



# The Right to Education for Women in Saudi Arabia

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## **Abstract**

This thesis offers an analysis of the rights of women in Saudi Arabia to access and obtain education on an equal footing with their male counterparts. The Kingdom of Saudi Arabia is undergoing a profound moment of social and legal transformation. The Saudi leadership has reformed various laws and practice to support its agenda of economic modernisation, including removing many barriers that prevented women from exercising their rights and freedoms. In this regard, the Saudi leadership has taken various measures aimed at bringing the country's laws and policies into greater alignment with international human rights norms. As this thesis shows, however, while women have achieved formal equality under the law, at least in the sphere of education, certain barriers continue to impede their ability to achieve full equality. The question posed by this thesis is the extent to which this impairs not simply the human dignity of women but the broader economic outlook of the Kingdom. At the conceptual level of analysis, the thesis also considers whether continuing obstacles to gender equality can be said to be rooted in religion rather than custom. In conventional thinking, economic (and social) modernisation reform is perceived to stand in tension with the Islamic laws and traditions in which Saudi Arabia legal system is deeply rooted and its social traditions enmeshed. This thesis seeks to challenge and contest the assumption that Islamic law and international law are entirely opposed as a false dichotomy. The thesis contextualises the debate on education rights in Saudi Arabia by drawing on broader aspects of Islamic law and thought. Islamic law is rooted in moral philosophy that is distinct from the liberal and secular origins of contemporary human rights discourses. However, while Islamic legal thought may conceivably be understood to view the relation between the genders as 'equal and different', there are now various attempts to reinterpret Quranic verses to support the further development of women's rights of education, alongside its clear endorsement of education as both a right and religious duty. It is by drawing on this more emancipatory ethic of Islamic law and thought that this thesis analyses the strengths and limitations of Saudi law and policy in respect of women's right to education. This thesis therefore seeks to identify the structures that are in place to protect and promote a women's right to education, and doing so by arguing that gender equality is not merely necessary as a moral (and religious) imperative but has also become necessary on pragmatic, i.e. economic grounds. If Saudi Arabia is to compete with other developed economies, the argument for further integration of women in public and private life will become more and more pressing. In this way, Saudi Arabia can more fully comply with its obligations in international law and its religious traditions, while furthering its economic modernisation agenda.

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## **Declaration of Originality**

This thesis, submitted for the Degree of Doctor of Philosophy, is an original work of my own and has not been submitted before for any other degree.



## **Table of Abbreviations**

- CDHRI - Cairo Declaration on Human Rights in Islam (1990)
- CEDAW - Convention on the Elimination of All Forms of Discrimination Against Women (1979)
- CESCR - Committee on Economic, Social and Cultural Rights (founded in 1985)
- ICESCR - International Covenant on Economic, Social and Cultural Rights (1966)
- OIC - Organization of the Islamic Conference (founded in 1969)
- NTP - National Transformation Program (2016)

## **Table of Relevant Case Law**

Case no 16/41 2005, [23/2/1426] General Court of Riyadh, Saudi Arabia

Case no 16/41 2005, [23/2/1426] General Court of Riyadh, Saudi Arabia and Decision No 3/334 (21/12/1436 H SA), Judicial Judgments Journal (1<sup>st</sup> edn, 1428 H)

Case no 3/334 2007, Ministry of Justice, *Mudawanat al-Ahkam alQada'iyya*, 1<sup>st</sup> issue, 284-6. Decision No 3/334 (21/12/1436 H SA), Judicial Judgments Journal (1<sup>st</sup> edn, 1428 H)

Sahin v. Turkey before the European Court of Human Right in Strasbourg (Ct. of Human Rights, App. No. 44774/98, 44 Eur. H.R. Rep. 99 (2005)

Vice Minister of the Interior's resolution no: 2S/690 on the 1/4/1397H.

Vice Minister of the Interior's resolution: S2S/48 on the 2/5/1397H

## **Table of Relevant Legislation**

Resolution No 52 (4/4/1397H) Fatwa No 20609, ‘The General Presidency of Scholarly Research and Ifta, Fatwas of The General Presidency of Scholarly Research and Ifta’ 1st issue, 1411H, vol 17, 223

Resolution No 52 (4/4/1397H) Fatwa No 20609, ‘The General Presidency of Scholarly Research and Ifta, Fatwas of The General Presidency of Scholarly Research and Ifta’ 1st issue, 1411H, vol 17, 223

Royal Decree No 24/2 (17/1/1425 H, 9 March 2004) Human Rights Commission (25 January 2011)

Saudi Labour Law, Royal decree no. M/51, Part IX Employment of Women

The Basic Law of Governance 2007 (promulgated by the Royal Decree No. A/90 dated 27/08/1412H (March 1, 1992)

The Board of Grievances Law (2007) Royal Decree No M/78 art 5 (19/9/1428 H, 1 October2007)

The Law of Sharia Procedure 2000 (Saudi Arabia) issued by Royal Decree No M/21 (20/3/1421 H, 23/6/2000) OG Umm al-Qura no 3811 (17/6/1421 H, 17/9/2000)

# **CHAPTER 1:**

## **Introduction**

### **1.1 Introduction**

This thesis attempts to do two things. Firstly, it examines the rights of women to education in Saudi Arabia and refers to the Islamic system of law and belief in this regard. As Saudi Arabia derives its laws from Islamic law, this thesis proposes the Kingdom of Saudi Arabia (KSA) establishes a legal framework by which women have a right to education. Secondly, it contends that it makes good economic sense for Saudi Arabia to ensure that women achieve substantive equality when exercising these rights, free from legal and culture encumberments. The analysis herein operates within this theoretical framework. The study of women's right to education in Saudi Arabia cannot be studied at a fixed point in time because both the access to education for women and economic foundation of the Gulf country state are undergoing rapid evolutionary changes. Nor can it be studied without placing the concept of women's education within an overall societal framework. The Arabian Peninsula has both a long history and, in recent times, there has been a swift evolution due to the sudden and drastic effects of the financial windfall associated with the discovery of oil.<sup>1</sup>

The status of women's current legal rights to education in Saudi Arabia must, therefore, be considered within the Saudi legal, social and cultural context. In other words, the interpretation and application of laws related to women's right to education must be considered within the context of a society and an economy undergoing rapid evolutionary changes. To that end, this thesis begins with a historical perspective of cultural norms and Islamic feminism. Though there is no common consensus on the definition of Islamic feminism, a working definition of this body of scholarship has been provided by Margot Badran, largely as a way of setting up a distinction between Islamic paradigms of feminism and mainstream (Western) feminism. Badran states that Islamic feminism is

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<sup>1</sup> Margherita Stancati and Ahmed Al Omran, 'Saudi Arabia Faces Challenges in Enlarging Private Sector', (2016), Wall Street Journal <[www.wsj.com/articles/saudi-arabia-faces-challenges-in-enlarging-private-sector-1465324961](http://www.wsj.com/articles/saudi-arabia-faces-challenges-in-enlarging-private-sector-1465324961)>

‘a feminist discourse and practise articulated within an Islamic paradigm. Islamic feminism, which derives its understanding and mandate from the Qur’an, seeks rights and justice for women, and for men, in the totality of their existence. Islamic feminism is both highly contested and firmly embraced. There has been much misunderstanding, misrepresentation, and mischief concerning Islamic feminism. This new feminism has given rise simultaneously to hopes and to fears.’<sup>2</sup>

It should be noted that Islamic feminism, while similar in nature to universal secular feminism in that the two have a broad goal of equalizing women’s rights, diverges because Islam provides the foundation for this feminist movement. This thesis considers the policies and laws that have been gradually implemented to create more expansive, yet incomplete equality in women’s rights to education. From a utilitarian perspective on women’s rights to education, this thesis claimed that more measures must be implemented, and quickly, to expand the educational rights of women beyond the current measures of solely granting women rights to study in certain fields. Measures now must be taken to open the doors to employment opportunities to exercise the use of the knowledge gained. Importantly, it is argued that women, more specifically educated women, may help to remedy the economic situation that the kingdom faces now with the collapse of oil prices, but more can be done to integrate women beyond specific educational rights, which in isolation provide no societal economic benefit.

This study draws on so-called modernist Islamic thought, including a range of voices sometimes described as Islamic feminists. There is no settled or comprehensive definition of Islamic feminism. Nonetheless, in recognition of the perceived tension between the classic exegetical perspective on the male-female relation and efforts to modernize Islamic legal systems, there have been attempts to articulate feminist discourses that emerge from within the traditions of Islam.<sup>3</sup> Writing in the nineteenth and mid-twentieth century scholars such as Amina Wadud, and more recently Kecia Ali and Ziba Mir-Hosseini, among many others, have

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<sup>2</sup> Margot Badran, *Feminism in Islam: Secular and Religious Convergences* (Oneworld Publications, 2009) 242

<sup>3</sup> Amina Wadud, *Qur’an and Woman: Rereading the Sacred Text from a Woman’s Perspective* (Oxford University Press 1999) 64.

attempted to deconstruct culturally specific readings of the male-female relation and to reimagine this relationship within a more equal relationship.<sup>4</sup>

Drawing on these traditions, the thesis argued that Saudi Arabia as a society must reconcile those aspects of its religious and cultural norms that continue to limit the educational opportunities of women. Second, the notion that empowering the women of Saudi Arabia as contributing members of society serves to focus reforms upon the historical and current religious aspects of the Kingdom that have impeded a more progressive interpretation of the law and policy toward women's rights to access education and pursuing employment opportunities that engage the knowledge therein gained. Finally, this thesis has argued that Saudi Arabia can fulfil its *Sharia*-based duties to provide socio-economic guarantees to the growing educated female workforce that, as will be argued, can symbiotically strengthen the religious fabric of Saudi Arabia while providing a broader base for its quest to build a more robust economy.

## **1.2 The Status of Women in Saudi Arabia: A Summary of Statistical Data**

Saudi society has undergone very rapid changes over the last 75 years due to the discovery of oil and the unexpected financial gains associated therewith. Consider too that these gains corresponded with a time of equally rapid globalization and modernization around the world. Thus, the people of Saudi Arabia have been given opportunities to improve the human condition in many facets of their society: individual economic stability, world-class healthcare, material wealth and comfort, infrastructural improvements, etc. The importance of education to the continued improvement and maintenance of such a society has become increasingly apparent. A strong economic base cannot rely on an uneducated workforce to maintain it, nor can the state of Saudi Arabia continue to rely on a one-dimensional platform: oil. To understand the importance of education generally to this equation, and more specifically women's right to education, one must understand some basic details of the overall economic picture.

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<sup>4</sup> Wadud, *ibid*; Fatima Mernissi, *The Veil and the Male Elite: A Feminist Interpretation of Women's Right in Islam* (trans) Mary Jo Lakeland (Basic Books 2006); Kecia Ali, *Sexual Ethics and Islam: Feminist Reflections on Qur'an, Hadith and Jurisprudence* (Oneworld Publications 2016).and Ziba Mir-Hosseini and Mulki Al-Sharmani and Jana Rumminger (eds), *Men in Charge? Rethinking Authority in the Muslim Legal Tradition* (Oneworld 2015).

Evidence suggests that there is an economic crisis looming on the horizon for Saudi Arabia. The falling price of oil suggests that if the trend is not reversed, and if current spending patterns continue, the current large financial surplus will be completely exhausted within some seven years.<sup>5</sup> Oil production constitutes almost all Saudi Arabia's gross domestic product (GDP), placing the country in a difficult situation.<sup>6</sup> In addition, it may come as a surprise that poverty in the world's richest oil country is reaching an unbearable level. The Saudi government does not publish the actual level of poverty, but private organizations estimate the number of poor people at some 4 million, or 15% of the population, with around 25% of Saudi youth unemployed.<sup>7</sup>

Oil has been at the centre of the modern Saudi economy and was the root of the major societal evolutions that have taken place over the last 75 years. Because oil has provided 80-90% of government revenue, the recent falls in oil prices have rendered Saudi Arabia's sovereign finances heavily exposed.<sup>8</sup> Furthermore, Saudi Arabia ranks poorly on the World Bank "Worldwide Governance Indicators".<sup>9</sup> There is a strong correlation between low GDP, low educational outcomes and high levels of corruption:

Cross-country studies have well-established that higher levels of aggregate education in a country are associated with lower levels of corruption as measured by aggregate rankings ... GDP per capita and gross enrollment in tertiary education alone explain 80 percent of the variance in [Corruption Perception Index] scores for a group of 56 developed and developing countries.<sup>10</sup>

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5 Samba Financial Group, Economics Department, Saudi Arabian Baseline Economic Forecast 2015-8, (2015) <[www.samba.com/Saudi\\_Arabia\\_baseline\\_macro\\_forecast\\_2015\\_2018](http://www.samba.com/Saudi_Arabia_baseline_macro_forecast_2015_2018)>

6 The World Factbook states that Saudi Arabia's "petroleum sector accounts for roughly 87% of budget revenues, 42% of GDP, and 90% of export earnings. CIA World Factbook <"[www.cia.gov/library/publications/the-world-factbook/geos/sa.html](http://www.cia.gov/library/publications/the-world-factbook/geos/sa.html)>

7 Kevin Sullivan, 'Far Removed from Saudi Boom' Guardian Weekly (4 January 2013) 30

8 Larry Elliot, 'Recession in Russia, revolt in Venezuela? The knock-on effects of tumbling oil prices' The Guardian, (16 October 2014) <<http://www.theguardian.com/news/datablog/2014/oct/16/datablog-low-oil-prices-chill-producer-economies>>

9 KSA ranks 48th place of 168. Transparency International 'Corruptions Perceptions Index 2015' <[www.transparency.org/research/cpi/overview](http://www.transparency.org/research/cpi/overview)>

10 Michelle Kaffenberger, 'The Effect of Educational Attainment on Corruption Participation in Sub-Saharan Africa', Vanderbilt University, Nashville, USA, (May 2012) <<http://etd.library.vanderbilt.edu/available/etd-03222012-205534/unrestricted/Kaffenberger.pdf>> p15

To put it starkly, more drastic measures are needed, if the Saudi economy is to avoid havoc. Adding to the complexity of the problems facing the economic situation that the modern economy of Saudi Arabia finds itself in are the norms and beliefs of religious communities that remain steadfast in their opposition to change.<sup>11</sup>

It is therefore vital that when considering any solutions to the economic problem that Saudi Arabia faces, that the religious tenets that ultimately express themselves as cultural norms<sup>12</sup> are at the centre of any formula for change, and that proffered solutions are not one-dimensionally focused on the economy, but rather embody the teachings of the *Qur'an*. While it is generally accepted that cultural taboos are expressed as religious norms rather than religious tenets expressing themselves through cultural norms, in order to address the cultural norms, we must locate the source for change. In other words, religious tenets must be addressed, for cultural change to be accepted.

### 1.2.1 Facts and Issues

The Kingdom of Saudi Arabia faces two inseparable dilemmas: one is how to navigate the economy to stability through diversification; the other is how to maintain core strength within its religious foundation as it undergoes yet another radical economic shift. Manifestly interwoven, and a vital component to a dynamic solution to these inseparable dilemmas is women's struggle for gender equality.<sup>13</sup>

Saudi Arabia has a population of thirty-one million people with 45% of those under the age of 25. When one accounts for the population of those 29 years of age and under, this population makes up more than two-thirds of the population as a whole.<sup>14</sup> With slightly more than half of this population being women, the Saudi government has a significantly large untapped resource that could contribute to the economic prosperity of the kingdom. But, the current approach to

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<sup>11</sup> Harun Yahya, 'True Muslims believe in destiny' Arab News (6 December 2015) <[www.arabnews.com/islam-perspective/news/760546](http://www.arabnews.com/islam-perspective/news/760546)>

<sup>13</sup> Saudi Arabian Demographics Profile 2016, Index Mundi (2016) <[www.indexmundi.com/saudi\\_arabia/demographics\\_profile.html](http://www.indexmundi.com/saudi_arabia/demographics_profile.html)>

<sup>14</sup> Caryle Murphy 'Saudi Arabia's Youth and the Kingdom's Future', Woodrow Wilson International Center for Scholars' Environmental Change and Security, Middle East Program Occasional Paper Series, (Winter 2011)



women's rights still significantly deprives any economic contribution to broadening the economic base of Saudi Arabia. This is due to the remaining significant restraints on women's capability to contribute, such as gender segregation, restrictions on movement, and restrictions on the right to work.<sup>15</sup> While statistical data shows that more and more women are becoming educated in the Kingdom, gaining ground in certain fields and professions, structural impediments, including gender segregation, restrictions on movement, and restrictions on the right to work, have proven to be difficult obstacles in putting women's education to use.

The National Transformation Program (NTP) constitutes one strata of Saudi Arabia's economic action plan published as part of its Vision 2030 development plan. This Saudi Vision 2030, and the NTP represents a comprehensive blueprint by the Saudi government to privatize state owned assets, introduce market reforms; and to diversify its economic income away from the oil industry to a knowledge-based and technology advanced economy.<sup>16</sup> In May 2016, the Ministry of Education released statistical data indicating that there are more Saudi women studying in universities than men, more specifically that women constituted 51.8 percent of Saudi university students.<sup>17</sup> There are 551,000 women studying for bachelor's degrees while only 513,000 men.<sup>18</sup> But the question remains as to where these educated women will work. Women currently only make up 16% of the workforce.<sup>19</sup> Consider too these alarming statistics regarding the future of the Kingdom's economy: 70 percent of the working population of Saudi Arabia are employed in the public sector, while the goal of the NTP delivery plan 2018-2020, first published in 2016, is to slash civic service jobs by 20 percent by the year 2020.<sup>20</sup> This means that there will be more pressure on the private sector to take up the slack.

This thesis argues that while women have been able to educate themselves as the result of incremental paradigm shifts in societal acceptance of a women's right to education, the

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<sup>15</sup> Human Rights Watch World Report 2016: Saudi Arabia, <https://www.hrw.org/world-report/2016/country-chapters/saudi-arabia#5abc38>

<sup>16</sup> For the official document see Saudi National Transformation Program, June 2016 <[https://vision2030.gov.sa/sites/default/files/attachments/NTP%20English%20Public%20Document\\_2810.pdf?](https://vision2030.gov.sa/sites/default/files/attachments/NTP%20English%20Public%20Document_2810.pdf?)

