
11. Genetic engineering and ethics in Muslim communities: case studies from Tunisia and Saudi Arabia

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I. INTRODUCTION

Presently, the position of women in Islam is one of the most debatable and controversial topics, in both Western media and Islamic jurisprudence. This chapter will look at areas of Islamic law that affect the reproductive health and decisions of Muslim women. These include adoption, medically assisted reproduction, abortion, child marriage and female genital mutilation. The chapter will compare the situation in strongly religious Saudi Arabia, with Tunisia, where a more liberalist view prevails. The ultimate aim of this chapter is to discover how Islamic law differs in Saudi Arabia and Tunisia by discussing their respective positions on the reproductive needs of women today.

While women have traditionally had few rights under Islam and have been oppressed for centuries, their reproductive rights in Muslim countries such as Tunisia have greatly improved. In other countries, such as Saudi Arabia, women still lack many fundamental rights. Suggested reasons for this disparity are the impacts of colonisation and Westernisation in Tunisia that have allowed for a continual adaptation to modern society. In Saudi Arabia on the other hand, the culture remains more intact, with a strict adherence to Shari'ah persists and a lack of Western influence is evident.

It will be argued in this chapter that religion is not the source of all discriminatory treatment of women, but rather that it stems from the traditional cultural and social norms of a particular society. However, as religion informs and shapes cultures, such practices are the indirect consequences of religion, in this case, Islam.

As there is no central authority figure like the pope in Islam, there is an assortment of beliefs on every aspect of life.¹ Furthermore, as the primary sources of Islamic law – the *Quran* and *Sunna* – have continually been reinterpreted and adapted to society over time through *ijtihad*, *qiyas*, *ijma'* and the issuing of fatwas, it is almost impossible to find agreement on any topic throughout the Muslim world. This discussion will therefore refer to just some of the views held on reproductive health issues.

II. WOMEN IN THE ISLAMIC WORLD

While men and women are considered equal under the *Quran*, Muslim women in the twenty-first century are still being burdened by conservative and patriarchal interpretations of the *Quran*.² According to Hajjar, 'in many contexts Sharia provides a potent justification for states to deny or limit women's rights.'³ However, Gbadamosi argues that it is culture that is employed throughout the world to justify discrimination and violence against women,⁴ as opposed to religion. In a country such as Saudi Arabia where religion and culture are so closely interrelated, it is hard to distinguish the two.

While many Islamic countries have signed treaties that protect women's rights such as the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), many have made reservations to these treaties, limiting their scope and enforceability. Both Tunisia and Saudi Arabia have imposed reservations on core articles of CEDAW, such as articles 2, 16 and 28, on the grounds that they cannot implement CEDAW provisions if they are inconsistent with Islam or Shari'ah.⁵ The effectiveness of international treaties is thus very limited.

Tunisia, however, became the first country in the Middle East/North Africa region to lift all specific reservations to CEDAW. On 16 August

¹ Nicholas Dunn, 'Abortion, *Ijtihad*, and the Rise of Progressive Islam' (2011) 37 (1/2) *Human Life Review* 53, 54.

² Olaide Abbas Gbadamosi, 'Intersection between Shari'a and Reproductive and/or Sexual Health and Human Rights' (2012) 36 (1) *University of Western Australia Law Review* 31, 36.

³ *Ibid.*, 32.

⁴ *Ibid.*, 38.

⁵ *Ibid.*, 47.

2011, the Tunisian Council of Ministers adopted a Decree to lift the reservations that limited women's equality within their families.⁶

An example of unfairness against women in Islamic law relates to the issue of *zina*, or adultery. Some Shari'ah courts have accepted the evidence of pregnancy as proof of the offence of *zina*, which clearly discriminates against women, as only women can be convicted on the basis of pregnancy.⁷ *Zina* was referred to by Santillana in 1926 as 'any sexual relationship between a man and a woman who is not his wife or slave'.⁸ This attitude of almost a century ago illustrates the proprietary nature of women back then; they were seen as mere chattels to be owned and controlled by men. While the status of women has improved in many Muslim countries since that time, the subjection of women to men still resonates today in countries such as Saudi Arabia in the form of guardianship.

