



## Equality in marriage and family life in Kurdistan regional government- Iraq

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### Abstract

The importance of family is recognized by international and national laws. It is the basic unit of societies and the initial unit where every individual is readied for social life. Accordingly, we should realize the significance of having a healthy family life. Such healthy family life requires having mutual respect between parents and also complete equality. Convention on the Elimination of all Forms of Discrimination against Women, in significant way, is an impression of humanity's conscience and cognition about what requires to establishing decent social life worldwide. Practically, Convention on the Elimination of all Forms of Discrimination against Women, demands complete legal and practical measures by States Parties to eliminate legal or otherwise barrier that deny equality for women and men in all matters related to marriage and family relations. Our research here attempts to examine the degree of compliance of the Iraqi and Kurdistan governments with these demands, considering that Iraq and by implication Kurdistan are parties to Convention on the Elimination of all Forms of Discrimination against Women. Moreover, we have tried to examine the reasons for failure and the possible motivations that render Iraq unwilling to comply. The finding of the research is that Iraq and Kurdistan have come a long way to meeting Convention on the Elimination of all Forms of Discrimination against Women demand but not completely.

**Keywords:** Women, Discrimination, recognized, societies

### 1. Introduction

Article 16 of CDEW deals with very extensively with equality in marriage and family life and here we will examine it phrase by phrase.

#### This Article says

States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women<sup>[1]</sup>.

Most States parties report that national constitutions and laws comply with the Convention, but in reality, custom, tradition and enforcement failure contravene it<sup>[2]</sup>.

Family violence is prevalent in all societies. Within family relationships women of all ages are subjected to violence of all kinds, including battering, rape, other forms of sexual assault, mental and other forms of violence<sup>[3]</sup>.

Women who have traditionally performed their roles in the private or domestic sphere have long had those activities treated as inferior. As such activities are invaluable for the survival of society; there can be no justification for applying different or discriminatory laws or customs to them<sup>[4]</sup>.

Article 16 (1)(a) Says men and women have same right to enter into marriage. Initially, the paragraph was supposed to include a statement that not to marry is also a right. However, because of objections the statement was excluded

<sup>[5]</sup>. But this equal right is not implemented when a man marries for second or third and fourth times. Particularly, it is known that polygamous marriages violate the right of women to equality with males and could lead to severe emotional and economic implications for themselves and their dependents<sup>[6]</sup>. In many cases, women seek divorce to escape the miserable condition they find themselves in. However, women divorcing their husband face far greater obstruction and even when they succeed, they face prejudice and disrespect in the society. Because of such anticipated consequences, and the economic hardship women their dependents expect to face, women usually stay in unhealthy marriage relations.

Article 16(1) (b) says 'the same right freely to choose a spouse and to enter into marriage only with their free and full consent'.

The right of a woman to choose a husband and marry freely is essential to her existence, dignity and freedom as a human being<sup>[7]</sup>. What contradicts this clause is forced marriage. It is prevalent in many cultures and is driven by an assumption that such a marriage, in which the girl or women are sacrificed in reality, would contribute to building strong connection between families or even clans involved and safeguard family honour and cultural values. Forced marriage is a marriage that takes place without the proper consent of both parties and should not be confused with arranged marriages, which work successfully in many societies. Forced marriage can be resorted to even to cover

<sup>1</sup> Un committee on the elimination of discrimination against women, cedaw general recommendation no. 19: violence against women no 21: violence against women 1994 at15

<sup>2</sup> id.

<sup>3</sup> un committee on the elimination of discrimination against women, cedaw general recommendation no. 19: violence against women no 19: violence against women 1992 at 23

<sup>4</sup> un committee on the elimination of discrimination against women, *supra* note 1 at 11-12

<sup>5</sup> Lars adam rehof, guide to the travaux preparatoires of the united nations conventions on the elimination of all form of discrimination against women 173(1993)

<sup>6</sup> un committee on the elimination of discrimination against women, *supra* note 1 at 14

<sup>7</sup> id. At p16

heinous crimes of rape whereby the rape victim is forced to marry the perpetrator, which is a common practice in many societies<sup>[8]</sup>.

Article 16(1)(c) of CEDAW says that “the same rights and responsibilities during marriage and at its dissolution”.

In reality, though this is not implemented. The application of common law principles, customary or religious law contravenes this clause of CEDAW. These local laws and practices limit women’s right to equal position and responsibility in marriage. These constraints often lead to a husband regarding themselves as the head of their households and thus the primary decision makers<sup>[9]</sup>. What we want to convey is supported by the report of the Special Rapporteur on violence against women, its causes and consequences, submitted in accordance with Commission on Human Rights resolution 2001/49:

During marriage, a wife may be treated like a slave. She is under the authority of the husband and she has to perform her “wifely duties” adequately if she does not want to be threatened physically and emotionally. In the majority of countries criminal law can be invoked for assault in marriage but not for rape. Most men believe that they have a right to sex whenever they like<sup>[10]</sup>.

In regard to the dissolution of marriage we need to mention that in some communities, divorced women face problems and humiliation and that keeps women in unpleasant marriages, as said before<sup>[11]</sup>. A ban on divorce in combination with consent to polygamous marriage could be discriminatory, as males may marry several females, but females will not be allowed to divorce<sup>[12]</sup>.

Article 16(1)(d) says “The same rights and responsibilities as parents, irrespective of their marital status, in matters relating to their children; in all cases the interests of the children shall be paramount”.

This clause gives priority to the interests of children, including children out of wedlock. Unfortunately, though, broaching the issue of children born out of wedlock in Iraq and Kurdistan is like anathema. Such, children are thrown on the rubbish tips or left to die by sides of roads and country sides. Unmarried women who are uncovered to be pregnant are usually killed. It is obvious that civil society organisations and governmental agencies have not done much to counteract these practices which are based on custom and tradition yet clearly contradict the demands of CEDAW and the Convention of the Right of the Child.

