement-law-of-saudi-arabia-an-additional-step-toward-a-harmonized-arbitration-regime>> accessed 24 June 2023.

⁷²⁵ *ibid*.

⁷²⁶ STA Law Firm (n 714).

(2013) requires an Enforcement Judge to abide by Sharia principles in enforcement proceedings unless existing law states otherwise.⁷²⁷ Further, article 11(v) provides that an Enforcement Judge can enforce a foreign arbitral award if the party that is seeking the enforcement ensures that the award does not in itself, contain aspects that are contradictory to Saudi public policy.⁷²⁸

These provisions as such, point to a continued reliance and deference to Sharia and it is probable that the participation of women as arbitrators in Saudi Arabia will run contrary to Sharia and as such, an award may fail to be enforced as it does not abide by the stipulations of article 2 and article 11(v) of the Enforcement Law. This research conforms to the argument made by Osama Rabah that contends that the source of public policy in Saudi Arabia should not be restricted exclusively to Sharia as other authorities such as the King is also a source of public policy as he has the power to issue royal orders and decrees. As such, an interpretation of public policy by an Enforcement Judge would appreciate both prevailing legislation such as the Saudi Arbitration Law (2012) as well relevant Sharia principles to ensure that a manifest injustice does not occur by prohibiting women to participate as arbitrators under Sharia yet there is lack of gender prohibitive stipulations at article 14.⁷²⁹

5.5.4.3. The Enforcement of Arbitral Awards in Saudi Arabia under the New York Convention

At the outset, it is notable that Article V of the New York Convention lays down the grounds for the refusal of an arbitration award. These grounds have been considered to be the exclusive source under which a court may deny the recognition or the enforcement of an award and as such, this has been considered to mean that the interpretation of the grounds under article V should be interpreted restrictively within the objectives of the convention.⁷³⁰ In listing these grounds, article V provides that the recognition and enforcement of an award may be refused if a party provides proof that:

⁷²⁷ Jones Day (n 724).

⁷²⁸ Enforcement Law 2013 (Saudi Arabia).

⁷²⁹ Saudi Arbitration Law 2012 (Saudi Arabia)

⁷³⁰ Rabah (n 636) 32 para 2.

- (a) Parties to the arbitration agreement were under some incapacity according to the applicable law or according to the law under which the award was made;
- (b) Proper notice over the appointment of the arbitrator or the arbitration proceedings was not given to the party against whom an arbitral award has been issued or in instances where such a party was unable to present its case;
- (c) the award in itself, deals with issues that do not fall within the terms of the submission to the arbitration or in instances where the arbitral award contains decisions that are beyond the scope of the arbitration agreement. However, this is on the condition that where it possible to separate sections of the award that are within the scope of the arbitration agreement, these uncontested sections will be capable of enforcement;
- (d) the composition of the arbitral tribunal or the arbitral procedure falls short of the arbitration agreement or in instances where an arbitration agreement does not conform to the domestic law of the country where the agreement took place; and
- (e) an award has not yet become binding on the parties to the arbitration agreement or in instances where the award has been set aside by a competent authority of the country in which the award was made under its domestic law;⁷³¹

There are two provisions under article V that could be understood as relevant to the participation of women as arbitrators in Saudi Arabia. Firstly, Article V(d) of the New York Convention provides a leeway for an aggrieved party to challenge on the grounds that the composition of the arbitral tribunal was not in accordance with Saudi law, specifically, Sharia. Secondly, article V(2)(b) provides that, the ‘recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that: The recognition or enforcement of the award would be contrary to the public policy of that country.’⁷³² Given that the principles of Sharia under the Sunna have largely been understood to prohibit the participation of women in positions of leadership, it is possible that the participation of women as arbitrators may be challenged on public policy grounds by virtue of article V(2)(b) of the New York Convention.

⁷³¹ New York Convention 1958

⁷³² New York Convention 1958

Authors such as Osama Abdullatif Rabah that the use of the wording ‘may be refused’ under article V indicates that Judges have discretionary powers in considering the grounds for the refusal of arbitral awards. Rabah argues that by virtue of this discretion, ‘courts should interpret the grounds of refusal restrictively.’⁷³³ The rationale behind a restrictive interpretation of article V could be understood to be in line with the principle of autonomy that is central in the arbitration process. The role of a court in considering challenges to an arbitral award have been regarded by scholars to relate to obvious cases where fundamental mistakes exist and nothing more as enforcement proceedings that have judges contemplating points of law directly negate the autonomy of an arbitration process.

The restrictive interpretation that judges ought to employ is particularly important given that a broad interpretation of Sharia would effectively limit the appointment of women as arbitrators by virtue of articles V(d) and V(2)(b) of the New York Convention. As a result of the danger posed by a broad interpretation of these two articles, scholars such as Kristin Roy argue that article V(2)(b) should be modified as it would allow countries to refuse the enforcement of non-domestic arbitral awards. She states that, ‘the public policy defence set forth in Article V(2)(b) of the New York Convention thus permits the circumvention of the Convention’s objective: the uniform enforcement of foreign arbitral awards.’⁷³⁴ As such, it would be a departure of the objective of uniformity in enforcement as envisioned by the New York Convention if by operation of articles V(d) and V(2)(b).

