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Polar opposites or possible bedfellows? Seeking to reconcile Islam and female equality in Kuwait

An evaluation of the feasibility, in terms of religious, cultural, legal, and constitutional considerations, of importation of legislation modelled on the equality measures applicable in the UK, including the Sex Discrimination Act 1976, into Kuwait law

Amani S. Alessa

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Law Department, Durham University

October 2007

2 0 DEC 2007

Abstract

Throughout history, women suffered from being the subordinate sex in most parts of the world. The West specifically the UK has acknowledged the existence of such discrimination and provided different laws to protect women from being discriminated against to achieve 'equality' between men and women. However, women in Kuwait still experience sex discrimination to a very high degree. Kuwait does not only lack a sex-discrimination law or any law that can ensure the 'equality' of women, it also continues to support and discriminate against women through different laws in many different areas of life.

The study aimed to discuss the discriminatory laws and analyse the sources of the discrimination; whether cultural or religious. Then it documented the discriminatory laws against women in different parts of the Kuwaiti Laws. The massive amounts of legislation that preserves the discrimination against women, not only proves the importance of eliminating such discrimination that still exists in these laws, but also the importance of adopting a sex-discrimination law that can prevent further discrimination in the fields that are covered by such laws. The study used the UK equality laws as a basis for Kuwait to model its anti-discrimination legislations on.

The research adopted both quantitative and qualitative methods. Questionnaires and interviews were conducted in Kuwait. One of the interviews was conducted in Egypt at

one of the oldest Islamic schools in the region Al-Azahar. The questionnaire was distributed to four groups of people; employed married women, single employed women, housewives, and men. It attempted to cover different subjects that women may be exposed to such as polygamy and honour killing. The interviews were made with officials in different ministries and courts.

The study shows that even though some of the discrimination was originally sourced from Sharia, it is the jurisprudence that has broadened the discrimination instead of narrowing it. This event may be seen to reflect the patriarchal mindset that governs Kuwait society. It also shows that some accept discrimination as a norm as long as it is related to the Sharia. However, some discrimination is now considered out of date and results show that people are ready for change. Also since a lot of discrimination has no justification it should be eliminated, and at the same time a sex-discrimination law should be adopted to provide legal protection for any individuals who are discriminated against.

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List of Abbreviations

AWDS	Arab Women Development Society
CEDAW	Convention on the Elimination of all forms of Discrimination Against Women
CC	Constitutional Court (of Kuwait)
CRE	Commission for Racial Equality
EAT	Employment Appeal Tribunal
ECHR	European Court of Human Rights
ECHR	European Convention of Human Rights
ED	European Directive 97/80/EC
EFU	Egyptian Feminist Union
EPCC	Equal Pay Campaign Committee
EPD	Equal Pay Directive
GCC	Gulf Cooperation Council
GEA	Gender Equality Act
GPA	Grade Point Average
HRA	Human Right Act 1998
KC	Kuwait Constitution
KU	Kuwait University
MP	Member of Parliament
MP	
TUC	Trade Union Congress
MWM	Muslim Women's Movement
NA	National Assembly of Kuwait
NSWS	National Society for Women's Suffrage
NUWSS	National Union of Women's Suffrage Societies
PAATE	Public Authority for Applied and Trading Education
PAHW	Public Authority for Housing Welfare
PRA	Public Rights Act
PTSD	post-traumatic stress disorder
PSO	prohibited steps order'

SDA	Sex Discrimination Act 1975
SIO	special issue order
WCSS	Women's Cultural and Social Society
WSPU	Women's Social and Political Union

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To my mother..who were deprived from education
Because of her gender
To my father.. who believed in education regardless
Of the culture

Chapter One

Introduction

1.1 The Importance of the Research (Motivation of the Study)

Recently the issue of sex discrimination has been widely discussed in Kuwait, particularly with regard to the suffrage rights campaign for women in 2005. Although sex discrimination has been only viewed from the political angle in this campaign, women suffer from discrimination in most fields in many different ways. Sex discrimination, in Kuwaiti society, starts from the moment the female is born. Regardless of the fact that it is less obvious now, it still exists in some families. The common feeling when a female is born is totally different from when the baby born is male. The birth of a male baby, unlike the birth of a female baby (especially when not the first born), is often considered a reason to celebrate and to feel proud. The birth of a female baby is often regarded as a reason to show sympathy for both parents, and might convince the father to get married again to someone who can give him a son instead. In cases where the family is more open minded, they try to convince the father that he might have a better chance next time to have the male. Kuwaiti mothers are often relieved when the firstborn child is male, unlike when it is female because they would probably have to go through multiple pregnancies until they have a male baby. Kuwait, like most of the Middle East, practices sex-

discrimination against women at a very young age. 56 women, aged 12 to 72, were asked in structured interviews whether they wished they had been born male instead, which is another way of asking if they ever sensed being victims of sex discrimination. 37 of those women claimed that they had entertained this thought in a certain phase of their lives. Most of them claimed that while they had such thoughts while they were teenagers, they no longer have them. Some, who did not feel discriminated against until they got married, continue to wish they had been born male. Also, the main reason given for wishing to have been born male was almost univocal, it was "freedom". Males in Kuwait are free to do and practice their daily lives as they wish. Females, on the other hand, experience a lot of restrictions be it in the way they dress, behave, or hang out with a friend. Furthermore, some of the women interviewed claimed that women have more social and traditional responsibilities than men do. At the same time men have the authority to make their own decisions in life while women do not: She is either dominated by her family or her husband later on. On the other hand, some women did not have such a wish to be male; they were either the firstborn child, did not have a brother to compare themselves with, or were raised in more non- discriminating families. The fact that most women got over their wish of being male could be either because they were able to gain their freedom, or because they realised, as they have been taught, that it is the way it should be since men and women should be treated differently and comparison is not acceptable. This might explain why some women accept discrimination against them in the public sphere, given that they have experienced it from an early age in the private sphere by their family and so have become accustomed to it. There then seems to be a vicious circularity inherent in the discussion of sex discrimination: one cannot blame the women's families for

practising it, since they are merely abiding by a standard that the society implicitly supports. However, one cannot blame society for supporting a standard that most families gladly abide by.

For Kuwait, the Iraqi Invasion in 1990 held one main advantage, which is that it brought the world's attention to focus on such a small country. This was because of the fact that the troops that freed Kuwait were international and sent from 30 different countries all led by the USA. Kuwait was, thus, pressured to change its laws in order to preserve human rights for its citizens and residents too. Women were an important matter within the human rights issue; they were still deprived from their political rights. Regardless of all the demands on Kuwait to be a more democratic country, women suffrage rights did not pass until May 2005. Kuwait is still required to have more legislative protections for women. The suffrage rights can only be the beginning, and in this matter Human Rights Watch and Amnesty publish an annual report to include all of the discriminatory laws and practices against women in Kuwait. One of the main solutions is to have an anti-discrimination law and in particular a sex-discrimination law abolishing discrimination against women (and men too) in different fields.

Legislating laws in Kuwait started in the sixties when it was liberated, though most laws remain untouched regardless of the fact that they really need amendments and adjustments. Furthermore, except for a few Acts, there is a certain need to include more laws in the legal system instead of depending on administrative decisions and some regulations. In that matter, discrimination, especially sex-discrimination, is one of the

most important issues that needs more legal protection, since women are the most subordinated group in society.

This study focuses on the equality laws of the UK and examines whether or not they can successfully be applied to Kuwait. The idea of adopting a western law is not new, since most Kuwait laws – except for the Family Law – are originally French. Even the Criminal Law, considered the main law in contradiction with the Sharia, is originally French. However, the study's primary focus is on the Sex Discrimination Act 1975 and the Equal Pay Act 1970. It examines what Articles in these two Acts may be compatible with the Sharia and with Kuwaiti culture. It also examines the other UK laws that protect women and how they are different from Kuwaiti Law either with regard to Criminal Justice or family matters. Where the Criminal Justice in the UK recognises domestic violence and marital rape, in Kuwait the Criminal Justice system still gives minor sentences for honour killings and exempts the kidnapper – of a female – from punishment if her father agrees to marry her to him. In the same vein, the family law in the UK gives the right to divorce in the case of "adultery" to both husband and wife. Kuwaiti law does not recognise this, nor does it give the wife the right to get a divorce if her husband marries another woman.

1.2 The Aim of the Research

The main aim of this thesis is to examine the banning of sex-discrimination in different fields and in particular against women either in law or in practice. It is true that some

discriminatory practices sourced from tradition and culture are harder to change than if they were law. However, abolishing discriminatory laws and including an anti-discrimination law within the legal system would eventually change such traditions and culture. Therefore, in order to achieve the aims of this study it is important to start with the history of the women's movement. This is in order to point out how society has valued women, whether they are equal to men or not and in what ways by examining the women's movement in Kuwait with a comparison to the women's movement in three other countries: Egypt, Iran and the UK. A study of how women's movements were received shows how societies have valued women. Having done this, the thesis attempts to gauge how successful these movements have been. It then considers all the equality theories in the West and in Islam. The theories of the West are presented in order to show the differences and similarities of the equality principle according to Islam. Also the Western theories are the main foundation of the UK equality laws especially in regards the 'formal equality'. Due to the strong influence of the Islamic religion on the laws and culture of Kuwait, the study only focuses on equality according to Islam. Equality in Islam can be seen from two different aspects: equality in worship, and equality in the socio-economic sphere including the most controversial matters within it. The main aim here is to investigate whether there are interpretations of Islam that are compatible with the improvement of women's status in society. Also, some of the Western theories are the basis of the equality laws in the UK, which the study suggests should be adopted by Kuwaiti Law. The main aim here is to make a distinction between religion and culture, since the history of women's subordination shows its cause to be a mix of these two main factors. With regard to the purpose of showing how Kuwait can and should adopt a sex-

discrimination law, the study takes a closer look into the equality laws of the UK with special consideration to what SDA 1975 and EPA 1970 include and what the main advantages of adopting them are. It also discusses what Kuwait should avoid when adopting such laws into its legal system. All of the discriminatory laws and practices that are illustrated in this study show the necessity of not only amending such laws but also, and most importantly, of legislating a sex-discrimination law, since discrimination against women has become an unjustified cultural norm.

Of course, there are religious, social, political, and also legal obstacles to adopting a UK law in Kuwait, but that does not mean it is impossible to do so. The new equality law – if adopted – might not be able to abolish all kinds of discrimination but it will provide a certain limited protection against it, since the act of discrimination would be unlawful. Since Kuwaiti society still practices discrimination against women, it is also important to present a realistic law, taking into account cultural and political factors. In light of this, it should be congruous with 'equality' theory but with some exceptions, since applying equality theory to it without exceptions would only put it in the 'imagination' column.

1.3 Research Questions

In order to achieve sex-equality, this thesis addresses three research questions, namely:

1. How can the existing discriminatory laws be changed in order to abolish sex-discrimination?

2. What are the cultural and religious difficulties of importing UK measures in Kuwait?

3. Is it a realistic solution? And how can it be applied?

1.4 Related Questions

What are the political difficulties in applying a UK law?

What are the possibilities of adopting UK measures for domestic violence?

How would the Kuwaiti Laws in general, and the Constitution in particular, be enforced?

Which, if any, of the existing custody laws should be re-considered?

1.5 Research Objectives

This study focuses on two main issues: first, that there are some laws that discriminate mainly against women. These laws need either to be amended or eliminated depending on the source of such discrimination, cultural or religious. Second, and most importantly, is that the existence of these laws only proves the importance of having an anti sex-discrimination law that would help in:

1. Eliminating discrimination in all of the fields the law would state.

2. Ensuring the principle of 'equality' in society.

3. Abolishing sex-discrimination in certain fields such as employment and education.

Not only does Kuwait lack any sex-discrimination law, it also lacks any anti-discrimination law. Both ideas have never been introduced before. In cases where a law was considered discriminatory, the particular law would be recommended for amendment and there would be no suggestion of creating a stand-alone anti-discrimination law. For instance, the first Article of the previous Electoral Act used to affirm suffrage rights for men only, the article was subsequently amended, but no suggestion of creating an anti-discrimination law ensued.

The study takes a close look at the UK laws that protect women; in the family law, criminal law, and its various equality laws, which show the big gap between the two countries. The gap is mainly reflected through women's cultural, societal, and legal subordination in Kuwait. The UK has more detailed and sophisticated laws, especially its equality laws and mainly the Sex-Discrimination Act 1975 and the Equal Pay Act 1970, that protect women from being discriminated against in many different fields. Kuwait could adopt these in an effort to offer real protection against discrimination. The thesis also focuses on Article 14 of the European Convention on Human Rights. In this regard one can see how similar it is to Article 29 of the Kuwaiti Constitution and shows how the latter Article can be more effective. In focusing on the UK laws, the study naturally examines the cultural and religious difficulties of adopting such laws in Kuwait. These two elements might be obstacles not only to adopting foreign equality measures, but also to eliminating existing discriminatory laws.

Even though the women's suffrage rights were passed in May 2005, thereby making Kuwait the last country to give women their political rights, this study shows that Kuwait still lacks some salient laws in this respect and thus allows discrimination to continue in other fields. A sex-discrimination law could be the first major step to eliminating such discrimination.

1.6 Research Methodology

This study combines two methods of study; qualitative and quantitative. Both were needed in order to achieve the aims of the study. The study depended on primary and secondary data. Books, Articles, URL, and official publications and statistics were used and also interviews and a questionnaire as a quantitative study.

1.6.1. The Questionnaire

Chapters four and five discuss the quantitative aspect of this study, part of which takes the form of a questionnaire. The main advantage of using the questionnaire is that:

1. It can capture the point of view of a large number of people, which would be very difficult for the interviews to achieve, for example.
2. It is easier for people to answer the questionnaire if its questions are raised in a sensitive way (asking about polygamy for both men and women, for example).

3. If the sample of respondents is high in number – as this questionnaire – it is easier to look at the differing points of view of the respondents who are from different classes, backgrounds, and cultures within the same society.

The reasons for carrying out a questionnaire were to capture the point of view of a large number of Kuwaiti people from a variety of different backgrounds and social class. Further, as Martin Denscombe has argued, conducting a questionnaire is a relatively low-cost (with respect to money and time) way of conducting quantitative research; it does not require any prior arrangement unlike setting up interviews; and it contains standardised answers which ensures that the respondents give limited answers and prevents variation in their answers.[1] The questions the questionnaire sought to answer were as follows:

1. Are people in Kuwait aware of discriminatory practices?
2. If they are, do they approve of them? Or are they ready for some amendments?
3. What are the justifications for some discriminatory practices (especially polygamy)?
4. Do women think they are equal to men?

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[1] Martyn Denscombe. *The Good Research Guide.*(England: Open University Press, 2003) pp 159.

1.6.1.1. The Sample of the Study

There were three main groups targeted for the questionnaire: men, women, and students, which totalled 700 randomly selected respondents. The plan was to include 200 students; 100 male and 100 female, 200 married employed men and 300 women; married employed women (100), non-married employed (100), and housewives (100). However the following answered questionnaires were received back: 202 from the students, 193 from men, 96 from married employed women, 98 from non-married employed, and 81 from housewives.

The main disadvantages of questionnaires in general and this one in particular are that:

1. It took longer time than it was planned (about two months).
2. Some respondents returned the questionnaire incomplete, and some did not return it at all.
3. It was difficult to reach people from all social classes.
4. Some of the questions in the questionnaire were a little sensitive, so honesty was not guaranteed.
5. The concept of the questionnaire is not well recognised by some people, so they would either answer without having the decency to read the questions correctly or they would just copy what others had answered.
6. Permission was required from every administrative department in order to conduct the questionnaire, and most of them did not agree to give permission.

7. There was a strong sense that the majority of the student questionnaires answered were not real at all, for that reason the whole student questionnaire was disregarded.

Suggestions for future questionnaires:

1. Allow for enough time to conduct the questionnaire.
2. If there are different categories required to respond, it might be better to finish them one by one instead of conducting them all at one time.
3. The usual questionnaires should not exceed 30 questions, while this questionnaire was 40-50 questions.
4. An effort should be made in order to find the right place where potential respondents would be and try to gain the permission from officials to conduct the questionnaire.

The questionnaire was conducted in January-February 2006. It should also be pointed out that, in order to get as much honesty in their answers as possible, it was important to get the men to fill out their questionnaires while they were away from their family, specifically their wives. This is because the questionnaire asks them for their opinion on polygamy and if they intent to commit it. Thus, he would never agree if his wife were sitting next to him.

1.6.2. Interviews and Visits

As well as the questionnaire, several interviews were conducted. The main advantages of interviews are that the interviewer is able to get the correct information if they are able to reach the right person and it would be a direct way of gathering information regarding a certain issue. The first interview, held in 02-01-05, was with the leader of the Arab Women's Development Society in Kuwait, Miss Nouria Al-Sadani, at her home. The second interview was with Dr. Suad Salah, the Dean of Al-Azhar Islamic Studies- Girls Campus. The interview took place in her office in Cairo 15-06-2005. The third interview was with the family law Judge Adel Al-Failakawi at the judges' wardroom in 19-07-05. Since there was a new kind of marriage *Al-Mesyar* appeared lately an interview was made with another family law judge in order to see the legal view regarding this matter his name was Faisal Bo-Resli in 05-02-06. In this regard an interview was also made at the same time with a Shia judge to ask him about the *Mota'a* marriage, but he preferred to remain anonymous. In 04-02-05 Emmad Al-Habib, Deputy Chief of the Prosecution Department in Kuwait City, was interviewed. The aim of the interview was to answer the following questions: First, how often do 'honour killings' take place? Second, what procedures are followed in the event such a crime is committed? Furthermore, as regards housing welfare, an interview was made with the Manager of the House Distribution Department Mr.Abdul-Azez Al-Qunae in the Public Authority for Housing Welfare in 3-07-06 in his office. Within the Ministry of Interior, two interviews were made, the first one was with Adul-Azez Al-Maso'd the Head of the Police Station of Kefan in 08-07-06, and Adel Al-Hashash the head of the PR Department in the Ministry of Interiors in 09-

07-06. Judge Abdullah Al-Essa, the former president of the Supreme Court of Kuwait, was interviewed on 21-12-06 at his house. Finally, Ebraheem Al-Nuqaimish, the Director of Human Development Department, and Head of the Education Department of the Police Academy previously, was interviewed on 08-02-07. However, interviews can have some difficulties according to this study:

1. It takes a lot of time and effort to be able to meet with lots of officials.
2. The official may sometimes be reluctant to give information.
3. Some officials refused to have the interview recorded, and some of them refused to have their names appear in this thesis.

Also, in order to gather some data, visits were made to different administrative departments such as police stations, Ministry of Interiors, Ministry of Planning, Ministry of Justice, Kuwait University, Public Authority for Applied and Training Education, Women's Cultural and Social Society and the Credit and Saving Bank of Kuwait.

The study depended on primary and secondary data. The primary data was the data collected by the questionnaires and the interviews. Governmental statistics have also been used in this study; such as the Ministry of Justice statistics on divorce, and the Ministry of Planning statistics regarding marriage. However the major problem with the official statistics is that it is not always sufficient. For example, regardless of the fact that the Ministry of Planning has detailed statistics about employment and the leading jobs in specific areas, these statistics do not show the respective number of females and males in such jobs, rather they only show the numbers of Kuwaitis and non-Kuwaitis (even though

in the public sector the number of non-Kuwaiti workers is very limited and they are very rarely appointed to leading jobs). Furthermore, they do not contain all the information that is usually included in such statistics, for example the Ministry of Interior statistics do not mention the "domestic violence" crime at all. Other primary data sources used are international statistics, such as the statistics on domestic violence and suffrage rights. Naturally, the study is also based on large amounts of secondary data such as books, articles, newspaper reports and, most importantly, websites.

1.6.3. Research Difficulties

Laws, Regulations, and websites, in some cases, would be enough to get the needed information. However, for Kuwait, websites are inadequate and the laws and regulations do not specify details especially when it comes to women. For example, some of the discriminatory laws, which are stated in the fourth and fifth chapter, contain no mention of any lesser treatment of women. However, discrimination occurs when applying the law based on the code of practice for example. This explains why visiting the above places (e.g. ministries, education institutions) was important to gather accurate information even though some officials did not feel comfortable giving any information about their work and were suspicious when asked for such information. A main problem for this study has been the irritation and offence that some people feel when asked about sex discrimination. In Kuwait – as well as in other countries in the region – certain accusations are made against those people who study sex- discrimination or even defend it. Such people are seen as wanting to westernise the country, move towards liberalisation

(which means in Kuwaiti society turning against the teaching of Islam in different ways) and wishing to alienate society. Some people refused to answer the questionnaire when they read the questions. In some cases people would refuse to offer any help or give any information, and in most situations a need to hide the real subject of the thesis presented itself. Also, some officials would not help unless there was a connection between him and myself e.g. a mutual acquaintance. Otherwise I would not be able to see the official or get any information.

Although there seemed to be fewer problems with the collection of other data, there were still some issues. For example, although there seemed to be a lot of material discussing the subject of "women in Islam" in general, there was little material that focused on the particular issues that concern this thesis in regards to women status in Kuwait. Further, it was difficult to arrange an interview with a *sheikh* on the subject of "women in Islam" in particular, since they do not consider it proper for them to sit with a female, and even the female researcher may not feel comfortable discussing all the issues needed to be discussed with them as they might get clumsy.

While browsing the internet is the fastest way to gather information, certain information are only available for a limited period of time.

Furthermore, all the Kuwaiti laws are written in the Arabic language, and they are not translated into any other language, not even English. It was thus difficult to translate the articles and provisions used in this study. The Constitution is the only law that has an

official translation into English, although some articles are mistranslated. For example, Article 29, which discusses equality among people, uses the word *Jens* which in Arabic means sex, but was translated as 'race'.

1.7 The Organisation of the thesis

This thesis is made up of nine chapters:

The present chapter discusses the main objectives of the study, explaining the methodology that was used. It also debates the main literary reviews, which were used as the primary sources for the study.

The second chapter is the "women's movement" chapter. It looks at the history of women's movements in four countries: Kuwait, Egypt, Iran, and the UK. The reason why these countries were chosen is that it is very important to discuss the women's movement in Kuwait in context. This clarifies the history of female subordination as well as explaining the cultural view towards women. It then discusses the women's movement in Egypt, the largest Arabic country population-wise and the most influential given that the whole Middle East used to be affected with all of its events and movements. Next it examines Iran, which represents a model of Islamic ruling since it is considered the Islamic republic. It also shows the shifts of women's positions after becoming an Islamic country in 1979. Finally the report reviews the women's movement in the UK for the purpose of presenting a different aspect of a women's movement than the ME models. Also the comparison is used to show the history of women in the country, which this

thesis proposes Kuwait should adopt its laws from. Furthermore, inspecting the women's movement in these four countries exposes the fact that women to varying extents were the subordinate sex within different cultures. The early awareness of women's right in the UK assisted the development of equality laws. The UK started to legislate about equality a while ago, however the ME still lacks such legislation.

The third chapter which discusses the 'equality theories' is divided into two main parts. The first part looks at the theories in the West and the most important schools that represent an idea of equality among genders. It investigates briefly the main feminism schools: the Christian, Cultural, Radical, Marxist, Liberal Feminisms, which all reflect the general development of gender equality in the West. Then it examines the advantages and disadvantages of 'formal equality', since it is the main theory the UK has adopted in its equality laws. This part also focuses on the 'differences' and 'similarities' between the two sexes; whether they are biological or social differences. The other part of the chapter considers 'gender equality in Islam', what the main obstacles facing gender equality are in relation to some verses from the Qur'an, and evaluates how those verses were interpreted to ensure the subordination of women. The chapter also looks at whether such verses can be interpreted in a way that improves the position of women. For this reason to prevent unjustified sex discrimination the 'formal equality' theory should be applied, but with exceptions. Discussion of the two approaches to gender equality is necessary, because although the Islamic approach provides the main basis for different laws in Kuwait, the intention of this study is to suggest that UK equality laws, based on a western approach to gender equality, should be adopted by Kuwait.

The forth chapter is entitled "Sex Equality within a Western Model – the UK". It mainly examines the Sex Discrimination Act 1975 (SDA) and is mainly concerned with the different kinds of discrimination: direct, indirect, discrimination by victimisation and discrimination by positive action. It also discusses other equality laws in the UK such as the Equal Pay Act 1970 and 'equality' in the European Community. The main aim of this chapter is to take a closer look at the SDA, and in particular to suggest it be applied in Kuwait, which lacks such laws. The chapter also discusses the Criminal Law regarding women on issues such as domestic violence, rape, provocation, and battered women, because it relates to women in such circumstances in Kuwait. Discussion of the UK Family Law may provide another model of what could be fairer for men and women, whether they are spouses or parents. This model would represent another form of family law from a different perspective – other than Sharia law - for Kuwaiti law. This will be discussed in the next chapter with especial regard to divorce and residence 'custody.'

The fifth chapter concerns "sex-discrimination within the Family Law" in Kuwait. The chapter encompasses all of the discrimination provisions stated in that Law, such as marriage, divorce, custody and allowance. This chapter also discusses the different interpretations of the Qur'an and the Hadith, which are related to family issues, by major Islamic schools of thought. The controversial issues that chapter three discusses, regarding gender equality in Islam, may provide examples from the law, especially regarding bearing witness and male supremacy.

The sixth chapter is entitled "Discriminatory Laws in Kuwait". The purpose of the chapter is to explore all kinds of discrimination against women in any field other than the family, such as in crime and employment. It attempts to show the importance of amending or eliminating certain laws that only subject women. It also exposes the amount of discrimination that relates to the Sharia, especially male supremacy discussed in the third chapter, most of which cannot be justified except in keeping women subordinate. The chapter also demonstrates how important a sex-discrimination law is in order to stop discrimination against women in fields like employment and education.

The seventh chapter is entitled "Amending the Discriminatory laws". It discusses some suggestions as to how discriminatory laws – discussed in chapters five and six – can either be amended or eliminated depending on the basis of discrimination. It is argued that if the basis for discriminatory law is unjustifiably cultural, then that discriminatory law ought just to be eliminated. However, if it is based on the Sharia, and on the Qur'an in particular, then it should simply be amended in order to lower the discrimination to its minimum. The chapter also discusses how Article 29 of the Kuwaiti Constitution could be enforced by examining the possibility of adopting the Human Rights Act 1998 in relation to the European Convention of Human Rights.

Chapter eight, "The Possibility of Adopting UK Measures, including the SDA, in Kuwait", explores the possibilities and difficulties of adopting the SDA 1975 in Kuwait, and how it can be applied by only adopting those Articles that are needed and by creating any additional articles that might be necessary to deal with the idiosyncrasies of Kuwait.

At the end of this chapter follows the suggested SDA for Kuwait (appendix one), which is a combination of the SDA 1975 modified to suit Kuwait and some other new articles.

Chapter nine is the Conclusion of this study, it discusses the main findings of the thesis and whether it met its objectives and aims. It also raises questions for further research into discrimination against women in general.

1.8 Literature Review

Finding the right sources for this study was one of the main challenges, especially in relation to Kuwait. Regardless of the fact that there were massive amounts of books that discuss 'women in Islam', women in Kuwait were not documented enough, and most of the documents that were found were governmental, so were only summarising the government's attitudes towards women. The study started with the women's movement in Kuwait, the main source for this was *Women in Kuwait the Politics of Gender*[2] written by a Kuwaiti sociologist Haya Al-Mughni. The book focuses on the history of female societies, not the women's movement in general. The author points out how the elite or the upper class of Kuwaiti society has affected the establishment and the performance of society, in more detailed analysis than before. In his book, *Women's Social Societies in the Arabian Peninsula*[3], Sa'ad Al-Haji categories all the Gulf societies by country, each in a separate chapter. It is a documentary book, which simply lists a society's name, how it was first established, the first board members, aims, activities, committees and all of

[2] (London: Saqi Books, 2001)
[3] (1983)

the board of directions up to the year 2000. The Kuwaiti women's activist Nouria Al-Sadani wrote two publications about the women's movement: *The Arabic Women's Movement in the Twentieth Century 1917-1981*,[4] and *The History of the Kuwaiti Women's Suffrage Rights*.[5] The first book discussed the early movement in the region. It documented some of the main historical events and presented some important figures and their roles in such events. Her second book can be considered as a documentary book, since it only focuses on the history of suffrage rights for women from 1971 until 1982. It also includes some dialogues of Parliament's sessions when such matters were being discussed. The first female teacher in Kuwait, Mariam AbdulMalik Al-Saleh, in *The Glimpse of the Historical Development in Gils Education*[6] (used in the sixth chapter) highlights the history of education for women and how it started. Specialising as it does on documenting the history of women's education, makes this a unique book on this matter, since other publications about education either do not mention education for women, or only mention it in a few pages or paragraphs. There are a few other books about women in Kuwait. However, the issue is mostly only referenced in a chapter – or less. Most books do not discuss the history of women: They either discuss the history of Kuwait and how life was in the early years of the country, mentioning women only as part of the main topic, or they discuss the life of women in the Arabian Peninsula. Baqer Al-Najar, in his book *Women in the Arabin Peninsula*,[7] mentions the history of women and discusses women in the Arabian Gulf. This can be considered a significant study because he argues that the subordinate position of women in the area during the pre-oil

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[4] (Kuwait, 1982)
[5] (Kuwait:Dar Al-Syasa, 1983)
[6] (Kuwait:Ministry of Information ,2002)
[7] (Beirut: Al-Markaz Al-Thagafe Al-Arabi, 2000)

discovery was mainly due to economic factors. Women at the time were not a source of income, rather they depended on men as breadwinners. If it had been otherwise, according to Al-Najar, women would now be more respected. He then discusses the era after the oil discovery and how women were more liberated in the seventies and argues that due to the Islamic movement their development and advancement in society was restrained yet again. He also briefly discusses the family laws in the Gulf and how they ensure the subordination of women. Mohammad Al-Rumahi has published a paper named *The Influence of Petrol on the Arabic Women in the Gulf.*[8] It is a study, which mainly discusses how the discovery of oil in the Gulf region has affected women by comparing their position before and after this revolution. Other information was gathered from URL/web pages mostly in the form of documents found on official sites, since there are not any published papers on this matter. On the other hand, there are lots of sources regarding the women's movements in Egypt, Iran and the UK. It is true that most of them take a broad historical view, but they nonetheless provide easier access to information than in Kuwait. The huge section of Middle East books in the Durham University was also a major help.

For the women's movement in Egypt, An important study by Margot Badran included in *Global Feminism Since 1945*[9] edited by Bonnie G. Smith, was the paper 'Feminist, Islam, and the state in nineteenth-and twentieth-Century Egypt.'[10] The study discusses women's roles in Egypt's main events, politics and revolutions from the late nineteenth century up

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[8] (Lebanon: Markaz Derasat Al-Wehda Al-Arabia, 1993)
[9] (London: Routledge, 2000)
[10] (London: Routledge, 2000) chapter one pp 13- 39.

to the 1980s. Nadje Al-Ali in her *Secularism, Gender and the State in the Middle East*[11] draws out the history of the women's movement in Egypt through interviews with activists. In the book she shows how women worldwide have been made subjects of subordination. In her study, *Al-Mara' Al-Masreya wa Al-Tagyer Al-Ejtemae' 1919-1945*[12] (Egyptian Women and Social Changes from 1919-1945), Professor Latefa Salem, who holds a PhD in history, analyses how the period from 1919, especially the revolution, has affected Egyptian women socially. Several essays were published under one cover: *Remaking Women.*[13] The essays focus on both Egypt and Iran, emphasizing the radical changes in women's situations in the Middle East, mainly in the post-colonial period and how women burst upon the public sphere breaking tradition.

In the case of Iran, the history of the women's movement is very well documented on the internet, on WebPages such as:

http://www.findarticles.com/p/articles/mi_m2267/is_2_67/ai_63787338

The page has, in a very clear and simple way, organised i.e. the historical events starting from the Islamic revolution of Iran in 1979 and how they have affected women. This helped build a clear picture of how and when exactly the events happened and in what way each affected women. Most importantly, the Iranian Chamber Society, formed in 2001, offers several published papers about women in Iran throughout history on its website http://www.iranchamber.com/. This meets the Society's main aim of providing researchers with information about Iran that, owing to the lack of historical documents

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[11] (Cambridge: Cambridge University Press, 2000)
[12] (Cairo: Al-Haya' Al-Masreya Al-Amma lelketab, 1984)
[13] (Princeton, N.J.: Princeton University Press, 1998)

and references about Iran, is difficult to find. In her book *Women of Iran*[14], Farah Azari explores the way the Islamic revolution has affected women in media, education, employment and even their regular daily life. She describes the aggressive behaviour carries out against women by fundamentalists, especially in the early days of the revolution. A comparative study is made between *The Women's Rights Movement in Iran*[15] by Eliz Sanasarian and *Women and the Political Process in the Twentieth Century Iran*[16] by Parvin Paidar. The former discusses women's positions, from the pre-Pahlavi period up until the Khumauni government, and how the differing politics affected them, the latter exposes the amount of discrimination that relates to the Sharia, most of which cannot be justified except in keeping women subordinate. *Women and the Political Process in the Twentieth-Century Iran* assures her reader that women played a major role in all political movement and changes in Iran. On the other hand, Camron Amin focused her study *The Making of the Modern Iranian Women*[17] on the Reza Pahlavi period and claims that the Iranian women's awaking started in the late 1930s.

The Islamic revolution of Iran in 1979 was a major event, especially in changing the life of women. Many books that document the history of the women's movement cannot ignore such an event. Haleh Esfaniari discussed the revolution, by telling the stories of 32 Iranian women. The book describes how their lives changed: Comparing their life before with their life after the revolution. Hala Afshar, has also contributed to the debate with some studies about women in Iran but most importantly through the study: *Islam and*

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[14] (London: Ithaca Press London, 1983)
[15] (New York: praege Publishers, 1982)
[16] (New York: Cambridge University Press, 1995)
[17] (Florida: University Press of Florida, 2002)

Feminisms An Iranian Case-Study.[18] Although the book was not very relevant to this study in regards to the women's movement in Iran, it does discuss how the Islamic movement affected women in Iran, particularly with regard to education, employment and to family matters such as marriage, divorce, and adultery. Also, a discussion of the influence of the Islamic revolution in Iran was included in a chapter of the *book The Third World- Second Sex: Women's Struggles and National Liberation.*[19] The book was compiled by Miranda Davies and includes a chapter called *Iranian Women: The Struggle Since the Revolution*[20] which discusses how and why the position of women changed and suggests what the future of women in Iran might be.

Women and the Women's Movement in Britain, 1914-1999[21] by Martin Pugh is of significant reference for any researcher looking at the history of the women's movement in the UK. It could be used as the basis for a study on the subject, because it gives details about the history of the women's movement including all of the important surrounding events such as wars, governmental political parties, economic factors and how they affected the movement. However, *English Feminism 1780-1980*[22] by Barbara Caine, also provides a major contribution to documenting the women's movement in the UK from the early stages. Olive Bank has written several studies about feminism in the UK, one of which - *Becoming a Feminist: the social origins of "first wave" feminism,*[23] discusses the main characteristics of the 'first-wave' feminism by studying the biographies of feminists

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[18] (GB: Macmillan Press Ltd 2nd, 1999)
[19] (London: Zed Books, 1987)
[20] (London: Zed Books, 1987) chapter fourteen pp 143-158.
[21] (London: Macmillan Press LTD, 2000)
[22] (New York: Oxford University Press Inc., 1999)
[23] (Brighton: Wheatsheaf Books Ltd., 1986)

at that time. However, it analyses these biographies in order to draw a general picture of feminism at that time, rather than creating a simple auto-biography. Cheryl Law has contributed to the women's cause in the study *Suffrage and Power*,[24] which considers the pre-war and post-war phases during the 1920s. It shows how the strategy of the women's movement helped gain success on many different levels. On a similar subject, Pamela Horn's *Women in the 1920s*[25] focuses to a greater extent on the post-war period and on the matter of how war affected women's life regardless of class. *Contemporary Feminist Politics*[26] by Joni Lovenduski and Vicky Randall, discusses the second-wave of the women's movement with special concern for the period at the end of 1970s and in the early 1980s. The study discusses the main achievements of the women's movement regarding different issues such as equality at work, abortion and maternity rights. Harold Smith, however, focuses his study *The British Women's Suffrage Campaign 1866-1928*[27] on the suffrage rights campaign from its start until it was again back in 1928. The author documents the major phases that the campaign went through, including the major movements in the campaign and the unions. It also explains how WW1 affected such rights. Philippa Levine recounts the women's movement and their struggle for equality in the half decade of the Victorian period in her book *Victorian Feminism 1850-1900.*[28] In the same vain Jane Lewis has also studied women in that period but goes further and looks at the Edwardian period as well, in her study *Women and Social Action in Victorian and Edwardian England.*[29] The author emphasises the contribution made by women in

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[24] (London: I.B. Tauris & Co Ltd., 1997)
[25] (Gloucestershire: Alan Sutton Publishing Ltd., 1995)
[26] (New York: Oxford University Press, 1993)
[27] (Essex: Addison Wesley Longman Limited, 1998)
[28] (Essex: Anchor Brendon Ltd, 1997)
[29] (Cheltenham: Edward Eglar, 1991)

social work and welfare by evidencing the autobiographies of women in that period. Susan Kent has revealed how gender-interaction during WW1 changed the image of women in *making Peace: the reconstruction of gender in interwar Britain.*[30] Elizabeth Wilson, in *Only Halfway to Paradise,*[31] presents a new perspective on the women's movement in the other half of the last century.

The studies that have been carried out on the subject of feminism have been very broad and various. There are many different approaches to issues such as movements, liberation, education, and politics. The studies have varying bases, for example basing feminism on geographical grounds, and on theological grounds. In this study, feminism is studied from several different approaches: geographically - the women's movement chapter discusses women in four different countries. The second approach is the gender-equality issue, which is discussed in the 'equality theories' chapter, and then in the same chapter women in Islam is discussed. However, in the first part of the chapter, which is about the equality theories in the West, feminism is studied from the point of view of a discussion about the various gender equality schools that were founded in the West. *Feminism Theory Today*[32] by Judith Evans is a helpful contribution to this matter, since it discusses mainly liberal, cultural, and radical feminism. The author criticises and analyses feminism in the UK and the USA. The major problem was trying to identify all the different feminism schools that exist and then to summarise their main philosophy and their main stream of thinking towards sex-equality.

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[30] (New Jersy: Princeton University Press, 1993)
[31] (New York: Tavistock Publications, 1980)
[32] (London: Sage Publication, 1995)

It was important to trace each school's view of equality as well as being familiar with all of the schools of thought that have existed throughout the west in general and in the UK in particular. It is true that when Aristotle formulated his theory of 'formal equality' it was not directed to gender equality in particular but rather it was a general theory about the basis of 'equality'. However, its significance is that it is the basis of the equality laws in the UK and especially the SDA 1975, and would therefore also be the basis of the sex-discrimination act in Kuwait if it adopted the UK law. It was important to go through books that discuss the history of feminism and how it started in order to discover what the early schools' view was. Doing so also exposes the amount of discrimination that relates to the Sharia, most of which cannot be justified except in keeping women subordinate. There are four main books and WebPages that discuss the history of feminism schools in regard to gender inequality. The first book is called *The Pursuit of Inequality*[33] by Martin Robertson. Regardless of the fact that this book does not discuss feminism in particular, it does analyse Aristotle's theory of 'formal equality,' which is relevant to this study. Most feminism schools consider Judith Evans' book, *Feminist Theory Today,* to be a main source of reference, since it successfully presents feminism schools with their main philosophies all in one volume. Another book, called *Gender inequality: Feminist Theories and Politics,*[34] by Judith Lober also discusses the accomplishment of those feminism schools and presents the main thoughts of those schools and their politics in the twentieth century. Also Hilaire Barnett's book, *Introduction to Feminist Jurisprudence,*[35] helped in identifying which feminisms schools held which doctrine. The Katharine T. Bartlett and Rosanne Kennedy book, entitled

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[33] (UK:Martin Ropertson & Company Ltd..1981)
[34] (California: Roxbury Publishing Company, 2001)
[35] (London: Cavendish Publishing Limited, 1998)

Feminist Legal Theory: Readings in Law and Gender,[36] presents the "symmetrical and asymmetrical" approaches to formal equality very well. The book also presents all the models included in each approach. It is strongly believed that these books can be useful references for the 'feminism' issue. Furthermore, a very important paper which has been published on the internet, called *Early Feminism: Equality, Ethical Theory and Religion*,[37] by Viola Larson, discusses the history of forming the feminism schools; how they were started and who stated them. On the other side of the feminism argument, concerning the biological differences between the sexes, a very interesting book called *S/HE BRAIN*[38] by Robert Nadeau is worthy of note. This book discusses the biology of the sexes and avoids using medical language, which makes it accessible for people to read and understand. It is especially useful for this study as it discusses the sexes in respect to gender, politics and feminism. If a researcher's specialty is 'equality', a valuable article by Catherine Barnard and Bob Hepple called *Substantive Equality* cannot be missed.[39] It discusses the concept of equality (primarily the concept of substantive equality) very lucidly, and also pays special consideration to indirect discrimination. The paper discusses the principle of equality in general and not simply within the context of the limitations of gender discrimination. Another relevant article by Lise Vogel is titled *Debating Difference: Feminism, Pregnancy and Work Place.*[40] In this Article, the author examines and evaluates the equal and different treatment of women especially as regards pregnancy. She explains the view of each side's proponent

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[36] (USA, UK: Westview Press, 1991)
[37] [online] [undated] Available from www.naminggrace.org/id64_m.htm
[38] (USA: Praeger Publishers, 1996)
[39] (GB: Cambridge Law Journal. Nov. 2000, 59(3) pp 562585)
[40] (USA: Feminist Studies, Inc. Spring 1990, 16(1) pp 9-32)

The content of the other part of the 'equality theories' chapter was easier to discuss because there is a well-established background about the subject covered. The subject is discussed and analysed in massive numbers of books and papers. The difficulty was in finding a middle view argument and interpretations of the required Qur'anic verses. This was because many books hold extremist views: They either base their interpretation of the verses on the argument that men are the superior sex e.g. Abbass M. Al-Aqad in his book *Women's Position in Qur'an*,[41] or at the other extreme they take a revolutionary view that the Qur'an is outdated and should not be used to rule at all. Anyone holding this latter view, such as Anwar Hekmat in his book *Women and the Koran*,[42] However, there are some scholars who believe in gender-equality and try to present different interpretations of those verses other than the traditional ones. Such scholars include Mohamad Siddiqi in his book *Women in Islam*;[43] Azizah Al-Hibri in her book *Women In Islam*;[44] Shaheen Ali in her book *Gender and Human Rights in Islam and International Law*;[45] Al-Gazali Harb in his book *Isteqlal Al-Mar'a fe Al-Islam*[46] (Independence of Women in Islam); Riffat Hassan in her published paper *Members, One of Another: Gender Equality and Justice in Islam*[47] and in her book titled *Islam and Human Rights*[48] in which she tries to argue that the women's subordination in the Muslim nations is related to culture more than religion (she has also some published on human rights

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[41] (Cairo: Dar Al-Helal, 1971)
[42] (NY: Prometheus Books, 1997)
[43] (Lahore: Ripon Printing Press, 1952)
[44] (Oxford: Pergamon Press, 1982)
[45] (London: Kluwer Law International,2002)2nd
[46] (Egypt: Dar Al-Mostaqbal Al-Arabi, 1985)
[47] [online] [undated] Available from
www.sacredchoices.org/hassan.htm
[Accessed 12th June 2004]
[48] (Damascus: Dar El-Hassad, 1998)

regarding Islam in general). Dr. Umayma Abu Bakr, in her book *Women and Gender*,[49] explains her view of how Islam is meant to improve women's position in the society and not to degrade her as some of the current ME laws do. Dahlia Eissa focuses her article, *Constructing the Notion of Male Superiority over Women in Islam*,[50] on the Qur'anic verse 4:34, which discusses male supremacy and the beating of women. She explains how the interpretations of such verses have been affected by stereotypes and have thus denied women their rights. The latter scholars such as Al-Hibri and Hassan have tried to adopt the middle view regarding women in Islam. They believe that women are an equal sex to men and have tried to find the best interpretations of Islam on these grounds. Women in Islam is a very broad subject that has been discussed in lots of books, papers, seminars, but few these discussions contain any original ideas. However, there are some other scholars that have made some important contribution as regards women and their position in the Middle East in general. One example is Fatima Al-Marnisi who has published several books regarding women's position in the Middle East, such as the *Beyond the Veil: Male-Female Dynamics in Muslim Society*,[51] *The Veil and the Male Elite*,[52] and *The Forgotten Queens of Islam*.[53] Nawal Sa'dawi, a well-known liberal feminist, has expressed her ideas in novels such as *The Fall of the Imam*[54] and in her autobiography that documents her time in a women's prison.

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[49] (Demascus:Dar Al-fikr, 2002)
[50] (*Women Living Under Muslims Law*. Nov. 1999, 11, pp 1-51)
[51] (London: Saqi Book, 2003)
[52] (Cambridge: Perseus Books, 1991)
[53] (Minneapolis, University of Minnesota Press, 1993)
[54] (London: Methuen, 1988)

The complications of the 'Sex Equality within a Western Model – the UK' chapter were owing to the lack of prior knowledge of the UK legal system and it laws. Although there are lots of books that discuss the laws on equality, the difficulty in this matter was due to two factors: First, the many equality laws in the UK made it complicated to find and understand the entire Law. Second, the continuous amendments of those laws led to the difficulty of distinguishing the latest version of such laws. However, there were some texts that provide good guidelines for the laws on equality in the UK, such as: *Discrimination Law: Text, Cases and Materials*[55] by Richard Townshend-Smith. The book discusses all the anti–discrimination laws in the UK either on the grounds of sex, race, or religion. It was a particularly good reference for research into sex–discrimination, since it analyses the sex-discrimination laws and the SDA 1975; the book explains the complexities of the statue by providing relevant case-law. This aids one's understanding of the application of such a law. Other books that were also referred to regarding the laws on equality in the UK, and Europe, were *Anti-Discrimination Law in Britain*[56] by Colin Bourn & John Whitmore and also Camilla Palmer's book *Discrimination Law Handbook.*[57] These three books offer different perspectives on mostly the same topic, thereby giving the researcher a deeper understanding and a fuller picture of the subject. As for Article 14 of the European Convention on Human Rights, a published paper called the *Law of the European Convention on Human Rights*[58] by D J,Harris, M, O'Boyle and C, Warbrick provided the major reference for this study. The paper offers an interesting view of the Article. As regards how the UK laws deal with Criminal, the internet is the

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[55] (London,Sydney: Cavendish Publishing Limited, 2001) 2nd.
[56] (London: Sweet & Maxwell Limited of, 1996)3rd.
[57] (GB:LAG Education and Service Trust Ltd,1997)3rd
[58] (UK:Reed Elsevier, 1995)

most useful resource in providing the necessary information and statistics. The websites cited in this study include: the Fawcett Society home page, the Home Office site, the Women's Resource Centre home page, and, most importantly, the Women's Aid Homepage.

There are no sources that directly discuss the discrimination within Kuwaiti Family Law. However, since the ME countries share almost the same rules in regards to the age of marriage, guardianship, divorce, etc. there are some relevant contributions in this regard. The most important is Abdullahi A. An-Na'im's book *Islamic Family Law in a Changing World: A Global Resource Book*[59] which includes a discussion on issues that relate to the family laws of the ME Another good book is titled *Al-zawaj wa At-alaq wa Ta'dud Al-Zawjat fe Al-Islam*[60] *(Marriage, Divorce and Polygamy in Islam)* and mostly focuses on these three issues. It also has two main approaches: first it reviews the four major Sunni doctrine's opinions in relation to each issue and then looks at how they are legislated for in some of the ME laws. In *The Rights of Women in Islam*,[61] Haifaa A. Jawad argues that when Islam helped to liberate women by giving them more rights, they were still considered the subordinate sex owing not only to the differing interpretations of the Qur'an and Hadith, but also to the degrading light the culture views women in. Chapter five has also taken information from websites as well as the information gathered from the interviews and questionnaire that were mentioned earlier.

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[59] (London: Zed Books Ltd, 2002)
[60] (London: Alsaqi, 2004)
[61] (London: Macmillan Press Ltd., 1998)

Owing to the lack of a real source for the discrimination against women in Kuwait, chapter six depended primarily on Internet sources. Sex-discrimination in Kuwait has been discussed for about a quarter of a century, but all the discussion has mainly centred on the suffrage rights of women. Sometimes Kuwaiti women who are married to a non-Kuwaiti discuss the matter. However, there are no publications addressing either discrimination against women, or any issues relating to it except for suffrage rights. The lack of publications and discussion is not the only issue; the problem remains that there is a major denial that any discrimination against women actually exists. Some think that there is no legal proof that there is any discrimination and therefore no need for the introduction of anti-discrimination laws, but in reality major discrimination against women does exist. For example, the Organisation of the Judiciary Act 23/1990 does not mention any discrimination against women, even though women are banned from being judges. This is the way most of the discriminatory laws operate. For this reason the discrimination has to be discovered in reality and then compared to the law. It is here where problems arise, because they are not based in law or regulation, some types of discrimination can only be discovered through first-hand experience. The websites were extremely useful for research about women in the Middle East in general. In particular, the Arab Woman Organisation's website provides details of events and laws relevant to women for each Arab country: http://www.awfarab.org/

The Aman Organisation also publishes a very useful site particularly with reference to violence against women and includes news, studies, and research on the matter: http://www.amanjordan.org/index1.htm

The Kuwaiti newspapers, especially those (such as the Al-Watan newspaper) that have an archive, were another source of information. There are three major newspapers that have a website on the internet which were helpful in providing information. The newspapers were:

http://www.alqabas.com.kw/Final/NewspaperWebsite/NewspaperPublic/

http://www.alwatan.com.kw/

http://www.alraialaam.com/16-09-2006/ie5/homepage.htm

Other websites that were used to translate a Qur'anic verse or a Hadith were:

http://quran.alislam.com/Targama/DispTargam.asp?nType=1&nSeg=0&l=eng&nSora=65&nAya=1&t=eng

Although this webpage translates both the Qur'an and the Hadith, it was easier to use the Qur'an browser than the Hadith browser, since the latter was complicated to use. The website of the University of Southern California was also used: http://www.usc.edu/dept/MSA/fundamentals/hadithsunnah/

This webpage offers a database of the four major Hadith books to enable easy translation and access. The problem with the Hadith database is that, unlike the Qur'an database, which is offered in a universal numerical system, the Hadith database has different numbers and categories for each of the Hadith's six major books. This makes it more complicated to find a Hadith, especially an English version. The last two sites are a useful source for any study that needs Qur'an and Hadith translations to English. These were significant to both chapter five and six in their examination of whether and to what extent certain issues are related to Sharia.

Chapters seven and eight draw upon the discussion from the previous chapters, but also focuses on three of the UK legislations: the SDA 1975, the EPA 1970, and the Human Rights Act 1998.

Chapter Two

Aspects of the historical context – movement towards sexual equality in Islam and in the West

2.I. Introduction

As the sociologist Mohammad Al-Rumaihi has discussed, any one society within the Arabic peninsula is not very different from any other, especially if the issue under examination concerns women.[1] Al-Rumaihi stated that parts of Arabic society can be described as a 'backward society' in economic, cultural and social terms. He described how attitudes towards women are also included in this definition. The main problem of women in Arabic society is the ignorance of their humanity; even women themselves are unaware of this. In spite of the statistics regarding women as educators and workers, it does not help to change the 'backward' view towards women. Also, according to Al-Rumaihi, there are no temptations to awaken women and, if there were any, they would only be artificial ones. In this chapter, three women's movements in three Middle East countries -- Kuwait, Egypt, and Iran -- will be discussed. The Middle East countries generally share some similarities such as religion, tradition, and occupation experiences.

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[1] Mohammad Al-Rumaihi. Athar Alnaft ala Wathe' Almara' Alarabia fe Alkhaleej. In: Al-Mara' wa Douroha fe Harakat Al-Wehda Al-Arabia (Women's Role in Arab Unity). Ali Shalaq 'et.al'. (Lebanon: Markaz Derasat Al-Wehda Al-Arabia, 1993) pp 231-251.

Although Kuwait only has a short history of the women's movement it nevertheless shares some similarities with the women's movement in Egypt and Iran. The fact that Egypt is part of the Arabic nation, and has a long history of struggles against colonialism in which women played a major part, is an effective factor on Kuwaitis in general. Also, as Egypt used to have a dominant role in the region, its experiences, including the women's movement, were inspiring. Huda Sha'rawi's[2] demeanour quickly spread throughout the Arab countries, and was also taught in schools. On the other hand, both the location of Iran as a neighbour of Kuwaitis position and as representative of the major Muslim denomination 'Shia', was also influential on Kuwaitis since about 15 to 25% of Kuwaitis are Shia.[3] Moreover, as Iran is an Islamic country, all its acts and laws are based on Islam. The three countries share nearly the same degrading attitude towards women and, to a certain extent, they experienced many of the same incidents such as colonism, war, and liberation although in different time periods.

A discussion of each country will begin with highlighting how the women's movement was initiated and will take into consideration the surrounding environment; the campaign for women's rights; the women's role in the political history; and the achievements that women have gained.

The similarities in Middle Eastern societies' points of view towards women and the fight that accompanied the campaign for women's rights will then be compared with the

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[2] A famous activist in Egypt.
[3] The Library of Congress. *Kuwait- Society.* [online] [undated] available from: http://lcweb2.loc.gov/cgi-bin/query/r?frd/cstdy:@field(DOCID+kw.htm [accessed 7th Feb. 2005]

women's movement in a Western country, the UK. The study of the women's movement in the UK is important because it represents a different culture from the Middle Eastern one. However, women in the UK had also suffered from the deprivation of many rights for a long time. They organised many different campaigns before they were able to gain a certain level of equality to men. The most controversial issue in the women's movement in each of these four countries is the participation of men. Unlike in the Middle East countries, in the UK men had also participated in women's rights campaigns by organising societies; this strongly reflects the different attitude towards women between the four countries.

Finally, in each country, there was a major event that affected women directly. In Kuwait, it was the oil discovery while in Egypt was the 1952 Revolution. Although Iran passed through many different revolutions the 1925, and 1979 Revolutions had the most effect on women's rights. In the UK the First World War was an inspiring event for women's rights legislation.

2.2. The Women's Movement in Kuwait

Before the discovery of oil, life in Kuwait was very different to what it is now. People were divided into two groups: the Bedouins and the city dwellers. The Bedouins lived in the deserts. The main profession of the city dwellers was 'pearling'.[4] This job required for

[4] Men earned their livelihood by going deep sea fishing for pearls several months of the year.

the men to leave home for about 3 months each year. During that time, women took care of the house.[5]

The Kuwaiti society — as in any Middle Eastern one — is formed upon the absolute power of the father or the eldest male. This patriarchal system assured women's subordination. The father, who in many cases has more than one wife, used to make all of the decisions in all of the family matters. He would even decide on his sons' behalf to whom they would marry. Deciding for the daughters is a given fact.[6]

The architecture during that time supported the idea of women as a lower class gender. Houses did not have any windows, so that women could neither be heard nor seen, or see any strangers. Also, men and women had separate guest rooms. In some families, women and men would not sit together to have a meal. Men would eat first, followed by women, and then finally children. Also, the culture is full of sayings that reflect the degraded position of the women.[7]

Going out of the house was restricted for any woman. The father was the one who was responsible for shopping. However, during the pearling season, a woman had to go out, especially if she was from low-class family who did not have maids to do their shopping for them.[8] A woman who went out a lot would be seen as wicked. Of course, no one would dare to go out unveiled. Small girls could play outside, but once they reached

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[5] Haya Al-Mughni, *Women in Kuwait The Politics of Gender.*(London: Saqi Books,2001) pp 67-94.
[6] Baqer Al-Najar, *AlMara'fe Alkhalej Alarabi wa Tahawelat Alhadatha Alaseera* (Women In the Arabian Peninsula). (Beirut: Al-Markaz Al-Thagafe Al-Arabi, 2000) pp 15-30.
[7] Ibid.
[8] Al-Mughni, H. (2001) pp 44-5.

adolescence they could not leave the house until they were married.[9] Females got married at a very young age, sometimes even before reaching adolescence.[10] It was very common that a girl would never know that she was about to marry until a few hours before the wedding which took place that very same day.[11] Her opinion never mattered as long as her father agreed;[12] many of girls got married to old men, to become widows while they were still in their early twenties.[13]

Some argue that economical factors helped to degrade women.[14] Since only males can work and earn money, they were the only ones who can take decisions in favour of their families. However, in some families women had to work as a seamstress, laundress or a housemaid, but this did not give much financial support since these were low income jobs.[15]

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[9] There are two female sayings, which people at that time used in regards to women who went out of their house. The first 'A women should go out of her house only twice in her whole life; first when she goes to her husband house, and second when she goes to the grave. The other saying based on the fact that since women used to – and some still do– wear *Abaya* (The Abaya is a black overgarment worn by women in Muslim cultures, Wikipedia). Before a woman got married, her father would – sometimes – put a condition on the marriage saying "our daughter does not have an *Abaya*." Since a women – at that time – could not go out without it, it meant that the father did not want his daughter to go out of her husband's house at all.

[10] The Official Website of the State of Kuwait. *Al-Ta'leem fe Al-Kuwait Ghabl Ekteshaf Al-Naft (Education in Kuwait Before Oil Discovery)*. [online] [undated] Available from: http://www.kuwait.kw/Diwan/main/Story_Of_Kuwait/Kuwait_before_Oil/Social_Life/education.html#WomanEdu11
[Accessed 5th Nov. 2004]

[11] Socio-economic cultural background of Kuwait.

[12] In some cases the opinion of the groom too does not matter.
The Official Website of the State of Kuwait. *Al-Ta'leem fe Al-Kuwait Ghabl Ekteshaf Al-Naft (Education in Kuwait Before Oil Discovery)*. [online] [undated] Available from: http://www.kuwait.kw/Diwan/main/Story_Of_Kuwait/Kuwait_before_Oil/Social_Life/education.html#WomanEdu11
[Accessed 5th Nov. 2004]

[13] In those days, if someone asked to marry a woman, it would be considered a disgrace to refuse his request – as long as he is known to have good-manners – regardless of his age or financial status for example.
Socio-economic cultural background of Kuwait.

[14] Al-Najar, B. (2000) pp 19

[15] Ibid.

When oil was discovered, it affected the lifestyle of society deeply. After the discovery of oil, the principles of society, especially towards women, changed.[16] The Kuwaitis became more materialistic and society became modernized along the lines of Western societies. During the sixties, a new trend was established: for the first time some families started to send their daughters abroad to study. However, they were from very wealthy families who could afford such education and, at the same time, were open-minded families who had had the chance to socialise with people across cultures. Since the society was divided into different classes according to their financial status, women from the merchant class families did not socialise with the others.[17]

The women's movement in Kuwait did not start until the early sixties when two women's organizations were officially formed. However, Sabeeka Al-Najar argues that the women's movement started in the late forties when the women's education started to expand. Also in 1953, a group of women organised a seminar called '*Al-Hejab*' which demanded an end of the al-hejab era for all Kuwaiti women. Regardless of the fact that the news of this seminar was widely spread and created many different reactions, it did not have any effect in changing the social situation due to the extreme conservativeness of society at that time.[18]

The two organizations, which were formed in the sixties, represented two different points of views. The first organization was established in 1963 by a famous Kuwaiti activist

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[16] Oil was discovered in 1938, but the production of it did not start until 1950.
[17] Al-Mughni, H. (2001) pp 67-94.
[18] Sabeeka M. Al-Najar. Al-Haraka Al-Nesae'ya fe Al-Khaleej (Women's Movemen in the Gulf) In: Violet Dagher. *Al-Mara' wa Al-Osra fe Al-Mojtama't Al-Khaleejeya (Women and Family in the Gulf Societies).* (France: Editions Eurabe, 2004) pp 6-14.

called Nouria Al-Sadani who came from a middle-class family and did not have the chance to get her bachelor degree from abroad, unlike the members of the other organization. In the second organization, all the women were from the elite of the society and were highly educated from universities abroad. They refused to cooperate with Al-Sadani in establishing her organization. This was very disappointing to her because she was extremely optimistic that these women were in the minority; that very few such women had the chance to study abroad and gain an open-minded mentality.[19] As a result, Al-Sadani managed to find members for her organization who came from middle-class families just like herself.[20] This organization was called the Arab Women's Development Society (AWDS). The main objective of this society is to work to modernise women in different ways, but mainly by education. It was responsible for informing women – especially the Bedouins - how education is important for their lives.[21] The members of the organization believed that illiteracy is the main reason for women's subordination. They worked on the idea of 'modernizing' women from day one. They held different conferences with the purpose of enlightening women regarding the gender discrimination that all women are suffering from. The Society did some studies about social problems that effect women such as divorce and polygamy it was one of the first studies in Kuwait. Such studies were represented at the Family Conference which was held in Kuwait in the early sixties.[22]

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[19] It might worth mentioning that when interviewing Nouria Al-Sadani and asked about this particular incident she did not want to comment on it, saying only that: Kuwaiti women have to focus more on their political rights (it was not given at that time). She added that if there was more co-operation such rights would have been passed in the seventies.

[20] Margret Badran. Kuwaiti Women in the Batlle: Before and After the Iraqi Occupation. In: *Islam, Gender and Social Changes.* (Amman: Al-Ahleyia, 2003) pp 364, 365.

[21] Sa'ad A. Al-Haji. *Al-Jame'yat Al-Nesae'ya Al-Ejtemae'ya* (Women's Cultural Societies).(1983) pp 798-801.

[22] Al-Haji, S. (1983) pp 798- 801.

In 1971 the AWDS held a conference about the struggle of Kuwaiti women it was the first conference organised and directed for women. 100 Kuwaiti women participated in this conference which ended with a petition being handed to the President of the National Assembly. This petition strongly demanded both political and social rights for women. In 1973 the National Assembly discussed the demands of the petition for the first time since being founded in 1963.[23] The Islamists vehemently objected to the petition and expressed their opinions aggressively towards the leaders of the women's organizations. Their point of view was simply that the petition was against Islam. Although the Islamists failed to prove their point from the Quran or Hadith, they succeeded in preventing the demands of the petition from being carried out.[24]

The AWDS spent the '60s convincing women of the importance of education as an end for their struggle. Also, it tried to encourage women to participate in the public sphere which was dominated by men. It organised some lectures and seminars about how important it was for the Kuwaiti women to participate in building up the country – especially since oil had just been discovered - and how it would benefit the country if it replaced the foreign workers with Kuwaiti women. In order to try to help the working mother, the AWDS opened the first nursery in Kuwait in 1967. It also honoured the very first women who participated in the public sphere in different activities with a generous celebration in order to set an example for the other women.[25]

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[23] Dewan Al-Arab. *Nouria Al-Sadani.* [online] [29th July 2006] Available from: http://www.diwanalarab.com/spip.php?article5356&vo=56
[Accessed 4th Nov.2006]
[24] Nouria Al-Sadani, *Almasera Altarekheya Lelheghogh Alseyaseya Lelmara'Alkwaytia* (History of Kuwaiti Women Suffrage Rights Movement). (Kuwait: Dar Al-Syasa, 1983) pp 54-59.
[25] Al-Mughni, H. (2001) pp 67-94.

As the AWDS worked on modernising and educating women and encouraging them to participate in public life, the objectives were shifted in the 70s. A major turning point occurred when Al-Sadani, the AWDS's leader was elected head of the Arab Family committee in 1971. This committee was part of the Arab Feminist Union lead by Huda Al-Sha'rawi, the famous Egyptian feminist. The new position gave support and was an endorsement of the Kuwaiti organization.[26]

When the petition was handed in 1973, although the Nationalists could not let the petition pass, they adopted women's political rights as a part of their campaign for the next election. During this time, while a group of women activists held a campaign about 'equal rights', another group of women held an opposite campaign disagreeing with the enfranchisement of women.[27]

In 1974, the AWDS held another conference in favour of working women which came up with a list of recommendations for the betterment of the status of middle-class working women who did not have the chance to be university degree holders. In the same year, when the National Assembly was about to legislate the Family Law, the AWDS held seminars over one week and invited law specialists from across the Middle East in order

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[26] Mentioned on the occasion of honouring Nouria Al-Sadani in the annual Kuwaiti cultural festival held by The National Council for Culture, Arts and Literature. The festival was called Qurain Cultural Festival and she was honoured in the eleventh year in Dec.2004.
Mahrajan Al-Qurain Al-Thaghafi (the Eleventh) Al-Quarain Cultural Festival. [online] [Dec.2004] Available from:
http://www.kuwaitculture.org/alqurain2004/taghderia.htm#book3-1
[Accessed 4th Feb. 2005]

[27] Al-Mughni, H. (2001) pp 67-94. Also
Al-Talea. *Annervarsy of the Human Rights Scociety.* [online] [29th June. 2005] Available from:
http://www.taleea.com/newsdetails.php?id=4854&ISSUENO=1684
[Accessed 4th Nov. 2006]

to amend some of the articles that might affect some of the women's rights, for example the legal age of marriage. Another conference was held a year after in 1975 (the same year of the new election of the NA), focusing mainly on enfranchisement rights for women.[28]

The second women's organization was formed later on in 1963; this was the Women's Cultural and Social Society (WCSS). The organization was formed by a group of women who came from well known and upper-class families.[29] They represent a specific class of the society that are fortunate to have the chance to have a degree from universities abroad.[30] The idea behind establishing this society was to have an organization that can take care of women from poorer classes and housewives who did not have the chance to receive any education. Also, it was a good chance for its members to do some useful charitable work in their spare time. It might be worth mentioning that when that group of women presented their application to the Minister of Social Affairs and Labour, he rejected their application refusing the name of their society since they had put 'The Kuwaiti Women Club.' Describing the group as a 'club' did not fit the society, but he agreed after a month when they changed to the name to 'society'.[31]

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[28] Al-Mughni, H. (2001) pp 67-94.
[29] Mohammad Mansour. *Ba'd Najaheha Fe Ghadeyat Al-Mara' Al-Kuwaitia* (After The Success of Passing the Women's Suffrage Rights). [online] [2006] Available from: http://www.ahl-alquran.com/arabic/show_article.php?main_id=373 [Accessed 4th Nov. 2006]
[30] Al-Mughni, H. (2001) pp 67-94.
[31] The Minister said that the description 'club' would create problems in the society especially since each member of those women – at that time – were studying abroad, Egypt, Lebanon and Scotland, so they might be accused of 'alienating the society'.
Al-Haji, S. (1983) pp 782.

The WCSS's membership was exclusive only to those who had a degree when most of women at that time were illiterate. Also, the activities provided by the society were exclusive to its members, so that the non-members cannot participate in those activities. As a result, only very few of selected women can enjoy both membership and activities and who also came from the same merchant-class families (some of them were relatives). Although the WCSS participated in some charitable activities inside and outside Kuwait - most of the charities were for orphans -it did not make an effort to participate in problems that women suffered from during that period, such as violence against them.[32]

The WCSS held a conference in the Gulf region in 1975 as a response to the UN's declaration of the ' decade for women' from 1976 to 1985. All of the papers were presented by men, but they came with very important recommendations for equal opportunities and suffrage rights for women among their main demands.[33]

Women's political rights were in a truce between 1976 and 1982 when the Amir of Kuwait Sabah Salem Al-Sabah announced that the NA was dissolved. However, another conference was arranged in 1977 to discuss the status of the working women.

When the AWDS held the women's rights campaign, many of the merchant-class and members of the WCSS were against it. It was not because they were against the idea of enfranchising women, but because the AWDS was the one that was holding it. The

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[32] Al-Mughni, H. (2001) pp 67-94.
[33] Nouria Al-Sadani. *Alharakat Alnesae'ya fe Algharn Aleshreen 1917-1981* (The Arabic Women's Movement in the 20th Century).(Kuwait, 1982) pp 37.

WCSS did not like the attention that was paid to the AWDS.[34] At that time another women's society was established called the Girl's Club, which as Mohammad Monsour argues was supported by Nouria Al-Sadani. The new society worked together with the AWDS to push the women's suffrage rights. The campaign gained greater importance when the two organizations worked together.[35]

In 1980 the Ministry of Social Affairs and Works dissolved the AWDS due to a violation of the condition of the number of board members.[36] Margret Badran argued that there are several reasons for closing this Society down. First, is the strong competion among the members that led to tension. Second, the connection between the Society and the nationalist activists in Egypt. Finally, the insistant demad for suffrage rights for women.[37]

There are some Islamic societies for women; in particular two were established in the early 1980s. However, their main activities were about giving Islamic teaching for the younger generations, and were not involved in politics.[38]Yet, the women's Islamic groups who represented the Shia approach had supported the women's suffrage rights. Khadeja Al-Mahmeed is one of the main activists who supported the women's rights issue and worked together with the WCSS in their campaign during the 1990s, unlike the women who represented the Sunni Islamic approach who tried to harm the suffragists' reputation.[39]

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[34] Al-Mughni, H. (2001) pp 67-94.
[35] Mansour, M. (2006)
[36] Al-Sadani. *Alharakat Alnesae'ya fe Algharn Aleshreen 1917-1981.*(Kuwait, 1982) pp 37.
[37] Badran, M. (2003) pp 366.
[38] Al-Sadani, N. (1982) pp 39, 40.
[39] Al-Mughni, H. (2001) pp 172-183. Also Mansour, M. (2006)

In 1982 a bill was presented by the MP Ahamad Al-Tukhamem to reform the Election Act to include women, but the bill was not passed. Although many of the MPs were in favour of the reform, they failed to vote. The WCSS and the Girls Club[40] handed a complaint to the National Assembly to reject the bill. The Girls Club established the Organizing Committee for the Political Rights for Kuwaiti Women. The Committee carried out some activities like fundraising, giving seminars, and writing articles regarding the issue. This was right before the 1985 election, though the next elected National Assembly was suspended a year after in 1986. Kuwait remained without any elected parliament until 1992 after the liberation from Iraq.[41]

On 1990 Kuwait was invaded by Iraqi troops. The occupation lasted for seven months. As it was dangerous for men to go out because of the possibility of getting arrested for no reason, it was left to the women to transfer money, obtain medicine, documents, and food. They also volunteered to undertake different jobs.

Although women had to fight the Iraqi occupation in armed resistance just like men, they protested in an all-female demonstration against the occupation, and were imprisoned and killed, still they were denied suffrage rights after Kuwait was liberated. As the women issue in Kuwait was an important one to the Western countries after Kuwait was liberated,[42] the Amir issued a decree giving women suffrage rights just like men; yet the

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[40] A women's organization established in 1975. Health and sports for women were its main objectives.
[41] Al-Mughni, H. (2001) pp 143-145.
[42] Ferry Biedermann. *The Struggle for Women's Rights in Kuwait.* [online] [26th April 2001] Available from:

decree was rejected by an all-male National Assembly.[43] The rejection was due to the fact that the Islamist movement made an alliance with the conservatives in order to defeat any initiation about women's rights.[44]

Regardless of the fact that there does not exist any text that forbad women from enfranchisement, Islamists were strict about it and insisted on rejecting it again in 2000 when it was presented by five liberals MPs by a 32-30 vote.[45] Some, such as Al-Mughni, argue that the bill did not pass because of shifting positions from some of the Liberals MPs who feared that women – if they were given the franchise rights – would vote for the Islamists representatives, though the bill was supported mainly by the liberals, Shia's, and the government members[46].Women tried to bring a case in the Constitutional Court several times in 2000 and 2001,[47] but all of them failed regarding a procedural cause.

In an interview, Nouria Al-sadani[48] stated that if Kuwaiti women had been united and more faithful to their main right, the enfranchisement right, they would have gained it a long time ago in the seventies.

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http://www.rnw.nl/hotpots/html/kuwait01426.html.
[Accessed 2nd Nov.2004]

[43] 41:21 voted against it.

The New York Times. *Kuwait Rejects Political Rights for Women*. [online] [24th Nov.1999]Available from: http://chora.virtualave.net/kuwaitrejectswomen.htm
[Accessed 2nd Nov.2004]

[44] Al-Mughni, H. (2001) pp 155-6.

[45] CNN. *Kuwaiti liberals propose women's rights bill, again*. [online] [29th July 2000] Available from: http://archives.cnn.com/2000/WORLD/meast/07/29/kuwait.women.rights.ap/index.html
[Accessed 2nd Nov.2004]

[46] Al-Mughni, H. (2001) pp 175.

[47] Feminist Majority Foundation. *Kuwait*. [online] [undated] Available from: http://www.feminist.org/news/newsbyte/news_results.asp?us=1&glo.
[7th Feb.2005]

[48] Interview On Sunday 02-01-05.

In summary, the general examination here of the women's movement in Kuwait concludes that since its foundation it was not well organised and was unfocused in its main demands. Moreover, some of the women's organisations used it more as a position of prestige which led to a negative influence on the women's rights in general. As a result of both its attitude since it was founded and being representative of a specific class of society, the women's rights campaign led by the WCSS has only managed to annoy the majority of women. Seham Al-Fraih[49] concluded that there is no women's movement in Kuwait; instead, there are a number of women who worked for the women's right sincerely. She also explained that the problem is that inside the women's groups there is tension which did not help in serving the women's cause in general– and suffrage rights specifically.[50]

Al-Sadani refers to nine reasons why the women's societies failed to serve the suffrage rights for women:

1. Lack of coordination between women's associations.

2. Fragmentation and disintegration of the women's movement in Kuwait.

3. Absence of the AWDS, one of the pillars of the family claim the rights of women.

4. Inexperience of the newly founded association such as the Girls Club.

5. The absence of proper planning programs for the women's societies to form lobby.

6. Failure to adopt a certain strategy for women's activities.

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[49] Arabic Language Professor in Kuwait University and Vice President of the Arab Organization for Human Rights.

[50] Muddafar Abdulla. *Interview with Dr.Seham Al-Fraih.* [online] [3rd Aug.2005] Available from: http://www.taleea.com/newsdetails.php?id=5214&ISSUENO=1689 [Accessed 8th Nov. 2006]

7. Absence of women from the sessions when the NA were discussing the suffrage rights.

8. Frustration that dominated the Arab nation during the 1970s and the 1980s.

9. The control that the religious trends had among people who opposed women's suffrage rights.[51]

Yet, as a result of the political upheaval that the whole region is going through, women were to be given the enfranchisement right in any case. This is not as a result of the women's movement but the result of necessary political changes.

2.3. The Women's Movement in Egypt

Women in Egypt have a unique history regarding the Pharaohs period. During that time women became queens like Cleopatra and Hatshepsut, ruling as wisely and fairly as any male king. However, as time passed, different factors changed the position of women.[52]

Egypt was one of the first countries in the Middle East to open schools for girls when Mohammad Ali Pasha was the Ruler: education and modernization was one of his main concerns.[53] Also, many of the important thinkers who demanded women's liberation were Egyptians, like Muhammad Abdu, Qasem Amin, and Jamal-Aldain Al-Afgani. The main demands were for education and the right to have a job for women. Those researchers'

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[51] Al-Najar, S. (2004).
[52] Aida Beshara. *The Role of Women in Integrated Development in Egypt.*(London: State University of New York Press, 1987) pp 337-343.
[53] Ayad Al-Qazzat. *Education of Women in the Arab World.* [online] [undated] Available from: file://A:\Arab%20Women%20and%20Education.htm
[Accessed 1st Sep. 2004]

thoughts were direct motivation for the women's movement later on.[54] Furthermore, the early move in allowing students to study abroad helped to gain more liberal attitudes towards women.[55]

During the mid-nineteenth century, Mohamed Ali Pasha was the ruler of Egypt. He was known as an open-minded person and liked to westernise the country. He asked for a French doctor named Dr. Antonio-Barthelemy Clot to establish a new medical system in the country. One of the schools the French doctor had established was the 'School of Midwives' in 1832. This was the first school of its kind to teach girls all about obstetrics skills. To graduate it took a full six years of study, and the graduates were referred to not only as midwives but as doctors. This move enabled the Egyptian women to demand their rights and liberties before any other women in the Middle East.[56] The main problem that the founders faced was to find students. At that time it was not proper for girls to go to schools, especially a professional school. The problem was solved by bringing females from the slave market, or orphans.[57]

The women's movement in Egypt started by the end of the nineteenth century[58] when different voluntary women's organizations were established. Egypt was under the Ottoman Empire at that time. Egypt joined the Empire in 1517. As the Ottoman rule in Egypt lasted for many centuries it has affected the Egyptians in general and women in

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[54] Nadje Al-Ali. *Secularism, Gender and the State in the Middle East.* (Cambridge: University Press, 2000) pp 56-60.
[55] Dr.Latefa Salem. *Al-Mara' Al-Masreya wa Al-Tagyer Al-Ejtemae' 1919-1945* Egyptian Women and Social Changes 1919-1945). (Cairo: Al-Haya' Al-Masreya Al-Amma lelketab, 1984) pp 14-21.
[56] Laila Abu-Lughod. *Remaking Women.* (Princeton, N.J.: Princeton University Press, 1998) pp 35-63.
[57] Ibid.
[58] Beth Baron. *The Women's Awakening in Egypt.* (London: Yale University Press, 1994) pp 168-175.

specific. The term *harem* appeared during that period. The term refers to upper-class women and means the seclusion of women.[59] The Turks exhibited cruel and tyrannical behaviour towards women, not only to the Turkish women living in Egypt but to all Egyptian women, to the extent that it became part of their own customs and their way of living. However, things started to change when Great Britain occupied Egypt.[60]

Women played a major role in the 1919 revolution; they succeeded in showing the nation in general that they can change and affect the destination of their country. They protested, went on strike, and boycotted English products in order to support the independency of Egypt. A few ladies' names appeared, but one of the most important was Huda Sha'rawi who was the first to organise a protest that included more than 500 ladies. Sha'rawi had formed more than one women's society which was involved in politics and mainly in supporting the struggle against the British occupation. Also, Safeya Zaglol, Sa'ad Zaglol's wife (the leader of Al-Wafd Party which led the major struggle for independency at that time) had such an effect on much of Egyptian life by standing sincerely beside her husband that they called her 'mother of the Egyptians'. Moreover, the Wafd members continued to ask Safeya for her opinion in the party's matters even after her husband's death. Although there were many women who had the courage to stand up for their beliefs against the imperialists and their supporters, the motion for women's political rights failed in 1944, just like the motion of the right for women to be members in the senate had failed in 1938 after the strong participation for women against the 1936

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[59] Majda S. Makhlouf. *Al-Harem fe Al-Ghasr Al-Othmani* (The Harem in the Othman Palace). (Cairo: Dar Al-Afagh Al-Arabeyia, 1998) pp 10-18.

[60] Soha Abdel-Kader. *Egyptian Women in Changing Society, 1899-1987*. (Colorado: Lynne Rienner Publishers,Inc,1987) pp 1-23.

treaty.[61] Women did not achieve political rights until 1956.[62] It is worth mentioning that Sha'rawi did not became famous from only participating in the revolution, but also due to the fact that she was the first one to go unveiled in public right after she came from a conference in Rome in 1923. When the ship arrived in dock, everybody was shocked that there was a lady who was not wearing anything to cover her face. Zaglol congratulated her, and ask his wife to do the same, but she preferred not to. After this, many women followed Sha'rawi and went unveiled in public.[63]

Women's societies started after WW1. Most of them worked on social and political aspects since Egypt – at that time – was full of major political change. From the very early 1920s women demanded to be equal with men, and to be liberated when Huda Sha'rawi was the leader of the Al-Wafd party (the women's subdivision), and then when she formed the leader of the Egyptian Feminist Union (EFU) – after quitting from Al-Wafd.[64]

The EFU had certain demands which were written in its constitution. The major demands were:

1. Equal educational opportunity for women.
2. Raising the age for marriage.
3. Reform of the marriage procedures (many females were forced to get married).

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[61] The Treaty agreed to end the British military occupation, yet to keep the British army in some designated areas.
[62] Ahmad Taha. *Almara' Kefahoha wa Amaloha* (Woman: their Strugele and Hope). (Cairo: Dar Al-Jmaheer, 1964) pp 71-73.
[62] Amal Al-Sabki. *Alharaka Alnesae'ya fe Maser* (Women's Movement in Egypt).(Eygpt: Al-Haya' Al-Mesreya Al-Amman Lel-Ketab, 1986) pp 106.
[63] Al-Sabki, A. (1986) pp 26-45.
[64] Al-Sabki, A. (1986) pp 26-45.

4. The government should pay more attention to the public health and to children (the infant death rates were very high at that time).[65]

Also, another demand for the Union that Sha'rawi worked on is the reform of the Family Law that Egypt had in that period of time. In 1935, she gave a lecture on polygamy. Her main demand was for the government to ban it.[66]

In 1923 the Union worked with the women's branch of the Wafd Party, and came up with a declaration with all of these demands addressed to all international and national organizations. Moreover, they organized a protest and raised banners with their demands and marched to the Parliament.[67]

Following this, there were different women's organizations all over Egypt. A distinguished union established right before the end of WW2 was called the National Women Party. This was formed by Fatima Ne'mat and all the members were lawyers. They demanded that women should be equal with men by accepting females in every university department and in every job position (there were many jobs that were forbidden to women); allowing them to be members in all of the unions; banning polygamy; restricting men the freedom to divorce; increasing the divorce allowance; and

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[65] Huda Sha'rawi. *Auto-biography of Huda Sha'rawi.* (Syria: Al-Mada House, 2003) pp 217. Also Jouslin H. Al-Debs. *Huda Sha'rawi.* [online] [6th Mar.2004] Available from: http://www.daralhayat.com/society/03-2004/20040305-06p18-01.txt/story.html [Accessed 8th Nov. 2004]

[66] Leila Ahmad. Early Feminism Movements in The ME. In: *Muslim Women.* (Australia: Croom Helm Australia Pty Ltd., 1984) pp 119.

[67] Taha,A. (1964) pp 71-73.

the raising of the custody age of children in order to stay longer with their mothers before transferring the custody right to the father.[68]

Before 1921, education for girls used to be provided by the colonials only, and for a certain class of people. Those in the upper-class believed in the importance of education for girls, but they would rather have tutors at home. On the other hand, the middle-class people did not mind their daughters going to schools paying for tuition so that their daughters would not socialise with lower-class girls.[69]

Nabaweya Mosa established a school for girls: the 'Developing Egyptian Girls Society' which was the first Arabic school for girls in early 1921. In 1923 a group of members on the Egyptian Feminist Union went to the Prime Minister at that time asking for elementary and high schools for girls. Their demand was welcomed and provided. In the early 1930s, education became compulsory for girls.[70]

Higher education did not start until later when Ahmad Lotfi AlSayed the Head of the Fuad's University, believed that women have an equal right to get a higher education just like men. He worked on it secretly with the Deans of the Literature and the Medical Schools. Without informing the media or the ministry, 17 girls were admitted in four schools in 1929. That incident raised a major argument because admitting girls to the university means girls socialising with boys, bringing the possibility of depravity. The

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[68] Dr. Salem, L. (1984) pp 52-65.
[69] Baron,B. (1994) pp 122-126.
[70] Ruth F. Woodsmall. *Moslem Women Enter A New World.* (NY: AMS Press, 1975) pp 184. Also Dr.Salem, L. (1984) pp 52-65.

argument did not stand for a long. On the contrary, the number of girls attending the university greatly increased year after year. In 1937, there was a strong movement towards banning co-education in the university, but that attitude could not stand when it was strongly resisted by the students and the liberalists. Instead, the uniform issue was presented, but again the college girls' student rejected the idea, and conservatives could not impose it.[71]

Although the 1919 revolution was known to be the main corner of women's movement in Egypt, some argue that the women's movement had started long before then, and women's participation in that revolution was not a sudden action for women. Women had supported Ahmad Orabi in his battle against the Turks (1875-1882[72]) and they had raised funds. Even the princes believed in Orabi, although he was fighting against King Khedewi Tawfeegh.