Traditionally, and as viewed by the Western media, women in Islam are oppressed and discriminated against. This external perception of Islamic law views Saudi Arabia as one of the most oppressive towards women. However, as will be demonstrated, viewed internally from within Saudi Arabia, women's rights are advancing.

A. Saudi Arabia

Saudi Arabia is an independent Muslim country that has not 'received' any system of foreign law.⁹ Saudi family law, or 'the Law of Personal Status', is based on the Islamic Shari'ah, which derives its authority from the *Quran* and *Sunna*.¹⁰ The Kingdom has adopted the Hanbali School to govern its laws.¹¹ Unlike most other Muslim countries, Saudi Arabia has not codified its law, despite increasing pressure to do so.¹² In Saudi

⁶ Ibid., 48.

⁷ Ibid., 47.

⁸ Dariusch Atighetchi, 'Islamic Tradition and Medically Assisted Reproduction' (2000) 169 (1–2) *Molecular and Cellular Endocrinology* 137, 138.

⁹ J. N. D. Anderson, *Islamic Law in the Modern World* (New York: New York University Press 1959) 83.

¹⁰ Zainah Almihdar, 'Human Rights of Women and Children Under the Islamic Law of Personal Status and its Application in Saudi Arabia' (2008) 5 (1) *Muslim World Journal of Human Rights* 1.

¹¹ Ibid.

¹² Frank E. Vogel, 'Shari'a in the Politics of Saudi Arabia' (2012) 10 (4) *Review of Faith & International Affairs* 18, 22.

Arabia, Shari'ah is the constitution of the state and the single formal source of political legitimacy.¹³

In Saudi Arabia, there is a 275-year history of adherence to the Wahhabi tradition, resulting in a differing interpretation of the Shari'ah than in other Muslim countries. As, unlike many other Muslim countries, Saudi Arabia has not been subjected to over a century of Western colonisation,¹⁴ the Kingdom instead relies solely on Shari'ah for its legal, cultural and religious teachings. So while in other countries, Shari'ah is merely a body of legal rules acting as an alternative to the statutory scheme already in existence, in Saudi Arabia, it is the primary law which binds all citizens in their everyday lives.¹⁵

It is argued that the more closely Shari'ah is followed, the more it restricts women's social mobility and rights.¹⁶ This is the case in Saudi Arabia, as the only puritanical Kingdom that practises strict separation of the sexes,¹⁷ and where the daily activities of women are highly regulated by Shari'ah. Saudi women are banned from driving and are legally subject to male chaperones for almost all public activities. Under Shari'ah, women are 'imprisoned behind veils', justified by men to control a woman's sexual impulses.¹⁸ Women are thus deprived of personal autonomy as well as the ability to express themselves and exercise their sexuality.

Vogel argues that restrictions on women in Saudi Arabia are more widespread and rigorous than what is required by Shari'ah, and that they instead 'appear to have evolved through a cross-breeding of *fiqh* rules with local customs and traditions'.¹⁹

Saudi Arabia has ratified four of the United Nations Human Rights treaties including the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and the Convention on the Rights of the Child (CRC).²⁰ However, it has made both general and specific reservations to these treaties,²¹ meaning their effect and enforceability in the Kingdom are negligible, if effective at all.

¹³ Ibid., 18.

¹⁴ Ibid.

¹⁵ Ibid.

¹⁶ Gbadamosi, above n2, 45.

¹⁷ Ibid., 46.

¹⁸ Ibid.

¹⁹ Vogel, above n12, 24.

²⁰ Almihdar, above n10, 1–2.

²¹ Ibid., 1.