Even in cases that children out of wedlock and their mothers survive, these children are denied the official registration and paperwork this means that children born to non-married parents do not always have the same status as children born to married parents, and the father not held accountable and does not bear responsibility<sup>[13]</sup>. Women who have to support and raise children alone are commonly impacted by

their personal development because their right to access education, jobs and other practice is limited<sup>[14]</sup>.

Article 16 (e) says the same rights to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights.

Historically, women were expected to give birth and raise children. In this context, women were not given much choice in terms of protecting their reproductive rights. The denial of control over their sexual and reproductive lives exposes women to poor health and risks their lives. Therefore, it is essential, as this clause of CEDAW demands, that women should have right of control over their sexual and reproductive lives. In the Middle East and many other underdeveloped countries, women do not enjoy these rights demanded by CEDAW<sup>[15]</sup>.

Article 16 (f) says: The same rights and responsibilities with regard to guardianship, wardship, trusteeship and adoption of children, or similar institutions where these concepts exist in national legislation; in all cases the interests of the children shall be paramount;

The same rights and duties apply in respect of custody and adoption, where such ideas occur in domestic legislation; children's interests are essential in all situations. States parties do not always follow the principle of equal status for parents, especially when they are not married. Many parents fail to share liability for care and maintenance of their children when the parents are divorced or living apart<sup>[16]</sup>.

Article 16(1)(g) says: The same personal rights as husband and wife, including the right to choose a family name, a profession and an occupation.

This clause offers women the right to choose her family name, and the right to seek jobs and occupation as equal to men. If a woman is forced to modify her name after marriage or dissolution, the right to choose her name is denied and her personality and identity cannot be safeguarded<sup>[17]</sup>.

Article 16 (1) (h) The same rights for both spouses in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property, whether free of charge or for a valuable consideration.

According to this clause, women are entitled to benefit from ownership of properties in regard to managing and administering these properties, regardless of whether they acquire these properties for free or for some considerable financial compensation. The equality with men in regard to the rights mentioned in this clause is once again asserted.

This clause is significant and reflects awareness that the lack of economic independence has very adverse effect on whether women enjoy their rights or not. According to this clause, every law or custom which gives a man the right to an increased share in a property division is discriminatory and seriously affects a woman's practical skill in divorcing her husband, supporting her own family and in living with dignity as an independent person, often under the pretext that the man alone bears responsibility for the support of women and children in her family<sup>[18]</sup>. Many women remain in violent relations because of lack of economic

<sup>8</sup> un commission on human rights, report of the special rapporteur on violence against women its causes and consequences, ms. Radhika coomaraswamy, submitted in accordance with commission on human rights resolution 2001/49: *cultural practices in family that are violent towards women*, 31 jan 2002, e/cn.4/2002/83

<sup>9</sup> un committee on the elimination of discrimination against women, *supra* note 1 at.17

<sup>10</sup> un commission on human rights, *supra* note 8 at 62

<sup>11</sup> *id.* At 63

<sup>12</sup> guð mundur s alfredsson & asborn eide, the universal declaration of human rights- a common standard of achievement 337 (1999)

<sup>13</sup> un committee on the elimination of discrimination against women, *supra* note 1 at 19

<sup>14</sup> *id.* At 21

<sup>15</sup> *id.* At 22

<sup>16</sup> *id.* At.19

<sup>17</sup> *id.* At 24

<sup>18</sup> *id.* At .28

independence<sup>[19]</sup>.

Article 16 (2) says that the betrothal and the marriage of a child shall have no legal effect, and all necessary action, including legislation, shall be taken to specify a minimum age for marriage and to make the registration of marriages in an official registry compulsory.

All State Parties to CEDAW should take all necessary measures including legislation to specify a minimum marriage age and to make marriage registration in the official register mandatory. Young children from a very early age are given into marriage in many communities which might be motivated by the assumption that younger girl will have longer virginity and a longer fertility period. It can also be due to the will to control the girl by the husband and his family<sup>[20]</sup>. In national law, marriages of individuals under 18 years old are routinely permitted for women than for men. The Committee on the Rights of the Child demands that marriage between children and childbearing by girls must be prevented, and that the lowest age of marriage for both sexes should be the same<sup>[21]</sup>.

What facilitate of marrying young girls is the fact that girls are schooled from birth to be obedient, hardworking and self-sacrificing; respectful of their parents' wishes and choice of a groom; they are prepared to carry out housework and look after other members of the family; and self-sacrificing might even mean literal sacrificing their own lives.

Childhood or early marriages are disadvantageous for young girls for many reasons because that deprive them from continued schooling when they are given into marriage. Such marriages make it impossible for women to develop abilities that give them personal or financial independence<sup>[22]</sup>.

If the marriage is patrilocal, i.e., the bride must go and live in her husband's house among strangers, she will have to submit to sex with an older man and her immature body must endure the dangers of repeated pregnancies and childbirth.

## 2. Legal Measures to Enforce Equality in Marriage and Family Law

CEDAW demands that all State Parties to it should make laws that enforce equality in marriage and family laws. However, Iraq expressed a reservation on the whole of Article 16 of CEDAW, which offers equal rights for females and males to marry, to choose a spouse and to end marriage<sup>[23]</sup>. These reservations indicate that Iraq is not fully compliant with CEDAW convention.

Iraq is not alone in this regard the following countries have also made reservations on the Article 16. Reservations to Article 16 (in part or as a whole) were entered by Bahrain, Egypt, Iraq, Kuwait, Libya, Morocco, and Syria, while Saudi Arabia entered a general reservation covering any unspecified discrepancies between Islamic Shari'a.

<sup>19</sup> *id.* At.23

<sup>20</sup> un commission on human rights, *supra* note 8 at 55

<sup>21</sup> un ited nations, the committee on the elimination of discrimination against women, and its optional protocol 36 (2003)

<sup>22</sup> see international women's tribune centre, rights of women: a guide to the united nations the most important united nations treaties on women's human rights 38 (1998)

<sup>23</sup> mohamed mattar, unsolved questions in the bill of rights of the new iraqi constitution: how will clash between "human rights" and "islamic law" be reconciled in future legislative enactments and judicial interpretations? 30 fordham int. Law j.126, 138 (2006)

The above shows that many Islamic countries expressed reservation. Saudi Arabia makes it clear that its reservation is based on whether the CEDAW convention contradicts Islamic Sharia Laws or not. However, not all Islamic states have entered reservations to the same provisions. This indicates that there is no consistency in interpreting Sharia Laws or that the interpretation of Sharia Laws depends on the balance of power between secular forces and religiously minded authorities and populace.