At that time many important thinkers who believed in women's liberation as a way for any nation to be developed appeared. Also, it was the time of the famous female poet, Aisha Taimour, who had first appeared in 1869.[73] After that, the female press started to develop. By 1913 there were more than nine magazines edited by women and addressed

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[71] Dr.Salem, L. (1984) pp 72-97.
[72] Arab News. *Birth of Ahmad Orabi (A Revolutionary Leader).*[online] [31st Mar.2001] Available from: http://www.arabicnews.com/ansub/Daily/Day/010331/2001033136.html
[Accessed 2nd Nov.2004]
[73] Al-Sabki, A. (1986) pp 13-16. Also
Nabeela Hashim. *Aisha Al-Taimouriya.* [online] [undated] Available from: http://cmadp.com/taymur.htm
[Accessed 8th Nov.2004]

to women.[74] One of the most important thinkers who daringly issued a book called the *Liberation of Women* was Qasim Amin. What helped Amin to have a liberated view about women and to have the guts to issue these views in a book was his education in France. Amin was specific in his demands towards women:

1. Get rid of the veil.

2. Education for women.

3. Men have the right to divorce – according to Sharia- but it has to be conditioned.

4. Polygamy should be banned unless there was an extreme need for that.

5. Women should have the right to have a job.[75]

It was not easy for the society to even listen to such demands. As a result, Amin was accused of many things, including the accusation that he was an atheist.[76] In spite of the strong objection against Amin, he continued to spread his thoughts about women and tried to make society acknowledge the importance of liberating women. Lots of men felt threatened by these thoughts because they were aware of how they might lose control over women if such thoughts were publicized.

Amin was strongly against polygamy, and tried to prove that it is against human nature and that it can only result in hatred within the family and brothers from different mothers

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[74] Kareema Hasan. *Rae'dat Sahafeyat mn Zamin Fat* (Journalists Women in the Passed Decades). [online] [14th April.2006] Available from:
http://harakamasria.org/node/5719
[Accessed 8th Nov.2006]. Also for more details on women's press in Egypt:
Beth Baron. *The Women's Awakening in Egypt.*(New York: Yale University, 1994) pp 13- 37.

[75] Mohammad Emara (Islam online website). *Qasim Amin*. [online] [undated] Available from:
http://www.islamonline.net/Arabic/history/1422/06/article19a.shtml
[Accessed 7th Feb.2005]. Also
Fat'hi Aamer. *Qasim Amin fe Mahakim Al-taftesh* (Qasim Amin in Inquisitions).[online] [19th Dec.2004] Available from:
http://www.al-araby.com/articles/939/041219-939-pnp01.htm
[Accessed 7th Feb.2006]

[76] Al-Sabki, A. (1986) pp 13-16.

despite the financial issue.[77] Furthermore, Amin related the backwardness of the ME then compared to the rest of the world – especially the West – who were progressing, the status of women. He concluded that a nation would be measured from the way they treat women; a measure of whether it is civilized nation or not.[78] Sa'ad Zaglol gave support to Amin, though this meant that he was risking his leadership. As already mentioned, Zaglol encouraged his wife to go in public unveiled in order to set an example for all Egyptian ladies.[79] Also, through its leader, Sha'rawi, the EFU founder, supported the same ideas that Amin demanded for women.[80] Also, it demanded a family law – when there was not any – to protect the status of women in different cases especially in divorce. They sought for women to have the right to divorce her husband just as men can. The Union demanded that the average age for marriage should be raised, 16 for girls and 18 for boys.[81] The Union raised this demand in June 1923 to the Prime Minister. Later on in the same year, the King issued a decree limiting the marriage age as the Union demanded. However, that decree has produced different problems of how people abused the law especially in the countryside. Although there were a lot of loopholes in the law, it achieved a little of its purpose, and this was important for the women's movement.[82]

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[77] Emara, M.

[78] Ulil Abdulla. *Islam, Women, and Heresy.* [online] [24th Oct.2003] Available from: http://www.umich-cseas.org/eventsandnews/abstracts/ULIL/Third%20talk.htm [Accessed 8th Nov.2006]

[79] Mamdoh Esmae'l. *Al-Hejab wa Ma'rakat Al-Tagreeb* (The Veil and the Battle of Westernization). [online] [16th Jan.2004] Available from: http://al-shaab.org/GIF/16-01-2004/c1.htm [Accessed 8th Nov.2006]

[80] Sha'rawi,H. pp 243,244, 329- 334. Also, Al-Sabki, A. pp 13-16.

[81] Al-Sabki, A. (1986) pp 13-16.

[82] Dr. Salem, L. (1984) pp 14-21.

What helped Sha'rawi in her quest is that she came from a wealthy family, so she was not in need of any financial support. When she first travelled to the West, she noticed that they had a stereotyped idea about how backward women were in the Middle East in general. As a result, she decided to publish a journal in French –a language she was fluent in - in order to correct this idea. The journal started in 1925 and only stopped in 1940 due to WW2. Sha'rawi made efforts to send the paper free of charge to all foreign organizations in Egypt.[83]

By the time of the death of Sha'rawi in 1947, the EFU had turned its attention to become once more a social and charity institution rather than a political organisation.[84]

By the end of WW2, things had changed. The number of working women in both industry and business sectors had increased. Socialism had started to find its way in the country. As it was the time when citizens were fighting strongly for independency, women participated in a great deal just like men. Two women's societies were established during that time: the Women's Party leaded by Fatima Rashid in 1942 and the Daughter of the Nile organization was established in 1949 by Dr. Dureya Shafeq.[85] One of the main aims for both societies was the demand for equal rights for women.

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[83] Taha,A. (1964) pp 65-66.
[84] Abdel-Kader, S. (1987) pp 108.
[85] Dureya Shafeq was one of the most famous women's activists at that time. She believed in the women's cause from different aspects: Socially (when she worked to change the Family Law to provide more protection for women especially in regards to divorce; politically (She turned her society into a political party after the revolution, to be the first political party established by a woman); and economically (when she organised a huge demonstration with 1500 people to storm the Parliament forcing them to discuss the women's demands especially the issue of equal payment between men and women).
Women Literature Assosation of UAE. *Dureya Shafeq.*[online] [26th Oct.2004] Available from: http://www.alrabetta.ae/content/view/854/89/
[Accessed 8th Nov.2006]

Women were very active by this stage. They participated in every strike against imperialism. Moreover, they participated in carrying weapons. A woman was liable to be killed and poisoned by the colonists just like a man.[86] Women succeeded in becoming members in some of the labour unions.

The 1952 Revolution, led by Jamal Abdul-Naser, was important for women. Since the activists for revolution were inspired by communism, they believed in equal rights among citizens - men *and* women. It was because of this revolution that women got political rights in the 1956 constitution. In the 1957 election, two women were elected and one appointed as a minister for the Social and Work Affairs Ministry. Women earned more rights as a worker afterwards.[87]

The Revolution believed in the ability of women as powerful workers. Different laws were set in place to insure women in the workplace. This succeeded in raising their numbers in the industrial sector: from 3.3% in 1961 to 13% in 1976. The Charter of 1961 announced that: 'women have to be equal to men, she has to be free from all of the obstacles in order to take her place in the society.' Women participated in a very large numbers in industry sector to the extent that there were 200 000 women unionists out of 100 000 0000 members in 1970s. Although it was decided to dismiss all the parties in the country in 1953 and only keep the Socialism Aran Union - the ruling party - women succeeded in becoming members: there were seven members of parliament in 1971.[88]

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[86] Taha,A. (1964) pp 85-103.
[87] Majed Badran. *Ahwal Alnesa'fe Masr* (Women's Conditions in Egypt). (Cairo: Dar Aldewan,1996) pp 44-50.
[88] Abdel Kader, S. (1987) pp 112-115.

When the government dissolved all the political parties in order to follow the one party system, it affected the rights of women. It is noteworthy that Shafeq, the founder of 'Daughter of the Nile', tried to fight that decision for the sake of democracy and the rights of women, but this was ended when she became a prisoner in her own house and when all the publishing media she owned were closed.[89]

Although the 1952 Revolution gave women lots of rights, like education, work, and equality treatment, it failed to give women the right of free speech and banned her from expressing herself and the demands for rights.[90]

The country had started a new strategy by the 70s. It accepted the idea of multiparty, so it allowed the establishment of parties other than the ruler party which used to be the only one in the country. By then women had gain lots of benefits as a result of what the 1952 Revolution gave her. The participation of women was very high in different jobs. [91] During that period, the fundamentalist Islamists appeared and made women their main bone of contention. They made several demands, but most importantly:

1. Women should return to her private sphere, only men can participate in the public sphere.
2. The interaction between the sexes is totally forbidden.

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[89] Amani Saleh. *Women in Modern Culture and Society: A Century of Arabic Discourse*. (Demascus: Dar Al-Fik, 2002) pp 88-92.
[90] Saleh. A. (2002) pp 8892.
[91] Saleh. A. (2002) pp 88-92.

3. The husband has the right of the control over his family; the wife should only obey.
4. Only the husband has the right to take every single decision in the family matters including the absolute authority of divorce.
5. Women should not go out unveiled.[92]

These demands would return women to a position that she was in before the 1919 Revolution when she fought a lot for her liberty from all of these restrictions. Another wave is the secularism movement which took a position against fundamentalism. A lot of women joined this movement as they were aware of the dangers of the fundamentalist ideas if they were to be applied. Some of the members of secularism accused religion to be the reason for women's backward position. Because those two movements were too extreme, a mid-way Islamic wave appeared in order to come up with moderate thoughts towards women.[93]

To conclude, liberation was the priority for the Egyptian woman. She fought against colonialism in every possible way. The women's organizations, although different in their main objectives, were more focused and clear in their approach. Despite the fact that there were many liberals who believed in women's rights since the nineteenth century and the long years of fighting, women did not gain their political right until the middle of the last century.

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[92] Abdul-Kareem Sulaiman. *Al-Islameyon wa Al-Mara'* (Woman and the Islamists).[online] [2nd July.2004] Available from:
http://www.rezgar.com/debat/show.art.asp?aid=20159
[Accessed 8th Nov.2004]
[93] Saleh. A. (2002) pp 88-92.

2.4. The Women's Movement in Iran

The position of Iranian women was not very different from that of women in Egypt. The restrictions on women's freedom to go in public and the veiling issue were the same. Back in the late 18th and early 19th century, Literature and poetry were the only domains in which woman could express herself. Whereas village women enjoyed some freedoms, the urban women did not. Furthermore, it depended on the social class, so that the restrictions increased on women from upper-class families.[94] However, Haleh Esfandiari argued that even though the women in the village were able to move more freely, they suffered not only from the hard labour, but also from a complete control of their lives by their husbands who were free to marry up to four wives and could have an unlimited number of 'temporary wives'.[95] Although education for girls was introduced very early in 1835 by the Americans, the main condition the government imposed is that it could not be applied to Muslim girls.[96]

However, forty years later, when the first school was opened, Muslim girls were allowed to go to school. Yet it remained the first and only school for girls until the beginning of the twentieth century when there were 50 schools in 1910 in Tehran.[97] Literacy for women used to be seen as a dangerous thing and against Islam. Some had believed the creation of a women's mind prevented her from accepting any knowledge[98].

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[94] Farah Azari. *Women of Iran.* (London: Ithaca Press London, 1983) pp 170-88.
[95] The Shia Sect which make up the majority of the Iranian population, have what is called 'Mota'a' Marriage which is a temporary marriage. It will be discussed in greater detail in chapter five.
[96] Haleh Esfandiari. *Reconstructed Lives.* (Washington DC: The Woodrow Wilson Centre Press,1997) pp 20,21.
[97] Azari, A. (1983) pp 170-88.
[98] Eliz Sanasarian. *The Women's Rights Movement in Iran.* (New York: praege Publishers, 1982) pp 4-13.

Traditionalists and religious people tried to attack girls' schools in different ways. When Tuba Azmudeh established a school in 1907, the government declared it was not responsible for the safety of the girls. As they left school, they were harassed or called prostitutes. Some parents who believed in education for their daughters decided to hire home tutors in order to protect their children from being attacked.[99]

Looking at the modern history of Iran, there were four major ruling phases. First, there was the Qajars whose ruling period ended in the early years of the twentieth century. Second, the Constitutional Revolution took place at that time and supported some of women's rights. Then, the Pahlavi Revolution occurred in 1925; it was an important period for a woman since she gained a major degree of her freedom. The final stage was the Khomeini Revolution in 1979, which was about fundamentalism.[100]

During the Qajars period, women were isolated and prevented from going out alone. In both the private and public spheres there was segregation. Even on the pavements of the streets, there were designated pavements for men and others for women.[101]

The women's position in Iran during that period was not very different from that in any other ME country. In spite of that fact, there was some participation of women in politics and in social aspects of society. Tajol-Saltaneh was a writer and poet. Her education in

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[99] Ibid, pp 39.
[100] Camron Amin. *The Making of the Modern Iranian Women.* (Florida: University Press of Florida, 2002) pp 1-12. Also
Nikki R. Keddie. *Women in Iran Since 1979.* [online] [2000] Available from: http://www.iranchamber.com/podium/society/010920_women_iran_since_1979.php [Accessed 10th Nov. 2006]
[101] Sanasarian, E. (1982) pp 4-13.

Persian and French literature gave her the ability to explore other cultures and to compare them with her own. She criticized the position of Iranian women by explaining how veiling was a major obstacle to their freedom. Her view was that if Iranian women cannot be like European women, then at least she has to have the same rights as women who live in the villages. The urban women work freely in the fields without veiling.[102]

A major factor for Iranian women's movement was the Constitutional Revolution in which education for girls was one of its main results. This revolution took place in the early years of the twentieth century. Iranians protested against the dictatorship led by Qajars. Women played a major role in the protests: they helped to build up the National Bank of Iran by selling their jewellery, so that the government would not have to borrow money from any foreign countries. Also, they carried guns and fought in protection of the revolutionaries. Not only that, but they also showed a great courage fighting against the Russian-British agreement to divide Iran between them.[103]

Since this Revolution, women started to form organizations and publications for themselves. Unlike the men's, their social and political activities were separate. The main purpose for these kinds of activities was the position of women in Iran. Regardless of the fact that women had strongly participated in the Revolution to impose the constitution that included the embitterment situation for women, it had very disappointing results for women. Since the Islamic influence was high at that period, it did not help a lot to change women's position. On the contrary, it was seen that women's participation was only

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[102] Azari, F. (1983) pp 170-188.
[103] Azari, F. (1983) pp 170-188.

exceptional and happened because of certain circumstances, and now she should go back to her own place: the home. Although women gained some rights after the Revolution, many other rights were denied. She was still evaluated as an object for sex and love only, and she would never be equal to men.[104] She struggled and fought in order to have a constitution to give Iranian democracy. This happened particularly when it was too dangerous for men to go outside, so women were the ones who transferred guns and news. However, she was paid back by the denial of her political rights in the first formed parliament after imposing the constitution.[105]

In 1925, Reza Shah took over; he wanted to modernise the country which had been affected by Attaturk in Turkey. Although the new government had closed all existing organizations including the women's, it believed in the importance of women in general. One of the most important laws that affected all of Iranian women was the 'Unveiling Law'. In 1936, the law was presented to prevent women from wearing a veil by force since it was symbolic of the traditionalism which was – according to the Shah's view - against modernisation and westernisation.[106]

During that period, one of the important organizations established in 1944 was 'Our Awaking'. It represented Communist thoughts. Beside, demanding equal and political rights for women, the main objectives for the organization was to improve working

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[104] Parvin Paidar. *Women and the political process in the twentieth-century Iran.* (New York: Cambridge University Press, 1995) pp 50-77. Also Azari, F. (1983) pp 170-188.
[105] Homa Hoodfar. *The Women's Movement in Iran.* [online] [1999] Available from: http://www.iranchamber.com/podium/history/020312_women_secul.htm [Accessed 3rd Nov. 2004]
[106] Asghar Fathi. *Women and the Family in Iran.* (Netherlands: E.J. Brill, 1985) pp 107-112.

women's lives by demanding more rights for them. Although the organization represented Communism and was affected by the Russian Peace Movement, nationalising the south oil fields was its priority. It participated in many activities in order to support Mossadegh's move towards this purpose. During that period there were different organizations and societies for women. Ashraf, the Shah's twin sister, decided to unite all of the women's organizations into one called The High Council of Women. Each organization continued to do its activities, but under regime control.[107]

After the coup d'etat on Mossadegh, the period from 1953-1963 was not a good one for democracy since all political activity was abolished, and all of the organizations were closed down. During that time, the country had a lot of strikes and demonstrations against governmental procedures in banishing all of the political activities. Women, from different classes and careers, and even students, participated in the protest. Some of them were killed because of that; the famous poet Marzieh Oskoui was one of these. When Mohammad Reza Pahlavi arrived by a white revolution, it was an important period for women. The new Shah gave women the political rights that she had been struggling for and had demanded for years. Women then were able to vote and be members in the parliament just like men in 1962. The Shah assigned two women in the Senate and, most importantly, issued the Family Protection Law in 1967. Women during the regime of the new Shah were allowed to wear the veil.[108]

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[107] Amin, C. (2002) pp 189-201. Also, Azari, F. (1983) pp 170-188.
[108] Esfandiari, H. pp 19-28.

Later on, protests against the dictatorship of the Shah started to increase. Two main protest groups were formed undercover: the Mojahedeen and the Fedae'en. The first group formed in 1963 and has an Islamic approach. However, the other group, which was established when it made its first attack in 1970, represented Marxist thought.[109] Both groups believed in armed protest and, more importantly, both of them included women members. Women's participation within the two groups was magnificent. Many of them were arrested, imprisoned, and killed for their cause. Iranian people saw the Shah as an agent for imperialism; they fought against him in different ways, and women had a part in every kind of protest.[110]

When the 1979 Revolution took place, it brought about a totally different attitude towards women. As soon as the fundamentalists took over, different rumours started to spread all around the country. These were about women and women's rights. The new government saw that some of Shah's rules must be changed to suit Islam and its ethics. Some Islamists who took over the Ministry of Judgment started a campaign against appointing women as judges, and cancelled the training programme for female law graduates. Also, they intended to change the Family Protection Act. Furthermore, there was some reconsideration about the compulsory veiling.[111] Within less than a month the

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[109] Dr. Zayar. *The Iranian Revolution- Past, Present and Future.* [online] [undated] Available from:
http://www.marxist.com/iran/index.html
[Accessed 12th Nov.2004]. Also, for more about the communism movement in Iran, see the interview with Ayman Bydar, journalist in The Anarki Comminist Magazine:
Mark, Arya, Ruwain. *Anarki in Iran.* [online] [19th Sep.2005] Available from:
http://www.kefaya.org/05znet/051005baymenbidar.htm
[Accessed 10th Nov.2006]

[110] Azari, F. (1983) pp 170-188.

[111] Mehrangiz Kar. *The Legal Status of Iranian Women.*[online] [18th April 2000] Available from:
http://www.iranian.com/Opinion/2000/April/Women/
[Accessed 17th Nov.2004]

Revolutionists started to attack some of the women's rights leading to the formation of the Association of Women Lawyers to try to stop any procedures against women's rights. The Association organized a rally on 8 March, which happened to be International Women's Day. 15 000 women gathered to start marching on the streets; the number of protesters rose to reach to 30 000 women. Although the event succeeded in drawing the media's attention from around the world, Iranian media described these ladies with different, improper accusations. Out of anger, these women decided to march again for three days, but were harassed in every possible way which prevented them from making the third day. The following day they were also attacked harshly by the media and described as 'Western dolls', traitors acting for the West, and other terrible descriptions.[112] As a response to the protest, the government promised to work on equal rights, and that there would be no intention of a compulsory veiling law. However, the day after, March 9th, the government called for segregations in all sports activities, which meant that women could no longer participate in any international sports activities. This resulted in another massive demonstration the day after, where women were beaten by armed fundamentalists.[113] Due to the fact that the regime was attacking every Western tradition, International Women's Day was seen as one of the most dangerous traditions that the republic should get rid of. As a result, it was announced that 7 May was the new Women's Day. This date was the birthday of Fatima, the daughter of the Prophet

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[112] Esfandiari, H. (1997) pp 19-20.
[113] Pedram Missaghi. *First protests against mandatory hijab*.[online] [7th March 2000] Available from: http://www.iranian.com/History/2000/March/Women/index.html
[Accessed 12th Nov.2004]

Muhammad, who the Shia Muslims view as having an extraordinary personality and should be the ideal for every Muslim woman.[114]

As the Revolution adopted Islam ideology, it was increasingly difficult for representatives on the left to proceed with their activities.[115] At that time, there were different women's organizations which represented different political views. There were organizations which presented the left wing, as well as the right wing which was supported by the regime. There were two publications for women who supported Marxism: *Equality* and *Women in Struggle*. But these publications were forced to work undercover. There were many protests and demonstrations against censorship, imprisonment, and demands for the freedom of speech.[116]

On the other hand, Revolutionists had changed some laws that led to two of women's organizations, the National Union of Women and Women's Emancipation, to set up the Women's Solidarity Committee in order to find solutions to stop the violation of women's rights.[117] The new government had lowered the female age for marriage from 18 to 13,[118]

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[114] Muslim Women (website). *Views of Imam Khomeini about Women*.[online] [undated] Available from: http://www.ezsoftech.com/women/index.php?option=com_content&task=view&id=1&Itemid=1 [Accessed 10th Feb.2005]. Also:Azari, F. (1983) pp 190-224.

[115] Other than joining the political organizations, many women joined the armed struggle against the government and also the 'underground political activity' - especially the groups who represent the leftist. Hammed Shahidian. Women and Clandestine Politics in Iran, 1970-1985. *Feminist Studies*. 1997, 23 (1), pp 7-42.

[116] Azari, F. (1983) pp 190-224. Also
Azar Tabari. The Women's Movement in Iran: A Hopeful Prognosis. *Feminist Studies*. 1986, 12 (2), pp 342-360.

[117] Azari, F. (1983) pp 190-224. Hoodfar, H. (1999)

[118] The changes to the Family Law were major since the previous Law – during the Pahlavi Era – it was more Westernized for instance the divorce grounds were the same for both men and women. Men cannot divorce their women as they wish – as in the Sharia Law states, which it will be discussed in great detail in the Family Law Chapter. Men also have to file a divorce suit just like women. The marriage age was 20 for men, and 18 for women. This used to be considered one of the highest ages in Family Law in the region.

banned married girls from attending secondary schools, and limited the opportunities for jobs, education, and sports for females.[119] The Committee arranged a conference which succeeded in drawing the attention for women's struggle, especially with the new laws. After that, the Committee arranged another rally which also took place on 8 March 1980. It is noteworthy that both organizations represented the left wing, and were affected by the Fedayeen group which was dissolved in the early days of the revolution. In July 1980, a new law was published banning any female employee from attending work without the *hejab* (scarf). Feeling that their position was going backwards, there were spontaneous demonstrations the day after in front of the Prime Minister's office. Both NUW and WE leaders handed a resolution of three major demands:

1. Changing the marriage and divorce laws.
2. Equal opportunities with men in education and jobs.
3. The veil should remain optional.[120]

None of these demands were looked at; on the contrary, any women who went unveiled would be harassed and the assaulter would get away with it. Harassment would start from throwing stones to knife attacks. Also, many of women were fired from their jobs with different excuses. Some of the left wing parties that still retained their own publications

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Finally, women have the right to seek custody of their children where it used to be guaranteed to the father. These were the major changes to the law, in addition there were also some other minor changes in regards to polygamy and temroary marriage for example.
Patricia J. Higgins. Women in the Islamic Republic of Iran. *Journal of Women in Culture and Society.* 1985, 10 (3), 477-494.

[119] In fact, these are just examples, the changes are longer list.
Mehrangiz Kar. *The Legal Status of Iranian Women.* [online] [2004] Available from: http://www.iranchamber.com/podium/society/041127_legal_status_iranian_women.php [Accessed 6th Feb. 2005]
For more details about the changes:
Val Moghadam. Revolution, the State, Islam, and Women. *Social Text.* 1989, 22, pp 40-61.

[120] Azari, F. (1983) pp 190-224.

and tried to support women and write about their harassment but it did not change the situation.[121]

Some of the Women's Organization sources formed an alliance called the Muslim Women's Movement (MWM). Its main object was to promote the revolution and its new regime. One of the active women was Azam Taleghani who also established the Society of Women for the Islamic Revolution after leaving the MWM. It was common to find a women organization in every profession which usually started with the word 'Muslim'.[122]

As women lost many of the rights that they had gained before many organizations, societies and publications were formed in order to speak on women's behalf. However, the Association of Women Lawyers was the most active and it is the only one that still exists. In 1980, all political parties were banned, which meant that there were a lot of arrests and executions. This led to some organizations being formed outside Iran like the National Union of Women and National Council of Resistance.[123]

On the other hand, accompanying the Revolution, the Islamic women's movement was created. A new organization called the Women's Society of the Islamic Revolution was

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[121] Paidar, P. (1995) 234-236.
[122] Ali A. Mahdi. The Iranian Women's Movement: A Century Long Struggle. *The Muslim World.* Oct. 2004, 94 (4), pp 427-448. Also
Azari, F. (1983) pp 190-224. Also, Paidar, P. (1995) pp 237-242.
[123] Massoume Price. *A Brief History of Women's Movements in Iran 1850-2001*.[online] [undated] Available from:
http://www.parstimes.com/women/women_movements.html
[10th Nov. 2004]

established soon after the Revolution.[124] The organization included members of highly educated women, many of whom held degrees from Europe or USA, who protested against the Shah. Although the organization adopted Islamic ideology, it did not get any support from the government. The conservatives thought that supporting such an organization might harm the new regime because, even though it encouraged the idea of the hejab, it warned the government to make it compulsory. Also, the organization was against abolishing the Family Protection Law.[125] As *Zan-e Ruz* was a widely available magazine for women, the hard-liners disapproved of its board editor and replaced her with one of their supporters. The organization was very careful in presenting its idea of Islam ideology towards gender in order to avoid closure. In the same period, another Islamic wave appeared to raise both the idea of sex discrimination and how religion was used to benefit the patriarchal system.[126]

When the war with Iraq ended, the women's magazine raised the women's rights issue. In 1992, it discussed how Islam was misread to result in degrading women. On one hand, the feminist activists worked with human rights organizations but, on the other hand, they realized the importance of internationally acceptance by the government. As a result, the regime was prepared to discuss the gender issue more than any time since the revolution.[127] Faezeh Hashemi, Rafsanjani's daughter, was elected for the Fifth Majlis with the highest vote because she was one of the active feminists.[128] In the 1990s women

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[124] Haleh Afshar. *Islam and Feminisms An Iranian Case-Study*. (GB: Macmillan Press Ltd 2nd, 1999) pp 56,57.
[125] Hoodfar,H. (1999).
[126] Hoodfar,H. (1999).
[127] Hoodfar,H. (1999).
[128] Afshar, H. (1999) pp 56,57.

regained some of rights they lost in the early days of the Revolution especially regarding the Family Law.[129] Also the government established the National Muslim Women's League in order to support all of women's organizations which now numbered over sixty.[130]

When Khatami won the election in 1998, it was mainly because of his support of women's rights.[131] With regards to the Majlis, it was notable that the numbers of women candidates increased to 417 for the 2000 Majlis election. Some of elected women were liberal as well as other liberal male.[132]

The history of Iran has the most contradictory laws in the Middle East regarding women. Throughout the twentieth century, they experienced the most extreme forms of both fundamentalism and liberalism. While in the 1920s women were prohibited from wearing the veil, by the end of the 1970s they were not able to go in public without it. However, religion has played a major part in all of the three countries under consideration here. Since Qur'an could be interpreted in many different ways, many acts and laws could be described as 'Islamic' according to someone's beliefs. In all of the three ME countries, any kind of participation in the public sphere for women was denied, as women should not be seen or heard by strangers. If she does so, then it considered a disgrace for the family. Although the women in the early age of Islam were powerful participators

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[129] Mahdi, A. (2004)
[130] Price,M.
[131] Price,M.
[132] Elham Gheytanchi. *Chronology of Events Regarding Women in Iran since the Revolution of 1979.*[online] [2000] Available from:
http://www.findrticles.com/p/articles/mi_m2267/is_2_67/ai_63787338
[Accessed 3rd Nov. 2004]

politically and socially, and their memoirs are very well known and taught in all of the ME countries' schools, after several decades the opposite was true. Although Prophet Mohammad was proud of his wives and their manners later on and until now in some Arabic cultures, a husband would be very ashamed to say his wife's name in front of a stranger. Hundred years of the Ottmans' imperialism had its affect on traditions and beliefs, and some of these effects remain today.

2.5. The Women's Movement in the UK

The women's movement issue in the UK means different campaigns for different issues concerning women. The earlier campaigns are called 'first-wave' feminism, and started early in the nineteenth century.[133] One of the main campaigns regarding women is the Women's Suffrage campaign which was launched in the mid nineteenth century. However, it is argued that the suffrage campaign started when Mary Smith in 1832 handed a proposal to the Parliament when it was intended to amend the Reform Act to include more men voters.[134]

The Women's Suffrage movement started officially with the Langham Place meeting by a group of women in London in the 1850s. The meeting was led by Barbara Leigh, Smith Bodichon and Bessie Rayner Parkes. The group launched the English Women's Journal which specialised in the educational, political and employment rights for women. In his

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[133] Olive Banks. *Becoming a Feminist: The social origins of "first wave" feminism.* (Brighton: Wheatsheaf Books Ltd., 1986) pp 46.
[134] The National Archives. *The Campaign for the vote.* [online] [undated] Available from: http://www.learningcurve.gov.uk/britain1906to1918/g3/background.htm [Accessed 25th Nov. 2004]

support for this movement, John Stuart Mill had included the women's rights in his election programme. Two suffrage societies then established one in London, and another in Manchester.[135]

While working on the suffrage campaign, a new Act was passed which inflamed women because of its double standard regarding sexuality. The Contagious Diseases Act that was passed in 1864 assumed that only women can spread the disease since it only subjected women to inspection.[136] At that time, there were different suffrage societies for women in different cities. In 1867 the Manchester Society, led by Elizabeth Wolstenholme, united all of these societies into one group which was known as the National Society for Women's Suffrage (NSWS). A major argument of whether or not to support the Contagious Diseases campaign resulted in the withdrawal of the London Society from the National Society until 1877. Since owning a property was a condition to vote, and married women cannot own a property, this created another argument of whether or not to include married women. The London Society viewed that enfranchisement should be for single women; the Manchester Society included married women. The agreement between both societies was that the vote conditions that applied for men would be applied for women too, in case the property condition would change in the future.[137]

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[135] Harold Smith. *The British Women's Suffrage Campaign 1866-1928.* (Essex: Addison Wesley Longman Limited, 1998) pp 3-14.

[136] The purpose of this Act is to protect men in the British Army and Navy from having 'sexual diseases' that prostitutes might cause. The Act forced prostitutes to be examined, to prevent the spread of such disease.
Christie Zablocki . Contagious Diseases Act. [online] [undated] Available from:
http://www.umd.umich.edu/casl/hum/eng/classes/434/charweb/zablocki3.htm
[Accessed 20th Nov. 2004]

[137] Smith, H. (1998) pp 3-14. Also
Tanya Pohl. *Votes for Mothers.* [online] [2005] Available from:
http://dissertations.bc.edu/cgi/viewcontent.cgi?article=1098&context=ashonors

In spite of the argument that the word 'men' in Lord Brougham's Act includes both men and women unless it expressly excluded women, the idea was rejected by the Court of Common Pleas in 1868. In 1869, an important achievement for the suffragists was accomplished when Municipal Corporation Act allowed single women to vote.[138]

Women's politics rights were introduced for the first time in Parliament in 1870.[139] It was introduced by the MP Jacob Bright who used to be an active member in the Manchester Society. When Mill was defeated in the 1868 election, Bright was the leader for women's politics rights in the Parliament. However, the bill did not pass mainly because the Prime Minister opposed it. The women's rights bill used to be introduced in every year during the 1870s. However, a disappointment occurred in 1884 when the suffrage for women did not pass when there were a general belief that it would. Although the vast majority of Liberals' supported the bill, the leaders were against it thinking that the majority of women would vote for the Conservative Party. On the contrary, the Conservatives leaders supported the women's right, but there were no intentions to introduce it because the majority of Conservatives MPs were opposed it. By the 1880s, there were two different attitudes concerning women. First, there were a group of women who opposed the suffrage rights for women. The anti-suffrages organised themselves in order to confront the suffrage campaign. Some of the men who opposed suffrage rights had supported the anti-suffrage group. Mary Ward was one of the main leaders who opposed the suffrage

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[Accessed 12th Nov. 2006]

[138] Philippa Levine. *Victorian Feminism 1850-1900.* (Essex: Anchor Brendon Ltd, 1997) pp 57-68.Also,Smith, (1998) pp 3-14.

[139] Manchester Central Library. *Women's Suffrage Cllection.* [online] [undated] Available from: http://www.ampltd.co.uk/digital_guides/womens_suffrage_mcl_parts_1_and_2/Publishers-Note.aspx [Accessed 12th Nov. 2004]

rights; she believed that the sexual attraction between men and women would prevent them from working together in politics.[140] However, in 1918, the movement declared they had been beaten. On the other hand, the Corrupt Practice Act in 1883 was passed. The Act led to the dependence on voluntarily work during the election, banning paid agents. As most of the volunteers were women, the Liberal Party established the Women's Liberal Federation in 1887. Furthermore, women were allowed to be members in the Conservative Party's Primrose League to reach to 500 000 female members in 1891. In spite of the women's participation, the Primrose League of the Conservative Party did not allow the Party to be a women's rights lobby. When the Liberal Party's Women's group tried to pressurise the party to support women's suffrage, Gladstone, opposing women's suffrage, made a statement to the group to decide whether their loyalty was to the party or to the women's suffrage. Some of the women's party organizations had joined the NSWS, which resulted in the withdrawal of some of its member like Millicent Garret Fawcett and Lydia Becker to establish another organization called the Central Committee of the National Society for Women's Suffrage. The main aim of this organization was to avoid interference from the political parties since the NSWS did not allow any party to join before it changed its rule.[141] After 1890 working class women started joining the campaign when before it used to be composed of the upper and middle class only. The North of England Society introduced a petition signed by more than twenty-nine thousand working women and given to the House of Commons in 1894. It

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[140] Florence Boos. *The Campaign for Women's Suffrage 1865-1928(63 years).* [online] [undated] Available from:
http://english.uiowa.edu/courses/boos/questions/womsuffrage.htm
[Accessed 12th Nov. 2004] Also: Smith,H. (1998) pp 3-14.

[141] Jane Lewis. *Women and Social Action in Victorian and Edwardian England.* (Cheltenham: Edward Eglar, 1991) pp 240-250. Also, Smith,H. pp 3-14.

was an important success for the women's movement when the Local Government Act allowed married women as well as single and widow to participate in the local election in 1894. In 1896 the suffrage societies merged into one union which was called the National Union of Women's Suffrage Societies (NUWSS). The union had one main purpose: to secure the suffrage rights for women.[142]

In 1907, the NUWSS planned a chain of protests. The first one was held in the same year in February. More than 3000 women participated representing forty women's organizations.[143]

In the beginning of the twentieth century, men's organizations for women's suffrage started to be formed. In London, the Men's League for Women's Suffrage was established in 1907, and others were established in Manchester and Scotland.[144] On the other hand, aware of the suffrage movement and its powerful development, the anti-suffrage women established the Women's National Anti-Suffrage League in 1908.[145] The NUWSS

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[142] Smith,H. pp 3-14. Also
National Union of Women's Suffrage Societies. *Records of the National Union of Women's Suffrage Societies.* [online] [undated] Available from:
http://www.aim25.ac.uk/cgi-bin/search2?coll_id=6639&inst_id=65
[Accessed 12th Nov. 2004]

[143] Smith,H. (1998) pp 3-14.

[144] John Rylands University Library collections. *Women's Suffrage Movement Archives.*[online] [undated] Available from:
http://rylibweb.man.ac.uk/data2/spcoll/mensuff/
[Accessed 12th Nov. 2006]

[145] In 1907, Sofia Londsdale was able to gather 37 000 signatures in a petition against the suffrage rights. The year after, the League was formed and signed a petition against such rights – the signatures numbered near to half million people (337, 018).
Janet S. Chafetz and Anthony G. Dworkin. In the Face of the Threat. *Gender and Society.* March 1987, 1 (1), pp 33-60.

succeeded to have as many members of women as possible from different social classes and different ethnic background by the start of the twentieth century.[146]

Another society called the Women's Social and Political Union (WSPU) was established in 1903 by Emmeline Pankhurst and her daughter Christable Pankhurst.[147] This union believed in using violence as the best way to secure suffrage rights for women. However, they did not want the violence to be life threatening. The organization used bombing and burning empty houses in order to prove their point.[148] Scores of them, both women and men, were imprisoned. They went on hunger-strike when they were not treated as political prisoners; the government ordered them to be force-fed. To prevent them from dying and becoming martyrs, the government published an act called the Temporary Discharge for Ill-Health which allowed the weak prisoners to be released, and when they regained their health, were rearrested again. Emily Davidson became the first martyr when she died from colliding with the King's horse in the Derby race. The NUWSS in Manchester supported the strategy of the WSPU at first, but then it believed that violence might be a drawback for the suffrage movement.[149] When the WW1 started in 1914, Christabel Pankhurst – the organization's leader - announced that the suffrage activities would be suspended.[150]

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[146] Smith,H. (1998) pp 3-14.
[147] Pohl, T. (2005).
[148] Jenni Murray. *20th Century Britain: The Women's Hour.*[online] [1st Jan. 2001] Available from: http://www.bbc.co.uk/history/british/modern/jmurray_01.shtml
[Accessed 15th Nov. 2004]
[149] Welch,P. *Divisions in the women's suffrage movement.*[online] [June 2003] Available from: http://pers-www.wlv.ac.uk/'le1810/suffdivs.htm
[Accessed 29th Nov. 2004]
[150] Susan Kent. *Making Peace: the reconstruction of gender in interwar Britain.* (New Jersey: Princeton University Press, 1993) pp 12-21. Also, Smith, H. (1998) pp 3-14.

The NUWSS faced different tactics towards the war and had to choose from among them. Some argued that the organization should adapt the anti-war campaign and work with the peace movement. Others argued that they should support the government with the war decision. This argument was to defeat the opinion that women are pacifists and not trustworthy, so the organization might loose the support of some members of both Conservative and Labour Parties. Avoiding the split of the organization, it chose to follow the educational campaign; that is to publish articles about causes and prevention of war. Some of the women's suffrage organization continued with their activities for the campaign like Women's Freedom League. As the war continued, some of women's societies had participated in demanding women's rights especially regarding the working issues.[151]

In 1916, the government intended to reform the election law in order to include the men in the armed forces.[152] That intention encouraged Fawcett to write a letter to the Prime Minister reminding him that any amendment to the election law should include women.[153] Moreover, Henderson and Cecil, who were ministers at that time, insisted that the amendment should include women or they would resign. This influential pressure meant that the government, especially the new Prime Minister Lloyd George, was more sympathetic with women's suffrage.[154]

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[151] Chery Law. *Suffrage and Power: the women's movement, 1918-1928.* (London: I.B. Tauris & Co Ltd., 1997) pp 13-23 Smith,H. (1998) pp 3-14.
[152] Laura Mayhall. Domesticating Emmeline: Representing the Suffragette, 1930-1993. *NWSA Journal.* 1999, 11 (2), pp 1-24.
[153] Susan Kent. The Politics of Sexual Differences. *Journal of British Studies.* July 1988, 27 (3), pp 232, 253.
[154] Smith,H. (1998) pp 3-14

As the issue of women's suffrage was very controversial between government members, the government held a Speaker's Conference. The conference issued a report giving women suffrage rights. Trying to limit the number of women elected so they would not form the majority, the report recommended two conditions:

1. Women should be either the occupier or the occupier's wife.
2. The age limitation would be either 30 or 35.

The NUWSS was asked to accept the proposal or the government might drop the suffrage issue. However, the NUWSS demanded suffrage right for women with the same terms as men. The Organization voted to work on a campaign for alternative proposal. Also, different suffrage societies like the National Council for Adult Suffrage, the Independent Labour Party, and the Manchester and District Federation had rejected the proposal. Nevertheless, on March 1917, the Labour Party had approved the Speakers Report, while the Conservative Party was divided.[155]

The proposal was passed in House of Commons with a massive majority on 19 June 1917. It has been stated that the majority was an appreciation of women's role during the war. It specified that the women's age to be 30 or over, and added another condition that a woman should be local government elector or a wife of local government elector. In spite of the fact that the restrictions on women and discrimination against her which led to prevent many of them from voting, the women's societies had celebrated the Representation of the People Bill's and considerable achievement though it was not what

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[155] Smith,H. (1998) pp 3-14.

they had demanded since the mid-19th century. Lady Astor was the first woman to enter the House of Commons as a MP in 1919.[156]

After passing the suffrage Act, it was recognized that the restrictions meant that the majority of women remained voteless. As a result, the women's society started to reform to work for the new campaign demanding equal enfranchisement. Realizing the importance of the new voters,[157] the Conservative Party allowed women to be members, and organize a women's society right after passing the Act. Regardless of the fact that many MPs supported the equal enfranchisement, the equal suffrage right used to be presented each year during the 1920s, but it did not pass.[158]

Women became an important factor in elections, and can affect the victory for the political parties. By 1928, the women members in the Conservative party reached almost a million. Before the 1924 election one of the Conservative Party's leaders announced that the Party supported equal political rights for women. On the other hand, the NUWSS changed its name to the National Union of Societies for Equal Citizenship. Eleanor Rathbone became the first president.[159] The new organization announced that the equal franchise was not included in the Labour Party election programme. Moreover, some of the Labour Party's leaders announced they supported the equal franchise, but that they

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[156] Pamela Horn. *Women in the 1920s.* (Gloucestershire: Alan Sutton Publishing Ltd., 1995) pp 1-24. Also Smith,H. (1998) pp 3-14.
[157] Rat Thane. *What Difference Did the Vote Make?.* [online] [undated] Available from: http://www.stm.unipi.it/Clioh/tabs/libri/2/05-Thane_53-82.pdf
[Accessed 12th Nov. 2004]
[158] Smith,H. (1998) pp 3-14.
[159] Barbara Caine. *English Feminism 1780-1980.* (New York: Oxford University Press Inc., 1999) pp xvi.

should wait for the right time.[160]When the Conservative won the election, the debate was should the equal franchise be at the age of 21 or 25, noting that some of the politicians feared that women would form the majority of electoral.[161]

From the women's perspective, the Equal Political Rights Demonstration Committee arranged a rally supporting the equal franchise. The rally was supported by forty women's organizations. As Rhondda announced that an action should be taken to pressure the government to pass the equal franchise, some were afraid of taking any militant action which would prevent any chances of getting the equal franchise.

In 1929, the Cabinet formed a sub-committee in the purpose of the equal franchise issue; however, the sub-committee was terminated after three meetings due to a major argument regarding the age. Some members made the important argument that if they agreed on the age of 25, the next Labour government would change the age to 21 and gain the loyalty of women. By the end of the 1927, most of the Party Central Council members were in favour of the equal franchise in the age of 21.[162] For the second time the Bill was passed in the House of the Commons with a massive majority in March 1928.[163]

By the end of the WW1, a new wave of feminists started to appear. Women like Maud Royden played a major part in the effort for men to admit that women are equal to

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[160] Smith,H. (1998) pp 3-14.
[161] Ibid.
[162] Law, C. (1997) pp 202-220,also Smith,H. (1998) pp 3-14.
[163] House of Commons Information Office. *Women in the House of Commons.* [online] [Oct. 2006] Available from:
http://www.parliament.uk/documents/upload/m04.pdf
[Accessed 13th Nov. 2006]

them.[164] Eleanor Rathbone formed an organization in order to acknowledge women who did not gain the suffrage rights of their political rights in the Women's Citizens Association. Then, another association, called the Six Point Group, was formed by Rathbone from a number of women's organizations, to seek a woman's seat in the House of Lords.[165] During the 1930s,[166] feminists worked on legislating and amending legislations in order to embitter women's social position. It succeeded in several Acts such as the abolished of death penalty for mothers, the Divorce Act, the Inheritance Act, and Midwives Act.[167]

The women's movement had been affected by the WW2 impact. Although women's employment was raised highly in both paid and voluntary jobs, the trade unions, as well as the electrical and engineering unions which accepted women to be temporary members only, refused the apprenticeship right for women.[168] The war prepared the atmosphere for women's demands for equal pay. In 1943, the Equal Pay Campaign Committee (EPCC) was established.[169] The Women's Freedom League held a conference which was attended

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[164] Maud was a religious lady, her main focus is to prove that women are equal to men in general and in Church in specific.
The Women's Library. *The Paper of Agnes Muad Royden.*[online] [undated] Available from: http://www.archiveshub.ac.uk/news/0409amr.html
[Accessed 20th Nov. 2004]
[165] Kent, S.
[166] During the early 1930s - the period of the great depression - there were a large number of unemployed men. As such the attitude of the anti-feminist was to exclude women – especially married ones – from paid jobs.
Harold L. Smith. British Feminism and the Equal Pay Issue in the 1930s. *Ruotledge* (part of Taylor and Francis Group). March 1996, 5 (1), pp 97-110.
[167] Martin Pugh. *Women and the Women's Movement in Britain 1914-1999.* (London: Macmillan Press LTD, 2000) pp 236-244.
[168] Pugh, M. (2000) pp 264-283.
[169] Harold Smith. *Equal Pay and Opportunities.* [online] [undated] Available from: http://www.adam-matthew-publications.co.uk/digital_guides/sex_and_gender4/Editorial-Introduction.aspx
[Accessed 6th Feb. 2005]

by about 20 women's organizations in order to harmonize women's activities. Then, the issue of equal pay became the main concern of the EPCC.[170]

For the purpose of women's rights, a new organization called Women for Westminster was established to encourage women to give their vote for women to be MPs.[171] The women's role was been shifted after the war; while some remained in their jobs, many others return to their homes. Those who chose to continue working were shifted to more lowly jobs described as 'women's-job'. By the 1950s, equal pay was acceptable more than any other time. The fact that the 1950 election brought MPs from both major political parties almost equally; both parties wanted to use the equal pay issue for their own interest. Moreover, most of the MPs would vote in favour of the equal pay, and they did so in 1952 for Equal Pay for men and women teachers, and the equal pay for Civil Service. Although some trade unions established the Equal Pay Co-ordinating Committee, the equal pay in industry was avoided.[172]

During the 1960s a new slogan for the women's movement was raised which was the 'women's liberation'. It was not raised in the UK only, but it was slogan for feminists world wide.[173] There were several factors which motivated women's organizations to adapt the liberation move, including violence against women; lack of freedom, female

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[170] Pugh, M. (2000) pp 264-283. Also, for more details about the equal pay campaign: Harold Smith. The Problem of 'Equal Pay for Equal Work' in Great Britain During the WW2. *Journal of Modern History.* Dec. 1981, 53 (4), pp 652-672.

[171] Amy Black and Stephen Brooke. The Labour Party, Women, and the Problem of Gender, 1951-1966. *Journal of British Studies.* Oct. 1997, 36 (4), pp 419-452.

[172] Pugh, M. (2000) pp 285- 311.

[173] Vintee Sawhney. *The Women's Liberation Movement of the 1960s.* [online] [undated] Available from: http://www.cwluherstory.com/GrrlSmarts/sawhney.html [Accessed 10th Nov. 2006]

opportunities in education; the achievement of equal pay; and so on. Many were optimistic for more modernisation when the new Labour government was elected in 1964. Harold Wilson, the Prime Minister, held his supporters' self-interests before women's issues. Regardless of some changes in legislations, many had the impression that the 1960s government had the same standpoint towards women of the 1920s government. The first use of the 'women's liberation' expression was in 1967 when women were ignored in the New Left conferences. The liberation of the women movement were also affected by the highly participation of women in the peace movement which started in the 1950s. Four major demands for women were announced in the annually conference, which started in 1970 for that purpose:

1. Equal pay for equal work.
2. Equal opportunities and equal education.
3. Free contraception and abortion on demand.
4. Free 24 hour child care.[174]

The activists realized the importance of women's history: they started to make documentations about the history of the women's movement. Later on, by the 1990s, universities started to have courses on it and taught it as a subject called 'gender studies'. In addition, feminist presses started to form in order to be liberated from the media that were controlled by men, and which also accused women's activity of different allegations according to their personal interest. Although feminists worked under the same slogan 'women's liberation', there were three major approaches which had accordingly different

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[174] Tony Cliff. *Class Struggle and Women's liberation.* [online] [undated] Available from: http://www.marxists.org/archive/cliff/works/1984/women/11-wmvmtb.htm [Accessed 12th Nov.2004]

starting point. There were the Radical, Social, and Liberal feminism. The need to protect women from violence led to legislating the Domestic Violence and Matrimonial Proceedings Act in 1971. However, as that Act alone was not enough protection, a centre for rape crisis was established in London in 1976. A major protest was held in several cities against pornography which was blamed by feminists as being the main reason for violence and rape against women.[175]

After the success of legalising the contraceptive and the ability of women to obtain it from the NHS since 1963, regardless of their marital status, the movement raised the slogan 'A Women's Right to Choose' in support of the abortion. The campaign was organised by the National Abortion Campaign in 1975 despite the fact that abortion was allowed in 1967, albeit with some restrictions. Feminists were very active in this campaign by using different means such as the media, strikes, and gaining the support of the trade unions.[176]

In 1970 the Equal Pay Act was launched (amended in 1975) followed by the Sex Discrimination Act in 1975. Before legislating the Equal Pay Act, the Women's Liberation Movement held a conference demanding equal pay and equal opportunities. Moreover, an affective strike in Ford's Dagenham factory was made by women workers who demanded equal pay to men. Also, in 1964, the Working Women's Charter established and arranged a proposal for the women workers' rights.[177] Due to some

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[175] Pugh, M. (2000) pp 312-333.
[176] Pugh, M. (2000) pp 312-333.
[177] Joni Lovenduski, Vicky Randall. *Contemporary Feminist Politics.* (New York: Oxford University Press, 1993) pp 179-182.

defaults in those two acts, both of them were amended. The Equal Pay Act was amended in 1983 and the Sex Discrimination Act was amended in 1986. Enquiries about equal pay and discrimination to the Equal Opportunity Commission reached 39,557 in 1993.[178]

By the late 1970s a different side of feminism started to demand greater sexual freedom. The view was that heterosexuality assured women's domination by men. Moreover, to these feminists, men were the enemies, so to achieve complete freedom for women they have to cut off any relationship with them.[179]

In the case of the news concerning the launch of cruise missiles containing nuclear warheads at Greenham Common in 1979, it was left to the peace movement to revitalise this motion. Most protests were organised spontaneously by women's organizations. They used the 'Women for Life on Earth' slogan, showing that male technological invention would destroy the earth. Although the peace campaign continued throughout the 1980s, the government -- regardless of the fact that it was led by a woman as the prime minister -- did not change its policy towards nuclear weapons.[180]

In fact, the peace movement had started before that with the wide participation of women, two of whom became secretaries of the National Committee for the Abolition of Nuclear

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[178] Pamela Clayton. Social Citizenship and Political Rights of Women in the United Kingdom.[online] [April 1997] Available from:
www.helsinki.fi/science/xantippa/wle/wle22.html
[Accessed 7th Feb. 2005]
[179] Pugh, M. (2000) pp 312-333.
[180] Pugh, M. (2000) pp 334- 353.

Weapon Tests. Also, a high number of women participated in a demonstration that walked from the Hyde Park to Trafalgar Square.[181]

As consequence of the women's liberation and the achievement of having different legislations in favour of women, violence against women continued. Despite the fact that the marriage rates were decreasing and divorce cases were rapidly increasing, women were the major victims of violence inside and outside marriage. Women Against Violence Against Women held a conference attended by 800 women in 1981. The most notable trends about women in the 1990s were the increase of single mothers; the postponement of bearing children in order to establish a career; and favouring cohabitation over marriage. Although in the 1990s women were accomplishing major successes in terms of education and employment, even though the number of professional women was rising, there still existed the 'glass ceiling' which prevented women from being appointed to high level positions in spite of the launch of the 'Opportunity 2000' scheme.[182]

In addition to the maternity leave rights that were included in the Employment Rights Act in 1996, a remarkable legal change occurred in 1999 when the Maternity and Parental Leave Act was issued.[183] This new law gives the right to both mother and father to have leave for the sake of child care up to thirteen weeks. The Parental Leave Act equalises the chances of getting a job between men and women as now both sexes can leave for a

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[181] Elizabeth Wilson. *Only Halfway to Paradise.* (New York: Tavistock Publications, 1980) pp 177-180.
[182] Pugh, M. pp 334- 353.
[183]The Maternity and Parental Leave etc. Regulations 1999. [online] [1999] Available from: www.legislation.hmso.gov.uk/si/si1999/19993312.htm
[Accessed 8th Feb.2005]

period of time for parenting. Previously, employers preferred to appoint men as they would not leave work to take care of the child. Finally, the movement towards 'equality' was extended to include different kind of discriminations other than sex-based. The Race Relation Act, issued in 1976 and amended in 2000, prevents any discrimination that might be based on race, colour, nationality, or ethnic or national origin. If such a discrimination took place in the workplace, training, education, housing, or in the services, the CRE (Commission for Racial Equality) is a non-governmental organisation responsible to put the Act into action.[184]

2.6. Conclusion

While there are a lot of similarities within the women's movement eras in the Middle Eastern countries, the movement in the UK is different especially when compared with Kuwait. The demand for suffrage rights started in the UK for more a century before it started in Kuwait. The movement in the UK was well organized and focused on its main aim the suffrage rights. They believed in their cause and were willing to fight for it, as they did when the WSPU used violence as a way of pressure (for example, the day called 'Black Friday' as a result of one of their actions). Forth reason is there were different societies in almost all over the UK. Furthermore, the suffrage societies had female as well as male members. Although there were men who opposed women's suffrage rights, there were many who supported that right for women and worked passionately for it. Moreover, regardless of the fact that some of the societies started with members from

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[184] Commission for Racial Equality (CRE). *The Race Relation Act.* [online] [undated] Available from: www.cre.gov.uk/navigate/help.html
[Accessed 8th Feb.2005]

upper and middle classes, later on they succeeded in having members that represented all of the society's classes. The two main political parties used the issue as a tactic knowing the right time of using it. Sometimes, some of the party members believed in suffrage rights for women, but rather to be more loyal to the majority of the party members who were opposed to it.

On the other hand, before the oil discovery in Kuwait, there is no record of any women's movement. Due to the fact they were secluded, and could not go out, they did not socialise with other women unless they were relatives or neighbours. Although in other neighbouring countries women participated in some activities even in politics, there was not any participation in the public sphere in Kuwait. That could reflect the cruelty and the absolute domination of women.

When the women's movement started in Kuwait, it was for the purpose of modernizing women. The demand for the suffrage rights did not start until a decade after establishing the women's organizations. The resolve of AWDS affected the political movement for women, because the WSCC did not start campaigning for women's political rights until later in the 1980s. The effort for the women's rights was not well organized, and it is excluded for the members from the upper-class women. Some modest demonstrations were made on every Election Day every four years, attended by a few women. No organization had been established for the purpose of the women's political rights issue. Although when there are some MPs who supported women's rights, the opposition

movement was always stronger. Even when the Amir issued the decree of women's rights, it did not pass in the Parliament.

Whereas there was a minority of people who were against the suffrage right for women in the UK, they are in the majority in Kuwait and are supported by some Islamists. In a study done by the AWDS in 1970, 51% of women were against the suffrage rights for women.[185]

On the other side of the argument, there are a lot of similarities in the movements between the ME countries. In all of them, veiling was a main obstacle to their freedom although Iran and Egypt struggled more over it. Women in all of the three countries considered here were denied their rights even after the participation in a major national event whether it was war, revolution, or occupation.

A major fact that differentiates between the three ME countries and the UK, other than culture and tradition, is religion which is arguably the reason for the creation of traditions and cultures. In Muslim countries people live according to different traditions and beliefs. In Kuwait, where 99% of the people are Muslims, there are great differences between the Bedouins and the city dwellers. Regardless of the fact that Bedouins do not live in the desert any more, and they live in the city, they still have a different culture from the city dwellers. Female Bedouins still get married without giving their consent or even seeing their future husband before marriage; many of them are forced to wear the veil, and can only be educated in an all-female college instead of the co-educational. If she gets

[185] Al-Sadani, N. pp 97.

married while still student, then her husband has the full authority to decide whether she should continue her studies or not. Many of these women are not permitted to drive or to own a car as it is considered 'shameful'. None of the above is the case for the town people.

As stated before, when the enfranchisement for the women's bill failed more than once in parliament, the Islamists were unable to come up with reasons based on Islam, whether from Qur'an or Hadith. It is noteworthy that most of the MPs are Islamists and most of those Islamists are Bedouins. Therefore, this mix between traditions and religion made it difficult for the draft to be passed if it was not for the political pressures from inside or, mainly, outside Kuwait. The coalition that liberated Kuwait enforced more of its democratic acts, and the women's right is one of these.[186], This is especially so since three Gulf countries, Oman, Bahrain, and Qatar, recently established a parliament and voting as a new system to accomplish democracy, and women took part in it alongside men.

As women's rights are seen to be more of a political issue in the other countries that was studied in this chapter, it is also true in the case of Kuwait. The Islamists had to change their oppositional position to supporting it in order to gain more votes as it will be discuss in more details in chapter six.

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[186] Ferry Biedermann. *The Struggle for Women's Rights in Kuwait.* [online] [26th April 2001] Available from:
www2.rnw.nl/rnw/en/currentaffairs/region/middleeast/kuwait.html
[Accessed 2nd Nov. 2004]

Chapter Three

Equality Theories

3.1. Introduction

Over the last two centuries, issues of gender have taken central stage in the debates on equality. However, 'equality' as a term has been studied long before that. Aristotle was the first to come up with a definition of equality in the civilized world when he defined it as *'treating equals equally, and unequal unequally'*.[1] When Aristotle presented his definition, known as 'The Formal Equality', justice was his main purpose. Treating the similar differently or vice versa was not fair or just. Since then, 'formal equality' has been the basis on which to apply equal treatment in different areas such as sex and race.

It is argued that demanding equality on the basis of gender came about as a result of the abuse of women in society. Throughout history, men have taken advantage of women in different ways to establish social inequality, often also enshrined in law.[2] One reason for this is the physical strength that helped give man the power to dominate society in different cultures, especially given that the lifestyle in early human societies fundamentally depended on this kind of power, for example in hunting and gathering.

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[1] William Letwin. *Against Equality*. (London: The Macmillan Press ltd., 1983) pp 169, 170. Also James Vice. *Neutrality, Justice, and Fairness*. [online] [undated] Available from: http://www.ombuds.uci.edu/JOURNALS/1997/neutrality.html [Accessed 1st May 2004]. Also www.dean.usma.edu/english/pojman/published works/Equalplethora.htm

[2] Martin Robertson. *The Pursuit of Inequality*. (UK: Martin Ropertson & Company Ltd..1981) pp 119-132.

While man was the hunter, the woman took care of the home and children. The common thought was that life needed special features which only men have such as physical build whilst the woman used to be a thought of as weak and unable to protect herself if she went out. This belief assured the subjection of women. It was believed that the house (a private sphere) was the suitable place for women, and working outside (the public sphere) was good for men only.[3]

Although there are many factors that shape every society, such as religion, politics and economics, the image of domination by men and the subordination of women is almost the same in different cultures.

In *The Inevitability of Patriarchy* Steven Goldberg[4] came to the conclusion that women can never be equal to men; they cannot be leaders either in society or at home. He based his thought on male hormones which make a man more aggressive than a woman, leading to his superiority in society, and hence his position as leader. However, Goldberg does not provide any study that confirms the relationship between hormones and human behaviour. On the other hand, in a study by Eleanor Maccoby and Carol Jacklin, they state that aggression does not lead to dominance.[5] Furthermore, if men dominate in any public position, this emphasises that women participate in it by electing the male; that is to say, so male dominance requires female agreement.[6]

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[3] Robertson, M. (1981) pp 119-132.
[4] Steven Goldberg. *The Inevitability of Patriarchy*. (New York: William Morrow & Co., 1974) pp 256-261. Also: Robertson, M. (1981) pp 119-132.
[5] Janet Hyde. Meta-Analysis and the Psychology of Gender Differences. *Journal of Women in Culture and Society*. 1990, 16 (1), pp 55-73.
[6] Robertson, M. (1981) pp 119-132.

Simone de Beauvoir presented the idea of 'the other sex'.[7] This expression encapsulates many ideas and attitudes toward women in similar cultures. De Beauvoir believes that where many activities are viewed as normal for a man, a woman has to explain herself if she too wishes to undertake the same activity. William Dugger has summed up society's view towards women in the West, which is very close to the view in the Middle East. He argues that power, income, and status are the major three aspects of gender discrimination and men occupy a higher position than women.[8]

This chapter discusses two main subjects. In the first part of the chapter I will look at the dominating gender equality theories and schools of feminist thought; the debates about formal equality; other approaches to gender equality; and the arguments about gender differences. The first part will be from the West's viewpoint. In the second part I will look at gender equality in Islam and will highlight four controversial issues about women and how they should be treated according to the Qur'an.

3.2. Theories of Equality in the West

3.2.1. Gender Equality and Schools of Feminists Thoughts

In the late 1700s Mary Wollstonecraft put forward her view of gender equality. She believed that education is important both for the independence of women and as a form

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[7] Simone de Beauvoir, S. *The Second Sex.* (London: Lowe and Braxdon, 1968) pp 702.
[8] William M. Dugger, 'Institutionalism and Feminism', *The Economic Status of Women under Capitalism*, eds. Janice Peterson and Doug Brown (England, USA: Edward Elgar, 1994) pp 7.

of protection for women especially if they are widows. Although Wollstonecraft stated that women can share in public life,[9] women still have a role to play in the private sphere.

In 1869 John Stuart Mill presented a different idea of equality. This was based on formal equality between men and women, and each person should be able to choose his or her own destiny. All discrimination practices should be changed or removed; treating women as slaves after marriage should be ended. A woman's position should not be changed after marriage.[10]

Early feminism in most of political theories, a woman was seen as a human with specific tasks: to serve her family and, of course, men. Due to this, early feminism tried to correct the image of the woman that she is created for the private sphere only. They worked on the idea that woman can also participate in the public sphere because she is rational and responsible. Also, they tried to remove barriers between the standard public and private spheres.[11]

3.2.1.1 Christian Feminism:

Although some argue that Christian feminism started with[12] the ministry of Jesus, it can be certain that it started in the nineteenth century when Mary Wollstonecraft wrote *The*

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[9] Douglas Kellner. Toward a Critical Theory for Education. *Democracy and Nature.* 2003, 9 (1), pp 51 -64.
[10] Katherine O'Donovan. *Sexual Division in Law* (London: Weidenfeld and Nicolson, 1985) pp 160-163. Also
Alice Rossi. *Essays on Sex Equality.* (USA: University of Chicago Press, 1970) pp 125-242.
[11] Judith Evans. *Feminist Theory Today.* (London: Sage Publication, 1995) pp 2-5.
[12] Helen Stanton. *Christian Feminism, An Introduction* (London: Darton, Longman & Todd: 1998) pp 1-51.

Vindication of the Rights of Women in 1792. Feminism in Christianity is argumentative controversial and sometimes unacceptable. The main problem with the Christian tradition is that it promotes patriarchy. Helen Stanton concludes that although there were women who followed Jesus, there are no famous followers as in the cases of Aaron, Joshua or Gideon. In Christian feminism, women theologians suffered a great deal in order to reveal the participations of women in the Christian tradition in the bible stories. Feminist theologians have two main criticisms of the liturgy: first, the language which uses 'men' to include both men and women, and the use of the masculine noun and pronoun. Second is the name of God. They argue that using the male term 'God' is unjust. Instead, they try to reveal the hidden feminine imaginary for God in the bible.[13]

In Christian thought both men and women are free. In God's creations[14] men were not the superior sex; on the contrary, both were created equally, they are equal in taking responsibilities and are responsible for their choices. Women should be appreciated and be respected just like men. The feminist movement believed that women must demand equality in all areas, including enfranchisement. However, they usually understood 'equal rights' as a means of fulfilling their roles as Disciples of Christ'.[15]

Sarah Grimke (1792-1873), an early Christian feminist, stated that the Bible gives equality between the sexes and that the Genesis story shows how men and women are

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[13] Stanton, H. (1998)
[14] Viola Larson. *Early Feminism: Equality, Ethical Theory and Religion.* [online] [undated] Available from:
www.naminggrace.org/id64_m.htm
[Accessed 6th May. 2004]
[15] Larson, V.

both God's formation and they are alike in right, nobility, and reliability.[16] Another early Christian feminist, Katherine C.Bushnell (1856-1946), tried to prove equality between men and women by writing a series of Bible studies for women. She gave examples for equality from Abraham and Sara, and used the law of Hammurabi of Babylonia as a background of her remarks.[17]

The influence of Christian feminism has succeeded in proving that the appointment of women as priests in the Anglican Church has enriched the church.[18] As a result, Catholics have respected this move.[19]

3.2.1.2. Cultural Feminism

Cultural feminism movement connected women to righteousness which was a powerful force for creativity and regeneration. It believed that men lack some qualities, like a loving, caring, and quiet nature. Due to those special qualities that women have, attaining female equality would solve many of the problems that existed in society.[20] Women's goodness was believed to be a 'spiritual *and natural force'*. Some cultural feminists stated that a woman should be freed from the burdens that she carried, such as house work, and child care. These should be replaced by a role in professional life.

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[16] Judith Sabrosky. *From Rationality to Liberation.* (USA: Greenwood Press, Inc., 1979) pp 60-65.
[17] Larson, V.
[18]Stanton, H. (1998)
[19] Stanton, H. (1998)
[20] Mariam Liss, Carolyn Heffner, and Mary Crawford. What do Feminist Believe. *Psychology of Women Quarterly.* Dec. 2000, 24 (4), pp 279-391.

Cultural feminism is also based on a belief that women are different from men physically and psychologically according to their backgrounds, experiences, the way the sexes were raised, and their nature.[21] Motherhood has always played a major role in a women's life. Within this form of feminist thinking a woman is prepared to be a mother at a very young age. This connection between women and motherhood has moved from a fact of nature to become part of society's culture. This placed women further into the private sphere, while the idea of man as a breadwinner associated him with the public sphere. This connection of men affected children negatively because it excluded men from the private sphere and prevented them from playing their role as fathers. If women took their place in the public sphere this would equalize the role of each parent in both public and private spheres.[22]

Cultural feminism includes the notion that women's values are highly rated but that they have been degraded and ignored by men for a long time. With their qualifications women should participate in the public sphere in order to improve human kind and make the world worth living in.[23]

A slightly different wave within this movement emphasized the special qualifications women have and which men lack, maintaining that female culture should be separate from men's because of the corrupted world of the latter. The beliefs of this school of

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[21] Larson, V.
[22] Hilaire Barnett. *Introduction to Feminist Jurisprudence.* (London: Cavendish Publishing Limited, 1998) pp 143-146.
[23] Evans, J. (1995). pp 19. Also for more about Cultural Feminism see,
Linda Alcoff. Cultural Feminism Versus Post-Structuralism. *Journal of Women in Culture and Society.* 1998, 13 (3), pp 405-436.

thought have been applied to all women in every culture, and this is one of the main critiques that this school faced. It assumed that every woman is aware of her duty, and the role she is meant to play in her family and society.[24]

3.2.1.3. Radical Feminism

There is more than one school of radical feminism, but women's sexuality is central to their thinking. Patriarchal culture in society should be removed rather than the legal inequalities. Radical feminists argue that the law legalises rape by seeking for women's permission in intercourse, rather than investigating the nature of male cruelty. They also criticise legalising prostitution and pornography because it assures the subordination of women by using them as 'sex objects'.[25]

A new school of thought was developed in the 1980s which suggested that the dominance of men and their control of politics and economics lead to women's suffering including poverty, violence, prostitution and even pornography.[26] It argued that equality is not about gender sameness or differences, but that it is socially constructed. It stated that men are the dominant sex because they have power while women do not.[27]

Radical feminists, unlike liberal feminists, believe in sex differences, but also emphasise that these differences should be minimized. They believe that society was harmed by

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[24] Evans, J. (1995). pp. 76-90.
[25] Barnett, H. (1998). pp 163-164.
[26] Ann Ferguson. Sex War: The debate Between Radical and Libertarian Feminists. *Journal of Women in Culture and Society.* 1984, 10 (1), pp 106-112.
[27] Barnett, H. (1998). pp 163-164.

these differences, pointing out the patriarchal system, and that men in particular were the main group to be blamed. Radicalism has also adapted the standard of androgyny which means: "An absence of differences relevant to full participation in the structures that exist now".[28]

Due to the fact that sexuality is one of the main concerns in radicalism, these feminists believe that women lived as the subordinated sex because of the image of the traditional family. As they believe that Western societies encourage male belligerence, then every woman is likely to suffer from male abuse. Furthermore, they argue that the media was a major reason for using women as 'sex objects' which emphasised the idea of women being taking advantage of. Radicalism goes a step further to suggest that rape is at the centre of every relationship between men and women, because deep in her mind a woman would think that if she refuses she might be subject to violence.[29]

3.2.1.4. Marxist Feminism:

Marx divided society into two divisions: the capitalist who owns assets; and the proletariat who works for a wage. In the nineteenth century and in the pre- industrial period, women did not have the ability to own a property or to work outside their houses and earn money for themselves (although wives worked in the house, for example sewing, to help her family). Unpaid work for housewives, Marxists argue, is essential for any industrial economy to take care of their husbands and children. Also, if a husband

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[28] Evans, J. (1995) pp 29,64.
[29] Judith Lober. *Gender inequality.* (California: Roxbury Publishing Company, 2001) pp 78-79.

received less pay or could not work due to a disability for example, a woman might have to work outside the house to help her family. In that case, whether for paid or unpaid work, inside or outside the house, women work for the sake of their families. Marxists argue that this unfair situation is the major basis of gender discrimination.[30]

Marxists analyse that in gender inequality there are two spheres. First is the economy, second is the family. The husband works for a specific wage, and even if he is less paid, as a kind of compensation he has a wife who works for him, doing all the house chores and raising the children. Not only that, but even in circumstances where a wife has to work and earn money in order to help her husband, she is less paid than a man, and she also has to do all the house work and take care of the children. Marriage is necessary in capitalism since a woman alone cannot support herself or children from the poorer paid job she usually gets, so she receives the financial support from her husband. Even in the economic sphere women are in a stand-by position: in the army for example, she would be employed when there is a need, but then she would be fired as soon as the job is done.[31]

3.2.1.5. Liberal Feminism

During the Enlightenment period women were deprived of their very basic rights. This was especially the case after marriage when both her lawful status was almost

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[30] Lober, J. (2001). pp 39-41.
[31] Lober, J. (2001). pp 39-41. Also
Catharine McKinnon. Feminist, Marxism, Method and the State: An Agenda for theory. *Journal of Women in Culture and Society*. 1982, 7 (3), pp 515-544.

demolished and her husband had the right to punish her, supported by the court. Liberal feminism came to view equality between sexes as an innate right. If a woman remains uneducated then that will negatively affect society and therefore men. Liberal feminism refused to accept the idea that a woman is less than a man in any way, even though the idea of woman as the inferior sex was very common by then. This movement has gained some important rights for women such as access to education, the right to vote, and changes in the divorce law giving women more equality rights.[32]

Even new liberalist thinkers, like Susan Okin and Betty Friedan,[33] argue that both sexes are the same and there is no given evidence of differences. If it existed then it is only social difference which has nothing to do with the nature of the sexes. Liberalists use the term *gender-blindness* as both men and women should be treated equally regardless of their sexes.[34]

Many liberals' demands have been already achieved. These include the demand for women to participate in a job of her choice or whether or not to have children by authorizing abortion. As for the question about motherhood and women, they argue that mothering skills are not women's innate nature, rather they are learnt skills. If fathers cannot take care of a child, it is because mothers are around who would do the job. If a father was left alone with a child, then he would learn parenting skills.

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[32] Larson, V.
[33] Evans, J. (1995) pp 28-46.
[34] Sue Thornham. *Feminist Theory and Cultural Studies.* (USA: Oxford University Press, Inc. 2000) pp 45-49. Also Evans, J. (1995) pp 28-46.

Another issue is that if gender identity is a social construction, it is because different social activities confirm the image of masculinity and femininity. Instead, a natural image for gender should be replaced, in order to minimize the defences and to eliminate the image of women as emotional and fashion-conscious, which only helps to downgrade them further.[35]

The main theme of liberalism as a movement is liberty. The form of this school is that every citizen should be free to choose his or her destiny, and that any interference from the state should be for the purpose of protecting society members.[36] Liberalism fought for women's rights. For example, the right to own a property; the demand for issues that are related to private sphere to protect women from domestic violence; and the right to have control in the childbirth. Also, it gave women the ability to have access to the public sphere like men, and to be able to plan her own life. Women should be able to participate in employment, politics, and economics just like men since they are equal. To a great extent, liberalism has gained many of their demands regarding women.[37]

Another opinion is presented by Ronald Dworking who argues that the main value of liberalism is equality; he tried to come up with a definition for equality. From a political point of view, he thought that the government should interfere with people's daily life not only to protect their safety, but also to arrange the assets and sources.[38]

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[35] Lober, J. (2001). pp 26-27.
[36] Barnett, H. (1998). pp 121-122.
[37] Barnett, H. (1998). pp. 124-125.
[38] Cathrine Iorns. *A Feminist Looks at Ronald Dworkin's Theory of Equality*. [online] [1993] Available from:
www.murdoch.edu.au/elaw/issues/v1n1/iorns113.html
[Accessed 12th June. 2004]

3.2.2. Formal Equality

Formal equality is considered to be within the same vein of the liberal feminism movement. As it was stated before, it is defined as 'treating equals equally, and no equals unequally'. Formal equality was adapted by different equality laws including those which arrange sex equality. A main advantage with formal equality is that it assures equality among people even if their differences were unjustified. Aristotle also used numerical and proportional equality. Numerical equality means that equals should be treated exactly the same and unequal should be treated differently in proportion to how they are different.[39] In the same vein, Aristotle stated that there has to be sufficient reason for discrimination, and that this is so for unequal treatment.

On the other hand, Hans Kelsen argued that Aristotle did not identify what kind of differentiation allows discriminatory treatment, other than that people are different in one way or another but that this can not be justified as discrimination. Also, Professor J.W.N. Watkins describes the weak principle of equality as:

> Weak principle of equality [is defined] as *people are to be treated equally unless some feature of their condition justifies unequal treatment.* Unlike *proportional equality*, there is the *unconditional equality* which was presented by some political theorist. It assumed that people should be treated equally regardless of any other aspect. It does not matter how they might be different in age,

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[39] John C. Rees. *Equality* (London: Pall Mall Press Limited, 1971) pp. 92.

> experience, or any other differences that might exist. The Manifesto agrees with such equality and the only difference that could be made is upon sex and age.[40]

Moreover, formal equality experienced difficulty when dealing specifically with sex discrimination. The case *California Federal Savings & Laon Ass'n v. Guerra,*[41],which was decided by the US Supreme Court, reveals a problem with formal equality.[42] Treating people alike creates some complicated issues. It ignores some facts such as social aspects. The subordination of women over the ages is unacceptable under the formal equality. Formal equality means treating people equally, regardless of their sex. This is a major failing for dealing with pregnancy. Pregnancy cannot be considered a disability as only women can be pregnant[43] (*EEOC v. Warshawsky).*[44] Some legislation gives pregnant women unpaid leave for a period of time but not people with other kinds of disability. [45]

Also, if a woman has access to a job, there should be no discrimination. In fact, this ignores two main issues. First is female subordination; second is what is called a male only job. As Mary Becker argues, there are some jobs, especially those to do with physical strength, which have been exclusively for men for a long time. Even if they are open – now – for women too, some women are not encouraged to have such jobs. More

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[40] Rees, J. (1971). pp 96-98.
[41] 479 U.S. 272 (1987)
Christopher McCrudden. *Anti-Discrimination Law.* (USA, England: Ashtgate darrmouth, 2004) pp 408.
[42] Eliza Wing-yee Lee. Anti-Discrimination Legislation and Gender Equality in Hong-Kong. *Asian Journal of Public Administration,* June 1996, 18(1), pp 22-44.
[43] Mary Becker. Prince Charming: Abstract Equality. *The Supreme Court Review.* 1987, vol. 1987, pp 201-247.
[44] 768 F.Supp. 647 (D. Ill. 1991)
Joan Williams. *Do Women A Opt Out Because They Have Different Values?: The Maternal Wall.* [online] [undated] Available from: http://www.brandeis.edu/centers/cfwp/Conference_papers/WilliamsPaper.pdf [Accessed 11th Dec. 2006]
[45] McCrudden, C. (2004). pp 405-411.

likely, sometimes, they might rather have a lower paid job than occupying any 'male jobs'.[46] Moreover, both Sandra Fredman and Catherine Barnard's arguments that this aspect ignores the fact that some women who are engaged with their 'domestic responsibilities' such as child rearing cannot compete with men as they lack flexibility and only a few women can meet with such a standard.[47]

Also, if a woman has access to a job, there should be no discrimination. This idea ignores the glass-ceiling phenomenal, which as Barbara Reskin explains is when women find that the highly ranked jobs are out of their reach as if there is a glass-ceiling preventing further ascent. Thus most women stop at middle-rank jobs. Reskin also explains that even in jobs that are dominated by women, like nursing, men would be in the higher position of such professions.[48]

Lise Vogel explained how some feminists argue strongly that formal equality should be applied without any exceptions even for pregnancy. Treating a pregnant woman favourably by giving her maternity leave is like a coin with two faces; one would be to the advantage of women to leave while keeping her job secure; the other the danger of assuring the stereotype of all women that they should have the burden of child rearing and child bearing. To eliminate this kind of result, instead of maternity leave, there

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[46] Becker, M. (1987)
[47] Catherine Barnard. The Principle of Equality in the Community Context. *Cambridge Law Journal*. July 1998, 57 (2), pp 352-373.
[48] Barbara Reskin. *Women and Men in Work.* (USA: Pine Forge Press, 2002) pp 38.

should be parental leave so that both mother and father can have 'leave' to take care of the child.[49]

Also Becker explained that one of the main disadvantages of formal equality is that women have lost some of the protection they used to enjoy. For example, if a child was in his early years custody used to be in favour of the mother, but due to formal equality, in many cases, custody now is jointly for both parents. Moreover, if the mother wants to have custody, she has to pay the father compensation. Moreover, there are some problems with formal equality dealing with other social issues like divorce and supporting the family, which is more disadvantageous to women.[50]

Some social and political factors have caused women to be described as the 'second class' sex, preventing them from enjoying life as a human being. This deprives women of the different advantages that men enjoy, on a different levels and aspects. Sex inequality will continue despite the existence of the sex equality laws, since they deal with the hypothetical rather than factual or real. On one hand, gender as a term is based on the sexual differences, while equality, as understood here, is based on sameness. As seen, there is a contradiction between the two terms.[51]

Catharine Mackinnon argued that since equality is based on sameness, and sex is based on differences, sameness and differences are determined by reference to the male

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[49] Lise Vogel. Debating Difference: Feminism, Pregnancy and Work Place. *Feminist Studies, Inc.* Spring 1990, 16 (1), pp 9-32.
[50] Becker, M. (1987)
[51] Catharine MacKinnon. *Sex Equality*. (NY: Foundation Press, 2001) pp 20-24.

standards. That was the main result of male dominance. The image of a male reflects the image of what a human being should be. Also, a woman is given 'special protection' because she is different from a man. The problem with the difference standard is that it will keep preventing women from having jobs that they struggled for a long time to have, while the sameness standard allows women to occupy almost every job, even with the military which was exclusive to men only. Men have reached equality treatment with matters that used to be almost always to the advantage of women – like custody- but women have not yet achieved equal pay, for example. There are still some jobs that women are excluded from the claim of 'special protection'.[52]

Since formal equality depends on the male as a standard, then it might not be able to assure the equality for people- women - who are in different positions or situations, and it can give employers the excuse to justify different treatment against women once their work would interfere with their socially structured role. On the other hand, substantive equality takes more than one measure into account beside anti-discrimination. It does not depend on issues like sex or race, but it looks to the person from different social perspectives; a person from a disadvantage group can bring a claim that can be based on different aspects other the discrimination issue.[53]Until reaching the positive action stage, the equality law have passed through four major phases since the last century and now in the West.[54]

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[52] Catharine Mackinnon. Difference and Dominance: On Sex Discrimination [1984]. In: Katharine T. Bartlett and Rosanne Kennedy. *Feminist Legal Theory* (USA, UK: Westview Press, 1991) pp 81-83.
[53] Helen Fenwick. *Civil Liberties and Human Rights*. (Nrberb: Cavendish Publishing Limited, 2002) pp 976-977.
[54] Fenwick, H. (2002). pp 977-978.

3.2.2.2. Formal Equality under the Symmetrical and Asymmetrical Approaches

Some critics such as Christine A. Littlton tried to limit the different views of gender equality into two approaches: symmetrical and asymmetrical. The first category is based on denying any gender difference between the sexes, while the second category depends on sex differences. The symmetrical approach includes two main 'models': The first model is 'assimilation'. This standard is based on the idea that women and men are exactly the same, and the law should treat both of them the same because they are alike. With this model it will be easy to apply formal equality since it assumes that men and women are the same.[55]

The major positive point about assimilation is that it is a clear way of thinking; it is a notion which is easy to apply. But, as Elizabeth A. Sheehy argues, applying such a model of equality would be through legislation adapted by a society which has a history of subjection to women, so that the standards would be according to the male's.[56]

The second model is 'androgyny' which is a standard that has also been adapted by radical feminism. The law should take the shared characteristics that both sexes have and deal with both sexes as androgynous persons. However, this standard could contain many obstacles in reality. It is difficult to find a standard norm for the androgynous person that

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[55] Christine Littleton. Reconstructing Sexual Equality [1987]. In: Katharine T. Bartlett and Rosanne Kennedy. *Feminist Legal Theory* (USA, UK: Westview Press, 1991) pp 35-41.
[56] Regina Graycar, & Jenny Morgan. *The Hidden Gender of Law.* (NSW: The Federation Press, 1992) pp 40-42.

could be applied in all cases. Also, to agree on middle characters from both sexes might be complicated, especially in evaluating women with their history of subordination.[57]

The other category is the asymmetrical approach. This includes five standards which are all based on sex differences. With these standards, it is difficult to seek the equality treatment since men and women are different, and to ask for equality the sexes have to be the same. These standards are based on differences. This approach seeks justice for women.[58]

The first model here is 'special rights'. Elizabeth Wolgast and others argue that men and women are not equal. Women's social role with child care creates another burden that adds considerably to her responsibilities, but she should not be punished for this with regard to her employment. In terms of these responsibilities that only women have, she should enjoy some of the rights that would be practical with her as an employee and as a mother in the same time.[59]

While this approach enables women to contribute in society in the public sphere, and keep her role in her family, it is not practical and hence it might be difficult to distinguish between some cases which are beneficiary and some which are not.[60]

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[57] Littleton, C. (1991) pp 35-41.
[58] Littleton, C. (1991) pp 35-41.
[59] Elizabeth Wolgast. *Equality and the Rights of Women.* (UK: Cornell University Press, 1980) pp 95, 156,157.
[60] Graycar, R. & Morgan, J. (1992) pp 40-42.

The second standard is 'accommodation'. This also depends on differences but tries to categorize these differences. It states that differences are either social or biological. Under the law, women would be treated differently if the differences are natural or biological since these differences cannot be changed or ignored. If these differences are cultural or related to women's subordination, then the law would treat both sexes equally as in the symmetrical approach.[61]

The third approach is 'acceptance'. This approach does not differentiate between differences whether socially or naturally constructed, but rather it deals with the consequences that inequality has produced. Sometimes, even with the equality law, a woman would avoid 'male jobs' purely because of traditions rather than for any biological reasons. This model assumes that the differences between sexes are real, and it comes naturally from the interaction between people within society, so it does not matter if these differences are natural or social as long they exist. 'Acceptance' tries to eliminate the disadvantages of the sex differences.

Within the 'acceptance' argument, since men and women are different biologically, socially, economically, etc, legislations should be designed according to such differences and hence they can not be ignored. It believes that some positive changes in women's position might come in the future, but until then under this view women are still different

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[61] Littleton, C. (1991) pp 35-41. Also,
Claire Barclay. *Toward Substantive Equality.* [online] [undated] Available from: http://scholar.google.com/scholar?hl=en&lr=&q=cache:xoYXiMhTf8kJ:web.uct.ac.za/depts/lrgru/equapaps/barclay.pdf+feminism+and+%E2%80%98accommodation%E2%80%99+and+%E2%80%98acceptance%E2%80%99
[Accessed 15th Dec. 2006]

from men.[62] In spite of the fact that this theory sounds realistic and deals with women on the basis of their position in society, it perpetuates differences and enhances the subordination and subjection of women.