5.5.4.4. Public Policy Considerations in the Enforcement of Arbitral Awards in Saudi Arabia and its Effect on the Participation of Women as Arbitrators

With regards to enforcement of arbitral awards, public policy considerations feature predominantly in Saudi Arabian domestic legislation as well as in international instruments such as the New York Convention which Saudi Arabia has ratified. Article 11(v) of the Saudi Arabian Enforcement Law (2013) provides that an Enforcement Judge may enforce a foreign arbitral award if the party that is seeking to enforce the

⁷³³ Rabah (n 636) 33, para 2.

⁷³⁴ Roy (n 661).

award ensures that the award does not contradict Saudi public policy.⁷³⁵ Further, article 50(2) of the Saudi Arbitration Law (2012) requires that an arbitral award (foreign or domestic) should not be in contravention of Sharia.⁷³⁶ A competent court that is considering nullification of an arbitral award is required under article 50 (2), on its own initiative, to nullify the award if it is in violation of Sharia or public policy grounds in Saudi Arabia.⁷³⁷

These two provisions read together with article V(2)(b) of the New York Convention point to the significant place public policy occupies in the enforcement of arbitral awards. However, it has been considered by scholars that the doctrine of public policy in itself, presents unclear characteristics. Authors such as Farshad Ghodoosi contend that, ‘the unruliness of public policy relates to its exogenous nature vis-à-vis the logic of legal reasoning. Simply put, the constitutive narrative of public policy departs from the structure of legal reasoning.’⁷³⁸ This understanding could be applied to Saudi Arabia as an application or consideration of public policy departs from legal reasoning and adopts an interpretation under Sharia, as this is the foundation of the Saudi Arabian legal system.

Whilst the above argument by Ghodoosi speak to the characteristics of public policy, the definition of public policy has been divergent amongst scholars and as such, it is not a settled position. Whilst on one hand, scholars such as James Lester describe public policy as a ‘projected program of goals, values and practice,’⁷³⁹ on the other hand, Anderson defines it as ‘the purposive course of action that governments might apply in order to deal with matters of concern.’⁷⁴⁰ Whilst there is lack of an exclusive definition of public policy, the definition applied by Justice Benjamin Cardozo in handling cases at the United States Supreme Court has been considered as the most comprehensive definition of public policy. Justice Cardozo definition of has described public policy as ‘the essence of law, and part of the welfare of society, which

⁷³⁵ Saudi Enforcement Law 2013 (Saudi Arabia).

⁷³⁶ Saudi Arbitration Law 2012 (Saudi Arabia).

⁷³⁷ *ibid.*

⁷³⁸ Farshad Ghodoosi, ‘The Concept of Public Policy in Law: Revisiting the Role of the Public Policy Doctrine in the Enforcement of Private Legal Arrangements’ (2016) 94(3) *Nebraska Law Review* 686 <digitalcommons.unl.edu/cgi/viewcontent.cgi?article=2833&context=nlr> accessed 5 September 2021.

⁷³⁹ Rabah (n 636) 167, para 2.

⁷⁴⁰ *ibid.*

encourages judges to decide with the community's interest in mind.⁷⁴¹ As such, it is apparent that Justice Cardozo's conception of public policy is that he regards it to have a role in maintaining justice in society as well as protecting interests of the community.

The nature of public policy has been considered by authors such as Osama Rabah to be a fluid sociological norm that it is created by a body politic/government according to the culture, religion, morals, interests and ethics of its citizens.⁷⁴² Given that the interests, morals, cultural considerations are dynamic in nature, public policy in itself, mirrors this dynamism. In *Renusagar Power Co. v General Electric Co.*, the court considered that the difficulty associated with defining public policy arises from the fact that standards of morality and justice are understood and appreciated differently from community to community as well as on a case-to-case basis.⁷⁴³

Whilst parties to an arbitration agreement can restrict the participation of a court in their adjudicating over a dispute by referring arbitration mechanisms, public policy allows courts to invalidate arbitral awards or refuse to recognize or enforce an arbitral award if the award in question is contrary to public policy.

Public policy in Saudi Arabia is comparable to the French and English legal system in the sense that both France and England have not provided an exclusive definition of public policy and this role has been left to the discretion of the courts.⁷⁴⁴

5.5.4.5. The Practical Challenges Present in the Application of Public Policy in Saudi Arabia

The ratification of the New York Convention in 1994 followed by the adoption of the Saudi Arbitration Law in 2012 and the enactment of the new Enforcement Law in 2013 point to a deliberate national push to make the country a more friendly environment for the resolution of international arbitration disputes and consequently, attract foreign direct investments (FDI). These positive developments in the Saudi Arabian legal

⁷⁴¹ *ibid* 168, para 1.

⁷⁴² *ibid*.

⁷⁴³ *Renusagar Power Co. Ltd. (India) v. General Electric Co. (USA)* XXV Y.B. COM. ARB. 714 (2000) XX Y.B. COM

⁷⁴⁴ Rabah (n 636).

framework are mindful of the conservative nature of the Saudi legal system given the central place Sharia occupies as a source of law. This reality has been mirrored by both the Saudi Arbitration Law (2012)⁷⁴⁵ as well as the Enforcement Law (2013)⁷⁴⁶ which both require compliance of Sharia before an award is enforced.