## 3. Capacity to enter into marriage and consent to marriage

Marriage is fully controlled by the Personal Status Code (1959 No. 188). It is a contract between a man and a woman that is legally permissible to him with the aim of establishing a bond for a mutual life and procreating children<sup>[24]</sup>. However, Article 3(1) of the amended law No. 188 of the year 1959 is suspended in the Iraqi Kurdistan Region and replaced by the following: "Marriage is a voluntary contract between a man and a woman according to which their marriage life will become legal as per Islamic laws. The aim of marriage is to form a family on the basis of love, sympathy and mutual responsibility according to the provisions of this Act." A marriage contract is initiated by an offer expressed by one of the two parties to the contract – either verbally or customarily - and the acceptance of the other party with the agent (*wakil*) acting in his place<sup>[25]</sup>. A marriage contract is valid if the two parties to the contract or whoever acting in their places meet the legal and lawful conditions<sup>[26]</sup>.

In Kurdistan, Article 5 of this law was suspended and replaced with this statement: "A marriage contract is valid if the two parties to the contract, or whoever acting in their places, meet the conditions required as per the provisions of this law." As it is obvious, the amendment made to the Article 5 by Kurdistan parliament, made it unclear which means that it can be interpreted according to the will of the authorities without clear legal basis to limit their interpretation. The Iraqi Article 5 though includes Sharia as a condition but it is anyway clearer.

According to Article 6(4) of Iraqi Personal Status Law, the wife has the right to revoke the contract when the husband fails to fulfil the conditions, he agreed upon in the marriage contract. As such, these provisions mentioned above are in de jure compliance with Article 16(1)(a) of CEDAW. There may be some concern that offers of marriage can be accepted by a party to a marriage's agent. As this may mean that a woman's family can arrange or consent to a marriage without her knowledge or consent.

To make the marriage valid, the two contracting parties must be sane and have reached 18 years old<sup>[27]</sup>. The judge may authorize a mentally ill person's marriage if it has been verified in a medical examination that his marriage does not hurt the community and that it redounds to his personal interest, provided that the other person expressly accepts the marriage<sup>[28]</sup>. However, in suspended Article 7, paragraph 2, of Kurdistan, the judge shall have the power to allow a man to marry a mentally challenged woman if a report from the Special Medical Committee shows that his and her marriage

<sup>24</sup> personal status code no.188 of 1959, iq art 3 s 1

<sup>25</sup> personal status code no.188 of 1959, iq art art 4

<sup>26</sup> personal status code no.188 of 1959, iq art 5

<sup>27</sup> personal status code no.188 of 1959, iq art 7 s 1

<sup>28</sup> personal status code no.188 of 1959, iq art 7 s 2

will not hurt the society and will be in his / her best interests / and ensures that the husband / wife clearly gives his/her consent in writing during the marriage contract. If a 15-year-old person asks to marry, the judge has the right to authorize his marriage if his / her legal capacity and physical capacity are established, with the consent of his or her legal guardian. If the guardian fails to respond, the judge will invite him to state his answer within a specified period. Thus, if the guardian does not object or if he submits an objection that is not worth considering, the judge must initiate the marriage <sup>[29]</sup>. If the judge considers pressing necessity, he or she may authorize the marriage of a 15-year-old person. The granting of such a license is also subject to legal puberty and physical capacity <sup>[30]</sup>. However, in Iraqi Kurdistan, paragraph 1 of Article 8 is amended and replaced with this statement: "If a 16-year-old person asks to be married, the judge can authorize his marriage if the eligibility and physical ability of the person in question was proven to him, after obtaining the approval of his legal guardian. If the guardian abstains from responding, the judge calls upon him to state his agreement during a defined period. Thus, if the guardian does not object or if he submits an objection that is unworthy of consideration, the judge shall allow the marriage." The Code leave to judge's discretion the decision to allow marriage for persons who are under 18 and over the age of 15 years. This exception is similarly valid for both genders. The Article 16(2) of the CEDAW demands the observance of and compliance with the minimum marriage age and call for mandatory marriage registration in an official register.

No family member or non-relative shall have the right, without their agreement, to force marriage on anyone, male or female. If the marriage is not yet completed, the agreement of forced marriage is regarded void.

In addition, none of the parents or other persons is entitled to stop anyone eligible for marriage under this marriage legislation from being married <sup>[31]</sup>. An immediate relative who breaches Article 9(1) shall be punished to a prison term not exceeding three years, and a fine of a certain sum shall be imposed. If a violator of this provision is not an immediate relative, the penalty shall vary from a minimum sentence of three years to no more than ten years <sup>[32]</sup>. Articles 9(1) and (2) of the Law in Kurdistan were amended and substituted with the following: No relative or non-relative has the right to force marriage on any person, whether male or female, without their consent. The contract of a forced marriage is considered void if the marriage is not yet consummated. Even if the marriage is consummated, the contract shall be suspended. Moreover, none of the relatives or other people has the right to prevent whoever is eligible for marriage from being married by virtue of the provisions of this marriage law; A first degree relative who breaches the provisions of paragraph 1 of this article shall be sentenced to two to five years [minimum of two years and maximum of five years]. If the person who breaches this provision is not a first degree relative, he shall be sentenced to an imprisonment term varying from a minimum of three years to a maximum of ten years.

The Kurdistan amendment for Article 9 of personal Status Law requires protection against forced marriage and deters

whoever contemplates giving a female into marriage without her full knowledge and consent. This Amendment complies with Article 16 of CEDAW.