The fourth approach of asymmetry is what is called the 'subordination principle'. In this standard every law, practice, or policy would be examined to evaluate its effect on women. If any social or economical or other reason emphasised the subordination of women or might affect their self-esteem for example, then an action should be taken in order to eliminate the subordination. The major advantages of this approach are that it focuses on the women's experience instead of investigating the differences in treatment. It also takes an immediate action against what it considered to contrary to the equality standards in general.[63]

The last standard is 'empowerment' which is very close to the 'subordination principle' model. It argues that all the differences are a result of male domination. Thus the treatment of the sexes depends on the law. If it treated women as an inferior sex then it would violate equality, but if it treated men and women the same then it will insure equality and eliminate the subordination of women in principle.[64]

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[62] Littleton, C. (1991) pp 37-39.
[63] Graycar, R. & Morgan, J. (1992) pp 40-42.
[64] Littleton, C. (1991) pp 35-41.

3.2.3. Gender Equality and Differences

Due to the fact that equality is about treating equals equally, whenever the issue of gender equality raised, the differences notion is on the other side of the argument which can be used as an excuse for inequality. It might be important to differentiate between the two terms: gender and sex. Gender usually refers to the social standard of male and female, while sex expresses the biological differences. In the 60s Margaret Mead stated that sex stands for the physiological differences in the body sphere, while gender controls the behaviour in the mind sphere.[65]Also, Judith Lorber defines gender and sex as:

> Gender: a social status and a personal identity, as enacted in parental and work roles and in relationship between women and men. Through the social processes for gendering, gender divisions and roles are built into the major social institutions of society, such as the economy, the family, the state, culture, religion, and the law- the gendered social order. Women and men are used when referring to gender.
>
> Sex: a complex interplay of genes, hormones, environment, and behaviour, with loop-back effects between bodies and society. Male, female, and intersex are used when referring to sex.[66]

When people used to live in hunting and gathering societies, people would have to fight in order to survive; man had to hunt and women had her job inside the house. Some argue

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[65] Robert Nadeau. *S/He Brain Science, Sexual Politics, and the Myths of Feminism.* (USA: Praeger Publishers, 1996) pp 3.
[66] Lober, J. (2001) pp 8.

that, from hundreds of thousands years ago, male and female still carry the same survival period genes.[67]

One side of the argument states that there are differences between the two sexes. Some argue that these differences are only biological differences, while others assert that they are also physiological. The other side of the argument denies any differences between the sexes since to admit differences might create an excuse for discrimination against women.

To prove that those differences are only socially created, some give the example of transsexuals whose sex characteristics are different from their gender's identity behaviour. They live their whole life with different male and female characteristics.[68]

In *In a Different Voice* Carol Gilligan[69] believed in such differences between male and female. Through her study on the issue of 'life', she studied men facing war, and women having an abortion. She concluded that women had less universal and more abstract, rational and contextual modes of thought, specifically of more reasoning, than men. In her test on a boy and a girl aged eleven years old, asking them a moral question, she concluded that the boy's response was more logic and confident, while the girl analysed the situation and hesitated before giving her response.[70]

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[67] Nadeau, R. L. (1996) pp 39-41.
[68] Nadeau, R. L. (1996) pp. 213-214.
[69] Evans, J. (1995) pp 93-97.
[70] Susan Okin. Thinking Like a Woman. In: Debororah L. Rhode. *Theoretical Perspective on Sexual Difference.* (USA: Yale University Press, 1990) pp 155-159. Also, Evans, J. (1995) pp 93-97.

Also, in regard to 'success', David McLelland concluded that men were afraid of failure and looked forward to success, but Martina Honer argues that this is unlikely with women who think of success as a cause of social rejection or loss of femininity. Jeane Kirkpatrick agrees with Honer in that when a woman gets a high degree or participates in a manly activity it might mean that both male and female groups will not accept her.[71]

Sara Riddick argues that the experience of motherhood enables a woman to gain more knowledge and ethics. She adds that women, through maternity experience, would develop a peaceful nature to her personality.[72]

Researchers in brain differences between men and women have consequently asked that the sex discrimination laws should be changed as a reaction to brain differences. They believe that as bodies differ from male to female, their brain must be different too; that is to say, differences are found in almost every aspect. It is true that behaviour can reflect one's sex-brain since it is part of nature, but also nurture is considered a main element of human behaviour which is thus subject to change depending on the experiences and learning of individuals. Due to this, every human brain is distinctive and its skills vary within the same sex group to which person belongs. Accordingly, there is not any scientific study that proves that a specific gender is not able to learn any skill, or acquire knowledge because both genders have the same ability.[73]

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[71] Evans, J. (1995) pp 93-97.
[72] Nadeau, R. L. (1996) pp 105-106.
[73] Nadeau, R. L. (1996) pp 15,16,125,126,133.

Robert Nadeau argues that in order to keep women's liberty, then the sex/gender terms should be neglected and to achieve sexual equality, there should be another term that would match the gender identity with biological differences without exaggerations.[74]In the matter of the human brain which is individually unique, it is not easy to come up with a conclusion differences in sensitivity or the desire for knowledge between the two sexes. Also, most computer studies on mental ability between men and women show little difference.[75]

Dorothy Dinnerstein concludes that it is pointless to refer to differences as natural. While it is true that the child-bearing ability of a woman is part of her nature, male-female arrangement should be changed to be part of the nature it serves too, according to the needs of the society.[76]

Some believe that there is no relation between sexual equality and sexual identity in order for a woman to be successful, but others believe that the conception of sexual identity is formed in the imagination of society to privilege men. As a result of this construction, women were the victims. Sexual differences should be deconstructed to prevent any gender supremacy. According to such changes some ask about the woman's role in the society and if these changes would be compatible with her role in general.[77]

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[74] Nadeau, R. L. (1996) pp. 100.
[75] Nadeau, R. L. (1996) pp 60.
[76] Jane Flax. Reentering the labyrinth. *Journal of Women in Culture and Society.* 2002, 27 (4), pp 1037-1057.
Nadeau, R. L. (1996) pp 107-108. Also
R. A. Sydie. *Natural Women, Cultured Men.* (USA: Methuen Publications, 1996) 3rd pp 163, 164.
[77] Timothy Macklem. *Beyond Comparison Sex and Discrimination* (UK: Press Syndicate of the University of Cambridge, 2003) pp. 78-81.

Drucilla Cornell argues that gender identity is a fantasy created in a hierarchal form. Women's subjection was motivated in the 'realm of language' which creates 'the Other'. Women in society are described as 'other to men'. Since hierarchy is about dominance and subordination, it believed in the legend of male presence and the hidden position of a female. Women have suffered through being denied and being invisible because of the construction of male culture society.[78]

Lorber[79] concludes that the argument is not only based on 'nature' which is about the biological construction such as hormones and genes, and 'nurture' which is about building a personality from adapting the surrounded environment and life's experiences for each person. Although feminists believe that the behaviour of the two sexes are natural, they are changeable too, depending on which social principle would be replaced towards women. The biological differences are not in doubt, but the debate is about the 'physical capacities' for both sexes which is variable depending on different elements such as culture and time. In many cases the beliefs of a culture or a society would define the physical strength and the ability of each sex.[80]

These were the main schools of the thought regarding gender equality. In each theory, there is a central idea that separates one theory from the other. For example, while Radicals concentrated on sexuality, others think that women have qualities that men lack such as the Cultural School, or they are just equal, as believed by the liberal school. Although some of these schools believe that sexes had differences, they also believe that

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[78] Macklem, T. (2003) pp 78-81.
[79] Lober, J. (2001) pp 217-218.
[80] Lober, J. (2001) pp 217-218.

women should enjoy the same rights men do, regardless of their differences. However, formal equality is the main theory that was adapted in the UK law regarding discrimination since it is the most practical theory to be applied by a law. The law, however, also recognises substantive equality.

In Kuwait the constitution states in Article 29 that: '1) all people are equal in human dignity and in public rights and duties before the law, without distinction to race, origin, language, or religion.' However, a major problem is faced when adopting the formal equality model since the Kuwaiti constitution also states in Article 2 that: 'The religion of the State is Islam, and the Islamic Shari'a shall be a main source of legislation.'

This chapter will now turn to a consideration of Islam in relation to the formal equality model. Islam includes some main discriminatory issues regarding women. Therefore, it would not be appropriate to apply formal equality in law at the same time when referring to these issues, if considering men and women equal. However, the main difficulty of the application of Shari lies in the interpretation of its standards.

The two main sources for Islam's teachings are the Qur'an and the Sunna;[81] the interpretation of both can vary from extreme conservatism to ultimate liberalism. Also, the interpreters themselves are not always subjective and this is considered to be a main

[81] Sunna is: the habitual practice, customary procedure; usage sanctioned by tradition. More specifically, the sayings and actions or way of life of Muhammad, the Prophet.

problem if applying the Shari as a law. For example, in 1990 in Saudi Arabia, a *fatwa* [82] was issued which stated 'women should not be driving a car because it is *haram* 'sin'.[83] When the Sheikh brought this fatwa, he was considering social and political factors rather then religion because neither the Qur'an nor the Sunna would prevent a woman from driving a car; therefore, in Saudi Arabia a woman driving a car is socially unacceptable but in all the other Islamic countries it is accepted. After one liberal essayist wrote an article supporting the 'women's driving right', he backtracked and sent a letter to a famous website owned by an extremist to clarify that he was mistaken.[84] Also, a few years ago in SA the famous Islamic scholar Ayedh Al-Qarni issued a fatwa stating that Islam allows a woman to be unveiled and that covering her face is not required.[85] Later on, he was forced to change his fatwa due to fear of social rejection and then it might result in complications for the government. Also, in Kuwait in 1985, the Ministry of Awqaf and Islamic affairs issued a fatwa regarding women's suffrage rights: the fatwa did not approve of these rights because the Ministry claimed that they were forbidden in

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[82] A fatwa, is a legal pronouncement in Islam, done by a law specialist on an issue. Usually a fatwa is issued at the request of an individual or a judge to settle a question where "fiqh," Islamic jurisprudence, is unclear. A scholar capable of issuing fatwas is known as a mujtahid or a mufti.
Defined by Wikipedia. [online] Available from:
http://en.wikipedia.org/wiki/Fatwa
[Accessed 5th Sep.2006]

[83] Al-Qabas. [online] [24th May 2005] Available from:
http://www.alqabas.com.kw/news_details.php?id=114445&word
[Accessed 1st July 2005]

[84] Mohammad Al-Jazae'ri. *Kateb Saudi Yataraja'* (Saudi Writer is backing up). [online] [10th June 2005] Available from:
http://www.asharqalawsat.com/details.asp?section=3&article=304658&issue=9691
[Accessed 1st July 2005]

[85] A Saudi director put this fatwa as she interviewed the Sheikh stating that the veil is not required in her movie called 'Nesa' bela Thel' – Women without Shadow. The fatwa caused a massive rejection which made him to back up on what he said.
Yousif Al-Deni. *Bayna Al-Shaikh Ayedh wa Al-Mokhreja Haifa'* (Between Shaiekh Ayedh and the Director Haifa'). [online] [23rd April 2005] Available from:
http://www.asharqalawsat.com/leader.asp?section=3&article=295119&issue=9643
[Accessed 1st July 2005]

Shari.[86] However, the Ministry has changed the fatwa lately, because of political pressure, and says that as there are three ways of looking at this matter the ruler must decide which one should be adopted.[87] Throughout history, there are numerous examples of how fatwas were issued not as accurate interpretations of the Qur'an or Sunna but to satisfy a president or a political party only, or to be compatible with the current cultural climate. While it is an advantage that the Shari can be interpreted differently in order to be more flexible, for example according to changes in events that have taken place in daily life, it should not be flexible to suit a person or a specific group, for example men, to subordinate another group, such as women. These kinds of fatwas and discriminatory issues will be discussed further in the following section.

3.3. Equality in Islam

3.3.1. General Background

Gender equality and women's rights in Islam have been discussed from different points of view throughout history. The women's position in Islam is very complicated, not because of Islam as a religion itself, but because of the history of the oppression of women, which became a tradition and a base of the culture. Examples unrelated to Islam include shotgun marriage, and depriving a woman from job access or education. On the contrary, many of these traditions are incompatible with the teachings of Islam.[88]

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[86] Asharqalawsat. *Fatwa Al-Hughough Al-Seyaseya* (Suffrage Rights' Fatwa). [online] [20th March 2005] Available from http://www.asharqalawsat.com/details.asp?section=3&article=289146&issue=9609 [Accessed 1st July 2005]

[87] Asharqalawsat. (20th March 2005).

[88] Dr. Umayma, Abu Bakr. *Women and Gender.* (Damascus: Dar Al-fikr, 2002) pp 28,29.

Although the Qur'an is the same since it existed as a text, the interpretations for it are different and vary. Islam as a religion includes different schools of thought within each denomination, and each school has different interpretation for the same verse of the Qur'an.

One of the basic facts of Islam is that it is divided into two main categories. The first one is worship (*Ebadat*), which regulates the relationship between a believer and god. The second is the socio-economic sphere (*Mua'malat*) which organizes the relationship among people in different activities, for example, employment, political, educational, social, and in economic terms.

In the following discussion, gender equality will be examined and analysed in both the worship and the socio-economic spheres within the different readings and explanations.

3.3.2. Gender Equality in Worship

Islamic religion contains two parts of worship. The first part is the belief that Muslims are not required to do anything but believe in five major things. First is to believe in God; then, to believe in prophets, angels, scriptures, and the last day of judgment. These are the cornerstones of Islam. Without them a person cannot be a Muslim.[89]

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[89] Colin Turner. *Islam, the Basics.* (USA: Routledge, 2006) pp 72, 97. Also Sara Wenner. Basic Beliefs of Islam. [online] [2001] Available from: http://www.mnsu.edu/emuseum/cultural/religion/islam/beliefs.html [Accessed 12th May 2004]

The other category is known as the five pillars of Islam, which is a translation of the strength of a person's beliefs in the religion. The first is the creed which in fact contains two confessions: no God but 'Alla, and Mohammad is prophet of Alla. The second is prayer. Muslims have to pray five times a day at certain times. The third is fasting Ramadan, which is one month out of twelve months of the Muslim calendar that depends on the prophet's migration from Mecca – the home town- to Almadenna where the prophet Mohammad- started to spread Islam. Fourth is the yearly alms-giving of money to the poor which has to be 2.5% of profit or any kind of money increase. Finally is the pilgrimage to Mecca which Muslims are required to do once in a lifetime.[90]

These are the two major parts of Islamic basic values which guide Muslims in what to believe in and what to do. See Verse 23:35 from the Qur'an:

For Muslim men and Muslim women

For believing men and believing women

For devout men and devout women

For true men and true women

For men and women who are patient and constant

For men and women who humble themselves,

For men and women who give charity,

And for men and women who engage in God's praise,

For them has God prepared forgiveness and great reward.

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[90] David Norcliffe. *Islam Faith and Practice.* (GB: Sussex Academic Press, 1988) pp 128-141.

On the other hand, there is – as in most religions- different types of practices which a good Muslim has to avoid doing. These are essentially the major sins. The greatest sin that a person could not be forgiven for is to deny the existence of 'Allah' or to have another god to adore. Next is mistreating parents. There are requirements on the Muslim to be good to his or her parents which is provided by different verses of the Qur'an and Hadith (these are the sayings of the prophet Mohammad from different times and occasions). Stealing is also one of the great sins that a Muslim should avoid doing; and devouring the wealth of the orphans. Fornication is one of the sins that should not be committed. Sixth is drinking alcohol. Any drink which contains alcohol, regardless of the quantity, is totally forbidden. Moreover, not only is drinking alcohol forbidden, but also making it, selling it, and serving it are all prohibited. Gambling also should be avoided too.[91] The list of sins is longer, but these are considered the major ones.[92]

Only the first sin is related to worship; the others are forbidden because of the negative effects that might harm society if they were permitted. The key point here is that in worship, whether in things that a Muslim has to do, or the others he has to avoid, men and women are equal.

All of the verses that include any of these instructions are directed to men and women equally, even if they use masculine words. That is, women are responsible in religious matters exactly like men. The Qur'an never discriminates between the sexes in that

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[91] Sayed Akhtar. *Islam.* (USA: Islamic Research Foundation International, Inc., 2005) pp 8. Also Mervyn Lewis. Islam and Accounting. *Accounting Forum.* June 2001, 25 (2), pp 103.
[92] There are different categorizations for the sins according to Islam, for more see: Dar Al-Islam. *The Evils of the Tongue.* (Saudi Arabia: The Islamic Propagation Office, 2005) pp 3-7.

matter; both are asked to do the same and avoid the same things. For example, verse 24:2 of the Qur'an states that:

The adulterer and adulteress,

Scourge each one of them,

(With) a hundred stripes.

All of the verses that organize matters of worship are equalize between the genders in terms of responsibility towards their religion, rewarding them for their commitment and in punishing them if they are not committed. Gender equality in matters of worship is not questioned.

3.3.3. Gender Equality in Socio-economic Sphere

Since the Qur'an – or Islam in general – covers most of people's daily activities; the socio-economic sphere is wide and varies. As was stated earlier, worship was not an issue of the gender equality since the equality has been stated clearly in both the Qur'an and Hadith between the two sexes. On the contrary, the socio-economic sphere is at the centre of the main debate about whether Islam has equalized between the sexes or not. If it creates equality between them, then the question would be how? If it discriminates between men and women, the question would be why?

In different subjects organized by the Qur'an such as marriage or divorce, there are controversial areas about women's rights and gender equality.

Some Islamic writers believe that Islam treats the sexes equally in general; however, the discriminatory treatment regarding some specific issue is due to their biological differences that cannot be ignored. They believe that men and women are different, not only in biologically but also sociologically.[93] There are different qualifications regarding faculties, powers, aptitudes and temperaments; each sex has different amounts of those qualifications. According to this point of view, their differences has to be considered in order to get an equal treatment, because ignoring their differences and treating them exactly the same will end in unequal results.[94] Others believe that all the Islamic differences between genders are mostly about misinterpretation of the Qur'anic verses or that they try to take it literally.

3.3.3.1. Polygamy

Polygamy is the custom where by a man can have more than one wife at the same time. Historically, this custom was a tradition within some of the tribes who lived in the Arabic Peninsula before Islam. A man used to be able to take as many wives as he liked, but what Islam did was to limit this number to four.[95] On the other hand, polyandry also existed in the period before Islam where by a woman could get married to more than just one husband; if she got pregnant then she had the choice to decide who was the father.[96]

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[93] Mohamad Mazheruddin Siddiqi. *Women in Islam.* (Lahore: Ripon Printing Press, 1952) pp 16-39.
[94] Siddiqi, M. (1952) pp 16-39.
[95] Jain Smith. The Experience of Muslim Women. In:Yvonne Haddad, Byron Hanis and Ellison Findly. *The Islamic Impact.* (NY: Syracuse, 1984) pp 91,92.
[96] Azizah Al-Hibri. *Woman in Islam.* (Oxford: Pergamon Press, 1982) pp 194. Also
Laila Ahmad. Women and the Advent of Islam. *Journal of Women in Culture and Society.* 1986, 11 (4), pp 665-691.

Polygamy is allowed by verse 4:129 of the Qur'an which states that:

...Marry women of your choice,

Two or three or four,

But if ye fear that ye shall not deal justly (with them)

Then only one"(4:3)

Then within the same *Surra:*

"Ye are never able to be fair and just among women,

Even if you tried hard(4:129)

This allowance was given many excuses which sought to prove that it is an effective system on the bases of many different reasons:

1. In case of war, since most of the army is composed of men, death is mostly going to be among men. This results in women becoming widows. As a result, it is better to have more than one wife than a woman living alone or raising her children by herself. Also, women will be in a fairer situation if they get married rather than staying as widows or alone.
2. If the wife is sick with an incurable illness, instead of divorcing her, a husband can marry another wife.
3. If the wife is infertile, in order for a husband to get children, it would be better for him to marry another wife while the first wife would remain as his wife too.

These are the main given reasons for a man to have two – or more – wives at the same time. This reasoning is a good example of male domination in the Middle Eastern culture,

simply because it is possible for both the husband and wife to go through the above situations, not only women. Some cannot accept the idea of a man having more than one wife at a time; they view it as completely inconceivable. Polygamy would result in both injustice and humiliation of the wife and hostility among children from different wives. All of the excuses for polygamy are specious excuses, especially within different non Islamic cultures, or otherwise countries who contributed in WW1 and 2 would be the first to adapt the system since they lost millions of men who therefore left millions of widows behind, as Anwar Hekmat argues.[97]

On the other side of this argument, there are certain religious people[98] who believe that polygamy is not allowed in Islam and base their argument on the same verse of Qur'an. In this verse when God allowed men to marry up to four wives, it was conditional upon treating them equally,[99] or precisely the same. Since that is impossible – which is also concluded in this verse below– Shaheen Ali concluded that polygamy must be prohibited.

"If you fear that you will not act justly towards the orphans

Marry such women as seem good to you,

Two, three, four;

But if you fear you will not be equitable,

Then only one,

Or what your right hands own,

So it is likier you will not be partial"(4:3)

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[97] Anwar Hekmat. *Women and the Koran.* (NY: Prometheus Books, 1997) pp 137-138.
[98] Shaheen Sardar Ali. *Gender and Human Rights in Islam and International Law.* (London: Kluwer Law International,2002)2nd pp 73-75.
[99] Carla Obermeyer. Islam, Women and Politics. *Population and Development Review.* 1992, 18 (1), pp 33-60.

To prove that point the Prophet Mohammad himself gave a good example since he loved his wife Aisha more than the others and asked for God's forgiveness. In regards to treating wives equally, many Islamist thinkers claim that to be just or equal is only for material things like furniture, clothes, and the expenses, but not in things that it cannot be controlled, like love.[100] Aziza Al-Hebri has put it in a mathematical equation:

"(a)if you can be just and fair among women, then you can marry up to four wives.

(b) If you cannot be just and fair among women, then you may marry only one.

(c) You cannot be just and fair among women.

(b) and (c) are of the logical form:

If p then q

and p[101]

from which follows q

This is the equivalent to saying that you may marry more than one wife, but since – due to the nature of human beings – you cannot treat them equally, then you cannot marry more than one.

Another interesting view about polygamy is that all religious people or interpreters who believe that polygamy should be allowed have misunderstood the Qur'anic verse. The verse stated above (4:3) cannot be seen by itself or to ignore the reasons of why it was stated in the first place. This verse has to be interpreted by reference to the two verses before it which state that:

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[100] Ali, Sh. (2002) pp 73-75.
[101] Al-Hibri, A. (1982) pp 207-219.

O mankind, fear your lord,

Who created you of a single soul,

And from it created its mate,

And from the pair of them scattered abroad many men and women,

And fear god by whom you demand one of another (your rights),

And the wombs.

Surly god ever watches over you (4:1)

"Give the orphans their property and do not exchange the corrupt with the good;And devour not their property with your property,

Surly this is a great crime"(4:2)

In order to reach a perfect understanding of the Qur'anic verses, the circumstances that motivated the revealing of this verse should not be ignored. That is what Mohammad Khan argued in *Status of Women in Islam*,[102] when this statement was first revealed it was around the time where Muslims had just lost a battle with the disbelievers of Islam called *Uhhoud* (March 625).[103] Muslims lost a lot of their men in this battle, thereby leaving many orphans and widows. Those widows and orphans had guardians to look after their inheritance or property from their husbands or fathers, so it was not convenient for the guardian either to get close to the widows nor to leave their properties without supervision since – as the verse stated –the guardians might get greedy. Especially, it was

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[102] Siddiqi, M. (1952) pp. 143-151.
[103] Islam Online net. *7th of Shawal.* [online] [undated] Available from: http://www.islamonline.net/arabic/history/1422/Shawwal/history07.shtml [Accessed 21st May 2005]

around this time when Muslims started to become corrupted as a society. For that very particular situation polygamy was started and therefore it cannot be extended to any other situation. Even if there might be a war and loss of men, the fact that the life style has changed and became more civilised and organised means that the state would take care of such a situation and therefore widows would avoid this kind of humiliation. Also, in a different verse of the Qur'an, monogamy is the norm, not polygamy. When God created Adam he created Eve, but importantly he created one Eve only. The Qur'an states:

Oh mankind fear your lord,

Who created you of a single soul,

And from it created its mate,

And from the pair of them scattered many men and women(4:1)

And of his signs is that he created for you,

Of your selves,

Mates, that you might repose in them,

And he has set between you love and mercy (30:21)

The first verse suggests that the nature of human being is to have only one partner, since we are created to be in pairs which means a man and a woman, not a man and more than one woman. Also, if we are created from a single soul, then we as human beings have the same nature: as the husband does not find it acceptable to share his wife, so a wife cannot share her husband. Also, the second verse (30:21) mentions repose, love and mercy which cannot exist in polygamy. Instead, it would be a very annoying and disturbing

situation in polygamy with three or more partners.[104] Dr. Muhammad Shahrour agrees with Khan in his argument that the verse specifically justifies the unfair position of the orphans. Thus, he refuses to consider other excuses for polygamy as they can be applicable to both spouses, not only the wife. Also, the marriage should be to a widow who holds custody of her children (orphans), because polygamy was allowed for the sake of the orphans. Of course, polygamy, according to Shahrour, cannot be allowed if the husband cannot be just, or he cannot afford the expense of more than one wife.[105]

On the other hand, Dr. Suad Saleh,[106] the Dean of Al-Azhar Islamic Studies- girls campus,[107] argues that although the verse talks about the orphans, it says 'marry such women' 4:3, then that should include *all* women, not only the widows or orphans. However, it should not be understood that polygamy is the norm but that it is conditional since in the Qur'an the verse starts with: 'If you fear that you will not act justly'. Accordingly, before the marriage, a husband must ask himself whether he can treat them justly or not. Dr. Saleh concludes that if polygamy is not necessary and that it will eventually harm the first wife, then it is considered a sin.

Some argue that since polygamy was a tradition encouraged by many, Islam could not have prohibited it.[108] Prohibition could only gradually eliminate the number of wives and

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[104] Qamaruddin Khan. *STATUS OF WOMEN IN ISLAM.* (New Delhi: Sterling Publishers Private Limited, 1990) pp 16-25.
[105] Mohammad Sharour. *Nahwa Ousol Jadeda Lel-Fegh'h Al-Islami* (A New Vision for Islamic Jurisprudence). (Lebanon: Dar Al-Furat, 2000) pp 301-309. Also available from: http://www.shahrour.org/booklist.php?bid=4
[106] Interview with her, in her office. 15/06/2005. Cairo
[107] Al-Azhar Islamic School is one of the oldest Islamic schools in the region.
[108] Siddiqi, M. (1952) pp 143.

require equal treatment.[109] If this is right then societies now are more civilized and polygamy is practiced less than before, so they are ready for such banning.

Even if the verse allows polygamy, Mohammad Abdu, an early theologian, stated that polygamy was practiced by early well-mannered and decent Muslims when it was needed by then, unlike these days where it tends to be practised out of lust.[110]

Only one Islamic country prohibits polygamy. In Tunisia it is considered a crime which results in imprisonment and a fine. Other countries such as Syria have controlled the issue of polygamy by adding two conditions. The first is that the husband must be able to support two families financially. The second condition, that there should be a good reason for him to have another wife. Moreover, the judge has the authority not to continue with the marriage if he knows that the husband is not equal in his treatment of his two wives.[111] In 1961, Pakistan has changed its law requiring the agreement of the Arbitration Council before committing polygamy.[112]

3.3.3.2. Inheritance

One of the discriminatory laws in Sharia also based on the Qur'an is the inheritance system, which is based on the Qur'anic verse that says:

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[109] Siddiqi, M. (1952) pp143-151.
[110] Barbara Freyer Stowasser . *Women in the Qur'an Traditions, and Interpretation.* (Oxford: Oxford University Press, 1994) pp 121.
[111] Muhammad Beltaji. *Makant elmara' fe Al-Qura'n wa AlSunna* (Women's Position in Qur'an and Sunna). (Cairo: Maktabat Al-Shabab, 1996) pp. 322-323.
[112] Freeland Abbott. Pakistan's New Marriage Law: A Reflection of Qur'anic Interpretation. *Asian Survey.* Jan. 1962, 1 (11), pp 26-32.

'Allah (thus) directs you as regards your children's (inheritance): to the male, a portion equal to that of two females' [4:11]

A female as a sister, a daughter, and as a wife will have only half of what the male would get as a husband or as a son.[113] Also, if a father died leaving only females – that is, if he has no sons- then the daughters will have half of the inheritance and the rest would go to the closest male in the family (agnate). Yet if he has a son, then he would share the whole inheritance with his sisters or brothers, or even alone if he is the only child. On the other hand, only if she is a mother would a female get the same share as the father from their son's or daughter's inheritance.

Since life styles have now altered and women's position has changed accordingly, there is a major argument about the inheritance issue. From the Islamic point of view the reason why a woman only gets half of what a man would get – if their relationship to the person who passed away is the same – is because the man is always, according to Islam, the one who has the financial burden. Women are always free from any financial responsibility and, because of that, men get the double share.[114] Also, a husband is obligated to pay a regular amount of money to his wife for different life expenses, regardless of her financial status.[115] The debate is related to how the life routine differs now from the previous one: women work just like men, and they share in all of life expenses for their families voluntarily or as an obligation, so why should they still only get half the share?

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[113] Murtada Mutaharri. *The Rights of Women in Islam.* (Iran: World Organization for Islamic Services, 1991) 4th pp 245.
[114] Iqbal Abuelaya. *The Social Structural Aspects of Women's Role in Early Islam in the Sixth and Seventh Centuries.* (USA: 1987) pp 98, 99.
[115] Ali, Sh. (2002) pp 73.

The liberalists' view is that before Islam was first established, a woman was part of the inheritance herself, but Islam denied such treatment because it degrades and humiliates women as human beings. In this way, Islam has honoured women by giving them a half part of the inheritance, but – at that time – it was not an acceptable situation to be exactly like men. So Islam wanted to take it step by step in equalising men and women, and it is now a suitable time to change this. On the other hand, some Islamists disagree upon any changes since the issue has been determined in the Qur'an which is the main source of legislation, and in this view changes are not acceptable.[116]

To have a middle view is difficult and complicated too. Women are now a major part of the work force in most Islamic countries, and although they are not obliged to support their families financially, they often do. Lots of women now work abroad for several years in order to earn some money and to raise the living standards for their families. Also, after 1 400 years since the existence of Islam, Muslim societies became corrupted; now, Muslims are not good followers of the Islam teachings as they should be. This results in women being victims because they were neither treated as they should according to the teachings of Islam nor received equality treatment from the law. According to Islamic teachings, Muslims are encouraged to write their wills. A person could only relinquish to one third of his wealth. If a person thinks that the distribution of his wealth according to the Sharia law will not be fair between the male and female inheritors, then he/she adjusts that by writing a will to redistribute property.[117] Therefore,

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[116] Ali, Sh. (2002) pp 72.

[117] It is worth mentioning here that there are two rules in regards to inheritance that the Sharia (and Kuwait Family Law too (Article 247) regulates. First, a person cannot write in his/her will that they wish to give a

the females can get more than only half of what the males would get, or they even can get more than the male share by the written will depending on what the dead person desired.[118]

3.3.3.3. Bearing Witness

Another debated issue regarding gender equality in Islam is bearing witness. In verse 2:282 the Qur'an says:

And get two witnesses, out of your own men, and if there are not two men, then a man and two women, such as ye choose, for witnesses, so that if one of them errs, the other can remind her [2:282]

The interpretation for this is that a man as a witness equals two women. So that two men can be witnesses, but if are only females, then they have to be four or one man and two women. This verse comes within organising financial matters and women in the past were not involved in such transactions. At that time, most women were housewives, where it was the time when the public sphere was the men's territory. Others argue that it is part of women's nature to forget the full details. The interpretation of this verse is the most controversial one among Islamists themselves.

Although this Qur'anic verse is about financial issues, some Islamists would expand it to any other subject. Most of them would not even accept a woman's testimony on certain

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person more than a third of what his/her inheritance is worth. Second, the will cannot specify giving any money (or assets) of the inheritance to one of the inheritors, unless they all approve it.

[118] Haifaa Jawad. *The Rights of Women in Islam.* (London: Macmillan Press Ltd., 1998) pp 61-70.

topics, like crime. Her testimony is not acceptable, especially if the punishment of that crime is the capital punishment.[119] Their point is that if two women equal one man in testifying in a financial issue, then if the matter has to deal with human body even if the Qur'an verse did not mentioned the number of men and women to testify on a crime. This is because the latter is more important and has a greater effect on people's life financial matters.[120] For example, see the verse that refers to slander:

And those who accuse honourable women but bring not four witnesses, scourge them (with) eighty stripes and never (afterward) accept their testimony - They indeed are evil-doers -24:4.

On the other side of the argument, as mentioned, in some crimes like adultery (if they are married), fornication (if they are not married), and slander, women were accepted to be witnesses in the Qur'an or Hadith by not specifying whether witnesses should be men only or men and a specific number of women instead as it did in the previous verse. Therefore, according to the Qur'an, women can also be witnesses.

Some critics like Afazlur Rahman have stated that this verse cannot be generalized, women's testimony is equal to men's except in regard to financial matters, yet it should not be changed even though women's status has now changed, and she is engaged in the public sphere just like men. However, since it is the Qur'an that stated this explicitly, then it should remain the same.[121] On the contrary, Dr.Saleh concluded that although this verse talks about commercial issues, it does not include financial matters; it only discusses

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[119] Beltaji, M. (1996) pp 495-510.
[120] Beltaji, M. (1996) pp 495-510.
[121] Ali, Sh. (2002) pp 71.

finances if there is a long-term loan. In such instances a woman might forget and need a reminder. Not only does not include any other financial matter, it does not include women who are in the business field.

As long as other verses that required testimony did not specify the number of male and females witnesses, then 2:282 should not be generalized. However, it should be considered as an exception since women at that time were not involved in financial matters. If the argument is that crime and its punishment is more important than money and financial matters in general, then women's testimony is equal to half a man's only, so two women's testimony is equal to one man's in all of the crimes. This argument is invalid because if the crimes are more important, then the Qur'an would have considered that and mentioned it in the verses that deal with crimes instead of finance or elsewhere. So, if asking for two men or one man and two women to testify, it is only because women are more likely to lack experience in financial matters, not because they are an inferior sex to men. Also, when the verse mentioned that one man equals two women, the reasoning was that if one woman forgot the other would remind her because, in financial matters, the lawsuit usually took place a long while after the transaction; however, in crime cases, the time between the crime and the hearing does not usually take so long time for the witnesses to forget.

To summarise the argument about women bearing witness, there are three different views:

1. The testimony of two women equal one man in financial matters only.

2. The testimony of two women equal one man in all matters whether regarding financial or crimes.
3. The testimony of two women equal one man in financial matters only, and she is not acceptable as a witness in any other matters.

3.3.3.4. Male Supremacy

This is another major argument regarding gender equality. It is based on the Qur'anic verse that concludes:

Men are the protectors

And maintainers of women

Because God has given

The one more (strength)

Than the other, and because

They support them from their means.[122]**4:34**

The words *maintainers* and *protectors* are a translation of the Arabic word *'qwammon'* for which it is difficult to find an accurate translation. This verse has been explained through different interpretations depending on differing views on women and Islam in general. The first interpretation of this Qur'anic passage is the more traditional view that includes the usual attitude towards women and explains it as meaning that men are the superior gender having many qualifications which women lack.[123] It explains that a man has the ability of physical strength that allows him not only to do work that women

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[122] It might be noteworthy that the original Arabic text did not mention the word "strength".
[123] Abbass M. Al-Aqad. *Al-Mara'fee Al-Qur'an* (Woman's Position in Qur'an).(Cairo: Dar Al-Helal, 1971) pp 7-15.

cannot do, but also to overcome women in any field, even the ones that are considered as women's jobs.[124] The second thought of that verse – and the most widespread- is that men are a degree above women because of the financial support that they are obligated to offer to their families.[125] As stated before, in Islam men are the ones who are responsible to provide the needs for their families no matter how much they earn in relation to their wives. The common thought in Muslim societies, is that God has chosen men because they are more rational and logical, unlike women who are more emotional.[126]

On the other hand, there are some Muslims who do not accept the traditional interpretation for this verse because it is not compatible with the Islamic teachings towards women and equality.[127] They interpret this verse as relating to the financial support only. They explain that only in cases where male is the sole provider for his family, the verse is about the male – mostly as a husband and father – to care and offer the needs for his family with decency and honourable morality.

A more liberal line of thinking is that both the supremacy of men over women, and the above degree, is because men used to be the breadwinner, and were responsible financially for their families; that is, the reason for supremacy is only because of economic issues. Since this situation has changed nowadays, and both men and women

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[124] Al-Aqad, A. (1971) pp 7-15.
[125] Mariam N. Fadl-alla. *Al-Mara' fe Del Al-Islam* (Woman in the Islam's Shadow). (Lebanon: Dar Al-Madda, 2003) pp 106-110.
[126] Beltaji, M. (1996) pp 137-157.
[127] Al-Gazali Harb. *Isteqlal Al-Mar'a fe Al-Islam* (Egypt: Dar Al-Mostaqbal Al-Arabi, 1985) pp 99-101.

are supporting their families, so the supremacy of men no longer exists. It is only exists if he is the one who is responsible of his family.[128]

Riffat Hassan argues that the interpretation for this verse is that woman has the function of child bearing and men has to be supported financially in return, so men are protectors and maintainers of women only during the time of child bearing.[129]

People are in favour of this verse only because of financial responsibility and not because of any other qualifications. Al-Hibri illustrates her argument by giving another Qur'anic verse which concludes that:

The Believers, men and women,

Are protectors, one of another:

They enjoin what is just,

And forbid what is evil:

They observe regular prayers,

Practice regular charity,

And obey Allah and His Messenger.

On them will Allah pour His Mercy:

For Allah is exalted in power, Wise. 9:71

Al-Hibri argues that the word 'protectors' in the above verse was translated from the word '*awleya*' in the original text, which has almost the same meaning as the word

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[128] Harb, Al. (1985) pp 99-101.
[129] Ali, Sh. (2002) pp 65.

'qwammon' mentioned in the previous verse, 4:34. She concluded that, based on the latter verse, men cannot be superior intellectually or physically in any respect.[130]

Eposito argues that the traditional interpretation of the verse 4:34 leads only to the degrading of women's status which is considered to be a major conflict with one of Islam's principles which is to ameliorate the women's situation.[131]

3.3.3.5. Wife-Beating

The last and one of the most argumentative verse in Qur'an regarding women is the 4:34 verse which comes right after the male supremacy:

Men are the protectors and maintainers of women, because Allah has given the one more (strength) than the other, and because they support them from their means. Therefore the righteous women are devoutly obedient, and guard in (the husband's) absence what Allah would have them guard. As to those women on whose part ye fear disloyalty and ill-conduct, admonish them (first), (next), refuse to share their beds, (and last) beat them (lightly); but if they return to obedience, seek not against them means (of annoyance): for Allah is Most High, Great (above you all).

Before discussing whether Islam allowed wife-beating or not, the meaning of the word 'beat' which comes from the Arabic word 'daraba' should be analysed first. 'Daraba' stems from 'darb' which is used 58 times in the Qura'n and has ten different meanings : to travel

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[130] Al-Hibri, A. (1982) pp 207-219.
[131] Ali, Sh. (2002) pp 66-67.

– to strike – to beat – to set up – to give – to take away – to condemn – to seal, to draw over, to cover – to explain. The word 'daraba' has also another meaning that was not included in the Qur'an, for example ' to have intercourse'.[132]

The words 'disloyalty', 'ill-conduct', and 'rebellion', as some may translate it, are translation of the Arabic word '*Nushoz*'[133] which means ' the type of behaviour on the part of the husband or the wife which is so disturbing for the other that their living together becomes difficult.[134] Dahlia Eissa gave different definitions for the *nushoz*, she explained that the literal meaning of it is 'rising' and in context it can be defined as 'rising against her husband.'[135]

If the word '*daraba*' must be interpreted as to beat, several conditions and teachings should be followed because many people had abused this verse thinking that they can use violence against their wives. First it has to be borne in mind that it should only be applied when dealing with a rebellious, unrighteous, wicked wife as opposed to the righteous husband who gave his wife all of her rights, because he cannot claim a right if he is not

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[132] Edip Yuksel. *Beating Women or Beating Around the Bush.* [online] [undated] Available from: http://www.yuksel.org/e/religion/unorthodox.htm
[Accessed 7th May 2005] Also
Crescent Life. *Defending Critical Words in 4:34.* [online] [undated] Available from: http://www.crescentlife.com/thisthat/feminist%20muslims/defining_4_34.htm
[Accessed 7th May 2005]

[133] *Nushoz* will be discuss in greater details in chapter five.

[134] Ahmad Shafaat. *A Commentary on The Qur'an 4:34.* [online] [1984] Available from: http://www.crescentlife.com/thisthat/feminist%20muslims/a_commentary_on_the_quran_4_34.htm
[Accessed 7th May 2005]

[135] Dahlia Eissa. Constructing the Notion of Male Superiority over Women in Islam. *Women Living Under Muslims Law.* Nov. 1999, 11, pp 1-51. Also, Ali Qasim in his book about the nushoz, presents the definitions of the term according to the major Sunni and Shai scholars, but they all agreed on the main idea that nushoz when a wife disobey her husband.
Ali M. Qasim. *Nushoz Al-Zawja* (The Disobedience of a Wife). (Egypt: Dar Al-Jame'a Al-Jadeda, 2004) pp 10-13.

fulfilling his obligations. As Fatimah Khaldoon argues, a believing man would never reach the stage of beating his wife since the next verse we are discussing says:

If ye fear a breach between them twain, appoint (two) arbiters, one from his family, and the other from hers; if they wish for peace, Allah will cause their reconciliation: for Allah hath full knowledge, and is acquainted with all things 4:35.[136]

Apparently, a husband should follow three stages: he cannot reach the stage of 'beating' before the two stages of admonishing his wife, then separate in bed. If she was still nasty in behaviour, then beat her. Now a husband cannot just beat his wife, the form of beating has conditions too:

1. It should be very slight so that would never leave any remarks, bruises, or injuries.
2. It should avoid the face.

A wife is not obligated to take the beating; instead, she can file for a divorce. Moreover, if the husband did not follow the conditions and he harmed her, she can take him to court.[137]

As the prophet instructed, beating should be only symbolic if it is permissible, but it is not advised. The prophet, who is suppose to be ideal and a good example for every Muslim, has never beaten his wives. Instead he said: '(How odd it is that) one of you

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[136] Fatima Khaldoon. *The Islam Report: Qur'anic Perspective on Wife beating and Abuse.* [online] [2003] Available from:
http://www.theislamreport.com/violence.html
[Accessed 7th May 2005]
[137] Shafaat, A. (1984)

should whip his wife as a slave is whipped and then sleep with her at the end of the day).[138]

A new translation of the verse presented by Ahmed Ali:

As for women you feel are averse,

Talk to them suasively;

Then leave them alone in bed (without molesting them)

And go to bed with them (when they are willing).

Ali interpreted the word 'daraba' as having intercourse, so he suggested that in facing such a situation, a husband would talk to his wife, advice her. Then separate the bed and leave her. If that did not work, then have intercourse.[139] Although, the word 'daraba' can mean intercourse, it cannot be used in here as it is not compatible with the verse. Although the verse might imply that beating a wife is legal, by Kuwaiti law it is not. If any wife was beaten by her husband she can file a complaint and get a divorce if she asked for it.[140]

3.3.4. Gender Equality in Culture

These were the main argumentative issues regarding gender equality in Islam. As was discussed before, in every issue there were different interpretations reflecting the

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[138] Shafaat, A. (1984)
[139] Shafaat, A. (1984)
[140] For more about both wife beating and male supremacy and how the interpretations might be affected by the patriarchal mentality, see:
Dahlia Eissa. Constructing the Notion of Male Superiority over Women in Islam. *Women Living Under Muslims Law*. Nov. 1999, 11, pp 1-51.

viewpoints of each scholar. These opinions are broad to the point that some believe these verses have to be applied exactly to what it says, while others believe that what was suitable more than 1400 years ago is not suitable now and there must now be a different interpretation for the Qur'an. Each party has provided evidence from the same book, the Qur'an. The main purpose of organising the relationship between people in their daily life by The Book is what benefits the society in general and each individual too. However, the main problem that women within the Islamic culture in general have to deal with is not only the equality issue in relation to the Qur'an; it is also related to culture.

Culture in itself has changed a lot from the pre-Islamic period until now, since the region has gone through many historical events and there have been many negative effects, especially on women. In the pre-Islamic time, the position of women was different depending on the traditions of the tribe that a woman belonged to. While there were tribes who used to be honoured to be named by a woman – mostly a grandmother, there were others who used to bury a new born girl alive. According to Al-Gazali Harb, there were only five tribes which practised female infanticide[141] and they were not respected among the other Arabs because of that tradition. It is noteworthy that the custom of infanticide was not exclusive to girls, but there were some families who used to kill a male too because they could not afford his expenses.[142] He also thinks that some writers exaggerate the degradation of women before Islam in order to prove the point of how

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[141] The infanticide custom started when the King AlNu'man Ibn Al-Munther invader AlTamim tribe for not paying the royalty. They took their property and women as bondwomen. AlTamim went to the king and asked him to retune their women, he accepted if the women would agree to leave. All of them wanted to return home except for one girl, she did not want to leave, since then her father swore that he would kill any girl whenever he got any. So he killed twelve daughters. (Harb,85)

[142] **Say: "Come, I will rehearse what Allah hath (really) prohibited you from": join not anything as equal with Him; be good to your parents; kill not your children on a plea of want - We provide sustenance for you and for them.[6:151]**

Islam honours women. Surely Islam did recognize many rights for women that had not existed before, like inheritance, but that would not change the fact that women during that time did enjoy some independence. Women participated in many social activities like politics, economics, and also literature. History has recorded certain queens who lead their people to a great civilisation, like the Queen of Sheba who was mentioned in the Qur'an. When the Qur'an mentioned the Queen of Sheba, it did not deny her leadership as a woman; instead, it praised her reign and how she managed to lead her people on a basis of democracy and justice.[143]

I found (there) a woman ruling over them

And provided with every requisite;

And she has a magnificent throne. (27:24)

(The Queen) said:

Ye chiefs! here is

- delivered to me –

A letter worthy of respect. (27:29)

She said: "Ye chiefs!

Advise me in (this) my affair:

No affair have I decided

Except in your presence."

They said: "We are

Endued with strength,

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[143] Harb,Al. (1985) pp 16-17.

And given to vehement war:

But the command is with thee;

So consider what thou wilt command.(27:32, 33)

Also, many women had the right to choose their husband, and to refuse someone's proposal if she did not want him. In addition, some women retained the right to be the one to divorce their husbands, and not vice versa, as now. If a woman did not have this right and she wanted a divorce, all she had to do was to close the door of her tent and open another from the other direction. The husband then would understand that this was a sign from her that she wanted a divorce, and that custom existed within the nomads.[144] Also, during the early years of Islam a woman's position was even better than before since there were more rights added, and some of the negative practices against women were forbidden, most importantly infanticide. At that time, women –including prophet's wives- participated in many different activities compared with nowadays, where they are deprived of these things. Some women were teaching people the Islamic teachings and principles to both men and women. Many of them participated in the battle fields just like men. Sometimes a woman was the army leader, or the holder of pennon.[145] She was able to express herself clearly and say her opinion without shame or hesitation in front of the prophet or the following rulers, just to stand up for what she believed in. Her judgments were valuable and were asked for –by men- in the most critical situations.[146]

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[144] Al-Hibri, A. (1982) pp 194.
[145] The war flag.
[146] Harb, Al. (1985) pp 15-86.

Unfortunately, after the early Islamic time onwards there were massive changes against women that happened gradually. Women's position became changed so that they became members of the lower class. Furthermore, some *Hadith* were forged and changed in order to prove that women were the inferior sex. Then those fake or incomplete *Ahadeth* were inherited and were repeated generation after generation just to prove that women were the inferior sex. Culturally, women are still accused of two main sins which are cleared out in the Qur'an as fabricated information:

1. Woman were created from Adam's rib, while the Qur'an in verse 4:1 stated that:

O mankind! reverence

Your Guardian-Lord,

Who created you

From a single Person

2. Blaming women for seducing Adam to eat from The Tree causing "man's fall" from haven to earth which is a clear contradiction to different verses, such as[147]:

So by deceit he brought

About their fall: when

They tasted of the tree,

Their shame became

Manifest to them,

And they began to

Sew together the leaves

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[147] Harb, Al. (1985) pp 93.

Of the Garden over their bodies.

And their Lord called unto them:

"Did I not forbid you that tree,

And tell you that Satan was an

Avowed enemy unto you?

[23] They said: "Our Lord!

We have wronged our own

Souls: if Thou forgive us not

And bestow not upon us Thy Mercy,

We shall certainly be lost.(7:22, 23)

The above accusation exemplifies how the society insisted on condemning women for matters that the Qur'an made clear was not women's fault.

Hassan states that:

> The negative ideas about women that prevail in Muslim societies are rooted in certain theological ideas. Until we demolish the theological foundations of Muslim culture's misogynistic and andocentric attitudes, Muslim women will suffer discrimination despite statistical improvements in education, employment, and political rights.[148]

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[148] Riffat. Hassan. *" Members, One of Another: Gender Equality and Justice in Islam"*. [online] [undated] Available from:
www.sacredchoices.org/hassan.htm
[Accessed 12th June 2004]

3.4. Conclusion

Trying to have a notion for gender equality that consists of the Western equality theories, practically the formal equality model and considering Islam in the same time, is complicated if not impossible, especially that some of discriminatory issues are socially constructed and not based on biological differences like in the inheritance issue.

As Fenwick argues, the duty for the state is to create equality among its people; that can be considered as being one of the major values of human rights codes. Under this thesis, although people might not be equal or are different, they should not have unequal treatment imposed on them. A state should be cautious about imposing differentiating treatment on its citizens, because the differences that people have are not always a choice. This is especially the case if the person belongs to one of the minority groups that has been discriminated against for a long time. Therefore, sometimes differences might be a reflection of the social position of one of the minorities or disadvantage groups that a person belongs to.[149]

If a country, such as Kuwait, takes the *Sharia* Law as a main source for the legislation in the constitution, then it should be careful about what *Sharia* means and most importantly, how it should be applied. For example, the distribution of inheritance cannot be changed since it was settled in detail in the Qur'an[150], but there should be more restrictions added

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[149] Fenwick, H. (2002) pp 975.

[150] Dr. Mohammad Shahrour has came up with a new theory about the inheritance. He disagree with the fact that the inheritance roles cannot be changed since it was interpreted by people who might be mistaken.

in order to meet with the purpose of the *Sharia* which is ultimately justice. If the man is a degree above women because he is the financial supporter, then legislation should organize this matter in order to make sure that the inheritance is spent for the benefit of his family. For example, in Kuwait a wife or a divorcée can file a law suit asking for alimony against her husband – or former husband- if he is not responsible enough towards his family. These kinds of cases women cannot lose, but it would be a matter of the amount she would get as alimony.

Also, if the government cannot prohibit polygamy, it should at least add some limitations to avoid many of the problems that such a system can cause if it is left widely open. Just as Syria has managed with such a system. Beside that, Islam is claimed to have the advantage of being flexible, so it should allow some restrictions in order to help women as a disadvantaged group from being discriminated against. As Mohammad Iqbal, the poet thinker, stated:

> The teaching of the Qur'an that life is a process of progressive creation necessitates that each generation, guided but unhampered by the work of its predecessors, should be permitted to solve its own problems.[151]

The Qur'an it self is not based on a principle of discrimination; instead, peace is one of the main missions of Islam. If it created discrimination, then this mission could not be accomplished. Also, if women were able to share the same exact burdens in the worship sphere, then they might be more likely to be treated equally in the socio-political sphere.

The main rejection was to the role that a male's share would be double of the female's, instead they sometimes can be equal, or the female's would be more or less depend on the number of them.
[151] Hassan, R.

As Umayma Abu Bakr has argued, due to historical events and male domination, constructed cultures have resulted in confusion between what is Islam and what is traditionally unrelated to Islam. This confusion resulted in interpreting some of the Qur'anic verse according to the patriarchal mentality and forming these interpretations according to what it meant in Islam and why it cannot and should not be changed.[152]

While Western policy-makers and scholars tried to reach to equality between the genders, Middle Eastern scholars had an additional burden: to reach equality within the Islamic teachings by giving different interpretations to the Qur'anic verses than the traditional ones.

Also, Kuwait as an Islamic country would face a problem when adapting to the formal equality model. Formal equality assumes that both male and female are equal and Islam does not accept that. Although Islam does not differentiate between male and female in the sphere of worship, it does in the socio-economic sphere. When applying the formal equality model to the Kuwaiti laws, there are two options. First, to apply the formal equality model without exceptions. This means ignoring all discriminatory issues stated in Islam and changing the laws partially, which means that polygamy would be forbidden and marrying another wife would be a crime as in the case when a woman marries another husband. Also, when a woman gives a testimony, it would be equal to a man's. This means that if a case required two witnesses then it would not matter if they were two women or a man and a woman. Finally, inheritors would have an equal share regardless if

[152] Abu Bakr, U. (2002) pp 28-29.

they were male or female. Those are the main issues that need to be changed when applying the formal equality because male supremacy and wife-beating are not supported by the law.

The second option when applying the formal equality model is to apply it while keeping those three issues as exceptions from the model. However, this does not mean keeping the current laws where there is no protection for women. If polygamy has to be applied, then it should be in exceptional cases only, because at present there are no limitations for this law and it only assures women subjection and humiliation. Moreover, in some cultures, polygamy would consider to be the norm while monogamy is the exception. Also, if a man was to be given double his sister's share of an inheritance because he is the one who bares all of life expenses, then his share should be dedicated to his family by law. Finally, as Saleh argued, when bearing witness it should be in case of a long-term loan only.

Adopting the first option would be a very extreme move in Kuwait. The majority of the population would not accept the idea of ignoring Qua'nic verses. While women's suffrage rights are not mentioned in either the Qur'an or Sunna, many Islamic scholars in Kuwait have issued fatwas which forbid women's rights. As a result of these fatwas, the majority (women as well as men) rejected women's rights and held protests against them. If this is the case for issues not mentioned in the Qur'an or Sunna, then for issues that *are* mentioned, the situation the rejection might be higher and possibly more violent. If society is not ready for the formal equality model, it does not necessarily mean that it

should be ignored but that it should be adopted with some *limited* exceptions in order to improve women's position in society as it will be discuss in greater details in chapters seven and eight.

Chapter Four

Sex Equality within a Western Model – the UK

4.1. Introduction

This chapter will discuss at how the Sex Discrimination Act (1975) and similar equality laws in the UK and EU will provide a model for Kuwait when it assumes anti-discrimination laws. My intention is not to analyse or criticise such laws but to show how Kuwait, and indeed other ME countries, may learn and benefit from them. Neither Kuwait nor any ME country has these kind of laws. So discussing the SDA and Equal Pay Act (EPA) and like laws is important for Kuwait to benefit from, especially that lately an MP[1] suggested having some anti-discrimination laws. This chapter will examine instead if such laws may be applicable to Kuwait and if mistakes may be avoided, some of which arose from having full access to the protection that the law should be providing.

Discrimination is commonly based on different grounds such as race, colour, religion, and/or sex. The standard definition of discrimination states that discrimination arises when 'individual workers who have identical productive characteristics are treated

[1] The MP name is Ahamd Al-Mulaify, he mentioned the subject of having a anti-discrimination law in an interview with him in Kuwait TV Channel in 2003.

differently because of the demographic groups to which they belong'.[2] An alternative definition is offered by international law which states:

> [D]iscrimination shall mean any distinction, exclusion, restriction or preference based on race, colour, religion or belief, descent, ethnic origin, language, or sex, which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of life.[3]

Warwick McKean defines discrimination as 'the pejorative sense of an unfair, unreasonable, unjustifiable or arbitrary distinction,' applicable to 'any act or conduct which denies to individuals equality of treatment with other individuals because they belong to particular groups in society'.[4] However, Natan Lerner argues that although the word discrimination can be used with both positive and negative meanings, it is now commonly used in a negative way only.[5] Another argument is that people discriminate all the time in their daily life: they discriminate when choosing their friends and partners, and their social life, for example, but discrimination is not considered illegal unless it violates rights that are protected by law.[6]

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[2] Doris Weichselbaumer. Is it Sex or Personality? The impact of Sex-Stereotypes on Discrimination in Applicant Selection. *Eastern Economic Journal.* May 2000, 0011, pp 1-40.
[3] Natan Lerner, *Group Rights and Discrimination in International Law* (London: Martinus Nijhoff Publishers, 1991) pp.25, 26.
[4] Lerner, N. (1991) pp 25,26.
[5] Lerner, N. (1991) pp 25,26.
[6] Lerner, N. (1991) pp.25, 28.

The main concern of this study is discrimination on the ground of gender and, specifically, discrimination against women. The definition of sex discrimination does not differentiate very much from the general meaning of discrimination.

One important achievement towards equality in the UK, was the SDA which was approved in 1975. Yet, the sex discrimination movement started a long time before this with the Sex Disqualification (Removal) Act in 1919. Regardless of the fact that this Act assured many rights for women in the public sphere domain, discrimination was still evident.[7]

The main aim of any anti-discrimination act is to achieve equality. It does this by prohibiting less favourable treatment against a person regarding his or her race or sex, for example. Such factors should not be grounds for a person to be treated differently or less favourably.[8]

The SDA of 1975 depends on formal equality which 'treats equals equally', as discussed in chapter three. One important disadvantage of formal equality is that it does not offer any assurances of the outcome. As justice is the main aim of equality, the outcome of formal equality is therefore not always justice. Furthermore, since it depends on having a male comparator, it is impossible to have the male as a comparator if the matter under

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[7] Helen Fenwick. *Civil Liberties and Human Rights.* (London: Cavendish,2002) pp 986.
[8] Hugh Collins. Discrimination, Equality and Social Inclusion. *Modern Law Review.* Jan. 2003, 66 (1), pp 16-43.

consideration is, for example, pregnancy. Also, equal pay for women cannot be considered if there is no male comparator.[9]

Sandra Fredman argues that the only requirement to achieve formal equality is consistency, regardless of whether the treatment is good or bad. Also, women can be at a disadvantage if they are deprived of existing benefits in order for men to be equal to them. Hence, formal equality can result in disadvantaging women.[10] Due to the many restrictions of formal equality, other forms of equality have been suggested, such as substantive equality.

The SDA (1975) also deals with both direct and indirect discrimination against women and men. It considers whether discrimination occurs in the employment field or other fields such as education, goods, or services.

This chapter will discuss sex equality legislations in domestic UK laws, like the SDA, and in the European Community such as the European Convention on Human Rights, Articles 8 and 14. As well as discussing equality regarding employment and civil statutes, it will also discuss equality and the women's position in other fields like the criminal and family law. The main purpose of this chapter is to examine the SDA and then to see if it could be applied in Kuwait (chapter eight). However, this chapter will also discuss other aspects of UK and EU laws that offer protection to women, for example Article 14 of the European Convention on Human Rights, the Domestic Violence, Crime and Victims Act

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[9] Catherine Barnard and Bob Hepple. Substantive Equality. *Cambridge Law Journal*. 2001, 59 (3), pp 562-585.

[10] Sandra Fredman. *Women and the Law*. (New York:Oxford University Press Inc.,1997) pp 350.

2004, and the Children Act 1989. The laws under discussion either provide equality between both men and women in different aspects of life's activities, prevent a discriminatory act, or give more protection when it is needed such as in crime. While laws such as the EPD can be applied to Kuwait as they are since they do not contradict religion, some laws such as the SDA might contradict religion and therefore need to be modified. However, this does not mean that these laws should be either modified to the extent that they become useless and or that religion is used as an excuse; rather, it has to be an effective modifications to abolish the discriminatory culture that society had adopted over a long period of time. Thus, Kuwait needs first to eliminate all of the sex discriminatory laws, then to adopt a sex discrimination law modeled from UK laws.

4.2. Equality in the UK's Domestic Laws

4.2.1. Sex Discrimination Act 1975

4.2.1.1. Direct Discrimination

The SDA 1975 in section 1 (1) (a) defines direct discrimination as follows: 'A person discriminates against women in any circumstances relevant to the purposes of any provision of this Act if

(a) On the ground of her sex he treats her less favorably than he treats or would treat a man.'

Also discrimination against married person is defined in section 3 (1)(a) as follows: 'on the ground of his or her marital status he treats that person less favourably than he treats or would treat an unmarried person of the same sex.'

There are two factors to direct discrimination. The first arises if someone receives 'less favourable' treatment in any of the areas covered in the SDA: employment, education, goods, facilities, services and premises. The SDA has specified in great detail from Articles 6- 36 what is considered unlawful and, as a result, is a discriminatory act.[11] The second discriminatory factor arises when the treatment a man or a woman receives is because of his/ her sex. If this kind of treatment exists, then the degree of the 'less favourable' treatment does not have as much importance as the affect it has on the person.[12] For example, in the case of *Gill v El Vino Co Ltd*[13] a woman complained that she was refused service in a bar. Regardless of the fact that the act caused only minor distress, it was still considered as discrimination. This case overruled an earlier case in *Peake v Automotive Products Ltd*[14] where women were allowed to leave work five minutes before their male colleagues. The court described that this act was for the sake of safety and that it was only a very minor discrimination.[15] While the EPA deals with discriminating in pay on the ground of gender, the SDA covers the areas of employment, education, goods, facilities, and premises.[16]

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[11] The SDA 1975.
[12] Richard Townshend-Smith. *Discrimination Law: Text, Cases and Materials.* (London,Sydney: Cavendish Publishing Limited, 2001) 2nd pp 140.
[13] [1983] Q.B. 425, [1983] 2 W.L.R. 155, [1983] 1 All E.R. 398, [1983] I.R.L.R. 206, (1982) 126 S.J. 769.
[14] [1978] Q.B. 233, [1977] 3 W.L.R. 853, [1978] 1 All E.R. 106, [1977] I.C.R. 968, [1977] I.R.L.R. 365.
[15] Townshend-Smith, R. (2001) pp 140.
[16] Fenwick, H. (2002) pp.988-989.

Fredman argues that the SDA is stronger than the EPA since the former does not require an actual male comparator; instead it is enough to estimate how a male would be treated.[17]

Less favourable treatment could be in different fields such as employment, education, or in services. Also, the differences in treatment could be in appointing staff, denial from opportunity, dismissal, and so on. In the case of *R v Birmingham City ex p Equal Opportunity Commission (EOC)*[18] it was concluded that the provision of more grammar schools for boys than for girls is considered discriminatory since girls were denied the same opportunity to choose as the boys have.[19]

Moreover, Richard Townshend-Smith argues that sexual segregation, unlike race cases, does not have to be unlawful as long as the services and facilities provided are equal for both sexes. He also argues that by providing the same classes for both boys and girls at different times is lawful; however, providing special classes for boys like metalwork and other classes for girls like needlework is discriminatory. Both sexes should have access to the same class, whether together or separated, as long as they are equal.[20]

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[17] Fredman, S. (1997) pp 287.
[18] [1992] 2 F.L.R. 133, [1992] 2 F.C.R. 74690 L.G.R. 492 (1992) 4 Admin. L.R. 685, [1992] C.O.D. 279, [1992] Fam. Law 433.
[19] Camilla Palmer, and others. *Discrimination Law Handbook* (GB:LAG Education and Service Trust Ltd,1997)3rd pp.62-65.
[20] Townshend-Smith, R. (2001) pp 142.

Motivation in sex discrimination is not relevant: even if the discriminator had a good reason for discrimination, it will still be considered unlawful as in *Grieg v. Community Industry*[21] case.[22]

The less favourable treatment should be compared to the male standard.[23] In other words, if a woman is treated less favourably, she has to prove that the treatment she got was less beneficial than that accorded to a man, whether actual or hypothetical .[24] As Fredman argued, the SDA is stronger than EPA because the male comparator does not have to be actual. Instead, it is enough to suppose hypothetically how he would be treated in such situation. This would help prove the difference in treatment between a man and a woman; that is to say, if a woman is less favourably treated and if the circumstances are not exactly the same as that with the male comparator, then it is sufficient to suggest discrimination.[25]

Hypothetical grounds for discrimination are offered by the example in *Grieg v Community Industry & Ahern.*[26] Here, the employer refused to hire a woman for a painting and decorating job within all-male group. The reason behind this was that she might get into trouble working with males. The employer explained that if a man applied for an all-female job he would not have been hired either. However, the Employment Appeal Tribunal (EAT) did not accept his discriminatory reasoning because if a male

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[21] [1979] I.C.R. 356, [1979] I.R.L.R. 158.
[22] Palmer, C. (1997) pp 65-66.
[23] Nicholas Bamforth. The Changing Concept of Sex Discrimination. *The Modern Law Review Limited.* Nov. 1993, 56 (6), pp 872-880.
[24] Palmer, C. (1997) pp 67-71.
[25] Palmer, C. (1997) pp 67-71.
[26] [1979] I.C.R. 356, [1979] I.R.L.R. 158.

applied for the job he would have been hired, then the discrimination is unlawful.[27] In this case the male comparator did not exist, but it was sufficient to suppose he exist in order to decide that the act was discriminatory.

Less favourable treatment is not the only condition for a sex discrimination case; a person must also prove that the treatment she got was because of her sex only. If the person fails to make this connection, then s/he will lose the case based on sex discrimination. When a teacher was dismissed from her job after becoming pregnant in *O'Neill v Governors of St Thomas More Upper School,*[28] the case was rejected as the EAT did not view that the dismissal was due to the pregnancy *per se*; instead there were additional circumstances surrounding the pregnancy that led to the dismissal such as being an unmarried religious teacher and getting pregnant by a Roman Catholic priest.[29]

A discriminatory act appears clearly in the case of *James v Eastleigh Borough Council.*[30] Mr. and Mrs. James went swimming in a local pool. As Mrs. James had reached the age of 60, the retirement age for a woman in the UK, she was eligible for free entry while her husband, who had not reached the retirement age of 65 for men, was charged 75p. As a result, Mrs. James filed a case because it was a discrimination act for Mr James to pay while she was eligible for free access. The House of Lords found that the act was

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[27] Palmer, C. (1997) pp 71. Also, Townshend-Smith, R. (2001) pp 146. For more about the legal development of discrimination in Britain, see:
Christopher McCrudden. Institutional Discrimination. *Oxford Journal of Legal Studies.* 1982, 2 (3), pp 303-367.
[28] [1997] I.C.R. 33, [1996] I.R.L.R. 372.
[29] Palmer, C. (1997) pp 77. Also, Townshend-Smith,R. (2001) pp 190,191.
[30] [1990] 2 A.C. 751, [1990] 3 W.L.R. 55, [1990] 2 All E.R. 607, [1990] I.C.R. 554, [1990] I.R.L.R. 288.

unlawfully discriminatory because if Mr. James had been a woman of the same age (he was 61 years old then), he would be able to enter for free.[31]

On the other hand, stereotyping can be a main source for sex discrimination. Commonly held beliefs towards certain groups might affect their lives. For example, women need physical strength for certain jobs, or that all mothers are not reliable. A good example for stereotyping is the *Hurley v Mustoe*[32] case when a woman was refused a job because she was a mother to four children and the employer assumed that all mothers with young children are not reliable. The EAT stated that this was direct discrimination because had the applicant been a father with small children it would not have been an issue. Parliament legislated that mothers and women should be treated as individuals not as a class. Another example for stereotyping is *Horsey v Duffed CC.*[33] Mrs. Horsey was denied attendance on a course related to her work because her husband had got a job in London and her employer believed that Mrs. Horsey would follow her husband to London. The general assumption was made against women as wives; if Mrs. Horsey was a man she would have got on the course.[34]

Melanie Howard and Sue Tibballs, in *Talking Equality*, concluded that stereotyping is still considered to be a problem in the UK. The results of their research show that the five lowest paid jobs are occupied by 75% of women; more highly paid careers like

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[31] Lizzie Barmes. Promoting Diversity and the Definition of Direct Discrimination. *Industrial Law Journal.* 2003, 32 (3), pp 200-213.
[32] [1983] I.C.R. 422.
[33] [1982] I.C.R. 755, [1982] I.R.L.R. 395.
[34] Townshend-Smith, R. (2001) pp 148,149.

engineering and construction are occupied by 97% of men; and in the field of teaching only 14% of men work as primary and nursery teachers.[35]

For direct discrimination it is not enough to obtain a 'less favourable treatment'. The plaintiff has to prove in this sense that the treatment was a gender based. If the plaintiff failed to make the connection between the treatment and his/her gender then the case will be dismissed as in *Bullock v Alice Ottly School*.[36] In this case, the school regulation was that the retirement age for teachers and domestic staff-which happened to be all female in this example- would be 60, while for the gardeners, who were all male, would be 65 since it was a hard job to recruit such staff. A teacher who was obliged to retire at the age of 61 complained that it was discrimination. The case failed because there was nothing in the SDA that prevent having different regulations for different jobs. If a woman was a gardener, she would not retire until the age of 65; if a man was a teacher, he would retire at the age of 60. Hence there was no discriminatory act.[37]

If the plaintiff succeeds in providing the two conditions for direct discrimination case: 'less favourable' treatment and that the treatment was on the grounds of sex, then the defendant has to provide a reason for the act. If he or she fails in reasoning his act as a non-discriminatory act and it was not because of the gender, then the court would support the plaintiff.[38]

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[35] Melanie Howard and Sue Tibballs. *Talking Equality: What Men and Women Think About Equality in Britain Today.* [online] [July 2003] Available from: http://www.eoc.org.uk/PDF/talking_equality_report.pdf [Accessed 15th April]

[36] [1993] I.C.R. 138, [1992] I.R.L.R. 564, 91 L.G.R. 32.

[37] Townshend-Smith, R. (2001) pp 149,150.

[38] Palmer, C. (1997) pp 82,83.

4.2.1.2. Discrimination Against married persons

Discrimination against a married person might be less important in the UK today due to the anti-discrimination law.[39] However, it is still an issue that affects women in Kuwait. In many cases a woman would keep the fact that she is married a secret in order to get a job, as she lacks legal protection – which it will be discuss in chapter eight. This is particularly prevalent in the private sector as the people in charge favour hiring either males or single females rather than married women. This is largely due to the stereotype that married women are not as committed to their jobs as they should be.

The SDA 1975 includes direct discrimination acts that might happen against a person because of her marital status. In order to claim such discrimination, the same conditions of the direct discrimination should be provided with a single difference. The complainant has to prove that she got differential, 'less favourite' treatment than a single person. A 'less favourite' treatment has to be provided. Finally, the plaintiff has to succeed in making the connection between the kind of treatment she got and her marital status. It has to be proved that but for her marital status, she would get the same treatment as a single person. These are the three conditions for discrimination on the grounds of marital status.

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[39] In *Dekker v. Stichting Vormingscentrum voor Jong Volwassenen* ([1992] ICR 325, ECJ Case 177/88) the European Court of Justice held an important judgment for the pregnancy matter, stating that 'only women can be refused employment on grounds of pregnancy and such refusal therefore constitutes direct discrimination on ground of sex'. However, Robert Wintemute argues that the 'comparator' is still needed in pregnancy discrimination as well as any other discrimination based on sex, or any other ground, for more, see:
Robert Wintemute. When is Pregnancy Discrimination Indirect Sex Discrimination. *Industrial Law Journal.* March 1998, 27 (1), pp 23- 36. Also, for more about pregnancy under the SDA, and commentary on the above mentioned article, see:
Simon Honeyball. Pregnancy and Sex Discrimination. *Industrial Law Journal.* March 2000, 29 (1), pp 43-52.

If the plaintiff succeeds in providing them, motive is then irrelevant. Also, a comparison has to be made with a single person of the same sex as the plaintiff whether he or she actually existed or is only hypothetical.[40]

A connection between a person's marital status and the 'less favourite' treatment could be made in *Horsey v Duffed CC* case. Mrs. Horsey could base her claim that if she was a single person she might get on the course she wanted.

4.2.1.3. Indirect Discrimination

Unlike direct discrimination, which treats equals differently, indirect discrimination treats unequal equally.[41] The main concept of indirect discrimination is when the treatment seems to be neutral but in fact consists of disadvantaging a group of people because of their sex when the employer applies a provision, criterion, or a practice.[42] Consequently, indirect discrimination disadvantages a group of people (for example, women) unlike direct discrimination which affects individuals.[43]

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[40] Fenwick, H. (2002) pp 1001.

[41] Security of Acts and Regulations Committee. *Discrimination in the Law Inquiry under Section 207 of the Equal Opportunity Act 1995*. [online] [Nov 2003] Available from: http://www.parliament.vic.gov.au/sarc/Equal_Opportunity/Discussion_paper.pdf [Accessed 11th April 2005]

[42] Women and Equality Unit. *Sex Discrimination Act*. [online] [2004] Available from: http://www.womenandequalityunit.gov.uk/ [Accessed 9th April 2005] Also The Employment Equality (Sex Discrimination) Regulation. [online] [undated] Available from: http://www.opsi.gov.uk/si/si2005/20052467.htm [Accessed 10th April 2005]

[43] Townshend-Smith, R. (2001) pp 259.

By outlawing indirect discrimination, it was intended to ban the broader meaning of discrimination in the sense that in practice discrimination did not differ on grounds of sex. However, in reality it had greater effect on women than men.[44]

Indirect discrimination deals with the effects of a practice more than its intentions. In the UK, unlike in the US or the EC, the SDA 1975 has a technical definition for indirect discrimination. In the latter two, there is a broader definition for this issue. Section 1 (1) of the SDA 1975 states that:

A person discriminates against another in any circumstances relevant for the purposes of any provision of the SDA 1975 if...(b) he applies to her requirement or condition which he applies or would apply equally to a man but-

(i) Which is such that the proportion women who can comply with it is considerably smaller that the proportion of men who can comply with it; and

(ii) Which he cannot show to be justifiable irrespective of the sex of the person to whom it is applied; and

(iii) Which is to her detriment because she cannot comply with it.[45]

(2) If a person treats or would treat a man differently according to the man's marital status, his treatment of a woman is the purposes of subsection (1)(a) to be compared to his treatment of a man having the like marital status.

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[44] Fenwick, H. (2002) pp 1010.
[45] Palmer, C. (1997) pp 158-160.

However, the Employment Equality (Sex Discrimination) Regulations, which came into force October 2005, has substituted the former article of the indirect discrimination as follows:

[H]e applies to her a provision, criterion or practice which he applies or would apply equally to a man, but—

(i) which puts or would put women at a particular disadvantage when compared with men,

(ii) which puts her at that disadvantage, and

(iii) which he cannot show to be a proportionate means of achieving a legitimate aim.[46]

Also, the European Directive 97/80/EC in SDA has given a definition for indirect discrimination:

[I]ndirect discrimination shall exist where an apparently neutral provision, criterion or practice disadvantages a substantially higher proportion of the members of one sex unless that provision, criterion or practice is appropriate and necessary and can be justified by objective factors unrelated to sex.[47]

The ED has included indirect discrimination in employment, education, goods, facilities and services just as the SDA of 1975 did.[48]

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[46] Women and Equality Unit. *The Employment Equality (Sex Discrimination) Regulation*. [online] [undated] Available from:
http://www.opsi.gov.uk/si/si2005/20052467.htm
[Acceseed 29th March 2005]

[47] The Council of the European Union. [online] [undated] Available from:
www-8.mensiny.vlada.gov.sk/data/files/400.doc
[Accessed 10th April 2005]

[48] Women and Equality Unit. *Sex Discrimination Act*. [online] [undated] Available from:
http://www.womenandequalityunit.gov.uk/legislation/discrimination_act.htm#indirect

To establish an indirect discrimination case, four elements have to be provided. First is the discriminatory condition on which the case would be based. Second is to show how the condition would affect women more than men or vice versa, such as height or weight conditions. Third, if the plaintiff succeeded in providing the first two elements, then the defendant has to reason his condition as non-discriminatory. If the defendant failed to reason the given condition as non discriminatory, then the plaintiff has to explain why s/he can not fit with the condition.[49]

In *Price v Civil Service Commission*,[50] Mrs. Price applied for a job at the age of 35 when it was required for applicants to be under 28. She filed a case as the condition was sex discriminating. The EAT held that the comparison is not between all women and all men, but it depends on the proportion of men and women. Since women at the required age usually would be rearing children, and those who can comply with the condition chose not to have children, thus men who comply with the age condition are in a larger proportion than women. This means that the condition of indirect discrimination is met.[51]

It is important in any indirect discrimination case proving the condition with a distressed effect and to provide the right comparison ground with the right comparator since failing to provide any of these might cause a dismissal for the case. Also, the meaning of the justifiability of the disparate impact condition must be defined by the defendant as

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[Accessed 10th April 2005]
[49] Fenwick, H. (2002) pp 1010.
[50] [1978] I.R.L.R. 3.
[51] Fenwick, H. (2002) pp 1011. Also Palmer, C. (1997) pp 175.

important for the job, or as some suggested as 'necessary'. These factors are considered to be the most complex in any indirect discrimination.[52]

The Court of Appeal frames the proportion approach regarding indirect discrimination:

1. Recognizing the condition.

2. Naming the pool of comparison.

3. The relevant populations have to be divided and to find out who can comply with the condition and who cannot.

4. Make a prediction of how many males and how many females can or cannot comply with the condition.

5. Count the actual males and the females in each group.

6. A comparison to be made between the prediction and the actual number.

7. If the women are found to be in less proportion, then the condition would be considered as discriminatory.[53]

When the London Underground legislated a new policy for shifts as part of their business plan, a woman who worked as train driver brought a case because as a single mother she could not comply with the new shift plan. She claimed that the new policy was a discriminatory condition. In deciding the *London Underground v Edward*[54] a multiple study had to be made. First, it found that in the pool of comparison, there were 2000 male train drivers and only 21 women. In that pool, all of the male drivers were able to comply

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[52] Fenwick, H. (2002) pp 1011.
[53] Colin Bourn & John Whitmore. *Anti-Discrimination Law in Britain.* (London: Sweet & Maxwell Limited of, 1996)3rd pp 72.
[54] [1999] I.C.R. 494, [1998] I.R.L.R. 364, (1998) 95(26) L.S.G. 32, (1998) 148 N.L.J. 905, (1998) 142 S.J.L.B. 182.

with the condition, while one woman could not comply with the condition because of her responsibilities. That means that 100% of men could comply with the condition compared with 95.2% of women. Regardless of the fact that a high proportion of women can comply with the condition, and that the difference in proportion between men and women was not significant, the Court of Appeal considered some other facts. It is true that a high proportion of women can comply with the new policy, but if one woman cannot comply with the condition it affects the proportion radically. However, if one man cannot comply with the condition, it will not notably affect the proportion. Besides, the number of women who work as train drivers was a lot less than the men, meaning that the job has requirements that more women than men cannot meet. The Court of Appeal held that such an institution should have a more flexible approach when considering their employees' responsibilities, especially if it was in regard with a good employee.[55]

On the other hand, in *Jones v University of Manchester*[56], the 46 year old applicant who had applied for a job as a graduate careers advisor did not get the job since it was a condition for the applicants to between the ages of 27 and 35. The lady claimed that the condition should be considered as indirect discrimination. Her claim was that female mature students are older than the mature male students. The case failed because the requirement had to have an adverse impact on women which Ms Johns failed to prove.[57]

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[55] Fenwick, H. (2002) pp 1010.
[56] [1992] I.C.R. 52v.
[57] Townshend-Smith, R. (2001) pp 279,280. also Palmer, C. (1997) pp 230.

Indirect discrimination is a complicated and hidden version of sex discrimination. Its main advantage is that it protects disadvantaged groups of people regardless of whether the added provision was intentional or unintentional as long as it disadvantages a higher proportion of a particular group. Societies such as Kuwait that preserve a patriarchal culture and where anti-discrimination laws do not exist, the concept of indirect discrimination is yet to be realised. If an employer applies a condition that a larger group of men can comply with and only very small group of women can (or even none at all), it is considered to be the women's problem rather than the employer's. Yet, as the main purpose of this chapter is to set a model for the sex discrimination act, it is very important to adopt indirect discrimination in order to cut off all kinds of discriminatory practices.

Moreover, the concept of indirect discrimination can be beneficial for Kuwait as an advanced step in demolishing discrimination, since it can be used to get around the law. The definition that was given in the Employment Equality (Sex Discrimination) Regulations can be adopted since it is more sufficient and comprehensive than in the SDA definition. Using the word 'disadvantages' is broader that the word 'proportion' which can be one of the disadvantages.

4.2.1.4. Positive Action

Unlike formal equality positive action presents another form of equality; equality that deals with the outcome rather than the kind of treatment a person might get. Positive action means that 'like people' might be treated unsimilarly for a while in order to assure

equality in the result of the treatment. Fenwick argues that positive action and formal equality cannot meet since formal equality allows different treatment only with unlike persons, while positive action permits different treatment even with similar persons as long as it achieves equality at the end.[58] Positive action can act in conflict with the concept of formal equality, but it is been adopted by law to advantage a group of people (women) who for a long period of time have suffered from being discriminated against. Positive action is the acceptable way of discrimination since it discriminates against people who are in favour and practice discrimination.

The concept of positive action includes creating, equality of opportunity, and equality of outcomes. Equality of outcomes however is an aspect of substantive equality. By outlawing the unjustified indirect discrimination, the requirement for the employer to eliminate any obstacles that might prevent the protected group from having a job, and having more flexible regulations for people who have responsibilities, the SDA has embraced positive action. Unjustified indirect discrimination is closer to the substantive equality than the formal equality.[59]

Positive action was legalized in the SDA Section 48 when it allowed discrimination for under-represented groups. However, discrimination is allowed only 'for access to facilities for training' and 'to take advantage of opportunities for doing that work'. Also, the EOC code allows employers to discriminate for the advantage of a specific gender in

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[58] Fenwick, H. (2002) pp 1034.
[59] Palmer, C. (1997) pp 117,118.

order to get jobs that are used to be upholding for the other sex; such jobs were formerly known as male-jobs only.[60]

Hence, there are four types of positive action:

1. The reverse discrimination, which is mainly about favouring a person who are from a protected group (e.g. women, black people).
2. If two persons, one from the advantage group and the other from the disadvantaged one, have the same qualifications then the institution can adopt regulations in order to favour the person from the disadvantaged group.
3. Supporting people from the disadvantaged group to have more opportunities in order to ensure them that they can compete with people from the advantage group.
4. Employers can include more regulations to encourage the under-represented sex to get equal opportunities considering advertisement and recruiting.[61]

The current SDA outlaws only the third type of the positive action with some restrictions. Section 47(3) of the Act states that:

> [A]ffording persons access to facilities for training which would help to fit them for employment, where it appears to the training body that those persons are in special need of training by reason of the period for which they have been discharging domestic or family responsibilities to the exclusion of regular full time employment.

This section of the Act discusses the restrictions for training facilities that the employer is not obliged to provide, though any other positive discrimination is not legal. An employer

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[60] Palmer, C. (1997) pp 122.
[61] Fenwick, H. (2002) pp 1035.

might encourage a certain disadvantaged group to apply for a job, but s/he is not obliged to hire a less qualified person from such group just because they were discriminated against in the past.[62]

In seeking a remedy for the disadvantaged group different terms other than positive action can be applied, such as affirmative action and 'special measures'.[63]

Robert Fullinwider defines affirmative action as raising the number of workers of any of the protected groups in different employment fields especially in occupations that were traditionally preserved for the advantage groups.[64] However, Townshend-Smith concludes that it is difficult to come up with a definition for the positive action or affirmative action, though it contains three factors:

(1) Identifying the policies and practices that might disadvantage any of the minority groups.

(2) Developing all the policies that might affect the working environment whether in the workplace or at home, such as maternity and parental leave.

(3) To increase the number of minority groups where they are under-represented.[65]

The positive action in the SDA is not only very limited, but it is also a voluntary matter. Employers are not obliged to apply it and courts cannot impose it. Therefore, when the

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[62] Fenwick, H. (2002) pp 1035.
[63] Palmer, C. (1997) pp 118.
[64] Robert Fullinwider. *Affirmative Action*. [online] [2001] Available from: http://plato.stanford.edu/entries/affirmative-action [Accessed 20th April 2005]
[65] Townshend-Smith, R. (2001) pp 540.