One of the key challenges facing the application of public policy in Saudi Arabia is that there is lack of judicial publication of cases, and this becomes a challenge in attempting to clarify the principles of public policy in the country. Authors such as Dr. Ashabib argues that the benefit of judicial publication is not available in Saudi Arabia and as a result, there is lack of clarity as what exactly the principles of public policy are.⁷⁴⁷ Osama Rabah argues that the cases that have been published by the Saudi Arabian Ministry of Justice are not sufficient to provide a clarification of the principles of public policy in the country and further, that no published case has clarified the relationship between Sharia and public policy.⁷⁴⁸ Saudi courts have been pointed out to not use the term ‘public policy’ in cases rather, they have been seen to adopt terms such as ‘against Islamic rules’ or ‘sharia infringement’ in making reference to issues affecting or relating to public policy.⁷⁴⁹

This essentially means that the interpretation of public policy in Saudi Arabia is to a great extent, done within the realm of Sharia and this is further reinforced by arbitration legislation that recognize and defer to the principles of Sharia as a public policy ground. As a result, the practical challenge that arises here is that whilst appreciating the significant influence Sharia has on public policy, Sharia in itself, is a religion and not a codified legal system. On one hand, it could be argued that the application of public policy grounds in Saudi Arabia is effectively the application of Islamic rules and ethics to parties, including parties that are non-Muslim.⁷⁵⁰ On the other hand, authors such as Osama Rabah argue that ‘in the modern era countries cannot only be ruled by such texts with various explanations and understandings such as Shari’a law without taking current Saudi legal structures into consideration.’⁷⁵¹

⁷⁴⁵ Saudi Arbitration Law 2012 (Saudi Arabia) article 45(ii).

⁷⁴⁶ Saudi Enforcement Law 2013 (Saudi Arabia) article 11(v).

⁷⁴⁷ Rabah (n 636).

⁷⁴⁸ *ibid.*

⁷⁴⁹ *ibid.*

⁷⁵⁰ *ibid.*

⁷⁵¹ *ibid.*

This is a significant argument particularly in relation to the participation of women as arbitrators. Whilst there exists hadith under the Sunna that have been interpreted by Muslim jurists to be prohibit the appointment and participation of women as arbitrators, Rabah's argument contends that public policy considerations such as these that wholly derive their authority and relevance from Shari'a cannot be applied without taking into account legal considerations contained in the relevant statutes. This would essentially require that the application or consideration of hadith that prohibit the appointment of women as leaders to be reconciled with statutory provisions such as article 14 of the Saudi Arbitration Law (2012) that provides no gender prohibitive stipulations in laying out the requirements that an arbitrator ought to have.

Further, a reading of article 28 of the Saudi Basic Law of Governance provides that, 'the State shall facilitate job opportunities for every able person and enact laws to protect the worker and the employer.'⁷⁵² In light of this article as read with article 14 of the Saudi Arbitration Law (2012), it is apparent that there arises an implied constitutional obligation for Saudi Arabia to facilitate and protect the appointment of women as arbitrators.

The operation of the practical challenges such as: lack of clarity of the principles of public policy in Saudi Arabia, lack of sufficient judicial publication to point to the principles of public policy together with reliance on the Sharia as a religious instrument despite the existence of relevant legislation has created a situation that might allow for the prohibition of women as arbitrators on wide interpretation of Sharia grounds. The prohibition of women to act as arbitrators is reinforced by authors such as Abdulrahman Yahya Baamir who argues that 'Shari'a requires an arbitrator to be a man; the appointment of a woman as a judge/arbitrator is considered null and void even if she gives a correct judgment.'⁷⁵³ Baamir contends that the appointment of women as arbitrators in Saudi Arabia largely concerns social nature and is not necessarily relevant to legal and religious issues as argued by authors such as Osama Rabah. According to Baamir, the issue of participation of women as arbitrators is a social in nature as it concerns common cultures and traditions that form the sources of public policy. Baamir remarks that, 'customs and practices are sources of Islamic law

⁷⁵² al-Agha (n 694).

⁷⁵³ Baamir (n 616) 80, para 4.

just as any fatwa or ijma' should fit within the overall social order.'⁷⁵⁴ As such, it is apparent from this argument that the prohibition of the appointment of women as arbitrators is not in line with the social order of Islamic customs and practices and hence, it is probable that enforcement of an arbitral award or challenges to its validity can be based upon the appointment of women as arbitrators on the premise that it does not conform to Saudi customs and practices.