In addition to these international instruments, Saudi Arabia has adopted various regional instruments and is a member of the Arab League. However, the effect of these instruments in promoting human rights is also questionable, as they have been criticised for being 'so broad and vague as to give Member States only limited responsibility in their protection of human rights'.²²

Authority in the family in Saudi Arabia is given to males over women and children.²³ This authoritarian relationship can be described by the term men's *qiwama*, or guardianship.²⁴ Under Saudi administrative and family law, guardianship gives male relatives the legal power over almost every aspect of women's lives, including their movements, work and children.²⁵ Saudi women thus need permission from a male relative to conduct everyday activities.²⁶ For this reason, opportunities for Saudi women can depend greatly on the men with whom they live, in terms of whether they are controlling and tyrannical or compassionate and progressive.²⁷

While Saudi women have previously been deprived of the right to vote, drive and work with men, advancements have been made in these areas. Following a 2006 labour law provision, women can now work in a mixed workplace with men as opposed to being previously hidden away,²⁸ and in September 2011 the King announced that women would be able to vote in the 2015 municipal council elections.²⁹ Furthermore, various protests have been staged by women by driving vehicles in Saudi Arabia, and King Abdullah is trying to advance women's legal status and rights in the Kingdom.³⁰

A new development has occurred. It was reported widely in September 2017 that the current Saudi King, Salman, had issued a decree giving women the right to drive for the first time from 2018. This would end a ban seen by human rights activists as an emblem of the conservative

²² Ibid., 2.

²³ Vogel, above n12, 19.

²⁴ Ibid., 24–25.

²⁵ Ibid., 24.

²⁶ Ibid., 25.

²⁷ Ibid.

²⁸ Ibid.

²⁹ Ibid., 24.

³⁰ Ibid.

Saudi Arabia kingdom's repression of women.³¹ These progressions indicate an improvement in women's rights in Saudi Arabia and support the view that '[h]owever regressive and traditionalist Saudi Arabia appears from outside, viewed internally the country seems to be on a path of rapid change and evolution'.³²

B. Tunisia

Unlike Saudi Arabia, Tunisia has been influenced by external sources. French civil law has had a substantial influence on the legal system in Tunisia and the court system introduced by French colonials was a major international influence.³³ The dominant school of law in Tunisia has been the Malikis, while the Hanafi school is also followed.³⁴ In January 1861, Muhammed Es Sadiq promulgated a Constitution³⁵ which specified the contours of a nationwide bureaucracy limiting the powers of the head of state.³⁶

Habib Bourguiba led Tunisia to independence from the colonial powers, which resulted in a series of laws that recognised equal social responsibility between men and women.³⁷ Upon this gaining of independence in 1956, the Constitution was enacted.³⁸ Following independence, Islam was declared as the state religion and was deemed to be compatible with the guarantee of equal rights and duties for all. Furthermore, the Code of Personal Status made men and women equal in their rights and duties, giving each the right to marry and each the right to divorce, but imposing an obligation to be loyal to only one partner (prohibiting polygyny), and requiring divorce to be finalised in a court of justice.³⁹

The law of Tunisia, however, is not and has not always been perfect in the arena of women's rights. The Code of Personal Status falls short in

³¹ See 'Saudi Arabia to allow women to drive, under decree issued by King Salman' *ABC News*, 26 September 2017, available at www.abc.net.au/news/2017-09-27/saudi-king-issues-decree-allowing-women-to-drive/8991486.

³² *Ibid.*, 26–27.

³³ Christina Jones-Pauly and Abir Dajani Tuqan, *Women under Islam: Gender, Justice and the Politics of Islam* (London: I. B. Tauris 2011) 71.

³⁴ *Ibid.*, 3.

³⁵ *Ibid.*, 17.

³⁶ *Ibid.*, 18.

³⁷ *Ibid.*, 1.

³⁸ *Ibid.*, 72.

³⁹ *Ibid.*

the area of inheritance law, as women receive only half that of men.⁴⁰ Furthermore, there is a history of *dar jawad* (house of discipline), where disobedient women would be restricted physically.⁴¹ There was no equivalent for disobedient husbands.⁴²

Tunisian leaders derived their political discipline not from the military but from the socialist workers' movement, which could accommodate women's interests more easily than a political movement controlled by the male-dominated military.⁴³

III. ADOPTION

Adoption was widespread among the Arabs before and during the early days of Islam. However, the practice was expressly forbidden under the *Qur'an*, which says: '... nor has He made your adopted sons your real sons ... Call them [adopted sons] by [the names of] their father's [names, call them] your brothers in faith ...' (33:4–5).⁴⁴