Labour Party shortlist only females for the purpose of raising the number of women as MPs, two applicants challenged this in *Jepson and Dyas Elliot v The Labour Party.*[66] The industrial tribunal found this to be unlawful since it contradicts the SDA Section 13.[67] However, later on there was pressure to deal with women being under-represented as candidates and to deal with this as a positive action rather than unlawful discrimination in order to encourage women's participation in politics. For this reason the Sex Discrimination (Election Candidates) Bill 2001-02 was adopted to lessen the inequality in the number of representatives between men and women. The Bill allows political parties to have regulations to reduce the inequality.[68]

Christopher McCrudden also presents four kinds of positive action. First is the reverse indirect discrimination. The idea of this is to adopt some standards that more of the disadvantaged groups can meet than the advantaged ones. Second, to enable the disadvantaged groups to be strong candidates for a job by training and by informing them of these jobs opportunities. The third kind of positive action supports the idea of more favourable treatment to the protected groups. It means choosing a person for a job just because s/he is from a disadvantage group. The fourth kind claims that it is better for the job to be occupied by one of the protected groups.[69]

Kuwait does not have anti-discrimination laws at present. However, legislators realized that some aspects of the law put some groups (including women) at a disadvantage are

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[66] [1996] IRLR 116.
[67] Townshend-Smith, R. (2001) pp 541,542.
[68] The Sex Discrimination (Election Candidates) Bill. [Bill 28 of 2001-02].
[69] Richard Townshend-Smith. *Sex Discrimination in Employment: Law, Practice and Policy.* (Scotland: Sweet & Maxwell,1989) pp 227,228.

seeking to redress this imbalance. Therefore, positive action will be discussed in chapter eight, and the concepts and the motives behind it will be analyzed.

4.2.2. The Equal Pay Act

The Equal Pay Act represents another form of the anti-discrimination law since it focuses on payment, ensuring that men and women get equal pay in certain conditions. While equal pay has become less important in the UK, in Kuwait, on the other hand, when comparing the two sexes, it is not as significant issue since in most cases employees get the same pay regardless whether they were men or women. Instead, its significance depends on their marital status. If two employees, one woman and one man, do the same job, then they would get paid equally if they were single. However, the payment for the man would be higher than for the woman if his social status changed and he became married. While this act has become less significant in the UK, it is not so in Kuwait since pay between men and women depends on marital status and therefore is not always the same.

The Trade Union Congress carried the first equal pay resolution in the UK in 1888. Between 1888 and 1963 forty legislations were passed regarding the equal pay issue. In 1946 the Asquith Commission agreed on the equal pay principal regarding public services. However, it did not prefer the equal pay idea in the private sector because it was believed that it might increase the unemployment rate of women. Only a minority of the Commission had accepted the equal pay notion regardless of the sex of the worker.

Subsequently, the equal pay movement led to the birth of the equal pay in non-industrial civil service although this was not completed until 1961. In that year the TUC asked the Government to sign the International Labour Organization Convention 100, but in the following year it realized the importance of passing equal pay legislation. When the Labour Government came to power in 1964 it introduced legislation for equal pay in 1970. However, it needed five years to prepare for its enforcement, so it was not implemented until 1975.[70]

The main goal of the Equal Pay Act 1970 is to remove sex discrimination in payment. However, Fenwick argues that what the Act in fact did originally was to move women to lower jobs than men; therefore women were not in comparable jobs, just as the TUC had warned the government.[71]

Fenwick and Townshend-Smith agree on the fact that the EPA added more complexity to the legal system, and its relationship with the SDA is confusing. However, it has been concluded that while the EPA can be enforced in contractual issues between employers and employees such as working hours or dismissals, the SDA arranges the areas where discrimination might occur even if was not contractual, such as in job opportunities.[72]

If an issue was not covered by the EPA, the case was applied by the SDA. Also, if the relation was not contractual like a job offer, SDA would be applied; once it became contractual, EPA is applied; for example, when a job offer is accepted. The difficulty lies

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[70] Bourn C. & Whitmore J. (1996) pp 7,8.
[71] Fenwick, H. (2002) pp 1018.
[72] Fenwick, H. (2002) pp 1018. Also Townshend-Smith, R. (2001) pp 390.

where the SDA requires a comparable male whether actual or hypothetical. The EPA requires an actual male and cases have been rejected due to the lack of an actual male comparator.[73]

EPA 1970 states in section 1:

> 1. If the terms of a contract under which a woman is employed at an establishment in Great Britain do not include (directly or by reference to a collective agreement or otherwise) an equality clause they shall be deemed to include one.
>
> 2. An equality clause is a provision which relates to terms (whether concerned with pay or not) of a contract under which a women is employed (the woman's contract), and has the effect that
>
> (a) where the woman is employed on like work with a man in the same employment
>
> (i) if (apart from the equality clause) any term of the woman's contract is or becomes less favourable to woman than a term of a similar kind in a contract shall be treated as so modified as not to be less favourable, and
>
> (ii) if (apart from the equality clause) at any time the woman's contract does not include a term corresponding to a term benefiting that man included in the contract under which he is employed, the woman's contract shall be treated as including such a term.

The equality clause in the EPA can be applied under two conditions:

1. The woman is employed in the same work and employment as the male.

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[73] Townshend-Smith, R. (2001) pp 391.

2. The job evaluating scheme is equal to the male comparator and also in the same employment.

Subsequently the Act requires a male comparator that the woman has to choose whom he does like work, and in equal value. Due to the fact that it is difficult to find such a comparator, the House of Lords resolved the problem in deciding the *Pickstone v Freemans*[74] case. Mrs Pickstone, a warehouse operative, complained that she was less paid than a male employed as a warehouse operative but the same as men who worked as warehouse checkers. Therefore, the defendant argued that their work was not of 'equal value' as the EPA provided. The House of Lords decided that accepting such argument means failure to implement the Act, so it rejected the argument. Also, the employer cannot choose the comparator; instead, a woman – as a plaintiff - can choose her comparator.[75]

It is important, when selecting a comparator, that the difference in payment is due to gender rather than other factors that employer might rely on when raising a claim. A plaintiff can use one or more than one comparator *Hayward v. Cammell Laird Shipbuilders*[76]; and theoretically losing one case claiming equality against one comparator does not necessary means losing it against others. Moreover, losing an equality claim against a comparator is not a final decision. The plaintiff can bring another claim against the same comparator in the future if she can prove that there have been

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[74] [1989] A.C. 66, [1988] 3 W.L.R. 265, [1988] 2 All E.R. 803, [1988] I.C.R. 697, [1988] I.R.L.R. 357.
[75] Fenwick, H. (2002) pp 1019.
[76] [1988] A.C. 894 [1988] 2 W.L.R. 1134, [1988] 2 All E.R. 257, [1988] 2 C.M.L.R. 528.

significant changes in work or in conditions since the last case was dismissed the *McLoughlin v. Gordons (Stockport) Ltd* [77] case can be an illustration for such situation.[78]

After setting up the right comparator which satisfies the first condition of an equal pay claim, the next condition is that the comparator has to be in the same establishment as the plaintiff, or hired by the same employer. Fenwick suggests that the Act should take a broader view to include all employees whether appointed by the same or different employers as long as they are doing the same work with the same equal value. For example, if the workers are with the same employer and have the same terms of service; or if the workers and their comparator work within the same conditions.[79]

As the section 1 (6) in the EPA provided, a woman may bring equal claim within the same establishment if they were subject to the same terms and conditions. If there was no suitable male comparator in the establishment, then the plaintiff can choose a male comparator who works with the same terms and conditions but in another establishment as long as it is with the same employer or with an associated employer. The Court of Appeal in *Leverton v. Clwyd County Council*[80] decided that the same terms and conditions can be extensively similar. The Court of Appeal also decided in *British Coal v. Smith*[81] and *North Yorkshire County Council v. Ratcliffe*[82] that the male comparator has to

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[77] [1978] I.C.R. 561, [1978] I.R.L.R. 127.
[78] Townshend-Smith, R. (2001) pp 392,393.
[79] Fenwick, H. (2002) pp 1019,1020.
[80] [1989] A.C. 706, [1989] 2 W.L.R. 47, [1989] 1 All E.R. 78, [1989] 1 C.M.L.R. 574, [1989] I.C.R. 33.
[81] [1996] 3 All E.R. 97, [1996] I.C.R. 515, [1996] I.R.L.R. 399, (1996) 93(25) L.S.G. 28, (1996) 140 S.J.L.B. 134.
[82] [1995] 3 All E.R. 597, [1995] I.C.R. 833, [1995] I.R.L.R. 439, (1995) 145 N.L.J. 1092, (1995) 139 S.J.L.B. 196.

be working with the same terms and conditions of other males doing the same work in the establishment, while the terms and condition can be vary among the working women.[83]

Kuwait can avoid the problems which arise if there is more than one legislation by adopting a single anti-discrimination act to cover all discriminatory areas. Achieving equal pay is an important issue that needs to be protected by law since, as mentioned earlier, men receive higher pay in some cases. In Kuwait, both sexes get the same salary if they are both singles. An increase is added to the salary when the marital status changes; however, this raise only affects men when they get married, no matter what their jobs or grades were. Moreover, a Kuwaiti male citizen would get that raise whether he married a Kuwaiti female or non-Kuwait, while a female Kuwaiti would be deprived from that raise if she got married to a non-Kuwaiti (keeping in mind that if she married to a Kuwait the raise go to him). Also, the government gives a fixed raise of 50 KD to each child a family gets. This is also added to the husband's salary, and a woman would be deprived of it if she married a non- Kuwaiti, whereas the Kuwaiti male would not be. If this is the case in the public sector, then it can be concluded that discrimination will also be prevalent in the private sector. In both instances, a woman who suffers from such discrimination cannot bring about a case simply because there is no legislation to protect her. Consequently, regardless of the complexity or faults of the EPA, the concept of protecting equal pay between two sexes is important to be included in Kuwaiti law.

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[83] Bourn, C. & Whitmore, J. (1996) pp 214,215.

4.3. Equality in the European Community

4.3.1. The Treaty Establishing The European Community: Article 141 (ex. Article 119)

The EU laws would provide a different model of anti-discrimination laws that it would

Equal payment is recognized within the European Community by the Treaty Establishing the European Community which took place in Rome 1957. The Equality clause is mentioned under Article 141 (ex. 119) which stated that:

Each Member State shall ensure the principle of equal pay for male and female workers for equal work or work of equal value is applied.

For the purpose of this Article, 'pay' means the ordinary basic or minimum wage or salary and any other consideration, whether in cash or in kind, which the worker receives, directly or indirectly, in respect of his employment from his employer.

Equal pay without discrimination based on sex means:

(a) that pay for the same work at piece rates shall be calculated on the basis of the same unit of measurement;

(b) that pay for work at time rates shall be the same for the same job.[84]

When the Treaty of Rome was formed, the community realized that beside economic and political factors within the concerned states, social factors were also implicated. Articles

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[84] Treaty Establishing the European Community. [online] [undated] Available from: http://www.hri.org/docs/Rome57/Part3Title08.html
[Accessed 10th April 2005]

136, 137 and 141 (ex. 117-119) are concerned with working conditions and what relates to it. The Community is always concerned about social factors because it assures a certain protection for the competitors in the common market. Moreover, according to Spaak Report in 1956, workers and capitals will always fellow the best of the legislations regarding working conditions in any state which affect the Market.[85] The ECJ clarifies the nature of Article 119 which became Article 141 of the Treaty.

Article 141 pursues a double aim. First, in the light of the different stages of development of social legislation in the Member States, the aim of Article 141 is to avoid a situation in which undertakings established in states which have actually implemented the principle of equal pay suffer a competitive disadvantage in intra-Community competition as compared with undertakings established in States which have not yet eliminated discrimination against women workers as regards pay. Secondly, this provision forms part of the social objectives of the community, which is not merely an economic union, but is at the same time intended, by common action, to ensure social progress and seek the constant improvement of the living and working conditions of their peoples, as is emphasised by the Preamble to the Treat. This double aim which is at once economic and social, shows that the principle of equal pay forms part of the foundations of the Community.[86]

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[85] Bourn, C. & Whitmore, J. (1996) pp 17,18.
[86] Bourn, C. & Whitmore, J. (1996) pp 18.

This clarification was made when deciding *Defrenne v SABENA*.[87] The plaintiff was an air hostess for the Belgian national airline; her complaint was that she was paid less than her comparator male worker who does the same job. She claimed that the lower payment she gets is a breach of the Treaty of Rome Article 119 (Article 141). Since the matter concerned payment equality, it was decided that Article 119 (Article 141) should be applied.[88]

The importance of the *Defrenne* case lies in its direct effect on the Member States jurisprudence which gives people the right to enforce the sex equality principal. Political reasons behind the enforcement of sex equality within the Community are irrelevant.[89]

The European Law in general has supremacy over the domestic law. It works next to the domestic laws though it gives more rights.[90] Colin Bourn and John Whitmore state that the main benefit of Article 141(ex.119) is that it is clear in its wording, and that its directness can be used to benefit individuals without relying on other legislations such as other rights in the Treaty.[91]

Article 141 presents another form of equal pay which provides additional protection to ones offered by domestic laws. This Article gives another example of anti-discrimination laws found not only in the UK but in the EU too. The main advantage of this Article is its supremacy over the domestic laws which Kuwait would not have unless such an article

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[87] Case 43/75 [1976] ECR 455; 1976 2 CMLR 98; [1976] ICR 547
[88] Townshend-Smith, R. (2001) pp 89,90..
[89] Townshend-Smith, R. (2001) pp 102,103.
[90] Townshend-Smith, R. (2001) pp 87.
[91] Bourn, C. & Whitmore, J. (1996) pp 18.

could be adopted within the Gulf Cooperation Council (GCC). Although at present this might seem a little far fetched, it is only a matter of time for reform in the Gulf area due to political pressures of adopting more democratic practices. However, Kuwait can benefit from the Article by adopting it, using the same clarified formula and giving it protection provisions and applying it without exception which usually happens.

4.3.2. Equal Pay Directive

This directive presents another form of anti-discrimination law and further protection of the principal of equal treatment. The main difference between Article 141 and this directive is that where the former is excluded to protect the payment to ensure that men and women doing the same job should get the same payment, the latter ensures the principal of equal treatment in employment in general. This includes several issues related to employment as will be discussed below.

When the Community wanted to accelerate achieving equality in payment, the Equal Pay Directive was legislated in 1976 as a major result of the Social Action Program in January 1974. It was passed shortly after the UK's domestic laws (the SDA and the EPA), although it was inspired by Article 119 (or 141) and the Equal Pay Directive. The Directive was divided into 11 articles that considered a broad outlook in applying the equal treatment as a principal.[92]

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[92] Bourn, C. & Whitmore, J. (1996) pp 18,19.

The main objective of the Directive and the areas covered are stated in Article 1(1) and 1(2):

> 1. The purpose of this Directive is to put into effect in the Member States the principle of equal treatment for men and women as regards access to employment, including promotion, and to vocational training and as regards working conditions and, on the conditions referred to in paragraph 2, social security. This principle is hereinafter referred to as "the principle of equal treatment."
>
> 2. With a view to ensuring the progressive implementation of the principle of equal treatment in matters of social security, the Council, acting on a proposal from the Commission, will adopt provisions defining its substance, its scope and the arrangements for its application.[93]

The principle of equal treatment as the Directive stated in Article 2(1) means that there 'shall be no discrimination whatsoever on grounds of sex either directly or indirectly by reference in particular to marital or family status.'

However, the Directive has provided an exception of the equality principle regarding sex when constituting a determining factor as Article 2 (2) stated. Article 2 (3) gives a special protection to women regarding maternity and pregnancy, while Article 2 (4) states a positive action to women's advantage. Article 3 states the requirement to apply the principal. Article 4 ensures the vocational guidance and vocational training. Article 5 organizes the discriminatory dismissal and victimization in Article 7. The Member States

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[93] The EEC Equal Treatment Directive. [online] [undated] Available from: http://www.pfc.org.uk/legal/etd.htm [Accessed 7th April 2005]

have to inform the Commission about the taken procedures in order to ensure the implementation of the Directive. Although the Directive is extended in order to account for the equality treatment principal, it did not cover the non-payment employment.[94]

A more detailed anti-discrimination law is presented by the EU member states. Whereas Article 119 ensures equal payment, the EPD provides protection in employment by different means such as promotion and working conditions. The EPD has several advantages; for example, as it protects equal treatment in any sector. Also, it demands that any domestic law in conflict with the directive should be abolished in order to enforce the principal of equality. When applying an anti-discrimination law in Kuwait, it should be ensured that it abolishes any other law or regulation that is in conflict with the principal of equal treatment.

4.3.3. European Convention on Human Rights

4.3.3.1. Article 14

In order to get a complete picture of the anti-discrimination laws in the UK and in the EU in general, it is important to discuss Article 14 of the ECHR which has some similarities with Article 29 of the Kuwaiti Constitution.

Due to massive human rights violations during the Second World War, the European state members drafted the European Convention on Human Rights in 1949. The main goal for this convention is to guard the basics of human rights. The Convention was considered to be the most influential treaty regarding the human rights on the UK laws

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[94] The EEC Equal Treatment Directive. Also, Bourn, C. & Whitmore, J. (1996) pp 19.

because of the way of its enforcement given to the European Court of Human Rights to address member states and to rule against them.[95]

As well as the need to protect human rights, the Convention came about as a reaction to Communism that was in place in Central and Eastern Europe. When the Convention enforcement started in 1953, 31 out of 36 of the member states signed the Convention. Since then, there have been some amendments in its protocols, including its enforcement machinery, and other protocols were added later on.[96]

Article 14 the Convention states that:

The enjoyment of the rights and freedom set forth in this convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin association with a national minority, property, birth or other status.

The protection against discrimination has been stated in many of the human rights treaties; most importantly the UN Charter which states human rights as being 'without distinction as to race, sex, language or religion'. Also, the UN has realized the importance of the issue so that it promoted international agreement protecting against discrimination.[97]

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[95] Fenwick, H. pp. 17.
[96] DJ Harris, M O'Boyle and C Warbrick. *Law of the European Convention on Human Rights* (UK:Reed Elsevier, 1995) pp 1-3.
[97] Harris, DJ. O'Boyle, M. Warbrick, C. (1995) pp 462. Also
Thomas Buergenthal. The Normative and Institutional Evolution of International Human Rights. *Human Rights Quarterly.* 1997, 19 (4), pp 703-723.

Unlike the UN Charter which includes a broad protection against discrimination, the ECHR prevents discrimination regarding rights that are included in the Convention only. Although the list of the rights included in the Convention are long it is not comprehensive. The grounds for discrimination referred to in the Convention are set as examples to protect against discrimination whenever another rights in the convention is engaged.[98]

It has been argued that the Convention protects against discrimination rather than supports equality. It should be noted that although non-discrimination and equality present the same idea, they have different ways in obligation, and the Convention has adapted the standard of 'non-discrimination/equal protection'.[99]

Moreover, discrimination in Article 14 has a different meaning from 'differentiation in treatment'. Article 14 does prevent treating people differently on the protected ground, when there is an eligible justification– so therefore they can be treated differently even if they are in the same situation- and this might be justified by the member states.[100] *Rasmussen v Denmark*[101] exemplifies the justifiable different treatment when the plaintiff claimed that he got time-limits for paternity unlike his wife who got access to paternity at any time. His claim was that the act violated Article 14 of the Convention. However, the Court decided that there was no breach of the Convention because, among other facts, the

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[98] Tammie O'Neil and Laure-Helen Piron. (2003) 'Rights-based approaches to tackling discrimination and horizontal inequality' Background paper for the Inequality in Middle Income Countries Study, London: Overseas Development Institute.
Harris, DJ. O'Boyle, M. Warbrick, C. (1995) pp 462,463.
[99] Harris, DJ. O'Boyle, M. Warbrick, C. (1995) pp 463.
[100] Bob Hepple. Race and Law in Fortress Europe. *The Modern Law Review.* Jan. 2004, 67 (1), pp 1- 15. Also Harris, DJ. O'Boyle, M. Warbrick, C. (1995) pp 463,464.
[101] (1985) 7 E.H.R.R. 371.

differentiation of the treatment was in the child's best interest, so that the treatment was 'objective and reasonable', regardless of the fact that it was different.[102]

In order to establish a discrimination case based on article 14 regarding being treated differently, first the ground of the different treatment that the case was based on has to be identified. Second, it has to be shown that the different treatment has approached the forbidden grounds that it was stated in the Article. Though, article 14 has a long list of characteristics that might be the ground for the 'infavorable' treatment.[103]

In *Nelson v UK*[104] a juvenile prisoner claimed a discriminatory act because he did not get remission for good behaviour like the adults did. The Court dismissed the case due to fact that if the complainant was an adult, he would suffer from a severe sentence like the adults, but a flexible system had been established for the juvenile prisoners. The differential treatment in that case was justifiable; it was not acceptable in *Schmidt v Germany*[105] when Schmidt claimed that he was subject to a discriminatory act based on his gender. Schmidt had to pay a levy as an alternative option if he did not wish to serve as a fireman. All men had to pay a levy because all of them are potential firemen, while women did not. Judges found that taxing men was a discrimination act regarding Article

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[102] Harris, DJ. O'Boyle, M. Warbrick, C. (1995) pp 463,464. Also, John Bowers and Elena Moran argue that the case law under this Article has developed 'to the extent that a difference is unlawful discrimination on the extensive range of grounds covered in the Article only if it has no objective and reasonable justification.'
John Bowers and Elena Moran. Justification in Direct Sex Discrimination Law: Breaking the Taboo. *Industrial Law Journal.* Dec. 2002, 31 (4), pp 307, 320.
[103] Harris, DJ. O'Boyle, M. Warbrick, C. (1995) pp 470.
[104] No 11077/84, 49 DR 170 at 174 (1986).
[105] (1994) 18 E.H.R.R. 513.

4(30(d) since the discrimination was not based on gender; instead, the states differentiated between who would fit the job and who would not.[106]

Although the Commission might consider that Article 14 is independent in its existence from other rights, it made it clear that it is not independent and it can be applied only when another rights in the Convention is engaged.[107]

D.J. Harris, M. O'Boyle and C. Warbrick argue that the characteristics that a state use to differentiate in treating people are usually direct and clear in order to identify that the 'badge' of differentiation is based on legislation or a practice. However, a plaintiff might argue that the less favourable treatment s/he got was based on a hidden reason. The treatment s/he got could be justified, but there was a 'real' reason other that the announced in *Hoffmann v Austria.*[108] Here the plaintiff claimed that although the state court had given the custody of her child to her husband because that would serve the best interest of the child, there was a reason beyond the interest of the child which was her religion. The European Court decided that the plaintiff's religion was the real reason of depriving her from giving her custody of her child.[109]

As part of its international obligations, the ECHR was integrated into UK's legal system. It can be enforced either by the European Human Rights Commission or the European

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[106] Harris, DJ. O'Boyle, M. Warbrick, C. (1995) pp 471.
[107] Stephen Livingstone. Article 14 and the Prevention of Discrimination in the European Convention on Human Rights. *European Human Rights Law Review.* 1997, pp 25-34.
[108] [1994] 1 F.C.R. 193, (1994) 17 E.H.R.R. 293, [1994] Fam. Law 673.
[109] Harris, DJ. O'Boyle, M.Warbrick, C. (1995) pp 476,277.

Court of Human Rights. Townshend-Smith concludes that claiming breach of the Convention costs less and is not as complicated as domestic laws.[110]

As mentioned before, discrimination is prevented against those rights that are stated in the Convention, which limits the value of it. The Convention cannot protect non-discrimination if the matter was related to employment for example.[111] Some lawyers think that Article 141 (ex.119) is more beneficial in the matter of equal pay, especially regarding sex discrimination, than Article 14.[112] Nevertheless, if the UK signed Protocol 12,[113] then that would redeem the irrelevant matters in the Convention since Protocol 12 secures non-discrimination in relation to rights that are protected by laws.[114]

Article 29 of the Kuwaiti Constitution states:

> *All people are equal in human dignity and in public rights and duties before the law, without distinction to race, origin, language, or religion. Personal liberty is guaranteed.*

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[110] Townshend-Smith, R. (2001) pp 107.
[111] Fenwick, H. (2002) pp 85.
[112] Livingstone, S. (1997) pp 25-34.
[113] Protocol 12 was applied in 2005. It is an additional mechanism to enforce the equality principle stated in Article 14 of the ECHR. Article 1 of the Protocol states that:
1. The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.
2. No one shall be discriminated against by any public authority on any ground such as those mentioned in paragraph 1.
Yet, the grounds of discrimination is – unlike Article 14 – not limited to the rights stated in the Convention. Magda KrzyŜanowska – Mierzewska (prepared by). *Why Should Central and Eastern European Countries Ratify Protocol No.12 to the European Convention for the Protection of Human Rights and Fundemental Freedoms?*. [online] [July 2007] Available from:
http://www.astra.org.pl/protocol.pdf
[Accessed 23rd Semp. 2007]
[114] Fenwick, H. (2002) pp 85.

Regardless of the fact the constitution is the superior law in Kuwait, there are some laws that violate it directly. For example, Article 1 of former the Election Law stated that 'both the candidates and electors have to be a male'. Before this article was amended in May 2005, it can be seen that political rights were exclusive to men; even the constitutional court could not change such violation. In some cases it is necessary not only to have legislation, but to protect it from such violations.

4.3.3.2. Article 8

While Article 8 does not discuss any discrimination act it is important for the two subjects that discusses immediately after it. The Article discusses the privacy of the family life and when the public authority can interfere. It draws the line between what is considered to be privacy and when it is necessary to break such privacy, giving the authority the right to interfere.[115] In Kuwait, the privacy of family life is stated in the constitution only and is not discussed in any other law. This Article is important in this chapter when discussing domestic violence and when discussing different issues of family law, especially when considering what is privacy and what is not.

Article 8 of the ECHR states that:

1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right

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[115] Helen Stalford. Concepts of Family under EU Law- Lessons from the ECHR. *International Journal of Law, Policy and the Family*.2002, 16 (3), pp 410-430.

except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

Fenwick argues that Article 8 includes four different rights if private life is to be considered to be different from family life. In fact family as a term might be understood to be included under the private term; therefore, that definitions for both terms need to be provided. Moreover, respect for a private life might be interrupted differently in the Member States as each one has a different meaning for what respect means.[116]

Article 8 focuses on negative obligations. Before a positive action, a state has to provide requirements according to Article 8. A positive action can come in different shapes. A state's inaction might cause damage to the applicant; a state might interfere by a positive action in order to protect another person; or under certain conditions, a private individual might be obligated to perform a positive action. However, the last form of positive action has some restrictions and it cannot be extended.[117]

In order to activate Article 8, the state has three obligations:

(1) the state authority has to take all the necessary procedures in order to ensure the enjoyment of the rights included in the Article.

(2) the state should assure that that enjoyment does not disturb another private party.

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[116] Fenwick, H. (2002) pp 67.
[117] Fenwick, H. (2002) pp 68.

(3) the state should guarantee the enjoyment of the rights for individuals by another private party taking all the required steps.[118]

Although the Article has some exceptions to interfere with the private life, those exceptions have limitations. The limitations are 'to be in accordance with the law', and for the interference to be 'necessary in a democratic society'.

- 'In accordance with the law'

This statement basically means that the act should be lawful. The state should justify its act by identifying the legal rule that the interference was based on. It is irrelative for the legal rule to be domestic or international as long as it justifies the state's act. The act might be drawn from a general legal regime, or from more than one legal order. If the state succeeds in providing the legal basis for its action, then the Court might favour the argument that the national court failed in interrupting the national law.[119]

- 'Necessary in a democratic society'

Providing a legal rule in justifying interference is not enough in itself; instead, the state has to clarify how the act is necessary in a democratic society. As general as it the phrase may sound, the Court explained in *Handyside v UK*[120]:

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[118] Harris, DJ. O'Boyle, M. Warbrick, C. (1995) pp 284.
[119] Harris, DJ. O'Boyle,M., Warbrick, C. pp 286.
[120] 1976, Series A, No 24.

'The Court notes...that, while the adjective 'necessary'...is not synonymous with ''indispensable'', neither has it the flexibility of such expressions as 'admissible', 'ordinary', 'useful', 'reasonable' or 'desirable'.

While the Court rejected the wide interpretation for 'necessary', in *Olsson v Sweden* the Court required a certain degree of proportionality when stating that:

According to the Court's established case-law, the notion of necessity implies that interference corresponds to a pressing social need and, in particular, that it is proportionate to the legitimate aim pursued.

Rights that are included in Article 8:

1. Respect for private life

The Court gave guidance to what could be meant by 'private life' in Article 8:

...it would be too restrictive to limit the notion [of private life] to an 'inner circle' in which the individual may live his own personal life as he chooses and to exclude thereform entirely the outside world not encompassed within that circle. Respect for private life must also comprise to a certain degree the right to establish and develop relationships with other human beings.[121]

When giving this explanation, the Court was deciding the case *Niemietz v Germany*.[122] The Court was unlikely to limit the private life notion into an 'inner circle'. A human being usually has relationships with other humans which also should be respected. The

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[121] Harris, DJ. O'Boyle, M. Warbrick, C. (1995) pp 305.
[122] (1993) 16 E.H.R.R. 97.

'private life' as a term has a broad meaning, but the Court still considers it in terms of a limited definition in issues regarding 'respect' that states are required to provide. It is more likely to consider business relations as part of private life.[123]

In *McFeeley v UK*[124] the Commission recognized the importance for someone to build relationships with the others; a prisoner should be free to associate with other prisoners to certain level. Moreover, in *X and Y v Netherlands*,[125] the Court included in the private life the term 'the physical and moral integrity of the person' to include 'his or her sexual life'.[126]

The broad meaning of 'private life' that the Court is adapting to might create difficulties in practice. Harris, O'Boyle and Warbrick suggest that 'the best that can be done is to identify the categories of the interests and activities that the institution has held to be within the ambit of "private life". These categories are not closed and, doubtless, the cases could equally profitably be arranged under different heads'.[127]

2. Family Life

Taking family life into account is a good example of social changes. Realizing the actual status of the relationships and the changes in social practices within the European States' law, family life is 'extended beyond formal relationships and legitimate arrangement'.

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[123] Fenwick, H. (2002) pp 68,69. Also, Harris, DJ. O'Boyle, M. Warbrick, C. (1995) pp 306.
[124] (1981) 3 E.H.R.R. 161.
[125] (1986) 8 E.H.R.R. 235.
[126] Harris, DJ. O'Boyle, M. Warbrick, C. (1995) pp 306.
[127] Harris, DJ. O'Boyle, M. Warbrick, C. (1995) pp. 603.

The term 'family life' includes only already established families. The Article does not include formal relationships, marriage, or divorce for example.[128]

What is important in considering whether the relationship falls within the term of 'family life' or not is the stability of the relationship and the intentions of the partners. While a relationship between a fiancé and a fiancée would be protected under Article 8, it might not cover a sham marriage.[129]

Article 8 includes the relationships between husband and wife, parents and their children, and relationships between grandparents and their grandchildren, but the more distant a relationship, the easier the state can interfere. However, in each case the actual relationship should be considered. The family life might include a complex of relationships and, if one of them ended, it should not affect other continuous relationships.[130]

The term family life was extended to include other than the legitimate children; that is, adopted children in relationship with their adapted parents. It also includes fostering agreements and informal matrimonial unions with the illegitimate children, though homosexual unions are not included under the term family life.[131]

3. Respect for the home

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[128] Harris, DJ. O'Boyle, M. Warbrick, C. (1995) pp. 313,314.
[129] Harris, DJ. O'Boyle, M. Warbrick, C. (1995) pp 313,314.
[130] Harris, DJ. O'Boyle, M. Warbrick, C. (1995) pp. 314,315.
[131] Harris, DJ. O'Boyle, M. Warbrick, C. (1995) pp. 31315-317.

'Home' is where a person lives and is settled in; not every place where someone lives is considered to be a home. The Commission concluded in deciding *Gillow v UK*[132] that 'home is where one intended to live, not confining 'home' where one actually was living.' In this case, Mr Gillow wanted to live in Guernsey where he had to have permission to build a house and permission to live on an island. The couple had lived there for five years, and then travelled around the world for eighteen years according to Mr. Gillow's job requirement. They had also maintained a house in England. Later, the authority of Guernsey rejected his request to renew his permission on the ground that it had been a long time since the couple had been in Guernsey, and the home should be understood as his house in England. However, the Commission rejected such a defence since the couples have always intended to go back to their home in Guernsey.[133]

The main concept of 'home' is the right to live in a house and to be protected from expulsion. However, the notion of home is wide, and the decisions of the Court vary depending on the facts of each case. The Court found in *Cyprus v Turkey*[134] that expelling citizens from their home and making it impossible for them to return was a violation of Article 8. In *Buckley v UK*[135] a gipsy was refused to attain permission to have a caravan on the land where she used to live. Here, the Court decided that the rejection was within the state's authority in order to control the areas where the gypsies live.[136]

Like the family life concept, 'home' under Article 8 would only cover already established homes. Homes that are not yet built are not protected. Also, protection is to prevent a

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[132] [1988] 45 E.G. 102, [1988] E.G.C.S. 10.
[133] Harris, DJ. O'Boyle, M. Warbrick, C. (1995) pp 317,318.
[134] (1993) 15 E.H.R.R. 509
[135] (1997) 23 E.H.R.R. CD129.
[136] Fenwick, H. (2002) pp 70.

person from being expelled from his/her home, but it does not mean providing a home, or finding an alternative one.[137]

While the notion of 'home' is broad according to the Court's decisions, in *Neimietz v Germany* [138] the Court decided that it could go a step further with the concept of home to include some business properties. Depending on both the French and the Germany laws, the Court saw that the meaning of 'home' could be extended to cover business premises in order to apply what Article 8 is meant to protect. At times it might be difficult to separate between business and home since, in some instances, a business is conducted from home. This decision does not mean limiting the state authority in interference with business properties because it is always easier for the interference to be justified than homes.[139]

In Kuwait, for a victim of violence to bring a case against a family member is not generally encouraged. That is to say, there is no particular procedure if woman files a complaint against her husband as the 'private life' is always given as the excuse against such a case. The advantage of Article 8, is to define what exactly would be considered as 'private life', family life, and home.

4.4. Equality in the Criminal Justice System

A discussion of the criminal justice in the UK represents another area of greater protection to women. Most of the legislation that protects women against criminal acts in the UK is absent in Kuwait. Not only that, but if an offender kidnapped a women and

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[137] Fenwick, H. (2002) pp. 71.
[138] (1993) 16 E.H.R.R. 97.
[139] Harris, DJ. O'Boyle, M. Warbrick, C. (1995) pp 318.

raped her, the prosecutor would suggest to her father that she should marry her attacker. If the father agrees in order to avoid disgrace, then the crime will be discharged.

In 1994, the United Nations formed its famous Declaration on the Elimination of All Forms of Violence Against Women. In Article 1, it stated that: 'any act of gender based violence that results in, or is likely to result in physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or private life'.[140]

However, the UK has the privilege of being the first country to provide 'crisis centres' to help women who escape from their home due to domestic violence by providing a safe environment for them. The UK has issued several laws trying to offer more protection for women from being raped or a victim of domestic violence in general.[141] For example, the Protection from Harassment Act 1997, Domestic Violence, Crime and Victims Act 2004, the Rape (SOA 1956), Sexual Offences Act 2003.

4.4.1. Marital Rape

Formerly, a husband or cohabitee can benefit of the marital immunity given by the law as exemplified in the *Kowalski*[142] case. Not only can the man benefit while married or

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[140] United Nations. *Declaration on the Elimination of All Forms of Violence Against Women.* [online] [undated] Available from: http://www.unhchr.ch/huridocda/huridoca.nsf/(Symbol)/A.RES.48.104.En?Opendocument [Accessed 20th March 2005]

[141] Sue Lees. *Combating Violence Against Women.* [online] [1999] Available from: http://www.bunker8.pwp.blueyonder.co.uk/Sue/ukreport.htm [Accessed 20th March 2005]

[142] (1988) 86 Cr. App. R. 339, (1987) 9 Cr. App. R. (S.) 375, [1988] 1 F.L.R. 447, [1988] Fam. Law 259.

cohabiting, but he can be advantaged even if the relationship has already ended before the violent act is carried out as in *Berry*[143] case.[144]

The Sexual Offences Act (1956) defined the crime of rape as follows: 'a man commits rape if he has unlawful sexual intercourse with a woman whom at the time of the intercourse does not consent to it.' The word 'unlawful' is used to give immunity for marital rape. In 1953 *R v. Miller*[145] decided that marital rape was the issue. It brought about a discussion whether this should or should not consider as rape. Since the crime of rape concerns the act of intercourse without the victim's consent, it was suggested that the marriage contract includes such consent, regardless of the fact that may be carrying out divorce proceedings as long as the divorce was not granted yet, and that she was still the man's wife. If he was violent to her, then he might be accused of common assault but not rape.[146] Marital rape was not considered to be a crime until *R. v R*[147] was decided in 1991. The decision of this case has ended the immunity of marital rape that was protected by law for 250 years. The Court of Appeal ruled that 'a rapist was guilty of rape and was criminally liable, regardless of his relationship with his victim',[148] therefore, marital rape is no longer immune.

Sheila McLean argues that every woman, whether married or single, worker or housewife, has experienced sexual assault to some extent, whether from a relative or

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[143] (1988) 10 Cr. App. R. (S.) 13.
[144] Fenwick, H. (2002) pp 1065.
[145] [1954] 2 Q.B. 282, [1954] 2 W.L.R. 138, [1954] 2 All E.R. 529, (1954) 38 Cr. App. R. 1, (1954) 118 J.P. 340.
[146] Sue Lees. *Marital Rape and Marital Murder.* [online] [2000] Available from: http://www.bunker8.pwp.blueyonder.co.uk/Sue/wiferape.htm [Accessed 20th March 2005] Also WestLaw.uk
[147] [1991] 2 W.L.R. 1065, [1991] 2 All E.R. 257, (1991) 93 Cr. App. R. 1, (1991) 155 J.P. 373, (1991) 155 J.P.N. 236.
[148] Ibid.

from a stranger. The main concept of 'rape' as defined in the UK's law is 'the commission of non-consensual, heterosexual intercourse'.[149]

As the definition might seem to be clear and just, in reality it is complex to apply. Since the crime of rape has to be 'non-consensual' the victim is required to prove that the intercourse was without her permission. Violence might prove the crime, although it is not a sufficient fact by itself. Injuries of the victim or rapist which occurred while resisting the act would be an important factor in proving the case. However, as Mclean argues, that most crimes happen under the threat of a weapon and resistance might be a serious risk to be a life, hence it is more difficult to show any harm against the victim or to the assailant happen while resisting. Consequently, while resisting might prove the case, but decreases the chances of survival. On the contrary, rape without resistance raises the victim's chance of harm; and not only does this result in providing lack of proof for the crime, but she would be hardly believed. If proving rape is difficult, it is even more complicated if it happened in a private place.[150]

As Jo Bridgeman and Susan Millns concluded, the law has a certain image for woman: how she should be and how she should behave. According to that image, the law punishes woman who fails to meet such image.[151]Also, Chris Docherty suggests the discrimination in the criminal justice occurs mostly whenever a woman acts out of the traditional image for her behaviour as a woman. That is to say, women would suffer from discrimination not only if they were offenders in sexual crimes, but also if they act in a

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[149] Sheila McLean & Noreen Burrows. *The Legal Relevance of Gender* (London: The Macmillan Press Ltd.,1988) pp 199-201.
[150] McLean, Sh. & Burrows, N. (1988) pp 201.
[151] Jo, Bridgeman & Susan Millns *Feminist Perspective on Law.* (London: Sweet & Maxwell, 1998) pp 621.

way consider out of character as a female and/or as a mother. Moreover, even if juvenile offenders, they would also be treated severely.[152]

On the other hand, there are some laws that discriminate in favour of women in the criminal justice system. If a boy over 14 had intercourse with a girl under 16, it is consider a crime. If a man deceived a woman to have intercourse, he would be considered a criminal, while if the same happened by a woman to a man, it does not classified as a crime. Tony Honore argues that whenever a crime is related to sexuality. It is mostly men who are the guilty ones. [153]

Perhaps one cause is physical strength which makes men more likely to commit sexual crimes such as rape. According to statistics, men are more aggressive than women, and they are involved in more sexual crimes than women. However, Honore also argues since that the numbers of women as offenders are increasing sharply that women are becoming more equal to men when committing crimes, so that there is no longer any reason to favour women in criminal law, which, in its written language, assumes that women are the victims and men are the assailants.[154]However, the Criminal Justice and Public Order Act 1994 had been formed to include men who are subject to enforced anal intercourse. [155] Also, even though the number of female criminals have increased, it does not change the fact that the number of men involved in crimes is generally higher than the number of women (26% men vs. 11% women). According to 2002/2003 statistics, 96% of sex

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[152] McLean, Sh. & Burrows, N. (1988) pp 185.
[153] Tony Honore. *Sex Law.* (London: Gerald Duckworth,1978) pp 52,53.
[154] Honore, T. (1978) pp 53,54.
[155] Anne Bottomley. *Feminist Perspectives on the Foundational Subjects of Law* (London: Cavendish Publishing Limited, 1996) pp 180.

crimes were perpetrated by men.[156] In a study by Morris et al in 1995 on female offenders in England, of a sample that included 200 women, about half had experienced physical abuse while a third had experienced sexual abuse.[157]

4.4.2. Domestic Violence

The word 'domestic' in its narrower definition refer to every couple that lives together, either now or in the past and had a heterosexual relationship. It is irrelevant if they have had the relationship recently, or they had a very intimate one. Also, the police prefer the wider meaning of 'domestic' to refer to people who live in the same house, so that domestic violence includes not only violence between couples, but also violence against the children.[158]

On the other hand, the word 'violence' includes assaults and attempted assaults. Some suggest that violence acts should only be considered as crime if it was intended. That is to say, if the offender was violent for the purpose of harming or injuring the victim, then it is a crime to punished for. However, intentions are difficult to prove, so the suggestion is not practical. However, violence includes not only physical acts, but also psychologically

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[156] Home Office Press Office. *Statistics on Women and the Criminal Justice System.* [online] [2003] Available from:
http://www.homeoffice.gov.uk/rds/pdfs2/s95women03.pdf
[Accessed 18th April 2005]
[157] Dr. Judith Rumgay. *WHEN VICTIMS BECOME OFFENDERS: In Search of Coherence in Policy and Practice* (London: London School of Economics, 2004) pp 4. Also Available from:
http://www.fawcettsociety.org.uk/documents/WhenVictimsBecomeOffendersReport_000.pdf
[Accessed 18th April 2005]
[158] Catriona Mirrlees. *Domestic Violence: Findings From a New British Crime Survey Self-Completion Questionnaire* (London: Crown Copyright, 1999) pp 1.
http://www.homeoffice.gov.uk/rds/pdfs/hors191.pdf

distressful behavior.[159] The Home Office gave a definition for the domestic violence as: 'Any violence between current or former partners in an intimate relationship, wherever and whenever the violence occurs. The violence may include physical, sexual, emotional or financial abuse'.[160]

Although domestic violence against wives was recognized long ago, when the Court of Appeal decided in 1891 in *R v. Jackson*[161] that a husband cannot imprison his wife to fulfil his need, it did not offer protection for wives from being or subject to domestic violence. The House of Lords decided that the victim of domestic violence can be treated as a compellable witness and cannot be enforced to give evidence. That was an exception for the family concerned, and taking account of how to give evidence proved problematic.[162]

Domestic violence can lead the victim to commit a crime against the abuser. It is established that women would rarely commit a murder, but if they did – according to a statistic given in 1994 – most of murders are committed against to their partners, whether the current one or a former one. Research indicates that this is basically due to the failure in preventing the domestic violence in the first instance. [163]

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[159] Mirrlees, C. (1999) pp 2.
[160] Kate Standley. *Family Law.* (NY: Palgrave Macmillan, 2004) pp 103.
[161] [1891] 1 Q.B. 671.
[162] Katherine O'Donovan. *Sexual Divisions in Laws.* (London: George Weidenfeld and Nicolson Ltd, 1985) pp 122.
[163] Jo Bridgeman & Susan Millns. *Feminist Perspective on Law.* (London: Sweet & Maxwell, 1998) pp 624.

As mentioned before, women are traditionally associated with a certain image. If they commit a murder, they would be treated, as Bridgeman and Millns describe, either as 'evil' or 'irresponsible' in the criminal justice system without searching for the reasons behind this.[164]

The Women's Resource Centre[165] concluded its report by saying:

> Domestic violence continues to adversely affect the health and wealth of the United Kingdom. Research indicates that one in four women in the UK will experience domestic violence in her life time. For battered women, the violence permeates every facet of their lives including mental and sexual health, employment opportunities and relationships with others. Children risk witnessing their mothers abuse and may repeat victimization or perpetrator behaviour in their own adult relationships.[166]

Statistics show that two women are killed every week by their partners or ex-partners. Police registered 8,500 rape crimes committed in the year 1999-2000.[167]

The UK signed the Convention on the Elimination of Discrimination against Women (CEDAW) in 1986. This is part of the Beijing Platform for Action. It lists the procedures that a government should be taken in order to provide protection for battered women. Both paragraphs 103a and 103c state:

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[164] Bridgeman, J., Millns, S. (1998) pp 630,631.
[165] The WRC is an organization established to provide infrastructure support for women.
[166] Women's Resource Center. *Respond to the Law Commission on the Partial Defence to Murder Consultation (No.173).* [online] [16th January 2004] Available from: http://www.wrc.org.uk/index.htm
[Accessed 20th April 2005]
[167] Howard, M. & Tibballs, S. (2003) pp 17.

I.(103a)As a matter of priority, review and revise, where appropriate, legislation, with a view to introducing effective legislation including on violence against women, and take other necessary measures to ensure all women and girls are protected against all forms of physical, psychological, and sexual violence, and are provided recourse to justice; and

II. (103c) Establish legislation and/or strength appropriate mechanisms to handle criminal matters relating to all forms of domestic violence, including marital rape and sexual abuse of women and girls, and ensure that such cases are brought to justice swiftly.[168]

This gives hope for a change in domestic violence policy by taking into account the international mechanism.[169]

The Family Law Act of 1996 criticised the formal Family Law (1992) for both its complexity and for the limited protection it offered with regard to domestic violence for married (heterosexual) couples only. The Family Law Act gave the authority of granting 'non-molestation'[170] and 'occupation orders'[171] to the magistrates' Family Proceedings

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[168] Women's Resource Center. *Respond to the Law Commission on the Partial Defence to Murder Consultation (No.173).* [online] [16th January 2004] Available from: http://www.wrc.org.uk/downloads/Policystuff/Law%20Commission.pdf [Accessed 20th April 2005]

[169] Ibid.

[170] It is an order to 'prevent a person from causing trouble or being violent. Causing trouble can include pestering or annoying someone deliberately, threatening or harassing them'. Compact Law. *What is a Non-Molestation Order.* [online] [undated] Available from: http://www.compactlaw.co.uk/freeinfo/injunctions/injunq12.html [Accessed 18th April 2005]

[171] An 'occupation order' is used where the future occupation of a property is in dispute. One person could effectively be required to leave the home because of his/her violent behaviour towards the other or the effect that his/her presence is having on the children.' Family Office. *Non-Molestation Orders and Occupation Orders.* [online] [undated] Available from: http://www.wolferstans.com/family/GUIDE_INJUNCTIONS.pdf

Court, County Courts and the High Court, thereby offering the victim from domestic violence more protection. Moreover, the Protection from Harassment Act (1997), which is mainly to provide protection against being from stalking, is also used in domestic violence cases.[172]

In 2004 the Domestic Violence, Crime and Victims Act was legislated which provided further protection for domestic violence victims. This Act has granted several actions to ensure maximum protection. Under this Act, domestic violence is considered as arrestable offence; offenders may be imprisoned for up to five years. It gave the court the authority to issue a restraining order to protect the victim if s/he was still in a position to be harassed by the offender. The Act had also covered couples who did not live together, there by giving a broader definition to domestic violence. It stated that the criminal justice agencies are required 'to give any support, protection, information and advice that a victim might need.' Last but not least, the Act has set up an independent Commissioner to empower the voice of both victims and witnesses at the government.[173]

4.4.3. Battered Women who Kill

When discussing domestic violence, the subject of battered women who kill must be included as the two very well connected. Battered women often kill as a result of being a victim of the domestic violence which leads them to murder their abusers.

[Accessed 18th April 2005]
[172] Standley K. (2004) pp 106-124.
[173] Home Office. *National Plan for Domestic Violence.* [online] [undated] Available from: http://www.crimereduction.gov.uk/domesticviolence51.htm
[Accessed 18th April 2005]

H. Allen argues that when a woman kills, that act is controversial to her nature because she is constructed to obey the law.[174] This helps to explain why the law considers the female criminal as either mentally disordered or that she is extremely evil.[175]

If a woman kills her abusive partner, after having been a victim of domestic violence, this may arise from the failure of laws and practices to protect the battered woman. Some might argue that a woman has the choice to leave her abusive partner instead of killing him; in fact it is not always as simple. A woman may be obliged to live with her partner because of her children, culture, or emotional reasons.[176]

Lenore Walker explains the perspective of the battered woman. Such women, Walker explains, are subject to being beaten and abused; these women also believe that it is impossible for the abuse to be stopped or to get protection.[177] Using the same theory, Gillespie continues the argument that the battered women believe that self-defence could be justified for what they have been through. He suggested that the self-defence approach should loosen up to include battered women offenders since in such cases these women had failed to stop the violence against them. They learned that their situation cannot be changed. He also suggested that a woman in such cases should be treated as having an abnormal condition which arose from an abnormal reaction when a woman kills her partner. This is in accord with the law which already recognizes that mental disturbance is often closely allied with battered women. Thus, this argument raises two main

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[174] H. Allen. Rendering them harmless: the Professional Portrayal of Women Charged with Serious Violent Crimes.in P. Carlen and A. Worral (eds), *Gender, Crime, and Justice*.(UK: Open University Press, 1987) pp 90-91.
[175] Bridgeman, J. & Millns, S. (1998) pp 623.
[176] Ibid. pp 626-629.
[177] Lenore Walker. *The Battered Women syndrome*. (New York: Springer Publishing Company, 2000) pp 116-119.

difficulties. First, this justification might include more of the inexcusable crimes committed by victimized offenders. Second, this justification would only be given to the ultimate crime which is homicide and does not take into consideration that most abused women commit other crimes.[178]

The public usually focus on the fact that a woman could leave the abusive relationship. If she did, then she would avoid being a victim of battering, and possibly avoid committing a murder. However, the public refuse to focus on why the abuser does not instead stop his violent acts. Walker puts forward one theory why a woman does not leave this kind of relationship. This is the learned helplessness which:

describes women as only passive victims, and the violence nature of being cyclic, woman would lose the awareness of leaving as a choice. Beside, battered women have learned that they cannot escape since laws are not so effective, and men can have the power to continue with being violent.[179]

The problem with battered women who kill the abuser is with the punishment. Judith Rumgay argues that by giving battered woman excuses to murder raises the problem of responsibility on one side and justice on the other side. Consequently, retributive punishment might be seen as the only solution. It is important when adapting the notion of that woman is responsible for the act (murder), to associate that responsibility with her social, psychological, and most importantly the history of victimisation backgrounds. Rumgay suggested support service provision to provide a treatment for the offenders who

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[178] Rumgay, J. (2004) pp 10,11.
[179] Women's Resource Center. (16th January 2004).

suffer from victimization in order to cure their long history of being abused, and also to prevent them from committing other crimes in the future.[180]

The provision of support services should not be understood as a reward for the offender who used to be a victim; instead, it is to help her to avoid such crimes in the future by recognizing the unpleasant experience she went through. The support services should develop the skills of a battered woman to avoid any kind of abusive acts in the future, and to learn a self-protection talent.[181]

4.4.4. Battered Women Syndrome (BWS)

The terminology of battered women syndrome was first given in the USA in the late 1970s; it has been used with self-defence in order to explain a woman's reaction as reasonable in such circumstances.[182]

BWS was used to explain the inability for a woman to protect herself from being repeatedly abused which was referred to as 'learned helplessness'. Later on, the terminology was used to explain the violence cycle, to clarify the behaviour of the batterer. In recent times, it refers to post-traumatic stress disorder (PTSD) which explains the psychological condition of battered women and the reaction to such condition.[183]

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[180] Rumgay, J. (2004) pp 15.
[181] Ibid. pp. 15,16.
[182] Bridgeman, J. & Millns, S. (1998) pp 657.
[183] Marry Ann Dutton. *Critique of the 'Battered Women Syndrome' Model*. [online] [Jan. 1996] Available from:
http://www.vawnet.org/DomesticViolence/Research/VAWnetDocs/AR_bws.pdf
[Accessed 15th April 2005]

The usual use of BWS is when a battered woman commits a murder against her abuser; the term is used to her defence to explain the psychological motive for the murder. However, it is not a legal defence.[184]

An inflexible model of the battered women characteristics has been developed from the word 'syndrome'. As a result of that, many women were not considered 'truly battered' according to the definition of 'syndrome'. The term also indicates that battered women are mentally unstable and ignores the fact that they were under a special condition of being abused for a while and they acted accordingly. Any normal person would act the same if s/he was under similar circumstances.[185]

However, BWS is problematic other aspects. Mary Ann Dutton criticized BWS terminology to be 'vague' because it refers a limited reaction for a woman to be battered and it does not recognized the diagnosis term that has been used in the Diagnostic and Statistical Manual of Mental Disorder. Also, using the term in a broader meaning might be misleading since defined criteria for its diagnostic utility.[186]

Furthermore, since the term was shaped in the late 70s, there has been some significant progress in that the term no longer fits these developments. Therefore, using this term as a defence might support violence and give an excuse for using it. Besides, it puts women

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[184] Women's aid, *Partial Defence to Murder*. [online] [2003] Available from: http://216.239.59.104/search?q=cache:ORTMi-Jdn3sJ:www.womensaid.org.uk/core/core_picker/download.asp%3Fid%3D134+Partial+Defence+to+Murder&hl=en&gl=uk&ct=clnk&cd=29
[Accessed 15th April 2005]
[185] Women's Resource Center. (16th January 2004)
[186] Dutton, M. (1997).

in a specific image of being unstable in their mentality which leads to questions concerning their suitability for motherhood.[187]

As much as the battered women issue is being discussed in UK it is still not a concern in Kuwait. This is because domestic violence issues are very vague and lack records or statistics to reflect how serious they are.

4.4.5. Provocation

Provocation is protected in the Kuwaiti Criminal Law (1960). In Article 153 it stated that:

And that represent only one kind of provocation which might be called 'honour killing' since other kinds of provocation is stated in the Kuwaiti criminal law, but crimes against women, or committed by battered women is the one to be discussed in this section. So, according to the above Article, a male in four different relationship with a female whether he was a husband, father, son, or a brother has the right to kill those four relatives if caught having an intercourse, whether she was married (with someone other than her husband) or not. Of course that Article applies to men only, meaning that if a wife caught her husband having an affair it will not be justified as provocation, a murder instead.[188]

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[187] Women's Resource Center. (16 January 2004)
[188] Article 153, will be discussed in more details in chapter six.

On the contrary, in the UK the concept of provocation in the past excused the husband when he killed his wife out of 'sexual jealousy' or when she was caught planning to leave him.[189]

Section 3 of the Homicide Act 1957 points out provocation when stating that:

where on a charge of murder there is evidence on which the jury can find that the person charged was provoked (whether by things done or by things said or by both together) to lose his self-control, the question whether the provocation was enough to make reasonable man do as he did shall be left to be determined by the jury; and in determining that question the jury shall take into account everything both done and said according to the effect which, in their opinion, it would have on a reasonable man.[190]

Hence if the defendant wants to claim provocation, two conditions had to be provided:

(1) The act that resulted in killing was a sudden and temporary loss of self control.

(2) The loss of self control has to be the measure for a reasonable man if the act would also lead him to a loss of control as the defendant did.[191]

Due to lack of the 'sudden temporary loss of control' Mrs. Duffy lost her claim of provocation in *R. v. Duffy*.[192] Although Mrs. Duffy was subject to violence, abuse, and

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[189] Women's aid, *Partial Defence to Murder*. (2003).
[190] Bridgeman, J. & Millns, S. (1998) pp 631.
[191] Bridgeman, J. & Millns, S. (1998) pp 631.
[192] [1949] 1 All E.R. 932.

threats, she killed her husband when he was sleeping. As she had waited for him to fall sleep, her reaction when she murdered him was not sudden.[193]

Justice Devlin has described the act of provocation, following the above case as:

> Provocation is some act, or series of acts, done by the dead man to the accused, which would cause in any reasonable person, and actually causes in the accused, a sudden and temporary loss of self-control, rendering the accused to subject to passion as to make him or her for the moment not master of his mind.[194]

Due to the difficulty of applying the provocation conditions, the Women's Aid suggested using the phrase 'under extreme emotional disturbance' instead of 'loss of self-control'. However, if the original phrase must remain as it is, then the act does not have to be 'sudden and temporary' because the long experience of fear should be considered.[195]

Accordingly, a woman can claim provocation as an excuse when killing her abuser; however, in reality it is difficult to apply the provocation article. When a woman who was subjected to domestic violence kills, it does not always happen as a sudden reaction to the violence; sometimes it happens out of fear.[196]

However, as Stanley Yeo argues, the court are more likely to consider the concept of 'cumulative provocation', meaning that the jury has to bear in mind the history of the abuse committed by the person killed when the killing did not take place suddenly. In

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[193] Bridgeman, J. & Millns, S. (1998) pp 632,633.
[194] Stanley Yeo, *Unrestrained Killing and the Law.* (Delhi: Oxford University Press: 1998) pp 11.
[195] Women's aid, *Partial Defence to Murder.* (2003)
[196] Women's aid, *Partial Defence to Murder.* (2003)

such a matter, in *R v. Ahluwalia*[197] the Court of Appeal describes the direction of the judgment as:

The jury can have been in no doubt that it was necessary for them to consider the history of this marriage, the misconduct and ill-treatment of the appellant by her husband as part of the whole story, culminating in what happened on the (fatal) night.[198]

This case is important for battered women since the killing was not a sudden reaction: the wife waited for her husband to fall asleep before burning. The provocation required sudden loss of self-control; however, women do not react immediately to their abuser as they learn that this might lead to more violence against them. Instead they wait for the abuser to sleep or to be drunk before reacting.[199]

The Women's Aid[200] institution suggested that in the case of provocation, female offenders should not be treated as other murderers; moreover, it is not in the public interest for her to be charged with murder or to be jailed. However, specific factors have to be provided in such cases:

- The offender would admit committing the crime after being subject of violence by the one who she killed.
- To prove that she has been abused for a certain period of time.

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[197] [1992] 4 All E.R. 889, (1993) 96 Cr. App. R. 133, (1992) 142 N.L.J. 1159.
[198] Yeo, S. pp. 22.
[199] Rohit Sanghvi and Donald Nicolson. *Battered* Women and Provocation: the Implications of R v. Ahluwalia. *Criminal Law Review.* 1993, pp 728-738.
[200] It is a national domestic violence charity which is supported and has a network with more than 270 local organizations in England. It was formed 30 years ago working with governmental and non governmental organizations and institutions in order to prevent domestic violence.

- The offender has to show that she is responsible for taking care of her family and especially her children. So that being imprisoned would defiantly harm the children.
- The offender is weak and frail.
- That the offender has no history of convictions of any violent crimes.[201]

On the other side of the argument of domestic violence against women in general, some researchers believe that the feminist movement has successfully convinced the public that society is constructed to be 'patriarchal'; and that domestic violence indicates the gender inequality by portraying men as the abusers and women as the victims. However, that image, as researchers claim, fails to explain domestic violence by women. Instead, domestic violence should be discussed as a human matter not as a gender inequality issue since both genders are subject to violence.[202]

Although domestic violence is also committed by women against men, some sociologists like David Hughes claim that men and women experience violence at an equal level. Not only that, but Hughes also argues that feminists have exaggerated the levels of violence against women in order to brainwash the public. However, these claims does not change the fact that due to difference in physical strength, women are subject to domestic violence more than men-- not only in the UK, but also world wide. According to the

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[201] Women's aid, *Partial Defence to Murder*. (2003).
[202] Fathers Canada for Justice. *UK Violence Courts*. [online] [Jan.2005] Available from: http://www.fathers.ca/uk_violence_courts.htm
[Accessed 18th April. 2005]

British Crime Survey 2001/02, 19% of the victims are male, and only half of these crimes are committed by females.[203]

While the UK's criminal law adapted the notion of provocation, it gave a definition of the characteristics that might fall within the definition, whether it was committed by a battered woman against her abuser, or by a husband against his wife in an act that would be consider as provocation., Kuwaiti criminal law has adapted the notion of provocation in general, but it also provides a special excuse to the husband (son, father, or brother) when killing his wife in a certain circumstances. Yet, it does not recognize any excuse for a battered woman when killing her abused husband or at least when finding him committing adultery, other than the fact that there are no special laws regarding domestic violence.

4.5. Equality in Family Law

The main concerns of family law are family issues. It arranges different areas regarding with regard to marriage, divorce, child custody, and so on. There have been some changes in the family law reforms lately, not only in the UK, but also in the EC States. Most important is the limitation of restrictions to easy access to divorce in the 1970s.[204]

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[203] David Hughes. *Domestic Violence against Men.* [online] [undated] Available from: http://homepage.ntlworld.com/verismo/dv.againstmen.html
[Accessed 1st April 2005]. Also
bbc.co.uk, *Male victims of Domestic Violence.* [online] [undated] Available from: http://www.bbc.co.uk/health/hh/men.shtml
[Accessed 1st April 2005]

[204] Rebecca Cook. Enforcing women's rights through law. *Gender and Development.* June 1995, 3 (2), pp 8-15.

4.5.1. Divorce

According to the Matrimonial Causes Act 1973 it gives the spouses the right to be divorced based on five different grounds:

4.5.1.2. Adultery

Adultery can be defined as 'involving voluntary or consensual sexual intercourse between a married person and a person (whether married or unmarried) of the opposite sex not being the other's spouse.[205]

A petitioner can file a divorce when the respondent committed adultery if the former finds it difficult to live with the latter. As Jonathan Herring argues, adultery and file for divorce do not necessarily have to take place in the same time frame. That is, if the spouse committed adultery and the other lived with it but found later that s/he cannot tolerate it for that reason or for any other reason, s/he can still base the divorce on the ground of adultery. Also, only the 'innocent' party can ask for the divorce against the one who committed adultery, and not the other way around.[206]

In reality it is not easy for the court to investigate whether the adultery is 'fact' or not; it depends on the honesty and seriousness of the divorce procedure. Most divorce petitions are assume that the adultery is a fact because it gives a rapid divorce if undefended.[207]

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[205] S.M. Cretney, J.M. Masson and R. Bailey-Harris. *Principles of Family Law.* (London: Sweet &Maxwell Ltd, 2002)7th.pp 280.
[206] Jonathan Herring. *Family Law.* (UK: Pearson Education Limited, 2001) pp 83.
[207] Cretney S., Masson, J. and R. Bailey-Harris, R. (2002) pp 280-281.

4.5.1.2. The respondent's behaviour

If the respondent behaves in a way that the petitioner cannot tolerate, the divorce will be given. However, intolerant behaviour should be according to the standards of a right-thinking person who will calculate whether the petitioner is unable to live with such behaviour.[208]

In such cases, the court has to be convinced that because the respondent behaves in a certain way, the petitioner cannot live with that behaviour. The behaviour ground can be defended more than any other ground. In *Bannister v. Bannister*[209] the wife (petetitioner) claimed:

(1) that H had not taken her out for two years; (2) that he did not speak to her except when it was unavoidable; (3) that he stayed away for nights giving her no idea where he was going and (4) he had been living an entirely independent life ignoring her completely.[210]

The County Court dismissed the petition, but the divorce was granted when she appealed.

It is complicated to give an exact definition of what is consider to be 'unreasonable behaviour' as it depends on the personalities of the petitioner (whether s/he can tolerate such behaviour or not); it cannot be measured on what one supposes is reasonable since

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[208] Herring J. (2001) pp 83.
[209] (1980) 10 Fam. Law 240.
[210] Ibid.

what might be considered reasonable behaviour to one person is not reasonable to another.[211]

As Katherine O'Donovan argues, in order to decide whether the facts given are sufficient to get a divorce or not differ from one case to another. The judge considers in addition to the facts given to get divorced the personalities and the behaviour of the couple, so there are no general rules for divorce.[212]

4.5.1.3. The respondent's desertion

If the petitioner can prove that the respondent deserted him/her for two years before the preceding of the divorce, it can be a valid ground for divorce.[213]

Desertion is rarely used as the ground of a divorce case; petitioners rather use other grounds because of the conditions that have to be provided. It has to be proved that the desertion is factual separation with the intention to desert without a consent from the petitioner and, of course, without a valid reason for the desertion. Desertion can count even if the couple is living in the same house.[214]

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[211] Cretney S., Masson J.and Bailey-Harris R. (2002) pp 283-284.
[212] O'Donovan, K. (1985) pp 127,128.
[213] Herring J. (2001) pp 83.
[214] Standley K. (2004) pp 150.

4.5.1.4. Two year separation with the respondent's consent

The Act states that if the spouse was separated for two years immediately before the presentation of the petition and the respondent agreed to the divorce, then it will be granted with no need to prove wrongful behaviour.[215]

David Terry argues that this is ground for what is called the 'amicable' or the friendly divorce because it would be filed with both parties' agreement. The consent of the respondent regarding the divorce has to be given otherwise the parties have to wait for five years separation. Terry argues that if the marriage is irretrievably broken, then it is useless to wait for two years for two main reasons. First, the essential point to consider is the consent of the other party, which would be difficult to get if they are living together for two years and their marriage is broken. Problems developed during that period might prevent the 'consent' condition, meaning that they (or the petitioner) have to wait for five years which is a long time. Second, when the court considers the financial matter it will look at the assets made at the time the divorce was agreed upon which includes the separation period. This may put the spouse at financial risk.[216]

The respondent must have the capacity to give such consent and to be aware of its effects; s/he must sign a notice of consent, but this can be withdrawn if it is misleading either intentionally or unintentionally. To encourage reconciliation, if the couple resumed living

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[215] Herring J. (2001) pp 83.
[216] David Terry *Divorce – Desertion or Separation.* [online] [undated] Available from: http://www.terry.co.uk/divorce3.html
[Accessed 5th April 2005]

together it will not affect the calculated period of separation if up to six months, but if greater than six months, the separation period has to recommence.[217]

4.5.1.5. Five years separation

If the couple were living separately for at least five years immediately before the divorce proceeding, this also provides valid grounds to grant a divorce.[218]

The divorce has to be established on one of these five grounds, otherwise divorce cannot be granted. For example, if a couple both agreed on the divorce simply because they do not suit each other but there was no adultery or unacceptable behaviour, they cannot get a divorce before a two year period. This is because none of the five facts have been established; instead they must base it on the two years separation.[219] Yet, before 1984 a couple could not become divorced before three years unless there was an exception due to extreme hardship. In 1984 Parliament ruled that this condition was unacceptable and implemented the change from three years to one year only; however, at present there a divorce cannot be granted any quicker than one year, no matter what was the circumstances are or how bad the marriage becomes.[220]

Regardless of the route by which a divorce is decreed, the fundamental reason for divorce according to the Matrimonial Causes Act 1973 is that the marriage has irretrievably broken. As Rebecca Probert argues, 'irretrievably broken' might sound a valid legal theory, but practically it can be confusing. In some cases the marriage may be

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[217] Standley K. (2004) pp 150.
[218] Herring J. (2001) pp 83.
[219] Jill Black, A. Jane Bridge and Tina Bond, *A Practical Approach to Family Law* (UK: Blackstone Press Limited, 2000)6th.pp 65-66.
[220] Rebecca Probert. *Cretney's Family Law.* (London: Sweet & Maxwell Limited, 2003)5th.pp 52.

irretrievably broken, it is possible that none of the five grounds can be provided such as in *Buffery v. Buffery*[221] case.[222]

If the petitioner approved one of the five facts (or more than one), then the court will assume that the marriage is irretrievably broken, so the divorce decree shall be granted in an undefended case. However, in a defended case, the respondent can oppose the petitioner's argument that their marriage is irretrievably broken. In such cases, the court would have to decide by evaluating the evidence and the respondent's opposition whether the marriage is irretrievably broken or not.[223] Probert also argues that this can be the second disadvantage of the 'irretrievably broken' marriage if the court already assumes that the marriage is irretrievably broken when one of the aforementioned five facts is provided. This would make it hard for the respondent to argue against it such as in *Le Marchant v. Le Marchant*[224] when the petitioner requested a divorce based on five years of separation. The divorce was granted regardless of the respondent's denial that their marriage was irretrievably broken and she still loved her husband.[225]

Marriage as a social status causes the wife's income to be decreased since she is engaged in new responsibilities. While single females earn more that married ones, men's income increase after marriage. Divorce, especially when mothers are granted custody, causes women's financial position to worsen. Single mothers earn less than both single and married women. Consequently, divorce worsens the financial status of the single divorced mother. The economist Victor Fuchs concludes that:

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[221] [1988] 2 F.L.R. 365, [1988] F.C.R. 465, [1988] Fam. Law 436, (1988) 152 J.P.N. 526.
[222] Probert R. (2003) pp 52.
[223] Black J. Bridge J. and Bond T. (2000) pp 65-66.
[224] [1977] 1 W.L.R. 559, [1977] 3 All E.R. 610, (1977) 7 Fam. Law 241, (1977) 121 S.J. 334.
[225] Probert R. (2003) pp 52-53.

In women's quest for economic equality, it is not the fact that women raise children that places them in a disadvantage, but that, on average, women have a stronger demand for children than men do, and have more concern for children after they are born.[226]

Between 1857 and 1923 divorce practice law discriminated between men and women, giving men the advantage. Even when this discrimination was removed, it remained less favorable on the non-breadwinner's side. Women were disadvantaged whether they were found guilty when they were divorced or when they were found innocent and men were obligated to pay them an allowance. There was a clear relation between the rise in numbers of divorced women and the rise in numbers of working women, since work is the only way to get financial support. Today, the status of divorced women has been recovered to some extend when considering the social scale factor.[227]

Although the priority used to be for marriage stability, the Divorce Law Act 1969 adopted the idea of the 'dead marriage'. If both husband and wife want a divorce, it is irrelevant who was responsible for the marriage to be 'dead'. It is pointless to set restrictive standards for divorce when both parties want a way out. Even when only one of them wants divorce, the matter will be how the one who seeks a break up can arrange it for the other party after getting divorced. The basis of divorce has now become a no-fault divorce; it is immediate.[228]

As a result in the changes in divorce practice which have made it easier to divorce than before, the divorce rate has sharply increased. In 1979 55% was still married after they

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[226] Michael Freeman. *Divorce: Where Next?* (England: Dartmouth Publishing Company Limited, 1996) pp 181,182.
[227] Susan Atkins & Brenda Hoggett. *Women and the Law.* (NY: Basil Blackwell Inc., 1984) pp 152,153.
[228] Atkins, S. & Hoggett, B. (1984) pp 152,153.

reach the age of 50 in the UK, and one fifth of children are expected to live with single parent (in most cases the single parent would be the mother). Since the mother usually ends up taking the responsibility of child rearing after divorce, she is also responsible for the expenses as a single mother.[229] However, in 2001 the rate of divorce dropped for the first time from 1984 to 12.7 per 1000 (in England and Wales) involving 142,457 children under 16.[230] In 2004 the divorce rate had increased to reach 0.2%; couples in their late twenties have the highest rate of divorce.[231]

This may explain why many middle-class women with good careers might delay the decision of getting married because they are aware of the risks to their position after being married. A large amount of middle-class children would end up living in low standard lives because of divorce, while the children of working-class mothers have even lower standards.[232]

Feminists realize the severe impact of divorce on women. For example, Martha Fineman argues that four factors should be taken into consideration when a woman's status is examined:

1. After marriage, the family becomes the woman's priority rather than her career.

2. Men have better job opportunities than women in general.

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[229] Freeman, M. (1996) pp 193.
[230] BBC. *Divorce Rate 'Lowest for 22 Years'*. [online] [21st Aug. 2001] Available from: http://news.bbc.co.uk/1/hi/uk/1502007.stm
[Accessed 2nd April 2005]
[231] Human Behavior Division. *The Divorce Rate in England and Wales.* [online] [2004] Available from: http://www.999-life.com/marriage-england-wales.htm
[Accessed 2nd April 2005]
[232] Freeman, M. (1996) pp 199.

3. Women generally help their husbands in their earning capacity.

4. Women are usually the ones who take charge of child rearing responsibilities.

For all these factors, women, Fineman argues, should be rewarded. They should also be seen as an investment for the sake of children care since the equality principle between divorced parents is only an 'illusion'. Karen Czapanskiy agrees with Fineman by saying that men have only limited responsibilities toward their children, yet they are supported, while mothers who bear all of the responsibilities receive only limited protection.[233]

Allen v. Allen[234] might set a good example of the fear of financial support after divorce. Mrs. Allen lived with her husband for twenty nine years against her wishes because she has six children, and she did not want to get divorced while they were growing up because of economic factors. However, had her husband wished to leave, he would have no difficulty in getting divorced.[235]

The financial issue after divorce is an important matter in divorce cases. The court adopted the standard of 'loyal, faithful and good wife' in deciding the financial consequences of the divorce. In dividing the capital assets and maintenance, the Matrimonial Causes Act 1973 considered 'the primacy of the welfare of the children to the ages of the parties, the length of the marriage, their income and earning capacities, their financial needs and their contribution to the family from paid or unpaid work'.[236]

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[233] Freeman, M. (1996) pp 200.
[234] (1973), *The Times*, 14 October.
[235] Atkins, S. & Hoggett, B. (1984) pp 155,156.
[236] O'Donovan, K. (1985) pp 128,129.

The first case was when Lord Denning decided to give the wife one-third of the assets. His view was that giving half of the property would result in encouragement for wives to get a divorce. However, one-third is fair for maintenance for her and children. The divorce court registrars decided that in 'my own view . . . I think some weight should go in favour of the good wife and I would be likely to order a bad wife less.' In describing the good wife model, Lord Denning said, in deciding *Trippas v. Trippas*[237] 'she did what a good wife does do. She gave moral support to her husband by looking after the home. If he was depressed or in difficulty, she would encourage him to keep going'. Also L.J. Scarman. labelled a good wife to be someone who' for over 25 years of marriage . . . maintained his home, . . . brought up his children, and . . . provided...the general and moral support to a man sometimes hard pressed by business worries that a good wife does.[238]

The division in favour of the good wife can be justified when considering some economic factors. As stated before, men usually earn more than women. From the point of view of a women's classification, the divorcée comes at the end of the list after single women and married women because of the fact that women alone are usually responsible for their families after divorce. In the UK especially, many married women take a part time job thereby, according to 1987 statistics, forming 41.6% of all female employees compared to only 5.9% percent of men.[239] Also, the 2002 statistics shows that 91% of men work in full-time jobs, while only 57% of women held a full-time job. Of these, 67% are single and 48% the married (or separated). Only 33% of single women have part-time jobs

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[237] [1973] Fam. 134, [1973] 2 W.L.R. 585, [1973] 2 All E.R. 1, (1973) 117 S.J. 204
[238] O'Donovan, K. (1985) pp 128,129.
[239] Freeman, M. (1996) pp 186,187.

while 52% of married women do. In addition, while 97% of men who had a child under the age of four have a full-time jobs and 3% in a part- time job, 68% of women in the same situation have a part-time job.[240] The pay that both genders earned from their work still reflect a difference; in 2005 the average weekly earnings for a man is £471 while for a woman it is £3721 (however, this is a drop in the gap as it used to be higher in previous years.[241]

There are some similarities between the two family laws in the UK and in Kuwait: for example, a divorce must be based on specific grounds or it will not be granted. However, a major distinction between them is that in the UK these grounds would apply equally to both husbands and wives, while in Kuwait the grounds for divorce are only applicable to women since a husband can divorce his wife whenever he wants to without grounds.

4.5.2. Residence

One main result of the increase in the divorce rate is the increase of children who experience divorce. According to the National Statistics, there was a sharp increase in the number of children who experienced divorce under the age of sixteen: between 1971 and 1972 the number went up from 82,304 to 130,903. The numbers peaked in 1993 at 175,961 after which the numbers went down to 149,335 in 2002.[242] Divorce has a severe

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[240] Dr. Karen Hurrell. *Labour Force Survey*. [online] [June 2004] Available from: http://www.eoc-law-scotland.org.uk/Default.aspx?page=2628&theme=print [Accessed 10th April 2005]

[241] National Statistics. *Gender Pay Gap*. [online] [Dec 2005] Available from: http://www.statistics.gov.uk/cci/nugget.asp?id=167 [Accessed 10th April 2005]

[242] National Statistics, to see further information about numbers of children involve in divorce and divorce in general, please check: http://www.statistics.gov.uk/cci/nscl.asp?id=7475 [Accessed 10th April 2005]

impact not only on children, but also on unborn ones. A study by Stott concludes that divorce during pregnancy increases the chance of having an unhealthy baby.[243]

For the guardianship of children, the father used to be the natural guardian while the mother did not have any rights for her children or was their guardian. The laws were developed until the Guardianship Act 1973 was passed to legislate that both parents have the same rights for guardianship, though it did not mention the father as the natural guardian.[244]

The custody decision in any case is never final. The parent, who loses the case, looks for other opportunities when circumstances change and files a new case based on those changes. If a decision was based on a condition, and then for any reason the parent who won the case could not meet that condition, or it was interrupted, the other parent would take the advantage to file a custody case due to the violation of the condition.[245]

'Custody' as a term was not defined in the Statute Matrimonial Causes Act 1973, so when a parent is granted custody rights, it means that s/he can dominate the child's life. Yet, after 1980, the court ruled that granting custody does not mean one parent solely controls the child's life; instead all major issues regarding the child have to be shared with the other party.[246] When the Children's Act came into force it disregarded the term custody. Instead, Part 11, Article 8 s1 discusses 'Orders With Respect To Children In Family Proceedings' gives four other terms with regard to children of divorced parents:

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[243] John Eekelaar. *Family Law and Social Policy.* (GB:Butler & Tanner Ltd., 1984)2nd pp 64,65.
[244] The Law Commission. Family Law Review of Child Law Guardianship And Custody. 25 July 1988.p.5.
[245] Joseph Goldstein, Anna Freud & Albert J. Solnit. *Beyond Best Interests of the Child.* (NY: A Division of Macmillan Publishing Co., Inc. 1973) pp 37,38.
[246] Nick Allen, *Making Sense of the Children Act.* (England: John Wiley & Sons Ltd,2001)3rd.pp 23.

"a contact order" means an order requiring the person with whom a child lives, or is to live, to allow the child to visit or stay with the person named in the order,[247] or for that person and the child otherwise to have contact with each other;

"a prohibited steps order" means an order that no step which could be taken by a parent in meeting his parental responsibility for a child, and which is of a kind specified in the order, shall be taken by any person without the consent of the court;

"a residence order" means an order settling the arrangements to be made as to the person with whom a child is to live; and

"a specific issue order" means an order giving directions for the purpose of determining a specific question which has arisen, or which may arise, in connection with any aspect of parental responsibility for a child'[248].

The first term, 'residence order', is given by the court less frequently than 'contact order' as the stable below shows:

Table 4.1 Residence and Contact Orders.

	Residence order	Contact order
1996	27,600	40,330
2000	25,809	46,070
2001	29,546	55,030

[247] Mary Welstead & Susan Edward. *Family Law*. (NY: Oxford University Press, 2006) pp 260.
[248] The Children Act 1989.

It might be concluded that in many divorce cases no residence orders will be granted. Andrew Bainham states that one major reason for giving such an order is that when there is a danger that the child will be taken outside the country, such as in *Re K*[249] case when the father gained a 'residence order' out of fear that the defendant would take the child to India.[250] Bainham argues that the resident parent would gain the right to look after the child physically. While the non-resident parent loses this right s/he still has the right of responsibilities for upbringing the child and to participate in the child's life, depending on the extent s/he wants to participate.[251]

The 'residence order' is a flexible term that it would be granted when the parties fail to reach an agreement regarding the children, or if they have an agreement but need a court order to assure it. The order might be given within a certain time limit, or it might describe the child's home as divided between the two parents. The court should provide a mechanism of the latter should work; in such cases it is called a 'shared residence order.'[252] Here it may apply to more than two people sharing the child's residency rights - - not only the two parents, but also the grandparents or the step-parent for example.[253]

The second term is the 'contact order'. As stated earlier, this order is issued by the courts far more often than the residence order. In fact, contact orders have been made more often than any other order stated in the Act. Most family law cases are concern this particular order. The on going debate is whether the 'contact' a parent's right or if it is the

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[249] [1999] 1 F.L.R. 583, [1999] 3 F.C.R. 365, [1999] Fam. Law 220.
[250] Andrew Bainham. *Children- The Modern Law.* (Bristol: Jordan Publishing Limited, 2005)3rd pp 151-152.
[251] Bainham, A. (2005) pp 152.
[252] Nick Allen, *Making Sense of the Children Act.* (England: John Wiley & Sons Ltd,2001)3rd.pp 25.
[253] Nigel Lowe and Gillian Douglas. *Family Law* (UK:Reed Elsevier, 1998)9th.pp 413-414.

child's right. According to the English view, the old law has been changed where the contact right used to be as the parent's right, allowing the adult to visit the child. Now it is the child's right and fundamentally states the right of the child to visit 'or stay'. In several cases like *Hansen v. Turkey*[254] the ECHR state that States should protect the right of the contact order.[255]

The contact order might be given to one parent only, or might be given to more than one person. It is possible to issue different contact orders for the same child. If a parent is granted a contact order, then s/he can assume full responsibility for the child during the course of the visit or stay without negotiating with the residential parent, guardian or carer; although, of course, this does not mean that s/he should contravenes the court order in any way.[256]

The order is so that the residential parent or carer should 'allow' contact to take place with out difficulties; that is, the resident should allow the contact. Neither the residential parent nor the court can force the contact order if contact lapsed for any reason.

The third order stated in Article 8 is the 'prohibited steps order' (PSO). Unlike the previous orders, and as the term implies, this describes a negative act: a person is forbidden from doing specific actions towards the child unless the court authorized such action. By outlawing such behaviour, the court has more power to control the upbringing of the child, and to exercise parental responsibilities. As Nick Allen explains, this is

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[254] [2004] 1 F.L.R. 142, [2003] 3 F.C.R. 97, (2004) 39 E.H.R.R. 18.
[255] Bainham A. (2005) pp 156.
[256] Lowe N. and Gillian Douglas G. (1998) pp 416-418.

drawn from the wardship law. The courts issue 6,000 such orders every year, and the most common reasons for the order are as follows:

1. to ban the child to be taken away outside the UK.
2. to ban an absent parent from making a contact with the child.
3. to ban the residential adults from arranging the child to be feature in a TV program.[257]

There are other actions that the court prohibit such as changing a child's surname, changing school, and even undergoing surgery. The order is related to parental responsibilities, regardless who has parental responsibilities and whether s/he is a parent or not.[258]

The last term is the 'special issue order' (SIO). This order is also related to parental responsibility just like the PSO. However, the SIO may contain either a positive or negative action unlike the PSO which is always about taking a negative action or prohibiting a specific act. The court issues 2,000 SIOs each year for different reasons. For example, a SIO was issued which required a mother to bring a child back from Turkey in *Re D*[259] even though they were there on holiday and the mother had a consent order from the court for that holiday.[260]

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[257] Allen N. (2001) pp 33,34.
[258] Lowe N. and Gillian Douglas G. pp 419-420.
[259] [1992] 1 W.L.R. 315, [1992] 1 All E.R. 892, [1992] 1 F.L.R. 637, [1992] 2 F.C.R. 41.
[260] Allen N. pp 34,35.