This also protects the prospective spouses from being prevented from marrying each other under family members' pressure or threat. It clearly prescribes relatively severe punishments to those who tries prevent people from marrying according to their own choices.

#### 4. Marriage to Non-Muslims

Muslim laws usually do not permit the marriage of a Muslim woman to a non-Muslim, although Muslim men can marry Kitabi women <sup>[33]</sup>. According to Article 17 of Law No. 188 (1959, amended), the personal status law, stipulates that it is permissible for a Muslim man to marry a woman belonging to one of the scriptural religions but it is not permissible for a Muslim woman to marry a non-Muslim man. Thus, a Muslim man is permitted to marry a woman belonging to one of the revealed religions, such as Judaism, Christianity and Sabeanism, and a wife has the right to retain her religion upon marrying a Muslim man. A Muslim woman does not have the right to marry a non-Muslim man, whatever his religion may be. This permission and prohibition here are based upon Islamic Shariah law, the provisions of which are derived from the Koran and the practice (sunnah) of the Prophet and are immutable.

It is an openly discriminatory clause that deprives Muslim women of their choice of marriage. Although some Iraqi legal experts are aware of the difference between men and women's choices, the repeal of this provision contradicts Islamic law that Muslim women are not allowed to marry non-Muslim men. Despite this reservation, this provision breaches Article 16 of CEDAW.

#### 5. Polygamy

The word refers to a marriage form in which one man is simultaneously married to two or more women. The term 'polygamy' is sometimes used even as a synonym for polyandry, a woman marrying more one husband. However, within the Islamic contexts such confusion cannot happen because multiplicity of spouses is allowed only for men and not women <sup>[34]</sup>. Some states, and some of which are Islamic, have outlawed polygyny completely. These include Tunisia, Turkey, Fiji, and Uzbekistan. Tunisia is unique in that its prohibition of polygamy is based on an interpretation of Muslim laws motivated by Qur'anic verses that a man can be unbiased among his multiple wives <sup>[35]</sup>. The spouse and subsequent spouse in Tunisia are sentenced to jail for one year and/or a high penalty <sup>[36]</sup>. In Rwanda, a new marriage contract is prohibited, in which according to Article 170, "no one is allowed to contract a new marriage if the earlier marriage is still valid <sup>[37]</sup>." With the adoption of the Turkish Civil Code in 1926, Turkey abolished polygamy <sup>[38]</sup>.

Under the Tunisian Code of Personal Status (Article 18), any person who commits a polygamous marriage shall be

<sup>33</sup> see women living under muslim laws, knowing our rights: women living under muslim laws, knowing our rights: women, family, laws and custom in the muslim world 98 (2006)

<sup>34</sup> *id.* at 197

<sup>35</sup> *id.* at 199

<sup>36</sup> *id.*

<sup>37</sup> law no.32/2016 of 28/08/2016 governing persons and family, rwanda

<sup>38</sup> *çiğdem balım et al., turkey: political, social and economic challenges in the 1990s (social economic and political studies of the middle east) 90 (1995)*

<sup>29</sup> personal status code no.188 of 1959 iq art 8 s 1

<sup>30</sup> personal status code no.188 of 1959 iq art 8 s 2

<sup>31</sup> personal status code no.188 of 1959, iq art 9 s 1

<sup>32</sup> personal status code no.188 of 1959, iq art 9 s 2

punishable by one year's jail or a penalty of 240,000 Tunisian francs or both. These clauses are applicable even if the new marriage is recorded and the man still lives with the first spouse. The same sanctions apply to a wife who knowingly enters into a polygamous marriage.

According to Article 3(4) of Law No. 188 (1959, amended), the personal status law, marrying more than one woman in Iraq is legal but not permitted unless the Qadi (judge) has authorized it. The granting of this authorisation is subject to the following two circumstances: the spouse should be able to provide for more than one wife financially <sup>[39]</sup>, and secondly, there is a legitimate interest <sup>[40]</sup>. Polygamy may not be permitted if injustice between women is feared. Then the problem would be left to the decision of the judge <sup>[41]</sup>. Every individual entering into the marriage with more than one wife is punished with no more than one year in prison or a fine not greater than 100 Dinars <sup>[42]</sup>.

Paragraphs 4 and 5 of Article 3 provide the exception, which in reality curtail the restrictions demanded by Article 3. The exception provided in Paragraph 4 and 5 of Article 3 say that restriction to marrying second will not apply if a man is to marry a widow <sup>[43]</sup>. It can be seen in Article 3(4) that the limitation on polygamy in this regard cannot be fully recognized and women are even less protected. The CEDAW Committee observed that inadequate attention is being paid to altering damaging traditional and cultural practices like polygamy in Iraq and calls on the Government to work to eliminate polygamy practices <sup>[44]</sup>. Also, the Human Rights Committee has discussed polygamy in several concluding observations, recommending that states parties take steps to abolish and prevent the polygamy, and finding that it violates women's dignity.

Now to shift our attention to Kurdistan Region, the first impression would be that polygamy is legal, but the law sets conditions under which the court shall rule to permit the applicant to marry a second wife, as stipulated in article 3 of Law No. 15 (2008), on the basis of the Personal Status Law. The application of paragraphs 4, 5, 6 and 7 shall be suspended and replaced by the following: It is only possible to marry more than one wife with the permission of a judge and the granting of permission shall be dependent upon the following conditions being met: The consent of the first wife to the marriage before the court; A chronic, permanent illness preventing marital intimacy, from which there is no expectation of recovery or the wife's permanent infertility, substantiated by a report from a competent medical board; That the person applying to marry a second wife has sufficient financial capacity to provide for more than one wife, as substantiated by official documentation presented to the court when drawing up the marriage contract; That the husband submits a written undertaking to the court, prior to the marriage contract being drawn up, to treat both wives impartially in respect of distribution and other material and moral marital obligations; That the wife did not stipulate no

<sup>39</sup> personal status code no.188 of 1959, iq art3 s 4

<sup>40</sup> personal status code no.188 of 1959, iq art4 s b

<sup>41</sup> personal status code no.188 of 1959, iq art 3 s 5

<sup>42</sup> personal status code no.188 of 1959, iq art 3 s 6

<sup>43</sup> personal status code no.188 of 1959, iq art 7

<sup>44</sup> un committee on the elimination of discrimination against women, *report of the committee on the elimination of discrimination against women: twenty second session (17 jan- 4 feb 2000); twenty third session (12 -30 june 2000), (30 june 2000, a/55/38)*

second marriage in the marriage contract; Any person issuing a contract of marriage to more than one wife outside the court in contravention of the above paragraphs shall be sentenced to a term of imprisonment of no less than six months and no more than one year and a fine of IQD 10,000,000. The judge may not suspend enforcement of the penalty stated in paragraph above.