While simply looking after a child is permitted (*kafala*), the prohibition on formal adoption has been kept by virtually all Muslim countries, including Saudi Arabia.⁴⁵ Tunisia, on the other hand, grants the right of adoption to every adult who is married and of sound character, mind and body, possesses civil rights and is capable of looking after the child.⁴⁶

As the role of women in Islamic society is primarily one of reproduction and nurturing the family, infertility in Islam poses major problems for women.⁴⁷ Furthermore, under the *Qur'an*, offspring are considered to be a 'divine blessing', so the importance of reproduction is paramount.⁴⁸

IV. POLYGYNY AND DIVORCE

The problem of infertility was thought to be adequately solved by resorting to repudiation and remarriage by the husband, or turning to

⁴⁰ Ibid.

⁴¹ Ibid., 28.

⁴² Ibid., 34.

⁴³ Ibid., 70.

⁴⁴ Jamal J. Ahmad Nasir, *The Status of Women under Islamic Law and Modern Islamic Legislation* (3rd rev. ed.) (Leiden: Brill 2009) 180.

⁴⁵ Atighetchi, above n8, 139.

⁴⁶ Nasir, above n44, 180.

⁴⁷ Atighetchi, above n8, 138.

⁴⁸ Ibid.

polygyny.⁴⁹ While this may appear to be a perfectly acceptable solution for men, who are allowed to have up to four wives under the *Qur'an*⁵⁰ and to divorce their wives unilaterally (*talaq*),⁵¹ women do not have this recourse. They cannot marry more than one man and it is much more difficult for them to divorce their husbands.⁵² These patriarchal solutions to sterility thus perpetuate the gender inequality present in Islamic society and provide no plausible solution for infertility in women.

In Tunisia, polygyny was criminalised in 1956 based on the understanding of the *Qur'an* at 4:129 that no husband can treat his wives equally.⁵³ In Saudi Arabia, the practice still occurs.⁵⁴ Tunisia also outlawed divorce and repudiation by men in 1956, allowing women to divorce without stipulating any ground.⁵⁵ However, women in Saudi Arabia are still faced with many social, legal and financial barriers to divorce.⁵⁶

V. MEDICALLY ASSISTED REPRODUCTION

Due to the prohibition on adoption in most Muslim countries, infertile couples are turning to other methods to have children. Medically assisted reproduction (MAR) is now used throughout the Islamic world.

Muslim jurists were initially critical of different methods of MAR, as many feared these methods would be used in defiance of Shari'ah.⁵⁷ Furthermore, unnatural methods of reproduction were avoided as fertility and sterility were considered to be the result of divine will (*Quran* 42, 49–50). Additionally, doctors carrying out the procedures would have to see parts of a woman's body that only her husband should see. Based on these views, some religious leaders prohibit all artificial methods of reproduction.⁵⁸

⁴⁹ Ibid.

⁵⁰ Ann Black, Hossein Esmaeili and Nadirsyah Hosen, *Modern Perspectives on Islamic Law* (Cheltenham: Edward Elgar Publishing 2013) 121.

⁵¹ Ibid., 132.

⁵² Ibid., 132–8.

⁵³ Gbadamosi, above n2, 39.

⁵⁴ Black, above n50, 123.

⁵⁵ Jones-Pauly, above n33, 8–9.

⁵⁶ Almihdar, above n10, 3–4.

⁵⁷ Atighetchi, above n8, 138.

⁵⁸ Ibid.

MAR has become increasingly accepted, as it contributes to the stability and continuance of marriage and the family.⁵⁹ While there is disagreement about most aspects of MAR, the general position in Islam today is that only homologous techniques are allowed.⁶⁰ All heterologous techniques involving a third party who is extraneous to the couple, whether it is a sperm or egg donor or a person implanting the embryo into the woman, are classified as acts of *zina*.⁶¹

Reproduction (and contraception) by unnatural instruments are not considered an infringement of divine will as it is thought that the reproductive or contraceptive technique will only be effective if God wishes it.⁶² While some argue that the recourse to semen banks comes under masked forms of *zina* and is thus not allowed,⁶³ in 1997 the National Committee for Medical Ethics of Tunisia noted that sperm banks are accepted, for example, in order to 'preserve the gametes of young people who are to undergo operations resulting in sterility'.⁶⁴

In polygamous relationships, 'the implant of the embryo which was the result of the gametes of the husband and of one of his wives into a second wife maintains the reproductive relationship within the same family nucleus',⁶⁵ making it a homologous technique. This further displays the interchangeability of wives, and their lack of power and individual rights.