<sup>17</sup> Saudi Gazette, "More women than men in Saudi universities, says ministry" Al Arabiya English (28 May 2015)

<sup>18</sup> *ibid*

<sup>19</sup> Vivian Nereim and Donna Abu-Nasr "Saudi Women Are Joining the Workforce in Record Numbers" <<http://www.bloomberg.com/news/articles/2015-08-10/saudi-women-are-joining-the-workforce-in-record-numbers>>

<sup>20</sup> Margherita Stancati and Ahmed Al Omran, 'Saudi Arabia Faces Challenges in Enlarging Private Sector', (2016), Wall Street Journal <[www.wsj.com/articles/saudi-arabia-faces-challenges-in-enlarging-private-sector-1465324961](http://www.wsj.com/articles/saudi-arabia-faces-challenges-in-enlarging-private-sector-1465324961)>

practical consequence has been that women have gravitated to the public sector; the question is why. Could it be that women's gravitation to the public sector is not because women enjoy government jobs, but rather because of the legal impediments that exist that have so far denied them opportunities in the private sector? Alternatively, it may be argued that barriers faced by women in the sphere of education and employment are the consequence of the Kingdom's long maintained (though recently relaxed) male guardianship laws, restrictions on the freedom of movement, and segregation in the workplace?<sup>21</sup> The following statistics really hone in on this issue: while Saudi women only make up 13 percent of the overall workforce<sup>22</sup>, 84 percent of their job participation is in the education realm, and 32 percent of Saudi national doctors are women.<sup>23</sup> To put this another way, as Saudi women progress to become 50 percent of the educated population<sup>24</sup>, women only currently account for 4.6 percent of all private-sector jobs<sup>25</sup>, not considering the number of uneducated women in the workforce.

### 1.3 Statement of the Problem

The gap in knowledge that this study of women's rights to education in Saudi Arabia seeks to explore can be posed as the following: strengthened protection and recognition of a women's right to education can be justified in terms of normative societal and instrumental economic gains. By exercising effective and meaningful rights to education and work, the dignity, autonomy and equality of Saudi women is not only given formal recognition under the law. What is more, the "outcomes" of such rights recognition is of mutual economic benefit to the growing number of educated women in Saudi Arabia, and to the future prosperity of the Kingdom as a whole. While educational rights have, and continue to expand for women as the result of the policies set forth by the Saudi leadership, the practical exercise of such educational training is counteracted, or rendered ineffective, by the lack of equally progressive changes to the policies affecting women's rights in the workplace. In other words, the most debilitating restrictions do not exist in the right to education or the right to work, *per se*. Rather the barriers to full enjoyment by women of their rights are the conjoining laws such as: male guardianship,

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<sup>21</sup> Gallup "Lure of Government Jobs for Saudis" 20 August 2015

<http://www.gallup.com/businessjournal/184748/lure-government-jobs-saudis.aspx> ;

<sup>22</sup> Saudi Gazette, Dammam "Women Constitute 13% of Saudi Workforce: Stats Agency" 10 February 2015

<sup>23</sup> Saudi Gazette, "Saudi females prove their mettle in operation theaters" 26 March 2016

<sup>24</sup> Saudi Gazette Al Arabia English "More women than men in Saudi universities, says ministry" 28 May 2015

<sup>25</sup> Saudi workers only make up 16% of the overall private sector workforce in KSA, of which Saudi women make up 29% of that 16%, or 4.6%. Arab News "Saudi workforce in private sector rises by 10%" 7 July 2016

segregation, and restrictions on the freedom of movement, that still manifest in the educational institutions and workplace or on getting to and from the educational institutions and workplace.<sup>26</sup>

In Muslim countries Saudi Arabia being no exception, one common tendency of the current debate on women's rights in general and more specifically, education, has been to gravitate to worldwide comparisons. Many Muslim women and men have had opportunities to receive "western" educations and live in "western" societies. "Western" notions of feminism have gained much of their momentum and strength in concepts such as universality, inalienability, and immutability. The Universal Declaration of Human Rights of 1948 and the Convention on the Elimination of All Forms of Discrimination against Women 1979 seek to memorialize these concepts of individual human rights and freedoms, and in the case of the latter eliminate discrimination against women. When studying these declarations and their underlying tenets, it is easy to rely upon ideas such that the laws and practices of Saudi Arabia are at odds with international human rights norms, especially when considering the controversial reservations that Saudi Arabia entered at the time of ratification of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW).

The relationship between international human rights treaties and their implementation in Saudi Arabia will be discussed in later chapters, focusing on the possible tension between Islamic rights conception and the more secular traditions in which conventional human rights treaties and instruments are rooted. The next section provides a brief overview of some of the key international human rights instruments which claim "universal" acceptance and recognition. This will prepare the ground for a more detailed discussion into the extent to which Saudi Arabia, at the level of national law, has fully implemented and complied with these norms, and the legal measures it has taken to bring its own laws into line with internationally recognized human rights standards.

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<sup>26</sup> "In this report, the terms "male guardianship system" and "guardianship rules" refer to the panoply of formal and informal barriers women in Saudi Arabia face when attempting to make decisions or take action without the presence or consent of a male relative." Human Rights Watch "Boxed In: Women and Saudi Arabia's Male Guardianship System" II. The Male Guardianship System <https://www.hrw.org/report/2016/07/16/boxed/women-and-saudi-arabias-male-guardianship-system> 16 July 2016

## 1.4 The Universal Declaration of Human Rights 1948

The Universal Declaration of Human Rights (UDHR) is a non-binding document that was adopted by the United Nations General Assembly on 10 December 1948.<sup>27</sup> For the first time in history, governments with different legal backgrounds and cultural norms were able to establish a common standard by which human rights could be recognised and protected as a baseline of internationally recognised norms.<sup>28</sup>

Articles 1 and 2 establish the foundation for the declaration establishing the principles of dignity, liberty, equality, and brotherhood.<sup>29</sup> Articles 3-11 identify the right to life, prohibition against slavery, and provided specific remedies for violations thereof.<sup>30</sup> Articles 12-17 identify the right of individuals within the context of civil society, such as no arbitrary interference on private and family affairs, right to asylum, right to nationality, and the right to own property, marriage is an equal of men and women and shall be equally consented to.<sup>31</sup> Article 13.1, specifically states “[e]veryone has the right to freedom of movement and residence within the borders of each state.”<sup>32</sup> Articles 18-21 focus on religion, thought, expression, peaceful assembly, government participation freedoms.<sup>33</sup> At the time of its adoption, 48 countries, including Muslim countries such as Turkey, Syria, Pakistan, Iran, Egypt, Afghanistan, Iraq, Lebanon, and Yemen signed the original declaration. Eight countries abstained from the vote, including one Muslim country: Saudi Arabia.<sup>34</sup> The Saudi leadership specifically objected to Article 18, which states:

Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship, and observance.<sup>35</sup>

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<sup>27</sup> The Universal Declaration of Human Rights (UDHR), United Nations General Assembly in Paris (10 December 1948) General Assembly Resolution 217A <[www.un.org/en/universal-declaration-human-rights/](http://www.un.org/en/universal-declaration-human-rights/)>

<sup>28</sup> *ibid*

<sup>29</sup> *ibid*

<sup>30</sup> *ibid*

<sup>31</sup> *ibid*

<sup>32</sup> *ibid*

<sup>33</sup> *ibid*

<sup>34</sup> Peter Danchin, The Universal Declaration of Human Rights: Drafting History-10 Plenary Sessions of the Third General Assembly Session. <[ccnmtl.columbia.edu/projects/mmt/udhr\\_general/drafting\\_history\\_10.html](http://ccnmtl.columbia.edu/projects/mmt/udhr_general/drafting_history_10.html)>

<sup>35</sup> *ibid* Article 18

The rationale behind Saudi Arabia's abstention seemingly focuses on the idea that human rights do not exist inherently. Rather the Saudi position might be that human's rights regulate the relationships between humans, but that these rights have been bestowed upon all humans by a divine creator. Contemporary human rights discourses in the West are generally secular and conventional in outlook. Advocates of human rights in contemporary society will typically draw their (implicit) inspiration from theories of legal positivism. Such theories tell us that human rights are conventional in that they represent a shared consensus around universal rights which only come into effect through formal and conventional law-making processes or international treaties.

In the Islamic tradition, human rights derive from the Islamic Sharia; they have an existence that is independent of social norms or practices and are such immutable and a-historical. All rights enjoyed, and duties owed, by private or public individuals, are extended to all human beings since all are the created subjects of a sovereign creator, *Allah, from whom all law and all social directives derive*. From this ontological standpoint, it follows that human rights are not artefacts of man-made law; separate and apart from religion or morality, nor is a distinction to be drawn the rights owed by the state to the individual or the social interactions between individuals. For the Muslim, all rights, regardless of the label given to them, derive from *Allah* and therefore can only be understood from within the framework of Islamic law and its sources. As Khalid argues, Islamic law provides direction on how an individual should act towards a fellow human but it also provides "directions also include the functions and responsibilities of State towards its population".<sup>36</sup> Similarly, Reisman has noted that:

Islam views life in its totality and purports to provide guidance for every aspect of human life. It recognizes no divisions among the spiritual, social, economic, and political sectors of life. No aspect of life is any less important to enhancing the worship of God. Islam thus cannot leave outside its domain the affairs of the state and the exercise of official power.<sup>37</sup>

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<sup>36</sup> See Akhtar Khalid Bhatti & Gul-E-Jannat, *The Holy Qur'an On Human Rights* Iii (1996)

<sup>37</sup> M.H.A. Reisman, Comment, *Some Reflections On Human Rights And Clerical Claims To Political Power*, 19 Yale J. Int'l L. 509, 511 (1994):

#### 1.4.1 The Convention on the Elimination of All Forms of Discrimination against Women 1979

The United Nations Commission on Human Rights was established by ECOSOC resolution 11(II) of 21 June 1946 in 1946<sup>38</sup>. After approximately two decades of attempts to address gender issues less extensively, the CSW created a comprehensive document encompassing women's rights. The Declaration on the Elimination of Discrimination against Women was adopted by the United Nations General Assembly in 1979, and within just two years the twentieth Member State had ratified the convention, the fastest for any human rights convention to enter force.<sup>39</sup>

The Convention on the Elimination of Discrimination against Women (hereon referred to as CEDAW) is often described as an international Bill of Rights for Women, is focused upon the binding contract between and among nations to eliminate discrimination based on sex.<sup>40</sup> By ratifying the treaty, member states are required to end discrimination in all forms against women through the effective use of legislation that ensures women their fundamental freedoms and human rights.<sup>41</sup> 'Discrimination of women', as defined by CEDAW, is:

Any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on the basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.<sup>42</sup>

Articles 2 and 3 specifically address that the nations who ratified the convention must take all appropriate measures to end all discrimination against women, in particular in the political,

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<sup>38</sup> Economic and Social Council (ECOSOC) resolution 11(II) of 21 June 1946.

<sup>39</sup> UN General Assembly, Convention on the Elimination of All Forms of Discrimination Against Women (18 December 1979) United Nations Treaty Series, vol. 1249, p 13  
<<http://www.refworld.org/docid/3ae6b3970.html>>

<sup>40</sup> UN Women, United Nations Entity for Gender Equality and the Empowerment of Women on the Convention on the Elimination of All Forms of Discrimination against Women  
<[www.un.org/womenwatch/daw/cedaw/cedaw.htm](http://www.un.org/womenwatch/daw/cedaw/cedaw.htm)>

<sup>41</sup> Convention on the Elimination of All Forms of Discrimination Against Women, United Nations General Assembly (18 December 1979) Article 3 <[www.un.org/womenwatch/daw/cedaw/cedaw.htm](http://www.un.org/womenwatch/daw/cedaw/cedaw.htm)>

<sup>42</sup> *ibid* Article 1

social, economic and cultural fields.<sup>43</sup> The convention requires states parties to modify existing laws and regulations, customs, and practices that are contrary to women's equality to men. Article 5 requires that the state parties modify existing social and cultural patterns and customs that are based on the idea of inferiority of women or superiority of men, or vice versa. Articles 7 and 8 oblige states to eliminate discrimination against women in political and public life, and along those lines, ensure women have the right to vote in all elections.<sup>44</sup> Reservations are set forth in Articles 28-29. The legality of reservations to the treaty has become the source of controversy as it relates to Muslim countries. While some Muslim countries have not ratified the CEDAW at all, and some other Muslim countries have ratified CEDAW without reservation, many including Saudi Arabia, have ratified with reservations.<sup>45</sup>

Common reservations obvious relate to the core provisions of CEDAW. Saudi Arabia's reservation state that the Kingdom is not under obligation if it determines that a treaty provision, or the application of a treaty provision, contrary to precepts of *Sharia*.<sup>46</sup> This thesis considers the reasons why Saudi Arabia entered reservations to the core provision of the text, n, while still professing to recognize and implement internationally endorsed norms. When the CEDAW Committee attempted to address these seemingly incompatible reservations, there was an uproar from Middle Eastern states that the Convention's challenges had tones of anti-Islamism.<sup>47</sup> Many expressed concerns that Islamic nations were essentially being compelled to adopt a historically contingent and ethnocentric (Western) model or system of human rights protection 'made universal' as a condition of political recognition, inclusion and participation in the wider "international community".<sup>48</sup> Thus, CEDAW consists of some member states, all Middle Eastern, to be treated as parties to the Convention despite the seeming conflict between reservations of a general nature and the broader aims of the Convention, specifically the eradication of all laws and practices that prevent women from achieving equality in all spheres

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<sup>43</sup> *ibid* Articles 2,3

<sup>44</sup> *ibid* Articles 5,7,8

<sup>45</sup> CEDAW, Declarations, Reservations, and Objections to CEDAW  
<[www.un.org/womenwatch/daw/cedaw/reservations-country.htm](http://www.un.org/womenwatch/daw/cedaw/reservations-country.htm)>

<sup>46</sup> *ibid* Article 9, 29

<sup>47</sup> Ann Elizabeth Mayer "Cultural Particularism as Bar to Women's Rights: Reflections on the Middle Eastern Experience," in J Peters and A Wolper (eds) *Women's Rights, Human Rights: International Feminist Perspectives*, (1995) Routledge NY pp 178-179.

<sup>48</sup> See generally Nora V. Demleitner, *Combating Legal Ethnocentrism: Comparative Law Sets Boundaries*, (1999) 31 *Arizona State Law Journal*. 737, 757 ("Some non-Western countries have responded to the claim of the existence of universal human rights with a charge of imperialism since they perceive some, usually Western, countries as attempting to impose their legal systems on others.");

of public and private life. The CEDAW debate and document is central to the discussion in this thesis regarding the establishment of cultural norms.

## **1.5 “Universal” v. Islamic Based Human Rights**

The international conception of human rights and more specifically women’s rights, as set forth in the UDHR and CEDAW unfortunately has only a broad acquaintance with Islamic notions of human rights. Most Muslim schools of thought, including the dominant Hanbali school that serves as the cornerstone of the cultural norms of Saudi Arabia, do not support the idea that human rights are universal or inherent, but rather ‘rights’ which are issued directly from *Allah* as set forth in *Sharia* law.<sup>49</sup> All human rights derive from a secular conception of human rights. Under Islam, inalienable rights are subordinate to one’s duties to *Allah*. In other words, before a person can enjoy their rights or freedoms from an Islamic perspective (the same rights that are enumerated in UDHR and CEDAW), one must fulfil their duties or obligations to *Allah* first. It is only after such obligations are fulfilled that a person can enjoy their rights and freedoms. You need to be specific, e.g. Shah argues: As a scholar notes,

In traditional Islam, the family is the cornerstone of society and is of vital significance to the conditioning of the future Muslim generations. All people within this society have specified communal rather than individual role, and for women, childbearing is the primary role.<sup>50</sup>

One of the primary objectives of this thesis is to parse out a method, that takes into consideration, how women’s rights can be liberated, but nonetheless hold onto the purity of the message of *Allah*.

## **1.6 Right to Education in Saudi Arabia: Progress toward Equality**

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<sup>49</sup> Joelle Entelis, International Human Rights: Islam’s Friend or Foe? Algeria as an Example of the Compatibility of International Human Rights Regarding Women’s Equality and Islamic Law, (1996) 20(4) Fordham International Law Journal, Article 7, pp 1252

<sup>50</sup> *ibid* at 1269-1270



Just as justification can be found for Islamic feminism and women's rights to education within the religious context of *Sharia*, more specifically within the context of the governance of the kingdom, so too does the justification exist in the Laws of Saudi Arabia. In order to understand laws on the slow-but-albeit-progressive expansion of women's right to education one must first understand the concept of 'law' within the context of the Kingdom's Basic Laws and the modern historical evolution of education for women in the country.

The legal system of Saudi Arabia is rooted in Islam. As Article 8 of Basic Law states "the system of governance in the Kingdom of Saudi Arabia is based on justice, consultation and equality according to Islamic *Sharia*."<sup>51</sup> Therefore, all policies, laws, decrees, regulations, and other functioning sources for creating structure within the State must be created in a manner that complies with *Sharia*. How *Sharia* is interpreted to form policy, law, decree, regulation, etc. within the realm of educational rights for women, is something that should be addressed first from a modern historical evolutionary perspective.

First, the *Qur'an* teaches that education is a duty upon all Muslims, and that the *Qur'an* continually emphasizes the importance of knowledge:

- *Read in the name of your Lord who created, created man from a clinging form. Sura and verse number Read! Your Lord is the Most Generous, who taught by means of the pen; taught man what he did not know.*<sup>52</sup>
- *God elevates by several degrees the ranks of those of you who believe and those who have knowledge...Those whom conceal from people the clear Signs which we revealed and the Guidance, after we have made it clear to the people in the Book, shall be cursed by others who are entitled to curse.*<sup>53</sup>
- *The Qur'an which we have sent down to you, full of blessings that they may ponder over its Verses, and that men of understanding may remember.*<sup>54</sup> (38:29)

*The Prophet Muhammad reiterated the emphasis on education:*

- *Seeking knowledge is mandatory for every Muslim.*<sup>55</sup>

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<sup>51</sup> Basic Law of Governance, Article 8

<sup>52</sup> Holy Qur'an 96:15

<sup>53</sup> Holy Qur'an, 58:11

<sup>54</sup> Holy Qur'an, 38:29

<sup>55</sup> Hadith 224

- *He who has a slave-girl and teaches her good manners and improves her education and then manumits and marries her, will get a double reward; and any slave who observes God's right and his master's right will get a double reward.*<sup>56</sup>
- *If anyone travels on a road in search of knowledge, Allah will cause him to travel on one of the roads of Paradise. The angels will lower their wings in their great pleasure with one who seeks knowledge, the inhabitants of the heavens and the Earth and the fish in the deep waters will ask forgiveness for the learned man. The superiority of the learned man over the devout is like that of the moon, on the night when it is full, over the rest of the stars. The learned are the heirs of the Prophets, and the Prophets leave neither dinar nor dirham, leaving only knowledge, and he who takes it takes an abundant portion.*<sup>57</sup>

The Mujaddid Al-Ghazali, born in 1058 CE, and one of the most influential Muslims to have ever existed divided knowledge into two categories: *fardh ayn* and *fardh kifayah*. *Fard ayn*, according to Al-Ghazali is the knowledge that every Muslim must acquire to properly discharge their duties to society such as daily prayer and pilgrimage to Mecca, while *fardh kifayah* is known as communal obligation such as feeding the hungry or raising up militarily to defend the community.<sup>58</sup> It is within the *fardh ayn*, which was written almost 1000 years ago, that debate around education still revolves. In other words, for most, the question is not whether women should be educated, but rather the question of *what* and *to what extent* do women need to be taught in order for the obligations of *Sharia* to be met. This is important in the present debate of women's right to education because still today, the debate fails to recognize that its argument is based on cultural norms and/or *fiqh*, rather than *Sharia* law.