However, Rabah advances contrary views as he argues that an analysis of the Saudi Arbitration Law (2012) points to an intentional significant departure of from the applicable public policy grounds present in the 1983 Saudi Arbitration Law. Rabah argues that,

In order to appoint an arbitrator, the new Act does not require a specific gender, religion or nationality. The parties are free to appoint arbitrators from any nationality and any language. It is provided that the arbitrators do not have to come from an Islamic background if he or she has a legal background or bachelor's degree in law as mentioned previously. Those requirements constitute an improvement in comparison with the arbitrator requirements set out in article 4 of the 1983 Act, which contained points of contention and uncertainty, with regard to the experience and good reputation.⁷⁵⁵

In light of the above excerpt, Rabah contends that it is clear that Saudi Arabian legislators have significantly shifted their interpretation of public policy between the Saudi Arbitration Law 1983 and the Saudi Arbitration Law 2012. Further, the ratification of international instruments such as the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) by Saudi Arabia point to a national willingness by the country to promote the participation of women in the political, social and economic spheres.

For example, in the arbitration case No. Q/1/26381436 heard in 2014, Saline Water Conservation Corporation entered into a supply contract with a construction company. When a dispute arose amongst the parties, the parties agreed to resolve their dispute through arbitration with the seat of the arbitration being in Saudi Arabia. An award

⁷⁵⁴ *ibid.*

⁷⁵⁵ Rabah (n 636).

was then issued in favour of Saline Water Conservation Corporation, and it required the construction to pay US\$ 15 million in damages together with a 5% interest. The court upheld the award albeit without the payment of the 5% interest.⁷⁵⁶ This case is considered as a departure in the courts public policy considerations as similar cases were dismissed during the dispensation of the 1983 Saudi Arbitration Law where the merits of an award could be reviewed by the *Board of Grievances* as was the case in *Jadawel Intl v Emaar Property*.⁷⁵⁷ By separating issues that relate to merit and dealing with the interest elements of the award, this can be viewed as a significantly progressive departure from the intrusive practices by courts under the 1983 Saudi Arbitration Law.

5.6. Perspectives to be Adopted by Saudi Arabia from other Islamic Countries

The analysis of women in Islamic countries within judiciary was undertaken in this chapter, with a focus on three Islamic countries namely Indonesia, Egypt and Malaysia. The reason for selecting these countries being that they are Muslim majority countries and therefore provide an opportunity to understand and evaluate the evolution of selection of female judges as well as the extent to which they are represented in the judiciary of these countries. Additionally, the three countries (Indonesia, Egypt and Malaysia) help to put the application of Madhab to different degrees into context. This helps to understand the differences in implementation of sharia laws in different Islamic countries.

A consistent suggestion that has emerged from the analysis regarding Indonesia, Egypt and Malaysia is that females across all the three countries have experienced challenges, when it comes to their appointment as judges and arbitrators. However, challenges have been greater for women in Egypt compared to Malaysia and Indonesia, as the application of Sharia law in Malaysia and Indonesia is a result of a more relax and moderate interpretation of Islamic laws. The progress made in each of the three countries with regards to the increased representation of females in judiciary is attributed to the role of governments and the international conventions. For instance,

⁷⁵⁶ Rabah (n 636).

⁷⁵⁷ Jones Day (n 724).

the proactive efforts of the Indonesian government have increased the empowerment and consequently the participation of females in the judiciary, as 26.4% of all the judges of the trial courts and 17.5% of all the appellate judges were female in 2015⁷⁵⁸.

The case of Egypt is interesting because as with Saudi Arabia, Hanbali school of thought is prevalent in Egypt too. Even in the contemporary 21st century environment, the Inferior Intellect Argument has been presented in Egypt to justify the exclusion of women from leadership positions in the judiciary, whereby it has been argued that women do not possess the same level of intellect as their male counterparts. Gender inequality within judiciary in Egypt continues, as the government allows Egyptian female judges and arbitrators to preside over the cases involving family disputes, but the female judges are not permitted to judge in the administrative and criminal courts. This distinction between judges based on their gender has reinforced the gender stereotyping pertaining to the capabilities and competency of the females, weakening their judicial stature and the prospects of their progression and career development within judiciary⁷⁵⁹.

In Egypt, the Arbitral Law (1994) explicitly declared that the arbitrators are not to be of particular gender or nationality unless the parties agree upon the contrary.⁷⁶⁰ However from SAL point of view, there are many disagreements on the supporting explanations for the opinions regarding the gender of arbitrators. For Egypt, the lawmaker was final in the declarative statement and the matter is not subject to debates. Therefore, the country's stance on the issue will be known once the award is announced by the arbitrator and recognised and enforced which will finally acknowledge the women's authenticity as arbitrators. Moreover, SAL also need to adopt more clear language in regard to the qualifications of the arbitrators. Clarity is critical in promoting transparency in the judicial processes and reaffirming the country's commitment to regional instruments such as CEDAW.⁷⁶¹ Egypt adopted a clear language that leaves no room for speculation making it easy for men and women

⁷⁵⁸ Nadia Sonneveld, *Women Judges in the Muslim World* (Brill 2017) 51-98.

⁷⁵⁹ Rania Maktabi, 'Female Citizenship in the Middle East: Comparing family law reform in Morocco, Egypt, Syria and Lebanon' *Middle East Law and Governance* (Brill 2013) 280-307.

⁷⁶⁰ Egyptian Arbitration Law 1994 (Egypt) article 16 clause 2.