Most Muslim states do not have specific legislation regulating MAR practices. In Saudi Arabia, ministerial regulations are applied and the authorisation for the centres comes from government authorities,⁶⁶ whereas Tunisia is the only Arabic-speaking country that has legislated on the issue of IVF. Here, the law states that 'assisted reproduction treatment for infertility should be performed with gametes of a married couple, and frozen gametes or embryos are only to be used if the couple is alive and the marriage contract is valid and with valid consent'.⁶⁷

⁵⁹ Ibid.

⁶⁰ Ibid.

⁶¹ Ibid.

⁶² Ibid.

⁶³ Ibid., 139.

⁶⁴ Ibid., 140.

⁶⁵ Ibid., 139.

⁶⁶ Ibid., 140.

⁶⁷ Mohamed Aboulgar, 'Ethical Aspects and Regulation of Assisted Reproduction in the Arabic-speaking World' (2007) 14 (1) *Reproductive Biomedicine Online* 143, 145.

The law further provides that cryopreservation of embryos is allowed for five years, which can be extended for another five years, and any patient can ask for destruction of cryopreserved embryos if they are filing for a divorce.⁶⁸ Cryopreservation of embryos does not take place in Saudi Arabia, while multiple pregnancy reduction is practised in the Kingdom.⁶⁹

There is also the issue of sex selection technologies, which have been condemned on the basis that they discriminate against female embryos and fetuses, ‘perpetuating prejudice against the girl child and social devaluation of women’.⁷⁰ While some scholars accept sex selection and some oppose it, both agree that family, as the core of Islamic society, should be maintained.⁷¹

Due to the uncertainties and risks involved with MAR, it is tolerable only in cases of extreme necessity and in the absence of any better alternatives.⁷² In summary, it appears that no one form of MAR is allowed throughout the Islamic world, and that each case must be considered on its merits.⁷³ Clearly, however, the more liberal Tunisia offers a much broader range of options for women.

VI. ABORTION

The Muslim theological position on abortion is more moderate than the Roman Catholic condemnation of the practice.⁷⁴ The abortion debate in the late twentieth century moved from the theological to the political. Decisions on abortion are made by the state, religious leaders and physicians, while ‘[n]owhere is the woman herself given a voice in deciding the suitability of abortion to her needs’.⁷⁵

⁶⁸ Ibid.

⁶⁹ Atighetchi, above n8, 140.

⁷⁰ G. I. Serour and B. M. Dickens, ‘Ethical and Legal Issues in Reproductive Health: Assisted Reproduction Developments in the Islamic World’ (2001) 74 *International Journal of Gynecology & Obstetrics* 187, 190.

⁷¹ Jonathan E. Brockopp, ‘Islam and Bioethics: Beyond Abortion and Euthanasia’ (2008) 36 (1) *Journal of Religious Ethics* 3, 6.

⁷² Atighetchi, above n8, 139.

⁷³ Serour above n70, 191; Brockopp, above n71, 7.

⁷⁴ Donna Lee Bowen, ‘Abortion, Islam, and the 1994 Cairo Population Conference’ (1997) 29 (2) *International Journal of Middle East Studies* 161.

⁷⁵ Ibid.