Cultural norms are obviously of key importance to understanding laws on women in education in present-day Saudi Arabia. Another, perhaps even more important point worth considering is the extremely brief history that comprises what is known as the present-day Kingdom of Saudi Arabia. The Kingdom of Saudi Arabia was only unified from various numbers of smaller

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<sup>56</sup> Hadith 3:273

<sup>57</sup> Hadith 1631

<sup>58</sup> Azizah Al-Hibri, "Islam, Law, and Custom: Redefining Muslim Women's Rights", (1997) 12(1) American University International Law Review 38

kingdoms and tribal factions by 1932. At the time of unification under one kingdom, it was one of the poorest nation-States in the world, consisting of primarily of agricultural and subsistence living.<sup>59</sup> It was only after the formation of the kingdom, in 1938 that massive oil reserves were discovered, and practically overnight, the tribal subsistence lifestyle of the kingdom was transformed into a global economic powerhouse. While the immediate pace of wealth can transform a society's lifestyles cultural practices do not necessarily adapt at the same pace. King Faisal was readily aware of the juxtaposed nature that the kingdom faced. On the one hand, he believed the *Qur'an* directed women to be educated: "Is there anything the Holy *Qur'an* which forbids the education of women? We have no cause for argument, God *enjoins* learning on every Muslim man and woman." To that effect, he argued that children should learn religion and manners in the home, but by educating Muslim women, the Saudi government would improve the spiritual future of future generations.<sup>60</sup> Conversely, it was based on the argument that women need to be educated to become good mothers.<sup>61</sup>

Since that time, more and more improvements have been made. As discussed in later chapters (chapter 5 and 6), the Education Policy of Saudi Arabia states that the government will offer free education at all levels without charging any tuition fee. In similar stride, the policy recognizes that the extensive technological and scientific developments are for the promotion of human dignity and the betterment of conditions of life. One of the major goals of the policy is to instil a desire for students, urging individuals to excel in their work and emphasize that each can have a key role in the construction of society:

Forming scientific skills and attending to applied sciences in school to give the student the chance to practice handicraft activities, participate in production, and acquire experience in laboratories, construction work and farms...Studying scientific principles of various activities so that the level of mechanical production will attain progress and invention.

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<sup>59</sup> Mohamad Riad El Ghonemy, *Affluence and Poverty in the Middle East*, (1998) pp 56

<sup>60</sup> Amani Hamdan, "Women and education in Saudi Arabia: Challenges and Achievements" (2005) 6(1) International Education Journal 49

<sup>61</sup> *ibid*

While many strides still need to be taken in gaining equal access to education, many of the obstacles now facing women reaching it are outside of the direct realm of education rights.

#### 1.6.1 Remaining Obstacles: Restrictions on Movement, and the Right to Work

Within the context of the classical notion on education, i.e. education for the sake of education, Saudi Arabia is far from the days where women's education was designed around women being good mothers and wives; good homemakers. However, from a utilitarian perspective, i.e. that a function of education is to equip an individual with a skillset that is applicable in the functioning machine that is society, the progressive-leaning education policies can only take Saudi Arabia so far. Policies stated above such as fighting ignorance and poverty and developing scientific skills to attain progress and invention and preparing the youth to be a useful member in building their society all allude to the idea that from an educational perspective, Saudi Arabia wants to be fully accepting of women's rights in education. But there are further challenges to accomplish. For instance, while women, at the university level, now have access to subjects and fields such as Arabic, English, history, geography, public administration, dentistry, nursing, economics, agriculture, nutrition, home economics, education, biology, medicine, computer science, and the humanities, they still remain excluded from several fields including engineering and geology. Pertinently, the expansion in the number of topics and fields open to women nonetheless has no effect on the patriarchal nature of Saudi society, i.e. women remain subordinate in every field.<sup>62</sup>

Human Rights Watch has reported that Saudi Arabia has the most severe restrictions on the movement of its female population, globally.<sup>63</sup> At the heart of the restrictions on freedom of movement was the strictly enforced principle of male guardianship. While these restrictions have been relaxed, as discussed in chapter 3, they continue to affect a women's ability to travel abroad. Women in Saudi Arabia are only allowed to leave the country or likewise, obtain a passport to travel outside the country only with the approval of her male guardian.<sup>64</sup> While these historic restrictions on the freedom of movement have significantly hindered women's

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<sup>62</sup> ibid 48

<sup>63</sup> Perpetual Minors: Human Rights Abuses Stemming from Male Guardianship and Sex segregation [2008], Human Rights Watch 1

<sup>64</sup> Sameena Nazir, *Women's Rights in the Middle East and North Africa: Citizenship and Justice* (Freedom House 2005) 262

capability to get to and from work, women's rights to employment are starting to open up. The government has begun to tolerate women working in shopping malls where they are more visible to the public, and likewise women can now work in some restaurants. King Abdullah fired a cleric who had criticized gender mixing, and he reinstates the head of the religious police in Mecca, who had been fired for declaring that some forms of gender mixing are acceptable.<sup>65</sup>

## 1.7 Thesis Rationale

This thesis seeks to match the economic need for an educated female workforce with the social and religious laws of Saudi Arabia, founded in a rigorous theological discussion. In this vein, Jawad suggests women's rights were steadily eroded after the 12<sup>th</sup> century at odds with the legacy of early Islam which endowed them with full rights of citizenship and allowed them to play a full and positive role in society.<sup>66</sup> For these writers, Islam offered a message of equality, solidarity and cooperation and it is these higher moral-regulatory purposes that should prevail over a strict or literal reading of *Qur'anic* texts or the narration of the Prophet's practices.

Despite the absence of a democratic or secular basis for human rights within Saudi Arabia, this thesis demonstrates that the rights accorded women in the *Qur'an* guarantee women a role which is in keeping with that required by the Saudi economy in the 21st century. The thesis attempts to show that Saudi Arabia's accession to treaties such as CEDAW, or the Arab Charter on Human Rights (ACHR) which guarantees freedoms in conformity with the fundamental values of society<sup>67</sup> is evidence of some degree of computability between the country's Islamic laws and international norms on gender rights.<sup>68</sup>

## 1.8 Research Questions

This thesis seeks to explore, and ultimately answer, the question to extent Saudi Arabia protects the rights of women to seek education as part of its economic modernization programs, in

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<sup>65</sup> *ibid* 44

<sup>66</sup> Jawad Syed, 'Global Business Norms and Islamic Views of Women's Employment,' (2014) 25(2) Business Ethics Quarterly 251

<sup>67</sup> The ACHR provides rights such as the right to liberty and security of persons, equality of persons before the law, protection of persons from torture, the right to own private property, freedom to practice religious observance and freedom of peaceful assembly and association.

<sup>68</sup> Arab Charter, Article 32 (2) <<https://www1.umn.edu/humanrts/instate/loas2005.html>>

accordance with Islamic law and its international obligations.

In the face of criticism from the academic and legal communities, questions are posed as to whether Saudi Arabia's norms should be accepted or whether the *Sharia* can be said to be entirely compatible, and even supportive of, contemporary gender rights discourses. Further, as discussed above, the foundational question explored by this thesis is whether *Sharia* upholds a right to education for women? This question naturally leads to a similar line of inquiry which frames the discussion of this chapter and the thesis more generally. What is the scope or limitations for such a right? Is the current legal practice and understanding of rights of women within the Kingdom outdated, dysfunctional or confluent with modern times? Is it necessary to separate religious morality from secular law, or is this a limited understanding of women's rights within an international or universal perspective? Can *Sharia* law be adapted to modern conditions without abandoning the spirit of Islamic law or its religious foundations? The Saudi legal system presents a unique example for framing this discussion because it is a theocracy that claims to uphold Islamic ideals but at the same time does not extend full rights to women, including access to education.

In order to achieve the above aim, the following objectives will be met:

Ascertaining the rules and policies that exist in Saudi Arabia to protect or hinder a women's ability to access high-quality education on equal footing with men.

Assess the Islamic perspective on gender equality vis a vis educational rights

Determining whether barriers to gender equality in education and beyond exist in Saudi Arabia, whether these can be properly understood to be rooted in cultural norms and traditions

Determining what legal and regulatory changes need to be made to the current framework of educational standards in Saudi Arabia to make them meet prospective future economic requirements in Saudi Arabia whilst still remaining *Sharia*-compliant.

## **1.9 Literature Review**

This thesis addresses the issue of whether the right to education for women is recognised under sources of Saudi Arabia and crucially how effectively such rights are enforced and implemented. In this literature review, it will be shown that very little has been published on

the main themes of this thesis: ‘the right to education in Islamic Law’ or ‘the right to education for women.’ While several books have assessed the status of women under Islamic Law generally, to the Researcher’s knowledge no study has comprehensively examined the issues examined this thesis synoptically. These are the claims that a) the right to education for women is congruent with Islamic Law and that it is widely accepted in Islamic jurisprudence and debate that Islamic text allows for such a right to be granted, exercised and practiced and b) that it is in Saudi Arabia’s economic interest for countries, including in this case, Saudi Arabia to provide women with a concrete right to education, including by eliminating regulatory, structural and cultural barriers to the meaningful exercise of this right. Beyond the narrow question of the Islamic perspective on women’s right, there is also an abundance of literature on women’s rights outside of the Islamic world, and social theorist and anthropologists have also assessed the importance of promoting educational equality for women from an economic perspective, and the limitations of this approach. However, as this literature review will show, there are few studies that synthesised these themes within a broader study of how such issues intersect.

### 1.9.1 The Link Between Women’s Rights and Economic Development

On the issue of broader scholarship on women’s rights and its socio-economic impact, legal scholars have long drawn on the work of sociologists to examine women's rights and roles in education, the workplace and family life, cultivating a rich body of scholarship examining the ways in which gender norms are constructed and inequality maintained, or rendered invisible through legislation or legal practice.<sup>69</sup> The now burgeoning field of law related gender studies, frequently advanced under the umbrella term of 'law and society' would form alliances with an emerging field of feminist economics.<sup>70</sup> Offenhauer noted that this interdisciplinary approach, which enabled lawyers to consider how rights could be extended to unpaid or underpaid workers within production processes largely made up of women.<sup>71</sup> Others such as Yamani and

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<sup>69</sup> Myra Marx Ferree, Shamus Khan, and Shauna A. Morimoto, “Assessing the Feminist Revolution: The Presence and Absence of Gender in Theory and Practice,” June 25, 2005. <  
<http://www.ssc.wisc.edu/~mferree/ferree%20khan%20morimoto%20-%20final.doc>>

<sup>70</sup> See generally, Mary Jane Mossman, ‘Feminism And Legal Method: The Difference It Makes ,’ (1986) 3 30 Australian Journal of Law and Society 30

<sup>71</sup> See Priscilla Offenhauer, ‘Women In Islamic Societies: A Selected Review Of Social Scientific Literature,’ Report Prepared by the Federal Research Division, Library of Congress, 2005 pp 6-7 available at <  
[https://www.loc.gov/rr/frd/pdf-files/Women\\_Islamic\\_Societies.pdf](https://www.loc.gov/rr/frd/pdf-files/Women_Islamic_Societies.pdf)> . See also Marilyn Waring, Counting for

Kabeer have examined the ways in which lack of access to education affect measures of the economic well-being, of how such conditions impact the life chances and freedom of women, particularly those from marginalized communities such as women living in poorer rural areas or immigrant workers.<sup>72</sup>

More generally, gender related studies in law and social sciences focused predominantly on the experiences of gender in Europe and the United States.<sup>73</sup> The topic of women's rights came to prominence with the rise of women's rights movements in the 1960s.<sup>74</sup> At the level of public policy, national governments around the world began to explore the link between women's issues and economic development, focusing on the impact of reproduction, maternal health and birth control on population control and development on gender economic equality and access to public goods such as education.<sup>75</sup> Similarly, international development programs such as United Nations Development Programme (UNDP) and the United Nations Population Fund (UNFPA) emerged in response to pressure from women's movements to help improve the economic circumstances of women globally.<sup>76</sup> However, these early policy initiatives have been criticised for assessing gender rights through an excessively instrumentalist lens.<sup>77</sup> This is because these early policy initiatives therefore reinforced the image of women as mothers and child-bearers, while seeming to reduce historic and contemporary experiences of gender discrimination, abuse and inequality globally to a simple issue of economic necessity, rather

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Nothing: What Men Value and What Women are Worth, 2 ed. (Toronto: University of Toronto Press. 1999; orig. 1987)

<sup>72</sup> See See Mai Yamani, *Some Observations in Women in Saudi Arabia*, in *Feminism And Islam: Legal And Literary Perspectives* (Mai Yamani & Andrew Allen eds., N.Y.U. Press 1996) 263, 274 and Naila Kabeer, *We Don't Do Credit: Nijera Kori Social Mobilisation and the Collective Capabilities of the Poor in Rural Bangladesh* (Dhaka: Nijera Kori, 2002)

<sup>73</sup> Chandra Talpate Mohanty, 'Under Western Eyes: Feminist Scholarship and Colonial Discourses,' in Chandra Talpate Mohanty, et al., eds., *Third World Women and the Politics of Memory* (Bloomington : Indiana University Press, 1991) 51

<sup>74</sup> Kimberly Wilmot, *Women Politicking Politely: Advancing Feminism in the 1960s and 1970s* (Lexington Books, 2017) 11

<sup>75</sup> See Priscilla Offenbauer, 'Women In Islamic Societies: A Selected Review Of Social Scientific Literature,' Report Prepared by the Federal Research Division, Library of Congress, (2005) 5

<sup>76</sup> Ibid. See also John C. Caldwell, *Theory of Fertility Decline* (London: Academic Press, 1982)

<sup>77</sup> Jennifer C. Olmsted, 'Is Paid Work The (Only) Answer? Neoliberalism, Arab Women's Well-Being, and the Social Contract,' (2005) 2 *Journal of Middle East Women's Studies* 112



than as a matter of personal rights.<sup>78</sup> The narrow focus on development goals brought renewed demand for governments to prioritise women's rights as a human right as an end of itself.<sup>79</sup>

In the Western world, legislators had already begun to introduce anti-discrimination legislation in the 70s.<sup>80</sup> With these broader developments, social scientists began to define gender as a social category in order to explore historic patterns of social, civil and economic inequality between men and women. This paved the way for a body of research that reflected on the broader experience of disempowerment in the private (as well as public) sphere, noting the lack of full equality available to women within families and marriage.<sup>81</sup> With these developments, scholars began to refocus their energies on exposing structural discrimination such as institutional and cultural forms of inequality that might otherwise be obscured behind a veil of pro-equality legislation and rhetoric.<sup>82</sup> By the 1990s onwards, many disciplines had once again begun to draw a firm link between female rights and economic development, promoting intergovernmental and national authorities to put women's inequality at the heart of various social and legal initiatives.<sup>83</sup> The rise of globalisation further challenged the economic status quo, as job and wage insecurity resulting from austerity measures and the dismantling of the Welfare State forced women to seek work in ways that undermined the traditional division of labour between men and women in a household.<sup>84</sup> The growing number of women who would consequently enter or return to the workforce would fuel the expansion of formal sector employment. Globalization, however, had its downsides, resulting in the growth of informal economies that denied women access to statutory labor rights, thereby reinforcing their unequal

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<sup>78</sup> See for example World Bank, 'Why Supporting Women's Economic Inclusion is Vital for the GCC' (World Bank Magazine, September 2017)

<sup>79</sup> Gavin W. Jones, "The Changing Indonesian Household," in Kathryn Robinson and Sharon Bessell, eds., *Women in Indonesia: Gender, Equity, and Development* (Singapore: Institute of Southeast Asian Studies, 2002).

<sup>80</sup> See for example Linda Dickens, 'The Road is Long: Thirty Years of Equality Legislation in Britain,' (2007) 45 *International Journal of Employment Relations* 463

<sup>81</sup> Reva B Siegel, 'The Rule of Love: Wife-beating as Prerogative and Privacy' (1995) 105 *Yale Law Journal* 2117; CEDAW 'Gender and sustainable development' (2002) UN Doc A/57/38 (Part I) 424, 426.

<sup>82</sup> Catherine A MacKinnon, 'Feminism, Marxism, Method, and the State: An Agenda for Theory' (1982) 7(3) *Signs: Journal of Women in Culture and Society* 515. From an Islamic 'take' see Abdullahi Ahmed An-Na'im, *Globalization and Jurisprudence: An Islamic Law Perspective*, (2005) 54 *Emory Law Journal* 25, 48-49

<sup>83</sup> See for example, Rosa Brooks, *Feminist Justice, at Home and Abroad: Feminism and International Law an Opportunity For Transformation*, (2002) 14 *Yale Journal of International Law* 345 and Harold Hongju Koh, *Why America Should Ratify the Women's Rights Treaty (CEDAW)*, (2002) 34 *Case Western Reserve Journal of International Law* 263

<sup>84</sup> Gavin W. Jones, 'The Changing Indonesian Household,' in Kathryn Robinson and Sharon Bessell, eds., *Women in Indonesia: Gender, Equity, and Development* (Singapore: Institute of Southeast Asian Studies, 2002).

status.<sup>85</sup> However, few studies had examined the link between economic opportunity and rights protection in Islamic cultures comprehensively as discussed below.