The text makes clear that the law in Kurdistan Region is more progressive than the Law No. 188 (1959), of Iraqi personal status law. It eliminates ambiguities in regard to obtaining the consent of the first wife as well as obtaining the husband sworn undertaking that he will not discriminate between his wives before the court can allow the second marriage. It contains other conditions which are absent from the stipulations in force in central and southern Iraq. Below are indicators of the argument for permitting marriage to a second wife and the argument of dire necessity, which allows a minor under the age of 15 to marry in all governorates of Iraq, with the exception if Kurdistan Region.

However, it is not as progressive and just as required by CEDAW's Articles. Kurdistan's Law in regard to marrying a second woman indicates clear disrespect to women when it allows a man to have a second, or probably more wives, when his other wives are not healthy or fertile. Moreover, such a law undermines the expectation of compassion and sympathy that a man should show to his ailing wife.

## 6. Dissolution of marriage and the equal rights of spouses

Many systems of beliefs, Islamic or otherwise, recognize the option of divorce through mutual agreement <sup>[45]</sup>. A husband may delegate his right to talaq (divorce) within arrangement based on Muslim Law to his spouse, enabling her to divorce herself or claim talaq or separation if she wills to do so. This contractual agreement can be inserted into the marriage contract or can be negotiated. In some countries that have adopted the Sharia law, the laws that govern female talaq are different to those for males. Regardless of the motivation, a man can divorce his spouse simply by saying three times his decision to divorce. On the other hand, a woman can only petition for divorce for specific reasons such as if the husband is unfaithful, if the husband takes a new wife without the current wife's permission, or if the husband leaves the wife with no financial support <sup>[46]</sup>.

Divorce is defined in Article 34 (1) Personal Status Code (No 188 of 1959) as the "termination of marriage by the husband or whom he assigns or by the wife if she is assigned to do so or by the Judge". In all cases, a divorce is not valid until registered in court.

In Kurdistan, the paragraph 1 of this Article in Kurdistan has been suspended and replaced with this statement "Divorce means the severing of the bond of marriage in an expressed utterance indicating the divorce legally, uttered by the husband or the wife, any authorized representative or the judge, although without being bound to a specific linguistic expression".

Termination of marriage is regulated in Chapter 4 of the Personal Status Code. The Code establishes three methods for ending a marriage; unilateral divorce by the husband

<sup>45</sup> women living under muslim laws, *supera note 33 at 251*

<sup>46</sup> see country information service, overview of the status of women living without a safety net in iraq 13 (2018)

(*talaq*) (Article 37); judicial separation by the court based on a motion filed by either the husband or the wife (Articles 40,41 and 43); and voluntary separation (*khul'*) (Article 46). In all cases, a divorce is not valid until registered in a court. In certain instances, such as where the wife instigates or is given the right to enforce a divorce, she may be obliged to return all or part of her dowry and in some cases to compensate the husband for other expenses incurred in pursuit of the marriage.

### 6.1 Talaq

Talaq, a type of divorce in which the husband can unilaterally terminate a marriage contract. It is the subject of this section to point out and clarify laws and customs that are based on Muslim laws and recognize the right of a husband to exercise talaq.<sup>47</sup> Talaq is one of the major factors that lead to women's unequal status in marriage. Although Muslim marriage is seen as a contractual relationship that must be entered into by two consenting parties, talaq gives the power unilaterally to the husband to terminate the contract<sup>[48]</sup>.

According to Article 37 (1), the husband executes the divorce by pronouncing three repudiations<sup>[49]</sup>. Based on Article 38 of law No. 188 (1959), the personal status law, Talaq is divided into two types: The revocable talaq, which allows the husband to retrieve his wife during her subsequent three-month waiting period (*iddat*) without a new contract. The resumed marriage is registered with the court in the same way as the divorce.

On the second and third incidence, the Talaq will be called the minor and major separations, respectively. The minor separation can be revoked and the spouses can remarry on the basis of new contract. The major separation happens after the third Talaq, on three separate occasions, and in this case no resumption of the marriage is allowed if the period of Iddat has passed.

Obviously, this arrangement is clear provision of indulgence to men, who can whimsically practice talaq and then retrieve his wife. It is also a clear disregard to women who would be always terrorised by the possibility of talaq.

In a move that looks as according greater equality to women, the Kurdistan Region added paragraph 5<sup>th</sup> of Article 6, which states that a woman can stipulate that the prospective husband delegate her right to Talaq (divorce herself). However, this does not grant full equality to women in regard to Talaq. Women are not given equal right to talaq as enjoyed by men. It is granted only when the woman asks for it and the future husband accepts. Such conditions are not available for most women. Only women who enjoy power and degree of independency from her social network can ask for such provision.

In Kurdistan, some of the Articles of the personal status code have been replaced to the benefit of women; however, men are still allowed to divorce their wives; they can also threaten the wives to force submission upon them. Obviously, such practices undermine the welfare of women and leave them exposed in many ways.

Our preliminary inference here would be that the Kurdistan Code does not accord full equal rights to men and women in regard to talaq.

Nonetheless, we find not reason that Kurdistan and Iraq in general cannot be like Indonesia, Tunisia, and Yemen where the talaq practice has been completely banned and divorce in all cases should go through the courts. This means we can have, somehow Islamic based law but still ban the practice of talaq as in aforementioned states<sup>[50]</sup>.