On the other hand, the Children's Act of 1989 has also portrayed a general guidance for some factors that would be considered before deciding the custody case.[261] It states in section 1(3):

(3) In the circumstances mentioned in subsection (4), a court shall have regard in particular to—

(a) the ascertainable wishes and feelings of the child concerned (considered in the light of his age and understanding);

(b) his physical, emotional and educational needs;

(c) the likely effect on him of any change in his circumstances;

(d) his age, sex, background and any characteristics of his which the court considers relevant;

(e) any harm which he has suffered or is at risk of suffering;

(f) how capable each of his parents, and any other person in relation to whom the court considers the question to be relevant, is of meeting his needs;

(g) the range of powers available to the court under this Act in the proceedings in question.[262]

Logically, the main consideration in any custody case is the welfare of the children; because of that consideration, there are no general rules to whom custodianship is granted

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[261] Black, J.M. Bridge, A.J. & Bond, T. (2000) pp 396.
[262] The Children Act 1989. [online] [undated] Available from: http://www.hmso.gov.uk/acts/acts1989/Ukpga_19890041_en_1.htm

because it depends on each individual case. Due to that fact, the court of appeal will not interfere with the decisions of the court unless it was 'plainly wrong'.[263]

The idyllic situation is when the parents come to an agreement about their children. In such cases, a 'Statement of Arrangement for Children' has to be signed by the petitioner at the time of divorce proceedings. This form would either be signed by the respondent during the divorce case proceeding or, if the parties were not speaking, the respondent would be given a copy of the form. If s/he did not take any action, the judge would assume that the issue in relation to the children was settled.[264]

The first factor in the welfare of the child is its physical welfare. There are plenty of concerns regarding the physical welfare such as who would be more able to provide the child with decent accommodation, clothing, and food? Which parent is more capable to give day care to the child and how to deal with school holidays? Regarding the pre-school child Brenda M. Hoggett argues that this is usually to the benefit of the woman to get custody because it is known that women can deal with this age better than men.[265]

The second factor is the moral welfare. The parent who is capable of treating the child well without neglect would be favoured for granting the custody. The relationship between the parents is not relative any more to the court. For example, if the mother was accused of committing adultery this would not affect her motherhood. However, working as a prostitute or being a homosexual would affect the decision of custodianship. Also, if

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[263] Brenda M., Hoggett, *Parents and Children.* (London: Sweet & Maxwell Ltd., 1987) 3rd pp 45.
[264] David Terry, *Children and Divorce.* [online] [undated] Available from:
http://www.terry.co.uk/child01.html
[Accessed 11th April 2005]
[265] Hoggett, B. (1987) pp 45.

the father has a criminal history or a violent record, this might prevent granting him custody since it directly affects the upbringing of the child. Religion is a concerned factor: the court would not favour one religion over the other, but believes that raising children within a religious environment is better than a non-religious one at all.[266]

The third and most recent factor is the emotional welfare of the child. The court investigates the mental health of the parents. The court would examine the parents, whether natural or the ones who afford to be substitutes, and determine how strong their relationship with the child is. It will not only depend on the evidence that is given, but will also see the adults involved as witnesses to make sure who is more qualified to have custody. The court might depend on the emotional needs of the child which, again, might be for the benefit of the mother as being stereotyped in that issue, but it is also known that the father is needed for older boys.[267]

It might be noteworthy that for the court to act in the best interest of the children the parent granted custody is ordered to remain in the same house. In doing so, the court supports the idea of the importance of continuity of the children in the same environment they used to live in. Also, as the divorce itself may have negative effects on them, changing homes might have worse results.[268]

If the court favoured a parent who cannot afford the same living standards that the other parent can, the court can justify its order by making a maintenance order to the favoured parent. There are some factors that can affect the court's decision such as the child age,

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[266] Ibid. pp 45,46.
[267] Hoggett B. (1987) pp 45,46.
[268] Susan Maidment. *Child Custody and divorce* (GB: Biddles Ltd, Guidford and King's Lynn, 1984) pp 193.

sex, or any other characteristics. For example, if the child is 15 years old, the court would concerned with his/her maturity to decide with which of his/her parent he/she want to live with. According to the Children's Protection Act, a child is someone less than 18 years old; however, the court has restricted the term to children under 16 years old.[269]

As it was discussed in the second chapter, societies within different religions and traditions believe that women have the role of child-rearing while men are responsible for providing the family with its needs. This sexual division was supported by some studies, like a study for the World Health Organization in 1951 by John Bowlby who concluded that:

What is believed to be essential for mental health is that an infant and young child should experience a warm, intimate, and continuous relationship with his mother (or permanent mother-substitute – one person who steadily mothers him) in which both find satisfaction and enjoyment.

The Bowlby's theory for the mental health interest for children includes three suggestions:

1. Regarding the emotional progress for the child his relation with his mother is the most important one, any other relations are just secondary.
2. It is important for that interest for the relationship to continue.

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[269] Black, J.M. Bridge, A.J. & Bond, T. (2000) pp 359,407.

3. The relationship is so important that it can affect the child mental health when grown up.[270]

However, Bowlby's theory was re-evaluated by another psychological study which concluded that the emotional link can grow between the infant and both his/her parent at very early stage; that is, not only with the mother as Bowlby suggested. Beside, there is no proof that the bond between the child and the mother though it is formed first, differs from the bonds with others.[271]

As the pre-divorce relationship between parents is an important factor, the post-divorce relationship is also important for the custody arrangements. However, women still have the traditional image of child caring when knowing that 80% of children live with their mothers after divorce in Keele custody in 1976. Also, between the year of 1996 and 2004, the lone-mother families have increased to %12 to 2.3 million; nine of ten lone parents are mothers in 2004.[272] So when judges favoured the residency to be for the mothers it is because in pre-divorce relationship they used to be in charge of taking care of their children. Full parent residency has its difficulties whether it was mother or father. For mothers residency has as its problematic dealing with their children, especially boys. Studies suggest that mothers seemed to experience behaviour disorder more with boys than with girls.[273] Also, the financial factor is important since lone mothers are more likely to face it than men. For fathers, custody on the other hand has other problems such

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[270] Maidment S. (1984) pp 182.
[271] Ibid. pp 182,183.
[272] Gingerbread, the organization for lone parent families. *Lone Parents Families-Action Fact.* [online] [undated] Available from:
http://www.gingerbread.org.uk/information-and-advice/ActionFacts.htm
[Accessed 10th April 2005]
[273] Maidment, S. (1984) pp 185-199.

as loneliness and the need for substitute care. John Santrok and Mavis Hetherington in their studies (1982) conclude that same sex custody would result in better, socially competent children than living with the opposite sex parent.[274] Also, a study in 1995 by the Social Policy Research shows that many lone parent families are poor because they held part time jobs, low income ones, or were out of work. Nine out of ten of the carers for their children were the mothers.[275] Moreover, another study done by the Economic and Social Research Council (ESRC) in 2004 shows that 22% of dependant children lived in single mother families while only 2% lived in a single father families, and of 42% of poor children who lived in lone parent families, most were single mother families.[276]

4.6. Conclusion

While Sheila McLean approves of the point of view that 'All democratic countries have as one of their highest aspirations the attaining of equality among their citizens', she also argues that 'in no democratic country in the world do women have equal rights with men'.[277]

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[274] Ibid. pp 185-199.
[275] Joseph Rowntree Foundation. *Diets of lone-parent families*. [online] [Jan. 1995] Available from: http://www.jrf.org.uk/knowledge/findings/socialpolicy/SP71.asp
[Accessed 11th April 2005]
[276] Economic and Social Research Council. *Welfare and Single Parenthood in the UK*. [online] [undated] Available from:
http://www.esrcsocietytoday.ac.uk/ESRCInfoCentre/facts/index40.aspx?ComponentId=12614&SourcePageId=6970
[Accessed 11th April 2005]
[277] McLean, Sh. & Burrows, N. (1988) pp 212.

Internationally, women's rights were not recognized until thirty one years after the Universal Declaration of Human Rights in [1948]. It was noticed that women were discriminated against in different aspects of public and private life and for different reasons such as race, religion, marital status, or bearing children. Women in many cultures are not allowed to work, to go out, or even to get medical treatment without her husband's permission for, as a wife, she became his own property.[278]

Also, as discussed in this chapter, domestic laws were passed in the UK in order to prohibit discrimination and with the aim of reaching a level of complete equality between genders. The question arising is whether the current anti-discrimination laws have already accomplished its main goal which is to prohibit discrimination and to provide equality and same opportunities for both men and women?

One of the main obstacles applying the anti- discrimination and equality laws is the multiple legislations in that matter. In organizing the issue, currently there are 30 Acts, 38 statutory, 11 codes of practice, and 12 EC directives that deal directly with discrimination. Some of these regulations are too complicated to be understood, as Lord Denning commented in 1983 regarding the Equal Value Regulations 1983 and Equal Pay Act 1970. Indeed, these are too complicated for even for the lawyers to fully understand them. The court experienced difficulties in interpreting the SDA, especially regarding the need of a comparator in pregnancy and harassment cases. For example, there are some

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[278] Katarina Tomasevski. Rights of Women: from prohibition to elimination of discrimination. *International Social Science Journal*. Dec. 1998, 50 (158), pp 545- 558.

gaps between the EPA 1970 and the SDA 1975. Bob Hepple, Mary Coussey and Tufyal Choudhury have given some examples for these gaps and inconsistencies:

1. The EPA does not have the hypothetical male comparator, while the SDA does.
2. The EPA regulates only the contractual relations, while any non-contractual case has to be resolved under the SDA.
3. While the SDA organized the discrimination regarding marital status, the EPA did not mention the matter.
4. The two legislations have different timing to file a claim.[279]

Townshen-Smith also agrees with Hepple's report describes the differentiation between the SDA and the EPA as 'outdated, confusing and unnecessary'. He criticised the difficulties under which legislation was to be applied when raising a discrimination issue especially regarding the indirect discrimination. Townshen-Smith also suggests an amendment to the EPA in order to meet its goals. The amendment is needed in order to implement the narrow interpretation in the indirect discrimination and victimisation; also sexual harassment needs to be given in a separate provision whether within the same statute or in a separate one.[280]

In a detailed study about the effect of anti discrimination laws in UK, Anton Zabalza and Zafaris Tzannatos conclude that the impact of these laws, especially the SDA 1975 and the EPA 1970, are positively significant in respect to women's employment and their earnings. Although there were other factors during that time like income policies,

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[279] Bob Hepple, Mary Coussey and Tufyal Choudhury. *Equality: A New Framework* (US and Canada: Hart Publishing, 2000) pp 21,22.
[280] Townshend-Smith, R. (2001) pp 617,618.

changes in industrial structure, level of the economic activities, and the labour supply conditions, the study shows that the raise in payment was 15% when the employment was raised by 17% than in the pre-legislation period.[281]

Melanie Howard and Sue Tibballs in *Talking Equality* conclude that inequality and discrimination not only still exist in the UK but it is common practice. Many people at a certain time have experienced inequality once in their life. An overall result of their research is that 'people seemed to think that women and men are now more equal in terms of rights and opportunities, but that society is still sexiest.[282]

Agreeing with earlier criticisms with regard to the equality laws, Judith Squires suggests that in addition to the complications that arose from the different laws organizing equality and anti discrimination rather domestic or European ones, these laws also assure the 'male norm'. Moreover, Paul Chaney suggests that the anti-discrimination and equality laws could be cause of inequality since 'it applies to legislatures and government department in different ways, privileges some social grouping, and affords varying levels of protection between polities'.[283]

However, criticisms to the anti-discrimination and equality laws in general could be minimized by adopting a single equality act. Domestic and EC laws related to

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[281] A. Zabalza; Z. Tzannatos. The Effect of Britain's Anti-Discriminatory Legislation on Relative Pay and Employment. *The Economic Journal.* Sem. 1985, 95 (379), pp 670-699.
[282] Howard, M. & Tibballs, S. (2003) pp 7,8.
[283] Judith, Squires, *Equality and Diversity: A New Equality Framework for Britain?* [Online] [Dec. 2003] Available from :
http://www.bath.ac.uk/esml/Library/pdf-files/squires.pdf
[Accessed 15th April 2005]

discrimination should be formed in one single act as some other countries such as New Zealand and USA are doing. There are a certain advantages for the single equality act. First, the equality notion would be seen as a united standard that cannot be divided. Second, the single act can perform better in multi-discrimination cases. Third, people from protected groups would enjoy the same rights and remedies. Finally, the general equality principal can cover any new ground of discrimination that might come up in the future without the need of a new legislation or amending the existing one.[284]

In conclusion, no matter how difficult it is to apply equality and anti-discrimination laws and practises, legislating these laws is a very important step *per se*. Employers now consider denying any application on discriminatory grounds in order to avoid being sued. These laws enforce the principal of gender equality, and have eventually affected and changed the traditional image of women in general. Since the purpose of this chapter is to examine the benefits from anti-discrimination laws experienced in the West in general and in the UK in specific, it is pointless to discuss such laws in Kuwait due to their absence there. Kuwait can therefore avoid the deficiencies of these laws and instead apply a sex discrimination law whereby women can be protected from discriminatory acts or laws. However, the problem in Kuwait is not only that it does not have any anti discrimination laws, in particular sex discrimination laws, but it also has some laws that in fact discriminate between the genders. This will be discuss in detail in the next two chapters.

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[284] Hepple, B. Coussey, M. & Choudhury, T. (2000) pp 23.

Chapter Five

Sex-Discrimination within Kuwaiti Family Law

5.1. Introduction

The long history of discrimination against women that was discussed in chapter two – especially in Kuwait – reflected the effect of both religion and culture that subjected women to the domination of men. Especially that the women's movement campaign was focused on the suffrage rights only, while the family law issues that subjected women were rarely mentioned. Discrimination against women in Kuwait can be found in different parts of the laws and practices; however, the Family Law can be considered a major source for discrimination against women. For that reason, this chapter will discuss only the discriminatory matters that exist in the Family Law, while all other discriminatory laws will be discussed in the next chapter. Also, the Family Law is unique due to the fact it is the only law that is based on the Sharia,[1] while other laws are adopted from other foreign countries, whether Middle Eastern or Western (mainly from France) countries.

[1] J.N.D. Aderson. *Islamic Law in the Modern World.* (London: Stevens and Sons Ltd, 1959) pp 39.
J. Anderson describes the important of the Family Law in the ME region as:
'the family law has always represented the very heart of the Sharia, fir it is part of the law that is regarded by Muslims as entering into the very warp and woof of their religion...family law has been basic to Islamic society down the centuries.' pp 39.

However, since there are four main (Sunni) Islamic doctrines,[2] Kuwait followed in its law, the *Maliki* Schools in all of the matters related to the family law or personal status law.[3] In the Middle East, family law is particularly concerned with discrimination against women. Family law enshrines such discrimination. Moreover, even though Kuwaiti family law is comparatively new,[4] since it was only issued in 1984, family laws in other GCC countries are even more recent. In the United Arab Emirates family law was established in 2003, and in Qatar it was established in 2004. Other countries, such as Bahrain and Saudi Arabia, still do not have family law.[5]

Family law in Kuwait, as in most Middle East countries, is supposed to be based on the teachings of Islam.[6] This has an influence on arranging marriage, divorce, inheritance or making wills. Issues of inheritance were discussed in chapter three (P139-142); the discriminatory issues of marriage and divorce with respect to family law will be discussed in this chapter.

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[2] Will be discussed in more depth later in this chapter.

[3] Personal Status is a translation of the Arabic term *Al-Ahwaal Ash-Shakhsiya* which refers to interactions between people and especially within the family matters. It was used in the Egyptian Law for the first time in 1890s.
Jamal J. Nasir. *The Islamic Law of Personal Status.*(Netherlands: Kluwer Law International, 2002) pp 34.

[4] In Egypt the first draft of Family Law started in the early of 1920s, while in Morocco the Family Law was issued in 1957 which is about the same time that the Tunisian law was issued. In Palestine the Family Law was issued in 1954. The Iraqi Family Law was issued in 1959, while – finally – was published in 1953 in Syria.
Abdullahi A. An-Na'im. *Islamic Family Law in a Changing World: A Global Resource Book.*(London: Zed Books Ltd, 2002) pp 112, 132, 138 169, 179, 182.

[5] Arab Women organization. *Family Laws in: UAE, Qatar, Saudi Arabia, Bahrain, and Oman.*[online][undated] Available from:
http://www.awfarab.org/index.htm
[Accessed 18th July 2005]

[6] Julia Robinson. Female Labor Force Participation in the Middle East and North Africa. *Wharton Research Scholar Journal.* 2005, pp 1-46.

In Kuwait there are two major religious cults: the Sunni and the Shia. In disputes related to family matters each branch has a separate court room and a judge from that particular branch. The reason for this is that in family law most of the articles are adopted from religion; sometimes the two branches differ according to the teachings they follow. Family law articles are applied to all Sunni, while only some are applicable to the Shia. However, if the Sunni and Shia follow different beliefs, according to their different explanations in the Qur'an and Sunna, then the Shia judge has the authority to rule according to the teachings he follows. For example, a Shia judge would follow the teaching of a famous religious *mujtahid* called Ali Al-Sestani,[7] who has written a book entitled *Menhaj Al-Saleheen*. This includes all of his teachings related to daily life, but there are major principles in the law which have to be followed by both sects, such as the family law regarding the age of marriage.[8]

In addition to an examination of such laws and practices, the current – as well as the next – chapter will also consider the results yielded from a questionnaire based on random selection that was conducted as part of this research in Kuwait. The questionnaire was mainly based on issues that included sex discrimination against women. The questionnaire targeted two groups, men and women, with appropriate changes to some questions. The women's questionnaire addressed three groups in order to see if there was a consensus of opinion among women: married-employees, single employees, and house

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[7] Traditionally, the Shia jurists (*faqueh*), unlike the Sunni counterpart, have strong influence on their fellowers since a shia individual must fellow, in practicing his/her daily Islamic rituals, a living faqueh as a source of imitation (imitation *marjie taqlid).*

[8] An interview with a Shia judge did not want his name to be revealed, Al-Rege'e Court Building, Kuwait, 07/02/2006.

wives.[9] The main objectives of the questionnaire were to ascertain whether or not people were aware of discriminatory laws; to see if they agreed with them or not; and to analyse whether they were ready for such laws to be eliminated. The questionnaire was also intended to determine what their attitude was on gender issues and whether the sexes were considered to be equal or not. In countries like Kuwait, it can only be expected that respondents would answer according to the influence of religion and/or culture. These two factors influence even highly educated people. The results may be clearer if compared with the probable results of a similar questionnaire conducted in another country with a different culture. For example, if the questionnaire was conducted in a Western country, not only would the answers differ, but most would not make any sense unless translated into a Kuwaiti context.

Since the questionnaire discusses different matters, only the issues that are related to the Family Law will be discussed in this chapter, while other discriminatory issues such as criminal law and education will be discussed in the next chapter.

5.2. Marriage

5.2.1. Age at Marriage

In Article 26 of the Kuwaiti family law the legislator has stated the age of marriage to be 15 for girls and 17 for boys. The Article does not limit the age of marriage; however, it

[9] The women's questionnaires will be combined if they have the same view toward an issue and indicated when the letter 'W' appears beside the question's number. The charts will be divided only when they disagree. The W1 means housewives, W2 married-employee, while non-married-employee is W3, M is for the men's. The code will be added to the question's number.

prohibits any marriage contract being officially authorized if the couple are under that age. Thus the couple can get married at a younger age but the contract cannot be officially authorised until they reach the age stated in the Article (as appendix 3 can show from the Ministry of Justice marriage statistics show). While both girls and boys can get married at a very young age, society has experienced the problems that occur for such a young couple. In addition, society is aware of the importance of education: families prefer that their children gain a university degree before marriage, especially for sons so that they can support themselves.

However, in other civil contracts the legal age is 21 and, according to criminal law, a person under 18 years old would be considered to be a juvenile if prosecuted for committing a crime. Therefore, family law treats people differently according to their age: it allows people at a very young age to become involved in matters that bear responsibilities equal or greater to those in any other civil contract. It is interesting to compare this with other Gulf countries. In Oman the age of marriage is 18 for both males and females. In Bahrain, since they do not have a family law yet, the suggested age is 16 for the girls and 18 for the boys.[10] Since Saudi Arabia also does not have a family law, there is no legal minimum age for marriage for both genders. On a broader level, in the Middle Eastern countries, the minimum age at marriage varies greatly from one to another. In Jordan it is 15 for girls and 16 for boys; in Morocco, 15 for girls and 18 for

[10] Hawa' (Eve, home page), *Bahrani Family Law Study*. [online][undated] Available from: http://www.balagh.com/woman/hqoq/jz0lghh9.htm
[Accessed 25th July 2006]

boys; and in Iraq it is 18 for both girls and boys.[11] On the other hand, in Iran a girl can get married before puberty if her guardian has authorised the marriage, although the minimum age is nine.[12]

Specifying an age for marriage (reflecting physical and emotional maturity) would be a major step in benefiting women, despite the fact that each of the four major Sunni and Shia scholars agree with the concept of early marriage even before puberty without specifying a certain age.[13] In countries like Egypt, some fathers lie about the age of their daughters in order to get them married.[14] On the other hand, neither the Qur'an nor the Hadith mentions the age at marriage. However, the Qura'nic verse below mentions that marriage — since it is a contract — should be at the age of maturity which varies according to different laws. It cannot be as young as nine or even before puberty, as some Islamic scholars believe. Those scholars' view depend on a *fatwa* based on the Prophet's marriage to Aisha (when she was nine or possibly younger). However, other interpretations believe that some have intentionally forged this story and in fact Aisha was seventeen or nineteen years old.[15] Historically, since the ME region was under the Ottoman Empire rule, its family law – Turkish – was applied for the entire region when it first published the Law in 1917. The Law did not apply any particular Islamic school of

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[11] Bahrain Family Law Committee. *A Study About the Family Law in Bahrain.*[online][16th May 2005] Available from:
http://www.amanjordan.org/aman_studies/wmview.php?ArtID=873
[Accessed 15thJuly 2005]˜

[12] Emory Law School. *The Islamic Republic of Iran.* [online] [undated] Available from:
http://www.law.emory.edu/IFL/legal/iran.htm#text
[Accessed 5thAug. 2005]˜

[13] Mustafa Al-Seba'e. *Al-Mara' Bayna Al-Fegheh wa Al-Ghanon.* (Woman, Between Jurisprudence and Law). (Cairo: Dar Al-Salam2nd, 2003) pp 38.˜

[14] Mostafa Al-Sebae' *women between Jurisprudence and Law(Al-Mara' beyn Al-Fegh'h wa Al-Ghanoon)*(Cairo: Dar Al-Salam, 2003)2nd pp 38-40.˜

[15] Dr. Riffat Hassan. *Islam and women's Rights.* (Damascus: Dar Al-Hasad,1998)pp 86-87.˜

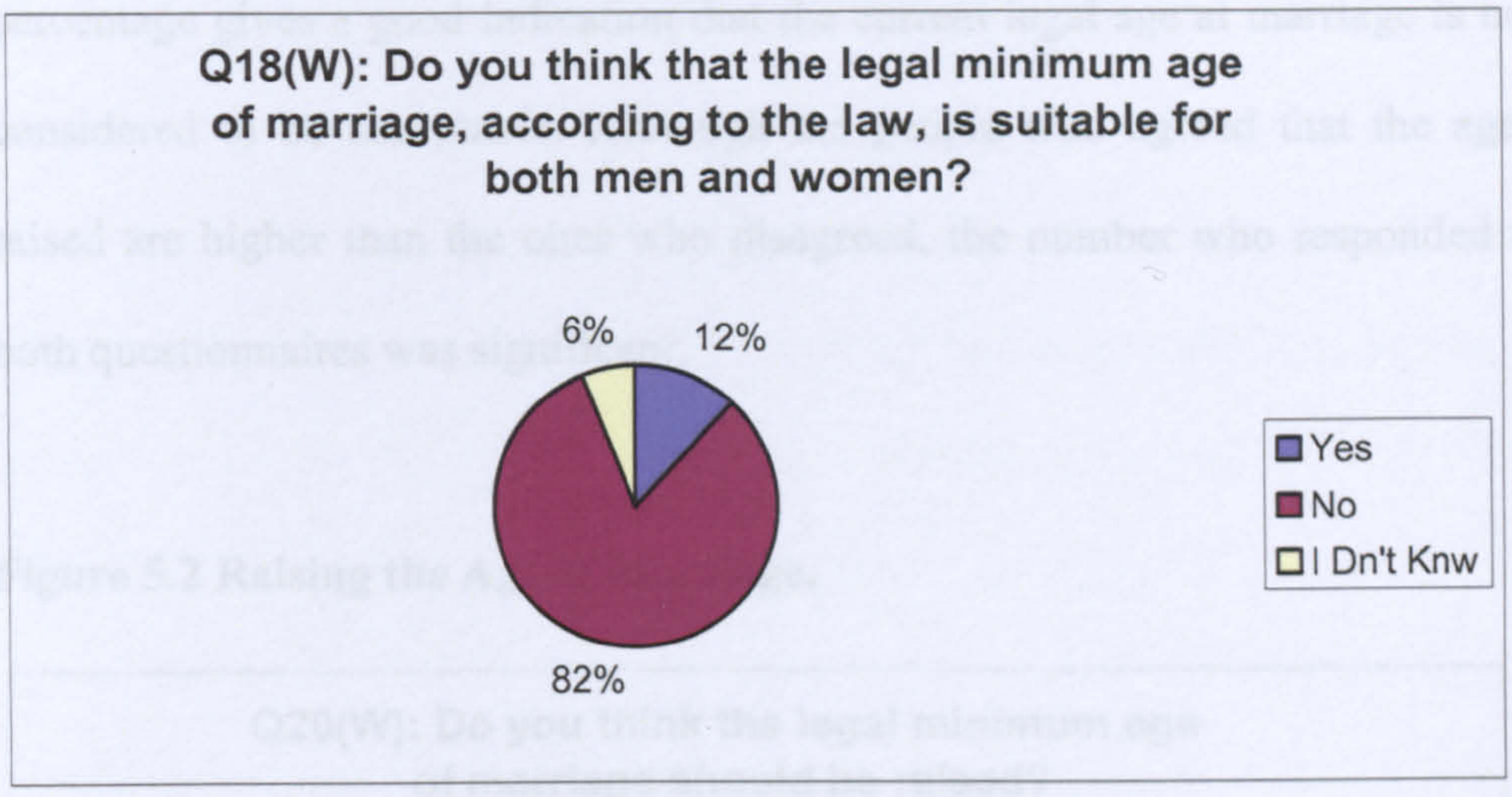
thought, but tried to take the best of each school, preventing the marriage of young people and specifying a certain age (17 for girls and 18 for boys). This was one of its main advantages that most Arabic Countries applied even after the end of the Ottoman rule.[16]

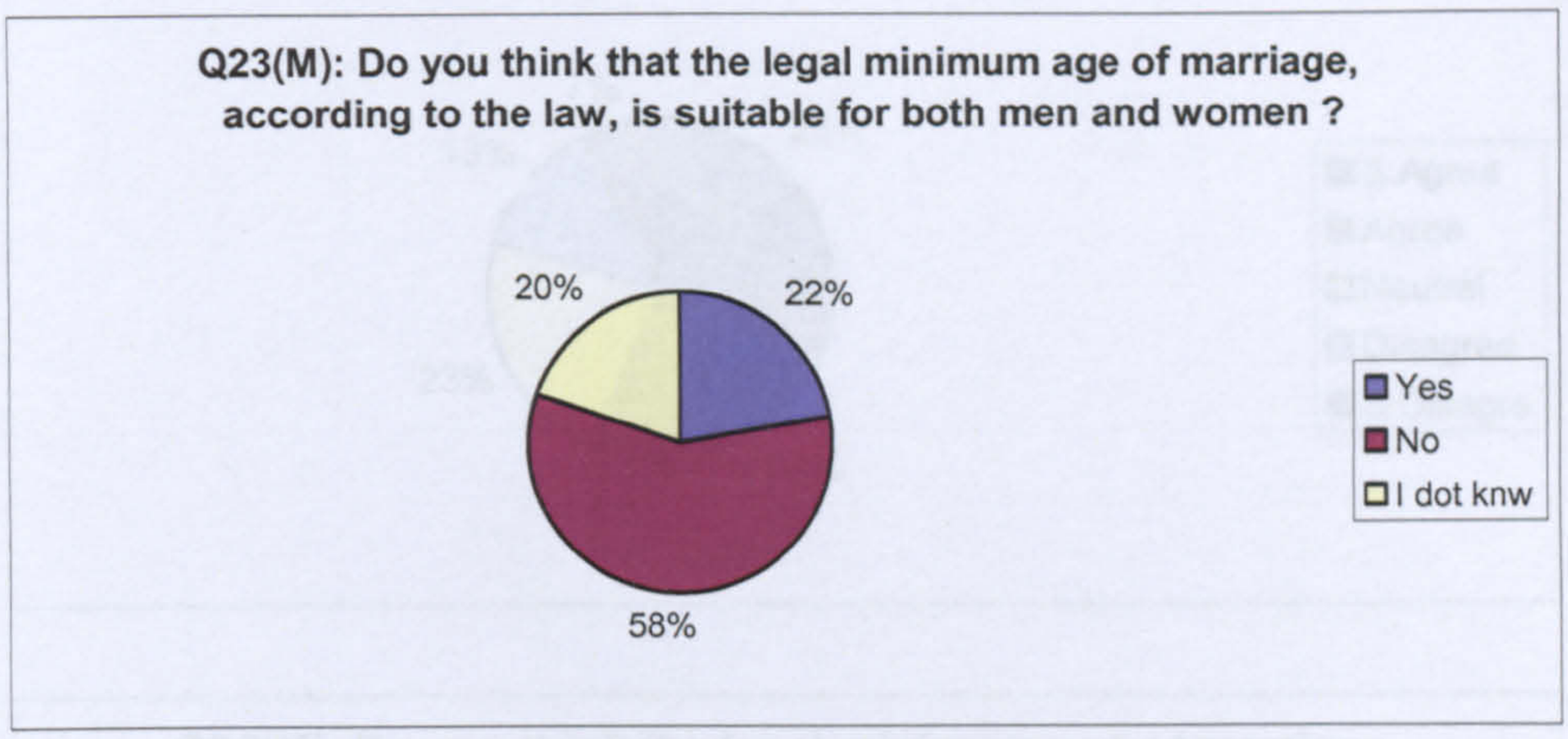
Make trial of orphans until they reach the age of marriage; if then ye find sound judgment in them, release their property to them; but consume it not wastefully, nor in haste against their growing up. If the guardian is well-off, let him claim no remuneration, but if he is poor, let him have for himself what is just and reasonable. When ye release their property to them, take witnesses in their presence: but all-sufficient is Allah in taking account.[4:6]

In the questionnaire, both men and women agreed that the age at marriage is not appropriate at present, as the chart below shows:

[16] Ghassan Ascha. *Al-zawaj wa At-alaq wa Ta'dud Al-Zawjat fe Al-Islam* (Marriage, Divorce and Polygamy in Islam). (London: Alsaqi, 2004) pp 29.

Figure 5.1 Age of Marriage.

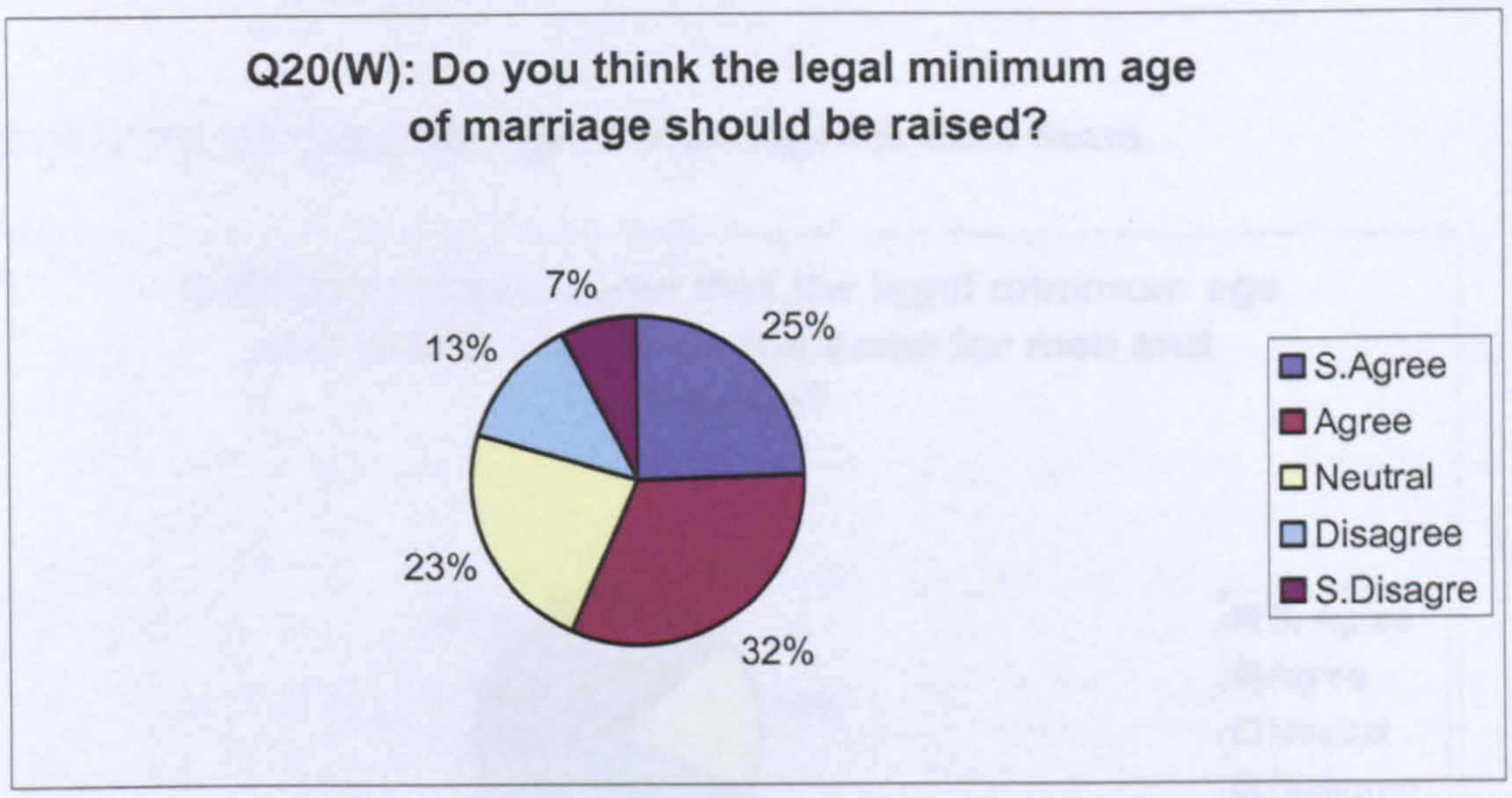


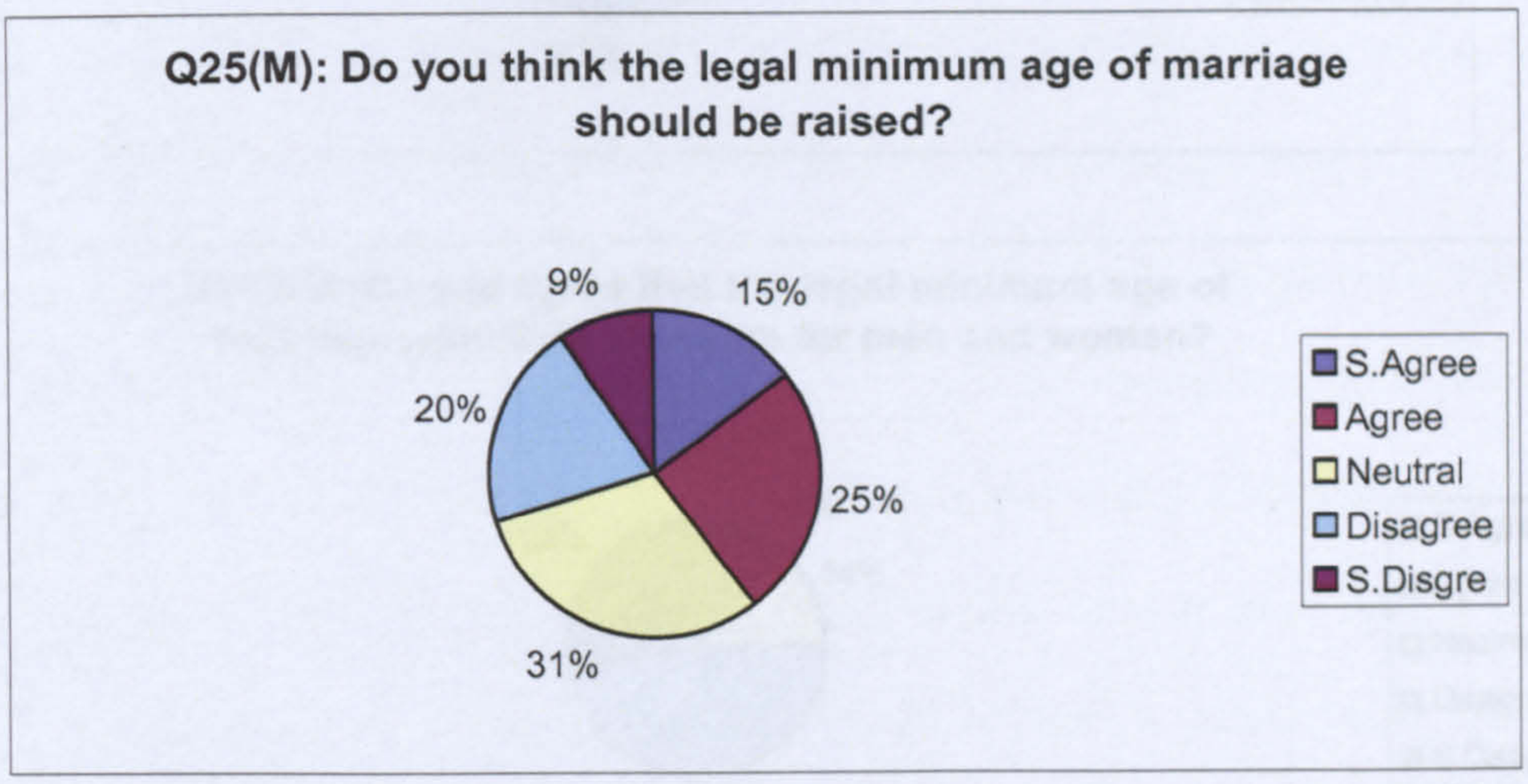


While most of the respondents agreed that the age is not suitable, the majority of women disagreed on the current age stated by the law. However, the majority of both sexes agreed that the age is not suitable, meaning that they either thought it should be raised or it should be lowered. This is why the answers differed between the sexes when asking whether the age should be raised. The charts shows that majority of women either strongly agreed or agreed (57% in total) that the age should be raised. For the men, although those who agreed that the minimum age was inappropriate were less than 50%,

of these 40% who agreed were still more than the men who disagreed 29%. This percentage gives a good indication that the current legal age at marriage is not generally considered to be acceptable. Although the people who agreed that the age should be raised are higher than the ones who disagreed, the number who responded neutrally in both questionnaires was significant.

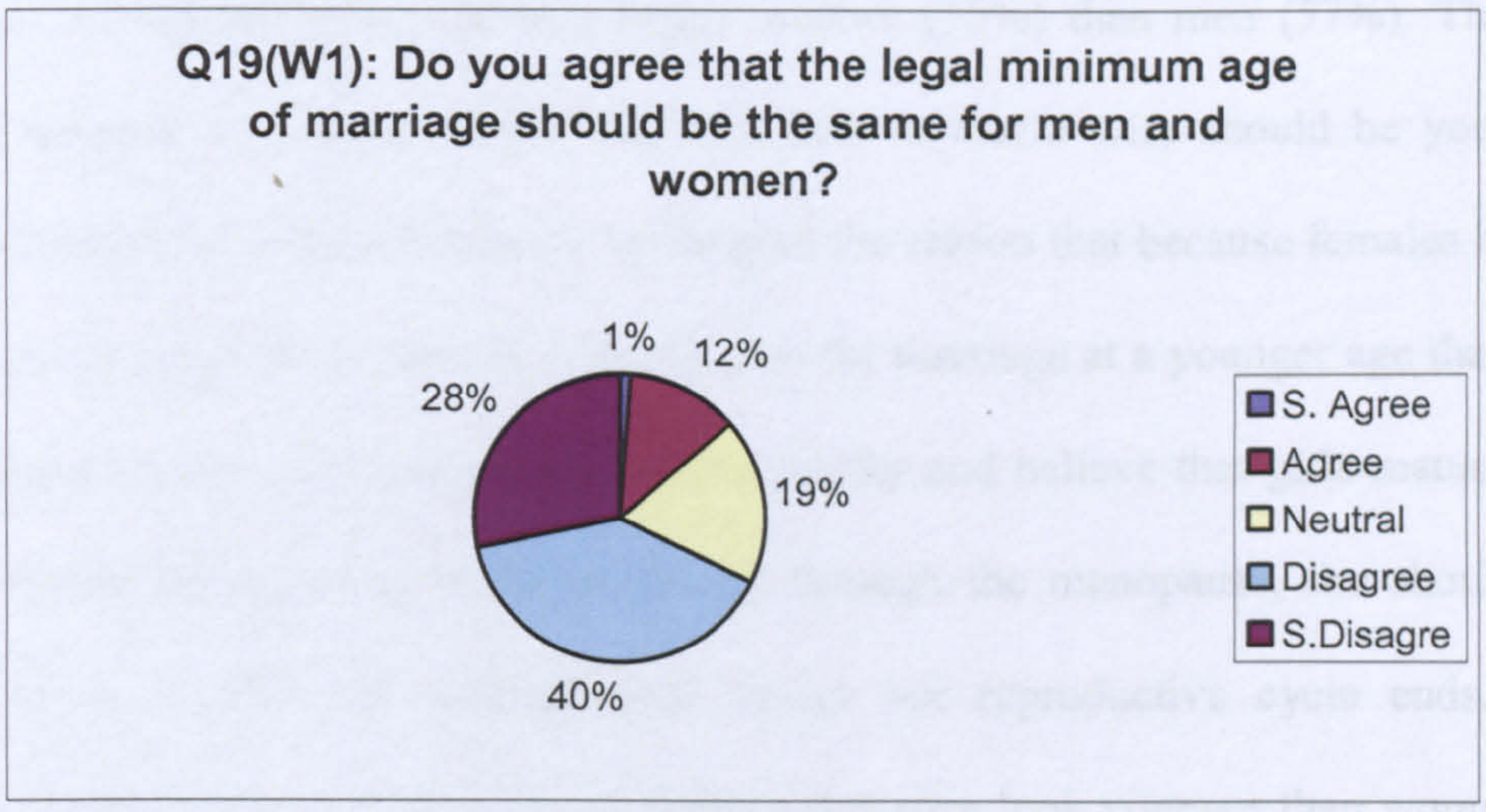
Figure 5.2 Raising the Age of Marriage.

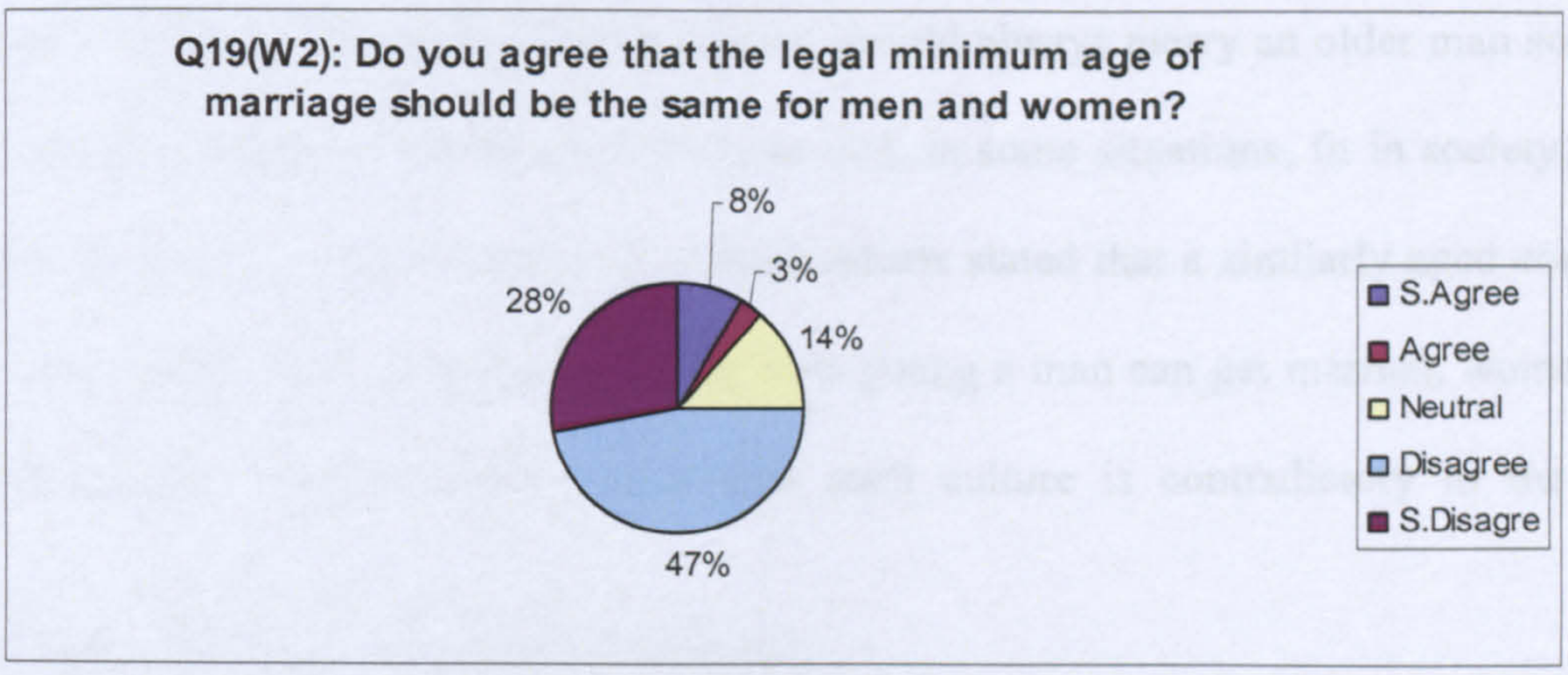


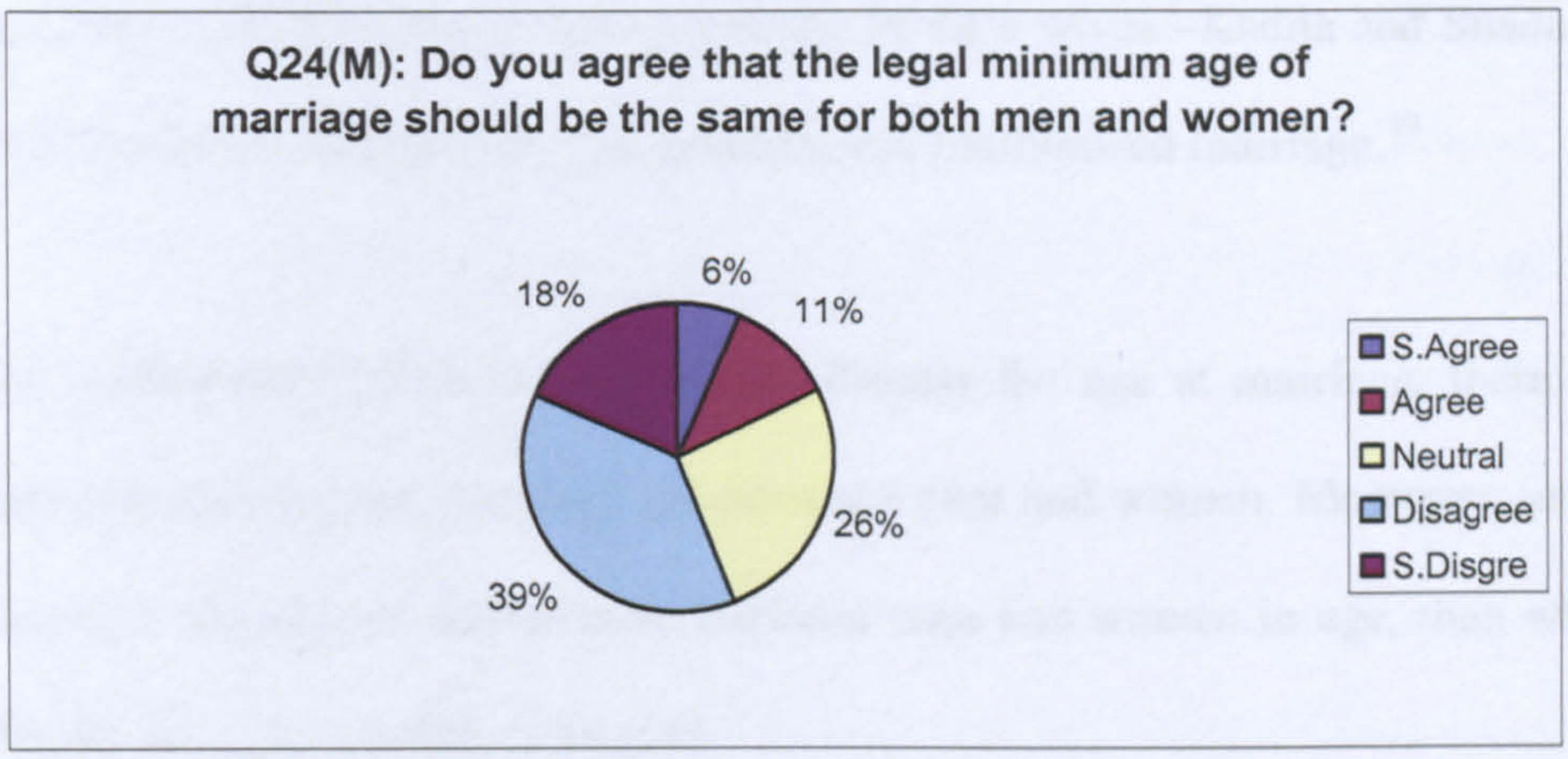


According to the questionnaire, a question followed that question asking the respondents to suggest an age at marriage if they disagreed with the current age. All of the respondents answered in the same way when giving two different ages: one for the male, and the other – which was always younger – for the female. As a result of cultural influence, people still believe that there should be an age difference between the couple getting married; this is supported by their answers to another question on whether the man and the woman should be of similar ages.

Figure 5.3 Unifying the Age of Marriage for Both Sexes.







The charts show that men and women did not agree that the age should be the same. While this was expected, it was not expected that women would reject the idea of specifying the same age in a larger number (75%) than men (57%). The influence of culture is clear here. Many Kuwaitis believe that a wife should be younger than her husband for different reasons. Some give the reason that because females hit puberty at a younger age, they are ready (physically) for marriage at a younger age than males. Also, some people associate puberty with maturity and believe that girls mature before boys. Others believed that since women go through the menopause, she should get married earlier so she can have children before her reproductive cycle ends. Others were concerned with appearance and believe that men look younger than women of the same age.[17] These people believe that a woman should always marry an older man so that she can look younger, feel more comfortable and, in some situations, fit in society.[18] These are the reasons why the majority of respondents stated that a similarly aged couple was unacceptable, believing that no matter how young a man can get married, woman has to be younger. Haifaa Jawad argued that such culture is contradictory to the Islamic

[17] Socio-economic cultural background of Kuwait.
[18] When a woman gets married to someone who is younger than her, she would be criticized harshly.

teachings which illustrate that two of the Profit's wives –Kadija and Suada – were older than the Profit, though they had peaceful and harmonized marriage.[19]

As neither the Qur'an nor the Hadith discuss the age at marriage, there is nothing to prevent unifying the marriage age between men and women. Moreover, as the civil and criminal law do not differentiate between men and women in age, then why should the family law take a different stance?

5.2.2. The Authorisation of Marriage (Guardianship)

Kuwaiti family law differentiates between girls who are younger than 25 and girls who are either 25 and above, or have been married before (either a divorcée or a widow). According to Article 29, in the case of girls who are younger than 25 and have never been married before, the authorisation of the marriage is given to her father.[20] While the legislator would demand the girl's agreement, her father is the one who can legitimately sign the contract. Therefore, both the girl and her father have to agree upon the marriage.

On the other hand, if the girl is over 25 or was married before, it is her decision to marry, not her father's. However, her father would still need to sign the contract. Consequently, in either situation, whether a girl is under or over 25, she needs her father's authorisation to marry. According to this, a father could therefore marry his daughter to someone

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[19] Haifaa A. Jawad. *The Rights of Women in Islam.*(London: Macmillan Press Ltd., 1998) pp 32.
[20] Her father would sign the contract if he is still alive; if not the authority would be given to the closest male in the family such as one of the brothers, then one of the uncles from the father's side. The male relative must be from the father's side of the family and is known as the 'Al-A'saba'.

without her knowledge. The usual procedure of a marriage contract does not require the girl's appearance or opinion; it is only dependant on the father, his conscience, and his relationship with his daughter.[21] In case 10/87[22] the wife brought a case against her father and her husband accusing her father of marrying her when she did not agree or even know about the marriage. At the same time her husband raised a case asking the wife to go back to the *Ta'a* house – this will be discussed in detail later in this chapter – although the first degree court had revoked the marriage and the Court of Appeal supported the judgment.

Therefore, no woman can initiate her own marriage, regardless of her age or education.[23] If she chooses a husband, her father has to agree; if he does not, then she cannot marry. There is only one way around such a situation, and this is by filing a case against her father (or guardian) and asking the judge for permission to authorise the marriage, called *Addal* case will be discussed in more details later in this section.

Theoretically, if the guardian system could be justified, it might be practical if a woman's guardian is her father since, it is assumed, he is the person – culturally – most responsible for her; however, if her father passes away, it is not logical for the guardianship to fall to her brothers, uncles or cousins, especially if they are younger than her. It is unreasonable that, according to Article 29, guardianship should move from one family member to

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[21] In some cases, the father could marry his daughter to someone who had a bad reputation to spite the mother or for the sake of money for example.˜

[22] Law and Judgment Magazine. Fifteenth Year. Volume Two. December 1994. pp 324.˜

[23] So that a woman cannot be a guardian, if she cannot authorize her own marriage, she cannot then authorize her daughter or sister's marriage for example. Also, Islamic scholars have different opinion regarding whether a woman can or cannot authorize her marriage, they agreed on the fact that she cannot be a guardian no matter what her age or her relationship to the woman who is getting married.˜

another, according to their closeness with the female, based solely on the fact that they are male (*'Al-Asaba'* or consanguinity.)[24] It is not based on fairness to the woman. The legislator is able to treat the issue of guardianship exactly like inheritance when, according to Sharia law, after giving the inheritors their shares, the rest – if there is any - would be distributed to the devisor's own male relatives.[25]

Article 29 of the family law has a religious root. In Islam there are four major views regarding a woman's marriage:

1. A woman never has the authority to arrange her own marriage. If she did, the marriage would be invalid. Some supporters of this opinion would consider marriage without the guardian as 'fornication'.[26]

2. If a woman chooses her own husband, then it would depend on her guardian to authorise the marriage. If he does not, it is not valid.

3. The guardian is required to authorise the marriage of a virgin only. However, this is not required when a divorcée or a widow is marrying.

4. A woman can authorise her own marriage.[27] This is the opinion of the *Hanafi* Islamic School which is contradictory to the others when it gives woman only the authority of her marriage, and does not recognize the guardianship system based on the Hadith when the Prophet said: "A woman who has been previously married (*Thayyib*) has more right to

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[24] *Asaba* or consanguinity is not only concerned with the male relatives, but also with the relationship, which must only be through men. For example a cousin from the mother's side could not be consider as consanguinity or 'asaba', because there is a female which cuts the 'asaba' chain.

[25] Family Law, Article 304.

[26] Zaki A. Abu-Adda. *Masawe'a Taharur Al-Mara'*(The Disadvantages of Woman's Liberation). (Egypt: Dar Al-Wafa'a, 2004). pp 109- 111.

[27] Dr. Mohammad Al-Beltaji. *Makanat Al-Mara'fe Al-Qura'n Al-Kareem wa Al-Sunna Al-Saheha* (Women's Position in Qur'an and Sunna). (Cairo: Dar Al-Salam, 2000) pp 327.

her person than her guardian".[28] However, the Hanafi doctrine does not distinguish between whether a woman was married before or was still a virgin, stating that both of them can get married without the guardian authority.[29]

Different Qura'nic verses from the *Suras* raise four major opinions regarding the marriage of women. These verses are:

When ye divorce women, and they fulfil the term of their (Iddat), do not prevent them from marrying their (former) husbands, if they mutually agree on equitable terms. This instruction if for all amongst you, who believe in Allah and the Last Day. That is (the course making for) most virtue and purity amongst you. And Allah knows, and ye know not. (2:232)

And:

Do not marry unbelieving women until they believe: a slave woman who believes is better than an unbelieving woman. Even though she allure you. Nor marry (your girls) to Unbelievers until they believe: a slave man who believes is better than an Unbeliever even though he allure you. (2:221)

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[28] USC-MSA. *Translation of Sahih Muslim:Book 8, The Book of Marriage*. [online][undated] Available from:
http://www.usc.edu/dept/MSA/fundamentals/hadithsunnah/muslim/008.smt.html
[Accessed 10th Aug. 2005]

[29] Fareeda Zozo. Equality and Differences Among Sexes in Islam. [online] [5th Oct. 2005] Available from:
http://www.lahaonline.com/index.php?option=content&id=9638&task=view&sectionid=1
[accessed 9th Oct.2006]

In the last verse, the Arabic text says: 'do not marry unbelieving women....nor unbelieving men'; it does not mention what has been added – in the translation – in brackets (ie 'your girls'). This can be concluded from diacritical marks of the verse — changing the marks means that the Qur'an has equalised men and women in marriage without the guardian. However, for the sake of clarity, 'your girls' has been added to the English translation. Therefore, two different conclusions can be assumed from changing the diacritical mark. When the *fatha* mark (ً) is used on the phrase 'nor marry' the voice is active and thus directed at women. This interpretation means that men and women are totally equal and that they both have the right to get married without the permission of their guardian. On the other hand, when the *damma* (ٌ) mark is used, as it is in the current reading of the Qur'an, it creates a passive voice directed to the guardian. This means that the guardian is the one in charge of a woman's marriage.[30] Most of the famous interpretations of the Qur'an[31] agree on the same translation; that of the second conclusion, which differentiates between men and women in marriage. This allows men to marry without the permission of a guardian, unlike women. This is all based on the way the diacritical mark is added to this verse.

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[30] It might be worth mentioning that the diacritical marks were not added into the Qur'an until forty years after the Qur'an was written. Arabs used to read Qur'an without diacritical marks or dots as they used to have the ability to read it correctly without any mark. However, when the Islamic populations grew and non-Arabs became Muslims it was difficult for them to read the letters without dots or to pronounce it correctly without the diacritical marks. This was the main motive in adding the dots and diacritical marks to the Qur'an.

[31] Those interpretation books are:
1. Abi-Bakr Al-Jazae'ri. Aysar Al-Tafaseer. (Saudi Arabia: Maktabat Al-Olum Wal-Hekma, 1994)Volume One pp 203-204.
2. Al-Emam Mohammad R. Redha. Tafseer Al-Manar. (Lebanon: Dar Al-Kotob Al-Ilmiyah, 1999) Volume Two pp 279-288.
3. Ibn Katheer. Tafseer Al-Qur'an Al-Adheem.(Lebanon: Dar Al-Kotob Al-Ilmiyah, 1988)Volume One pp 387-385.
4. Sayed Qutob. *Fe Delal Al-Qur'an*. (Lebanon: Dar Ihya' Al-Turath Al-Arabi, 1971 7th)Volume One pp 348-352.
5. Ahmad M. Al-Maraghi. Tafseer Al-Maraghi. (Dar Alfekr) Volume One pp 150-154.

Another verse stated that:

'So if a husband divorces his wife (irrevocably), he cannot, after that, remarry her until after she has married another husband and he has divorced her' (2:230)

This verse has been interpreted in two different ways. People who follow the first opinion say that the words 'she has married' mean not with her guardian's authority; however, those who believe in the fourth opinion listed above say that the phrase gives the woman authorisation to get married without her guardian's consent since there is no mention of the guardian.

Finally, in the same Surra, a verse is directed at women:

'there is no blame on you if they dispose of themselves in a just and reasonable manner' (2:234). This verse is used by people who adopted the fourth opinion to exemplify that a woman has the authority and the ability to decide what is good for her, especially in the matter of marriage.

Some evidence is also provided by the Hadith:

Abu Huraira narrated that the Prophet said: "A matron should not be given in marriage except after consulting her; and a virgin should not be given in marriage except after her permission." The people asked, "O Allah's Apostle! How can we know her permission?" He said, "Her silence (indicates her permission)."[32]

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[32] USC-MSA,*Translation of Sahih Bukhari: Wedlock,Marriage, Volume 7, Book 62, Number 67*.[online][undated] Available from: http://www.usc.edu/dept/MSA/fundamentals/hadithsunnah/bukhari/062.sbt.html [Accessed 25th July 2005]

'Aisha narrated: "O Allah's Apostle! A virgin feels shy." He said, "Her consent is (expressed by) her silence."[33]

Khansa bint Khidam Al-Ansariya narrated that her father gave her in marriage when she was a matron and she disliked that marriage. So she went to Allah's Apostle and he declared that marriage invalid.[34]

Sufyan reported on the basis of the same chain of transmitters (and the words are): A woman who has been previously married (Thayyib) has more right to her person than her guardian; and a virgin's father must ask her consent from her, her consent being her silence. At times he said: Her silence is her affirmation.[35]

Jabir ibn Abdullah narrated that the Prophet (peace-be-upon-him) said: If any slave marries without the permission of his masters, he is a fornicator.[36]

Aisha Ummul Mu'minin narrated that the Apostle of Allah (peace-be-upon-him) said: The marriage of a woman who marries without the consent of her guardians is void. He said these words three times. If there is cohabitation, she gets her dowry for the

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[33] USC-MSA. *Translation of Sahih Bukhari:Wedlock,Marriage Volume 7, Book 62, Number 68.* [online][undated] Available from: http://www.usc.edu/dept/MSA/fundamentals/hadithsunnah/bukhari/062.sbt.html [Accessed 25th July 2005]

[34] USC-MSA. *Translation of Sahih Bukhari: Wedlock,Marriage Volume 7, Book 62, Number 69.*[online][undated] Available from: http://www.usc.edu/dept/MSA/fundamentals/hadithsunnah/bukhari/062.sbt.html [Accessed 25th July 2005]

[35] USC-MSA. *Translation of Sahih Muslim:Book 8, The Book of Marraig.*[online][undated] Available from: http://www.usc.edu/dept/MSA/fundamentals/hadithsunnah/muslim/008.smt.html [Accessed 10th August 2005]

[36] USC-MSA. *Translation of Sunan Abu-Dawud, Marriage Book 11, Number 2073.*[online][undated] Available from: http://www.usc.edu/dept/MSA/fundamentals/hadithsunnah/abudawud/011.sat.html [Accessed 25th July 2005]

intercourse her husband has had. If there is a dispute, the sultan (man in authority) is the guardian of one who has none.[37]

While Kuwaiti family law requires the guardian to initiate the marriage contract regardless of whether a woman is a virgin, divorcée or widow, in Jordan, however, if a woman is over 18 and a divorcée or widow, she has the authority to initiate the contract without her guardian's consent. On the other hand, Egypt, Morocco and Tunis adopt the fourth opinion which does not require the guardian to authorise the marriage, regardless of whether the woman is a virgin, divorcée or widow.[38] In Iran, as in Kuwait, the guardian's consent is required when marrying a divorcée or widow, irrespective of whether this is her father or her paternal grandfather. The court can give permission if the guardian refuses to marry his daughter without a logical reason.[39]

In Kuwait, however, in practice and according to the teaching of the Shia law, the marriage official (who is usually a religious person) would not continue with the marriage contract without asking the girl if she agrees or not to the marriage. Moreover, if he sensed that she was forced to agree, he would take her aside and ask her again until he is sure that she wants to marry.[40]

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[37]USA-MSA. *Translation of Sunan Abu-Dawud,Marriage Book 11, Number 2078.*[online][undated] Available from:
http://www.usc.edu/dept/MSA/fundamentals/hadithsunnah/abudawud/011.sat.html
[Accessed 25th July 2005]

[38] Dr. Fozeya, Abdul-Sattar, *Hughogh Al-Mara'fe Insha'Aghed Al-Zawaj.*[online][undated] Available from:
http://www.womanandlaw.org.bh/paper_fawzia.htm
[Accessed 10th Aug.2005]

[39] Emory Law School, *Islamic Republic of Iran.*[online][undated] Available from:
http://www.law.emory.edu/IFL/legal/iran.htm#text
[Accessed 5th Aug. 2005]

[40] Socio- economic culture background on Kuwait.

On the other hand, the role of the guardian is seen differently by the Shia and the Sunni. First, the role of guardianship is exclusive to her father and her paternal grandfather, and the guardianship would never transfer to her brothers, uncles, or cousins. Second, according to Sestani's teachings, there are three different categories of women when it comes to guardianship in marriage: the unmarried virgin; divorcée or widowed woman who has had her marriage consummated, and the independent, unmarried virgin. For the first kind of woman, her father and grandfather are her guardians. Both are considered to have the same authority over marrying her, meaning that the grandfather can allow her to marry even if her father is alive. For the second kind of woman there is no guardianship over her. That would support the forth *Sunni* opinion that a woman can authorize her marriage. As regards, the third category of woman that was presented by the Shia sect, her situation stands between the two previous examples. In his book Sestani states that: 'her guardians cannot force her to get married, but can she marry without their consent? That depends.' He says that she has to obtain her guardian's consent. If neither her father nor grandfather are alive, then her brother would act as her guardian. Sestani does not say whether she can initiate her own marriage or not. On the other hand, their consent is not required if: the guardians refuse to marry her without a valid reason; refuse voluntarily to interfere with the marriage; or they are absent. [41] Above all, this category of women is important as a positive move. That is, a woman is not treated according to her virginity, but according to whether she is able to manage her life and to decide for herself. It is unacceptable when it comes to marriage that her guardian makes the decision on her behalf if a woman is the only wage earner and takes the burden of her family expenses. Furthermore, the guardian may be her younger brother.

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[41] Ali A. Al-Sestani, *Menhaj Al-Saleheen* (Kuwait:Marafie Foundation:2002)pp.25-29.

5.2.2.1. Addal

According to Kuwaiti law as mentioned, if her father – or any other guardian – refused to authorise the marriage, a woman has the right to ask the judge to be her guardian and authorise her marriage, which is the addal. That is to say, even if her guardian refuses to agree to the marriage, a woman cannot file a case to gain authority over her own life in order to marry; on the contrary, she has to seek another male's (judge) approval to get married. Such a case is called addal which, in Arabic, means preventing a woman from marrying.

Practically and socially, it is difficult to raise this kind of case where a woman stands against her family in order to ask for approval to marry. If such a request was denied, the woman would have to return to her family against whom she had brought a law suit.

In case 48/95[42] a daughter was married against her father's will – she probably got married outside Kuwait – but the father was able to revoke their marriage. The daughter brought this case against her father (which is the addal case) when he refused to marry her again to her ex-husband even though she was pregnant. According to the case notes, it is not known why the father refused the marriage, but the court decided to marry her again mainly because she was pregnant, and the Appeal Court supported such judgment.

Most of addal cases are raised when the daughters do not live with their fathers, that is to say that her parents are divorced and her mother is the custodian. Even though the mother is the custodian and the one who raised the daughter, the father is still the guardian and

[42] Law and Judgment Journal. The year of twenty-three. Volume two. January 2000. pp 308.

marriage cannot be continued without his authorization. In case 89/2001[43] both the mother and the daughter brought an addal case against her father because he refused to marry his daughter to a particular person even though he was a good person and he met the 'efficient' condition (this will be discussed later); the trial courts, both the first degree and the Appeal Court, denied their request. The trial courts did not question whether the potential husband was suitable or not, their refusal was based on the fact that they – the daughter and the mother – failed to prove the addal fact when the father claimed that the potential husband did not come to him to propose as a first step. In here, a question might be raised as to whether it is possible for the plaintiffs to bring a suit, before simply asking the father to authorise the marriage?

In such cases, the law does not mention on what basis the judge can accept or refuse her request. The two cases that will be discussed in the next paragraphs, give some hints as to how the courts decide on addal cases. These cases were decided by the first degree court. More details are given in the judgment notes. The first one is *Ishaq v. Ishaq.* [44] The plaintiff brought a case against her brother because he refused to allow her to marry, claiming that the potential husband belonged to a different sect. Although the fiancée proved that he could offer a good standard of living to the potential wife, and had a stable job, the court decided that: 'the brother – as a guardian – is the one who has the authority to decide who is suitable to marry his sister. A fiancée's "religious sect", whether he is Sunni or Shia, is one of the relevant matters that affect the efficiency standard, so the

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[43] Law and Judgment Journal. The year of twenty three. Volume one. July 2005. pp 455.

[44] This verdict was decided by the first degree court, in case number: 3131/1991.

guardian has the right to refuse the marriage on that basis if the sects of the potential couple differ.

In the second case, *Abu-grais v. Abu-grais*,[45] the guardian refused to marry off his daughter because the fiancée was Iraqi. In its judgment, the court explained that, as Article 35 of the family law is supposed to be efficient in religion (which means that the potential husband should be a decent and polite man), this can be extended to society as a whole. The court considered that nationality should be included, especially in this case where the nationality would be a reason of humiliation to her family.[46] On these grounds the court refused the plaintiff's request to allow her to marry. It is noteworthy that the plaintiff was 36 years old when raising this case. According to Article 30 of the family law, she has the final word as to whom she should marry since she is over 25. However, since the guardian is the one who has the authority to sign the marriage contract, he in fact has the final word, and this was supported by the court. In this case the court explained that 'addal' as a word is only used in cases where the guardian refuses the marriage for no valid reason, once he has a reason then he has the right to refuse the marriage.

On the other side of the argument, if the marriage happened in both the cases illustrated above, social problems might have occurred. When a woman reaches 25 years old as Article 30 states, she can decide for herself whether to get married. If this is a bad

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[45] The verdict was decided by the first degree court, in case number: 855/1995.

[46] If a Kuwaiti female married a non- Kuwaiti or any nationality other than a GCC citizen she is considered shamed in more conservative families, and would be subject to gossip in the society.

decision, the woman is the one to suffer the consequences, as any man can make a bad choice in marriage.

5.2.2.2. Efficiency

On the other hand, other than the *addal*, according to Article 34 of the family law, both the guardian and the wife have the right to revoke the marriage contract under what is called *'Al-Kafa'a'* (or 'efficiency'). If, after marriage, the wife or the guardian claims that the husband was not religious at the time of the marriage, the marriage can be revoked.[47]

This right should not be underestimated because, according to the article, if the marriage occurs against the guardian's wish[48] he would be able to revoke the marriage by claiming non-efficiency. This right is given in sequence of guardianship, according to Article 37, to:

1. The father.
2. The son.
3. The paternal grandfather
4. The brother.
5. The step-brother.
5. The uncle.
6. The step-uncle.

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[47] Family Law.~

[48] If the marriage was authorized by the judge through the 'addal' case, then the guardian cannot revoke the marriage, but in some cases the couple would travel to marry out side Kuwait, then come back, in here the guardian can have the chance to ask for the marriage to be revoked.~

While Article 35, which discusses efficiency in marriage, states that religion is the norm of the efficiency, which is another way of meaning good manners. The explanatory memorandum of the law clarifies that good manners imply that the man is not dissolute or dissipated.

According to Article 39, in order for the guardian to claim non-efficiency there are some conditions:

1. If the guardian is aware of the marriage for at least one year.

2. If the guardian has shown that he agreed to the marriage in any way.

3. If the wife became pregnant.[49]

Case 30/87[50] can give an ideal example of some situations where the father misused his power of marrying his daughter – mostly – to spite his divorced wife. In that case the daughter – 21 years old – got married outside Kuwait – in London – when her husband asked her mother – custodian – and her maternal grandfather to marry her they agreed, but her father did not. The mother tried to convince him to authorise the marriage, but she failed. He did not give any reason why he refused this marriage. That was the reason for the couple to travel and get married at the Islamic Centre in London. When they got back, the father filed this law suit asking the court to revoke their marriage because it was completed without his authorization. Both court degrees supported his request and revoked their marriage. In such cases, even though the mother was the one who raised the

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[49] Family Law.~
[50] Law and Judgment Journal. The year of sixteen, volume two. June 1995. pp 279.~

child until she reached marriageable age, while the father was away from the daughter, the law – still – preserves the right of marrying the child to him only.

In Jordanian family law, efficiency is measured by the financial status of the husband or the potential husband.[51] For example, it gives the guardian the right to ask for the marriage to be revoked if the woman – whether a virgin, divorcée or widow – married someone who is not financially equal to her. However, John Esposito argues that according to Hanafi School, there are six factors the judge would consider for kafa'a matter which are: '*(1) family, (2) Islam, (3) profession, (4) freedom, (5) good character, and (6) means.*'[52]

Some questions included in the questionnaire considered the guardian and the authorization of marriage. Some questions were added to the men's questionnaire which were not included in the women's. The most important question in this instance was: Do you think that the law that forbids woman from authorizing her own marriage is a fair law? The chart shows some differences not only between men and women, but also among women too.

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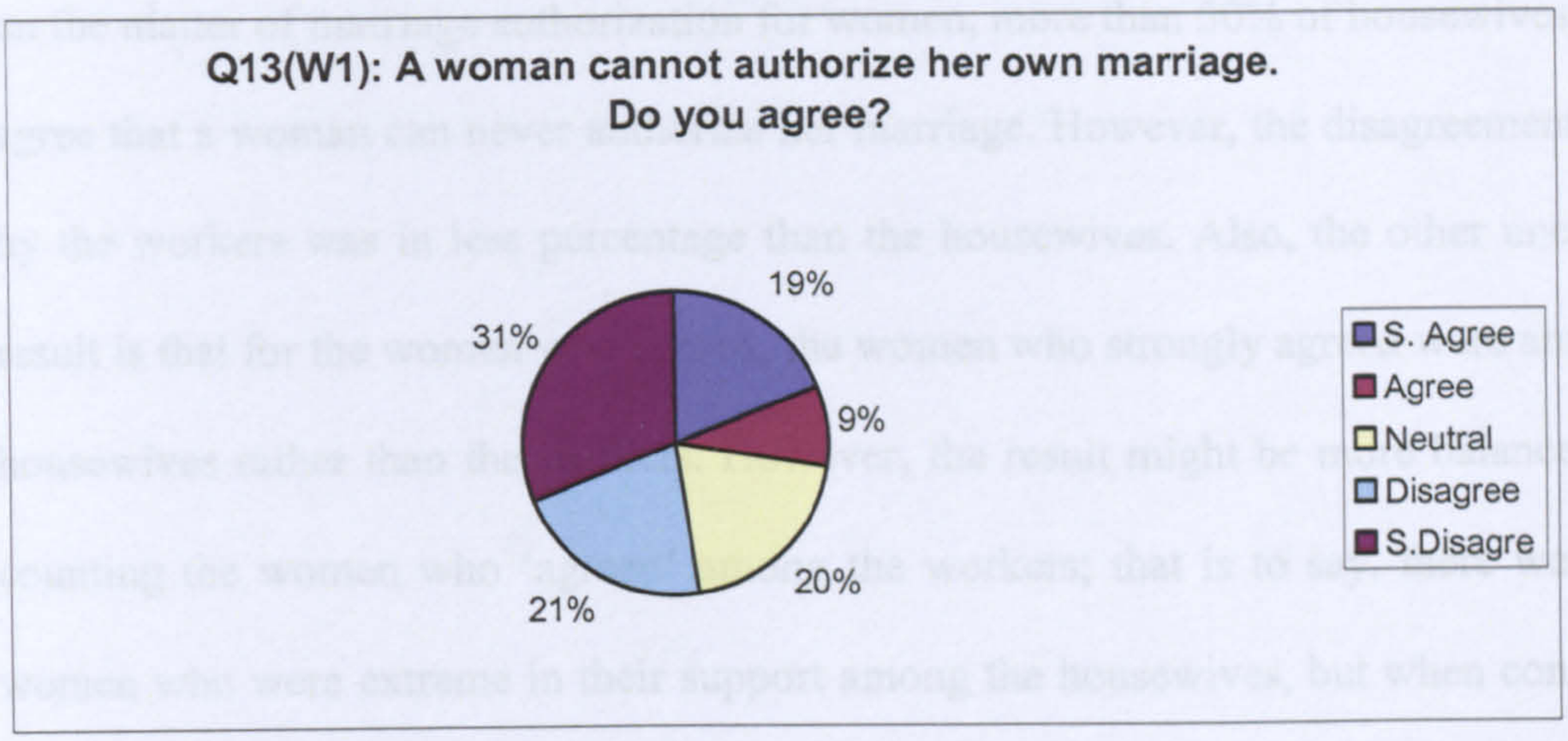
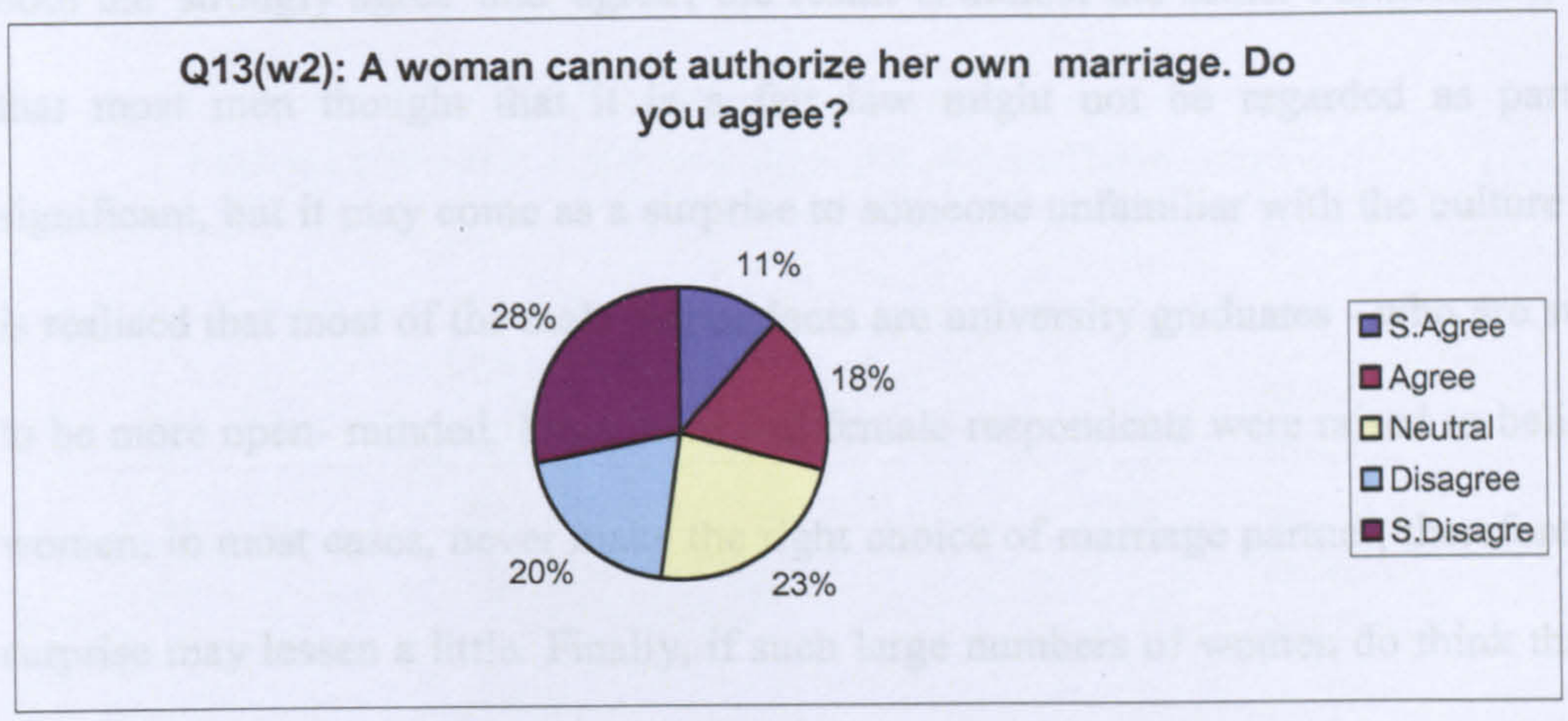
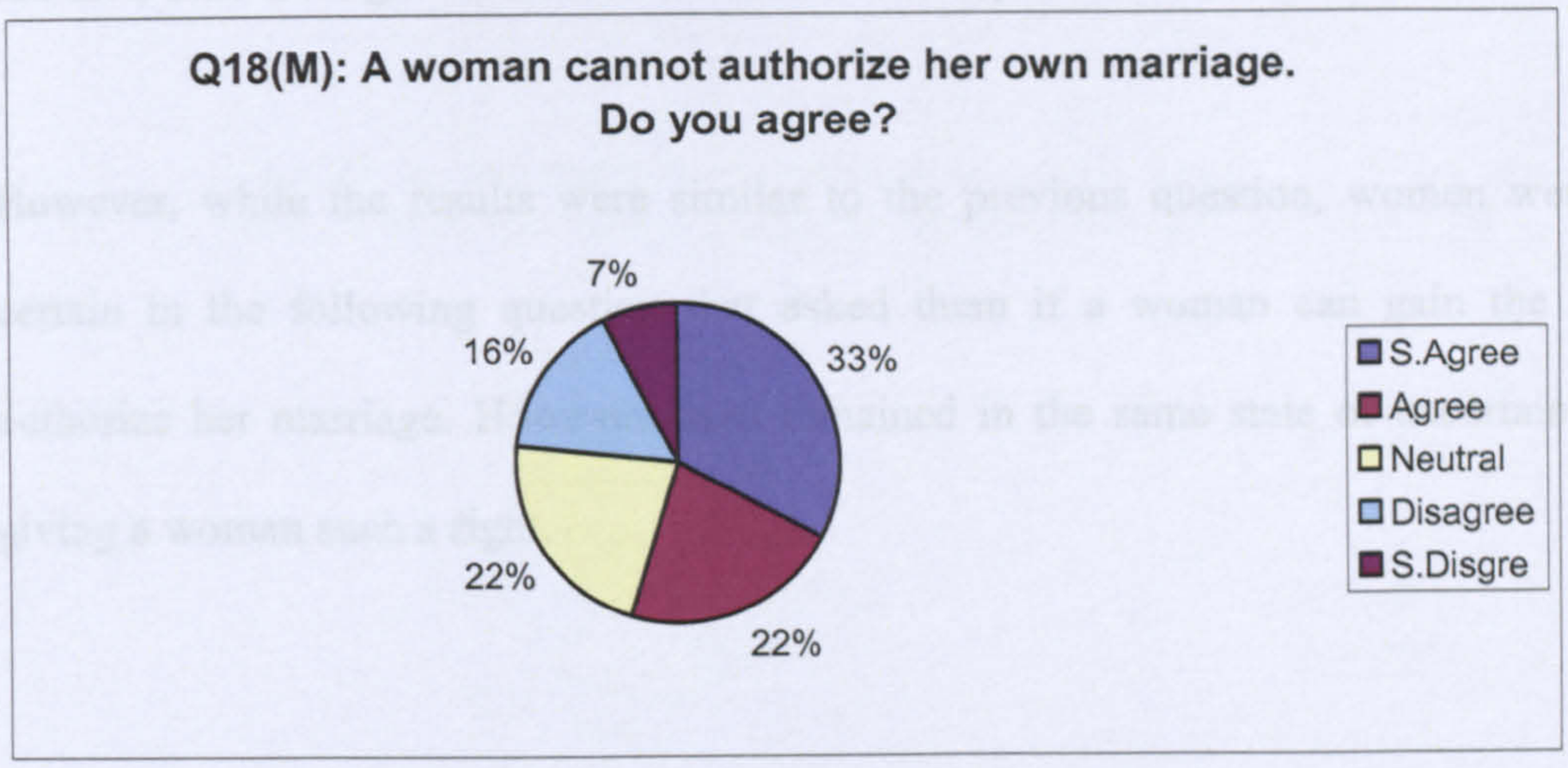
[51] Article 20 of the Jourdan Family Law.˜

[52] John L. Esposito. *Women in Muslim Family Law.*(New York: Syracuse University Press 2nd, 2001) pp 21.˜

Figure 5.4 Authorizing the Women's Marriage.