### 1.9.2 Muslim Women in Scholarship

The status and role of women in Muslim societies would receive scant attention until late in the twentieth century. When mentioned in Western literature, Muslim women were often depicted in highly polemical and sweeping terms as victims of an oppressive religious culture.<sup>86</sup> Conversely, the preponderance of theological literature in the Islamic world tend to reproduce or reify certain paternalistic stereotypes of the gender divide. The contribution of these Islamic perspectives in the 1960's and before was largely limited to theological discussion on the degree of freedom women should be permitted to exercise while remaining pious and modest.<sup>87</sup> As a result, there was a dearth of serious scholarship in law or in the social sciences devoted to the study of the rights of women in Muslim societies in 1960s and prior. By the 1970's scholars in various sub-disciplines began to engage meaningfully with Islam and Islamic culture but often did so with scant references to women within these societies.<sup>88</sup> In a striking example, a canonical bibliography composed by Yvonne Haddad and others devoted a mere 8 pages to works dealing with women from a total of 230 pages.<sup>89</sup> The state of research would improve over the next two decades alongside the rise of feminism and gender-rights related activism, culminating in an explosion of literature on the issues concerning gender and Islam from the 1990s and onwards.<sup>90</sup> In this regard, social scientists began to examine what they regarded as

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<sup>85</sup> See for example Meghan Campbell, *Women, Poverty, Equality : The Role of CEDAW* (Hart, 2018) who criticizes the 'neoliberal' paradigm to of domestic and international regimes on women's right protection for failing to address pervasive gender-based poverty.

<sup>86</sup> Ann Elizabeth Mayer, 'Cultural Particularism as a Bar to Women's Rights: Reflections on the Middle Eastern Experience' in Julie Peters and Andrea Wolper (eds) *Women's Rights, Human Rights: International Feminist Perspectives* (Routledge 1995) 176, 177 and J. Rich, 'Saving Muslim Women: US Policy and the War on Terror' [2014] *International Affairs Review*

<sup>87</sup> For example the residency of Saudi Islamic Scholarly Research and Ifta has several *fatwas* on the modesty of women and stated that 'A man should not remain in seclusion with a woman except in her husband or *mahram's* presence'

<sup>88</sup> Joseph Schacht, *An Introduction to Islamic Law*, (Oxford University Press, 1979)

<sup>89</sup> See Priscilla Offenbauer, 'Women In Islamic Societies: A Selected Review Of Social Scientific Literature,' Report Prepared by the Federal Research Division, Library of Congress, (2005) 5. Yvonne Yazbeck Haddad and John L. Esposito, *The Islamic Revival Since 1988: A Critical Survey and Bibliography* (Westport, CN: Greenwood Publishing, 1997).

<sup>90</sup> See e.g. Karin Ask and Marit Tjomsland, eds., *Women and Islamization* (Oxford: Berg, 1998); Yvonne Haddad and John L. Esposito, *Islam, Gender, and Social Change*. (N.Y. U. Press 2000); Leila Ahmed, *Women and Gender in Islam: Historical Roots of a Modern Debate* (YUP 1992); Oliver Leaman, *An Introduction to*

the pervasive role of patriarchy in Islamic societies, including the preoccupation with female body and relation notions of chastity as means of regulating social relation between the genders.<sup>91</sup> Frequently, however, scholarship on Islam tended to suffer from binary thinking. For instance, some scholars from the non-Islamic world would tend to draw a stark comparison between what they defined as the patriarchal traditional social structures in Islamic societies, on the one hand, the enlightened modernism of urbanised capitalist societies in the West.<sup>92</sup> More generally, scholars with a pro-Islamic perspective, such as Ahmad, would often deflect focus away from laws or practices in Muslim countries that appeared problematic from a gender rights perspective, and instead emphasise the West's biases to heterodox traditions including Islam.<sup>93</sup> The result was a tug of war between apologists for conservative perspectives that invoked the immutability of the Islamic texts when justifying gender inequality on religious grounds, and orientalist perspectives that sensationalised the diverse experiences of Muslim women by depicting them as passive agents of a primordial and oppressive religion.<sup>94</sup> This thesis follows the position of scholars such as Otto who reject this either/or position as a false dichotomy that fails to capture the complex relationship between religion, culture and indeed law in supporting, or subverting, the experiences of inequality faced by women across the Muslim world.<sup>95</sup> Crucially, researchers from within and outside of the Muslim world began to reflect on heterogeneous experiences of women in the Muslim world.

Researchers such as Bielefeldt have recognised that the well-being and experience of Muslim women is and has been highly variable across the time, space, culture and economic status

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*Classical Islamic Philosophy* (Cambridge University Press, 2002) and Timur Kuran, *The Long Divergence: How Islamic Law Held Back the Middle East* (Princeton University Press, 2002)

<sup>91</sup> Ziba Mir-Hosseini and Mulki Al-Sharmani and Jana Rumminger (eds) *Men in Charge?: Rethinking Authority in Muslim Legal Tradition* (Oneworld Publications, 2015) 1. See also Jennifer S King, *Islamic Feminism vs Western Feminism: Analyzing a Conceptual Conflict* (Central Connecticut State University 2003).

<sup>92</sup> For a paradigmatic example of this type of cultural chauvinism see Wallace Daniels, 'Editorial: Islam and the "Clash of Civilizations,"' 48(3) *Journal of Church and State* 509. For an example of orientalist literature see, Majid Fakhry, 'The Theocratic Idea of the Islamic State in Recent Controversies (1954) 30(4) *International Affairs* (Royal Institute of International Affairs 1944-) 450 and Joseph Schacht, *An Introduction to Islamic Law*, (Oxford University Press, 1979)

<sup>93</sup> See, for example, Sara Ahmed, 'Liberal Multiculturalism Is The Hegemony – Its An Empirical Fact,' In Sara Ahmed, *Darkmatter: In The Ruins Of Imperial Culture*, (Ed., 2008).

<sup>94</sup> See the criticisms of this line of thought developed by John Hursh, 'The Role of Culture In The Creation Of Islamic Law' (2009) 84 *Indiana Law Journal* 1401, 1411

<sup>95</sup> Jan Michiel Otto, *Sharia and Law In A Bird's-Eye View: Reform, Moderation And Ambiguity*, In *Delicate Debates On Islam* (Jan Michiel Otto & Hannah Mason Eds., 2011) 73. See also Shahen Sardar Ali, *Conceptualising Islamic Law, CEDAW and Women's Human Rights in Plural Legal Settings: A Comparative Analysis of Application of CEDAW in Bangladesh, India and Pakistan* (UNIFEM -South Asia Regional Office 2006).

among other factors.<sup>96</sup> Recent studies have shown that women in South Asia, South East Asia and North Africa have begun to cast off traditional expectations and embrace more modern roles against the backdrop of broader demographic changes, including postponement of marriage and the decline in child-birth rates as more women from these regions and localities pursue further education and entry into employment.<sup>97</sup> Empirical work of this nature more nuanced appreciation of the lived realities of women within Muslim societies opened a space for scholarly engagement with the diverse voices that now shape legal and theological discourses in the Muslim world. To more authentically represent the voices and interests of Muslim women, activists from within and outside the Islamic world begun to forge a stronger presence in academia. Research centers devoted to women studies were established in Palestine, Jordan, and in Egypt and Lebanon.<sup>98</sup>

These developments were accompanied by a more conceptual field of research that emerged around the relation between Islam as system of beliefs and embedded cultural practices.<sup>99</sup> From a gender perspective, scholars probed the rights and status of women by going back to Islamic sources of law and religious tradition. This sparked a debate between those who maintained fidelity classical legal ruling and exegesis of Islamic texts even when seemingly in conflict with notions of gender equality,<sup>100</sup> and those who sought to uncover, subvert and supplant ideological constructs, including religious rationales, that have sustained forms of gender discrimination, inequality and subordination of women in modern Muslim societies.<sup>101</sup> As explained by Asma Lamrabet,

[s]ome very explicit universal values [...] which exhort equality between men and women have been marginalized in Islamic thought. They are rarely cited and are even at times completely overlooked in favour of other verses that are more

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<sup>96</sup> See Heiner Bielefeldt, Muslim Voices In The Human Rights Debate, (1995) 17 Human Rights Quarterly 587, 601, 603

<sup>97</sup> Annelies Moors, "Debating Islamic Family Law: Legal Texts and Social Practices," 141–75, in Margaret L. Meriwether and Judith E. Tucker, eds., *Social History of Women and Gender in the Modern Middle East* (Boulder: Westview Press, 1999), 151.

<sup>98</sup> Saad Eddin Ibrahim, 'Arab Social-Science Research in the 1990s and Beyond: Issues, Trends, and Priorities,' (Canada: International Development Research Centre)

<sup>99</sup> Wael B Hallaq, *A History of Islamic Legal Theories* (CUPress 1997)

<sup>100</sup> Al-Zamakhsharī, *al-Kashshāf 'an Ḥaqā'iq Jawāmid al-Tanzīl*, (al-Bābī al-Ḥalabī, 1948) vol 1, 394. And Al-Baydāwī, *Anwār al-Tanzīl* (1968) vol 1, 217.

<sup>101</sup> Azizah Al-Hibri, 'Islam, Law and Custom: Redefining Muslim Women's Rights' (1997) 12(1) American University Journal of International Law and Policy 1

difficult to interpret or whose application was contingent on the time of revelation.<sup>102</sup>

In his summary of the state of the current debate among scholars who study the rights of women in Islam, Shah notes that the literature on rights in Islamic, including the rights of women, tends to coalesce around three poles.<sup>103</sup> The first group of scholar tends to deny the existence of any conflict between international human rights discourse and absolves religious tradition of any role in perpetuating or legitimating gender inequality in Muslim countries. Haideh Moghissi and Hammed Shahidian point to the biases in Western scholarship, which in failing to recognise forms of patriarchy present in Western societies, remain endlessly focused on the mistreatment of women in the Muslim world, often in ways that lack negate or dismiss any positive role for Islam in promoting gender rights.<sup>104</sup>

A second group of scholar tends to take a more defensive position, accepting that Islam and Islamic rights conceptions may well be entirely in conflict with international (Western) human rights discourses. These scholars will reassert the supremacy of Islamic law as a supreme and totalising framework for how all Muslim should live their lives and practice their faith. Any attempt to 'buy into' contemporary rationales for gender equality, by extension, is viewed by these scholars as a form of capitulation to the secular model of human rights and other expressions of cultural, political and economic 'imperialism'. Scholars who ascribe this type of view, for example, Nawal El-Saadawi, a prominent Egyptian feminist, contends that patriarchal structures have contributed to female subjugation in Muslim societies, but that the presence of these elements are not unique to Muslim societies.<sup>105</sup> The danger associated with this type of account is that it may serve to wall off any examination into the conditions women live under Islamic legal systems, in ways that paradoxically prevent further scrutiny into

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<sup>102</sup> Asma Lambrabet, 'An Egalitarian Reading of the Concepts of Khilafah, Wilayah, and Qiwanah' in Mir-Hosseini Ziba and Al-Sharmani Mulki and Jana Rummingner (eds), *Men in Charge? Rethinking Authority in Muslim Legal Trad* (Oneworld 2015) 71.

<sup>103</sup> Niaz Shah, *Women, The Koran and International Human Rights Law: The Experience of Pakistan* (ed IV, Martinus Nijhoff, 2006) 3

<sup>104</sup> Haideh Moghissi, *Feminism and Islamic Fundamentalism: The Limits of Postmodern Analysis* (London: Zed Books, 1999), and Hammed Shahidian, *Women in Iran: Gender Politics in the Islamic Republic* (Westport, CT: Greenwood Press, 2003).

<sup>105</sup> Nawal El Saadawi. "*Women, creativity and dissidence*" (1997), Cited in Adele Newson Horst (ed) '*The essential Nawal El Sadaawi*', Zed Books, pp. 66-77.

whether such discriminatory practices are, in fact, properly justified by theological interpretations of religious texts.<sup>106</sup>

A third position urges the need for positive change, and some scholars actively advocate for a more liberalised, secular or modernised Islam,<sup>107</sup> to be excised of any religious doctrines or traditions that appear to support inequity between the sexes.<sup>108</sup> For these scholars, failure to confront aspects of Islamic law and tradition that do not appear to provide textual justification for unequal treatment risks providing ‘cover’ to fundamentalist forces that would seek to deepen control of women and limit their life chances by denying them basic freedoms, in social spheres such as education, and in family life.<sup>109</sup> Moreover, attempts to strengthen women’s rights from within the Islamic tradition are, these scholars claim, doomed to fail because they further reinforce the authority of religious actors, thus further placing any future goal of the separation of state and religion in Muslim countries further out of reach.<sup>110</sup>

These scholastic clashes remain important because religious law forms part of the legal systems of many countries, in ways that highlight the intimate linkage that exists between dominant religious discourses and forms of state legitimisation of gender norms in public debates on the status of woman.<sup>111</sup> Islamic conceptions of women’s rights has therefore emerged as a hotbed of new and vital scholarship. One reason for this is that, new branches of Islamic legal theory are being forged by Muslim women many of whom have engaged in a project to revisit and re-examine the texts and traditions of Islam, and in doing so disentangle these from male-dominated or exclusionary readings of religious texts, and the cultural practices that support them.<sup>112</sup> Wadud Muhsin, for example, argues in favour of the importance of understanding the

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<sup>106</sup> Peter R. Knauss, *The Persistence of Patriarchy. Class, Gender, And Ideology In Twentieth Century Algeria* (1987) 124

<sup>107</sup> Yusuf Sidani, ‘Women, work, and Islam in Arab societies’ (2005) 20(7) *Women in Management Review* 498

<sup>108</sup> Charles Kurzman, ‘Introduction: Liberal Islam and its Islamic Context’ in Charles Kurzman (ed), *Liberal Islam, A Sourcebook* (OUP 1998)

<sup>109</sup> D.E. Artz, ‘The Application of International Human Rights Law in Islamic States’ (1990) *Human Rights Quarterly* 12(2), pp.202-230: p.205

<sup>110</sup> Abdullahi Ahmed An-Na’im, *Globalization and Jurisprudence: An Islamic Law Perspective*, (2005) 54 *Emory Law Journal* 25, 48-49

<sup>111</sup> See e.g. Azzam Tamimi, *The Origins of Arab Secularism, in Islam and Secularism in the Middle East* (John L. Esposito & Azzam Tamimi eds., N.Y. U. Press 2000) 13, 28

<sup>112</sup> See, for example, Amina Wadud, *Quran and Woman: Rereading the Sacred Text from a Woman’s Perspective* (OUP 1999); Fatima Mernissi, *The Veil and the Male Elite: A Feminist Interpretation of Women’s Right in Islam* (trans) Mary Jo Lakeland (Basic Books 2006); Kecia Ali, *Sexual Ethics and Islam: Feminist Reflections on Qur’an, Hadith and Jurisprudence* (Oneworld Publications 2016).

proper intent and purposes underlying Quranic text as well as the contexts in which these verses were revealed, especially in verses related to women. Muhsin states:

No method of Quranic exegesis is fully objective. Each exegete makes some subjective choices. Some details of their interpretation reflect their subjective choices and not necessarily the intent of the text. Yet, often, no distinction is made between text and interpretation.<sup>113</sup>

Often described as Islamic feminism, one particular strand of literature treads a middle ground between apologetics and abrogation of sacred religious texts – which is anathema to the beliefs of most Muslims – namely by seeking to create a space for alternative, more gender-inclusive, and egalitarian interpretation of Islamic texts.<sup>114</sup> These scholars seek to revive the best of Islamic tradition by seeking support for gender equality within the Islamic tradition itself. Moreover, these scholars will often seek to clearly demarcate that is what is mandated by Islam itself from what has become accepted (but theologically contestable) cultural practice.<sup>115</sup>

The above review of the literature points to the uneven nature of ideological perspectives on the rights of women in Islam and empirical accounts of the way women in Muslim societies exercise their rights in practice, and particularly in the case of this thesis, the rights of women to access and participate in education when faced with other restrictions on their freedoms.<sup>116</sup> It is also worth noting that some nations and regions tend to attract more focus from scholars than others. This takes us to the study of the rights of women in Saudi Arabia. This thesis attempts to straddle the divide between scholarly literature on Muslim and the more empirical investigations of the concrete experiences of women in specific areas of life.<sup>117</sup> It draws its influence from those scholars that have questioned the usefulness of sensationalised narratives

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<sup>113</sup> Amina Wadud Muhsin, *“Qur’an and Woman, dalam Liberal Islam a Sourcebook, Charles Kurzman”* (1998 New York: Oxford University Press) 128.

<sup>114</sup> Fatima Mernissi. *The Veil and the Male Elite: A Feminist Interpretation of Women’s Rights in Islam* (Basic Books 1991) 113

<sup>115</sup> Shadi Mokhtari, ‘The Search for Human Rights within an Islamic Framework in Iran’ (2004) 94(4) *Muslim World* 478

<sup>116</sup> Fawziah Al-bakr and others, ‘Empowered but not Equal: Challenging the Traditional Gender Roles as Seen by University Students in Saudi Arabia’ (2017) 4(3) *Forum for International Research in Education* 3, 5 and Amani Hamdan, ‘Women and Education in Saudi Arabia: Challenges and Achievements’ (2005) 6(1) *International Education Journal* 42, 64.

<sup>117</sup> Yahya Al Alhareth and Yasra Al Alhareth and Ibtisam Al Dighrir, ‘Review of Women and Society in Saudi Arabia’ (2015) 3(2) *American Journal of Educational Research*, 121, 125.

that depict Muslim women as victims of an oppressive religion and culture, without regard to history, context or the interpretative disputes that rage among Islamic scholars.<sup>118</sup> Instead of treating Muslim women as a fixed identity or social category, it is necessary to consider differences regional, national, or ethnic differences between Muslim women.

### 1.9.3 The Right to Education in Islamic Countries

This section will now consider the absence of literature that has examined the right to education for women in Islam and how such a right is defined, enforced and implemented in Saudi Arabia. There has been some important mapping work on the rights of women in relation to broader conceptual debates and provisions of personal status law (for example marriage, divorce, maintenance, the dissolution of marriage, parentage, a child's rights during infancy, guardianship, inheritance and divorce) in Islam and in Islamic legal systems in recent years by scholars such as Jamal Nasir<sup>119</sup>, Shaheen Sardard Ali<sup>120</sup> and Niaz Shah<sup>121</sup>, these general scholarly works have not focused on the right to education as a specific right and entitlement. There are also various studies that focus on women's rights in Saudi Arabia, focusing on practices of guardianship,<sup>122</sup> but none to this Researcher's knowledge focused on the ideological basis of the specific right to education in Islam and how these debates have shaped and impacted legal and cultural practices in Saudi Arabia, and with what potential ramifications for its future economic development.<sup>123</sup>

Turning now to concrete developments related to the rights of women in the sphere of education and work, governments in many Muslim majority countries reached the conclusion that women

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<sup>118</sup> Austin Dacey and Colin Kaposke, 'Islam & Human Rights: Defending Universality at the United Nations' (Center for Inquiry, 2008).