Still we cannot ignore some efforts that informed some laws in Iraq to bring about greater justice and protection to women from wilful and capricious talaq performed by men. The law in question is the Article 39(3) of the Personal Statute Code and states: "If the husband divorces his wife and the court finds that the husband was arbitrary in the divorce, which resulted in causing harm to the wife, the court may, at her request, order the husband to pay compensation that is proportionate to his financial circumstances and degree of arbitrariness, assessed as a lump sum. This may not exceed her alimony for two years, in addition to her other established rights."

It is clear the compensation is not prohibitive of the practice of talaq which we can be argued to be unjust to men. It is easily affordable to rich men although it discourages the poorer ones. In Kurdistan, this Article 39(3) was suspended and is replaced with the following: "if the husband divorces his wife and the court finds out that the husband has arbitrary in divorcing her and the wife is harmed because of it, the court shall rule based on the (legal) suit requested by the wife that her husband has to pay a compensation that is proportionate to his financial condition and the extent of his arbitrariness and severity. The compensation would be a lump sum which may not be less than her alimony for three years and does not exceed that of five years.

The amendment is an improvement on the Iraqi law. Yet, it does not amount to outlawing the practice.

We should also note another positive provision in Iraqi laws concerning the housing of the divorced wives. The Divorced Women's Right to Housing Act No. 77 of 1983 stipulates that a woman for whom a decree is issued must have the right to remain in the house or apartment where she has lived with her husband for a sufficient period of time. This enables them to secure adequate housing. A second paragraph was added to Article 1 of the Act under Law No. 27 of 1988, which now includes six articles on the right of divorced women to live in the home owned by their former husbands.

Obviously, neither Iraq nor Kurdistan has rectified the inequality entailed by talaq. We have noted that certain Muslim countries have now annulled the laws that grant husband the right to divorce arbitrarily. Yet, Iraq and Kurdistan have not followed the suit. We can also note that Kurdistan legislatures have brought about a degree of equality for women greater than their Iraqi counterparts have done. However, even in the case of Kurdistan the equality is not complete as it demanded by CEDAW.

### 6.2 Judicial separation and its legal consequences

According to Article 40, for any of the following reasons, either spouse may request separation: if one of the spouses causes such hurt to the other or to his or her children so that the marriage cannot be retained; if the spouse commits adultery; if the marriage occurred before either spouse attained the age of 18 without the authorization of a judge; if the marriage was concluded by coercion outside the

<sup>47</sup> women living under muslim laws, supra note 33 at 255

<sup>48</sup> *id.*

<sup>49</sup> personal status code no.188 of 1959, iq

<sup>50</sup> women living under muslim laws, supra note 33 at. 255

jurisdiction of the tribunal; and if the spouse marries another wife without the court's permission.

Moreover, Article 43 offers that, for any of the following reasons, a wife has the right to request separation: 1- If the husband is facing an incarceration for a period of three years or more, even if he can still provide for her needs. 2- If the husband has abandoned his wife for two years or more without a legitimate reason, and that his whereabouts are known, even if he can still provide for her needs. 3- If the husband did not ask his wife, with whom marriage was not consummated yet, for wedding for two years after the conclusion of the contract. The husband's demand to wed his wife shall not be accepted if he did not fulfil her marital rights. 4- If it turned out that the husband is impotent or became impotent and is unable to perform his conjugal duties, whether for physical or psychological reasons, or if he was afflicted with impotence after consummation and it was proven that it is impossible for him to recover based on a medical report prepared by an official competent committee. However, if the court sees that the reason behind impotence is psychological, it shall postpone separation for one year, during which the wife shall not deny her husband the physical relationship. 5- If the husband was infertile, or became infertile after marriage and the wife does not have a living child from him. 6- If the wife discovers after the conclusion of the contract that her husband is afflicted with a disease that makes sexual intercourse inevitably harmful, such as leprosy, tuberculosis, syphilis, insanity; or if he attracted later one of these diseases or the like. If the court finds out, after medical examination, that the disease is likely to be cured, it shall postpone separation until the disease goes away, and the wife must abstain from sexual intercourse with her husband throughout the whole period of postponement. However, should the court discover that the disease is unlikely to be cured within a reasonable period and the husband refrains from granting his wife divorce and the latter insists on her request, the judge shall rule in favor of separation. 7- If the husband abstains from spending on his wife without a legitimate excuse, after granting him a maximum respite of sixty days. 8- If it was impossible to collect the alimony from the husband because he had disappeared, or had been absent, missing, or sentenced to more than a one-year term of imprisonment<sup>[51]</sup>.

Moreover, the wife has the right to ask for separation before consummation. In this case, the court's judgment shall adjudicate separation after the wife returns to her husband the entire amount of the dowry, she had collected from him in addition to all the money and expenses he had incurred for the purposes of the marriage and which he can prove. The Iraqi woman has also the right to seek separation from her husband if the latter has been staying in a foreign country for no less than three years and he is a national of this country; or because he is forbidden or abstaining from entering the country. Additionally, the wife of a person who has been officially declared as missing has the right to seek separation from her husband through the court four years after he is declared missing. The court shall verify the fact that the husband is still missing in the same way it initially verified that he was missing and then it may render the judgment of separation.

It is noteworthy that this Article does a good justice to women by allowing them to file for divorce. It brings about

certain equality between the spouses.

In Kurdistan, however, the validity of sub paragraphs 1 and 2 of Article 43 (1) of the Law has been suspended and replaced by the following: if the husband faces imprisonment for a period of three years or more, after serving one year of imprisonment, even if he can still provide for her needs; if the husband has left his wife for one year or more without a legitimate reason, even if the husband has had a known residence and the means to support the wife financially. Furthermore, the legitimacy of Article 43(3) of the law was removed in the region of Kurdistan. What can be inferred from the above, regarding the Article 43, is that Kurdistan laws have in certain aspects provided more protection for wives.