Discussions around abortion tend to focus on the health of the mother and the issue of when the embryo becomes a human being, or 'ensoulment'. The time of ensoulment is considered to be anywhere between 40, 90 and 120 days.⁷⁶ Abortions carried out before ensoulment are not considered murder and as there is no human being to kill.⁷⁷ However, the general consensus is that once ensoulment has occurred, abortion is prohibited.⁷⁸

In Tunisia, however, the Hanafi treatise didn't try to determine the occurrence of ensoulment in terms of months or days; instead, midwives were prohibited from aborting once formation was 'evolved'.⁷⁹ Abortion in Tunisia is believed to be a biological issue that is closely tied up with the bodily integrity of the woman, not the foetus, as opposed to a theological issue of predicting when something will become a soul or a life.⁸⁰ This point of view purports that women and the foetus are one, so that the woman is the determining factor when the issue of abortion arises, making the health of the woman the most important. If they are divided, on the other hand, the woman loses importance and the foetus takes precedence.⁸¹ The latter is the position accepted in Saudi Arabia and in Christianity. An analogy with *azl* (withdrawing the penis before ejaculation) was utilised in Tunisia, demonstrating that if men are allowed to prevent pregnancy by practising *azl*, then women should be allowed to have an abortion.⁸²

In Saudi Arabia, abortion is only permitted to save the life of the mother and to preserve her physical health,⁸³ and only if the pregnancy is less than four months old and it is proven beyond doubt that continued pregnancy would gravely endanger the mother's health.⁸⁴ In Tunisia, on the other hand, abortion is available on request, and is permitted on all grounds, including:

⁷⁶ Leila Hessini, 'Islam and Abortion: The Diversity of Discourses and Practices' (2008) 39 (3) *Institute of Development Studies Bulletin* 18, 23.

⁷⁷ Dunn, above n1, 53.

⁷⁸ *Ibid.*, 55.

⁷⁹ Jones-Pauly, above n33, 92.

⁸⁰ *Ibid.*, 93.

⁸¹ *Ibid.*

⁸² *Ibid.*, 92.

⁸³ UN Department for Economic and Social Information and Policy Analysis: Population Division, *Abortion Policies: A Global Review: Volume III: Oman to Zimbabwe* (New York: United Nations 1995) Sales No. E.95.XIII.24, 74.

⁸⁴ *Ibid.*, 75.

- to save the life of the mother;
- to preserve the mother's physical and mental health;
- rape or incest;
- foetal impairment; and
- economic or social reasons.⁸⁵

Furthermore, in Saudi Arabia the government has placed major restrictions on contraception use,⁸⁶ while in Tunisia, the government directly supports contraception use.⁸⁷

In Saudi Arabia, a legal abortion must be performed in a government hospital, a panel of three medical specialists must sign a recommendation before it is performed, and the written consent of the patient *and* her husband or guardian must be obtained.⁸⁸

In Tunisia, in contrast, consent is only required from the patient herself. Married women have never been required to obtain the consent of their husbands.⁸⁹ Under section 214 of the Penal Code as amended in 1973, abortion is permitted on request within the first three months of pregnancy, and must be performed during this period by a legally practising physician in a hospital, healthcare establishment or authorised clinic.⁹⁰ Beyond the third month, abortion is allowed if the mother's health or mental equilibrium would be endangered by continuing the pregnancy or on the grounds of foetal impairment.⁹¹

Up until 1965, Tunisia prohibited abortion. In that year, Tunisia was the first Muslim country to liberalise its abortion law as part of its population policy. The 1965 amendment decriminalised abortion if a couple had at least five living children and the woman had been pregnant for less than three months. A further amendment of the Penal Code in 1973 removed this family size requirement, allowing abortion on request for all women.⁹² This amendment was deemed urgent, as in the first years of independence, 25 per cent of all beds in gynaecological clinics were

⁸⁵ Ibid., 137.

⁸⁶ Ibid., 74.

⁸⁷ Ibid., 137.

⁸⁸ Ibid., 74.

⁸⁹ Jones-Pauly, above n33, 94.

⁹⁰ UN Department for Economic and Social Information and Policy Analysis: Population Division, *Abortion Policies: A Global Review: Volume III: Oman to Zimbabwe* (New York: United Nations 1995) Sales No. E.95.XIII.24, 138.

⁹¹ Ibid.