<sup>119</sup> See Jamal Nasir, *The Status of Women under Islamic Law and Modern Islamic Legislation* (Brill, 2009)

<sup>120</sup> Shaheen Sardar Ali, 'Women's Human Rights in Islam: Towards a Theoretical Framework' (1997-98) 4 Yearbook of Islamic and Middle Eastern Law 117.

<sup>121</sup> Niaz Shah, *Women, The Koran and International Human Rights Law: The Experience of Pakistan* (ed IV, Martinus Nijhoff, 2006)

<sup>122</sup> See for example Farida Deif, 'Perpetual Minors: Human Rights Abuses Stemming from Male Guardianship and Sex Segregation in Saudi Arabia' (HRW, 2008); Ayesha S. Chaudhry, *Producing Gender-Egalitarian Islamic Law: A Case Study of Guardianship (Wilayah) in Prophetic Practice in Men in Charge: Rethinking Authority in Muslim Legal Tradition* (OneWorld Publications, 2015) Chapter 4; Ranad Abdel- Matloub Moawad, "Women's Rights under the Guardianship Wilayah of Male Relatives in Saudi Arabia" (Law and Society in the Middle East and North Africa)

<sup>123</sup> However see Roula Baki, 'Gender-segregated Education in Saudi Arabia: Its Impact on Social Norms and the Saudi Labor Market' (2004) 12(28) Education Policy Analysis Archives 1



were, from an instrumentalist perspective, an under-utilised resource, and potential source of cheap labour within a globalized economy. In recognition of a growing body of empirical research pointing to development-impeding effects of denying women rights to access education and the labour market, these governments began to implement programs aimed at widening access to education resources, in part as a means of encouraging their participation in the labour force.<sup>124</sup> With globalization and growing levels of international integration, countries such as Saudi Arabia have begun to reassess the role of women in Muslim societies.<sup>125</sup> Significantly, gender gaps in education are narrowing as countries such as Saudi Arabia have made substantial investments in education.<sup>126</sup> These investments are designed in part to drive women's productive potential through higher rates of literacy, secondary school enrollment and higher education, each increasing rapidly since the 1960s.<sup>127</sup> For example, more women in Saudi Arabia benefit from occupational mobility, as the number of women occupying professional roles continues to increase.<sup>128</sup> Nonetheless, some studies have correctly noted that in the Middle East female labor force participation remains comparatively low, although growing.<sup>129</sup>

The greater danger of an overwhelming or exclusive focus on economic development as a metric of women's wellbeing and autonomy is that it further obscures the barriers to, and the practicalities of, empowering women through education, particularly where other supplementary rights (such as the right to travel or obtain government documents) are not also

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<sup>124</sup> See, for example, World Bank - Unlocking the Employment Potential in the Middle East and North Africa: Toward a New Social Contract (Washington, DC: World Bank, 2004).

<sup>125</sup> Saudi Arabia's Vision 2030, <<https://english.alarabiya.net/en/perspective/features/2016/04/26/Full-text-of-Saudi-Arabia-s-Vision-2030.html>>

<sup>126</sup> See 'King Abdullah Bin Abdul-Aziz Project for Public Educational Development' (2011) . See also Ministry of Education KSA, 'The Development of Education' (2003) <[http://www.ibe.unesco.org/International/ICE47/English/Natreps/reports/sarabia\\_en.pdf](http://www.ibe.unesco.org/International/ICE47/English/Natreps/reports/sarabia_en.pdf)>

<sup>127</sup> World Bank, 'Why Supporting Women's Economic Inclusion is Vital for the GCC' (World Bank Magazine, September 2017) <http://www.worldbank.org/en/news/feature/2017/09/29/why-supporting-womens-economic-inclusion-is-vital-for-the-gcc>. See also Maan Bin Abdul Haq Arif Khutani, 'Educational rights for women in Islamic and international human rights law: a study of theory and its application in Saudi Arabia' (DPhil Thesis, University of Wollongong 2013) 92 <<http://ro.uow.edu.au/theses/3886/>>

<sup>127</sup> Reema Alsweel, 'Education and the Role of Women in Saudi Arabia' (DPhil Thesis, George Mason University 2012) 5

<sup>128</sup> UNDP, 'The Human Development Report 2016' (2016) <[http://hdr.undp.org/sites/default/files/2016\\_human\\_development\\_report.pdf](http://hdr.undp.org/sites/default/files/2016_human_development_report.pdf)>

<sup>129</sup> Hani Abdulghani, 'Examining Obstacles to Saudi Women's Right to Work in the Kingdom of Saudi Arabia' (DPhil Thesis, Brunel University London 2016) 67

protected.<sup>130</sup> Some scholars suggest that longstanding practice rooted in religious tradition, including guardianship and gender segregation in Saudi Arabia (discussed in detail in this thesis), is the primary reason for low levels of educational and employment mobility for women in these countries. Prior to 2017, the practice of male guardianship effectively denied women the opportunity to take up work, travel, or to obtain citizenship rights and documentation without prior consent from their guardian.<sup>131</sup> Baeshen defines this practice as being:

[p]remised on a paternalistic approach toward “protecting” women and it is ultimately the fundamental obstruction to a women’s ability to act autonomously.<sup>132</sup>

Moawad identifies the roots of the system of guardianship in certain orthodox interpretations of Islamic legal sources and states:

[t]he idea behind it [guardianship] is found in classic Islam and its intention is to prevent women from falling into the hands of wrong men.<sup>133</sup>

This would seem to give credence to those strands of orientalist scholarship that lays blame for gender inequality squarely at the feet of Islam itself. However, empirical research indicates that economic development strategy may play a more prominent role than religious or cultural factors in accounting for disparities in educational and employment outcomes. As Moghadam notes, Saudi Arabia and other oil rich GCC nation enjoyed the luxury of being able finance costly public programs from petroleum revenues alone until the 1980s, thereby diminishing demand or need for greater female participation in the labour force.<sup>134</sup> The social research of Charrad, by contrast, highlights higher levels of female participation in the workforces of the labour intensive economies of North African countries of Morocco, Algeria, and Tunisia. This study indicates that inequalities in women’s participation in socio-economic spheres of life,

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<sup>130</sup> See Afsaneh Najmabadi, “Hazards of Modernity and Morality: Women, State, and Ideology in Contemporary Iran,” in Deniz Kandiyoti, ed., *Women, Islam, and State* (Temple University Press, 1991) 48–51 (drawing on the experience of Iran)

<sup>131</sup> Amani Hamdan, ‘Women and Education in Saudi Arabia: Challenges and Achievements (2005) 6 International Education Journal 42, 64.

<sup>132</sup> Arabia Foundation, “The Good, the Bad, and the Paternalistic: A Decade’s Reflections on Women’s Rights in Saudi Arabia” <<http://www.arabiafoundation.org/wp-content/uploads/2017/06/The-Good-the-Bad-and-the-Paternalistic-A-Decade’s-Reflections-on-Women-Rights-in-Saudi-Arabia.pdf>>.

<sup>133</sup> Ranad Abdel- Matloub Moawad, ‘Women’s Rights under the Guardianship Wilayah of Male Relatives in Saudi Arabia’ (Law and Society in the Middle East and North Africa) p12

<sup>134</sup> Valentine M. Moghadam, ‘Patriarchy in Transition: Women and the Changing Family in the Middle East’ (2004) 2 Journal of Comparative Family Studies 137

including their access to high quality educational institutions and resources, may be the product of complex linkages between tribal practices, customs, and economic development strategy and therefore less influenced by broader discourses on Islamic law and thought.<sup>135</sup> Once again, scholars who imply that Islam is the main cause of women's subordination in the Muslim world risk shifting focus away from other root causes, such as the role of economic structures in maintaining forms of gender inequality.<sup>136</sup> Consequently, they fall into a trap of both relying on overly stereotypical accounts of Islamic perspectives on women, while at once implicitly passing over the instrumentalisation of women as the mere producers of economic goods. In summary, female participation in higher education and labour markets in certain Islamic countries indicates that the experiences of female inequality cannot be explained away by religious factors alone. El-Saadawi argues that an excessive focus on Islam has the effect of diverting attention away from economic factors which may be equally oppressive to women:

[T]he original cause of women's triple oppression is not Islam but the patriarchal class system which manifests itself internationally as world capitalism and imperialism, and nationality in the feudal and capitalist classes of the Third World Countries.<sup>137</sup>

More importantly, increased participation of women in one socio-economic sphere, such as education, does not necessarily equate to improved rights protection, in education or indeed in other less well-regulated sphere of private life. Moreover, nor does it necessarily mean that women do not encounter resistance to their full participation in education as a result of structural e.g. cultural or institutional forms of discrimination.<sup>138</sup> As a result, scholars such as Nausbaum have often reinforced the need to move from a developmental account of female participation in the socio-economic spheres to a more substantive, cross-cultural framework of rights protection based on the dignity and specific needs of women facing structural barriers to

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<sup>135</sup> Mounira Charrad, *States and Women's Rights: The Making of Postcolonial Tunisia, Algeria, and Morocco* (Berkeley: University of California Press, 2001). See also Philippe Fargues, 'Women in Arab Countries: Challenging the Patriarchal System?', *Population et Sociétés*, 387, February 2003

<sup>136</sup> CEDAW Committee 'Gender and sustainable development' (2002) UN Doc A/57/38 (Part I) 424, 426.

<sup>137</sup> Nawal El Saadawi, *The Essential Nawal El Saadawi: A Reader*. (2013), Zed Books Ltd, p. 91.

<sup>138</sup> Elin Andersson and Linn Togelius, 'Women oppressed in the name of culture and religion: Saudi Arabia and the Convention on the Elimination of All Forms of Discrimination Against Women' (Malmö University School of Global and Political Studies 2010) 3 and Kelly Le Benger, 'Behind the veil: The state of women in Saudi Arabia' (Institute of Gulf Affairs, 2008) 13

their rights, such as poverty or general trends in the world's political economy.<sup>139</sup> However, as this thesis will examine, achieving consensus over what such a framework might look like, or how it would be implemented, can often prove elusive in the face of regulatory, cultural and political pluralism.<sup>140</sup>

In the above regard, activists from the Muslim world and transnational women's groups have long engaged in efforts to build consensus around women issues among Arab and non-Arab Muslim majority countries.<sup>141</sup> One major victory in the quest to mainstream women's right came in the form of the decision to adopt the Convention for the Elimination of all Forms of Discrimination Against Women (CEDAW). Of the twenty-two Arab countries, sixteen signed CEDAW including Saudi Arabia. As Mtango notes, the demand for wider recognition of women's rights as a non-instrumental economic right would, however, bring international human rights discourses into confrontation with cultural and religious discourses.<sup>142</sup> For instance, efforts to promote women based human rights, including the right to access and obtain education for development and planning in the Muslim world, would invite further debate around the question of whether such rights could be neatly reconciled with Islamic constructions of gender relations. Perspectives on genders issues in the Muslim often differed quite substantially, as Bonner outlines, from the rhetoric of women's rights movements that had evolved over the past four decades in Europe and the United States.<sup>143</sup> Indeed, Saudi Arabia as with other Muslim majority countries enter reservations to CEDAW stating their intention to derogate from any treaty provisions, including those that require signatory states to eradicate laws and cultural practices that stymie gender equality in education, should it consider that such obligations conflict with norms governing gender relations under Islamic law and tradition.<sup>144</sup>

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<sup>139</sup> Martha C. Nussbaum, *Women and Human Development: The Capabilities Approach* (Cambridge University Press, 2001) 101

<sup>140</sup> Clark B Lombardi and Nathan J Brown, 'Do Constitutions Requiring Adherence to Shari'a Threaten Human Rights? How Egypt's Constitutional Court Reconciles Islamic Law With The Liberal Rule Of Law' (2006) 21 *American University International Law Review* 379

<sup>141</sup> See generally, Brad R. Roth, 'The CEDAW as a Collective Approach to Women's Rights,' (2002) 24 *Michigan Journal of International Law* 187,

<sup>142</sup> Sifa Mtango, 'A State of Oppression – Women's Rights in Saudi Arabia' (2004) 5 *Asia Pacific Journal on Human Rights* 61

<sup>143</sup> Anjali Sara Bonner, 'Muslim States' Reservations to CEDAW and Possibilities for the Reconciliation of Shari'a Law with International Women's Rights Norms' (2009) 3 *Hong Kong Journal of Legal Studies* 27, 33,-34.

<sup>144</sup> For background see BW Seaman, 'Islamic Law and Modern Government: Saudi Arabia Supplements the Shari'a to Regulate Development' (1979) 18 *Columbia Journal of Transnational Law* 413.

#### 1.9.4 The Islamic Perspective on Education and its Impact on Saudi Policies

The above discussion leads us to a final section on the literature dealing with the literature that addresses the specific right to education, and scholarly perspectives on the existence of the right and any religious limitations placed upon it. This thesis will show that no specific verses of the Qur'an, or teaching of the Prophet, the two primary sources of the Sharia deny women the right to access or obtain public or private learning, subject to condition that any educational pursuit falls within bounds of knowledge permitted by Islam. To this point, the Qur'an avers the importance of seeking education as a religious duty and as a precondition of the intellectual and social enlightenment and benefit of all mankind. An illustrative verse of the Quran states: Are those who know equal to those who do not know? Only they will remember [who are] people of understanding.<sup>145</sup> Outside of the most fundamentalist interpretations, few modern scholars, from whatever school of thought, deny the existence of the right of education for all, including women.<sup>146</sup> Mohammed Saifal Islam suggests that the right to education is not only well established in the Quran but goes further to argue that an Islamic education strategy and practice have provided equal opportunities for both men and women.<sup>147</sup> Abbasi elaborates by stating, 'the very fact that the first revelation upon the Holy Prophet...contained the commandment to 'read' speaks volumes of the emphasis Islam lays on education.'<sup>148</sup> By invoking Islamic theories of interpretation and linguistics to argue that a general right to education must be fact of necessity apply to both genders.<sup>149</sup> As a result, a women's right to education has figured prominently contemporary debates on Islam and human rights. While the right to education for women is itself not generally contested on its own terms, the manner in which women exercise this right, or any limits imposed on this right where it conflicts with religious requirement, has recieved little attention in the existing literature.

In the above regard, it is notable that some conservative scholars have implied that women have certain biological functions that reinforce their proper role as mothers and wives, and in some cases an inferior intellect.<sup>150</sup> While these religiously inspired narratives are not directly related

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<sup>145</sup> Surah Az-Zumar 39:9

<sup>146</sup> Islamic Bulletin, 'Women in Islam' <[http://www.islamicbulletin.org/newsletters/issue\\_10/m.women.aspx](http://www.islamicbulletin.org/newsletters/issue_10/m.women.aspx)>

<sup>147</sup> Mohammad Saiful Islam, 'Importance of Girls' Education as Right: A Legal Study from Islamic Approach' Beijing Law Review (2016) 7 p. 6 <[https://file.scirp.org/pdf/BLR\\_2016010515081324.pdf](https://file.scirp.org/pdf/BLR_2016010515081324.pdf)>

<sup>148</sup> Raheeq Ahmad Abbasi, 'Women and Education in Islam' *Minaj-Ul-Quran International* (27 May 2009)

<sup>149</sup> *ibid*

<sup>150</sup> Narrated by Abu Said Al-Khudri, Sahih Bukhari 2:24

to the acceptance, or otherwise, of a right to education for women, they may inform the way governments pass laws or adopt policies that do impact the ability of women to access educational resources and other social provisions on the same footing as men.<sup>151</sup> Harrison notes:

[n]otwithstanding the progress made by young female Saudis in higher education and by some women in the national labour market....it remains, in most respects extremely progressive resistant in terms of gender equality.<sup>152</sup>

Building on these themes, Syed suggests that while important policy reforms have been implemented to promote gender equality in areas such as education and work, a culture of masculinity continues to persist. He states:

[I]t is a traumatizing idea for many Muslim men, particularly those from poor strata where women's access to education is generally hampered, and women's work outside the home is considered as an emotional mutilation, a symbolic castration.<sup>153</sup>

#### 1.9.5 Overview and Contribution

The above literature review has attempted to map out the complex interplay that exists between religion, state law and culture on matters concerning women's rights to education, noting that these issues have not been dealt with comprehensively under a singular analytical frame in the existing research. It is nonetheless the case that, Saudi Arabia has introduced a raft of reforms that go some way towards advancing the rights of women to access and benefit from education and educational resources of a similar quality to that has been more readily available to Saudi males.<sup>154</sup> Many of these changes may well be motivated by economic reasons, such as the perceived need to shift from a resource-dependent economic strategy and closer to the model of a knowledge economy fuelled by a well-educated population. It is certainly the case that the

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<sup>151</sup> Anne Elizabeth Mayer, "Cultural Particularism as a Bar to Women's Rights: Reflections on the Middle Eastern Experience", in J Peters and A Wolper (eds), *Women's Rights, Human Rights: International Feminist Perspectives*, (Routledge 1995) 9

<sup>152</sup> Cited in Nick Forster, *The Rise of Women Managers, Business Owners and Leaders in the Arabian Gulf States* (Cambridge University Press 2017) 277.

<sup>153</sup> Jawad Syed, 'A context-specific perspective of equal employment opportunity in Islamic societies' (2008) 25(1) *Asia Pacific Journal of Management* 143, 147

<sup>154</sup> CEDAW 'General Recommendation 24' (1999) UN Doc A/54/38/Rev.1, para. 14.

2030 Vision for the Kingdom – a policy document that sets out the economic goals of the country, recognises the need for social as well as legal and market related reforms.<sup>155</sup> This policy shift has been met with approval, with the UN Special Rapporteur on Extreme Poverty and Human Rights praising the Saudi government’s decision to relax guardianship rules on the basis of ‘the need to encourage full female participation in the labour market to enable women to become both more economically productive.’<sup>156</sup> However, as Rajkhan contends to that, there are still many ‘legislative, social, educational and occupational constraints (which) prevent women from fully participating in the development process of their country.’<sup>157</sup> Baki notes that practices such as gender segregation and guardianship create barriers for women, and discourage them from pursuing further education or employment opportunities.<sup>158</sup> It is here that those sympathetic to the school of Islamic feminism seek avenues to reform Muslim societies from within.

As this thesis will explore, there is firm scriptural support for a general right to education for women in Islam. The CEDAW treaty also reinforces the right of women to access, participate in and complete their education free from legal or cultural impediments. Therefore, no conflict exists, in theory, between Saudi Arabia’s obligations under constitutional provisions mandating compliance with Sharia, and those issued under international treaty-based law.<sup>159</sup> There is a question, however, as to whether there are some religious requirements that take priority over a women’s right to education, including restrictions on personal freedoms. This requires an investigation into whether certain impediments to the free and full right to education for women are necessarily mandated and justified under Saudi Arabia’s Islamic system, or whether such readings can be contested as being rooted in cultural or male-dominated jurisprudential practices.<sup>160</sup>

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<sup>155</sup> 2030 Vision See: <http://vision2030.gov.sa/en/goals>.