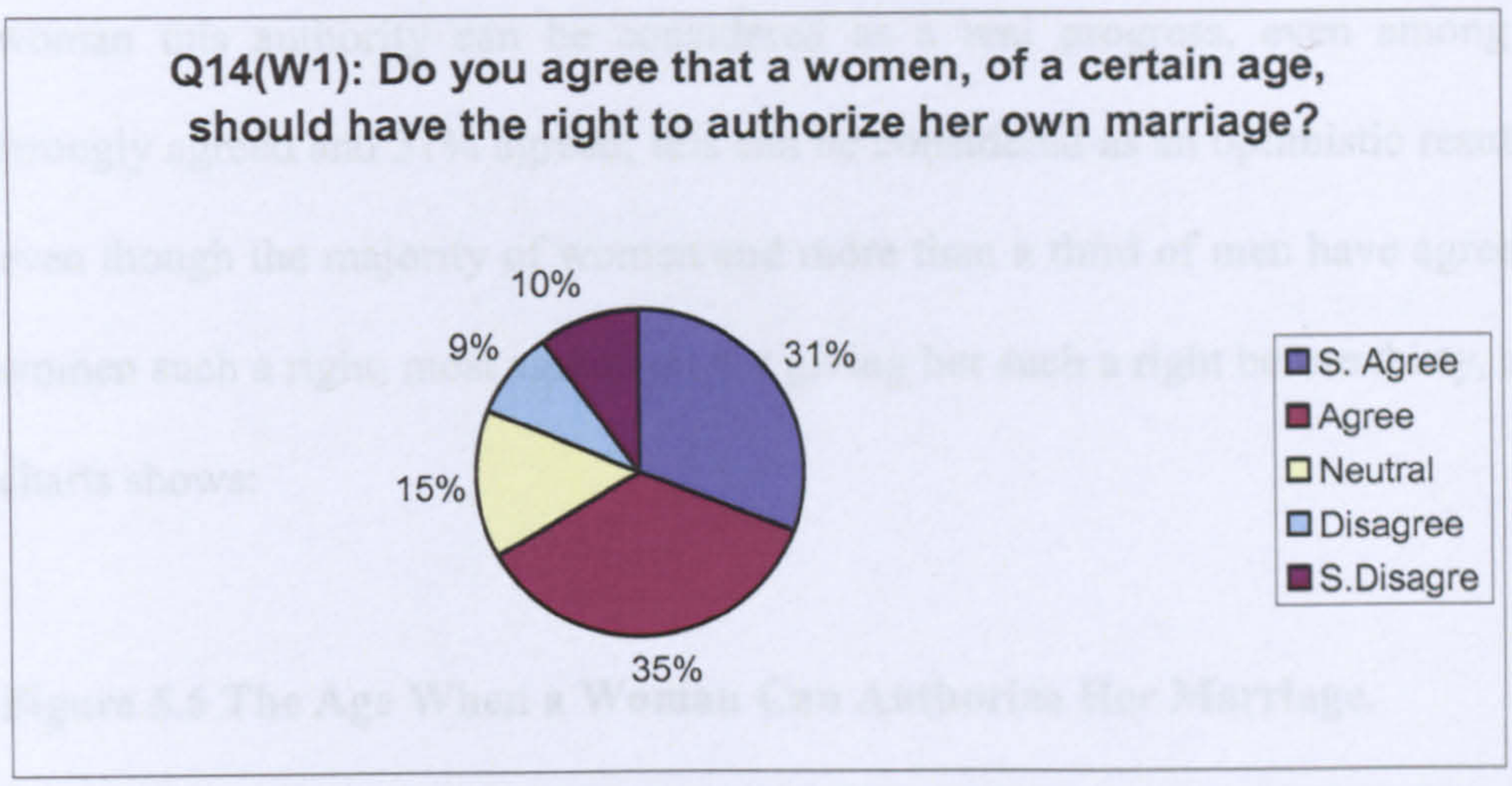


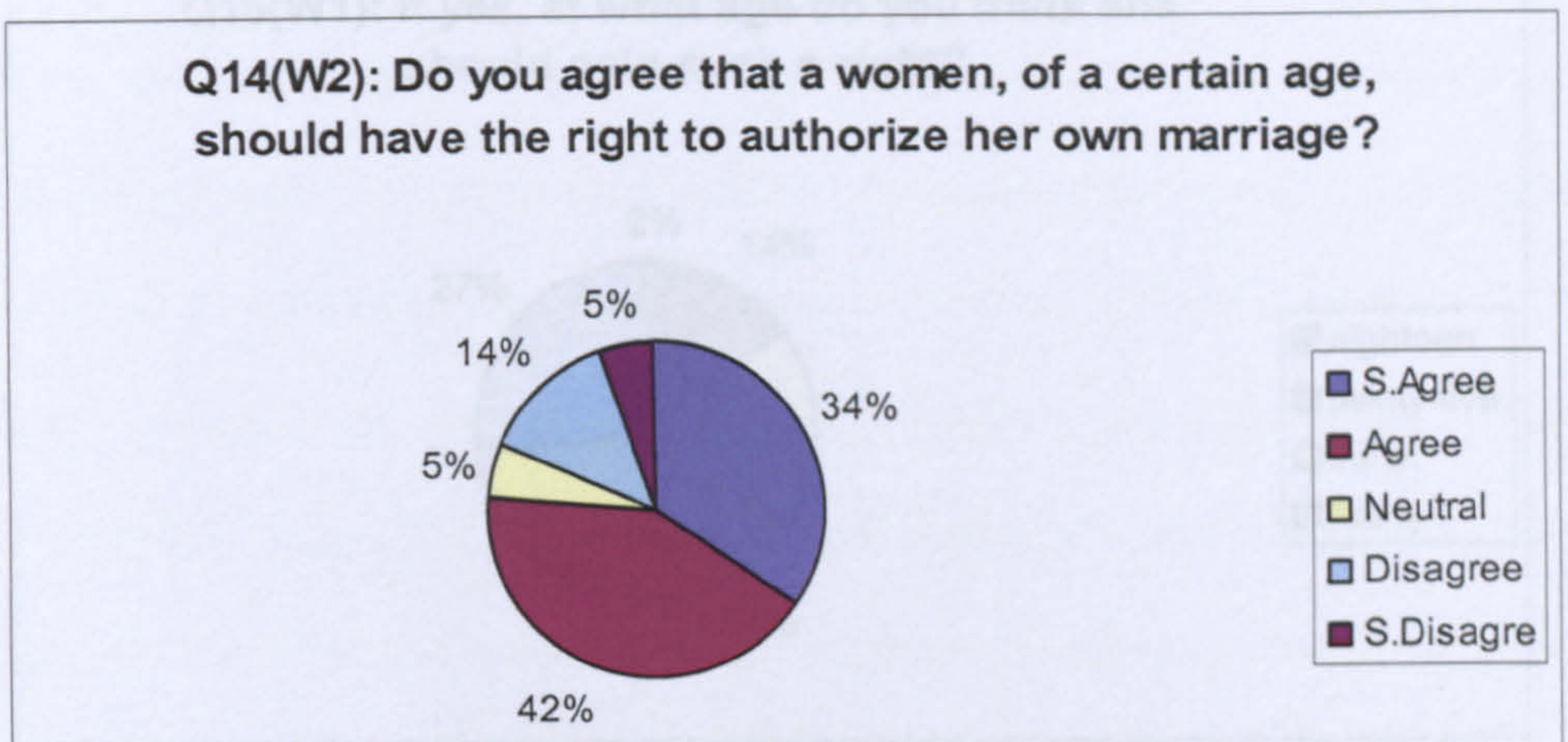


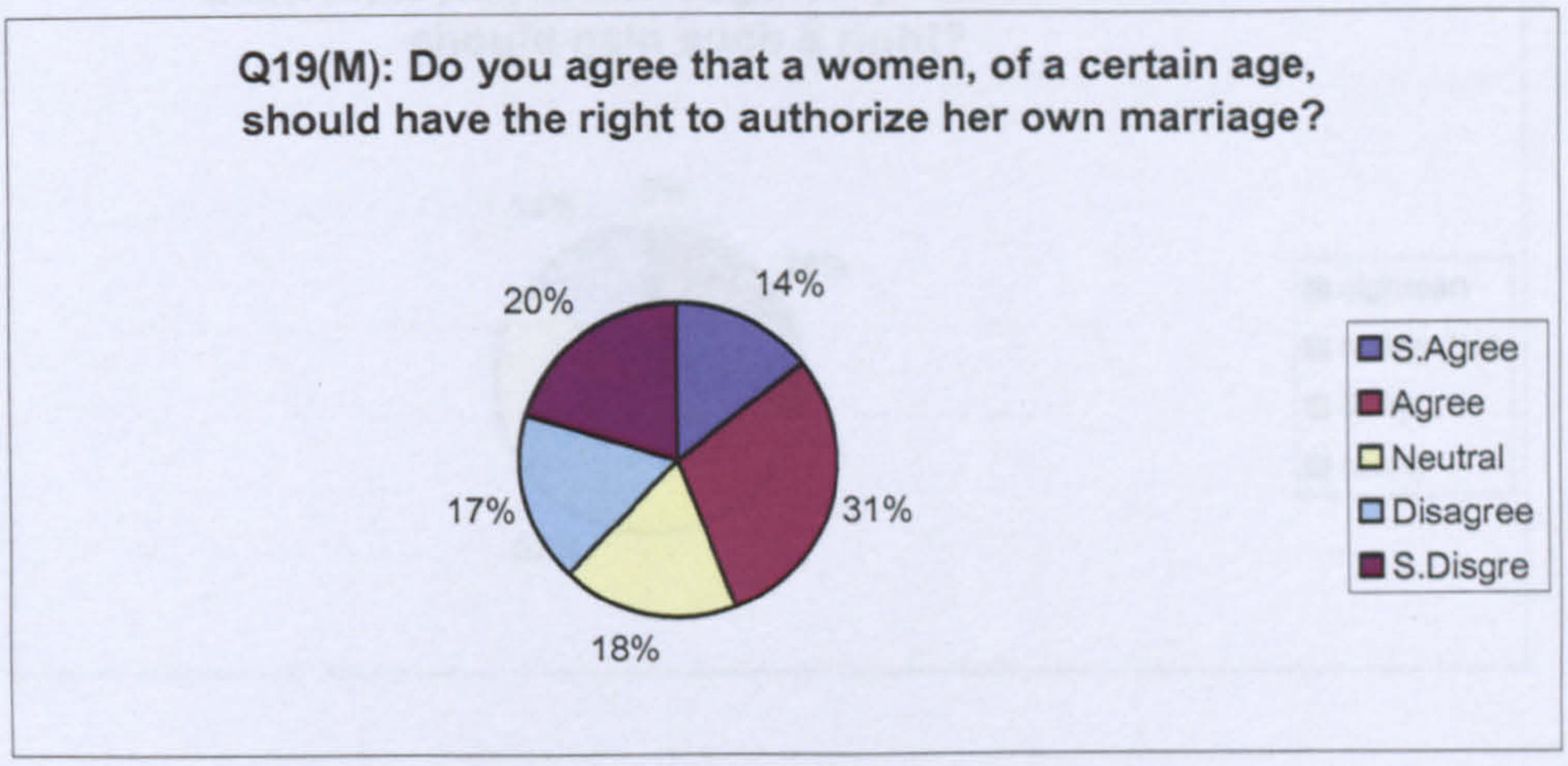
While there is a slight difference among women - housewives and workers - who agreed on the matter of marriage authorization for women, more than 50% of housewives did not agree that a woman can never authorize her marriage. However, the disagreement voiced by the workers was in less percentage than the housewives. Also, the other unexpected result is that for the women who agreed, the women who strongly agreed were among the housewives rather than the workers. However, the result might be more balanced when counting the women who 'agreed' among the workers; that is to say, there were more women who were extreme in their support among the housewives, but when considering both the 'strongly agree' and 'agree', the result is almost the same. Furthermore, the fact that most men thought that it is a fair law might not be regarded as particularly significant, but it may come as a surprise to someone unfamiliar with the culture when it is realised that most of the male respondents are university graduates - who are supposed to be more open- minded. Most male and female respondents were raised to believe that women, in most cases, never make the right choice of marriage partner; therefore, such a surprise may lessen a little. Finally, if such large numbers of women do think that it is a fair law, then the high numbers of men should be expected.

However, while the results were similar to the previous question, women were more certain in the following question that asked them if a woman can gain the right to authorize her marriage. However, men remained in the same state of uncertainty as to giving a woman such a right.

Figure 5.5 Can a Woman Authorize Her Marriage?

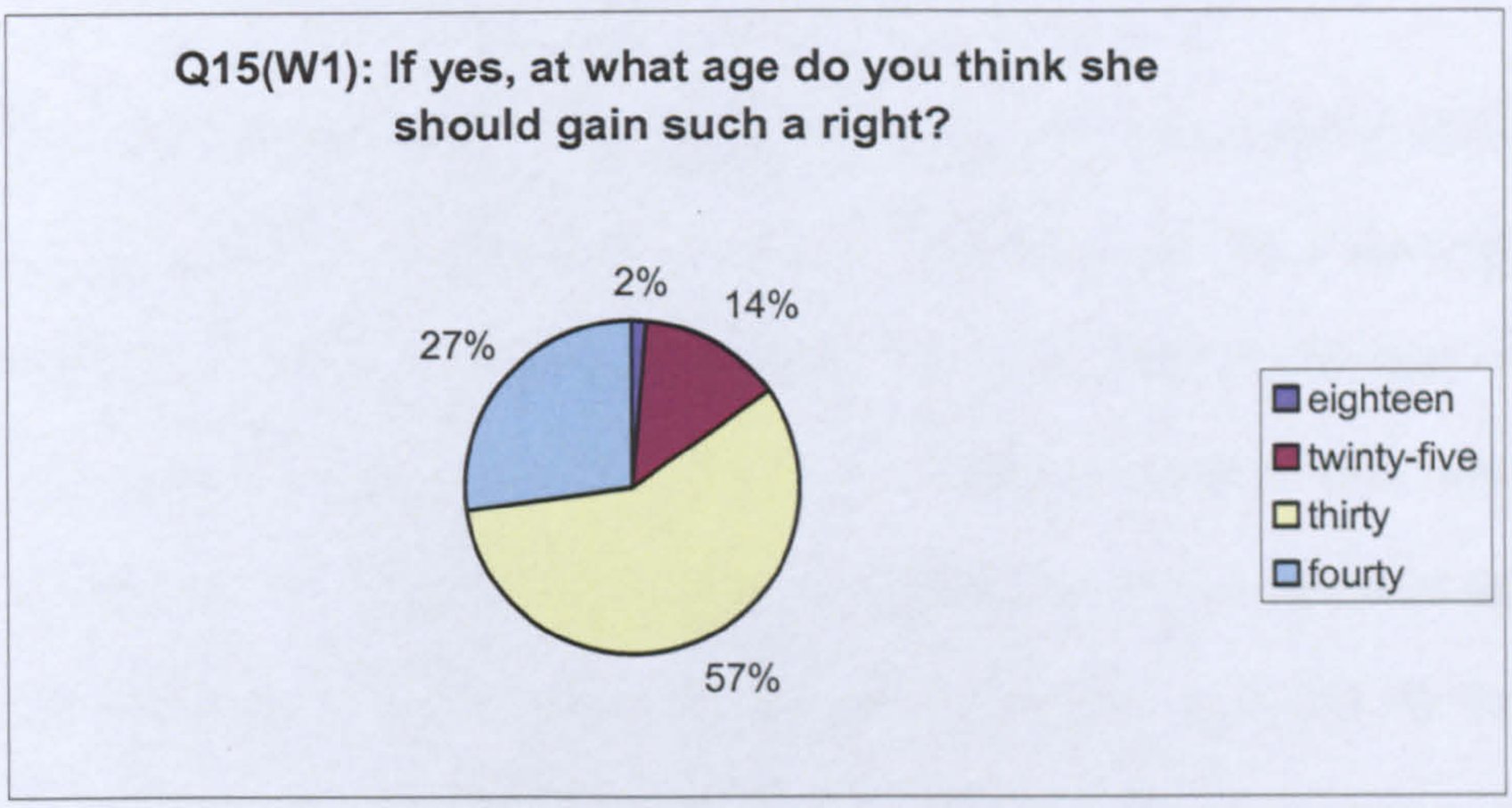


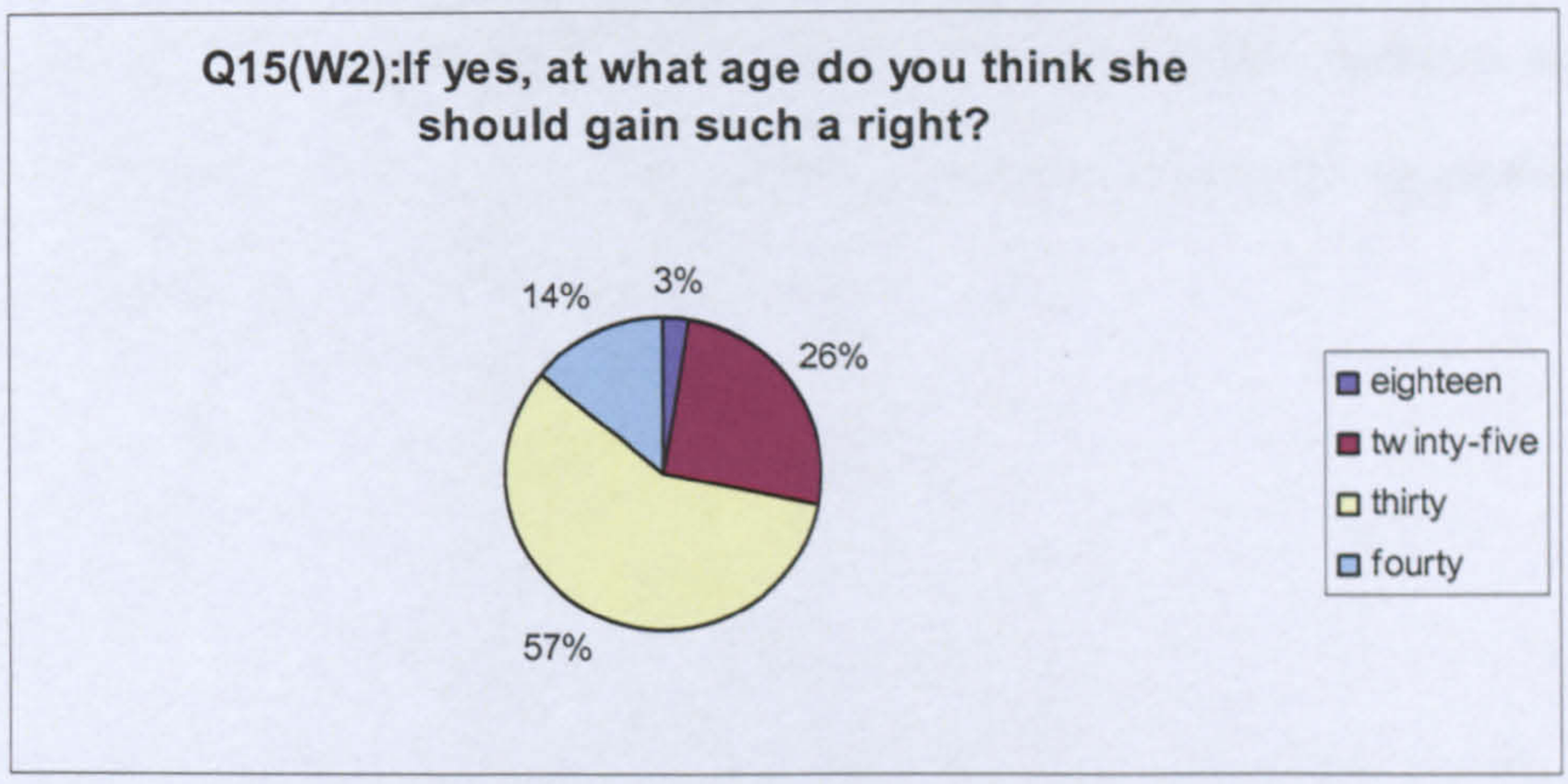


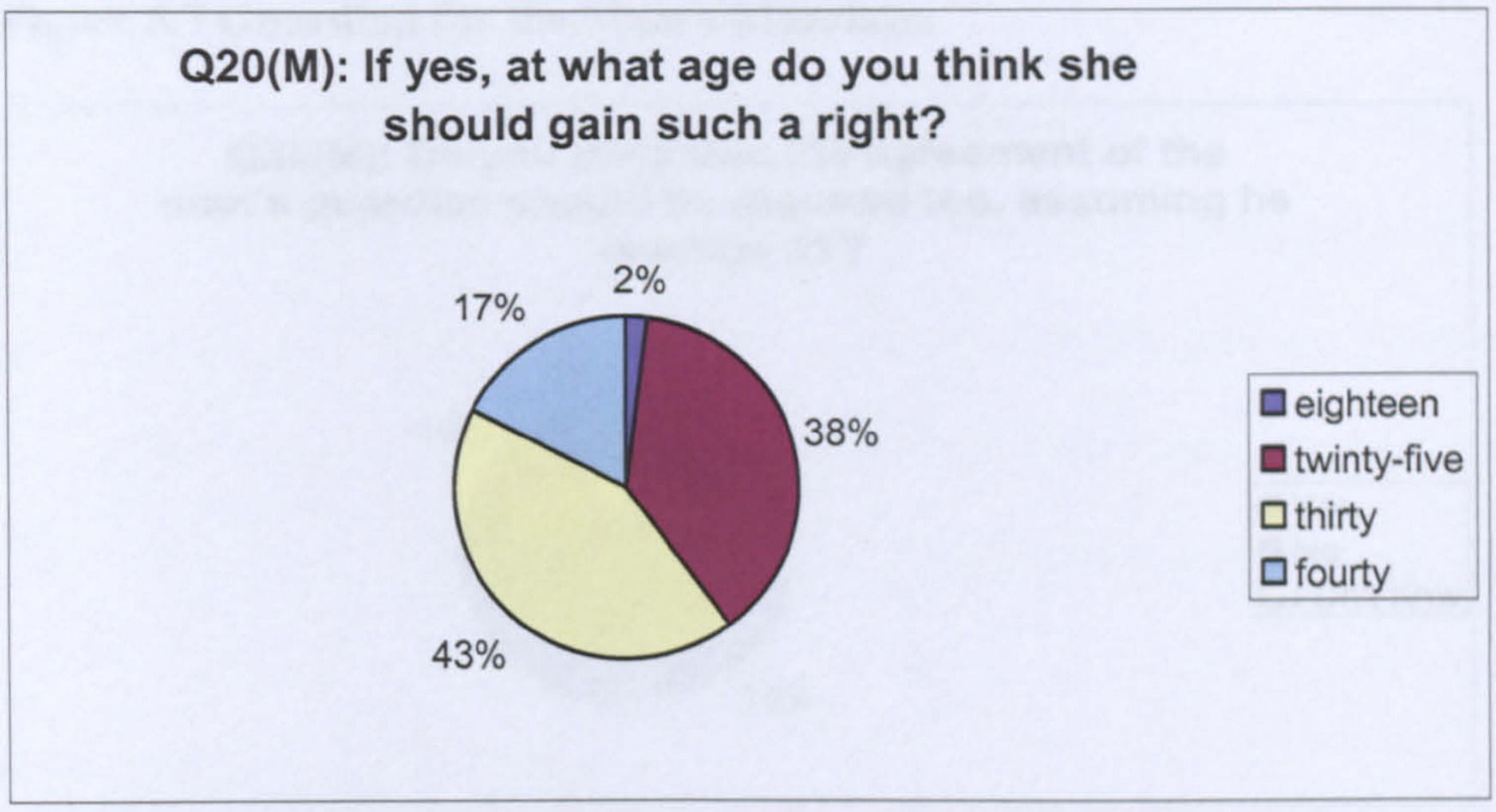


On the other side of the argument, reaching such a percentage of agreement on giving woman this authority can be considered as a real progress, even among men. 14% strongly agreed and 31% agreed; this can be considered as an optimistic result. However, even though the majority of women and more than a third of men have agreed on giving women such a right, most agreed on not giving her such a right before thirty, as the below charts shows:

Figure 5.6 The Age When a Woman Can Authorize Her Marriage.

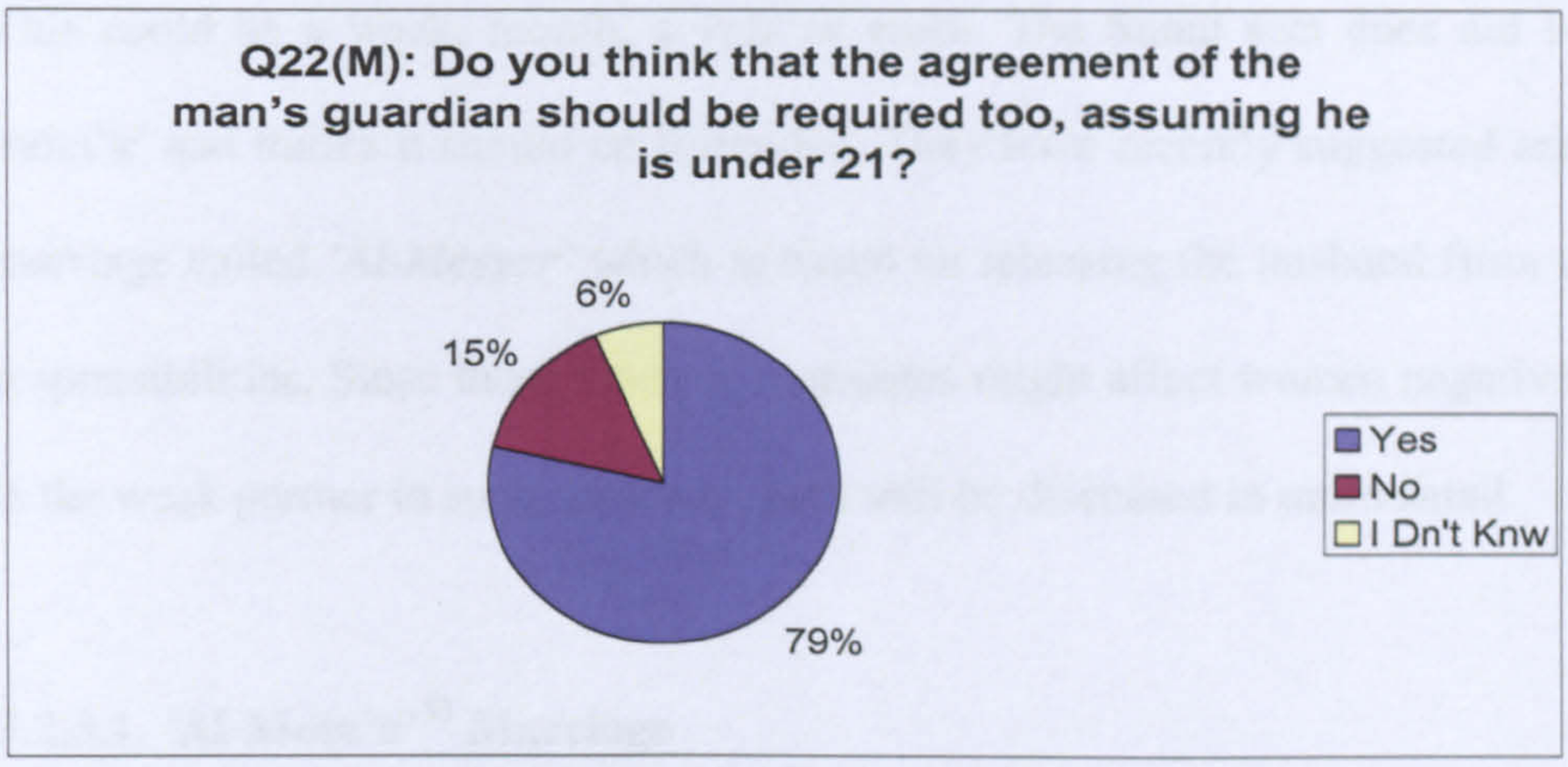






When the percentage is exactly the same with the housewives and workers, 57% of both samples agreed on the age of thirty, 26% of workers believe that it can be given at the age of 25, were 14% of housewives believe so. The men's chart can be more surprising when 38% agreed on the age of 25 which is a higher percentage than both workers and housewives. While the high percentage of employed women and men fall between the age of 25 and 30, the housewives fall between the ages of 30 and 40. However, in the men's questionnaire, a question was added of whether the guardian's consent should be required in a man's marriage too, but because asking such question can sound very strange to many, a statement was added to make it sound more reasonable which is: 'if the man was under 21 for example'.

Figure 5.7 Guardian for the Male's Marriage.



It is true that while most men agreed on the previous question, it is only true if he was under 21. Therefore the results shows some cultural contradictions: while most of the respondents – men and women – agreed that women can get married at a younger age, because of the reasons stated earlier (including the belief that a female gains maturity before a male), at the same time, they do not acknowledge her maturity in allowing her to authorise her own marriage, at least not before 30 (or even 40 in some answers). It is a common culturally determined belief that a woman cannot make the right choice when it comes to marriage, becomes very emotional, and is easy to be deceived. This neglects the fact that none of this relates to sex - both the male and the female can make a wrong choice in marriage.

5.2.3. Different kinds of marriages

According to Kuwaiti family law, there is only one kind of marriage. This is the traditional kind that exists in almost every culture. According to the Shia', there is

another kind of marriage called *'Al-Mota'a'* which is based on a certain period of time. This could be a week, month, a year or more. The Sunni sect does not believe in al-mota'a' and thinks it should be forbidden. They have recently suggested another type of marriage called *'Al-Mesyar'* which is based on releasing the husband from any marriage responsibilities. Since these kinds of marriages might affect women negatively, since she is the weak partner in such contracts, both will be discussed in more detail.

5.2.3.1. 'Al-Mota'a'[53] Marriage

It might be important that before explaining this kind of marriage to first define the word mota'a. It means to benefit from something,[54] but once it is associated with marriage it means the sexual pleasure. The main idea behind this marriage as the name indicates is that it is a temporary marriage. However, there are some conditions for this marriage:

1. Offer and acceptance: the potential husband has to offer the woman the marriage – as *mota'a* – in clear terms and she has to accept it.

2. The dowry: if he fails to pay it, then the marriage is void.

3. The duration: it should be stated whether the marriage would last for a week, month, or year.

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[53] There is a huge debate about this marriage between the Sunni and Shia. The former believe that this marriage should be forbidden totally and do not accept it, while the Shia believe in it and gave proof that it is allowed in Islam. However, the point here is not the debate whether it is allowed or not but to discuss how such a marriage can affect women.~

[54] Mohammad Al-Hussaini. *What is the 'Mota'a marriage(Ma Howa Zawaj Al-Mota'a)*[online] [undated] available from:
http://www.banihashem.org/alkotob/06/06.htm
[accessed 09-01-2006]~

4. Religion: the groom has to be Moslem, but the bride can be Moslem, Christian or Jewish.[55]

The temporary marriage has several rules that are different from regular marriage. These rules are:

1. The husband does not have the burden of paying for life expenses as in a regular marriage.

2. The wife has no right to ask her husband to spend the night.

3. No one can inherit the wealth of the other if a partner dies.

4. The marriage ends without divorce.

5. The *Iddat* is two months (in a regular marriage it is three months) but if the woman reaches the menopause, then the duration is only forty five days.

6. A man can marry as often as he desires even if he already has four wives (as allowed in a regular marriage).[56]

Although this kind of marriage is allowed according to the Shia's teaching, it is not accepted socially in Iran where most people are Shia. Many Iranian thinkers are against it and some of them describe it as legal prostitution. Since the marriage can create problems and it is forbidden within the Sunni sect, it is not allowed in Kuwait, but acts as an ideal example of how the Sharia can be interpreted differently. The Shia depends on allowing such marriage on the following Qur'anic verse:

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[55] Mohammad Al-Hussaini. *What is the 'Mota'a marriage(Ma Howa Zawaj Al-Mota'a)*[online] available from:
http://www.banihashem.org/alkotob/06/06.htm
[Accessed 9th Jan.2006]

[56] Ali A. Al-Sestani. *Menhaj Al-Saleheen*. (Kuwait:Marafie Foundation:2002) pp 73-82.

Also (prohibited are) women already married, except those whom your right hands possess: thus hath Allah ordained (prohibitions) against you: except for these, all others are lawful, provided ye seek (them in marriage) with gifts from your property, desiring chastity, not lust. Seeing that ye derive benefit from them, give them their dowers (at least) as prescribed; but if, after a dower is prescribed, ye agree mutually (to vary it), there is no blame on you, and Allah is All-Knowing All-Wise.[4:24]

5.2.3.2. Al-Mesyar[57] Marriage

Al-Mesyar (short daytime visit) marriage is a new kind of marriage introduced about ten years ago,[58] though it existed in the Arabian Peninsula before Islam. This concept of marriage appeared within the Sunni school. As the name indicates, it concerns a burden-free marriage on the husband's side. This marriage is the same as a regular marriage with all of its conditions, except that the husband is not obliged to pay anything, to spend the night, or to offer any accommodation for the wife. One of its main conditions is that the marriage has to be announced but it will be known only among her immediate family.

This marriage reappeared at a time when there were a lot of spinsters, divorcées, and widows all of whom are financially independent. However, for some reasons they cannot

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[57] The word in Arabic language in general – in Saudi dialect in specific- means 'visit' because the husband would only 'visit' his wife and does not live with her, it also existed in pre-Islam age but it was called 'Day Marriage' since a husband does not spend the night.

[58] Susan Barakat. *The Experience of Al-Mesyar Marriage Divorcee.*[online] [22-01-2006] Available from: http://www.amanjordan.org/a-news/wmview.php?ArtID=1978&page=1 [Accessed 1st April 2006]

leave their houses to live with their husbands or, in other circumstances, the husband cannot afford the marriage expenses, or he does not want his first wife to know, and he can only afford this type of marriage. The *mesyar* wife accepts this form of marriage because, as some believe, it is better than nothing.

The marriage can take one of two forms about which Islamic scholars have different opinions. First, if the concession for the wife's rights (for example, alimony or accommodation) is not mentioned in the contract and it appears as a regular marriage, but the mesyar contract was only between the man and the woman then most scholars agree that the contract is legal. Second, if the 'rights given up' clause was mentioned in the contract, then there are three different opinions: (1) the marriage is void since the conditions are illegal; (2) the marriage is legal but the conditions (the concession) are illegal and it will not have any consideration; and (3) the marriage with its conditions is legal.[59] However, if someone thinks that the conditions are illegal, then the marriage should be void. This would be true even if the conditions were not mentioned in the contract so that no one could take the advantage of a legal marriage while in fact it is mesyar marriage in which the wife would be deprived of her rights.[60]

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[59] Those different opinions were drawn from the Islamic Schools, but cannot be referred to any person in particular. For each Islamic Schools there would be students or followers who would decide which opinion the School is going to adopt. In some cases there would be more than one opinion in the same school, but the one that most of followers would agree on is the opinion that it will be taken into consideration.˜

[60]Bani Hashem Organization. *What is Mesyar Marriage.* [online] [undated] Available from: http://www.banihashem.org/alkotob/06/05.htm [Accessed 3rd Jan.2006] Also
Al-Jazeera Channel. Al-Mesyar Marriage. [online] [date of the episode 3-5-1998] Available from: http://www.aljazeera.net/channel/archive/archive?ArchiveId=90777 [Accessed 3rd Jan. 2006]
Those three opinions are concluded from three of the main Islamic Schools:Hanafi, Shafe', and Hanbali, either given by themselves or by their students. However, even within the same school, their were disagreement on the matter.˜

Most mesyar marriages happen if the couple live in different towns. The husband would 'visit' his wife once or twice a month. However, people can take advantage of this and abuse it since the husband has no burdens. Some Islamic scholars, mostly in Saudi Arabia –such as Al-Albani and Ibn-Othaimeen, argue that this marriage is haram and should be forbidden for two reasons:

First, it does not achieve the purposes the marriage was legalised for. This is supported by the following verse:

And among His Signs is this, that He created for you mates from among yourselves, that ye may dwell in tranquillity with them, and He has put love and mercy between your (hearts): verily in that are Signs for those who reflect.[30:21]

Second, the children will not have the chance to live with their fathers or to see him.[61]Other scholars such as Ibn-Bazz would legalise mesyar, but dislike the fact that it must remain secret from the first wife.[62] There are different opinions as to whether this kind of marriage is halal or haram, and even scholars who legalise it dislike it.[63]

This kind of marriage has became very popular in Saudi Arabia, though some[64] argue that it is similar to al-mota'a marriage because it is like a legal or halal prostitution since the

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[61]Mohammad Al-Hussaini. *What is Al-Mesyar Marriage.*[online][undated] Available from: http://www.banihashem.org/alkotob/06/05.htm
[Accessed 9th Jan.2006]

[62]Bani Hashem Organization. *What is Mayar.*[online] [undated] Available from: http://www.banihashem.org/alkotob/06/05.htm
[Accessed 3rd Jan.2006]

[63] Ibid.

[64] Abdulla Kamal. *Al-Da'ara Al-Halal* (Legal Prostitution). (Al-Da'ara Al-Halal) (Bairut:Al-Maktaba Al-Thagafeya,1997) pp 66-69.

main goal of this marriage is sexual fulfilment whereas marriage according to Islam is more sophisticated and is not solely based on sexual fulfilment.[65]

A family law judge[66] in Kuwait states that 'we have only heard about it', thereby indicating that it does not yet exist in Kuwait.[67] However, he continues, if a marriage is without court supervision, then it is not 'legal', and even if there was a marriage contract with conditions that contradicted the law or Sharia, then it will not be authorized.

However, the issue might get more complicated when The Islamic World Organization issued fatwa lately – April 2006- allowing the Mesyar marriage, saying that as long as it has the required conditions, then it is legal or halal.[68]

Ironically, the Sunni sect forbids mota'a marriage as they would describe it as prostitution, but at the same time they legalise mesyar marriage. It is true that there are differences between the two kinds of marriages, but the main goal for both is to allow the fulfilment of sexual desire. It is not surprising to see the result of a public survey of 5075 men, 72% agreed with mesyar marriage, while only 28% refuted it. Women have more reservations about the issue but did not give their clear opinion about it.[69] The results reflect that in such a marriage a man would only gain from it and never lose.

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[65] Kamal, A. (1997) pp.66-69.~
[66] Faisal Bo-Resli.~
[67] Faisal Bo-Resli interview at the Palace of Justise- Kuwait- 05-02-06.~
[68] CNN Arabic. [online] [15th April 2006] Available from:
http://arabic.cnn.com/2006/entertainment/4/13/islam.fatawi/index.html~
[Accessed 21st April 2006]
[69] Al-Watan. *Most Suadi Men agree on Mesyar Marriage.*[online] [undated] Available from:
http://www.watan.com/modules.php?op=modload&name=News&file=article&sid=4131
[Accessed 15th March 2006]~

Shahla Ha'eri[70] argues that when Islam first came to the Arabian Peninsula it unified all existing marriage types. Marriage was by contract and it shifted the right of taking the dowry away from the father. This was a right that he had to waive to his daughter as stated in the Qur'an:

And give the women (on marriage) their dower as a free gift.[4:4], so Hae'ri states that Islam has changed women's position from being an object for sale into being a party in the contract. As a party the woman has to agree to the contract in order for it to be valid. This explains how, according to the Shia teachings, a woman is more independent and able to negotiate her own destiny. Hae'ri concludes that according to Islam the marriage is a kind of commercial contract, and is also a social, legal and religious form of contract. She agrees with Noil Kolson that the regular marriage is similar to a selling contract while the *mota'a* marriage is similar to a renting contract since it is for a certain period of time and for a certain amount of money for a specific task.[71]

Since the mesyar marriage is a new issue, respondents – especially women – do not support it as the charts show:

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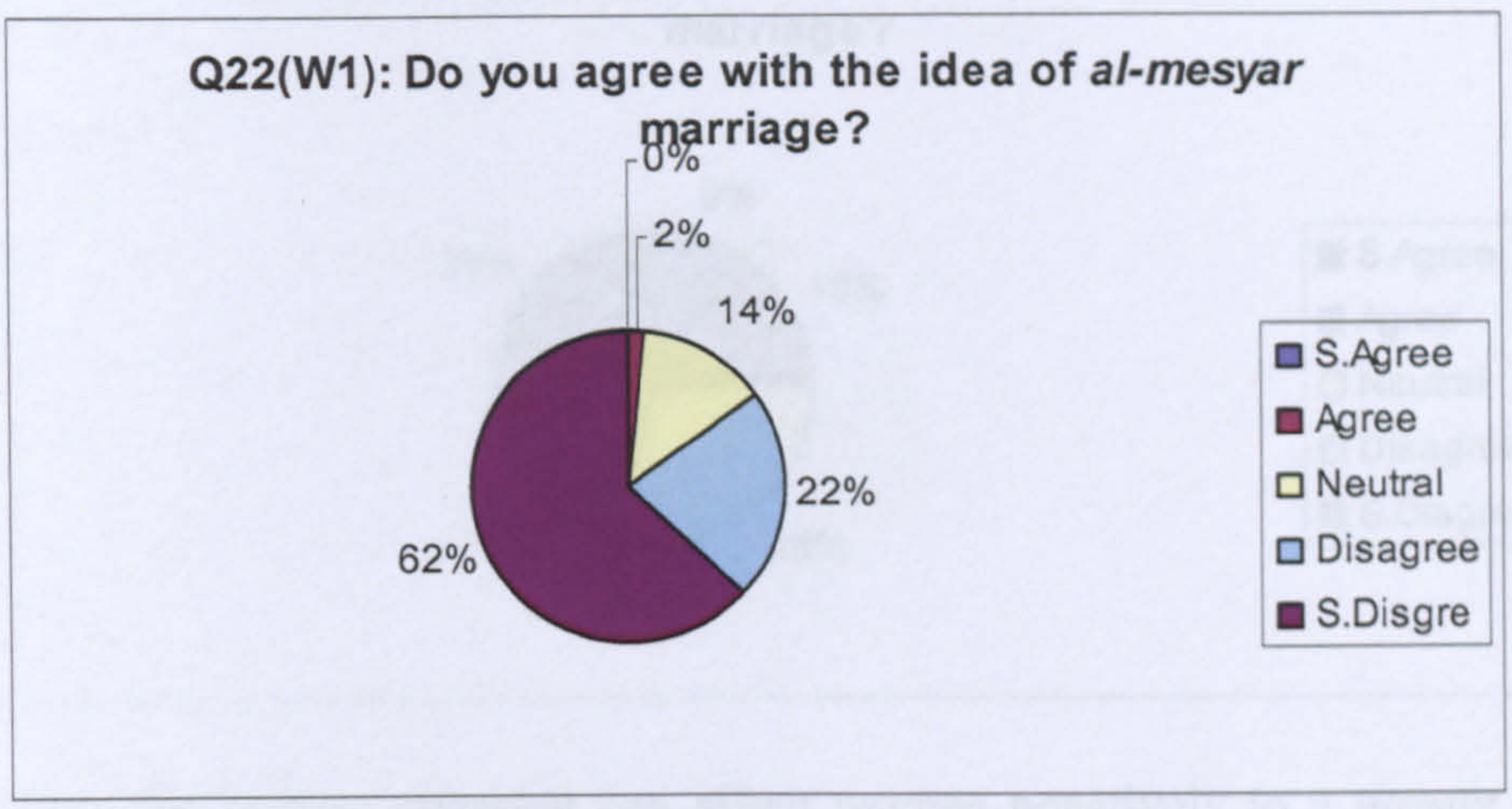
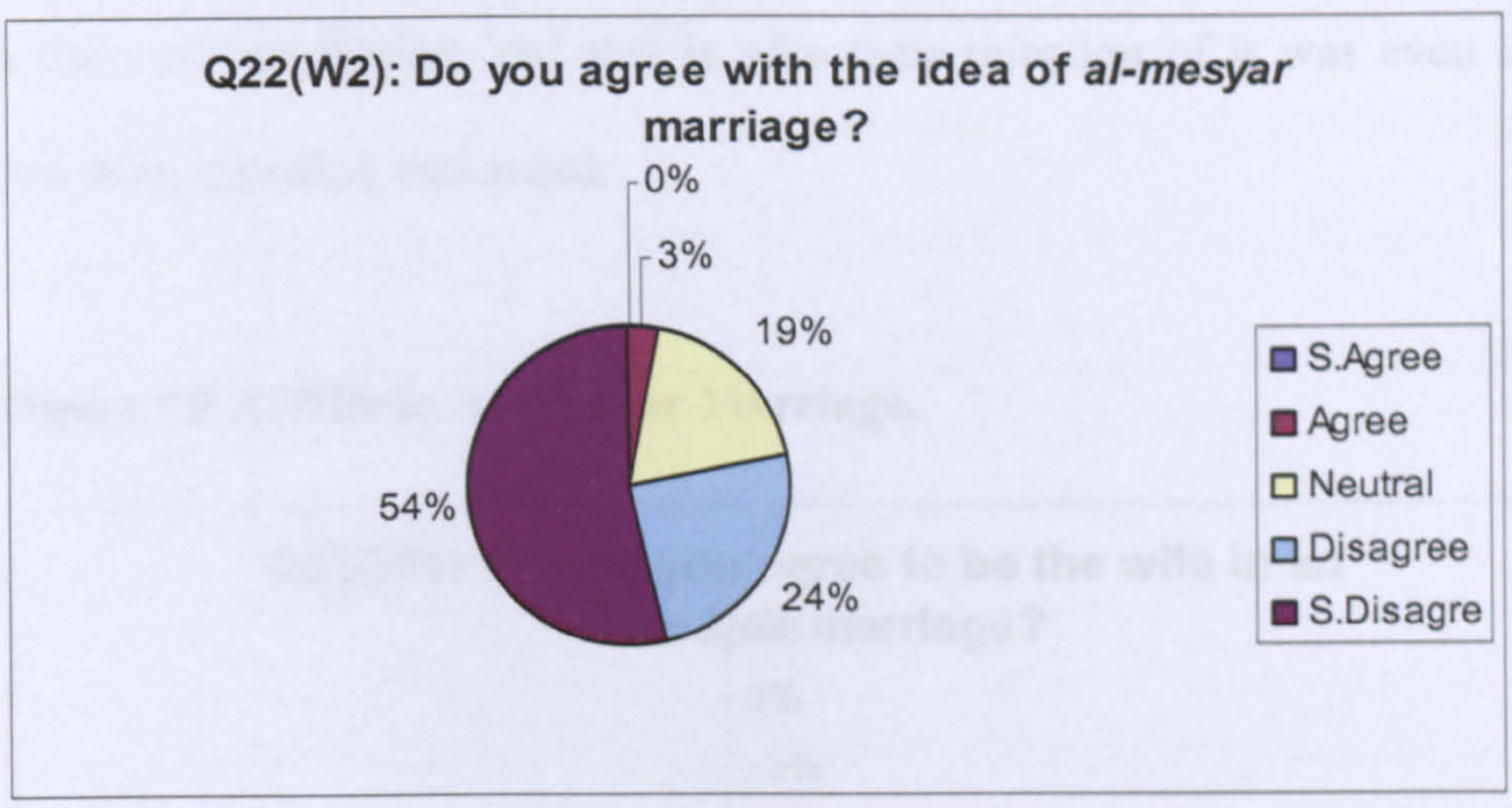
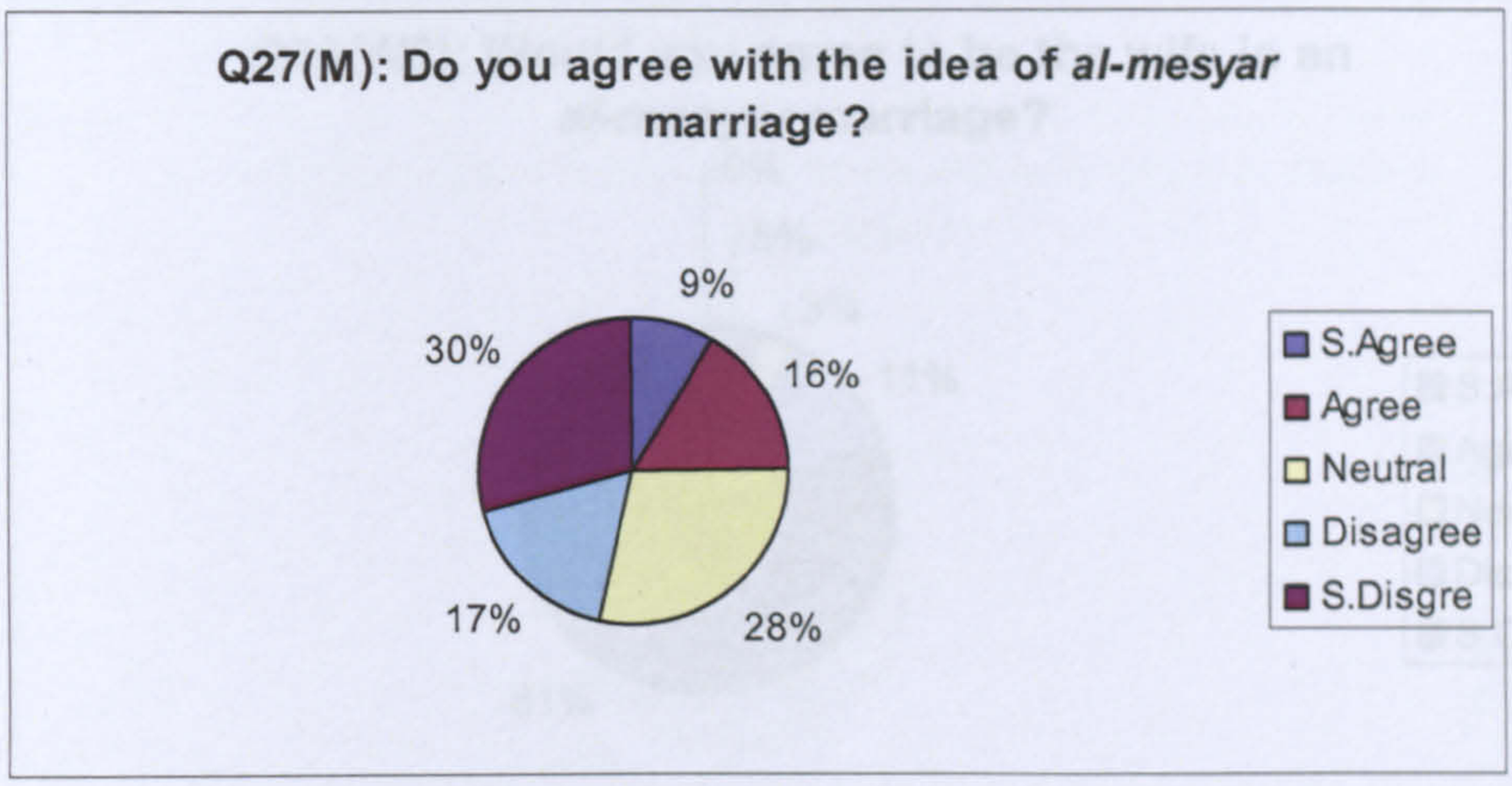
[70] Anthropologist Iranian scholar and granddaughter of one of the famous religious scholars in Iran, Ayato Allah Hae'ri.~

[71] Dr. Shahla Hae'ri *Marriage As a Contract.* [online] [undated] Available from: http://www.balagh.com/mosoa/marah/5c0j2rmb.htm [Accessed 28th Feb.2006]~

Figure 5.8 Al-Mesyar Marriage.

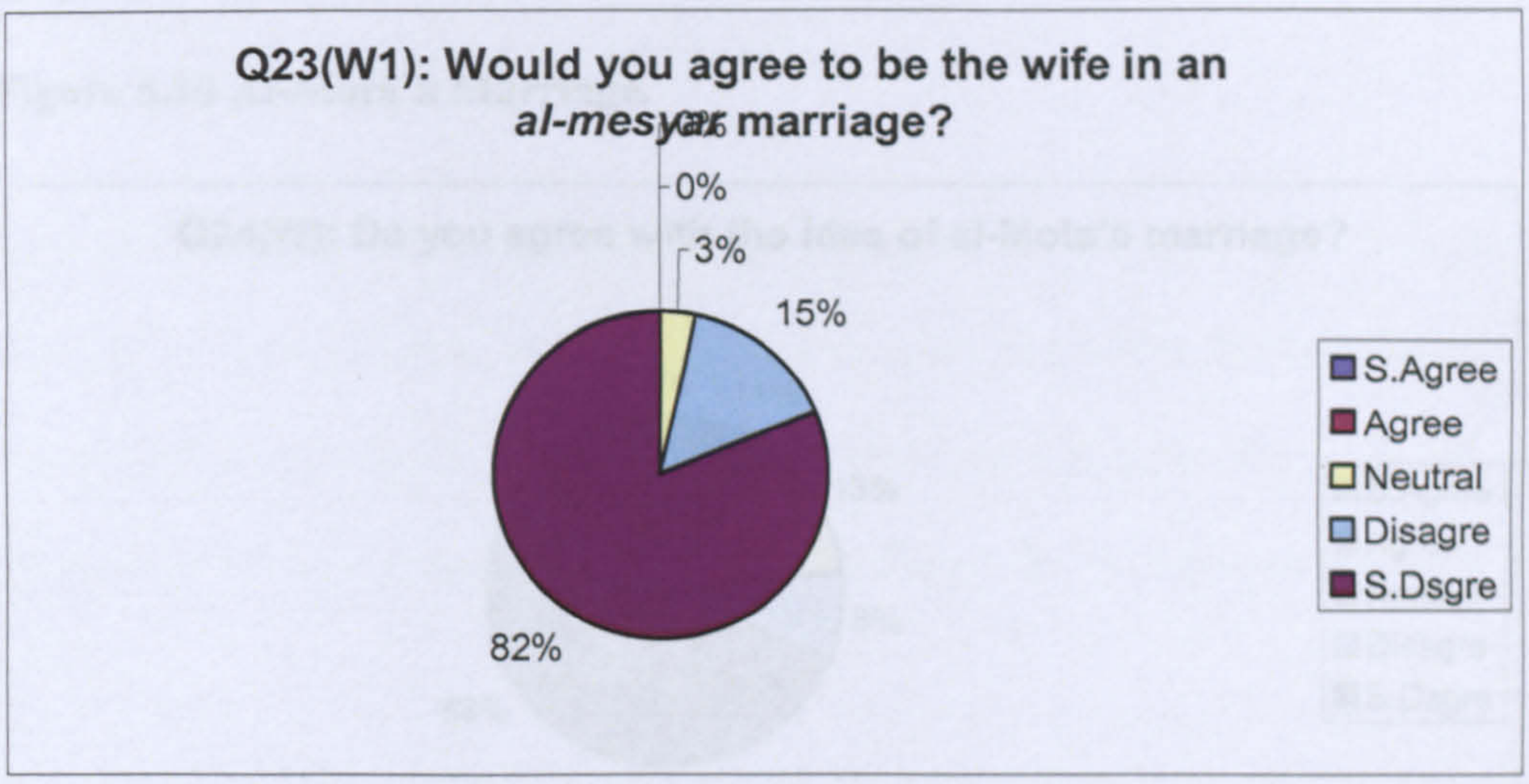


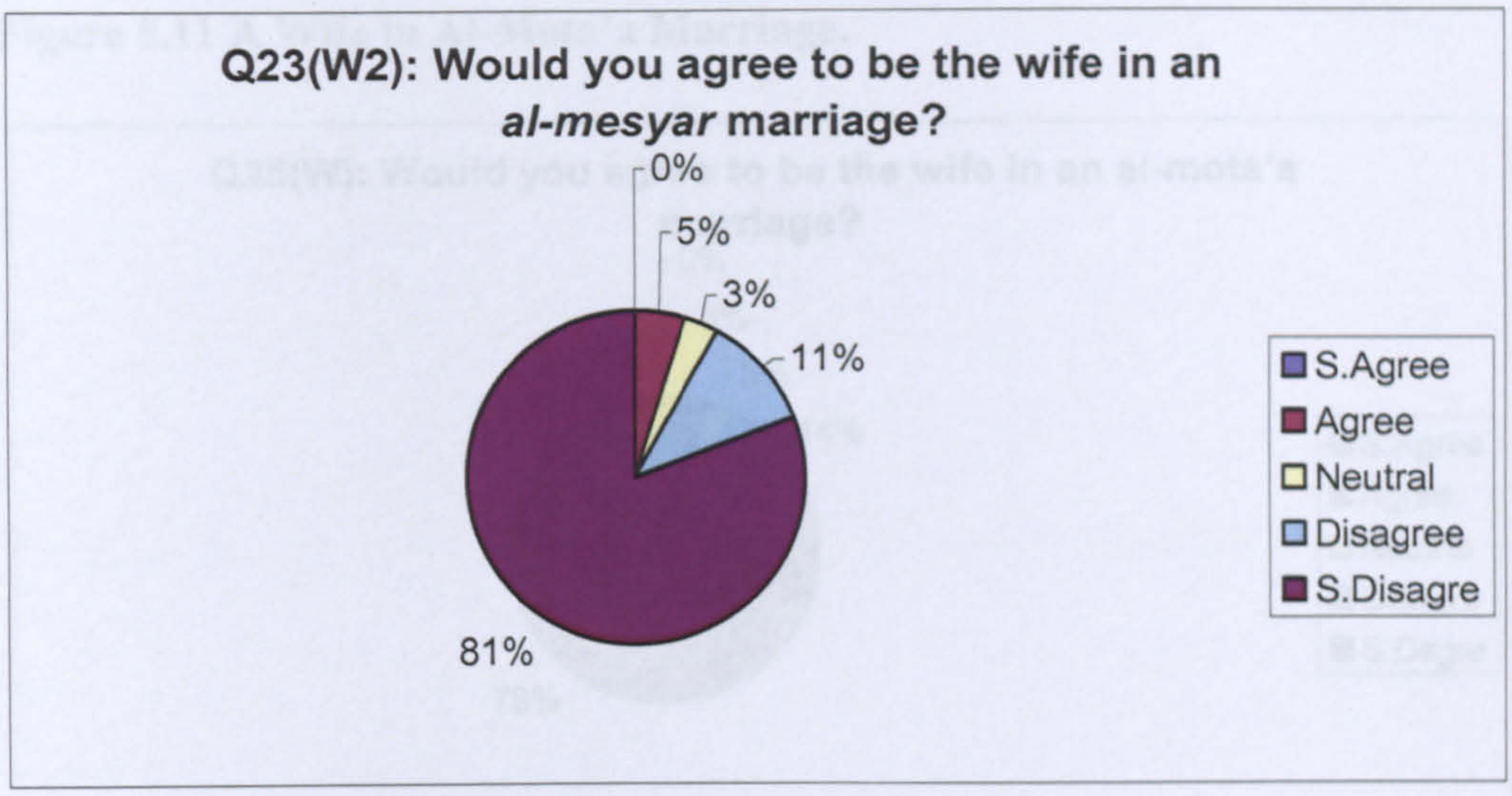




Since the mesyar marriage can affect women negatively to a greater extent than men, women were more firm in opposing that kind of marriage. Most women thought that it is a form of humiliation, and this is why their rejection of it was even larger when the following question was asked:

Figure 5.9 A Wife in Al-Mesyar Marriage.





Not a single female among the housewives agreed to be a wife in such marriage. However, the situation might change with the latest fatwa. Moreover, respondents were less enthusiastic about mesyar especially when knowing that it does not have any religious roots like al-mota'a marriage, most Shia respondents, however, were against al-mota'a, regardless of the fact that it does have religious roots and that Shia scholars favour it.

Figure 5.10 Al-Mota'a Marriage.

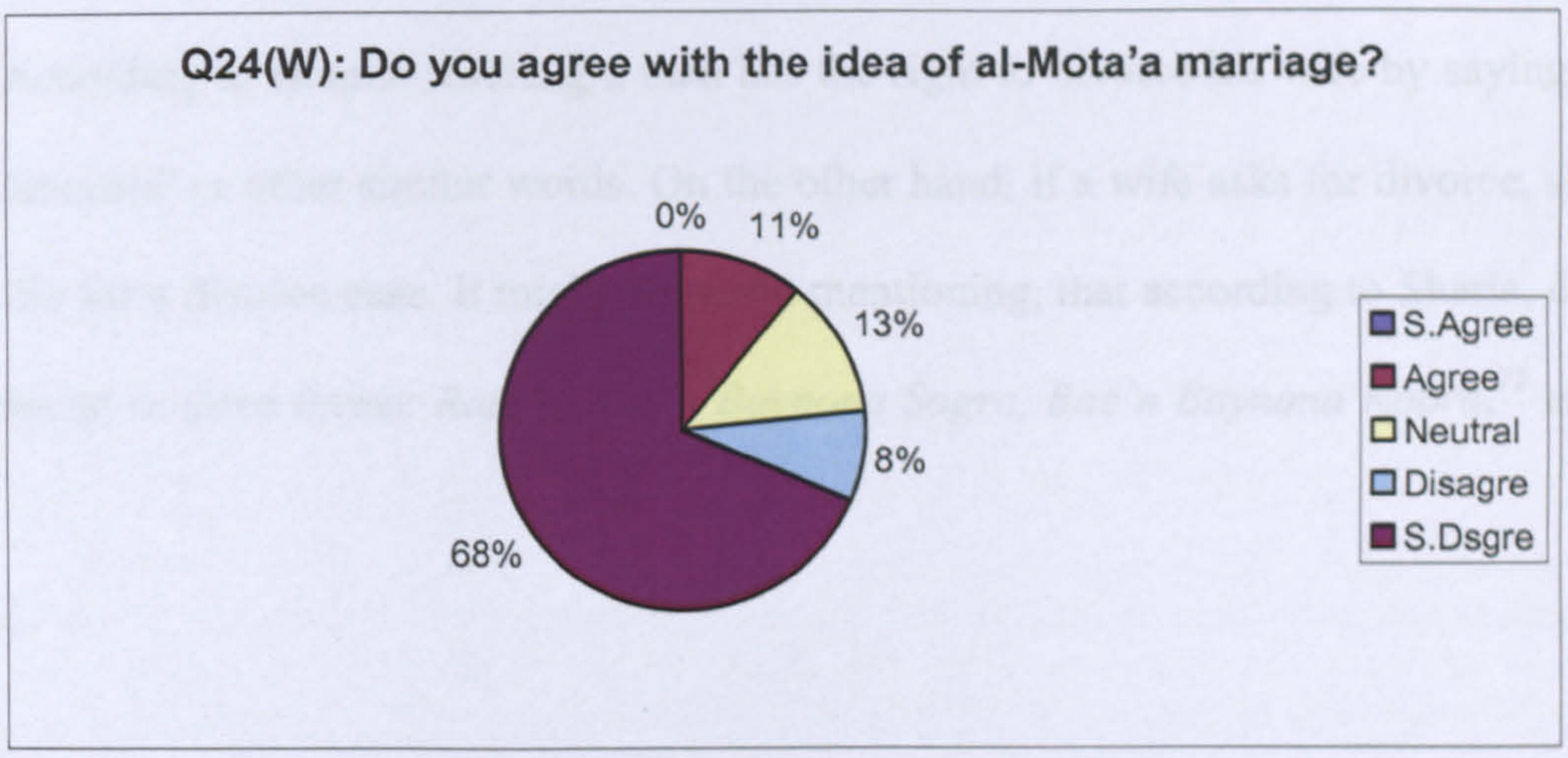
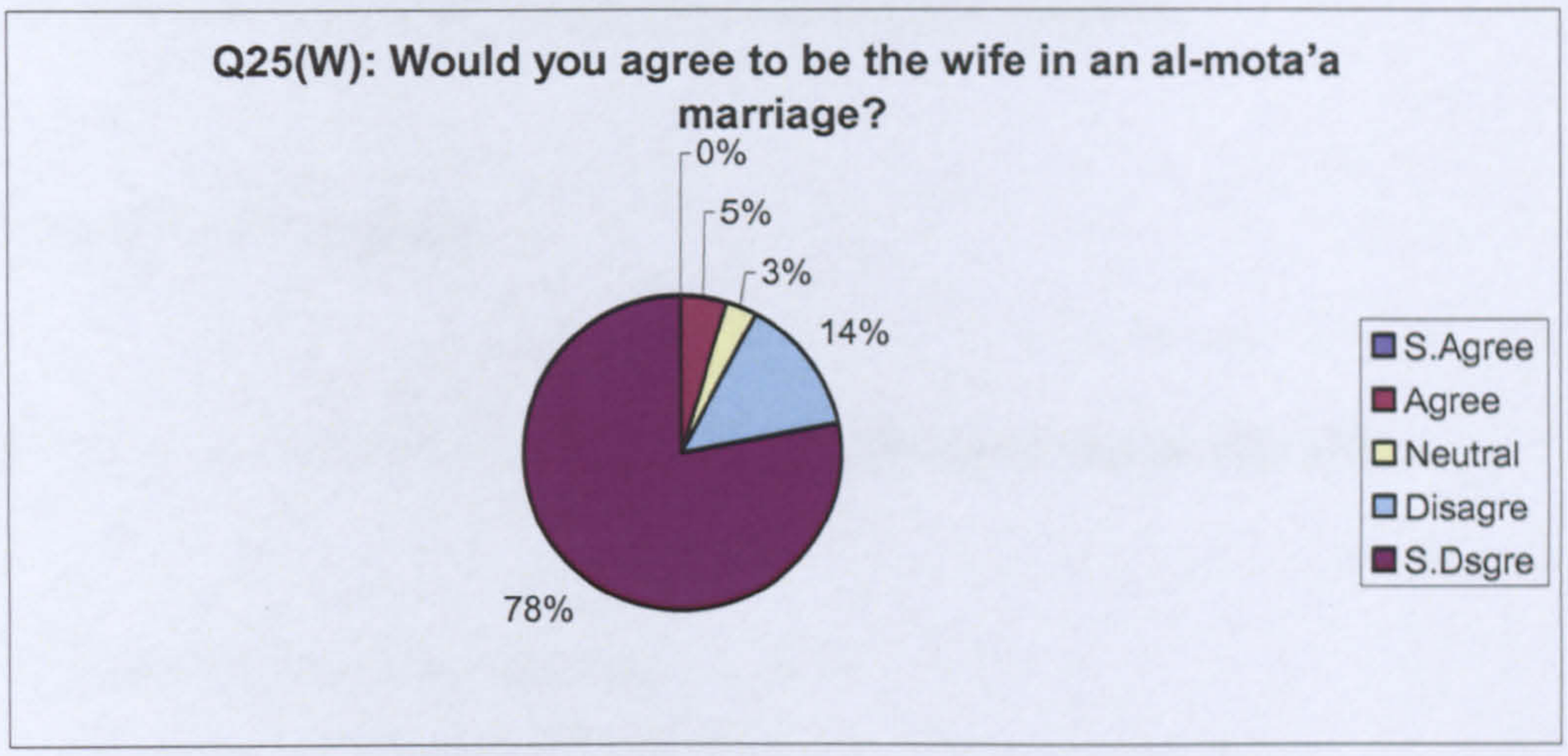


Figure 5.11 A Wife in Al-Mota'a Marriage.



Women are also against al-mota'a marriage because, regardless of the fact that it is supported and encouraged by the clergy, most people – especially women would consider it as a humiliation since she is the weak partner in such a marriage just as in the mesyar marriage.

5.3. Divorce

According to Islamic teaching a man has the right to divorce his wife by saying 'you are divorced' or other similar words. On the other hand, if a wife asks for divorce, she has to file for a divorce case. It might be worth mentioning, that according to Sharia, divorce is found in three forms: *Raje'e, Bae'n Baynona Sogra, Bae'n Baynona Kobra*,[72] each form

[72] Ahmad F. Hussain. *Ahkam Al-Osra fe Al-Islam* (The Family's Statutes in Islam). (Egypt: Dar Al-Jame'a Al-Jadeda, 1998) pp 98-104.

has different consideration and effects.[73] However, according to the Kuwaiti Family Law, there are specific situations when a wife can file for a divorce:

5.3.1. Divorce Grounds

5.3.1.1. If the husband failed to provide maintenance (Articles 120, 122)

This situation has some conditions:

a. if the husband is present and does not seem to have sufficient income, this does not prove that he is insolvent or unable to pay. However, the judge can grant the wife an immediate divorce and ask the husband to pay the overdue maintenance from the date of filing the law suit.

b. if the husband is insolvent, absent but his whereabouts known, or in jail and does not seem to have a sufficient income, the judge will give him one to three months to pay the maintenance. If he does not pay then the judge would grant the wife a divorce.

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[73] Under the first kind, if a husband divorces his wife he can get her back during the three months of *Iddat* by words or actions. This is why during that period a wife is encouraged to stay in the marital house so the return to marriage is easier. As she is still considered to be her husband's wife, if they get back together they do not need a contract or witnesses.
The second kind of divorce occurs after the *Iddat* period ends. If the couple want reconciliation, they need a new contract and a dowry. The third kind of divorce is when they get divorced for the third time. In this case, they cannot get back together unless the wife consummates her marriage – after *Iddat* – to someone else, and then gets a divorce. She can then return to her first husband and will have the right to divorce him three times again. Islam stated the *Raje'e* marriage to make it easy for couples to get back together without the need for any formal procedures.
It might important to mention that there is an argument about the third kind of marriage, while some require it to be irrevocable, it is only when the divorce happens three times. Others say that it is enough to be irrevocable if words 'you are divorced' are said three times by the husband.
Nayer Honarvar. Behind the Veil: Women's Rights in Islamic Society. *Journal of Law and Religion.* 1988, 6 (2), pp 355-387.
Suleman Dangor. The Family Relationship in Islam. *Institute for Social and Economic Research, University of Durban-Westville.* Mar. 1985, Paper No. 20, pp 122-127.

c. if the husband is either absent and his whereabouts is unknown or if he is missing, and he has no income that the wife can depend on, the judge would grant her an immediate divorce.

In case 57/94[74] the wife filed for divorce because her husband was not able to provide her maintenance. When the case was investigated, the first degree court gave her a divorce based on that ground, but on the condition that her husband has the right to have her back as a wife whenever he improves his financial status.

5.3.1.2. Maltreatment (Articles 126-135)

Both the husband and the wife can ask for a divorce if they feel they have been maltreated. In such cases the court will appoint two people as arbitrators (a relative from each family) to try to reconcile the couple.[75] If they are unable to reach an agreement, then they must write a report to be presented to the judge who will decide who is responsible for the divorce. If it is the husband, and it was his wife who asked for the divorce, then she would be granted the divorce and the husband would have to pay her maintenance. If the wife is responsible for the maltreatment, the couple would be granted the divorce and the husband would be exempt from maintenance. If both are responsible,

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[74] Law and Judgment Journal. The year of twenty two, volume two. July 1999. pp 460.
The husband appealed later and proved that he improved his financial status, so that the Appeal Court void the first degree court decision.

[75] Such a system is taken as a solution that the Qur'an has stated it:
If ye fear a breach between them twain, appoint (two) arbiters, one from his family, and the other from hers; if they wish for peace, Allah will cause their reconciliation: for Allah hath full knowledge, and is acquainted with all things[4:35]

then they would be divorced either without compensation or with what is commensurate with the mistreatment.

Although divorce is considered to be a family matter experienced by both the husband and the wife, strangely enough, according to Article 133, maltreatment can be proved by witnesses. However, they must be either two men or a man and two women. Thus, the Article reflects how little the law values a woman's capacity as a witness, even in matters that directly involve women. Contrarily, legislators prefer to deal with women in business matters, as mentioned in the equality theories chapter, regardless of the underlying reasons. According to the Qur'an, this should be confined only to business matters. However, the legislator mistakenly decided that two women's testimonies equal one man's in all matters and not only in business. The law disregards the fact that women usually are more aware of family disputes than men,[76] so they should have a greater priority to be witnesses, regardless of whether they are from the husband's side or the wife's.

If a wife asked for divorce that was based on maltreatment, but could not approve it, then she might get a divorce but the husband would be exempted from paying any allowance or compensation. In case 96/98[77] the wife filed a divorce claiming that she was subject to maltreatment. However, the court as usual procedure in this case has appointed to

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[76] It is usual when couples get married to live at the husband's parents house, it is common seeing more than one couple (brothers and their wives) living at the same house, their parents'. At the same time, women of the house usually and culturally spend more time inside the house unlike men, who are most of the time outside their houses for different reasons. In that case women are the ones who are usually witness to the dispute between couples whenever it happens.

[77] Law and Judgment Magazine, the year of twenty seven, Volume one, April 2002. pp 323.

members from both families, but they could not reach an agreement of who was mistaken in the relationship. So it was decided that she would get a divorce, though without any payment.

5.3.1.3. If the husband is imprisoned or leaves (Articles 136-138)

In cases where the husband leaves his wife and moves to another country without a legitimate excuse, she has the right to file for a divorce even if he left her money. If he has a known address, the judge can give him a period of time to return or to ask his wife to move in with him; if he has left no forwarding address, then the judge can authorise a divorce with immediate effect. Also, if the husband is imprisoned and is sentenced to three or more years, his wife can file for divorce after one year. In such a case, it is irrelevant whether the husband left behind money for the wife or not.

Article 138 can be criticised for two main reasons. Firstly, the husband's prison sentence here must be three years or more in order for the wife to have the right to ask for a divorce; however, she should have the right to a divorce if he was guilty of any criminal act. The law ignores the fact that a wife's reputation might be affected if her husband is involved in any criminal act. Secondly, a wife must wait for a year after her husband is jailed in order for her to file for divorce. This is unreasonable, especially when considered that if the situation was reversed she could become divorced without her knowledge if she was in jail.

However, in Iraqi family law, Article 43 allows a woman to file for a divorce straight away if her husband is sentenced to three or more years; she does not have to wait one year first.[78]

A husband was accused of stealing and sentenced for three years. However, the Supreme Court dropped the charges. His wife then filed a law suit 58/97[79] asking for divorce claiming that such accusation can damage her reputation, though the first degree court denied her request. However, the Appeal Court divorced her when she added to her claim maltreatment from her husband.

For desertion, a wife requested a divorce in case 64/94[80] on the ground that her husband deserted her for five years, and not only that but also married another wife. The first degree court gave her the divorce, and so did the Appeal Court. However, the husband regardless that he had another wife appealed – but lost. He went on to appeal to the Supreme Court, which also supported the decision of the two previous Courts.[81]

[78]Arab Women organization. *Family Law in Iraq.*[online][undated] Available from: http://www.awfarab.org/page/ir/2004/desto1r.htm
[Accessed 20th July 2005]

[79] Law and Judgment, the year of twenty six, volume one. May 2001. pp 352.

[80] Law and Judgment Journal, the year of twenty three, volume one. December 1999. pp 304.

[81] All of the cases discussed in this chapter – except for the two cases that have names – are decided by the Supreme Court. Due to the fact that it is considered as a law court and not a trial court, which means that it only considers the fact if there were mistakes in applying the law by the previous two courts. Then the Supreme Court would correct such mistakes, otherwise it would support the appealed decision in most cases.

5.3.1.4. Inadequacy, Articles (139-142).

According to Articles 139-142, if the husband was sick or lacking in some way, a wife could file for a divorce if she found it difficult to live with him. However, in case 26/97[82] a wife filed a law suit for her husband was impotent, and she was married for five years and did not have children because of him. The Court denied her request because the husband filed a suit before that for ta'a case, so both Courts denied the divorce and ordered her to comply with the ta'a order instead.[83]

5.3.1.5. Apostasy (Articles 143- 145)

According to Islamic teachings, a Moslem man can marry a non-Moslem woman only if she is a Christian or Jewish. However, a Moslem woman cannot marry anyone who is not Moslem.[84] On the other hand, if the husband or the wife were Moslems and he apostatized to another religion, then the marriage can be revoked; however, it remains legal if the wife apostatized. In case 26/85[85] the wife brought the case claiming that she and her husband married on the Orthodox Church in Egypt – since they are Egyptians – but since she became a Muslim, she wanted to revoke their marriage. Both Courts supported her request and revoked the marriage.

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[82] Law and Judgment Journal. The year of twenty six, volume two. November 2001. pp 320.
[83] Though because the couples was Jordanian, the Courts applied the Family Law of Jordan which does not recognize impotence as a deficiency. ~
[84] Norman Anderson. *Law Reform in the Muslim World.* (London: The Athlone Press, 1976) pp 105.~
[85] Law and Judgment Journal. The year of thirteen, volume three. September 2003. pp 292.~

Abdulla AN-Na'im argued apostasy can represent another example for discrimination based on gender within the Islamic family law, where it allowed a man to marry non-Muslim women, which it should be *ketabeya*,[86] Christian or Jewish, and at the same time, woman cannot marry but a Muslim.[87]

Moreover, if a wife wants a divorce in circumstances other than the above situations, then her only solution would be the *Khole'* as Article 111 states. In such a case, she makes a deal with her husband where she would give him a sum of money to divorce her. She would then give up the right to maintenance that is usually paid to the wife after a divorce. According to Kuwaiti law, the couple must agree on the amount of money that she has to pay him to divorce her. However, in Egyptian family law, Article 20 (which was added in 2000) states that if the couple failed to reach an agreement for him to divorce her, then the wife can file a case. To get divorced without her husband's agreement, she would have to give her dowry back to him and to relinquish her right to alimony.

According to Sestani's teachings, there are three main reasons for a wife to obtain a divorce. First, if her husband stops paying household expenses due to unemployment, for example, or if he does have money but is unwilling to financially support his wife and family. Second, if he no longer has sexual relations with his wife and leaves her in a similar situation as a divorced woman, she can file for a divorce. However, if he was forced to leave his wife, such as a jail sentence, he would be asked to divorce her. If he

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[86] Ahl Al-Ketab means the people of the book, the three religions who have a holy books: Jewish, Christian and Muslims. Ketabiya is used for the female and Ketaby is for the male in Arabic language.

[87] Abdulla A. AN-Na'im. *Toward an Islamic Reformation.* (NY: Syracuse University, 1990) pp 91.

refused, then she must wait until he finishes his sentence, suggesting that the judge cannot grant her a divorce, unlike the first two situations. Nevertheless, some Shia thinkers argue that she can get a divorce if the husband's sentence was for life.[88] Third, she can get a divorce because of maltreatment. If she was not able to fulfil any of these three criteria, she either has to be patient or she can ask for Khole' according to Sestani's *fatwa*.[89] However, the Shia court does take 'inadequacy' as a reason for revocation. There are eight illnesses that can be considered as inadequacies to enable the wife to get the contract revoked: amputation, impotence, insanity, castration, leprosy, blindness, depegmentation and *weja'*.[90] In the case of the first two the contract would be revoked *whether* the illness happened before or after the marriage. There are six illnesses that allow the husband to ask for divorce. The husband can claim revocation only if the illness existed before the marriage. Apostasy is also considered as basis for revocation by both sects.[91]

Kuwaiti law does not give the right for a wife to get a divorce in cases where her husband has married again (polygamy). In case 27/85[92] the wife asked for a divorce claiming that she had been married for four years and their marriage was not yet consummated – because of her husband – but also he had got married to another woman and had children. The first degree court denied her request. When she appealed, the Court of Appeal divorced her, but without any compensation for the divorce. Even though the husband in

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[88] Ashraf M. Kamal. *Sharh Ganoun Al-Ahwal Al-Shakhseya(Explaning the Kuwaiti Family Law)*(Kuwait: Dar Al-Kotob, 2005-2006)3rd pp 209.˜
[89] A. Al-Sestani,pp 108-109.˜
[90] Testicles' haematoma.˜
[91] A. Al-Sestani, pp 83-85.˜
[92] Law and Judgment Journal. The Forteenth Year.Volume One. May 1993. pp 283.˜

this case was married and had another life while deserting his first wife. The Court did not consider any compensation as long as she was the one who asked for the divorce.

Other laws in the Middle East, such as the Yamani family law, gives the right for any wife sharing the same husband to seek a divorce if the husband is unable to bear the expenses of two or more wives (Article 53).[93] Also, the new family law in Morocco recognizes the right for the wife to add a condition to the marriage contract that her husband cannot marry again; if he did, she is free to get a divorce. Moreover, a husband cannot marry again unless the first wife approves the marriage.[94]

On the other hand, although when the divorce matter in Kuwait compared to divorce in the UK, shows some similarities (in regards to some grounds), but most importantly, it also shows the cultural differences that effect the law. The only ground that both laws (the UK and Kuwaiti) agreed on is the 'desertion' or the 'leave' fact'. Both laws agreed that such reasons can be a basis to grant a divorce. Of course the concept is different in the way that in the UK law the grounds for the divorce is valid for both husband and wife, while in the Kuwaiti law, it is only for the wife to use, since – as discussed before – the husband can divorce his wife at any time. However, desertion in the UK family law is different than in the Kuwait law, because the UK law is based on the fact of separation, while in the Kuwaiti law the desertion has to be based on a husband who is imprisoned or

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[93]Arab Woman Organization. *Family Law in Yemen.*[online][undated] Available from: http://www.awfarab.org/page/ya/2004/d.htm
[Accessed 10th Aug.2005]~
[94] Arab Woman Organization. *Moroccan Family Law.*[online][undated] Available from: http://www.awfarab.org/page/mor/2004/m3.htm~
[Accessed 10th Aug. 2005]

who has left the country. However, in practice, the Kuwaiti court does not – always – recognize the separation fact for divorce (case 27/85). This might be for the reason that it is difficult to prove that is why in some cases the wife would have to base the divorce on other grounds other than desertion (case 64/94).

Also, the maltreatment in the Kuwaiti law can be compared to the 'respondent behaviour' but the two courts have different concepts of which behaviour that can be the basis for a divorce. For example, while in the UK in case such as the *Bannister v. Bannister*[95] the wife based her claim on the ground that her husband is ignoring her and does not speak to her, and she was granted the divorce, while in Kuwait most divorce cases based on maltreatment are based on violence whether verbal or physical. On the other hand, the other grounds for divorce differ in the two laws, while in the UK, adultery can be a basis for a divorce, in Kuwait that cannot be a reason for the divorce to be granted unless – maybe – if it was associated with the maltreatment for example. As the Kuwaiti law does not recognize a certain years of separation (two or five) as in the UK's, the latter does not recognize the inadequacy or the apostasy.

As discussed in the equality theories were some give more excuses for polygamy, In Kuwait, polygamy has no conditions, nor can a woman get a divorce on that basis.[96] Therefore, questions on polygamy were asked to evaluate how deep is the issue was in the culture, how women would respond to it, and how men considered the issue.