⁷⁶¹ UNCEDAW, CEDAW General Recommendation No. 23: Political and Public Life [1997] A/52/38 <www.refworld.org/docid/453882a622.html> accessed 17 June 2023.

to equally vie for appointment in tribunals whereas the ambiguity in the gender-neutral language in KSA, might leave room for appeals.

Clarity in the arbitration laws is important for the recognition and the enforcement of decisions. In dispute resolutions procedures, parties place trust in the arbitrators to be efficient and just in their hearing. However, breaking the trust may occur intentionally or unintentionally with the consequences of this breach being unfair or unenforceable award which fails to restore balance of rights and obligations between the parties.⁷⁶² Clarity in the laws is important to constrain their extent of the jurisdiction given to the party's agreements and the procedural rules that ensure that arbitrators do not exceed the powers given to them. Clarity also ensures that a valid and enforceable award is reached based on the applicable rules.

Clarity in the arbitration laws is needed to enhance certainty in the arbitral proceedings and awards. A precise description on instances where the judiciary can be involved should be provided as well as a precise description on the arbitral procedures including the qualification of the tribunal to avoid any misunderstandings and loopholes in the arbitral laws which can be used to challenge the awards limiting the effectiveness of the arbitral procedure as a cost-effective and fast approach to resolving commercial disputes.

Other Islam countries aside from Egypt including Malaysia and Indonesia have made strides in the appointment of females in the judiciary and arbitration. In Indonesia, the Shafi'e jurisprudence acknowledges the vital role of women in the judicial system and differs from the KSA in that Indonesia does not adhere to the wide interpretation of Sharia and hadiths. Therefore, it is important to promote the role of women that can be played in the judicial system. Moreover, the women in these positions have worked exceptionally well and have not demonstrated any lack of intellectual ability or mood swings as their inherent nature as 'emotional beings' makes them take into consideration all aspects of a case. It brings about a new perspective to arbitration and aligns the country's arbitration practices with the international forums.

⁷⁶² Turki Alrajaan, 'The Saudi Arbitration Law 2012 Assessed Against The Core Principles Of Modern International Commercial Arbitration: A Comparative Study With The Model Law And Scots Law' (DPhil thesis, University of Stirling 2017)

Additionally, an important point to note from the analysis of Indonesia, Egypt and Malaysia is the need to exercise a proactive role in increasing the representation of women in the judiciary. Notably, the other three countries analysed in this chapter (Indonesia, Egypt and Malaysia) are distinguishable as they were colonies of European countries in the early to mid-20th century. Therefore, the colonial rule influenced their legal system, which has to an extent might have impacted the degree to which Sharia law in its strict sense is applied in Indonesia, Egypt and Malaysia.

5.7. Conclusion

Given various developments in the legislative, economic and social environment in Saudi Arabia, the appointment of the first female arbitrator in Saudi Arabia demonstrates significant progress and aligns with the trajectory of the aforementioned developments and is therefore was expected. This indicates the initiation of the process of addressing the issue of under-representation of female arbitrators in Saudi Arabia. Another example of the framework that is expected to support gender equality within judiciary in Saudi Arabia is the Saudi Arbitration Law 2012, which offers greater flexibility when it comes to commercial arbitration, as there is an emphasis on establishing the framework that is effective in serving as an alternative dispute resolution mechanism.

The increased investment in education in Saudi Arabia and the resultant development of human capital (of both males and females). Moreover, as the availability of qualified and skilled legal professionals (both men and women) increases, it is likely that further progress would be visible in terms of the appointment of more female arbitrators in Saudi Arabia in the current future.

With regards to women arbitrators, it is evident that the pre-Islamic period did not recognize women in any other role other than wives, daughters or sisters and peace symbols. In SAL 1983, the language used expressly prohibited the appointment of women as arbitrators by using male pronouns in describing the qualifications of arbitrators as opposed to the SAL 2012 which uses neutral language. Consequently, it has been established that the Saudi Arbitration Law is ambiguous on the status of

women in arbitration arising from the different interpretations of different Islamic jurisprudence.

However, a shift has been marked regarding the role of women in arbitration as was evident in the appointment of Ms. Shaima. However, this still marked an ambiguous decision by the court and could be used as a legal loophole in arbitration system as the system was not clear in this point.

CHAPTER SIX: CONCLUSION

The primary research question underlying this study sought to critically discuss the participation of women as arbitrators under Saudi Arabian law. In tackling this research question, this study adopted further secondary research questions in order to substantiate the main research question. Having critically discussed and evaluated the issues arising under the main and secondary research questions, this study has arrived at important conclusions.

6.1. Summary

Firstly, one of the aims of the thesis as well as the secondary questions covered under chapter two was a critical analysis of the role of women in arbitration from an international perspective. The chapter opens with a discussion of the issue of gender inequality across multiple professions internationally before delving into specific focus on the legal profession. The chapter highlights the role of gender inequality and discrimination in leading to the low rates of female judicial appointments and the gender pay gap in the legal profession. Next, the chapter examines the status of gender parity in commercial arbitration and presents arguments in support of the promotion of women in arbitration to the benefit of the field. Finally, the chapter closes by examining initiatives to promote gender equality in arbitration, specifically with the initiation of the CEDAW and the way in has impacted the status of female arbitrators in Saudi Arabia.