<sup>156</sup> UN News Centre, *UN Rights Expert Urges Saudi Arabia to use Economic Plan to Bolster Women’s Rights*, See: <http://www.un.org/apps/news/printnewsAr.asp?nid=56004>

<sup>157</sup> Safaa Fouad Rajkhan, “Women In Saudi Arabia Status, Rights, And Limitations” (June 2014) <<https://Digital.Lib.Washington.Edu/Researchworks/Bitstream/Handle/1773/25576/Rajkhan%20-%20capstone.Pdf?Sequence=1>>

<sup>158</sup> Roula Baki, ‘Gender-segregated Education in Saudi Arabia: Its Impact on Social Norms and the Saudi Labor Market’ (2004) 12(28) Education Policy Analysis Archives

<sup>159</sup> Moosa Akefi Ghazi, ‘Constitutional Human Rights: Saudi Perspective,’ (2010) 4 Journal of Middle Eastern and Islamic Studies (in Asia) 28, 39

<sup>160</sup> Azizah Al-Hibri, *A Study Of Islamic Herstory: Or How Did We Get Into This Mess In Women im Islam* (PP 1982) 214, 215

Given the above analysis, a socio-legal analysis of Saudi Arabia's education policies, and underpinning rights framework, may help to substantiate the claims of Islamic feminists. These scholars aim to counter blanket criticism of Islam and its perceived role in curtailing women's by turning their attentions instead to certain legal and cultural practices that might be subverted through the use of religious texts and traditions that do emphasise on gender equality in spheres such as education. These scholars have traced the roots of gender inequality to patriarchal social relations that pre-existed Islam but which have nonetheless endured the transition of Muslim societies to modern nation states and legal systems. Roald notes a key challenge is the prevalence of certain male-dominated readings of Islamic texts, leading to a situation whereby certain texts that appear to endorse the unequal status of women are privileged over verses that uphold the ideals of equality, cooperation and justice for all, without distinction to gender.<sup>161</sup> In this regard, Roald also notes that the dogmatic or conservative interpretations of religious texts tend to be more prevalent among groups and communities with limited access to wealth, resources and education. In this sense, the absence of educational opportunity, for men as well as women, tends to contribute to female experiences of discrimination, inequity and isolation.<sup>162</sup>

This thesis integrates these themes in support of the further advancement of Saudi Arabia's positive attempts to promote women's rights to education, both for the purposes of furthering the human dignity and autonomy of women, and as a means of achieving the Kingdom's economic development goals.

### **1.10 Significance of the Study**

In the broadest sense, this thesis aims to provide an insight into the somewhat unique features of the Saudi legal system and its model of governance. Saudi Arabia remains a key economic player on the world stage. At the level of domestic law, the Kingdom of Saudi Arabia has undertaken a number of private sector related legal reforms aimed at enhancing the competitiveness of its domestic investment and commerce activities.<sup>163</sup> However, this thesis argued that the Kingdom has failed to introduce important political and legal reforms in the

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<sup>161</sup> Anne-Sofie Roald, *Women in Islam: the Western experience* (Routledge, 2003)

<sup>162</sup> Ibid p. 120.

<sup>163</sup> Amani Hamdan, "Women and education in Saudi Arabia: Challenges and Achievements" (2005) 6(1) International Education Journal 49



domain of public law and governance. This thesis, as suggested above, focused on the legal measures adopted by the Saudi government to protect and enhance the social, economic and civil rights of its citizens, and in particular the rights of women. At the international level, Saudi Arabia has taken important steps to ratify major international conventions involving certain rights. The ratification of CEDAW, for instance, marks a potential turning point for a country that has, since its establishment, observed a strict policy of gender segregation. Most existing literature has tended to focus on the “compliance pull” and reforming effects of international human rights obligations on the domestic law of Saudi Arabia. The work of Anne Marie Slaughter and other “process theories” of international law for instance provide a useful insight into why Islamic countries have incentives to cede some of their sovereignty through their participation in international human rights treaty frameworks, primarily to avoid their exclusion from other diplomatic processes as ‘punishment’ for failing to observe minimal human rights guarantees.<sup>164</sup> This thesis, however, presents its argument somewhat differently.

The significance of this study is that few, if any, scholars have considered human rights in more instrumentalist terms: that is as being directly related to social and economic conditions which prevail in States at any given moment in history. As such, this thesis seeks to go beyond the focus of existing literature by situating its assessment of the evolving nature of women’s rights in Saudi Arabia from within a wider exploration of the changing religious and economic dynamics of the country, and the connections between these dynamics.

It is not accidental that this thesis has chosen to focus on one particular category of rights of women in Saudi Arabia: the right to education of women. It is argued that Saudi Arabia has been more willing to implement measures aimed at guaranteeing the educational rights of women in Saudi Arabia for two principal reasons. First, unlike other civil or political rights that emphasize gender equality, the right to education of women finds strong support in Islamic scripture. In other words, the right of education can be advanced within the framework of *Sharia* law and, moreover, can be maintained without opposition to Saudi Arabia’s religious laws and customs. However, as will be shown, gender equality in respect of the right to education is only effective when other civil, political and social rights and freedoms are also

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<sup>164</sup> Anne Marie Slaughter, (ed.) *A New World Order* (ed.2004) id at 40, 43. See also H Koh; ‘Bringing International Law Home,’ (1998) 35 *Houston Law Review* 623.

protected. The thesis will therefore consider whether the gradual recognition of the right to education has the potential to provide the impetus for further human rights reform, for instance by empowering women in Saudi Arabia and changing the political conversation. Secondly, Saudi Arabia is experiencing a period of profound economic transformation and demographic change. With the diversification of its economy, Saudi Arabia may well be seeking to provide educational opportunities to Saudi females in anticipation of a future need to integrate more women into the workforce. But even if Saudi Arabia does not anticipate this need, it may not have a choice.

In light of the economic pressures placed on the Saudi government, this thesis offers, both, pragmatic and moral reasons for the formulation of a robust and effective right to education for all women in Saudi Arabia. That is to say this thesis does not simply rely on arguments that refer to the *moral* need to comply with international human rights that claim universal acceptance. Nor does it focus solely on whether or not Saudi Arabia has a religious duty to provide equal educational opportunities to women under the framework of *Sharia*. Rather, this thesis also considers the rights of women in Saudi Arabia from a socioeconomic standpoint. Otherwise put, this thesis formulates its question not only simply in terms of why Saudi Arabia *ought* to protect the rights of women to education in accordance with its religious-constitutional *and* international obligations but, additionally, why Saudi Arabia *needs* to protect the right of women to education in contexts of economic volatility and social change. To this Researcher's knowledge, there are no studies that have examined this question in any comprehensive way.

### **1.11 Original Contribution**

As noted in the literature review, this is the first study to assess the Right to Education for Women in Islam in the context of Saudi Arabia's legal system, focusing on the non-instrumental justification for such a right, and the reasons why it makes good economic sense for Saudi Arabia to continue its efforts to eliminate direct and structural barriers to the exercise of this rights. As noted, there have been attempts to evaluate women's rights under the Islamic framework.<sup>165</sup> There have also been attempts to examine the relationship between women's rights and economic development. There also have been attempts to consider the legal effects

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<sup>165</sup> See for example, Abdulaziz Sachedina, (ed) *Islam and the Challenge of Human Rights* (Oxford University Press 2009)

of gender segregation and guardianship laws on the rights and status of women in Saudi Arabia.<sup>166</sup> Finally, there have also been attempts to assess the different legal and conceptual foundations of Islamic *Sharia* and international human rights treatises.<sup>167</sup> While each of these are in-depth analyses, this researcher has yet to identify any literature that considers these issues in an integrated way. More importantly, this researcher has not been able to locate any studies that have linked broader factors of social and economic change in Islamic countries with an emerging (though highly qualified) right to education for women. In this light, this thesis seeks to address a “gap” in the literature.

In seeking to make an original contribution, this thesis attempts to synthesize, and then to subject to critical analysis, three key issues (which are often treated as distinct) from within a singular research frame and focus. Secondly, it proceeds to consider the co-dependent relationship between education in general and women’s education in particular, economic development and any limitations imposed by *Sharia* on either. Thirdly, it considers the conceptual impediments to developing effective and legitimate standards for women’s education. Finally, this thesis considers the future stability and needs in terms of human resources of the Saudi economy.

In the final analysis, the goal of this thesis is to identify the extent to which the rights of women, to the extent that these coincide in their secular and Islamic forms, can be used to advance education of women to meet the needs of Saudi Arabia’s economic modernisation agenda.

## 1.12 Limitations

The topic this Researcher has chosen has been framed by the coming oil-price-related shock and the way that the current debate is being led, together with the writer’s desire to contribute

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<sup>166</sup> See for example, William Ochsenwald, ‘Saudi Arabia and the Islamic Revival,’ (1981) 13(3) International Journal of Middle East Studies 273; Abdur-Rahman Salim Al-Saif, *Ab’ad Al-Huquq Al-Iqtisadiya Wa Al-Ijtima’iyah Fi Al-Islam* (An Analytical Study in the Light of Modern Theories of Human Rights and their Applications in the Kingdom of Saudi Arabia), (Riyadh: Maktabat Ar-Riyadh, 2008), p. 168 and Az-Zuhayli Wahbah, *Al-Wisayah Wal-Waqf Fi Al-Fiqh Al-Islami* (Guardianship and Endowment in Islamic Jurisprudence), (Beirut: Dar Al-Fikr Al-‘Arabi, 1987).

<sup>167</sup> See for example, Shaheen Sardar Ali, (ed) *Genders and Human Rights in Islam and International Law: Equal Before Allah, Unequal Before Man?* (The Hague: Kluwer Law International (2001); Heiner Bielefeld, ‘Western’ versus ‘Islamic’ Human Rights Conceptions? A Critique of Cultural Essentialism in the Discussion on Human Rights’ (2000) 28 Political Theory 90

to the debate over the country's economic development at a time when the debate can still be of use to the country. These factors will dictate both the scope and direction of this thesis. Limitations imposed on the research supporting this study include a lack of empirical economic domestic data from within Saudi Arabia; a lack of documented judicial and semi-judicial precedent which restricts full legal evaluation of government-related policies. This study will not assess these practices themselves but will work within the available information and materials. Further, this study attempts to limit the study of women's rights, to the right to education, and has chosen not to expand, in-depth, to such areas of domestic considerations such as guardianship, marriage, or property rights.

### **1.13 Methodology**

Considering the research problem stated above, the Researcher will use an interdisciplinary approach employing a mixed methodology to test its propositions and propose reforms. These methods include the legal doctrinal analysis, the textual analysis methodology, and treaty interpretation.

Critical examination is an important tool in this thesis. Where the source material consisted of current media excerpts, the research consisted of a qualitative content analysis of the comment therein. Using the legal doctrinal analysis, the research will entail reviewing key laws, decrees, and policies. Using the textual analysis methodology, a data-gathering process whereby valid inferences can be made by interpreting and coding textual material. This represents an objective tool of analyzing data as it provides evidence contained in the text. The subject matters required a parallel reading of texts used in international human rights instruments and jurisprudential texts extracted from the sources of *Sharia*. These are represented by the primary sources of the *Sharia*: the *Qur'an* and its secondary sources the *Sunnah* (the sayings, actions and tacit approval of Prophet Muhammad), the unanimous agreement of Islamic scholars (*Ijmaa'*) and analogical reasoning (*Qiyas*), as well as the Saudi laws which tackle the issues relevant to the right to education for women in Saudi Arabia.

This thesis additionally engages in a comparative analysis of human rights treaties such as CEDAW and UDHR and the Islamic parallel treatises such as CDHR and the Arab Charter on Human Rights (ACHR). As a supplement to this comparative study, the thesis goes on to examine and evaluate the applicability of international human rights standards within both

*Sharia* and Saudi legal frameworks. This will entail a discussion of the specific legal measures adopted by Saudi with a view to implementing their obligations under international law, keeping in mind the reservations which Saudi Arabia has entered into its ratification of CEDAW.

This thesis will also consider the validity of reservations under the applicable rules of the Vienna Convention the Law of Treaties. Through careful analysis of generally accepted principles on the law of treaties, the decisions of monitoring bodies, this thesis will consider the admissibility or inadmissibility of Saudi Arabia's reservations to CEDAW and other UN treaties. The question remains whether it is courts or treaty bodies who have the power to determine whether a reservation is compatible with the object and purpose of the treaty.

## **1.14 Structure of the thesis**

Chapter 2 considers the Islamic basis of the Saudi legal system and introduced some of the key regulations and policies that have been adopted to delineate and advance women's right to education in Saudi Arabia. The purpose of this chapter is to gain an overview of the nature of the legal system in Saudi Arabia. Based on the Hanbali school of Islamic jurisprudence, Saudi Arabia is a dualist legal system and is constitutionally founded on the supremacy of the *Sharia* (the *Qur'an* and *Sunnah*).<sup>168</sup> As a result, *Sharia* has supremacy over any conflicting general principle of an international law treaty provision. The challenge, however, is that no specific interpretation of a legal issues, such as the rights of women, is codified under the existing provisions of Saudi law. Saudi law equips its citizens with certain social and economic protections that exceed its equivalents in Western legal systems. However, societal, and cultural norms that are framed as religious obligations have resulted in women's rights not being implemented equally as discussed in subsequent chapters.

Chapter 3 serves a broader review of the literature and considers the rights and role of women under the classical legal-*Qur'anic* tradition and how this may be seen to differ from liberal conceptions of rights. It noted that some religious practices, including an expansive interpretation of guardianship and curatorship are grounded in cultural norms and can be

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<sup>168</sup> On this notion of dualist legal systems, see David Sloss, 'The Domestication of International Human Rights: Non-Self-Executing Declarations and Human Rights Treaties' (1999) 24 Yale International Law Journal 129.

contested from a theological perspective.<sup>169</sup> Nonetheless, the mainstream application of concepts of *qiwāmah* and *wilāyah* have long been established in Saudi Arabia through legal discourse and have prevented the free movement of women and inter-mixing of genders in Saudi Arabia. In practical terms, these understandings have contributed to cultural stereotypes around women, many of which were given legitimacy and force through the state policy of restricting free mixing in educational facilities, and other restrictions on the freedom of movement. Concepts that have been traditionally used to justify the discriminatory treatment of women are now being redefined by Islamic feminists, who offer a more egalitarian take on the *Qur'anic* notion of the male-female relation.

Chapter 4 aims to demonstrate that the right to education is a human right and outlines the key treaties that define the scope and content of this right. The chapter argues that Saudi Arabia's ratification of Convention on the Elimination of Discrimination Against Women represents an important symbolic move by the Saudi leadership's willingness to participate in the international human order. At the same time, while Saudi Arabia has ratified a number of international law treaties that refer, in full or in part, to the rights of women, it has yet to ratify related treaties such as the International Covenant on Social, Economic and Cultural Rights. Chapter 4 also noted that the Kingdom of Saudi Arabia has also entered ratifications to the Conventions on the Elimination of Discrimination of Women on Islamic grounds, in ways that raise questions about what type of reservations may be considered consistent with the broader aims and aspirations of the treaty.<sup>170</sup> The weak enforcement powers of the CEDAW Committee is heightened by the Saudi government's slow progress in tackling (indirect) structural and cultural barriers to equal access to education.

Chapter 5 draws more deeply on the Islamic concept of education, noting the *Qur'anic* exegesis and the narration of the *Hadith* are replete with authority for the right of Muslim women to acquire knowledge and seek enlightenment. The Chapter began with a discussion of the rules of interpretation in Islamic law. Islamic law regards the right to education as a right and

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<sup>169</sup> See, for example, Amina Wadud, "The Dynamics of Male-Female Relationships: A Contemporary Analysis (Qur'an 4:34)," *The American Muslim*, 1995.

<sup>170</sup> Guide to Practice on Reservations to Treaties, UN General Assembly, 63 Session, Supplement no.10, Addendum 1, UN Doc.A/66//10/Add.1 Available at: <http://legal.un.org/ilc/reports/2011/english/addendum.pdf>

religious duty.<sup>171</sup> Nonetheless, this thesis argues that if the women's right movement is to gain traction in Islamic societies, it cannot be imposed on them 'from above'. Instead, this thesis focuses on areas of potential consensus and overlap between Islamic human rights instruments (specifically those that emphasise third generation of international human rights) and international instruments.

Chapter 6 serves as a discussion chapter that attempts to synthesize the core aims and research question of the thesis. It considers whether the Saudi Arabia has taken the necessary measures to promote educational equality between the genders and considering the barriers that prevent women in Saudi Arabia from being allowed to achieve equivalence in educational opportunity and outcome. This chapter draws on evidence a combination of economic and cultural conditions has perpetuated and legitimised structural and cultural barriers to education. The limitations of the right to education in Saudi Arabia are also considered in connection with the right to education in international rights human rights law. Any remaining restrictions to education in Saudi Arabia exist in spite of the Kingdom being party to a number of international human rights instruments that support the right of education to women, as well as *Sharia* law also appearing to support the right, and indeed obligation, of education for women. Chapter 6, therefore, served as a discussion chapter, aiming to explore the relation between religious law, authority and custom.

On the whole, this thesis has attempted to demonstrate that the Saudi government is working towards promoting gender equality and empowering women through its recent economic development agenda. In this vein, the thesis has argued that the right to access and obtain primary and secondary education for women is well-established under Saudi Arabia's educational policy and under the legal system more generally. The Basic Law of Saudi Arabia enshrines the right to education as a right available to all citizens and makes no distinction between genders in this regard.<sup>172</sup> In recent years, there has been a growing recognition on the part of the government that women have a right to education and work across all sectors of society. In this regard, the Saudi government has adopted various legislative and policy initiatives that can be seen to encourage women to pursue studies and employment outside the

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<sup>171</sup> Mbaha Khutani, 'Educational Rights For Women In Islamic And International Human Rights Law: A Study Of Theory And Its Application In Saudi Arabia' (2013) University Wollongong Thesis Collection 92

<sup>172</sup> Article 13 of the Basic Law of Governance

traditional ‘gendered’ professions such as teaching and health care. Faced with the changing needs of the labour market, and structural change in its economic circumstances (such as the diversification from oil exports), the Saudi government has taken important steps to expand the female workforce, including by investing in women’s education and vocational training. In many respects, Saudi women today enjoy a similar level of education to men, and the number of women pursuing higher education abroad and in Saudi Arabia is growing. In another positive development, Saudi women have been able to take advantage of economic opportunities in the private and public sectors. Obstacles remain however to the achievement of more extensive gender equality in the educational sphere. Despite efforts to promote access to educational equality, Saudi women may face various institutional and cultural barriers, including attitudes to women’s role in the family home. The question posed by the thesis is the extent to which these social attitudes can be properly traced to religious understandings as to the limits placed on women’s rights and freedoms under Islam itself.