### 6.2.1 Procedures for Judicial Separation

Before a court reaches a decision on separation on the basis of an action brought by one of the spouses, it follows the procedures laid down in Article 41, paragraphs 2, 3, and 4, of the personal status code, which requires the court to investigate the reasons for the dispute and consider reconciliation through the husband's family or that of the wife. If this fails, two arbitrators are chosen by the spouses or, if they are unable to agree, by the court. If the arbitrators fail to bring about reconciliation, they refer the matter to the court, indicating which of the parties is at fault. If they cannot agree on this, the court appoints a third arbitrator. If the court determines that the dispute continues and that the husband refuses to repudiate his wife, then the court separates the two.

### 6.2.2 Legal Consequences of Judicial Separation

Article 41(4) (b) states that if separation is decreed after consummation has taken place, the deferred dowry lapses in the case where the wife is at fault. If she has already been paid the entire dowry, she must return no more than one half. If both parties are at fault, the deferred dowry is divided between them in accordance with the degree of fault of each. Moreover, if separation takes place before consummation and the wife is proven to be responsible for fall out, she would be responsible for returning of the dowry she had collected from her husband<sup>[52]</sup>.

Overall judicial separation complies with CEDAW's Article 16 which requires certain equality between the spouses in the context of termination of marriage.

### 6.3 Elective Separation (khul)

In many systems based on Muslim laws, a woman may seek a divorce from her husband (without having to prove fault on his part) by offering him some form of compensation. This form of divorce is referred to as khul'. In most systems, a woman must access khul' through the courts. Khul' is not available in Indonesia and Tunisia, where the laws provide equal grounds-based dissolution to men and women<sup>[53]</sup> Article 46 states that (khul) is the dissolution of the marriage tie. For khul to be valid, the husband must have the capacity to pronounce repudiation, and he may grant his wife a divorce for a payment that is either greater or less than her dowry. In Kurdistan the validity of paragraphs 1 and 3 of Article 46 of the law shall be suspended and

<sup>51</sup> personal status code no.188 of 1959, iq art 43 s 3

<sup>52</sup> personal status code no.188 of 1959, iq art 41 s 4

<sup>53</sup> women living under muslim laws, supera note 33 at 273

replaced with the following statement “*Khul'* is to sever the bond of marriage by pronouncing the formula of *khul'* or words of the same meaning, in return to paying back a compensation that is no more than the pre-dowry that she received. In the case of *Khul'*, the husband should not necessarily express agreement with *Khul'* if the judge finds out, through his arbitration, that the wife cannot stand living with him.”

Comparing the Iraq and Kurdistan Laws regarding *Khul'*, it can be noted that in the Kurdistan amended law, the acceptance of *Khul'* by the husband is not a condition for proceeding with the divorce. The Iraqi law, on the other hand, does not express this explicitly, that husband's acceptance is not required for the *Khul'* to take place. As such, it could be said that the Kurdistan law is more progressive, in regard to divorce but not as progressive some other Islamic countries that have outlawed talaq or repudiation altogether.

Finally, the different regulations on separation or divorce for males and females make it significantly more difficult for females to separate from their husbands than for males to divorce their wives. While women under certain circumstances can seek divorce from their husbands, they are still not capable to leave marriages in which they no longer wish to stay.

### 7. The Right to Keep the Woman's Own Identity

Nothing in any Iraqi law and Kurdistan or custom obliges a wife to change her name after getting married. The wife continues to bear her family name, just as she continues to retain her independent legal personality, although her marriage is noted in her civil identity card. The fact that women continue to enjoy their independence legal personality, enable them also to legally own property, act independently and engage in all types of lawful civil and commercial acts<sup>[54]</sup>.

This is also in compliance with Article 16 (g) which demands that the “same personal rights” are accorded “to husband and wife, including the right to choose a family name, a profession and an occupation”.

And (h) the spouses enjoy the same “rights in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property, whether free of charge or for a valuable consideration.”

### 8. Conclusions

We have noted that Iraq has expressed a reservation on the whole of Article 16 CEDAW, which offers equal rights for females and males to marry, choose a spouse and end marriage. These reservations indicate that Iraq is not fully compliant with CEDAW convention.

One of the reasons for the reservation as mentioned is that Iraq and Kurdistan are controlled by the Personal Status Code (1959 No. 188), which though progressive in some ways it does not provide for complete legal equality between men and women. Our explanation for the failure of these codes is deference or commitment to Islamic teachings. The bias is most obvious when it comes to Talaq. Nonetheless, the fact that some Islamic countries have outlawed the practice of

Talaq means that there can be many interpretations of the Islamic laws and some of such interpretations are more just to women than others.

One area of flouting CEDAW concerns the control some parents want to have over their children's marriage, such a control particularly over women is prescribed by Islamic religion. However, the laws of Kurdistan deny the right of guardians to control the marriage of their minors, particularly women.

Kurdistan has also amended Article 9 of personal Status Law so that it provides required protection against forced marriage and deters whoever contemplates giving a female into marriage without her full knowledge and consent.

Here we have also noted inequality which is informed by Islamic Laws and is kept still in Iraq and Kurdistan Personal Status Code, concerning marriage. Muslim laws do not permit the marriage of a Muslim woman to a non-Muslim; however, Muslim men are allowed to marry Kitabi (Christians and Jews) women.

In regard to polygamy, it was noted that the law in Kurdistan Region is more progressive than its counterpart Iraqi Law. The Kurdistan law eliminates any ambiguity and loophole that may allow courts permitting a husband to marry a second wife without the consent of the first wife and requires that the husband gives a sworn undertaking before the court to treat his wives impartially.

However, we cannot still plaudit Kurdistan Laws, since it can consider allowing polygamy to men and this undermines very severely equality between men and women and this contradicts CEDAW.

In regard to the marriage of underage, it was noted that Iraq and Kurdistan legislators set the legal marriage age at 18 years. However, a judge, in Kurdistan, can approve marriage below this age for persons who reach 16 years old under certain conditions even if their parent do not approve – an Iraqi judge might allow the marriage of 15 years old under certain circumstances.