⁹² Ibid.

filled with women (including married women) who had developed complications as a result of unprofessional abortions.⁹³

Although there was little religious opposition to the liberalisation of abortion in 1973, it is still difficult for a woman to seek a legal abortion openly, despite it being subsidised by the government and performed free in public hospitals for those entitled to free healthcare. Furthermore, abortion for unmarried women continues to be a taboo subject in traditional communities. Illegal abortion thus continues to be practised in Tunisia, especially for extramarital pregnancies and in rural areas.⁹⁴ These reasons may explain why Tunisia has the lowest abortion rate in the Middle East and North Africa, despite having the most liberal abortion law.⁹⁵

VII. CHILD MARRIAGE

Another serious issue that negatively impacts on women is child marriage, which violates a number of human rights guaranteed in international human rights instruments.⁹⁶ The practice perpetuates gender discrimination by placing women in an inferior position, 'disempowered to participate equally in their marriage, sexual and reproductive choices'.⁹⁷ There is now medical evidence that early marriages could have adverse effects on a child's mental health and physical health.⁹⁸ This includes poor sexual and reproductive health, which often results in maternal mortality and morbidity as a result of early pregnancies.⁹⁹

There is no minimum age for marriage set out in the *Qur'an*, so jurists established the position that once a child becomes an adult, they can marry.¹⁰⁰ Childhood under Islamic law is not defined by age, but instead is characterised as anyone who has not yet reached puberty.¹⁰¹ Most child

⁹³ Jones-Pauly, above n33, 94.

⁹⁴ UN Department for Economic and Social Information and Policy Analysis: Population Division, *Abortion Policies: A Global Review: Volume III: Oman to Zimbabwe* (New York: United Nations 1995) Sales No. E.95.XIII.24, 138.

⁹⁵ Hessini, above n76, 19.

⁹⁶ Gbadamosi, above n2, 44.

⁹⁷ *Ibid.*, 42.

⁹⁸ Almihdar, above n10, 10.

⁹⁹ Gbadamosi, above n2, 42.

¹⁰⁰ Black, above n50, 116.

¹⁰¹ Almihdar, above n10, 6.

marriages are forced marriages,¹⁰² as in most cases, there is no consent of the child.

To counteract this problem, the CEDAW Committee suggested that ‘no marriages shall be entered into before the age of 18 for both spouses’.¹⁰³ Further, article 16(2) of CEDAW holds that ‘child marriages shall have no legal effect’.¹⁰⁴ However, as earlier stated, both Tunisia and Saudi Arabia imposed reservations on this article. Since Tunisia lifted all reservations, it is now obliged to comply with the article. In Saudi Arabia, however, child marriage continues.

Under Hanbali law, a father or guardian has the right to contract his previously unmarried wards into marriage without their consent.¹⁰⁵ While this is generally stated as the position of the Hanbali school, another opinion states that the consent of both parties is essential for a marriage contract, and numerous hadiths say a virgin should not be given into marriage without her consent.¹⁰⁶

Two recent decisions to annul child marriages in Saudi courts have been praised as landmark judgments, as they were given around the same time a number of *fatwas* were issued declaring that there should be no set minimum age for marriage and it is permissible for young girls to wed.¹⁰⁷

A court in Qatif annulled the marriage of a 14-year-old girl who had been contracted into marriage to an elderly man by her father without her consent. The court considered the girl’s best interests and found that the marriage resulted in a deterioration of her education and psychological health.¹⁰⁸ This was the first known case where a Saudi judge annulled a child marriage to an elder.¹⁰⁹ Similarly, in March 2009, the Court of Appeal in Riyadh reversed a judgment that had held that ‘the marriage of an 8-year-old girl to an elderly man was legal, despite the fact that she had been contracted into marriage by her father without her knowledge’.¹¹⁰

¹⁰² Black, above n50, 129–31.

¹⁰³ Almihdar, above n10, 6.

¹⁰⁴ Ibid.

¹⁰⁵ Ibid., 3.

¹⁰⁶ Ibid.

¹⁰⁷ Ibid., 10–11.

¹⁰⁸ Ibid., 10.

¹⁰⁹ Ibid.

¹¹⁰ Ibid.