The coming chapters will present a series of limited studies on how improving the conditions of women’s ability to exercise their right to education will imminently collide with the downward trends of Saudi Arabia’s oil-based economy. Or in other words, while the economic justifications for improving social and economic conditions for women are only addressed in this study from a high-level perspective, the inevitable facts remain that the Kingdom needs to diversify its industries, needs to better train its existing workforce, needs to expand its workforce, and already has a “built-in” base for all of these things in their highly educated and capable class of women. Changes in the Saudi economy takes places at the same time as Saudi women are becoming educated and creating more demand for access to jobs and continued means of education. This thesis foresees the point of collision for these two inevitabilities, and provides theoretical, religious, and sound policy bases for redefining cultural norms; encouraging the exploding youth population in Saudi Arabia; and for implementation of genuine reforms.



## Chapter 2:

# The Rights of Women under the Saudi Legal System

### 2.1 Introduction

This chapter outlines defines the key features of the Saudi legal system as the basis on which to assess the ways in which laws and policies promulgated by the Saudi government, often on religious grounds, have restricted the rights of women in general, outside the specific sphere of education. In the next chapters, the focus will be on the rights of women to access education under Islamic, Saudi and international law, and of any conflict between these two legal domains, but in this chapter the focus on the relation between law, religion and culture more generally in the treatment and recognition of women's rights. This will set the scene a critique of the limitations of focusing narrowly on legal protection of education rights in Saudi Arabia, since this is already well established under the Kingdom's Basic Law and Sharia. A more interesting part is to consider the role and rights of women in the Saudi legal and cultural context, as the basis with which to assess how discourses and practices, particularly those which limit the ability to participate in the public sphere, may also create indirect barriers to the ability of women to exercise equal rights to employment and education. Equally, it is necessary to unpack whether laws and policies that appear to perpetuate the unequal treatment or discrimination of women in certain spheres of law and economy can be said to be justified by Sharia itself. This and the following chapter will take these issues one by one.

The Saudi legal system is unique in character, design and function, even in the Islamic community, because of the primacy with which it treats *Sharia* in its legal system, including the use of exclusive definitions, interpretations, and legal/religious opinion (known as *fatwa*) on the requirements of *Sharia*.<sup>173</sup> Similarly, its approach to defining human rights, in particular the rights of women, is more conservative when compared to its neighbouring Arab nations, proffering what would seem to be a highly conservative perspective on the role and rights of women in the arena of family life and in society generally, as compared with more other Islamic

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<sup>173</sup> Jan Michiel Otto, *Sharia Incorporated: A Comparative Overview of the Legal Systems of Twelve Muslim Countries in Past and Present* (first published 2010, Leiden University Press, February 2011) 172

legal systems.<sup>174</sup>

## 2.2 The Islamic Foundation of Saudi Arabia's Legal Constitution

The concept of “rights” is dependent not only on definitions but on the sources and authority for those rights. Specifically, analysis of legal documents and structures addresses whether the collective people or public to whom rights are generally attributed are balanced with the rights of individuals and whether the exercise of governmental power contributes to or inhibits the balance of rights for the societal good. An examination of Saudi Arabia's legal structure and the status of individual or gender-based rights of its citizens ostensibly begins with a study of its constitution.

A constitution can take many forms, but for purpose of analysis in explaining the composition of a constitution in Saudi Arabia, this chapter will refer to elements of a universal normative constitutional model as compared to the theocratic nature of Saudi Arabia's transnational constitutionalism.<sup>175</sup> A full exploration of constitutionalism is beyond the scope of this thesis, but the surface consideration of the nature of Saudi Arabia's constitutional doctrine and structure is relevant to its perception of women's rights and the legal conduct of both the governing bodies and private citizens. As one scholar notes: “At one end are views of constitutionalism that see the role of the constitution as delineating a national identity... At the other end are views of constitutionalism that see the role of the constitution as imposing constraints in the name of universalist conceptions of humanity...”<sup>176</sup> The debate around women's rights in Saudi Arabia is greatly influenced by the theocratic nature of Saudi Arabia's constitutional authority.

Theocratic constitutionalism refers to a legal system which “prioritizes a religious conception of the good that is strict and comprehensive in its range of teachings,” and places all sovereignty and authority in the hands of God.<sup>177</sup> The transnational element of Saudi Arabia's constitution

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<sup>174</sup> Robert Lacey, *Inside the Kingdom* (Penguin Publishing Group 2009) xx–xxi

<sup>175</sup> Larry Cata Backer, ‘Global Panopticism: States, Corporations, and the Governance Effects of Monitoring Regimes’ (2008) 15 *Indiana Journal of Global Legal Studies* 101

<sup>176</sup> Robin West, ‘Human Capabilities and Human Authorities: A Comment on Martha Nussbaum's Women and Human Development’ (2003) 15 *St. Thomas Law Review* 757, 771

<sup>177</sup> Lucas Swaine *The Liberal Conscience: Politics and Principle in a World of Religious Pluralism* 2–4, 6–7 (2006)

builds upon the theocratic notion of *Sharia* law as a universal law, not just a domestic religion.<sup>178</sup>

According to an originalist or textualist reading, a constitution is a legal document which establishes written law. A more conceptual or normative idea of constitutionalism is based on the idea of the role of establishing the functions of government, while establishing boundaries between legal and political authority and between the realm of public authority and private autonomy. In short, this is a concept of constitutionalism which defines the juridical and political (if not moral) boundaries of a society.<sup>179</sup> Functionally, a constitution is also the instrument which constitutes the authority of state organs, while defining the substantive and procedural powers of the government and the division of powers between governmental entities or institutions. There is a close connection between constitutionalism or constitutional theory and the regulatory ideal of the rule of law in that both are concerned with the rights of the individual against the arbitrary use of governmental power.<sup>180</sup> In the tradition of political theory, constitutionalism also evokes the idea of the democratic will of the sovereign people, to whom government must remain accountable and from whom it derives the source of its legitimacy and authority. The constitution is the fabric which sustains a whole set of ideas and values which are rooted in the birth of the modern state: the rule of law, collective identity, and means of cohabitation or community, including management of internal disputes or conflict, despite the existence of outside influences or resources.<sup>181</sup> By maintaining a written constitution, citizens and the state can understand the rights and duties owed to the other, including the consequences of violating fundamental laws such as penal codes or natural justice.<sup>182</sup> Saudi Arabia enshrines religious texts into political and legal doctrines through its

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<sup>178</sup> See for general discussion on elements of Islamic constitutionalism, Ann Elizabeth Mayer, 'Conundrums in Constitutionalism: Islamic Monarchies in an Era of Transition' (2002) 1 UCLA J. Islamic & Near E. L. 183, 183

<sup>179</sup> See Carl Schmitt, *Constitutionalism: The Philosophical Dimension* 4 (Alan S. Rosenbaum ed., 1988); See also, Chapter 3 "Conceptualizing Constitutions" discussion in Zachary Elkins, Tom Ginsburg, and James Melton *The Endurance of National Constitutions* (Cambridge University Press, October 2009) 36; See also, Ahmed Al Ghadyan, 'The Judiciary in Saudi Arabia' (1998) 13 ARAB L.Q. 235

<sup>180</sup> H.W.O. Okoth-Ogendo 'constitutions Without Constitutionalism: Reflections on an African Political Paradox', in *Constitutionalism and Democracy* 65 (Douglas Greenberg et al. eds, 1993); See also Keith E. Whittington, 'Yet Another Constitutional Crisis?' (1996) 43 William and Mary Law Review 2093, 2139

<sup>181</sup> See Larry Cata Backer, 'The Rule of Law, The Chinese Communist Party, and Ideological Campaigns: Sange Diabiao (the "Three Represents"), Socialist Rule of Law, and Modern Chinese Constitutionalism' (2006) 16 Transnational Law and Contemporary Problems 29,39; See also Thomas M. Franck *Fairness in International Law and Institution* (1995) 41 ("In most national communities, a law draws support from having been made in accordance with the process established by the constitution, which is the ultimate rule of recognition.")

<sup>182</sup> Michael Foucault, *Discipline and Punish: The Birth of the Prison* (1<sup>st</sup> published 1975, Alan Sheridan trans., Vintage Books 2d ed. 1995)

constitutional fidelity to the principles and sources of *Sharia* law. It is noted that

‘*Sharia* is not based on a core of concepts, but rather on an ensemble of precepts which is at times general, at times precise, and which expands to include the totality of human acts through induction, analogy, extension, commentary, and interpretation.’<sup>183</sup>

In this regard, *Sharia* is regarded by its followers as a way of life and embodies broad, general rules that are deemed immutable because they are ordained by *Allah*.<sup>184</sup> It governs the behaviour of the individual and looks to “the general benefit of society as a whole from a general perspective and presents a theoretical model that if followed provides safety and protection for society.”<sup>185</sup> Yet it also provides for ‘the adaptation of law according to time and circumstance [as] necessitated by changes in society, and the influx of various cultures and material conditions.’<sup>186</sup>

Saudi Arabia has a rich history based in nomadic tribal traditions and was founded by one of the largest and most powerful Arab dynasties.<sup>187</sup> This present-day family dynasty, tracing back to King Abdulaziz (Ibn Sa’ud), is geographically divided into a number of clans who rule under the distributive, but permissive, authority of the current monarchy via roles such as council or ministry positions.<sup>188</sup> The tribal custom is an important cultural heritage of the modern dynasty, serving as a guiding force in the current political or religious policies of the Kingdom. Tribal custom established the patriarchal system of community and civil obedience that is now embodied what is arguably a culture of gender domination by men over women in both private and public spheres of contemporary life within the Kingdom. Further, religious authorities cite to tribal custom as a basis for their conservative interpretations of women’s rights and the continued use of the guardianship system or segregation policies.

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<sup>183</sup> Olivier Roy, *The Failure of Political Islam* (Harvard University Press, 1994) 10

<sup>184</sup> Bahgat Korany and Ali E. Hillal Dessouki *The Foreign Policies of Arab States: The Challenge of Globalization* (first published 2008, American University in Cairo Press 2010) 358

<sup>185</sup> Islamic Supreme Council of America, ‘Understanding Islamic Law’ (2017) <[http://www.islamicsupremecouncil.org/understanding-islam/legal-rulings/52-understanding-islamic-law.html#\\_ftn2](http://www.islamicsupremecouncil.org/understanding-islam/legal-rulings/52-understanding-islamic-law.html#_ftn2)>

<sup>186</sup> *ibid*

<sup>187</sup> Hossein Esmaeili, ‘On a Slow Boat Towards the Rule of Law: The Nature of Law in the Saudi Arabian Legal System’ (2009) 26 *Ariz. J. Int’l & Comp. L.* 1, 4

<sup>188</sup> Esmaeili *Ibid* 4

Also, inherent in Saudi Arabia's cultural heritage is the jurisdiction of religious and governing authorities over all aspects of social life, including morality. While Saudi Arabia's legal structure and constitution may also exhibit some characteristics of the above described constitutional models, the integral difference is that Islamic law derives from the Islamic faith. Any threat to Islamic law is seen as a threat towards the faith and a violation of divine law.<sup>189</sup> With respect to the latter, theoretical constitutionalism diverges from the modern or civic model or definitions of constitutional law and theory. All legislation and law are derived from the commands of the ultimate sovereign, *Allah*, and no man-made laws can supervene these commands. Therefore, the legal system is not in the hands of officials elected by a people, but aspects of Saudi rulemaking are subject to consultation with the *Shura* council, a religious body.<sup>190</sup> In answer to the question of whether this type of system can be a legitimate constitution, Hirschl writes:

How can a polity, therefore, reconcile the principles of accountability, separation of powers, and the notion of "we the people" as the ultimate source of sovereignty when the fundamental notion of divine authority and holy texts make up the supreme governing norm of the state?<sup>191</sup>

Again, while answering this question is beyond the scope of this thesis, it highlights the tension between Islamic and universal legal systems.

Normative constitutions, such as in the United States, aim to separate legislative rule-making from religion. In contrast, Islamic states using the theocratic constitutional approach often integrate rule-making under *Sharia* law by combining religious mandates with secular governance. However, it could be argued that both normative constitutions and theocratic constitutions integrate moral justifications into their legal policies—e.g., one cannot harm another person as it violates social order and good—as a means to convince and control the

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<sup>189</sup> Allan Christelow 'Muslim Law Courts and the French Colonial State in Algeria' (1985) 6

<sup>190</sup> Gideon Sapir 'Religion and State in Israel: The Case for Reevaluation and Constitutional Entrenchment' (1999) 22 *Hastings International & Comparative Law Review* 617, 640 n. 83

<sup>191</sup> Ran Hirschl 'The Theocratic Challenge to Constitutional Drafting in Post-Conflict States' (2008) 49 *Wm & Mary L. Rev.* 1179, 1185

general public through legal order and a shared system of values.<sup>192</sup> Alternatively, normative constitutions endow citizens with inalienable rights, but clearly, as evidenced by Saudi Arabia, this does not apply to all legal systems or theocratic constitutions which prioritize religious doctrine over universal rights.<sup>193</sup> An intriguing concept of a constitution, normative or theocratic, was expressed by Max Lerner: “Constitutions, like all creations of the human mind and the human will, have an existence in men’s imagination and men’s emotions quite apart from their actual use in ordering men’s affairs.”<sup>194</sup> Thus, regardless of the origin or classification of a constitution, it is its ability to inspire the emotions of a people that truly dictates how a legal and social order will be maintained.

One could argue that in Saudi Arabia, the Basic Law of Governances functions as a constitution, and it often does so.<sup>195</sup> However, the true legal constitution and foundation of the Kingdom is *Sharia* law, or more specifically the *Qur’an* and the *Sunnah*, as reflected in Article 7 of the Basic Law.<sup>196</sup> Saudi Arabia is unique in encapsulating the *Qur’an* as its rigid philosophical and doctrinal constitution, whereas other Islamic states, such as Egypt or Iran, have chosen a more codified approach to their governing systems. The *Qur’an*, and by implication *Sharia* law, provides a broader constitutional order for Saudi Arabia.<sup>197</sup> The Basic Law, alternatively, serves as the functional equivalent to a written legal or political form of rules, rights and responsibilities for the state and its citizens.

The original version of the Basic Law was created by King Abdulaziz Ibn Sa’ud, the founder and first King of Saudi Arabia, in 1924 as a tool for solidifying the traditionally nomadic tribes

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<sup>192</sup> See for general discussion on values and constitutionalism, Vicki C. Jackson, ‘Constitutional Comparisons: Convergence, Resistance, Engagement’ (2005) 119 *Harvard Law Review* 109, and Edward S. Corwin, *The “Higher Law” Background of American Constitutional Law* (Cornell University Press 1974) 4-5

<sup>193</sup> See for example ‘According to Khaled Abou El Fadl, the power of the Saudi government in issuing visas for Muslims all over the world to visit Islam’s holy sites gives the Saudi government a power to have an impact over the life of all Muslims. Criticizing Wahhabism may result in denying visas to scholars if they intend to visit Saudi Arabia or the holy sites for the purpose of pilgrimage (hajj)’ Khaled Abou El Fadl, ‘The Great Theft, Wrestling Islam From Extremists’ (Harper 2005) 87

<sup>194</sup> Max Lerner, ‘Constitution and Court as Symbols’ (1937) 46 *Yale Law Journal* 1290, 1293-94

<sup>195</sup> Abdulaziz Al Fahad,, ‘Ornamental Constitutionalism: The Saudi Basic Law of Governance,’ (2005) 30 *Yale Journal of International Law* 375

<sup>196</sup> The Basic Law of Governance (promulgated by the Royal Decree No. A/90 dated 27/08/1412H (March 1, 1992)), Article 1

<sup>197</sup> Zachary Elkins, Tom Ginsburg, and James Melton *The Endurance of National Constitutions* (Cambridge University Press, October 2009) 36

of the territory under a cohesive, national system of governance.<sup>198</sup> This document underwent various transformations until 1992, when King Fahad bin Abdulaziz enacted and promulgated the contemporary Basic Law of Governance (“the Basic Law”).<sup>199</sup>

The Basic law is derived from the authorities set forth in *Sharia* law, specifically the *Qur’an* and the *Sunnah*.<sup>200</sup> The *Qur’an* is the word of Allah and the *Sunnah* are the teachings of the Prophet Muhammad. Allah is supreme, and the underlying basis of the Kingdom is allegiance and obedience to Allah and the preservation of the nuclear family in society.<sup>201</sup> Further, governance in the Kingdom is based on justice, *Shura* (consultation), *fatwas* (religious legal opinions) and equality in accordance with *Sharia*.<sup>202</sup> In addition to the emphasis on the family unit and elimination of disagreement in society, the Basic Law specifies that “Education shall aim to instil the Islamic creed in the young, impart knowledge and skills to them, and prepare them to be useful members in the building of their society, loving their homeland, and taking pride in its history.”<sup>203</sup> This underlying concept of being “useful members” of society is pertinent to the study of the right to education of women in Saudi Arabia.