The significant role of women in the arbitration field from an international perspective includes crucial contributions across various aspects. The involvement of women in arbitration aligns with the broader objective of promoting gender equality and empowering women. Women's engagement in arbitration breaks barriers and challenges entrenched gender stereotypes, fostering an environment of inclusivity and fairness. Such commitment to inclusivity aligns with leading regulatory systems that adopt a gender-neutral approach when appointing judicial and arbitration experts. Remarkably, the substantial representation of women among Supreme Court Justices in many legal systems highlights women's capability to perform in high-level legal

roles highly. Since women can successfully serve in such positions, it logically follows that they should have the opportunity to compete on equal terms with their male counterparts in the role of arbitrators. This acknowledgement emphasises the value of enabling women to exercise their skills and expertise in the arbitration system.

Women in arbitration lead to a more effective and legitimate arbitration system and more equitable outcomes. On the one hand, the presence of women in arbitration enhances credibility and fosters public confidence. By actively involving women, arbitration demonstrates a commitment to inclusivity and equal opportunities for both genders. On the other hand, women bring distinct perspectives, experiences, and insights to the arbitration process, ensuring a more balanced and comprehensive decision-making approach. Their inclusion promotes the legitimacy and fairness of arbitration proceedings.

In light of the above, this study comes to the conclusion that with respect to the calls and efforts to promote the participation of women as arbitrators in international arbitration, these efforts have to be carefully considered against the principle of party autonomy. This is in the sense that parties to the arbitration, including in-house counsel that represents these parties, enjoy the freedom of choosing an arbitrator of their liking. As such, this research concludes that in exercising this freedom, parties to an arbitration are likely to choose an experienced arbitrator who has a history of issuing rich expertise or jurisprudential background for particular issues/matters. In the same line, this research concludes that ethical considerations to diversify arbitral tribunals will be secondary considerations in instances where parties consider or weigh arbitrators on their ability to offer a party the best chance to succeed.

Moreover, the research tackles the crucial role of women in arbitration from an international perspective to consider whether or not there is a global trend of enabling women arbitrators from which the Saudi judicial system can benefit. Consulting a number of conventions and the status of women arbitrators in several systems the study finds that women are acknowledged as arbitrators to ensure balanced perspectives on all matters, including promotion of women's rights and gender equality, leading to a

more effective and legitimate arbitration system and more equitable outcomes. It is evident that leading regulatory systems are gender neutral when it comes to appointment for judicial and arbitration experts. Looking at Supreme Court Justices in many legal systems reveals significant representation of women. Thus, if women can be Supreme Court Justices, by default, they can and should be allowed to compete with their male counterparts in serving as arbitrators. This consistency across jurisdictions raises a question for the Saudi legal system as to why it should consider adopting the same principle. Indeed, just because it is implemented everywhere does not mean it has to be implemented in Saudi Arabia, but being aware of the issue allows the legal community and public officials to better position the Kingdom on that issue.

Secondly, in further elaborating the participation of women as arbitrators in Saudi Arabia, this study explores the historical context of Saudi Arabia's legislation and judicial framework. Understanding the historical context of Saudi Arabia's legislation and judicial framework is crucial in understanding the origins, foundations and developments of the legal framework that has led to the formation of the legal status of women in the country, including but not limited to their participation in arbitration. Most significantly, such an understanding is necessary to remedy the issue of women's participation in arbitral panels in a way that is appropriate for Saudi Arabia's legislation and judicial framework and is in line with the Kingdom's 2030 Vision. Historically, King Abdul Aziz, there was an intention and willingness to modernize the Kingdom by unifying the legal system through codification of both Shari'a and legislative statutes. The study further concludes that whilst the efforts of King Abdul Aziz to modernize the legal system was successfully opposed by the *ulema* who advocated for the foundation of law upon Shari'a, this situation has resulted in a dichotomy of law in Saudi Arabia. This is on the basis that whilst Shari'a remains to be the authoritative source of law in Saudi Arabia, the existence of legislative statutes with their own methods and systems of dispute resolution, this study concludes that Saudi Arabia's legal framework lacks uniformity. The Saudi judicial system has moved from being completely influenced by Islamic norms, to adopt mundane norms that are not in clear violation of Islamic principles. As part of modernizing the Saudi judicial system it should take into account global best practices to build a robust and reliable legal system. Otherwise, the country may continue to face challenges in attracting foreign investments and talent. Just like every other legal system, change

requires serious will and public support that cannot be achieved if women talent is ignored. As such, understanding the history of the legal system helps policymakers contextualize and adopt the right tools for change. The intention is to build on the achievements of the past, modernize the system to fit modern times.