We also noted the violation of CEDAW by continuing exercise of Talaq which gives sometimes overwhelming power to husband at the expense of wife by allowing him to repudiate his wife or wives. Women in disadvantageous conditions can be hugely intimidated by the Talaq practice and submit to the demand of their husband so much so that they lose their personhood in regard to their husband.

The legal provision in Kurdistan whereby a husband can delegate the right to Talaq to his prospective wife may be regarded as attaining greater equality to women and as better meeting of CEDAW. However, in reality, this does not bring about complete equality because it is the husband who has to agree to the arrangement. Women suffer from the threat of Talaq irrespective of their preferences.

We noted that the divorce law, which requires to be processed through courts, brings about a good deal of equality. The problem, as noted, is that this Law exists side by side with Talaq, and this constitutes another failure to meet CEDAW demands completely.

One of the procedures that can be resorted to to end marriage is *Khul'*. This is a right practiced by women to repudiate their men. In this context, women can obtain her separation from her husband even if the husband is unwilling. In this regard Kurdistan differs from Iraq. In Iraq, unlike Kurdistan, the consent of the husband is demanded. However, we have also noted this option does not suit women who are disadvantaged socially and economically.

<sup>54</sup> un committee on the elimination of discrimination against women, consideration of reports submitted by states parties under article 18 of the convention on the elimination of all forms of discrimination against women, combined fourth, fifth and sixth periodic reports of states parties: iraq, 11 jan 2013, cedaw/c/irq/4-6



## Suggestion

1. Iraq should abandon all its reservation to CEDAW's Article 16.
2. Talaq which is practiced according to Article 34, should be altogether abolished. Another reason for abolishing this practice is that it conflicts with CEDAW.

The removal of Article 17 of personal status code, which allows a discriminatory right to Muslim men whereby the Muslim is allowed to marry women from the Kitabi (Religions with scripture and it is meant the Jews and Christians) women.

## References

1. Un committee on the elimination of discrimination against women, cedaw general recommendation no. 19: violence against women no 21: violence against women, 1994. at15
2. *id.*
3. un committee on the elimination of discrimination against women, cedaw general recommendation no. 19: violence against women no 19: violence against women, 1992. at 23
4. un committee on the elimination of discrimination against women, *supra* note 1 at 11-12
5. lars adam rehof, guide to the travaux preparatoires of the united nations conventions on the elimination of all form of discrimination against women 173, 1993.
6. un committee on the elimination of discrimination against women, *supra* note 1 at 14
7. *id.* At p16
8. un commission on human rights, report of the special rapporteur on violence against women its causes and consequences, ms. Radhika coomaraswamy, submitted in accordance with commission on human rights resolution 2001/49: *cultural practices in family that are violent towards women*, 31 jan 2002, e/cn.4/2002/83
9. un committee on the elimination of discrimination against women, *supra* note 1 at.17
10. un commission on human rights, *supra* note 8 at 62
11. *id.* At 63
12. guð mundur s alfredsson & asborn eide, the universal declaration of human rights- a common standard of achievement 337, 1999.
13. un committee on the elimination of discrimination against women, *supra* note 1 at 19
14. *id.* At 21
15. *id.* At 22
16. *id.* At.19
17. *id.* At 24
18. *id.* At .28
19. *id.* At.23
20. un commission on human rights, *supra* note 8 at 55
21. un ited nations, the committee on the elimination of discrimination against women, and its optional protocol 36 (2003)
22. see international women's tribune centre, rights of women: a guide to the united nations the most important united nations treaties on women's human rights 38 (1998)
23. mohamed mattar, unersolved questions in the bill of rights of the new iraqi constitution:how will clash between "human rights" and "islamic law" be reconciled in future legislative enactments and judicial interpretations? 30 fordham int. Law j.126, 138 (2006)
24. personal status code no.188 of 1959, iq art 3 s 1
25. personal status code no.188 of 1959, iq art art 4
26. personal status code no.188 of 1959, iq art 5
27. personal status code no.188 of 1959, iq art 7 s 1
28. personal status code no.188 of 1959, iq art 7 s 2
29. personal status code no.188 of 1959 iq art 8 s 1
30. personal status code no.188 of 1959 iq art 8 s 2
31. personal status code no.188 of 1959, iq art 9 s1
32. personal status code no.188 of 1959, iq art 9 s 2
33. see women living under muslim laws, knowing our rights: women living under muslim laws, knowing our rights: women, family, laws and custom in the muslim world 98 (2006)
34. *id.*at 197
35. *id.*at 199
36. *id.*
37. law no.32/2016 of 28/08/2016 governing persons and family, rwanda
38. *çiğdem balim et al., turkey: political, social and economic challenges in the 1990s (social economic and political studies of the middle east) 90 (1995)*
39. personal status code no.188 of 1959, iq art3 s 4
40. personal status code no.188 of 1959, iq art4 s b
41. personal status code no.188 of 1959, iq art 3 s 5
42. personal status code no.188 of 1959, iq art 3 s 6
43. personal status code no.188 of 1959, iq art 7
44. un committee on the elimination of discrimination against women, *report of the committee on the elimination of discrimination against women: twenty second session (17 jan- 4 feb 2000); twenty third session (12 -30 june 2000), (30 june 2000, a/55/38)*
45. women living under muslim laws, supera note 33 at 251
46. see country information service, overview of the status of women living without a safety net in iraq 13 (2018)
47. women living under muslim laws, supera note 33 at 255
48. *id.*
49. personal status code no.188 of 1959, iq
50. women living under muslim laws, supera note 33 at. 255
51. personal status code no.188 of 1959, iq art 43 s 3
52. personal status code no.188 of 1959, iq art 41 s 4
53. women living under muslim laws, supera note 33 at 273
54. un committee on the elimination of discrimination against women, consideration of reports submitted by states parties under article 18 of the convention on the elimination of all forms of discrimination agaist women, combined fourth, fifth and sixth periodic reports of states parties: iraq, 11 jan 2013, cedaw/c/irq/4-6