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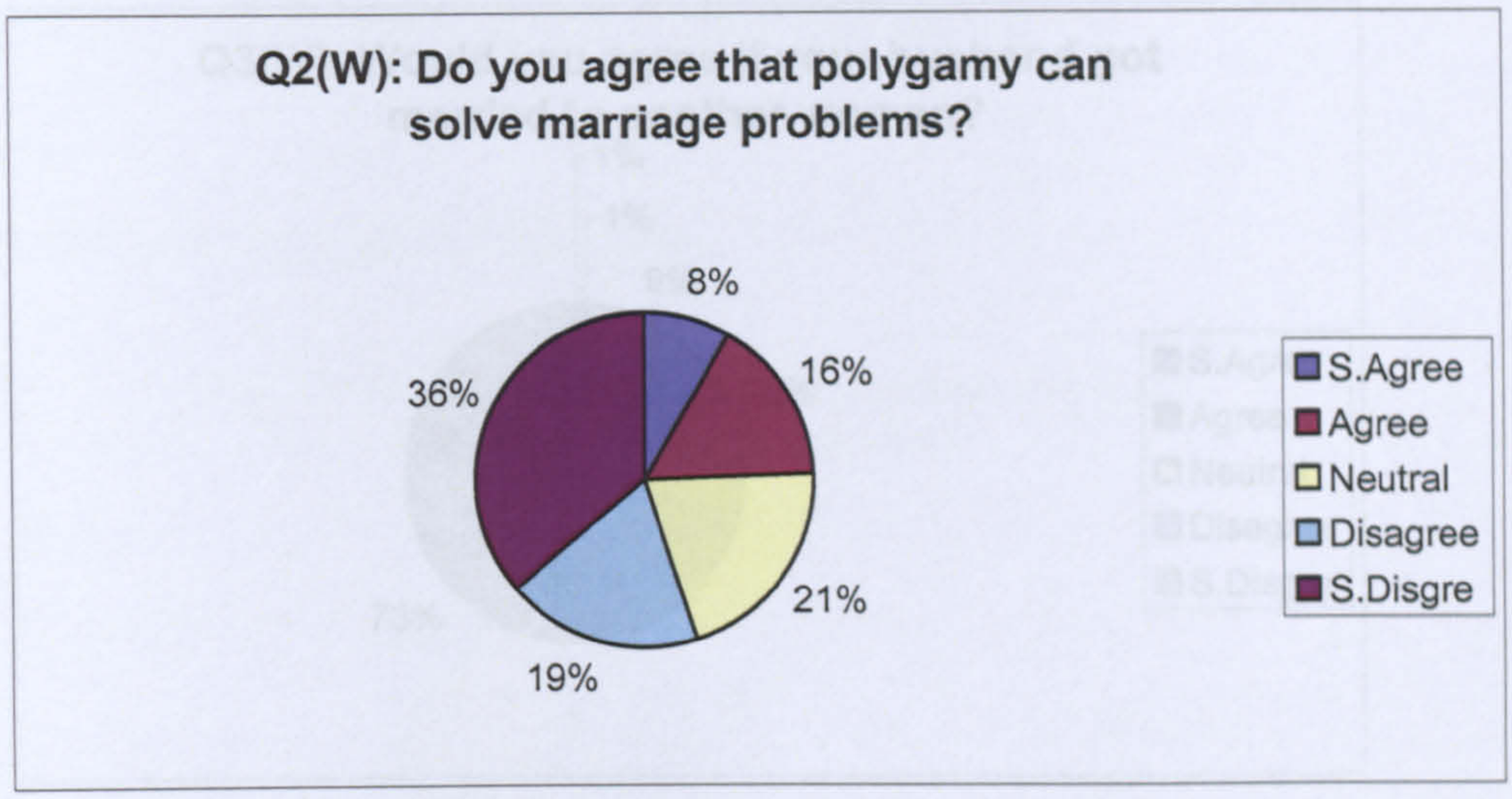
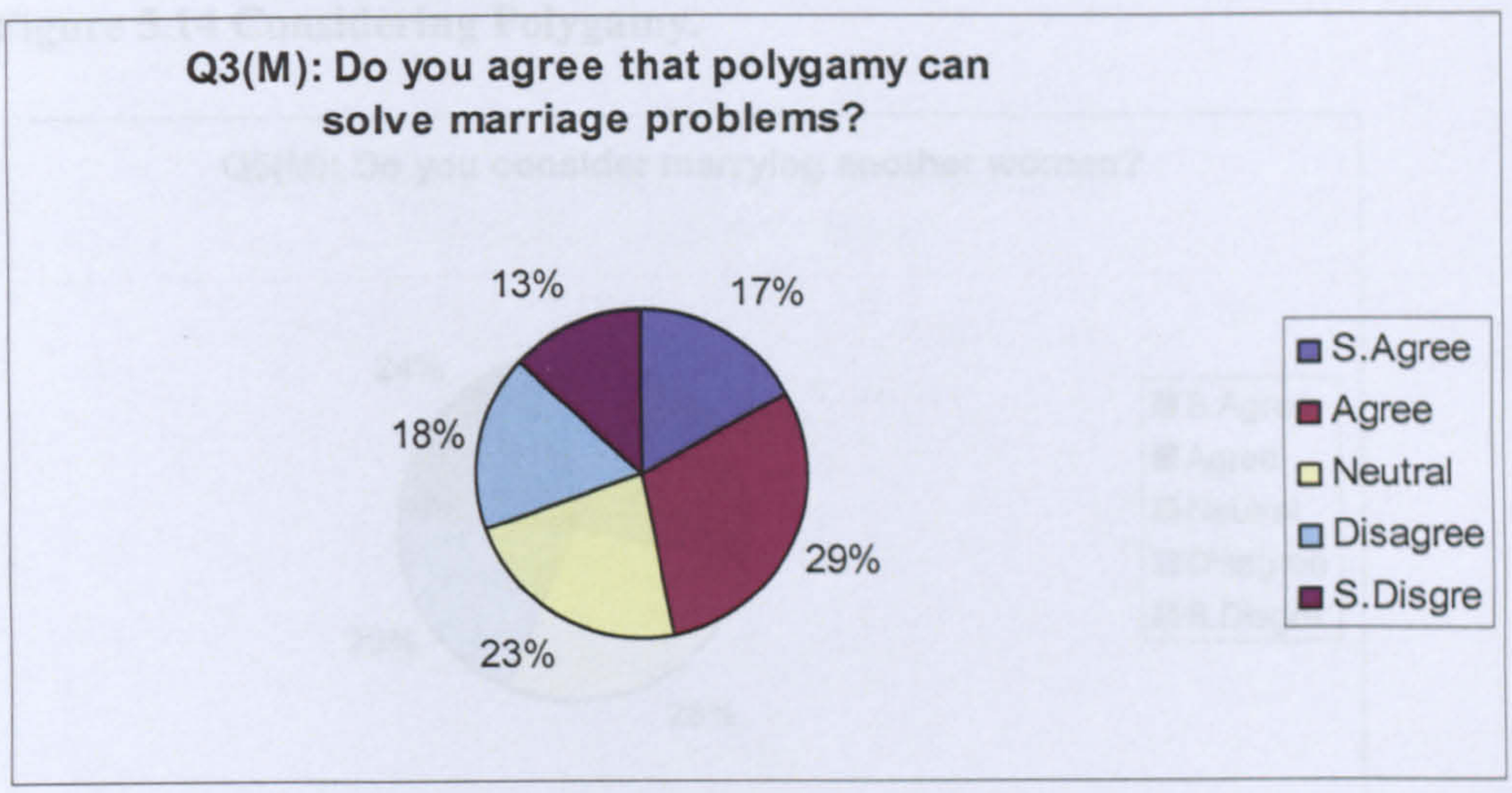
[95] See pp 230.

[96] All of the divorce cases that was searched, none of them had based on the ground of polygamy, since Court does not recognize it as a reason for divorce."

Figure 5.12 Can Polygamy Solve the Marriage Problems?[97]





The difference between men and women in this matter is understandable and it is expected for men to agree more on the matter. However, even though there are some women who agreed with polygamy, their answers were different if they themselves were in this situation and in such instances their agreement was zero:

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[97] The single employed women were not asked about polygamy, so W would represent house wives and employed married women only.

Figure 5.13 Committing Polygamy.

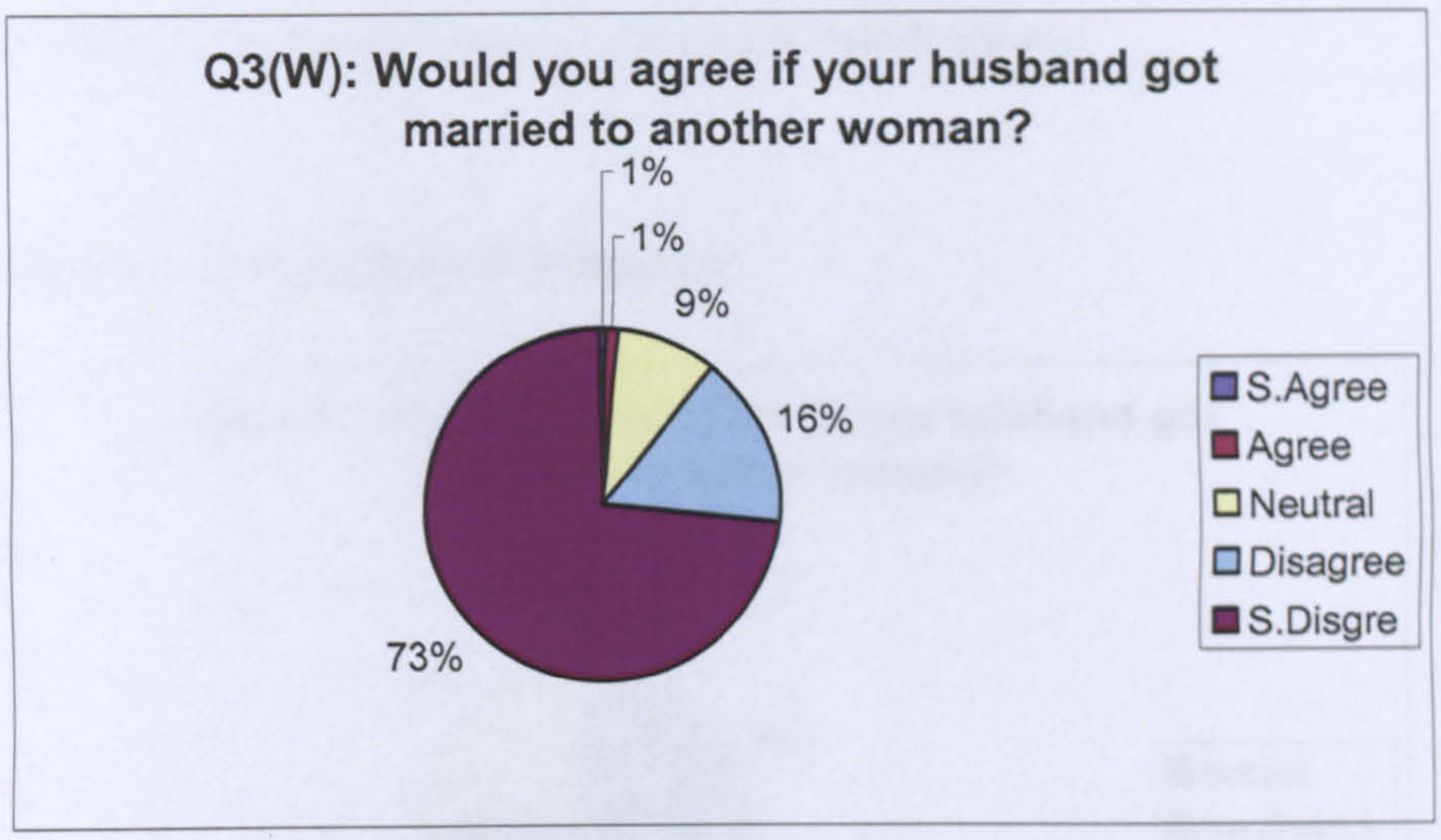
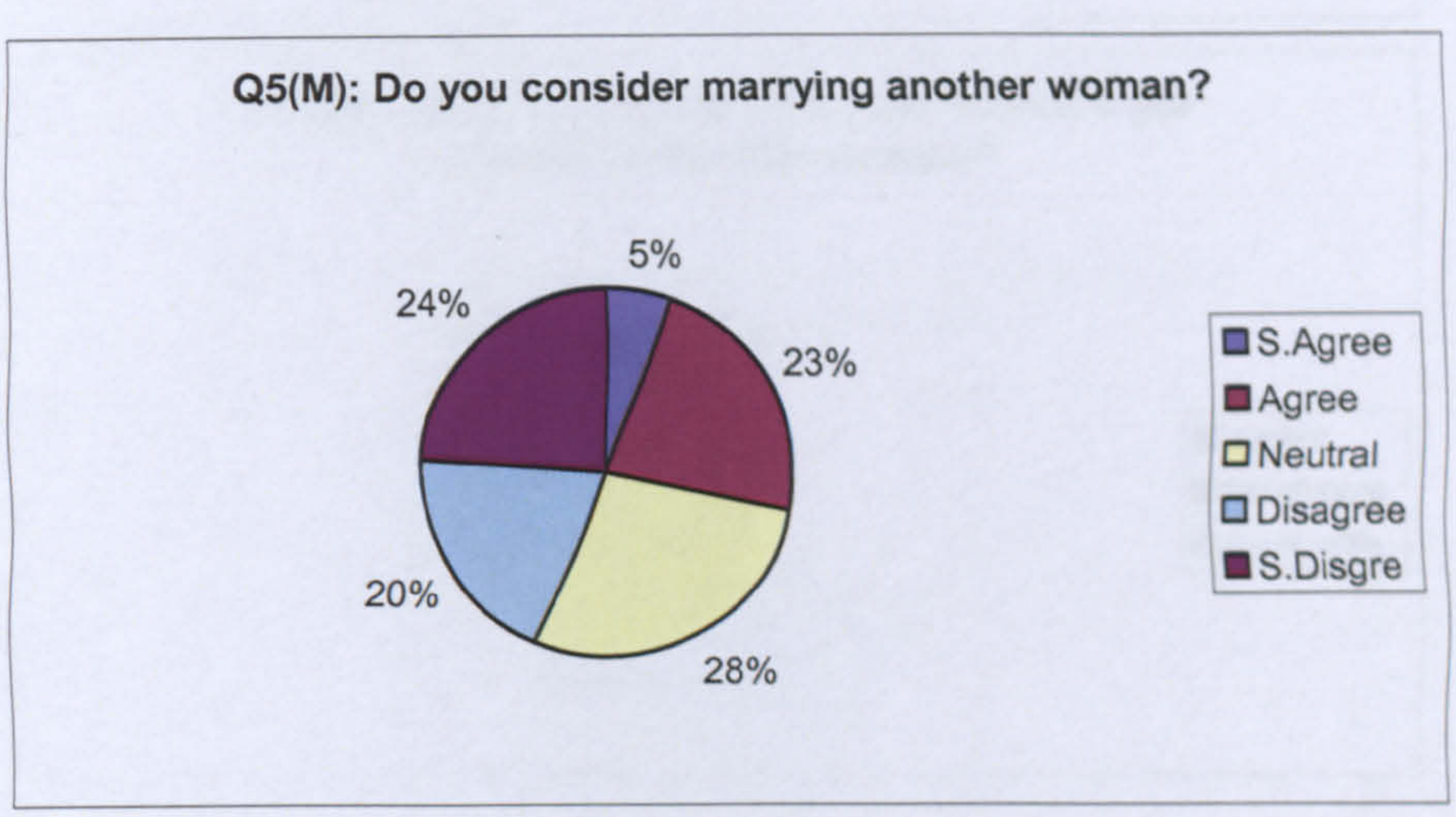


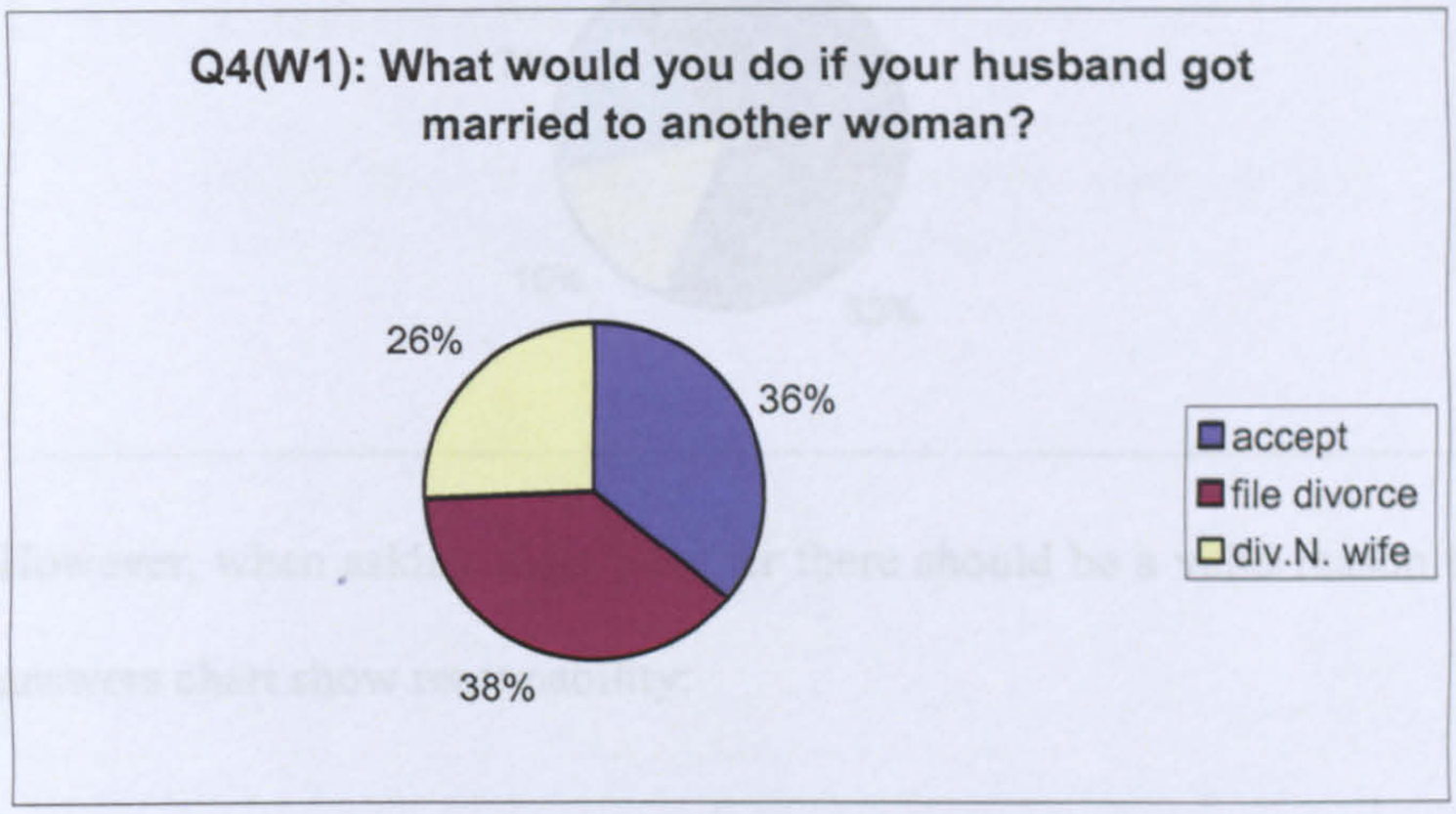
Figure 5.14 Considering Polygamy.

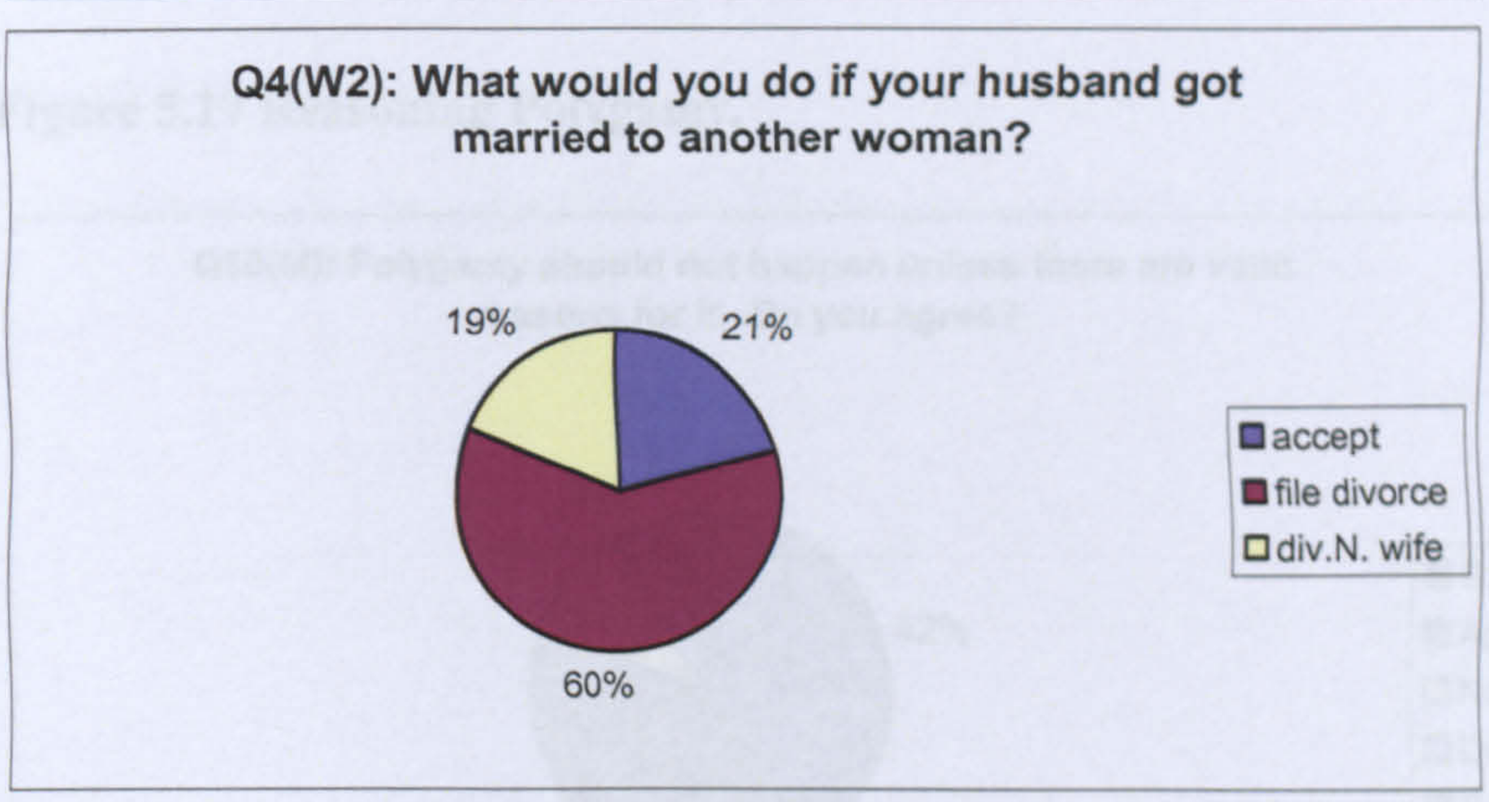


Some respondents were courageous enough to express their intentions to marry another, which is usually a secret matter – at least until he actually gets married, and nearly a third of the respondents were considering the matter. In the next question, women were asked about their reaction if their husbands married someone else. They answered according to three options: to accept it and live as if nothing had happened; to file for a divorce; or to

try her best to get the new wife a divorce. The answers were different between housewives and employees as the charts below shows:

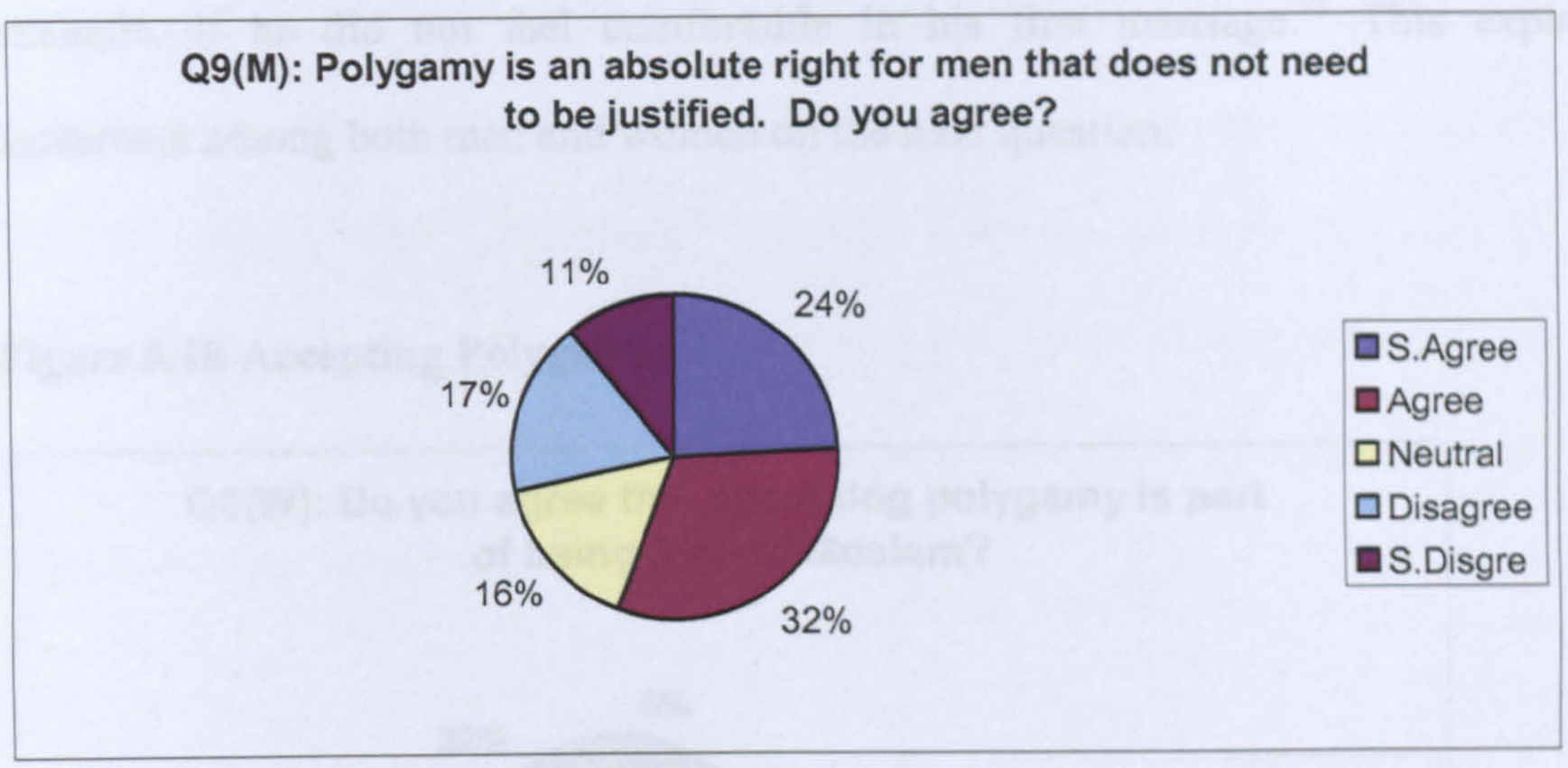
Figure 5.15 Reactions to Polygamy.





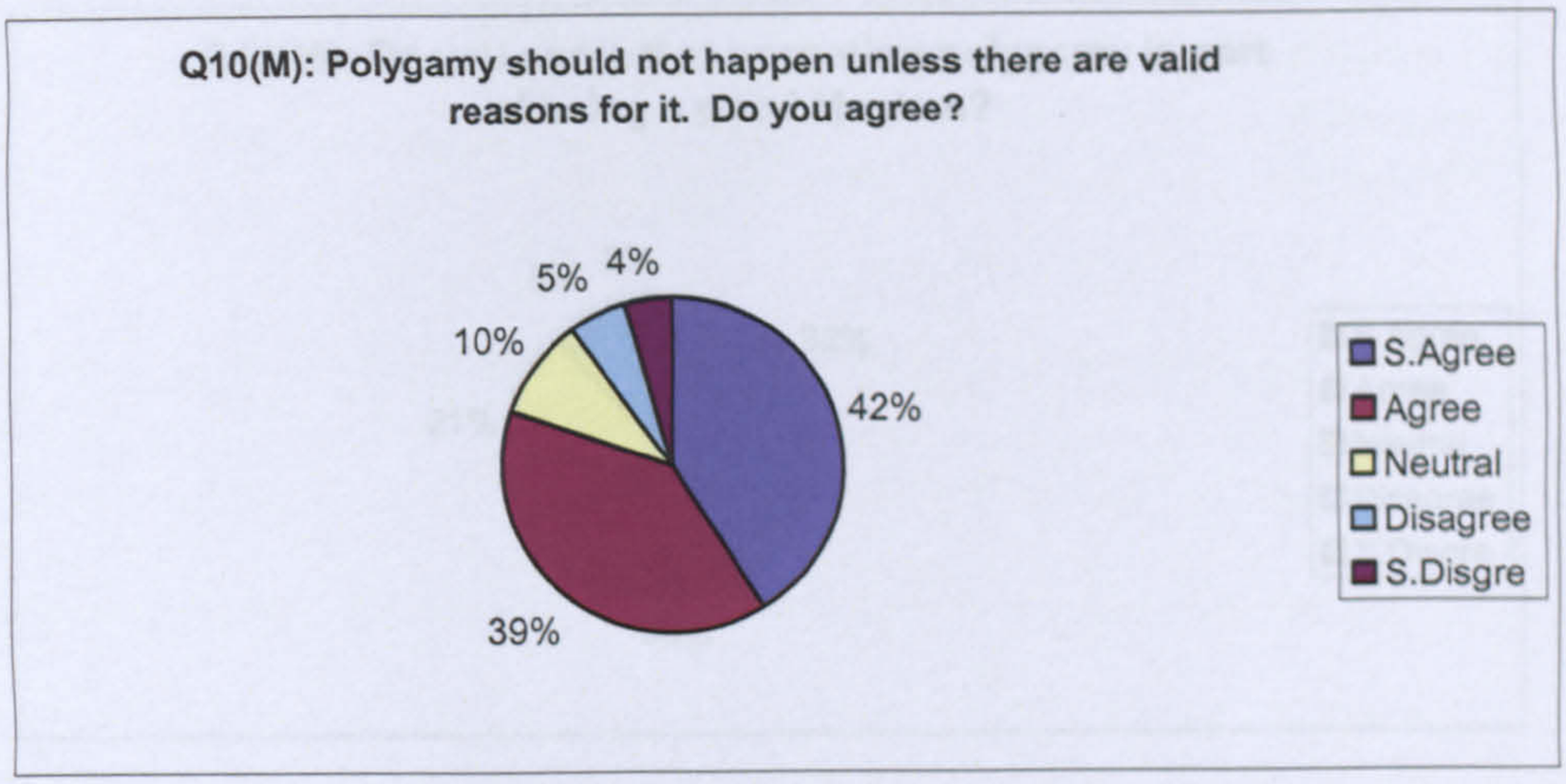
Housewives were more accepting; this might be due to financial issues. Since the employee has an income and is more independent, then she would have a better chance to manage her life after the divorce than the housewife. When asking men if polygamy is an absolute right for men, more than half agreed:

Figure 5.16 Polygamy as a Right.



However, when asking them whether there should be a valid reason for polygamy, there answers chart show reasonability:

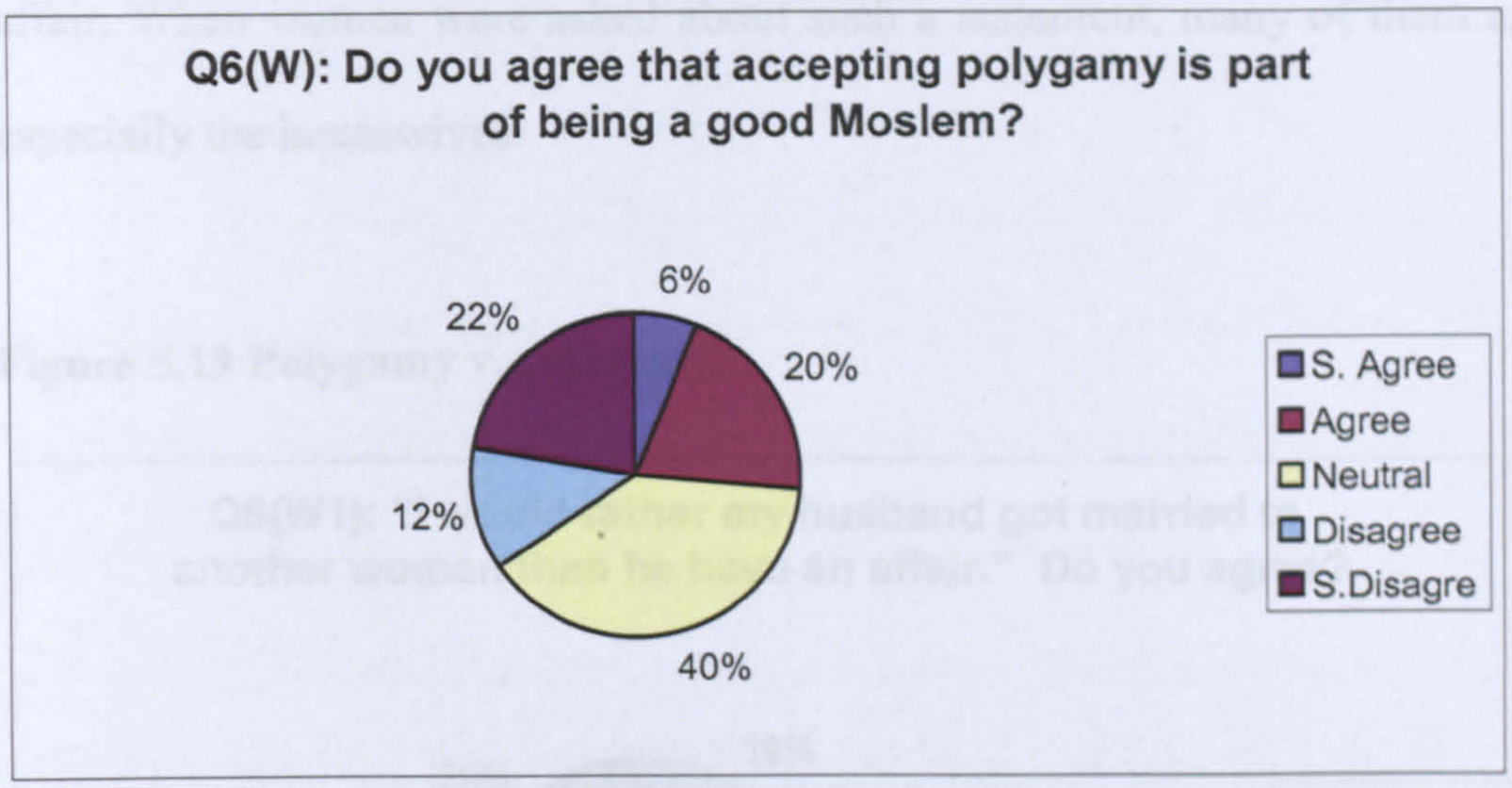
Figure 5.17 Reasoning Polygamy.

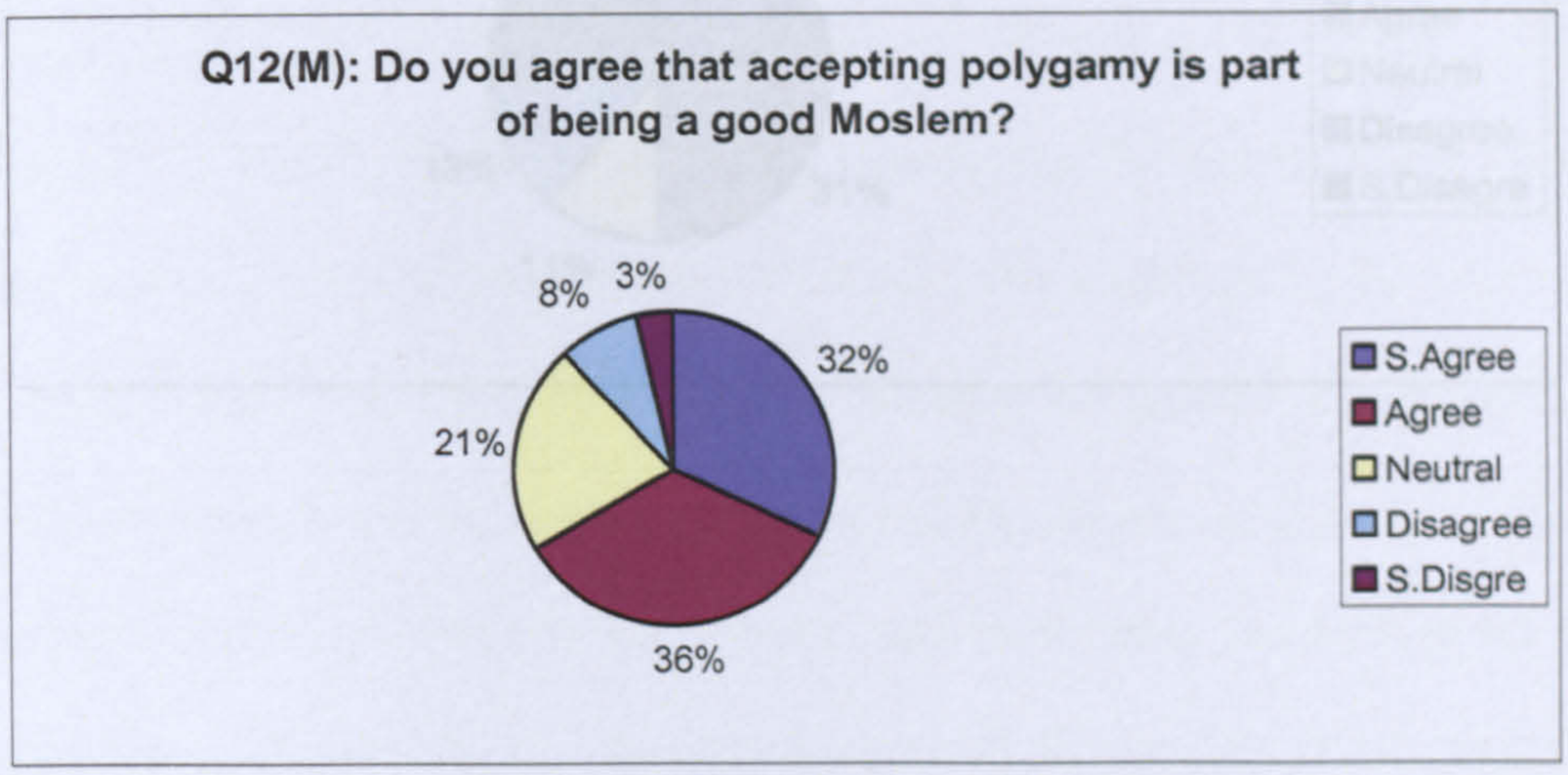


Only 9% thought that polygamy did not need a reason. To explain the contradictions between the answers to these two previous questions, it might be true that more than half believed that it is one of men's rights, but it is believed that it should happen for a reason. The question then was: what could be the reason? One respondent gave the reason that it

is according to his needs and demands, it does not have to be reasonable to society, for example, if he did not feel comfortable in his first marriage.[98] This explains the agreement among both men and women on the next question:

Figure 5.18 Accepting Polygamy.

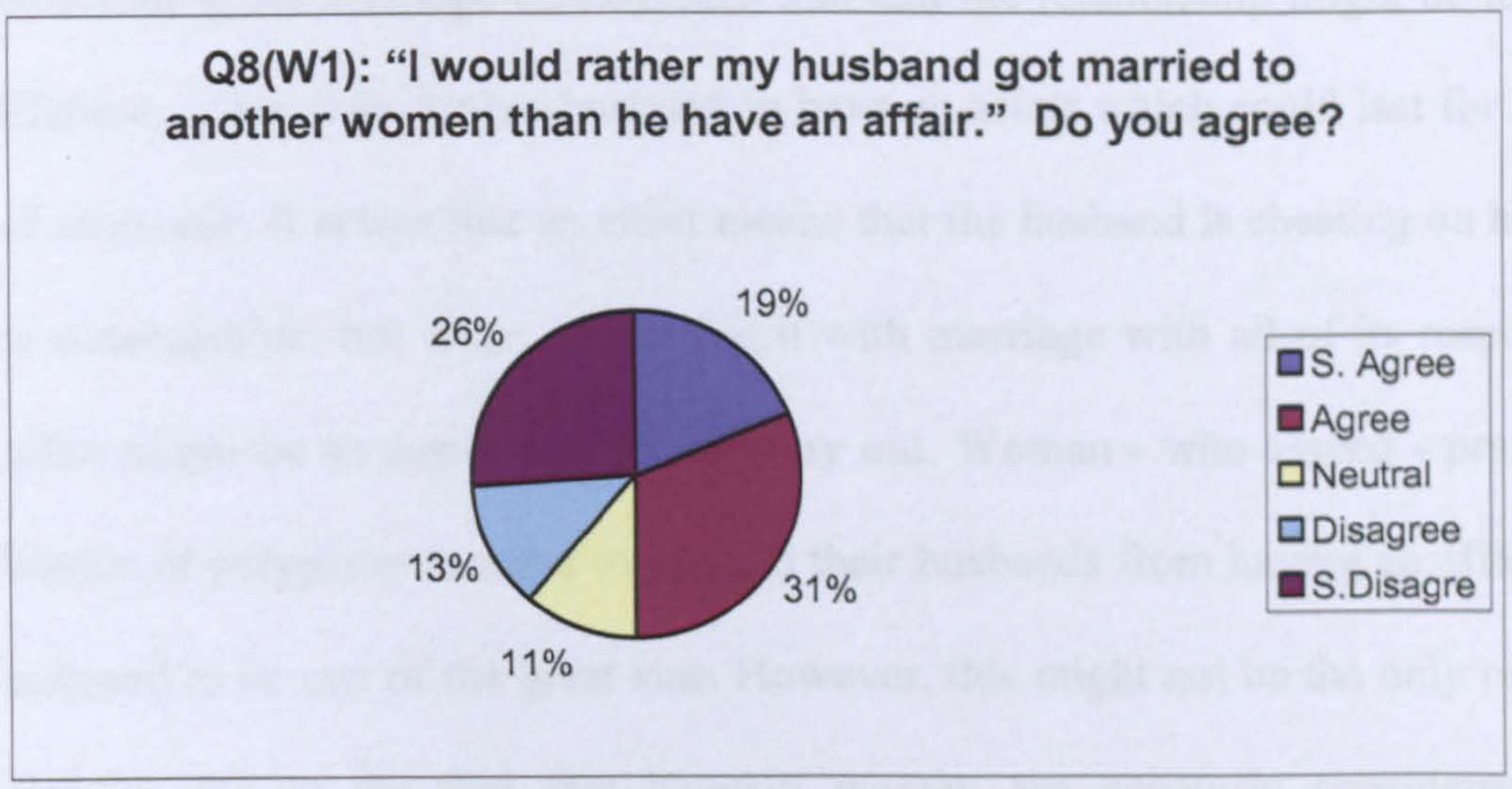


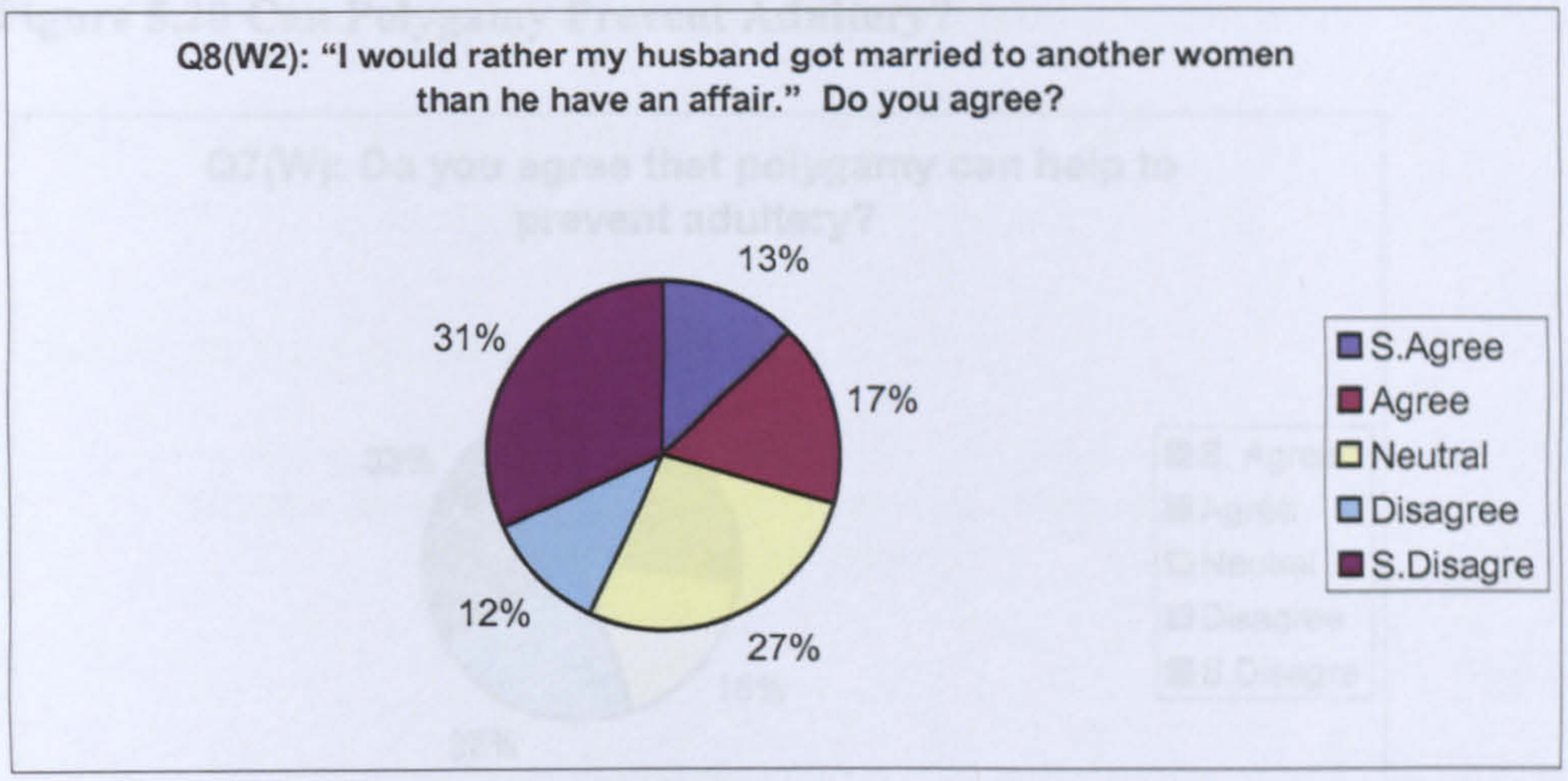


[98] In cultures other than Middle Eastern, where polygamy does not exist, if someone – whether husband or wife – does not feel comfortable within the marriage, divorce is the only way out. However, in the ME culture, this is the only solution for the wives; husbands can marry another wife while still remain married to the first one. In some cases, men consider that he is doing a favour to the first wife when he marries another woman but does not divorce the first wife.

The majority of men believed that a good Moslem wife should accept this matter. Almost a quarter believed this; it might explain the fact that many Islamists marry another wife because, from the husband's side it is a right for him to do so and, from the wife's side, she thinks that it is her duty to accept it. Also, there is a common culturally determined belief that it is better for a wife that her husband marry another wife than to have an affair. When women were asked about such a statement, many of them agreed on this, especially the housewives.

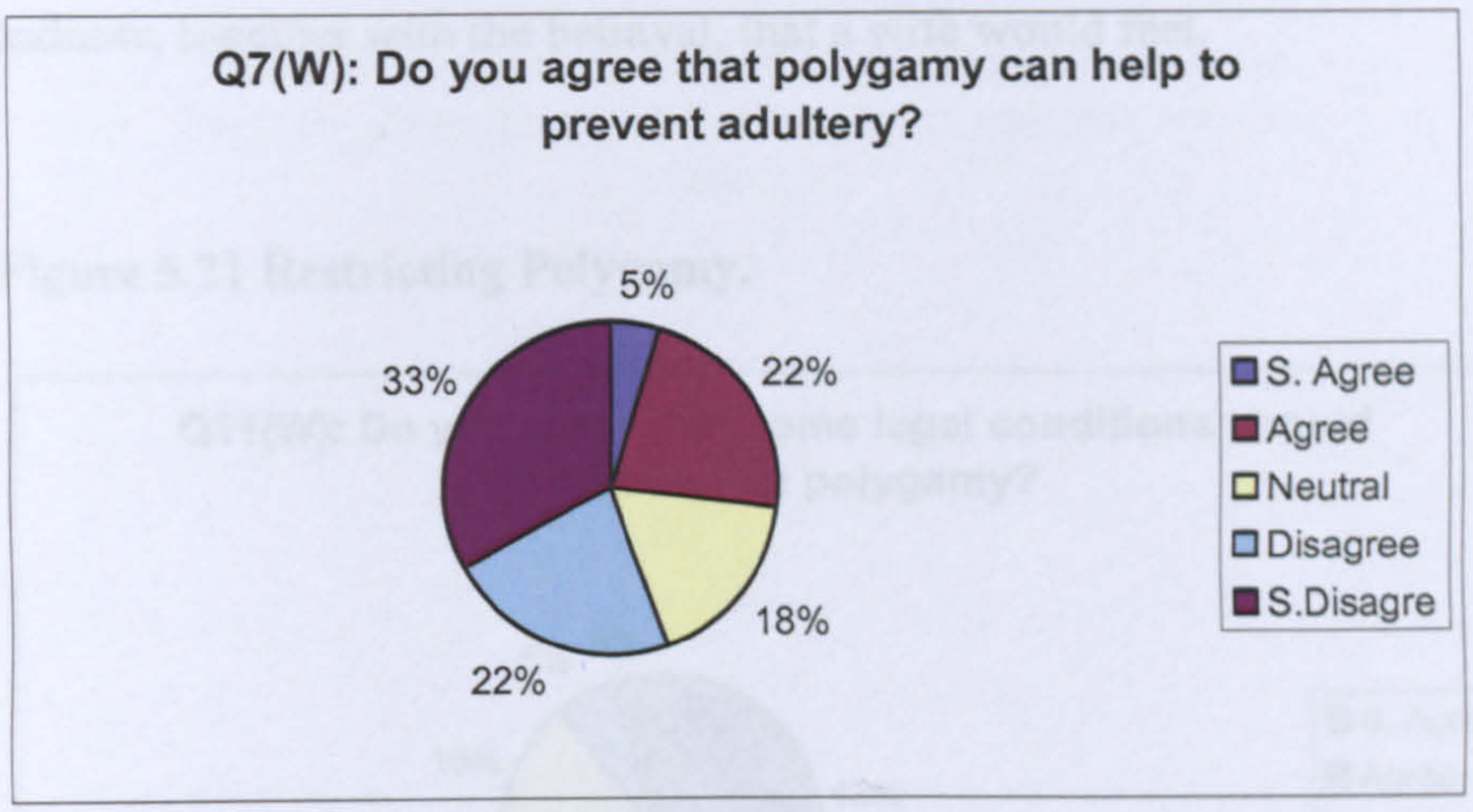
Figure 5.19 Polygamy v. Adultery.

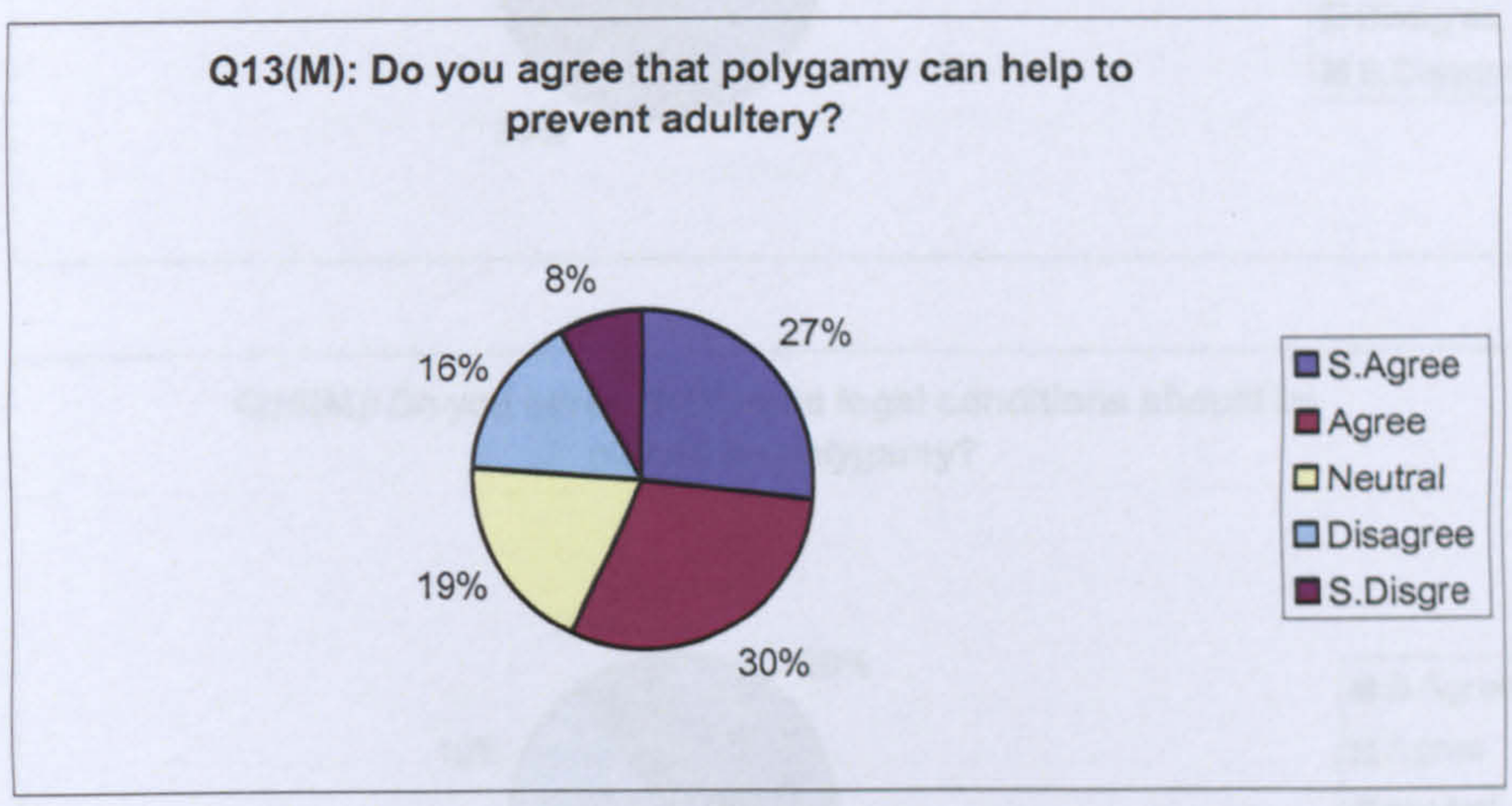




It is hard to explain why a woman would prefers her husband to get married when considering the marriage commitment and that the relationship might be for the rest of a lifetime, rather than for her husband to have an affair which could last for a finite period of time only. It is true that an affair means that the husband is cheating on his wife, which is unacceptable, but when comparing it with marriage with all of its responsibilities, an affair might be an easier and shorter way out. Woman - who agreed - prefer to take the burden of polygamy in order to prevent their husbands from having an affair since that is believed to be one of the great sins. However, this might not be the only reason; it might also be due to the fact that Kuwaiti women are generally considered to be more conservative than men. A woman would not like to live with a sinner and would rather her husband to get married and live in halal rather than committing the haram. As the following chart shows, not many women believed that polygamy can prevent adultery, but most men did, so it can be used as a good reason for justifying polygamy in a deeply sexist society.

Figure 5.20 Can Polygamy Prevent Adultery?





The positive side to polygamy might be that most men and women – of course – agreed on adding conditions to polygamy such as telling the first wife or checking the financial status of the husband before he married again. However, not many of the male respondents supported the idea of giving women the right to get a divorce if her husband remarried, which might indicate some selfishness from the men's side. One of the simplest rights for a wife if her husband decided to live with another woman was to get a divorce. However, as some men see it as an absolute right for them, and a good wife

should accept the matter, they cannot understand the combination of humiliation and sadness, together with the betrayal, that a wife would feel.

Figure 5.21 Restricting Polygamy.

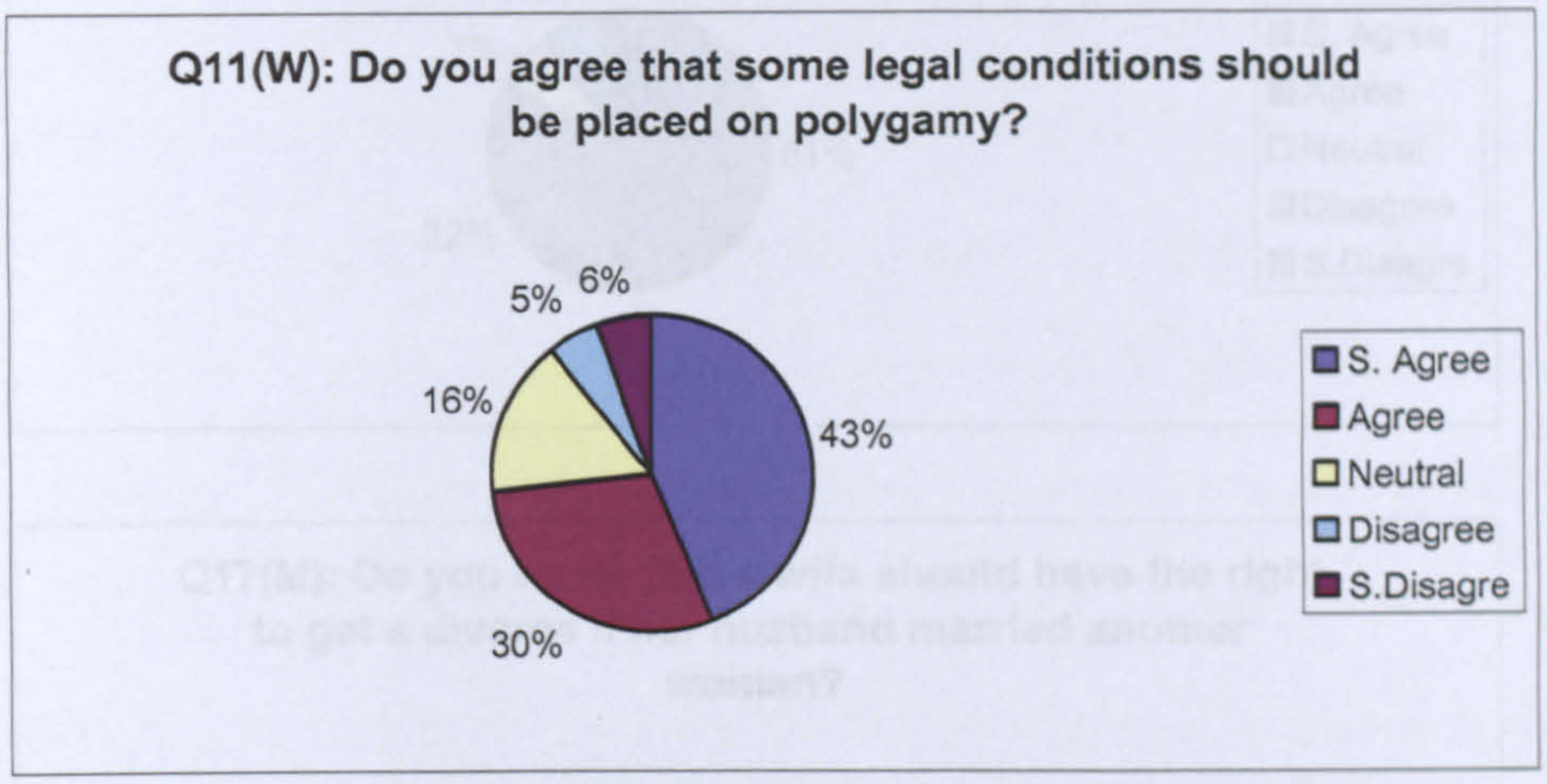
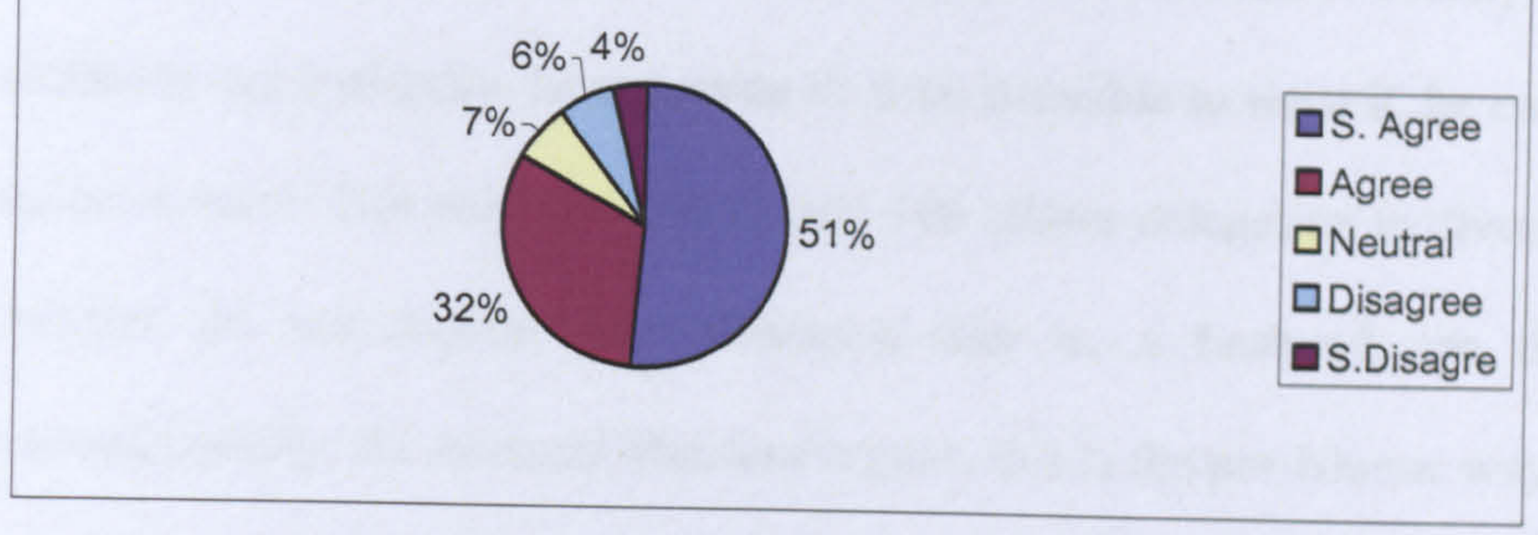
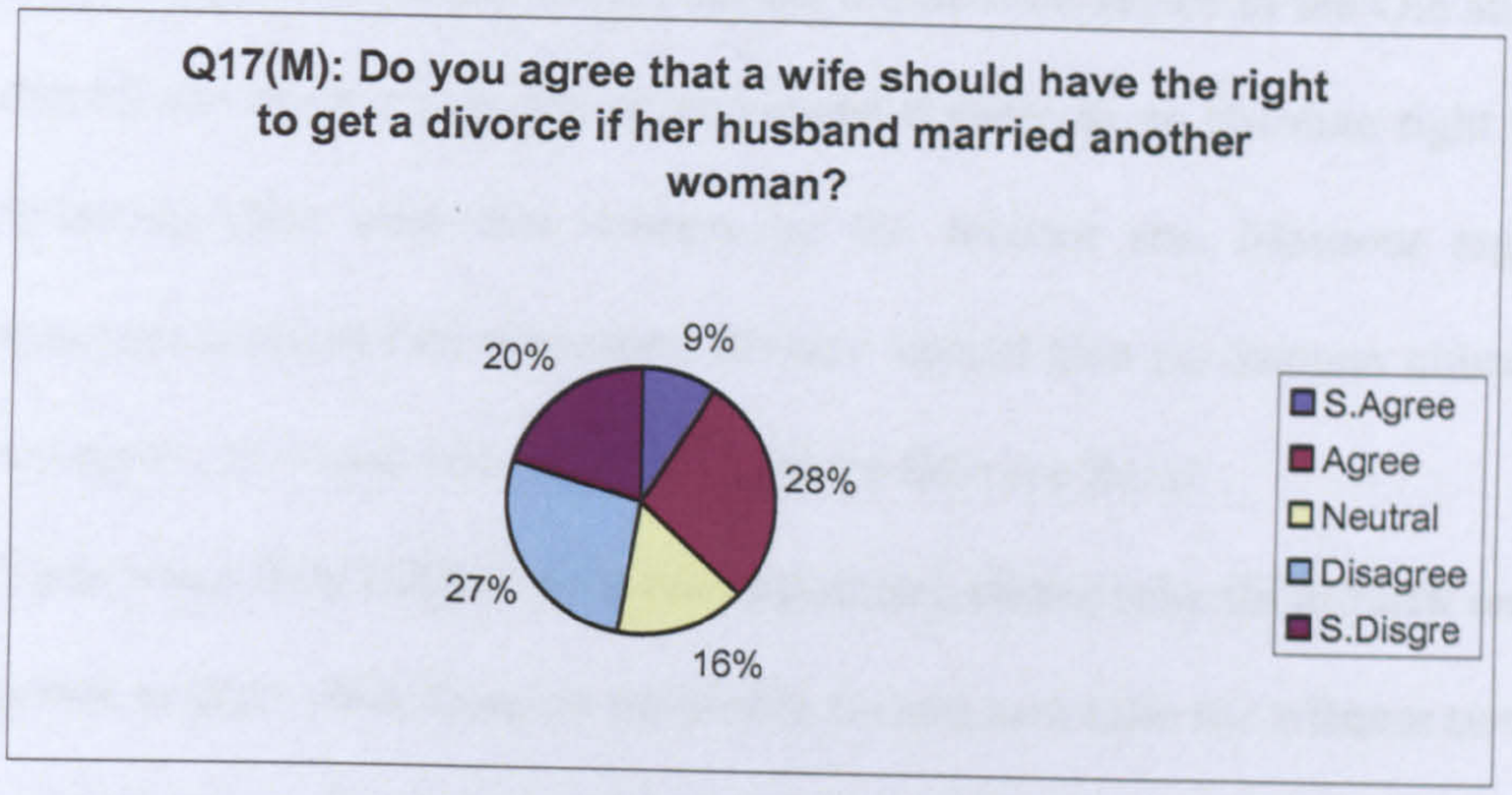


Figure 5.22 Getting a Divorce Because of Polygamy.





5.3.2 Divorce Witnesses

Article 104 states that a divorce can happen when a man says to his wife: 'You are divorced', or in other similar words, according to the custom of society. If the husband is unable to say it directly, he can write it; if he is unable to write it, he can give a sign that means divorce. Not only that, but Article 106 allows delegation in divorce.[99] The divorce Articles do not require any witnesses, that is, a husband can divorce his wife unconditionally. As Ahmand Mansour argues, this is the pre-Islamic way of divorce. This is not what Islam meant when it stated the divorce verses in the Qur'an. Mansour claims that all the *sheikhs* over the years viewed divorce as an absolute right for the man, thus reflecting their view that women are the inferior sex. Mansour arguess that as the marriage requires two witnesses, divorce should also not happen unless there were two witnesses, as stated in the Qur'an[100] (in the Divorce Sura):

Thus when they fulfil their term appointed, either take them back on equitable terms or part with them on equitable terms; and take for witness two persons from among you, endued with justice, and establish the evidence (as) before Allah. Such is the admonition given to him who believes in Allah and the Last Day. And for those who fear Allah, He (ever) prepares a way out. [65:2]

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[99] Divorce is not only easy for men it can also happen without his wife's knowledge which is called 'in absentia divorce'. This happens sometimes when a husband divorces his wife and does not tell her. She would only know about it when the court officer delivers the official divorce paper.

[100] Ahmad Mansour. *The Contradictions in Divorce Between Qur'an Jurisprudence* .[online] [8thOct.2005] Available from: http://www.metransparent.com/texts/ahmad_sobhi_mansour_text/ahmed_sobhi_mansour_divorce_between_coran_and_faqh.htm [Accessed on 16thMay 2006]

It is worth noting that according to the Shia sect, witnesses are required in divorce just as they are required for marriage.[101] If there were no witnesses, then the divorce is not valid, as mentioned in the previous verse.[102]

The family law should add a condition that the divorce would not be valid unless the wife can hear it in the presence of two witnesses. Furthermore, Article 106 allows the husband to carry out a delegation on his behalf and to do the paper work for him in court. The court does not place any conditions on such delegation; it allows it without specifying under what circumstances it can happen. For example, it can be used if the husband does not live in the same country as his wife, or if he is away for a long period of time.

The way of divorce according to the Kuwaiti law as it exists now is discriminatory against women. However the requirement of witnesses could function as a protection for both parties. This would restrict the divorce process so it will not be as easy as it is now, and people would take it more seriously. On one side of the argument, adding such a condition should not be a social problem as it supported by the Sharia. However, on the other side, political issues might be arise because some might think that putting such a condition in place would be tantamount to following the teachings of the Shia sect, and this they consider grounds enough for rejecting the proposed amendment.. As Ghassan Ascha argues, only the Shia Imams have agreed on the divorce witnesses. Further, all of

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[101] Hasan Al-Hefnawi argues that the four major Sunni Scholars believe – unlike Shia's – that witnesses on divorce are only optional, but it is favored.
Hassan Al-Hefnawi. *Al-Osra Al-Muslema wa Tahadeyat Al-Aser* (The Muslim Family and the Today's Challenge). (UAE: Al-Majma' Al-Thaghafi, 2001) pp 54-57.

[102] Bahr Al-Olum, Mohamad, *Witness in Marriage and Divorce in Sharia and Law.*(Bairut: Dar Al-Zahra',1977) pp48-49

the fourth major Sunni Schools did not. Despite the fact that a Qur'anic verse (as cited above) demands that witnesses be present in divorce cases, the Sunni schools agreed that it is optional.[103] This may explain why Shia Iran has required this condition while Sunni states such as Egypt and Kuwait have not.

However, the matter should not be seen from a Sunni or Shia angle but instead from the importance of the matter and its benefits. Witnesses can avoid a lot of claims whether or not the husband meant the divorce or not and clarify the facts of the situation. Besides the fact it might not have been required in the early days of Islam it was given as an option; an encouraging option by the Qur'an.

5.3.3. Disobedient Wife (*Nushoz*)

Usually when a wife asks for a divorce, her husband would file a case called *'Ta'a'* or obedience. In such situations, he claims that his wife has left the house and asks the judge to force her to return home. The meaning of nushoz was discussed in chapter three,[104] however, in here and in such cases, it means the 'disobedient' wife.

If the husband wins the ta'a he must prepare the house which is then called the Ta'a house'. In some cases, court staff would check that the house has all that is needed for the wife to return before ordering the wife to live in the house. In the past, in some countries, if the wife refused to return to the 'Ta'a house', she would be forced to return by

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[103] Ghassan Ascha. *Marriage, Divorce and Polygamy in Islam*. (London: Alsaqi, 2004) pp 139.
[104] See pp 148.

policemen.[105] Nowadays, no one can force her to return. However, if she refused to live in the house she would be considered to be a *'Nashis'*. Nashis means that she would be seen neither as married nor as divorced, and would have no right to alimony. When family law decided upon the matter of *Nushoz*, it did not depend on any religious source. The Qur'an states that the relationship of marriage should either be undertaken in kindness or that separation should occur with no harm to either party:

Thus when they fulfil their term appointed, either take them back on equitable terms or part with them on equitable terms;[65:2]

A divorce is only permissible twice: after that, the parties should either hold together on equitable terms, or separate with kindness. It is not lawful for you, (men), to take back any of your gifts (from your wives), except when both parties fear that they would be unable to keep the limits ordained by Allah. If ye (judges) do indeed fear that they would be unable to keep the limits ordained by Allah, there is not blame on either of them if she give something for her freedom. These are the limits ordained by Allah; so do not transgress them if any do transgress the limits ordained by Allah, such persons wrong (themselves as well as others).[2:229]

O ye who believe! when ye marry believing women, and then divorce them before ye have touched them, no period of 'Iddat have ye to count in respect of them: so give them a present, and set them free in a handsome manner.[33:49]

When ye divorce women, and they fulfil the term of their (Iddat), either take them back on equitable terms or set them free on equitable terms; but do not take them

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[105] For example, it used to happen in Egypt until the year of 1967.
Human Rights Watechs Organization. *The Pain and Dagerous of the Inequality in Divorce System –Egypt (Allam wa Makhater Al-la Mosawat fe Netham Al-Talaque.* [online] [Dec.2004] Availble from: http://hrw.org/arabic/reports/2004/egypt1204/4.htm
[Accessed 1st Nov. 2006]

back to injure them, (or) to take undue advantage; if anyone does that, he wrongs his own soul. Do not treat Allah's Signs as a jest, but solemnly rehearse Allah's favours on you, and the fact that He sent down to you the Book and Wisdom, for your instruction. And fear Allah, and know that Allah is well-acquainted with all things.[2:231]

These verses emphasise that divorce should take place peacefully. No harm should come to a woman and her rights should be preserved; enforcement would only ruin a marriage. Also, the ta'a house does not mention that forcing the wife to live with her husband would not automatically create a fulfilling marriage; moreover, it is inhumane to insist that a woman should live with a person she hates. As mentioned earlier, the court usually would send a committee in the ta'a cases to check on the house that it is equipped with all of the necessities. However, it might be considered strange when the Court orders the wife to comply with the ta'a order when the house was in fact a tent such as in case 4/87.[106] The husband filed a ta'a case when the prepared ta'a house was a tent since he was a sheep keeper and lives in the suburb. The first degree court denied his request, but it was given at the Appeal Court ordering the wife to live in the tent as long as she agreed to live in it when she got married and lived their for a while.

Riffa't Hassan argues that as marriage in Islam is a contract like any other contract, it can be ended by the wish of one or both parties. Divorce in all of the Qur'anic verses is

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[106] Law and Judgment Magazine. Fifteenth Year. Volume Two. Decemper 1994. pp 276.

referred to without judging it as a bad choice as the Muslim culture in general emphasises.[107] The following verses support this argument:

If ye fear a breach between them twain, appoint (two) arbiters, one from his family, and the other from hers; if they wish for peace, Allah will cause their reconciliation: for Allah hath full knowledge, and is acquainted with all things.[4:35]

If a wife fears cruelty or desertion on her husband's part, there is no blame on them if they arrange an amicable settlement between themselves; and such settlement is best; even though men's souls are swayed by greed. But if ye do good and practise self-restraint, Allah is well-acquainted with all that ye do.[2:128]

There is no blame on you if ye divorce women before consummation or the fixation of their dower; but bestow on them (a suitable gift), the wealthy according to his means, and the poor according to his means; a gift of a reasonable amount is due from those who wish to do the right thing.[2:236]

And if ye divorce them before consummation, but after the fixation of a dower for them, then the half of the dower (is due to them), unless they remit it or (the man's half) is remitted by him in whose hands is the marriage tie; and the remission (of the man's half) is the nearest to righteousness and do not forget liberality between yourselves. For Allah sees well all that ye do.[2:237]

For divorced women maintenance (should be provided) on a reasonable (scale). This is a duty on the righteous.[2:241]

[20] But if ye decide to take one wife in place of another, even if ye had given the latter a whole treasure for dower, take not the least bit of it back; would ye take it by slander and a manifest wrong? [65:20]

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[107] Hassan, R. (1998). pp.90-91. ~

[21] And how could ye take it when ye have gone in unto each other and they have taken from you a solemn covenant?[65:21]

O Prophet! When ye do divorce women, divorce them at their prescribed periods, and count (accurately) their prescribed periods: and fear Allah your Lord: and turn them not out of their houses, nor shall they (themselves) leave, except in case they are guilty of some open lewdness, those are limits set by Allah: and any who transgresses the limits of Allah, does verily wrong his (own) soul: thou knowest not if perchance Allah will bring about thereafter some new situation.[65:1]

[6] Let the women live (in 'iddat,) in the same style as ye live, according to your means: annoy them not, so as to restrict them. And if they carry (life in their wombs), then spend (your substance) on them until they deliver their burden: and if they suckle your (offspring), give them their recompense: and take mutual counsel together, according to what is just and reasonable. And if ye find yourselves in difficulties, let another woman suckle (the child) on the (father's) behalf. [65:6]

As Hassan argues, these verses give the right of divorce to women without the many restrictions imposed by laws in most Muslim countries.[108]

In case 47/98[109] the husband brought a case to force his wife to go back to the house – ta'a house – claiming that he prepared a suitable house for her to go back. She tried to challenge by arguing that the house is not legitimate to live in, though she lost the case in the three degrees of court and was forced to go back to him or to be consider as nashiz.

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[108] Hassan, R. (1998) pp. 90-92.

[109] Law and Judgment Journal, the year of twenty seven, Volume one, April 2002.pp 400.

While in 103/98[110] case the wife was able to liberate her self from such density when she was able to prove that her husband was mentally ill and he was under medication. To gain the divorce or not does not only depend on the factors of the case, but also depends on the judge him self, whether he was lenient or strict for example the personality makes a difference in giving the decision. In case 114/98[111] the first degree court forced the wife to live under the ta'a house, though the Court of Appeal gave her the divorce. The trial court would take witnesses in such cases into consideration even if they were not related to the couple. For example in case 4/95[112] when the first degree court denied the *ta'a* house requested by the husband, the Court of Appeal gave it to the husband when it considered his two neighbours witnesses although it is known that Kuwait – in general – is a conservative society and males do not mingle with females even if they are couples. If they were in the same place then women would be sitting separately from men, and if that was the case in general, the *ta'a* house that was prepared for the wife to live in was located in *Al-Jahra* which is usually a city of the Bedouins who are even more conservative than urbanism. However, in this case the neighbours witnessed that the husband was treating her very well and she would be in a safe environment living with him.

Some times the purpose of the ta'a cases is for the husband to get rid of the alimony if the wife did not comply with the verdict to prove that she is nashiz. For example in 30/98[113] the husband wanted to prove that his wife was actually nashiz – as she did not come to

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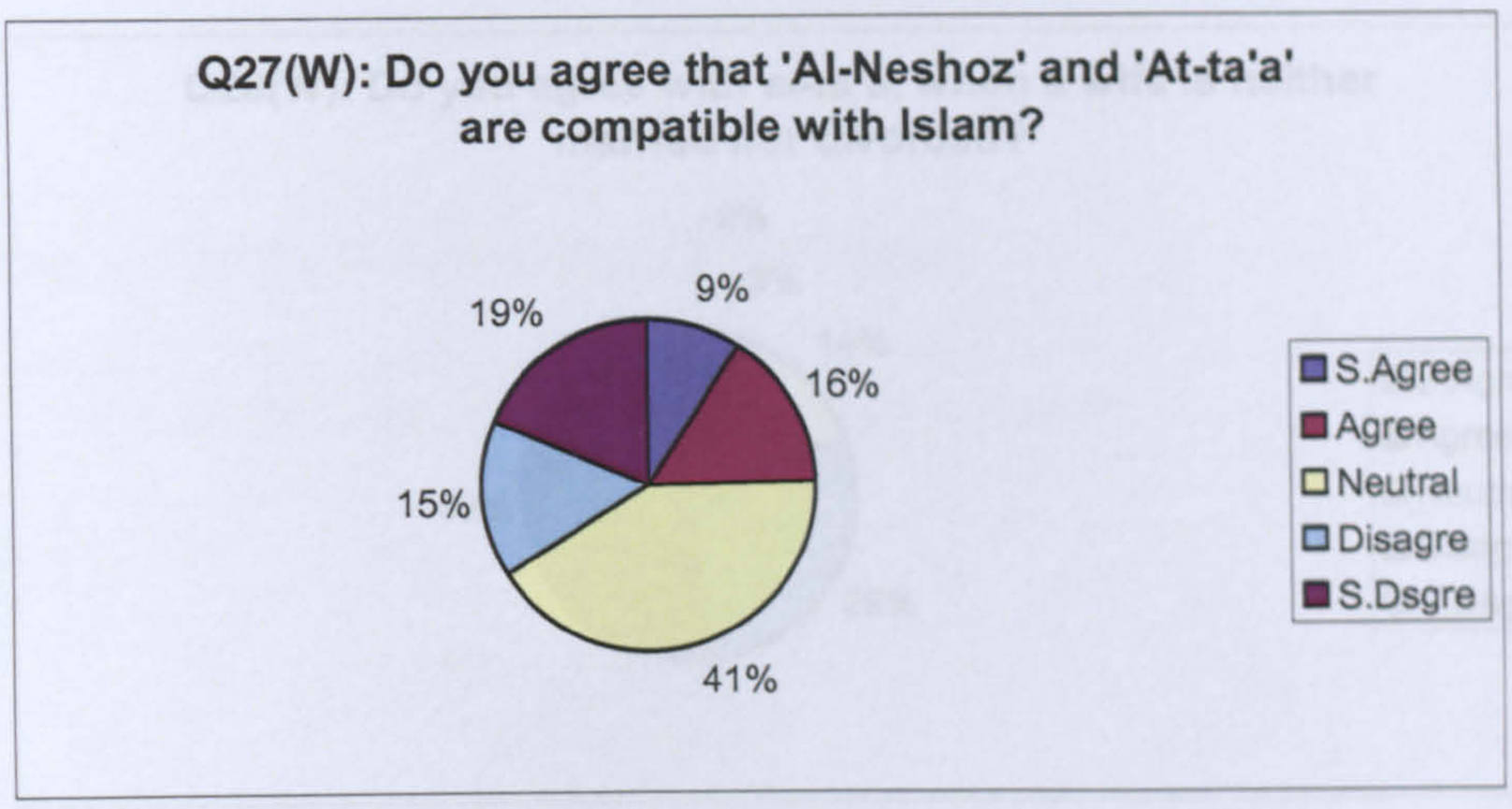
[110] Law and Judgment Journal, the year of twenty seven, Volume one, April 2002 pp 402.
[111] Ibid. pp 409.
[112] Law and Judgment Journal The year of twenty three. Volume two. January 2000. pp 222.
[113] Law and Judgment Journal.The year of twenty seven, Volume one, April 2002.pp 433.

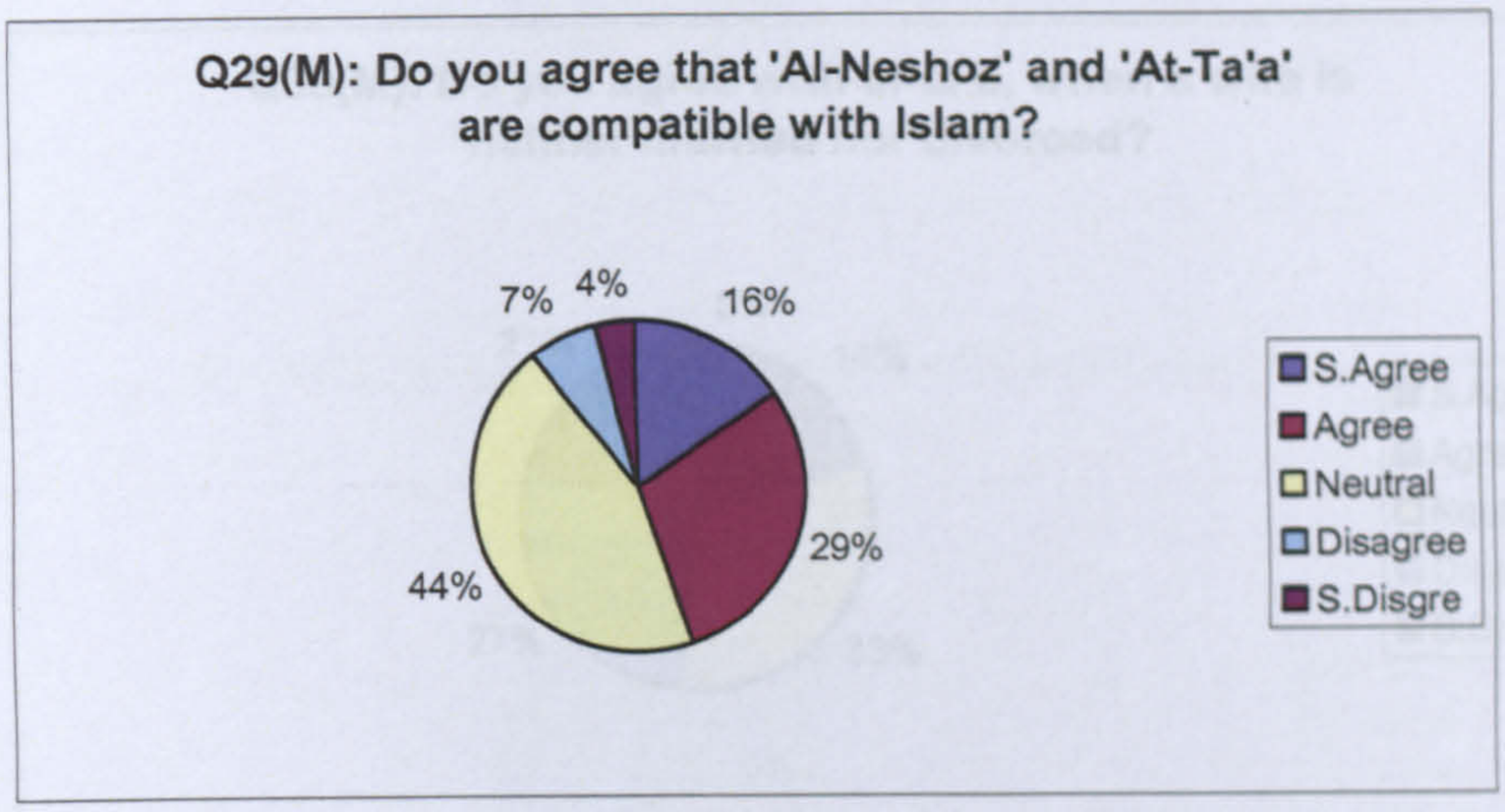
live at the ta'a house – and thus she did not deserve alimony since – as he claimed – she was a disobedient wife. The first degree court refused his demands, but the Court of Appeal supported his request denying the wife from any rights of alimony until she complied with the ta'a verdict. Also, in case 10/94[114] the husband filed a suit case to prove that his wife did not comply with the ta'a case he won, so that the court decided that from the day 07/07/93 she is considered nashiz and cannot demand any right of alimony.