Thirdly, this research sought to address the legal status of women under Shari'a with an aim of analysing the role that women played from the pre-Islamic era, as well as during the introduction of Islam during the era of Prophet Muhammad. To this end, this research came to the conclusion that the main theological justification prohibiting the participation of women as arbitrators and judges is founded on the hadith of Abu Bakrah. This hadith is directly related to the leadership role played by Aisha during the *Battle of the Camel* as Abu Bakrah recalled the words of Prophet Muhammad after this battle. The hadith narrates how Prophet Muhammad admonished the people of Persia for allowing a woman to rule over them. This study concludes that despite significant criticisms by various scholars as to the validity of this hadith, it enjoys respect across the four schools of jurisprudence owing to the strength of its transmission. However, this study shows that some Muslim jurists opposed to the participation of women to leadership, judicial and arbitration positions have gone ahead to give a wide interpretation to the hadith so as to effectively limit the participation of women in these areas.

The legal status of women within Sharia in accordance with Sharia law implemented in Saudi Arabia varies depending on different interpretations. This is due to the fact that there exists a hadith that could be interpreted for the various party's interests with regards to women's roles in leadership, judicial, and arbitration positions, despite the lack of any express text in the Qur'an, Sunnah, or legislative statutes that prohibits the appointment of women as arbitrators.

A fascinating fact about Shariah is its agility to fit all times when properly interpreted. Progressive jurists adopt a pragmatic approach in interpreting Shariah, giving more importance to what is known as *Maslahah* "common good". The literal interpretation of sacred texts in all belief systems leads to rigidity, subjecting them to being outdated and against common good. The fact that Islamic jurisprudence allows for no fewer than four Islamic schools, is in and of it itself, evidence that differences of opinion is tolerated if not encouraged. Modern times where male and female receive the same training in almost all law schools inside and outside the Kingdom indicates that both

should compete to serve the society and common good. That said, one can argue that it is a matter of choice whether to allow women to be arbitrators; nothing strictly prohibits it in Shariah. Policymakers can adopt what is fit for the society, citing scriptures that are in favour of whatever policy proposed. The same can be done in all walks of life including allowing women to be formal arbitrators.

Fourthly, the study discusses the participation of women as arbitrators in Saudi Arabia. The status of participation of women as arbitrators in Saudi Arabia is considered ambiguous, as the legal issues in SAL 1983 are still not clearly resolved in the current SAL 2012. Indeed, the unclear provisions in the laws may leave room for petitions in case individuals want to question the place of women arbitrators. The SAL 2012 is drafted under the Sharia law and lacks an unequivocal place including women in arbitration. Therefore, interpretation of the law is bound to be different limiting the acceptance of women in arbitration, more so in the recognition and enforcement of the awards.

The state of appointment of women as arbitrators is severely limited due to legal ambiguity, cultural norms, and the wide interpretation of a hadith by Muslim jurists, despite the absence of explicit prohibitions in the Qur'an, Sunnah, or legislative statutes.

However, it is crucial to amend the existing law to clearly allow women to be arbitrators in all areas of law including commercial law. This will enrich the legal system as it suffers from lack of qualified and well-trained legal professionals. This is consistent with the national objectives articulated in 2030 vision where women empowerment is at the heart of all national programs and initiatives. It is expected to receive less resistance as women have been already allowed to be lawyers and legal academics. Although one may argue that women should or can be arbitrators in women-sensitive issues only, such as custody and marital disputes, the Kingdom has made significant progress in allowing women to compete and demonstrate their potential in all areas of law.

Lastly, this study concludes that the primary challenge faced by women arbitrators in Saudi Arabia is not the legal constraints, but it largely arises from the interplay of social, cultural, and religious factors. Therefore, the wide interpretations of some school such as in the Hanbali school, it might have questioned the role of women in public spheres. Women are often confined to specific professions while being excluded

from traditionally male-dominated roles like judicial duties. Thus, the challenges faced by women in arbitration primarily revolve around cultural acceptance, deeply and long shaped by norms, beliefs, and customs regarding their place in the field, as well as the recognition and enforcement of their awards.

The progress made by the Kingdom of Saudi Arabia in promoting women's rights and gender equality positions it uniquely as a leader in the MENA region. Indeed, a World Bank Report acknowledges that since 2017 the Kingdom of Saudi Arabia has progressed rapidly towards gender equality, ranking it the top performer and improver among the Gulf Cooperation Countries (GCC) and second in the Arab world.⁷⁶³ The government has also taken the initiative to ratify the Convention on the Elimination of All Forms of Discrimination Against Women. Women have also been allowed to work as Public Prosecutors in Saudi Arabia from 2018 and the appointment of Saudi Princess Reema Bint Bandar as the Saudi's Ambassador to the United States are indicative of a shift in women taking up more leadership roles in Saudi Arabia. In addition, Saudi Arabia's Vision 2030 dedicates a section to enhancing women's role as a vital part of the country's economic, social, and cultural development, with a specific goal of increasing women's workforce participation from 22% to 30%. The Saudi Arabian Ministry of Justice has also announced in 2019 that women will be permitted to operate as notaries, a profession that was previously only been open to men. Moreover, since the time of the commencement of this research project, the Kingdom of Saudi Arabia has taken a very large step in ensuring gender equality and women's empowerment in the legal sector by further appointing fifty female public prosecutors. The steps taken by the government demonstrate its commitment to gender equality and women's empowerment, reinforcing the likelihood of the research results being taken into account, with a high probability that the findings of this research on the significant role of women in arbitration will be seriously considered.