VIII. FEMALE GENITAL MUTILATION

Female genital mutilation (FGM), which discriminates against women and causes significant reproductive health problems, is defined by the World Health Organization (WHO) as encompassing ‘all procedures involving partial or total removal of the external female genitalia or other injury to the female genital organs for non-medical reasons’.¹¹¹

While religion is commonly provided as a basis for FGM, there is little evidence that the practice is a religious obligation.¹¹² The practice, believed to have existed for at least 5,000 years, is not mentioned in the *Qur’an* and it is also practised in Christian communities,¹¹³ suggesting that its origins may lie elsewhere. In a 1997 decision, Egypt’s highest court upheld a ban on FGM which rejected an argument that FGM is a religious issue, ruling that the practice is not mandated by the *Qur’an*.¹¹⁴ Despite this, evidence suggests that the practice is more commonly carried out in Muslim societies.¹¹⁵

The practice has been legitimised by some religious authorities who refer to the Hadith in which Prophet Muhammad said it is *Sunnah* ‘if you cut, do not overdo it ... , because it brings more radiance to the face, and it is more pleasant for the husband’.¹¹⁶ Further, *fatwas* that stated that *khifad* (one type of FGM) is *Sunnah* led to the belief that all types of FGM are *Sunnah* and thus justified.¹¹⁷

Reasons put forward for FGM include the prevention of promiscuity and the regulation of the moral behaviour of women in society.¹¹⁸ Such reasoning reflects the oppression of women in Muslim societies¹¹⁹ and perpetuates male control of Islamic women.¹²⁰

¹¹¹ Abdulrahim A. Rouzi, ‘Facts and Controversies on Female Genital Mutilation and Islam’ (2013) 18 (1) *European Journal of Contraception and Reproductive Health Care* 10.

¹¹² Maria Kontoyannis and Christos Katsetos, ‘Female Genital Mutilation’ (2010) 4 (1) *Health Science Journal* 31, 33.

¹¹³ *Ibid.*, 32.

¹¹⁴ Margaret Brady, ‘Female Genital Mutilation: What Every Nurse Needs to Know’ (1998) 28 (9) *Nursing* 50, 51.

¹¹⁵ Rouzi, above n111, 11.

¹¹⁶ *Ibid.*, 12.

¹¹⁷ *Ibid.*

¹¹⁸ Kontoyannis, above n112, 32.

¹¹⁹ *Ibid.*, 35.

¹²⁰ *Ibid.*, 33.

Some of the serious immediate and long-term complications resulting from FGM¹²¹ include the transmission of HIV and hepatitis B virus. Many girls also die of shock, haemorrhage, sepsis or infection.¹²² In the long term, infertility and complications during pregnancy and childbirth are also common.¹²³

FGM has not been documented in Saudi Arabia or Tunisia;¹²⁴ however, there is widespread medical evidence of the practice amongst Saudi women.¹²⁵

IX. CONCLUSION

In comparing Saudi Arabia and Tunisia, we see the broadest range of attitudes regarding the treatment of women and their rights in the Islamic world. Tunisia offers legal abortion, divorce and access to IVF, while Saudi Arabia still demands male consent for the simplest procedure. Abortion and divorce are still unavailable there, and women remain at the mercy of men, even in regard to decision-making about their own bodies, particularly health and reproduction. Genital mutilation and the taking of child brides still occurs, but cautionary precedents are becoming evident.

It is worth noting, however, that while the West sees Saudi Arabia as rigidly fundamentalist and archaic in its treatment of women, changes are occurring within the Kingdom, which has until recently been almost devoid of Western influence. Although slow, when compared to the more progressive Tunisia, the general trend is towards liberalism. The Arab Spring, the internet and the emergence of Muslim feminism are all factors contributing to the reforms throughout the Muslim world, and Saudi Arabia cannot help but be affected.

¹²¹ Ibid.

¹²² Brady, above n114, 50.

¹²³ Ibid., 50–1.

¹²⁴ Rouzi, above n111, 12.

¹²⁵ A. A. Rouzi, 'Epidermal Clitoral Inclusion Cysts: Not a Rare Complication of Female Genital Mutilation' (2010) 25 (7) *Human Reproduction* 1672–4.