There were four questions regarding the nushoz and ta'a matter. The first question is to see the confusion that people can have thinking that both matters are compatible with Islam or, to be more precise, that they are taken from the teaching of Islam. A quarter of women thought that the matter originated from Islam, while nearly half of men have such thought. The 'neutral' area is significant: it is surprising how little some know about such important matters that are directly related to their lives. However, some respondents might think that it is not compatible with Islam, but because they believe that the family law is adopted from the Sharia law, they did not want to disagree with what the Sharia states.

[114] Law and Judgment Journal.The of year twenty two, volume two. July 1999. pp 393."

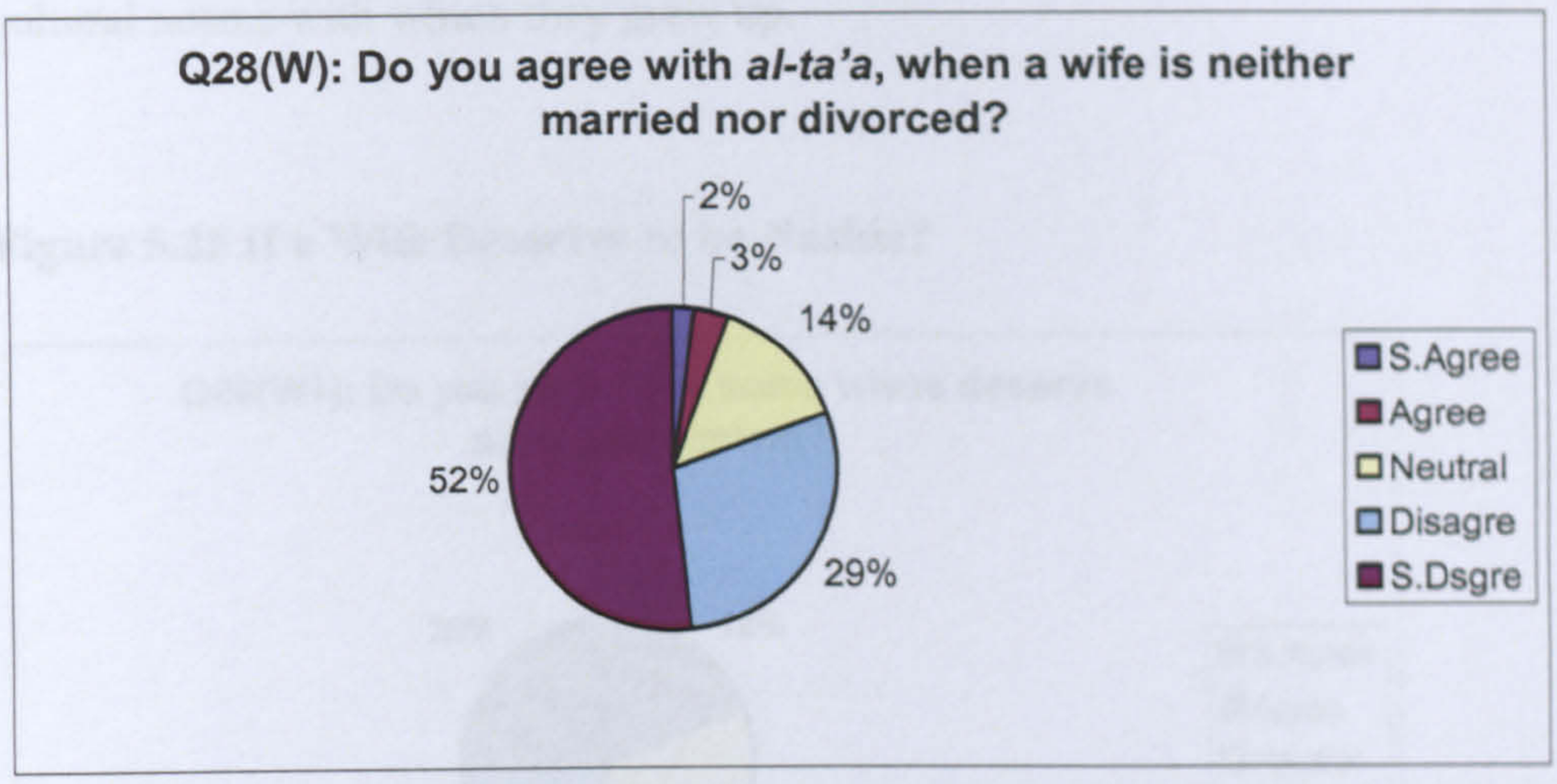
Figure 5.23 Is Nushoz and Ta'a Compatible with Islam?

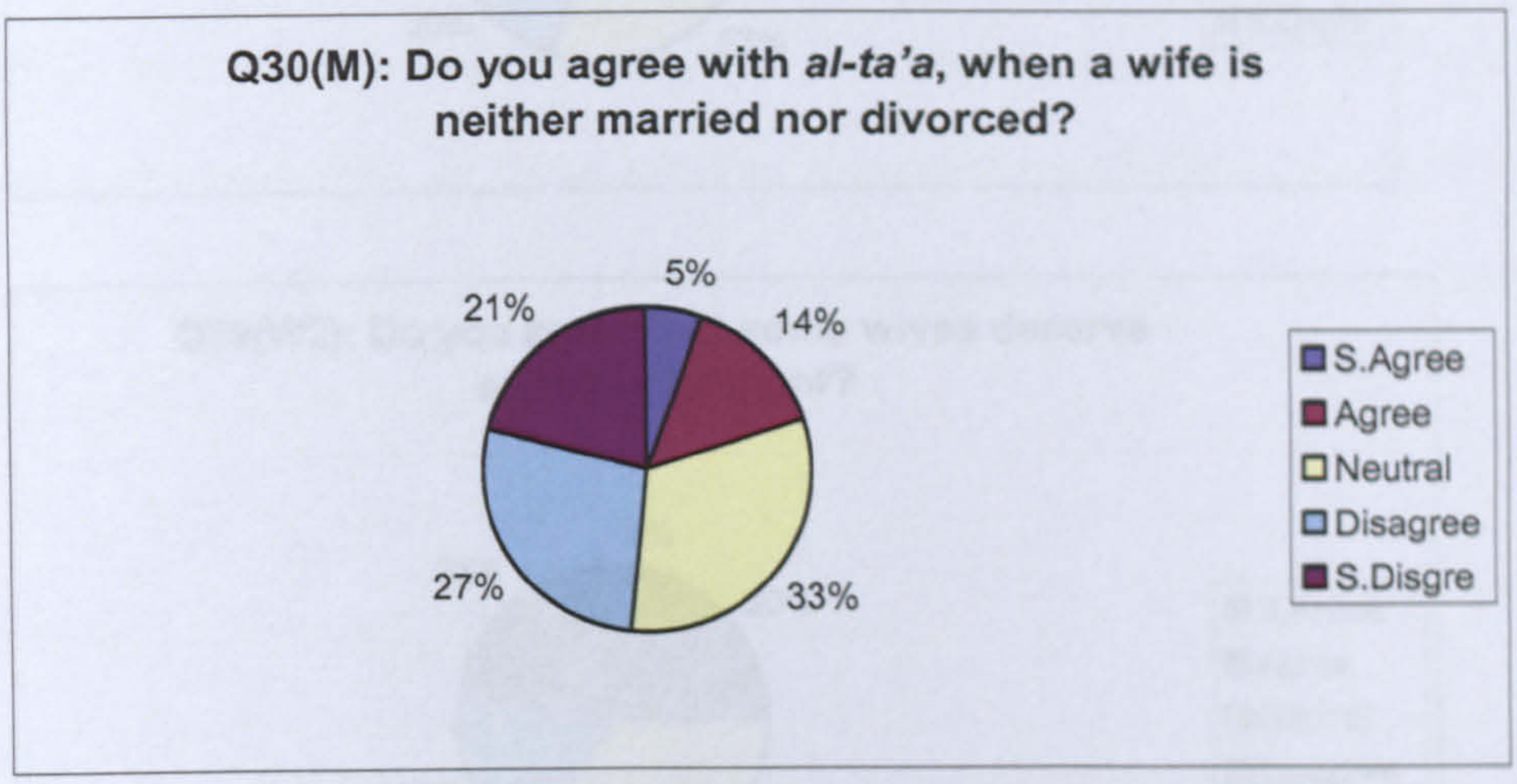




Because some – as the previous charts show- might not be aware of what nushoz and al-ta'a really mean, the following question explains it to see how many did agree on such situation:

Figure 5.24 Agreeing with Nushoz?

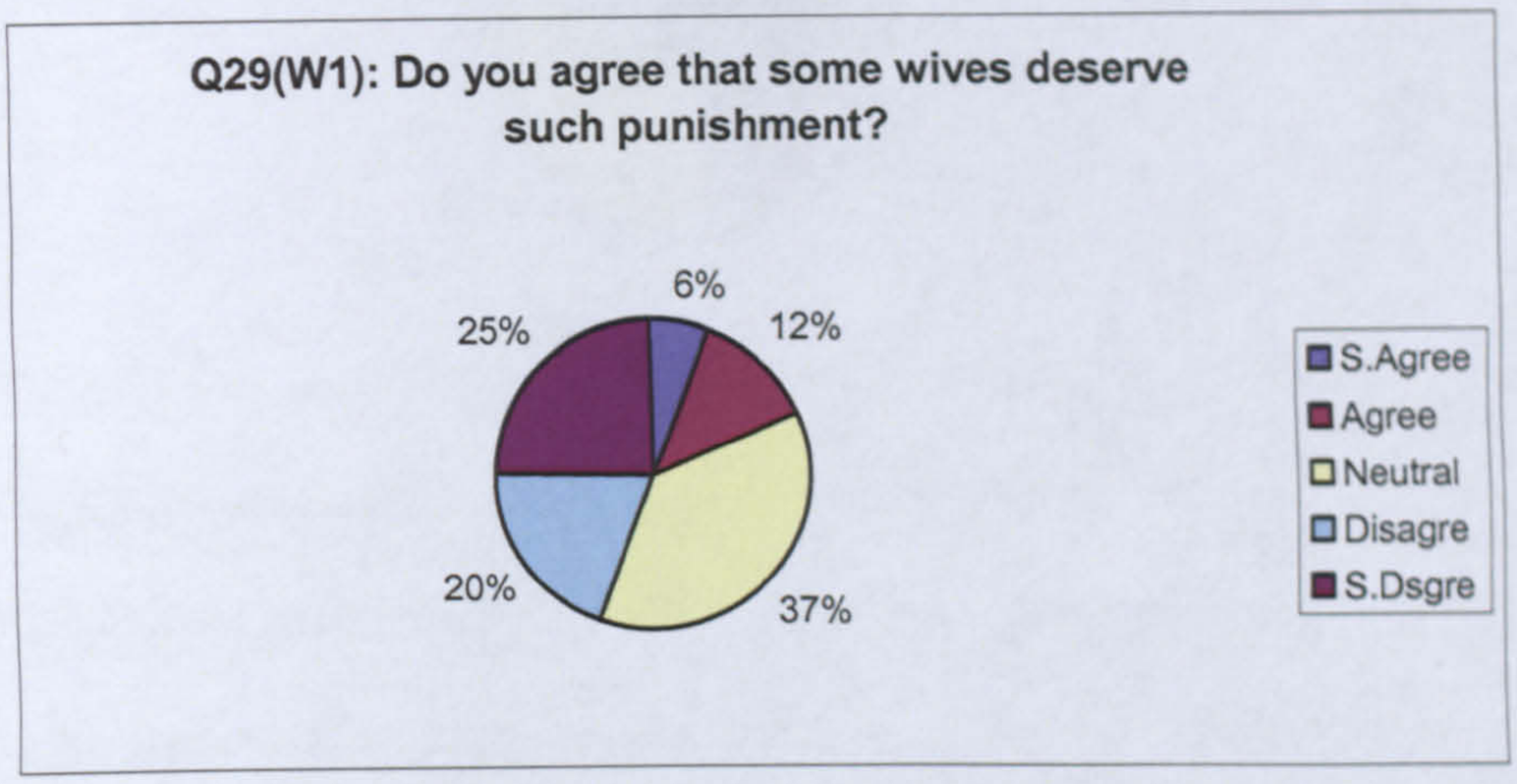


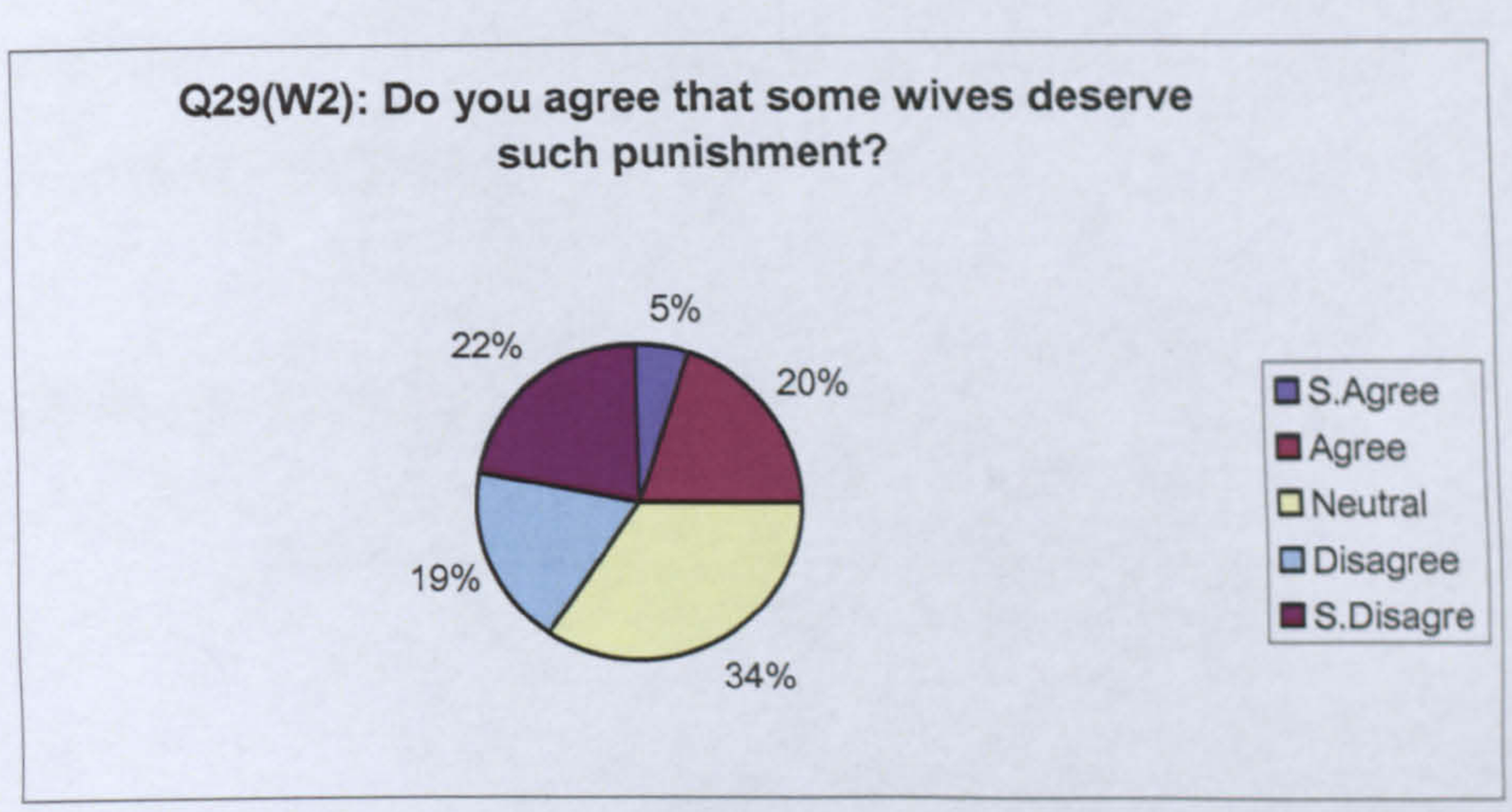


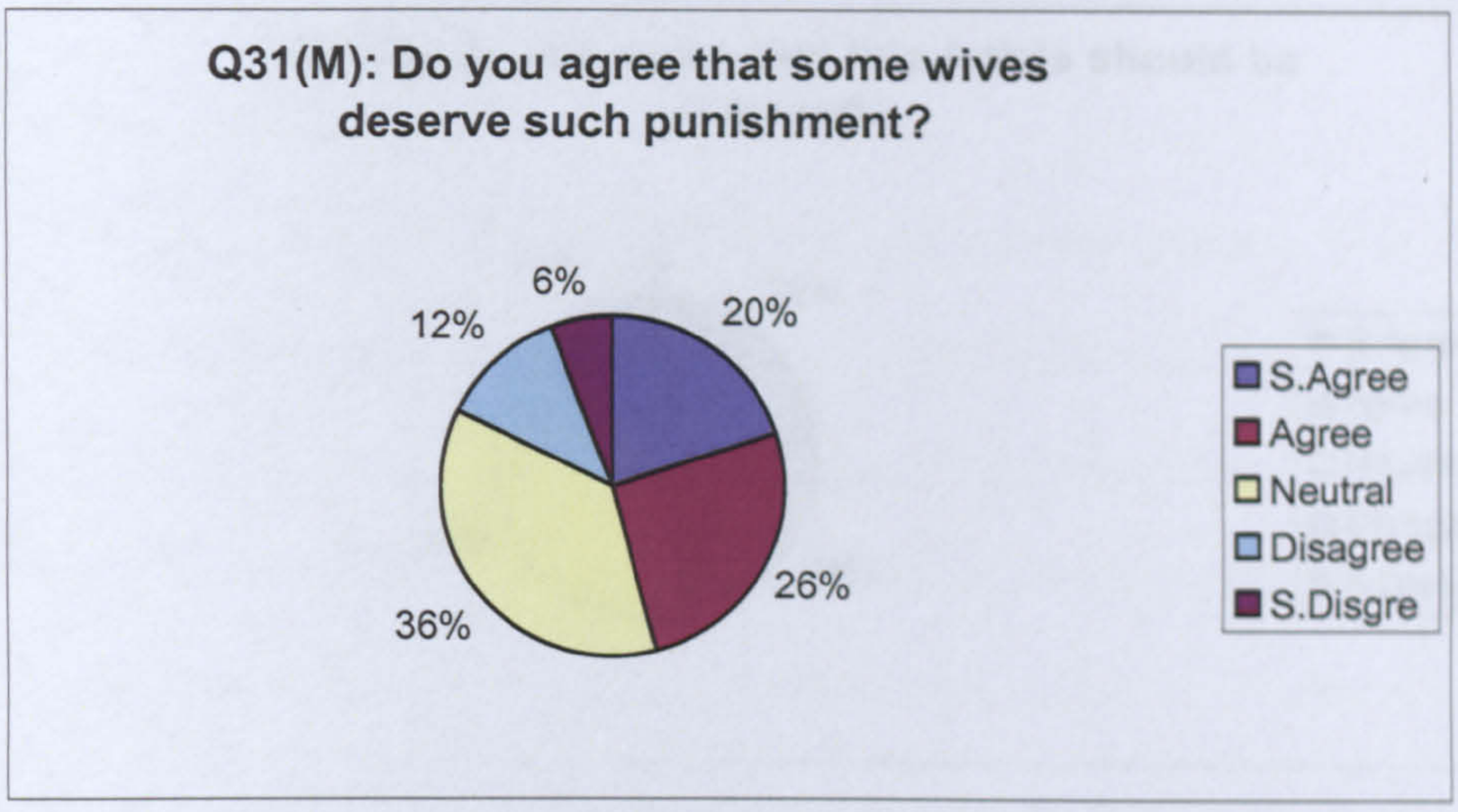
Respondents were more confused when asking them about the nushoz issue; most of them disagreed since it is very inhuman status the law has imposed upon women. It is true that there were some who agreed with the nushoz, but they are still a minority even with the men's questionnaire who think that some wives do deserve such punishment. It might be worth mentioning that there is a certain percentage of respondents who agreed on the nushoz from the three categories, men, women, employed and housewives. Someone might find it strange for women to agree on such matters, because they might end up in the same situation, however, it shows how women can be harsh on themselves

sometimes. Ultimately, women — whether illiterate or educated — cannot escape the cultural norms with which they grew up.

Figure 5.25 If a Wife Deserves to be Nashiz?

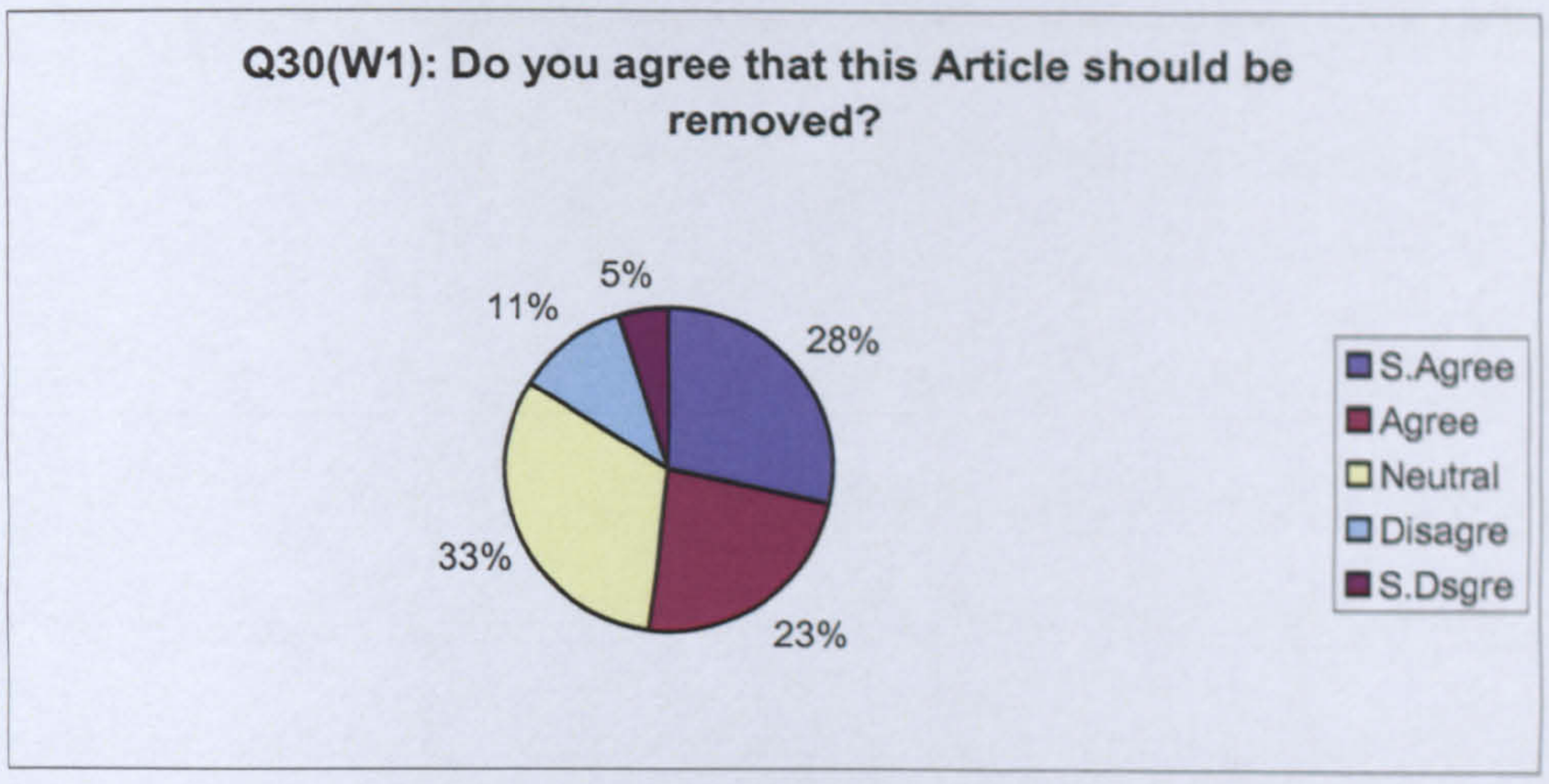


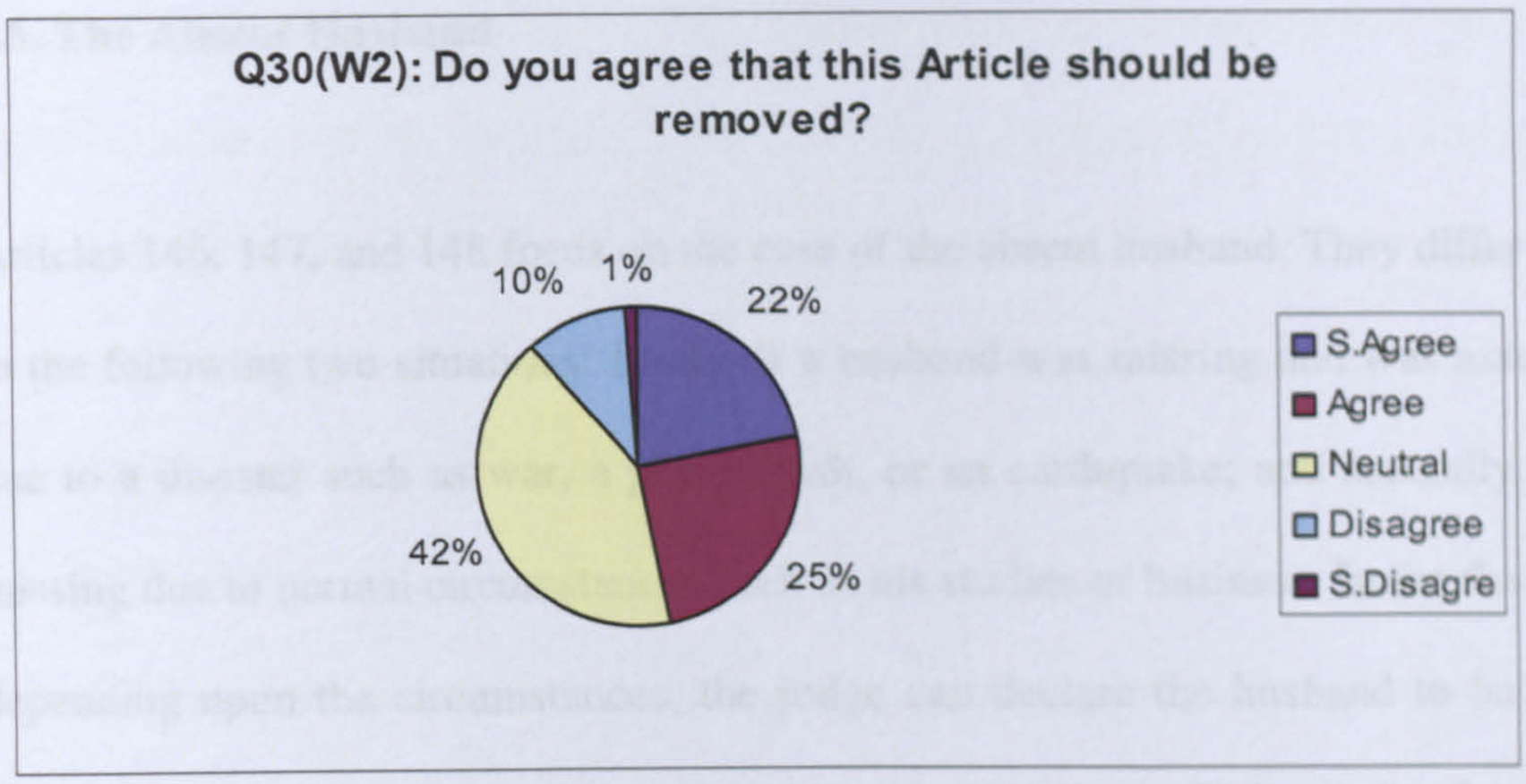


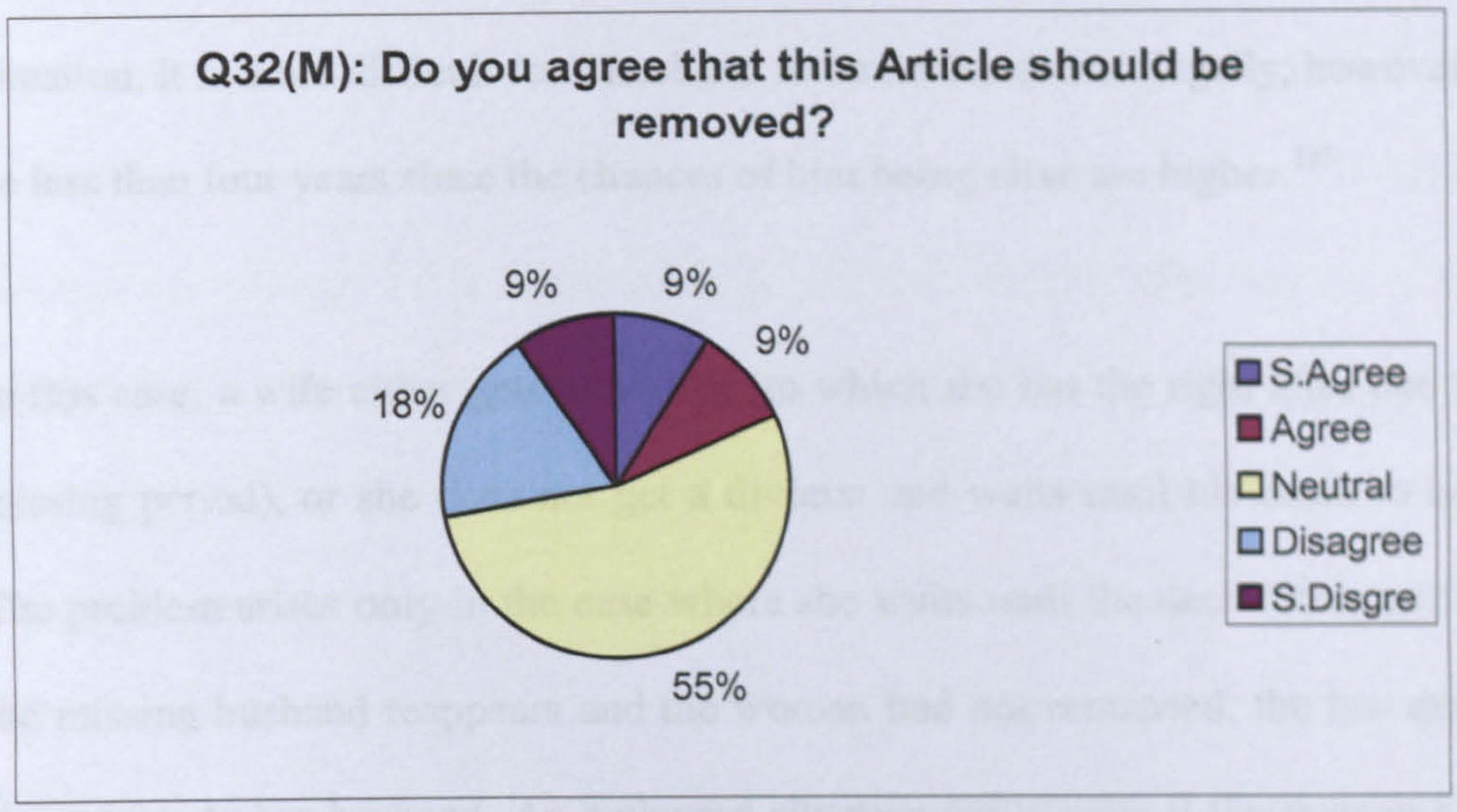


Housewives seemed to be more assuring of their rights than the workers, they agreed in larger percentage, and their neutral area was less. The majority of men, on the other hand, were more confused to decide whether to cancel the article or not since 55% are in the neutral area. Thinking that the article is in somehow related to Islam might be the reason for confusion among both men and women.

Figure 5.26 Cancelling the Nushoz Article.




Q30(W2): Do you agree that this Article should be removed?
10%
1%
22%
42%
25%
S.Agree
Agree
Neutral
Disagree
S.Disagre


Q32(M): Do you agree that this Article should be removed?
9%
9%
9%
18%
55%
S.Agree
Agree
Neutral
Disagree
S.Disgre

5.5. The Absent Husband

Articles 146, 147, and 148 focus on the case of the absent husband. They differ according to the following two situations: firstly, if a husband was missing and was assumed dead due to a disaster such as war, a plane crash, or an earthquake; and secondly, if he was missing due to normal circumstances such as his studies or business. In the first situation, depending upon the circumstances, the judge can declare the husband to be dead after four years or earlier if there are circumstances that leave little doubt. In the second situation, it is more difficult for a husband to be declared dead legally; however, it cannot be less than four years since the chances of him being alive are higher.[115]

In this case, a wife either gets a divorce (to which she has the right after one year of the missing period), or she does not get a divorce and waits until his death to be declared. The problem arises only in the case where she waits until the declaration of his death. If the missing husband reappears and the woman had not remarried, the law demands that she returns to her husband. An awkward situation could arise if the woman had married someone else and her first husband returns after the court had declared his death.

In such a scenario there are two possible situations. First, if the marriage contract was signed but the relationship was not consummated then the marriage contract would be revoked and the wife would have to return to the first husband. Second, if the first

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[115] The Islamic Scholars differe upon the 'waiting' period for both situations, however, these are what the Kuwaiti law has consider. For more details about the missing husband, see
Jamal Abdul-Gaffar. *Ahkam Al-Mafghoud fe Al-Sharia Al-Islameyia* (The Missing Person Statute in Sharia). (Egypt: Dar Al-Jame'a Al-Jadeda, 2003) pp 37-42.

husband reappeared after the second marriage had been consummated, then the wife should remain with the second husband. However, this is under the condition that the second husband did not know that the first was still alive; if he knew and continued with the marriage, regardless of the fact that this marriage had been consummated, the wife would have to return to the first husband.

The problem with cases of the absent husband is that they do not consider the interest of the wife at all. The law takes into account the wishes of the missing husband only. It does not consider the period of time that the wife had spent with the second husband: she might have spent more time with the second husband than the first or have children with the second husband. What if the missing husband returned after twenty or thirty years when the wife has established a whole life with her second husband? Is it reasonable for the missing husband to force his ex-wife to return to him after all those years? In this respect the law appears limitless as it does not take into account the length of the period that the husband may have been absent.

In addition, according to Shia teaching, in general a wife cannot be divorced from her missing husband; she has to wait for his return or for him to be declared dead. There is one exception to this which is if he did not leave any money for her to spend. According to such a rule, only financial needs are respected, while other needs are ignored. If he did not leave money for her to spend, a judge has to investigate the circumstances of the missing husband. If the judge can not find out whether the missing husband is dead or alive, then the wife can get a divorce after four years. The wife can get a divorce prior to

the end of the four year period if she puts forward other evidence that she cannot wait for four years.[116] However, a good point according to Shia teaching is that if the wife remarried and the missing husband returns, then he cannot be reunited with her as his wife as long as the four year time period has elapsed, and the investigation into his life was properly conducted.[117]

It is not just Kuwaiti law that rules along these lines: Egyptian, Iraqi and Omani laws are the same. Yamani law decided that the marriage would be revoked one year after if the husband is declared missing if the wife does not get any alimony; after two years if she gets alimony.[118] In Jordan, the second marriage would be revoked if it was not consummated, but it will not be revoked if it was, regardless of the fact whether the second husband knew if the absent husband was alive or not.[119] According to the law in Qatar, the wife would have to return to the missing husband despite all of the aforementioned situations, even if she was divorced from him and not just a widow.[120]

It is worth mentioning that these complex regulations concerning the missing husband have no source in the Sharia. There are two Hadiths that mention the missing husband. One is narrated by the prophet. He said: 'In a missing husband case, his wife should

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[116] Monther Al-Shemaly. *Al-Ahwal Al-Shakh'seya fe Al-Fegheh Al-Ja'fari* (The Personal Statute in the Ja'fari School). (Egypt: Monsha'at Al-Ma'ref, 2006) pp 236.

[117] Al-Sestani, A. pp 179-187.

[118] Jenan Shoue'b. *Missing Person ,His Missing is a Problem. His Appearance Could Cause a Bigger One.*[online][29th April 2005] Available from:
http://www.alkhaleej.ae/articles/show_article.cfm?val=161367
[Accessed 20thAug.2005]

[119]Arab Woman Organization. *Jordanian Family Law.*[online][undated] Available from:
http://www.awfarab.org/page/jr/2004/16_19.htm
[Accessed 20thAug.2005]

[120] Arab Woman Organization. *Qatar's Family Law.*[online][undated] Available from:
http://www.awfarab.org/page/qt/2004/pl.htm
[Accessed 20thAug.2005]

remain his until she get the news (if he had died or was alive)'.[121] The other is narrated by one of the *'Sahaba'* (the prophet's companions). Omar said: The missing husband's wife should wait for four years, then she would start *Iddat*.[122]

As Jehan Shoue'b argues, these two Hadith are ranked as weak and they are not mentioned in the famous Hadith's books that Muslims usually rely on.[123] Furthermore, both Hadiths do not mention the situation whereby if a woman remarried after the missing husband is declared dead. Instead, the second Hadith indicates that the wife is free after his death is declared.

In the *Majalat Al-Ghanon wal-Gada'* (Law and Judgment Journal) that the Ministry of Justice publish two volumes of every year to include all the cases that the Supreme Court has judged, there is not any case regarding the missing husband. This is either because there was not any case raised on this ground, or if one existed, it did not reach the Supreme Court. It might be understood that there were no cases regarding this subject before the Invasion of Kuwait when there were a lots of missing Kuwaitis who were not found until the year of 2003 in the Liberation of Iraq war. However, it has been argued that people who were missed during that incident, were dealt with as a political matter, and the courts did not judge any one to be dead, even after the four years, because the Kuwaiti Government was still doing all that was possible for their return, and judging them as dead would have disappointed all the family who were waiting for their return.

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[121]Shoue'b, J. (2005).~

[122] In Islam, when the husband died his widow should be mourning for four months and ten day which she cannot remarry during that time.~

[123]Shoue'b, J. (2005).~

5.6. Custody

In family law the custody issue is considered to be fair to women to such an extent that in Kuwait it might be considered to be prejudiced against men. Article 189 gives the priority for custody to six female relatives of the child before considering the father. These relatives are the mother, the maternal grandmother, her sister, her aunt (her mother's sister), her aunt (her father's sister), the paternal grandmother and then the father, his sister, his aunt (the father's sister), the niece (the brother's daughter), and then the niece (the sister's daughter). If none are eligible for custody, the designated guardian would be the brother, the grandfather, the nephew or lastly the uncle. Thus, the wife's relatives come first, then the husband's relatives.[124] There are different custody arrangements among the Shia sects: the mother, the father, grandparents (priority would be according to their age), brothers and sisters, nieces and nephews, aunts and uncles, and then the cousins.[125]

The custody is considered as a right for both the child and the custodian, but priority is given to the child. The judge has the authority to decide whether the mother is capable of custody. If not, he will take the next in line.[126]

Since the age of custody has not been stated in the Qur'an or Hadiths, there is a major difference of interpretation between the five Islamic schools:

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[124] Family Law.
[125] Kamal. A. (2005) pp 105.
[126] Kamal. A. (2005) pp 102.

1. The Hanafi school states that for boys, the mother's custody would end at the age of seven as it is "the age when he dispense with the women's care", and for girls at the age when she starts to became more like a woman at the age of nine.

2. The Shafe'e's states that the end of the mother's custody is at the age of seven for both boys and girls, though the boy would be given the choice of whether he wants to live with his mother or father.

3. For the Hanbali school the age of custody is similar to the *Hanafi* school, but the boy is given the choice as to whether he wants to live with his mother or father.

4. The Malki school argues that the boy' remains in custody with his mother until he reaches puberty, then he would be given the choice as to whether he wants to stay with his mother or father. The girl remains with her mother until she gets married. This is what Article 194 of Kuwaiti law has adopted.[127]

5. The Ja'fari school, which represent the Shia, states that the mother has custody for a girl until the age of seven and for a boy until the age of two. When the boy attains puberty, he can choose whether he wants to live with his mother or father but the girl is forced to move to her father's house at the age of seven until she gets married. She does not have the choice of where to live like the boy.[128] In case 55/95[129] the father filed a suit case against his divorced wife (custodian) asking the court to end her custody for his two children (boy and girl) since they reached the age of seven. The first degree court gave him the custody for both, but the Appeal Court denied it for the girl deciding to let her remain with her mother even though she was older than the boy, and decided the custody for his son.

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[127] Family law, explanatory memorandum."
[128] Kamal.A. (2005) pp 143."
[129] Law and Judgment Journal. The year of twenty three. Volume two. December 2000, pp 342.

All five Islamic schools give priority to the child; this explains why the custody of the child, whether male or female, ends as soon as the child does not need its mother's care. The schools also agree (with the exception of the Malki School) that the mother is only needed for the basic needs of the child, which is why custody ends at a young age.

According to most schools the mother cannot be trusted to bring up a child, especially in the girls who are not given the chance to live with their mother after a certain age. Most of the five Islamic schools agree that the boy should have the right to choose with whom to live. The reason that the girl must move from her mother's house to her father's is because the father can be stricter on her and this would guarantee her good behaviour.[130] Or it could be because the schools think that girls, if given the choice, would prefer to be with their mothers. Does this imply that if a girl is given a choice it might be riskier than giving it to the boys?

According to Kuwaiti law, this worked in the mother's benefit, especially for custody of girls, to such an extent that some Kuwaitis consider it to be a discrimination against the father, who might never have the chance to gain custody of his daughter. However, the right of custodian would be taken from the mother if she ever got married to someone other than the father. In case 167/98[131] the mother lost custody of her children in the first degree court because she got married to someone else. Though when she appealed the

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[130] Mohammad Al-Saleh. *Fegh'h Al-Osra* (Family Jurisprudence). (Riyadh: King Fahad Library, 1996) Volume 2, pp 839, 840.
In fact Mohammd Al-Saleh argues that the main reason that the choice would be given to the boy, and not to the girl, is because the boy is always loved by his both parents, if he choose one over the other, the other parent would still love him. Unlikely, the girls custody is usually – as he claims – is unwanted, which increase the chance of rejecting her by the parent who was not chosen to live with. pp 842. "
[131] Law and Judgment Journal. The year of twenty seven, Volume one, April 2002. pp 452.

Court of Appeal gave her custody back because she was divorced then and that was why she regained her right of custody. Now, it is not very clear from this case if she got the divorce because of her children or for another reason, but it would still be possible, which is only unfair to her. On the contrary, a mother requested custody of her children in case 48/98[132], where the father, who already had custody, got married even though the mother would have been more eligible for custody. The first degree court gave her the custody, but the Appeal Court denied it and so did the Supreme Court. In case 28/94[133] however, the custodian mother who had four children got married, but she got divorced when her ex-husband filed a case to end her custody which he achieved since his ex-wife married a "stranger" which ended her right of custody. Even though she got a divorce from the second husband, the first degree court gave the custody to the father because her divorce was not yet final (she did not finish the Iddat). She appealed after this when the Court of Appeal gave her the custody right back because her divorce, then, was final.

According to Article 190 of Kuwaiti law, there are several conditions to be fulfilled to earn custody:

1. Adulthood and rationality: the custodian must be mature in order to take care of the child.

2. Trustworthiness: the custodian should be trusted to look after the child and its money.

3. The ability to take care for the child: the ill and the elderly could be prevented from being custodian.

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[132] Law and Judgment Journal.The year of twenty seven. Volume one, April 2002.pp 449."
[133] Law and Judgment Journal.The year of twenty two. Volume two. July 1999. pp 458."

4. If the custodian is male, he must not only be a relative but also *Mahram* to the child if she was a female.[134]

5. If the custodian is male, then there must be a female – wife, sister, and mother - to take care of the child.

The first three conditions are necessary and reasonable, but the forth clearly raise some questions. It means that the mother can only marry a few select people – such as her ex-husband's brother — which happens rarely, in order to keep the custody of her daughter. Otherwise she will lose custody if she marries outside the family circle as the Article 191 has stated. This condition is strange and does not make any sense because, according to Sharia, a man can never marry his step-daughter when his marriage – to her mother – was consummated. Even if he divorced his wife he still could not marry his wife's daughter because he is like a father to her and already became a mahram. When Sharia stated this, it was because it realized how close they might become living in the same house. Thus both would be more comfortable knowing that their relationship would never go any further than father and daughter.

However, the judgment on the custody cases varies due to the different given factors in each case. In 139/98[135] the divorced couple are from different sects, the father was Shia while the mother was Sunni, because the Shia sects ends the custody in an earlier age than the Sunni (according to the Family Law) the father wanted to take advantage of this in this case requesting the custody of his three children. The first degree Court decided

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[134] Usually the word *'Mahram'* means the male relatives that a woman cannot marry like her father, brother, grandfather, son, uncles, and nephews."

[135] Law and Judgment Journal. The year of twenty seven. Volume one, April 2002.pp 382.

him the custodian for the youngest child while the other two remained with their mother since that was their choice. However, when the mother appealed she gained the custody of her three children back since she was Sunni and the Family Law is the basic ground for this case, which supports the custody for the mother in such cases. Also in 15/98[136] where the father and the mother were both Shia. The father demanded his three children's custody. He based his claim on two reasons, since he had a son – who was the eldest – and two other daughters, he claimed that his son had reached the age when his custody should be moved from his mother to his father. Also, because the two girls had not reached that age yet, he requested their custody claiming that their mother was not eligible for their custody. The first degree court granted him the custody for the son only, while the Appeal Court denied it and decided the custody of the three children should remain with their mother.

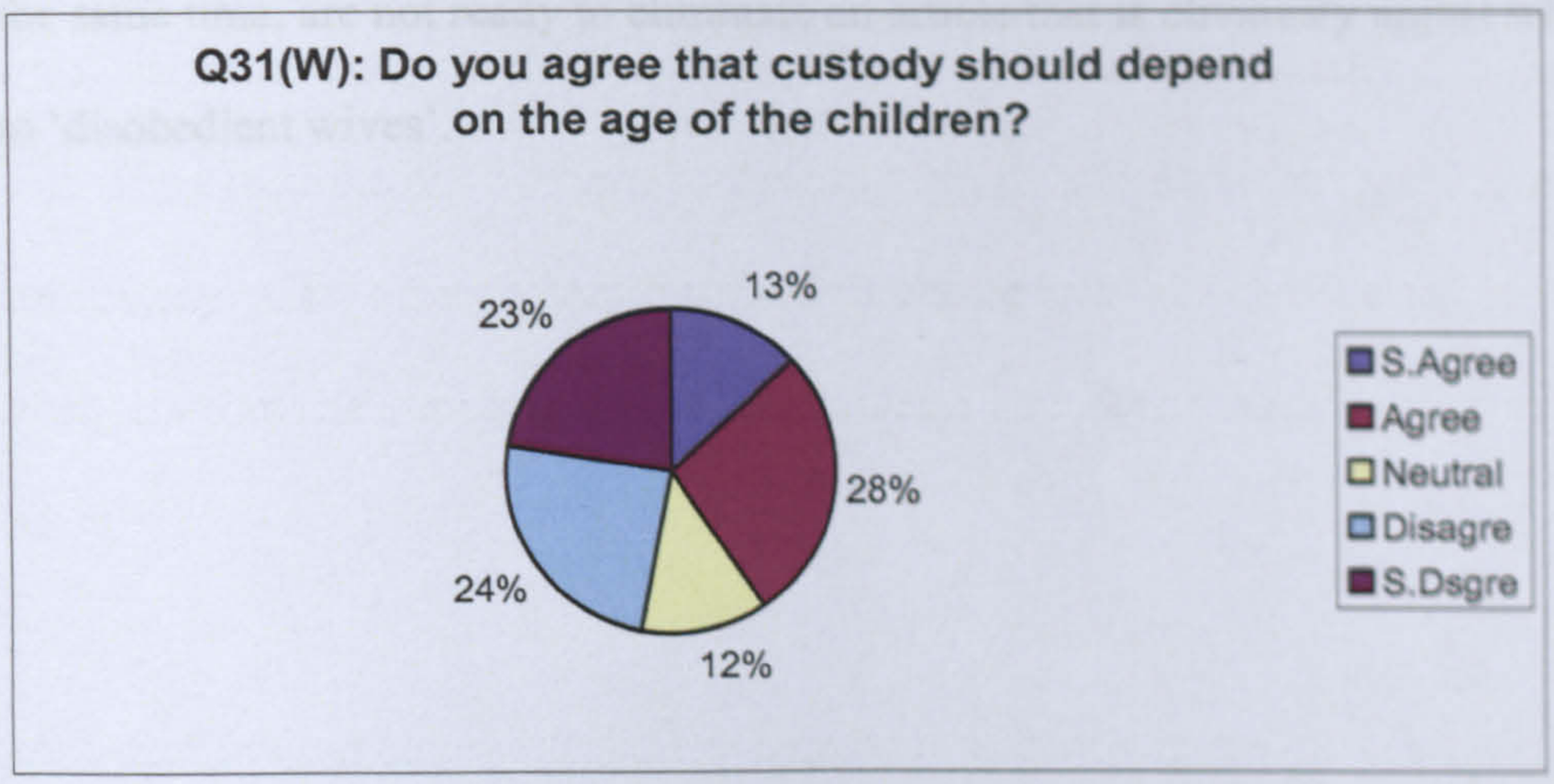
Due to different factors, the differences between the Kuwaiti Family Law, and the UK law regarding the custody are obvious. The main factor that it is considered in the Kuwaiti Law is the age of the child, while the UK law is more sophisticated in the matter taking into account seven factors in the Children's Act of 1989 section 1(3) as discussed in the previous chapter. Two custody factors the Kuwaiti court does not take into account are: the welfare of the child and the best interest of child – as the UK court does in some cases – because if the court find that the best interest of the child is to live with one parent who cannot afford a certain standard of living for the child, then it will order a maintenance for the child from the other one. However, according to the Kuwaiti Law, the father is the one who is always responsible for the maintenance of his children,

[136] Law and Judgment Journal. the year of twenty seven. Volume one, April 2002.pp 33.

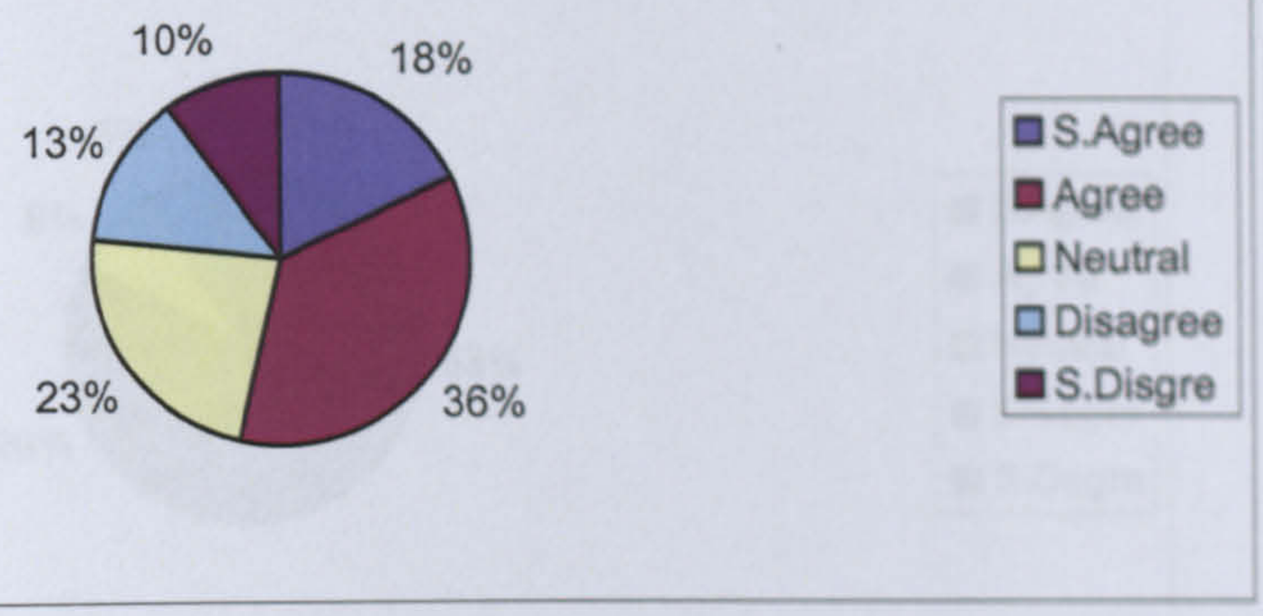
meaning that if the mother is granted custody, the father is obliged to pay his maintenance. However, if the father is granted the custody, whether he can afford it or not, the mother is never asked to contribute to the child's welfare. As it will be discussed in more detail, the Kuwaiti law can benefit – to a certain extent – from the UK law in the area of custody. Especially since the matter is not stated in the Qur'an nor in the Hadith, which makes it more flexible to change for the interest of the child and the parents as well. The age of the child cannot be the only factor for the trial court in Kuwait to decide the custody. Also, other factors that the court takes to decide the custody include such as when the custodian mother gets married while that fact does not affect the custodian father.

Regarding the custody matter, there were two questions in the questionnaire to see how people would agree on matters that are not related to Sharia, but the famous Islamic scholars have an opinion to it, but it might be against the wish of one of the parents.

Figure 5.27 Custody Right.

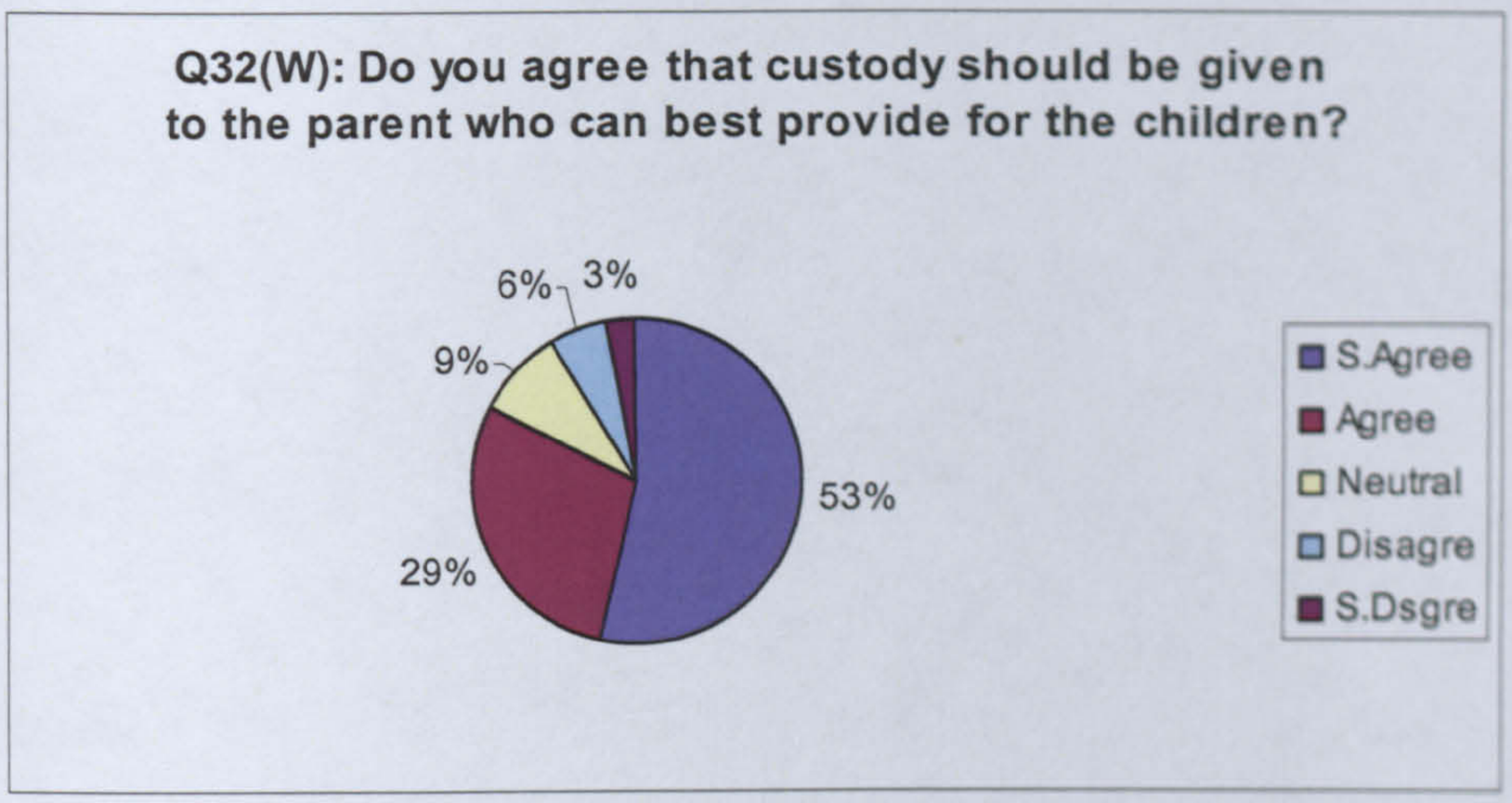


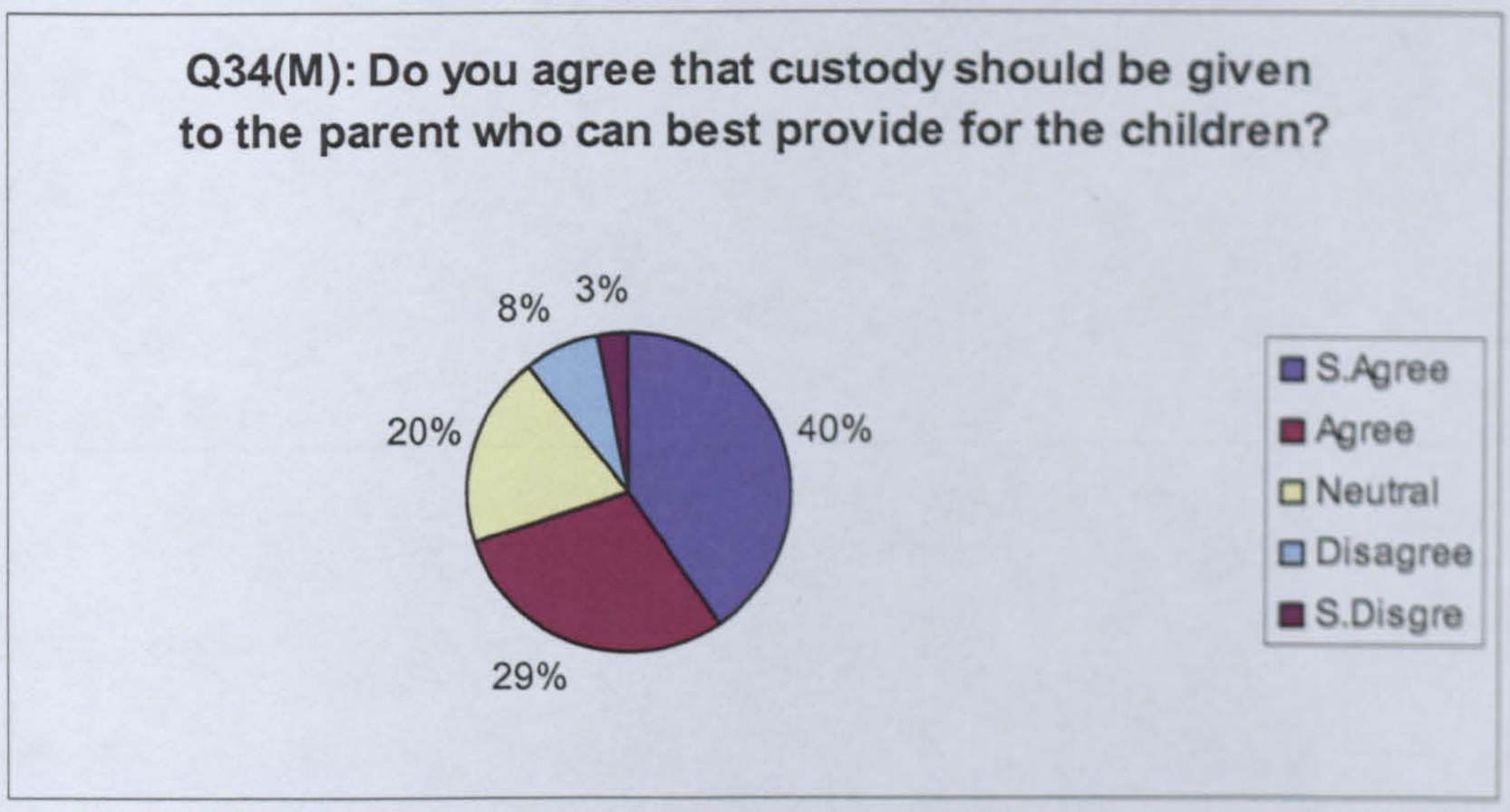
Q33(M): Do you agree that custody should depend on the age of the children?



However, when suggesting the idea of custody being dependant on the parent who deserves it rather than on age, since the priority of the custody as a right is given to the children rather than to their parents, and one of them can afford a better environment for the children regardless of their age, respondents were more supportive of this idea, in spite of the religious roots of the custody. When the Kuwaiti Family Law stated the custody rights, it depended on the Malki scholar for most of the law's articles. In conclusion, the respondents supported a change in matters that relate to religion but, at the same time, are not ready to eliminate an article that is obviously unjust when it relates to 'disobedient wives'.

Figure 5.28 Deciding the custody.





5.7. Alimony

There are two kinds of alimony: alimony between divorced couples and alimony for family members.

5.7.1. Divorce alimony

There are different kinds of alimony, there is alimony for the wife as a wife, and another as a mother if she has children, and the other of alimony is for the children. The alimony for the wife is two kinds; the first one is the Iddat alimony. When a husband divorces his wife, she has to stay single for three months before getting married to someone else, and according to Article 162 the husband is responsible for such alimony for three months. The second kind is the mota'a alimony. According to Article 165, when a wife divorces she is eligible for alimony which is based upon her husband's income for only a year. This is called mota'a and it is as if the husband pays compensation to the wife to be divorced. The mota'a alimony starts when the Iddat ends.[137] However, this alimony would not be paid if the divorce was because of the husband's insolvency, the maltreatment of the wife, if the wife asked for the divorce, or the death of the husband.

The second type of alimony is received if the wife has children. She would get numbers of different alimonies; first if she has a child under the age of two, then she would get

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[137] According to the Sharia and Kuwaiti law too, when a woman gets a divorce she would start what it is called 'idda' which is a three month time period when she cannot marry another person during that time, and she would rather stay at her house with the husband, so that it is easier for them to get back together, but once the three moths are over without getting back together she has to leave the house since they became strangers. ~

alimony for breast feeding until the child reaches two year old (Articles 187, 188). The second type is the alimony she would get as a custodian according to Article 199. The third kind of alimony is to be paid for the child expenses. According to the law, if custody was granted to the mother, the father would still be responsible to pay her custodianship expenses as decided by the judge. The alimony – usually – would be decided according to the father's income.[138] It would be for the child for his/ her expenses, and its accommodation (if rented).

However, the alimony that was decreed by Article 199 ends when a boy reaches the age of seven and a girl reaches the age of nine. This kind of alimony is humiliating for the mother as she is being paid to take care of her own child. It is as agreed upon as a right for the mother regardless of her financial status, because in some cases a mother needs such alimony. As mentioned, that according to Article 187, a mother not only gets paid for taking care of her children but also if she breastfeeds. The mother is only entitled to this kind of alimony if she is divorced and her child is under two years old. Such concepts may appear strange because paying the mother money is like treating her as a servant to the child, not as a mother who usually – and culturally- would devote her life to her children. On the other hand, these alimonies are generally small and not worth the humiliation.

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[138] Article 163 stated that the *idda* alimony should be decided according to the husband's income. This is the usual way of deciding all of the different types of alimony.˜

Instead, the mota'a[139] alimony should not be like a year only salary; it should reconcile any damage caused by the divorce. The mota'a alimony can work in the case of a short-term marriage but not in the case of a long-term marriage. If a woman got married at the age of seventeen and had no chance of an education because of the marriage[140]and then was divorced against her will fifteen or twenty years later, when her children had grown up, she is not entitled to any alimony unless for the Iddat which for three months, and mota'a alimony is only for one year and if she is lucky she will have a place in which to live. Even though, the Iddat and mota'a allowance is usually a small amount of money. In 120/98[141] the first degree court decided for the divorced wife KD 300 as Iddat alimony, and KD 1200 as mota'a alimony to be paid as KD 100 each month for a year. When the divorced husband appealed the Court voided the first degree judgment denying any rights for the divorced wife when the ex-husband was able to prove that he had already paid her and supported his claim with two witnesses (one of them was his brother). One of rare cases that the alimony was considerably high was case 26,25/95[142] when the first degree court ordered KD 450 as Iddat[143] allowance and KD 180 as the two boys alimony, though the payment was raised by the Court of Appeal to be KD 900 as Iddat, and KD 300 as the custody rent house and allowance for the boys jointly.

As the wife has to pay to get a divorce if she does not have a valid reason such as in the khole' situation, the husband should do the same. Although he paid a dowry when they

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[139] It is also better to change the name of it since the word 'mota'a means pleasure or even lust, which indicate that she is getting paid for such.˜

[140] In many cases if a woman got married during her high school or college, her husband will order her to quit, preventing her from getting a degree and the chance of good-pay job.˜

[141] Law and Judgment Journal. The year of twenty seven. Volume one, April 2002.pp 353.˜

[142] Law and Judgment Journal. The year of twenty three. Volume two. January 2000. pp 224.˜

[143] The Iddat is three months but the Court makes it one payment usually.˜

first got married, this cannot be considered adequate compensation in a long-term marriage, as in most cases the woman is the weak party with the most to lose. The husband always has the chance to remarry whenever he wants as it is always the man's decision when it comes to marriage. For the woman her chances would drop by at least half after the divorce and even less as she gets older.

Consequently, when a husband divorces his wife he has to pay her different kinds of alimony: Iddat which is alimony for three months, mota'a which is a specific amount of money, breastfeeding money if she has children under two years old, the rent for the custodian mother, custody alimony which is usually set at KD 50 for each child,[144] and rent for the house (if the mother had to pay for the rent). Most of these costs are dependent upon the income of the husband who usually attempts to show the judge that he has lots of debts. In some cases he even takes loans in order to minimize the amount of alimony paid. Also, in some cases a wife would not be given all kinds of alimony, she would be given only some of them depending on different factors for each case.

In case 169/98[145] since the divorced couple have four children, the first degree court decided KD 200 for their allowance which is exactly the amount of the children raise that was added to his salary – which will be discussed in more detail in the next chapter – as KD 50 for each child, but the Court of Appeal amended it to KD 240. Both courts did not decide any kind of other allowance for the divorced wife. Also in case 12/87[146] the

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[144] That is the raise each Kuwait employee get each time he got a child as it will be discussed in details in chapters six and eight.˜
[145] Law and Judgment Journal, the year of twenty seven, Volume one, April 2002.pp 336.˜
[146] Law and Judgment Journal, the fifteenth year. Volume two. December 1994. pp 273.˜

divorced couple have a daughter, the wife filed the law suit for the different kinds of alimony. The first degree court ordered KD 60 as the rent for the house, KD 20 for a servant, and KD 30 as a rent for the mother as custodian. When the father appealed, the alimony was lowered for both the house rent to be KD 40 and the custodian rent as KD 20 but supported for the others. Both courts did not agree on the ex-wife's request of the mota'a allowance. Many alimony cases end with low amounts of money. Even though the later case was decided in 1987, the rent of the house was never that low.

In 100/99 case[147] the Supreme Court denied the right to the custodian mother to get rent for the house since, the husband claimed that his ex-wife was living with him and his new wife in a governmental house without paying any rent,[148] which she would stay in until the end of the children's custody.

5.7.2. Alimony for family members

According to Articles 200-207 this alimony is based upon the needs of family members. First, as Article 200 stated, the alimony is for parents, grandparents, children and grandchildren only. That is to say, the alimony is not for sisters, brothers, nieces, nephews, uncles or cousins. Second, Article 201 stated that if a son and a daughter were wealthy they have to support their poor parents or grandparents even if they were able to work and earn money. Third, as Article 202 stated, a wealthy father has to give his poor son or daughter alimony until they are able to earn their own money. Fourth, if the father

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[147] Law and Judgment Journal. The year of twenty eight, Volume one, June 2003. pp 422.

[148] One of the main benefits a Kuwait male citizen gets when he gets married either a ready build governmental house, or a land and a non-interest loan to build a house.

was poor and the mother was wealthy then she has to support her children. If the father obtains money later then he has to pay her back unless he died or became absent.

All these articles make sense in a society such as Kuwait where the family, in most cases, is very close. Each member should support the others and also treat females equal to male if she is wealthy and can support herself and her family. These are sensible rules in today's society where both men and women can get paid employment. However, there are contradictions when saying that the male is always the one responsible financially for his family and as a result gets double the inheritance. According to Kuwaiti law, a female gets financial support as a wife, mother, and as a daughter and not as a sister where a brother is not financially responsible for his sisters. However, according to these articles, she is financially responsible if she is the wealthier person in the relationship or if she earns money in place of her son, or father. When the law stated these rules it did take into consideration that a female can not only support herself but her family. However, this is not the case in other articles such as Article 29 where it states that a female has six guardians to decide her marriage and that she can never get married without their approval, even though half of them are not responsible for her financially (brother, step-brother, and uncle). They could also interfere with her inheritance[149] just because they are male relatives. Furthermore, according to Article 202, a wealthy father has to support his poor children whether they are male or female.

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[149] If someone died –whether male or female- and left only a female relatives like daughters, wife, or a mother, they will take their shares and the rest will be given to the closest relative male, however if the person left a son, the female will take their shares and the rest will go for that son. The male relatives could be the brother, the uncles and also the male cousins."

5.8. Interview with a Family Law Judge

In order to get a complete point of view about the family law, cases, procedures and rulings should be studied too. For this reason, an interview was made with a family law judge, Judge Adel Alfailakawi, who clarified some issues about family law cases. He started with the addal cases. The legal definition for this case is that when a woman sues her father – or any other guardian if her father is dead - for his refusal to authorise her marriage to a person she wants to marry, she can file a case asking the judge to act as her guardian and authorise her marriage to the person of her choice. The judge stated that these kinds of cases are very rare due to strict traditions.

- What are the most significant reasons why a guardian rejects the marriage?

There are many different reasons: social, material, tribal matters, or simply because the guardian does not think that the potential husband has a secure future. However, often the father refuses to let his daughter marry in order to spite her mother if he is divorced from her. The judge must study the reasons and give the verdict accordingly. If the potential husband is able to provide a good living for the plaintiff and he is suitable for her in many aspects, then the judge will sanction the marriage.

- According to the law, efficiency (or Al-Kafa'a) is in terms of religion rather than social or material aspects.

Although the law mentions religion as the most important aspect, it does not prevent the judge demanding other qualities. These are the different aspects that the judge has the authority to investigate, whether they are provided or not. Thus, while the law mentions

one thing, the details are left to the judge's authority and are dependent on each individual case.

- What if the potential husband has a high standard of living but is socially inferior to the woman?[150]

The judge should make sure that the potential husband can provide the minimum living standard. It is not necessary that he should have a high income or a large house for the plaintiff to be willing to marry him.

- Do you think that rejecting the request to marry would produce an unusual situation since both the plaintiff and the defendant are living in the same house?

First of all, rejecting such a request would occur only under rare instances since marriage is one of the human rights. Second, rejection means that the case went through the three levels of judicial proceedings (the first degree court, the court of appeal, and the Supreme Court). This means that the verdict would be a decision from nine judges.

However, this kind of case would usually only go to court if the parents are separated and the mother is enjoying the right of custody of the plaintiff. This is because if the plaintiff loses, she does not live with her father.

-Is there an average age for the plaintiffs?

The average age of the plaintiff is usually in her early twenties, but in some cases she is in her late thirties and early or mid forties.

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[150] Some families consider tribal matter very highly, or if they are noble and the other party is not. ~

-While it is understood that the law gives guardianship to the father, do you think it is right to give it to every male in her family after the father?

The law gives it to the men. One can refuse to authorise the marriage of his sister or his cousin, or all of them can refuse. Brothers have no right to reject the marriage if the father is alive. But of the brothers it is generally agreed that the eldest brother is next in authority after his father. However, in Kuwait all of the brothers have the same powers of authority: any one of them can marry his sister. If she has no father or brothers, then her uncle (from the father's side) has authority; if she has no uncles, then the guardianship will move to her cousins who are all equal in terms of authority, like her brothers.

- What if a woman files the case, but her father did not attend. Will that affect the verdict?

Not necessarily. The judge would proceed with the case like any other one and must still consider if the potential husband is suitable for her or not.

- How about the request to revoke the marriage?

It does exist, but it is rare. The marriage would be revoked if the husband failed in any way, or if the husband deceived his wife or her family.

- What if the request was filed by the guardian rather than the wife?

It is also very rare, but happens if the marriage was not conducted lawfully, for example if the woman gets married while her father is away. Then the father can ask for the marriage to be revoked since his right of guardianship was ignored. However, if the

father was away for a long time, then his daughter can file a case asking the judge to authorise her marriage if she does not know when or if her father will return. Under such circumstances the marriage would be legal. In any case, if the wife got pregnant, or if she already has children, then the marriage will not be revoked no matter what her guardian's reasons are.

- How about divorce, obedience, and nushoz cases? How do they work?

The husband can file for divorce in obedience cases. He can file the case after signing the marriage contract and handing the dowry over to her. If he has not yet given her the dowry, then he cannot file such a case. If he wins the obedience case but his wife does not move to his house, then she becomes a nashis. The house should be furnished according to his standard of living and income, rather than according to how she lived while with her family. So whether her family is rich or not, she must live according to her husband's means since she (or her family) accepted him to be her husband knowing his wealth.

However, the woman can file for a divorce if she claims that the house is inappropriate, in a dangerous area, or that she does not feel safe in it. Also, she can get a divorce if she claims that her husband is violent or mistreats her. In such cases she has the right to alimony. When the wife has objections to the house, the court must inspect the house.

- How can a wife prove abuse?

In all family law cases, witnesses are very important. She can bring witnesses to the court if they saw or heard the abuse. Any member of her family apart from her parents or her children can be a witness.

If her husband wins the obedience case, and if the wife does not move to the house, then he can file for the nushoz case. The wife would be considered as a nashis from the day she refused to move to the obedience house. This would affect her rights to alimony as the husband would be exonerated from it. In that case, she would be considered neither as a wife nor as a divorcée, and would be deprived from any rights. She can file for divorce if she was able to prove evidence of abuse. Moreover, the husband can divorce her without any further responsibility since she is a nashis.

- Is there a time limit on being a nashis?

No, there is not. A wife can file for divorce at any time, but it is not guaranteed of course. If she lost a case she can raise another one whenever there were new causes for the case, and that goes also for the obedience case. So losing it on one occasion does not mean that it cannot be raised again.

- What is considered as mistreatment?

Mistreatment is a very loose definition. It includes violence, slander, and cursing, whether directed to her, her family, or her children. Also, even if the husband did not mistreat her, if the wife cannot stand living with him due to hatred, then she can get a

divorce. So, in all cases, women can get divorced, but sometimes she has to give up all her rights as a divorcee or pay the husband (for example, return the dowry).

5.9. Conclusion

Marriage, divorce, custody, and all of the discussed Family Law issues in this chapter are suppose to be based on the Sharia teachings and here is the complication. The differences are clear within the issues that were discussed with the family law of the UK regarding divorce and custody since that UK, since that the latter country recognises 'equality' while Kuwait depends on Sharia. However, the Sharia is not a written law that can give clear roles for such issues; instead it gives highlights and principles, which give the opportunity for very wide and different opinions. Abdullahi An-Na'im defined the Sharia as:

'The term Sharia refers to the general normative system of Islam as historically understood and developed by Muslim jurists, especially during the first three centuries of Islam – the eighth to tenth centuries CE. In this commonly used sense, Shari'a includes a much broader set of principles and norms than legal subject matter as such. While the term Islamic Law is generally used to refer to the legal aspects of Shari'a, it should also be noted that Muslims tend to believe that the legal quality of those principles and norms derives from their assumed religious authority. Yet, whenever enforced or applied by the state, Shari'a principles are legally binding by virtue of state action, through either enactment as law by the legislative organs of the state or enforcement by its court.'[151]

[151] An-Na'im, A. (2002) pp 2, 3.

Sharia derives its teachings from four main sources which are accordingly: Qur'an, Sunnah (the Prophit Mohammad conducts and sayings), endeavour (*Ijtehad*)[152] and finally analogy (*Gheyas*). Qur'an is the main source of the Sharia since it is believed that it is the only source that contains holy words from God that were and would never be changed throughout the ages. Sunnah comes as the second source because it is Prophet Mohammad's conducts and sayings (Hadith). The problem with such a source is that there were a lot of hadiths that are considered as forgeries that the profit never said. However, there are certain references that their authors accumulated the correct hadiths only in one book, even though there are about nine books but the most reliable books are six: *Al-Bukhari*, *Muslem*, *Abu-Dawood*, *Al-Nesae'*, *Al-Termethi,* and finally *Ibn-Majah.* However, the first two books are the major Hadith books since their authors are very well know for their accuracy, but those two books do not agree on all of the hadiths that are included in each book. Meaning that there are hadiths that they agreed on, and there are hadiths that they do not.[153] So, as much as the Hadith is important as a source of the Sharia, there is a disagreement on a large amount of the Hadiths of what is accurate and what is forged.[154] Then, the third source is the endeavour, which is what the *mujtahid* decides on different matters whether in regards to worship or socio economic sphere.

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[152] Wikipedia defined *Ijtihad* as:
is a technical term of Islamic Law that describes the process of making a legal decision by independent interpretation of the legal sources, the Qur'an and Sunna. For more see:
http://en.wikipedia.org/wiki/Ijtihad
Wikipedia, the free Encyclopedia. [online] [undated] available from:
http://en.wikipedia.org/wiki/Main_Page
[Accessed 6th Oct.2006]

[153] Abdul-Muhsen Al-Bader. *The Six Books of the Hadith*. [online] [undated] Available from:
http://nosra.islammemo.cc/onenew.aspx?newid=2303
[Accessed 2nd Oct.2006]

[154] It should be mentioned that there are Hadiths that are agreed to be accurate, especially the ones that are included in the first two books. However, the two authors did not agree on all of the Hadiths that each one included in his book. The *Bukhari* book included 4,000 Hadith, while *Muslem* included 3033. The most accurate Hadiths are the ones that both of them agreed on.

There are four major sunni schools: *Hanbali*, *Hanafi*, *Maliki*, *Shafii*, and three major *Shia* schools which are *Ja'fari* (or Imami),[155] *Zaydeya*, and *Ibadheya*.[156] Those Schools conclude what is right – or what each of them believes is right – based on the two previous sources. The forth source of Sharia is the Qiyas, which is a measure of whether a new matter – that was not mentioned in the Qur'an nor Hadith – is halal or haram based on a similar matter mentioned in the Qur'an or Hadith.[157] Keith Hodkinson argues that Qiyas is the only source that depends entirely on human intellect.[158] For example, when drugs were first used, a fatwa was announced that it was haram because the negative effects of using drugs can be similar to alcohol or even more damaging to the health and brain and since Qur'an forbids alcohol, then drugs should be forbidden too.[159]

However, for the family law issues, since as stated both Qur'an and Hadith gave only highlights giving the space to have different opinions in such matters, the legislators should have the benefit of such privilege, especially since the major Islamic scholars have different opinions regarding family law issues. Instead most of the Family Law in the

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Al-eman website. [online] [undated] Available from:
http://www.al-eman.com/hadeethŽ
[Accessed 9thOct. 2006]¯
[155] It is the school of the most Shia in Kuwait.¯
[156] Mohamad Baker. Unifying Islamic Schools. [online] [undated] Available from:
http://www.balagh.com/malafat/870mfah1.htm
[Accessed 8th Oct.2006] also:
Abdulaziz O. Altwaijri. *The Stratejy of Unifying Islamic Schools.*[online] [2004] Available from:
http://www.isesco.org.ma/pub/arabic/StratTakrib/P5.htm
[Accessed 8th Oct. 2006]¯
[157] To know more about Qiyas, see:
http://en.wikipedia.org/wiki/Qiyas¯
[158] Keith Hodkinson. *Muslim Family Law, A Sourcebook.* (Australia: Croom Helm, 1984) pp 5.¯
[159] Juma' Al-Kholy.*The Islamic Way in Avoiding Drugs and Alcohol(in Arabic).*[online] [undated]
Available from:
http://66.102.9.104/search?q=cache:AsO_XpUXo9kJ:www.iu.edu.sa/Magazine/54/8.doc+%D8%A7%D9%84%D9%82%D9%8A%D8%A7%D8%B3+%D9%81%D9%8A+%D8%AA%D8%AD%D8%B1%D9%8A%D9%85+%D8%A7%D9%84%D9%85%D8%AE%D8%AF%D8%B1%D8%A7%D8%AA&hl=en&gl=uk&ct=clnk&cd=8
[Accessed on 1st Nov.2006]¯

Middle East has adopted a certain doctrine for its provisions. For example, the Kuwait family law adopted the Malki School, while the Jordanian Law adopted the Hanafi and so on.[160]

However, if the law must follow the Sharia, then it can adopt different opinions from different schools according to what is most just for people. For example, some Schools allow women to add a condition to the marriage contract to preserve the right to divorce her husband just as he usually can, and in Egypt women can have the access to such a right.[161] According to the Egyptian law, and to the Sharia too (for some Scholars), giving such a right to the wife does not affect – by any means – the husband's right to divorce his wife in the usual procedures.[162] Giving the woman the right to get a divorce according to her will whenever she wants and without filing a law suit, if she stated this right in the marriage contract, it would save her a long process of filing a law suit against her husband that may not be granted, Especially because divorce cases – in Kuwait and also in some other ME countries – takes several months – sometimes years to reach the final decision[163]. This can be an example of how different the opinions can be, and how it can

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[160] Jamal J. Nasir. *The Islamic Law of Personal Status.* (Netherlands: Kluwer Law International 3rd, 2002) pp 35-40.

[161] Human Right Watch (website). *A General Look to the Marriage and Divorce Laws in Egypt.* [online] [12-04] Available from:
http://hrw.org/arabic/reports/2004/egypt1204/3.htm
[Accessed 6th Oct. 2006]

[162] Al-Jazeera net. *Women in Islam.*[online] [date of the episode 15-03-1998] Available from:
http://www.aljazeera.net/Channel/archive/archive?ArchiveId=90745#I.5
[Accessed 6th Oct.2006] Also:
Egyptian Consulate website. [online] [undated] Available from:
http://www.egy2000.com/ft12r.htm
[Accessed 6th Oct. 2006]

[163] The Human Rights Watches organization has mentioned in its Dec.2004 report on Egypt, thatdivorce cases can take years. For example there were 5252 divorce cases filed by women in 2002, only 60 of them reached a final decision by the beginning of the next year (2003). The others remain at court waiting for their turn.

offer more justice to the law, and benefit women mostly. Chapter seven, will discuss the solutions of family law matters that discriminate against women, and on what bases such resolutions can be achieved, and their reality, while in the next chapter, other discriminatory laws in Kuwait will be discussed.

Human Rights Watches Organization. *The Pain and Dagerous of the Inequality in Divorce System –Egypt (Allam wa Makhater Al-la Mosawat fe Netham Al-Talaque.* [online] [Dec.2004] Availble from: http://hrw.org/arabic/reports/2004/egypt1204/4.htm
[Accessed 1st Nov. 2006]˜