Against this backdrop, the thesis provides three recommended solutions that could enhance the state of arbitration in general by allowing qualified women to serve as arbitrators. These recommendations will be discussed further with the legal experts in the Kingdom to put forth an optimal solution to the issue. The massive legal reform in

⁷⁶³ Issam Abousleiman, 'Gender in the GCC — the Reform Agenda Continues' (*World Bank*, 3 March 2021) <www.worldbank.org/en/news/opinion/2021/02/24/gender-in-the-gcc-the-reform-agenda-continues> accessed 22 June 2023.

the Kingdom is quite promising to adopt the recommendations of this thesis in the near future.

6.2. Recommendations

Clarifying the language around women's role as arbitrators can take multiple forms, either one of which can be promulgated in Saudi Law.

First, in the midst of the massive legal reform currently ongoing in the Kingdom, SAL2012 is recommended to be amended to be in line with global arbitration codes. Although the focus of this research is the role of women as arbitrators, there are multiple amendments to be adopted especially when the Kingdom opens up for foreign investors. This approach can bring the arbitration practice closer to legislative efforts, resulting in better credibility for the legal system. Global companies prefer to incorporate arbitration clauses in their contracts to avoid national courts, a modern arbitration code will boost their confidence in partnering with Saudi entities or operating in the Kingdom. The legal system has been accustomed to constant updates, the most recently updated laws are the Companies Law and Civil Transactions Law. This has come after decades of what might be called legal stagnation, a state where the legal system had not seen a single update or amendment to an existing law, nor a new law had been promulgated. It is also attested to by the fact that leading legal data platforms such as Lexis Nexus and Westlaw entered the Saudi market as the legal content, including laws and regulations, have increased over the past decade. A new law can also reduce the load and pressure on national courts as the number of sophisticated cases involving multiple foreign parties are increasing. Likewise, the court system can also benefit from leading practices in arbitration in a way that enhances the quality of the judicial system. There is little research in Saudi about arbitration due to its minimal use, a new law will likely stimulate scholars and researchers to conduct research within the field of arbitration, contributing to the expanding legal library in Saudi Arabia. Although intellectual, financial, and logistical resources must be allocated to draft and promulgate a new arbitration law, it is a worthy investment that will positively contribute to the judicial ecosystem. The adoption of legal tech and the use of technology in adjudication indicates that even new articles

should be added to govern the use of technology in arbitration, along with its extraterritorial implications if the parties involved are of multiple nationalities and the nature of the case is cross jurisdictional.

Second, it is also possible to just amend article fourteen of SAL2012, which is silent on gender, to be as follows:

Without prejudice to gender, an arbitrator shall satisfy the following conditions:

1. Be of full legal capacity;
2. Be of good conduct and reputation; and
3. Be a holder of at least a university degree in Sharia or law and a qualified subject matter expert. If the arbitration tribunal is composed of more than one arbitrator, it is sufficient that the chairman meets such requirement.

This amendment would conclusively settle any disputes over the legality of female arbitral appointments. Thus, the recommendation solves the gender-neutrality issue in the law, but it leaves other loopholes that can and should be simultaneously addressed. Furthermore, the amendment approval process is almost identical to the approval of a new law. It is typically proposed by the Ministry of Justice, reviewed by the Council of Advisors and Beuro of Experts, and then enacted by the Cabinet “Council of Ministers” in the form of “High Order”. Indeed, the review time is expected to be shorter in the case of one clause versus a new law, but it is likely that a new law is needed anyways in the near future. Amending article fourteen only can be a temporary solution until a new law is enacted. However, still, one may argue that it is suboptimal and inefficient to solve for one problem and then solve it for the whole law. A pushback against this route is expected from the Beaurue of Experts in particular, who typically asks if all is needed is amending one clause only or multiple clauses or if a new law is needed. Practically speaking, it is hard to claim that only one clause should be amended, as an assessment of SAL12 will expose multiple flaws and new areas that should be added especially as the use of technology has been more pervasive post covid-19 pandemic. Thus, amending article fourteen can address the issue of this research, but it falls short of offering a grassroot solution.

Third, is to activate the international conventions, to which Saudi Arabia is a signatory, to the effect that arbitration is not exclusive for a specific gender. The reservation

Saudi Arabia puts against Sharia non-compliant articles, can be interpreted progressively to be limited to what is strictly prohibited not what is up for interpretation. Doing so removes potential conflict of views and allows for more female involvement in arbitral panels. The aim is not to give women advantage over men, rather it is to create a level playing field where qualifications and competence are the only determinant. Needless to say, it is always subject to the parties to any dispute to choose their arbitrator, therefore it is not guaranteed that women will take the lead in arbitral panels.

It is suggested to explore the three options further. This suggestion will be communicated to the legal community in the Kingdom to discuss it and debate it. Although it is strongly recommended to enact a new Saudi Arbitration Law that addresses the current gaps in the current law, the other two options can legally satisfy the recommendation of this thesis. It will also contribute to enhancing the alternative dispute resolutions framework in the Kingdom, paving the way for mediation as well to be more visible and exercised.

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