For women, the opportunity to be considered a “useful member” of society or the broader public can transcend the primary importance of the family to include the right to an education and the rightful opportunity to apply that education to economic, communal and intellectual contexts through employment. A traditional understanding of a constitution is that it is a “living” document, capable of adaptation and designed to not just delineate expectations but to establish the rights of individuals and the duty of the state to protect and defend those same rights as well as the health, safety and welfare of its citizens. This same universal legal notion applies to *Sharia* in Saudi Arabia. The obligation and opportunity to be a “useful member” is therefore not just an individual right, but is arguably the duty of the state to provide the

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<sup>198</sup> Abdullah F. Ansary, ‘Update: A Brief Overview of the Saudi Arabian Legal System’ (August 2015) NYU Hauser Global Law School Program, Journal of Global Law and Justice online, Section II<[http://www.nyulawglobal.org/globalex/Saudi\\_Arabia1.html](http://www.nyulawglobal.org/globalex/Saudi_Arabia1.html)>

<sup>199</sup> Ibid Section 1 Constitutional Evolution

<sup>200</sup> Article 7, *The Basic Law of Governance* 2007 (promulgated by the Royal Decree No. A/90 dated 27/08/1412H (March 1, 1992))

<sup>201</sup> Ibid Articles 9 and 45, *The Basic Law of Governance* 2007 (promulgated by the Royal Decree No. A/90 dated 27/08/1412H (March 1, 1992))

<sup>202</sup> Ibid Article 8, *The Basic Law of Governance* 2007 (promulgated by the Royal Decree No. A/90 dated 27/08/1412H (March 1, 1992))

<sup>203</sup> Ibid Article 13, *The Basic Law of Governance* 2007 (promulgated by the Royal Decree No. A/90 dated 27/08/1412H (March 1, 1992))

opportunity or at the very least the communal environment to exercise these rights, as well as to defend against any encroachment of these rights by persons or entities. Further, the very purpose of defining human rights in a legal capacity for individuals, or through a collective bill of rights, is freedom from encroachment of natural or positive rights by the state. It can be argued, that the use and defence of systems like the guardianship system or legal restrictions on women's abilities to exercise their rights is not only a failure by the State in its duty to protect the rights of its citizens, but, in fact, the State itself is guilty of either perpetuating the encroachment of rights by private citizens or of directly violating the rights of women through legislation or acquiescence to informal religious policy.

The constitutional law or *Sharia* of Saudi Arabia, including the *Qur'an* and the Basic Law, provides distinctions for gender roles, rights and obligations, while preserving a model for law and morality for society that is steadfast in obedience to *Allah*, but adaptable in response to a changing societal and global context. The following sections parcel out how rights are defined, the legal institutions which retain the responsibility to do so, and how the constitution functions within this legal system.

### **2.3 Defining Rights Under Saudi Law**

When defining rights in Saudi law, it refers more to the sense of morality measured by *Sharia* law, rather than a universally understood technical right supported by codified law and judicial precedent. While much of Saudi law remains uncoded, as *Sharia* law itself is uncoded, the Basic Law provides some categorized understandings of the rights of citizens within the Kingdom, including but not limited to rights associated with the family structure within Saudi society ("Part Three"), as well as economic prosperity and property ownership ("Part Four").<sup>204</sup> Part Five elucidates more personal rights of safety, security, education, health, and employment, while Parts Five and Six of the Basic Law also encompass higher level protection of the state's identity and cultural heritage in relation to the State's duties to individual rights and the community. The provisions of Parts Five and Six explicitly state the responsibility of the state to protect the rights of citizens that are granted under *Sharia* law and promulgated in the Basic Law, as well as the means and the governing structure with which they should carry

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<sup>204</sup> See Part 3: Articles 9 through 13, and Part 4: Articles 14 through 22, *Basic Law of Governance* 2007 (promulgated by the Royal Decree No. A/90 dated 27/08/1412H (March 1, 1992))



out that duty.<sup>205</sup> As will be discussed below, the source of authority for human or women's rights is a combination of societal good, individual rights and governmental power; thus, these provisions of the Basic Law are clearly stating a specific, but not exhaustive, list of rights within Saudi Arabia, and the responsibility and governance associated with those rights. In other words, the Basic Law's provisions set an expectation for which rights may or may not be enforced within the Kingdom.

Article 8 specifically addresses women's rights in the Basic Law, which provides for "government...based on the premise of justice, consultation, and equality in accordance with the Islamic *Sharia*." In addition, Article 47 provides for the principle of equality before the law, stipulating "[t]he right of litigation shall be guaranteed equally for both citizens and residents in the Kingdom." Most relevant to this thesis is Article 28 of the Basic Law, which provides that "the state shall protect human rights in accordance with Islamic *Sharia*."<sup>206</sup>

This section has presented only an introductory treatment of rights within Saudi Arabia for purposes of developing a working definition to be used throughout the thesis and for making legal distinctions in order to better explain Saudi Arabia's legal structure and the use of the legal concept of rights by governing bodies within the Kingdom.

### 2.3.1 Sources of Law Under the Saudi Legal System

As mentioned above, Saudi Arabia is an absolute monarchy built on a system of primary and secondary sources of law. In view of the ultimate authority of *Sharia* law and the superior power of the King, its executive, legislative, and judicial tributary structures are left intentionally vague as to the distribution of power and decision-making, but according to the permissible limits of *Sharia*. The Basic Law of Governance outlines the responsibilities and processes of governing institutions.<sup>207</sup> The governing institutions or bodies include: The King, the Council of Ministers, the *Shura* Consultative Council, the *Sharia* Courts, the Board of Grievances, and the ever-controversial *ulama* (religious elite authority). These institutions, or entities, are guided by the primary authority of *Sharia* law as derived from the *Qur'an* and the

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<sup>205</sup> Ibid Part 5: Articles 23 through 43, and Part 6: Articles 44 through 71 *The Basic Law of Governance*

<sup>206</sup> Article 47, The Basic Law of Governance 2007

<sup>207</sup> Tim Niblock *Saudi Arabia: power, legitimacy and survival* (2006) 104

*Sunnah*. Secondary sources of law then include the institutional or non-religious legal tools of Royal Orders, Royal Decrees, Ministerial Decrees, and Regulations.<sup>208</sup> The primary and secondary sources necessarily influence the collective and individual decision-making authority of judicial and religious scholars.

The King serves not only as the supreme executive authority with ultimate authority to develop public policy for the Kingdom, but also acts as the Prime Minister for the Council of Ministers. The King's discretion extends to the issuance of Royal Orders and Decrees of his own cognizance or upon ratification by the Council of Ministers.<sup>209</sup> The King does not, however, have authority beyond that which is granted by *Sharia* law nor beyond the religious interpretations of those such as the *ulama*.<sup>210</sup> Instead, the King and the *ulama* primarily work in implicit agreement for the social, religious, and political policies of the Kingdom. Despite certain policy-based controversies, the two entities have generally discovered cooperation to be a more effective means of governing and more aligned with the wisdom of *Allah*.

The Council is the legislative body, executive advisor, and regulatory arm of the government.<sup>211</sup> They develop, propose, and vote on legislative policy through Royal Decrees and Council of Minister Regulations, in a semi-cooperative system with the *Shura* Consultative Council.<sup>212</sup> Further, they advise the King as to executive matters, which may or may not be implemented in Royal Decrees or Royal Orders. Any passage of legislation by the Council must pass a final step of approval or rejection by the King as the executive authority and as the

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<sup>208</sup> Dr. Abdullah F. Ansary. 'UPDATE: A Brief Overview of the Saudi Arabian Legal System' (August 2015) NYU Law School. Hauser Global Law School Program (Global Law & Justice). <[http://www.nyulawglobal.org/globalex/Saudi\\_Arabia1.html](http://www.nyulawglobal.org/globalex/Saudi_Arabia1.html)> [Dr. Abdullah F. Ansary, among many notable positions, is the former Director General of Legal Affairs and International Cooperation at the Ministry of the Interior, Riyadh, Saudi Arabia.] ["Saudi legal materials are composed of Royal Decrees, regulations, executive regulations, schedules, codes, rules, procedures, international treaties and agreements, ministerial resolutions, ministerial decisions, circular memoranda, explanatory memoranda, documents, ministerial decisions and resolutions which have been designated by the Government as the official sources of Saudi Arabian law. As previously mentioned, no statutory laws or regulations, treaties, international agreements or concessions may be enacted, concluded or amended unless they are approved by Royal Decrees after having been studied, usually by both the Council of Ministers and the Shura Council."]

<sup>209</sup> Dr. Abdullah F. Ansary. 'UPDATE: A Brief Overview of the Saudi Arabian Legal System' (August 2015) NYU Law School. Hauser Global Law School Program (Global Law & Justice). <[http://www.nyulawglobal.org/globalex/Saudi\\_Arabia1.html](http://www.nyulawglobal.org/globalex/Saudi_Arabia1.html)>

<sup>210</sup> See for discussion on the power and influence of the *ulama*, Abdulaziz Al Fahad, 'The Prince, the Shaykh and the Lawyer,' (2000) 32 Case W. Res. J. Int'l L. 307

<sup>211</sup> Dr. Abdullah F. Ansary. 'UPDATE: A Brief Overview of the Saudi Arabian Legal System' (August 2015) NYU Law School. Hauser Global Law School Program (Global Law & Justice). <[http://www.nyulawglobal.org/globalex/Saudi\\_Arabia1.html](http://www.nyulawglobal.org/globalex/Saudi_Arabia1.html)>

<sup>212</sup> Council of Ministers Act, Art. 18, Royal Decree No. 38, dated October 22, 1377 AH (October 16, 1958)

Prime Minister. Council of Minister Regulations serves as both a quasi-legislative authority and executive regulator issuing guidelines for the execution of policies within each ministry. In essence, it acts secondarily in promulgating legislative policy passed through Royal Decrees or Orders. Royal Decrees and Orders are considered to be regulations, not “laws” in the secular sense. As such, the term “law” is reserved for the rules derived from the *Qur'an*. However, the regulations have the same legally binding effect and are often referred to as “law” by secular entities outside the Kingdom.<sup>213</sup> Importantly, treaties and international conventions also undergo approval or adaptation through the Council of Ministers and the *Shura* Consultative Council before final ratification by the King.<sup>214</sup>

Consultation is an important principle in the Islamic tradition, as the *Qu'ran* states:

So by mercy from *Allah*, [O Muhammad], you were lenient with them. And if you had been rude [in speech] and harsh in heart, they would have disbanded from about you. So pardon them and ask forgiveness for them and consult them in affairs (of the moment). And when you have decided, then rely upon *Allah*. Indeed, *Allah* loves those who rely [upon Him].<sup>215</sup>

The *Shura* Consultative Council is an expression of this consultative principle, and is considered to be “the people’s body” because it includes representatives from the community, including scholars, recognized leaders and learned individuals. It is a unicameral legislative-type body, comprised of 150 seats, and its members are appointed by the monarch to serve 4-year terms.<sup>216</sup> It is an institution designed to provide debate and alternatives, or corroborate the opinions of the King and the Council of Ministers. The *Shura* may propose legislation or policy decisions, which are subject to debate and approval by the Council, with the ultimate power of enactment resides with the King.

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<sup>213</sup> Gayle E. Hanlon ‘International Business Negotiations in Saudi Arabia’ in James R Silkenat, Jeffrey M. Aresty & Jacqueline Klosek (eds.) *The ABA Guide to International Business Negotiations*, (Chicago, Illinois: American Bar Association 2009)

<sup>214</sup> Abdul Rahman A Shllwb, *Al Nizam Al Dustuwry fi AL Mamlakh Al Arabiya Al Sa'wdiya* (Safir Press, 2005) [Translation: The Constitutional System in the Kingdom of Saudi Arabia] 306-10

<sup>215</sup> The Holy Qur'an 3:159

<sup>216</sup> CIA “Saudi Arabia” (Nov 2016) The World Factbook <<https://www.cia.gov/cia/publications/factbook/geos/sa.html>>

Further, while decisions of the *Shura* are non-binding—they are authoritative and advisory, but do not establish precedent—it serves as an institution which sets the agenda for public policy and public discourse and provides a voice for peoples of the Kingdom. For example, the King recently appointed 30 women to the body for the first time in the country’s history.<sup>217</sup> The inclusion of women in the *Shura* Council is controversial but it has been observed as a sign of progress in accepting the role of women as scholars and contributors to public policy in Saudi Arabia’s society.<sup>218</sup> Additionally, a proposal to abolish the requirement that a woman obtains the permission of her male guardianship to obtain a passport was symbolically introduced to the *Shura* Council in fall 2016, but subsequently failed to be taken into consideration or adopted by the Council.<sup>219</sup> Regardless, its introduction is yet another sign of the active voice that exists in Saudi Arabia for shaping the rights of women and enabling their ability to be “useful members” of society.

Codified law in Saudi Arabia is limited in scope and nature-based on intentional omissions in *Sharia* Law. In other words, the Kingdom has only codified areas of law in which there is clearly no conflict with the purpose and guidance of *Sharia* Law. As Dr. A. Alasry has observed, modern statutory laws and regulations can be introduced and adopted only through the doctrine of public interest (*al-maslahah al-mursala*) as a basis for rulemaking.<sup>220</sup> Examples of codified law in Saudi Arabia include family, criminal, and inheritance matters, all of which have an impact on women’s rights. While these codes may not directly apply to the research in this thesis or are outside its scope, they are relevant to discussions of reform. For instance, women were forbidden to drive in Saudi Arabia until 2017 ; however, this is not a *Sharia*-based law, but is a religiously dictated societal policy or regulation supported by a *fatwa*.<sup>221</sup> Further,

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<sup>217</sup> -- “Saudi Women Take Seats in Shura Council” (19 February 2013) Al Jazeera <http://www.aljazeera.com/news/middleeast/2013/02/2013219201637132278.html>

<sup>218</sup> Andrew Lee Butters’ ‘Saudi’s Small Steps’, Time Magazine 19 October 2009, <<http://www.time.com/time/magazine/article/0,9171,1929152-1,00.htm>>; See also, Salwa Al Omran, ‘The council shall be the Number of Counselors to 10 Women Parliamentarians and Assignment Tasks and meet with Representatives of Foreign Delegations, International Women’s’ (14 September 2009) <<http://www.alriyadh.com/2009/09/14/article459250.htm> [Arabic]>

<sup>219</sup> See Gulf News ‘Shoura to debate Independent passports for Saudi women’ (Albilad, Saudi Arabia, 01 February 2017) < <http://www.albiladdailyeng.com/shoura-to-debate-independent-passports-for-saudi-women/>>

<sup>220</sup> NYU Law School. Dr. Abdullah F. Ansary. ‘UPDATE: A Brief Overview of the Saudi Arabian Legal System’ (August 2015) Hauser Global Law School Program (Global Law & Justice) <[http://www.nyulawglobal.org/globalex/Saudi\\_Arabia1.html](http://www.nyulawglobal.org/globalex/Saudi_Arabia1.html) >

<sup>221</sup> The Saudi Interior Ministry declared that women are legally not allowed to drive cars in Saudi Arabia based on a report from a council of senior scholars in Saudi Arabia See Riyadh Newspaper issue No. 8178; See also Standing Committee for Scholarly Research and Issuing Fatwas, Fatwa No 6412; See also Muhammed Alih Al-Munajjid, ‘A Brief Introduction to the Fatwas of the Standing Committee for Scholarly Research and Issuing

women are permitted to obtain a divorce or to seek gainful employment, but only with the approval of their male guardian. This approval, however, may be based in codified law or merely traditional, tribal practice. The confluence of customary social or religious practices with legally regulated behaviour is a hallmark of Saudi Arabia domestic law. These types of legal distinctions in classification shall be further addressed in later chapters and remain an important consideration in what reforms may be necessary to effectuate women's right to education within Saudi Arabia.

The judicial branch of Saudi Arabia consists of a dual-court system: The *Sharia* courts (*Al Mahakim Al Shar'iyah*), with authority over personal status law such as marriage, custody and property; and the Board of Grievances (*Diwan Al-Mazalem*) with jurisdiction over some criminal matters as well as administrative or governance-related matters.<sup>222</sup> The Board tends to assess decisions based not only on *Sharia* law, but also extended codes developed outside the emphasis of personal status law, for instance, discrimination provisions in the Saudi Labor Code.<sup>223</sup> On the other hand, *Sharia* courts focus on personal status law, thereby dealing with more intimate or communal-related matters under the *Qur'an*. The courts have been created by Royal Decrees and their structure, power, and functionality have been sustained by resolutions, regulations, and the opinions of jurists, but jurists are granted authority with respect to judgments and legal reasoning (*Ijtihad*) independent from that of other governing bodies or authorities.<sup>224</sup>

Specifically, with respect to women's rights, the dual judicial authorities provide means of redress to women through their various bodies. Further legal protection is also provided through either quasi-judicial entities or through departments for human rights set up within

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Fatwas' (Islamic Propagation Office, Riyadh, 2009) Islamhouse.com  
<[http://dl.islamhouse.com/data/en/ih\\_fatawa/en\\_A\\_brief\\_introduction\\_to\\_the\\_fatwas\\_of\\_the\\_Standing\\_Committee\\_for\\_Scholarly\\_Research\\_and\\_Issueing\\_fatwas.pdf](http://dl.islamhouse.com/data/en/ih_fatawa/en_A_brief_introduction_to_the_fatwas_of_the_Standing_Committee_for_Scholarly_Research_and_Issueing_fatwas.pdf)>

<sup>222</sup> Dr. Abdullah F. Ansary. 'UPDATE: A Brief Overview of the Saudi Arabian Legal System' (August 2015) NYU Law School. Hauser Global Law School Program (Global Law & Justice). <[http://www.nyulawglobal.org/globalex/Saudi\\_Arabia1.html](http://www.nyulawglobal.org/globalex/Saudi_Arabia1.html)>; See also Ibrahim Alhudaithy, 'Historical review of Saudi administrative contracts' (2002) Public Procurement Law Review 17-21 (P.P.L.R. 190)

<sup>223</sup> Articles 8 and 53, The Board of Grievances Law (2007) Royal Decree No M/78 art 5 (19/9/1428 H, 1 October 2007)

<sup>224</sup> The Law of the Judiciary issued by Royal Decree No M/64 (14/7/1395 H, 23 July 1975); See also Royal Decree No A/14 (2 April 2005) regulatory arrangement for the judicial and dispute resolution system; See also Ahmed A Al-Ghadyan, 'The Judiciary in Saudi Arabia' (1998) 13(3) Arab Law Quarterly 235, 237.

individual Ministries<sup>225</sup> or through the government-sponsored National Organisation for Human Rights in the Kingdom, which is tasked with investigating complaints of human rights violations.<sup>226</sup> Notably, however, there are questions as to whether these entities have been set up to accommodate gender segregation, and therefore whether they actually provide redress for injustice or provide shallow protections for women's rights.<sup>227</sup> If gender-mixing is prohibited under Saudi Arabia law, but accommodations are not made to allow women to access resources without the risk of mixing with men, then it stands to reason that women are either not actually permitted to use the resources regardless of what a law or regulation might say, or they are forced to attempt to access a resource knowing it to be a violation of gender-mixing and thereby causing them to intentionally violate the law to exercise a legally granted right. It is a common area of contradiction in Saudi Arabia's domestic law, and one that poses the greatest risk to women.

Collectively these governing bodies comprise Saudi Arabia's legal structure. Generally speaking, they look towards the primary sources of *Sharia* law in fulfilling their governance obligations and supplement any decisions, actions, or judgments with the secondary sources. There are two types of *Sharia* rules or laws: 1) Inalterable rules that cannot be changed by the passing of time, change of circumstances or through reasoning by religious scholars, since they are obligatory duties and explicitly prohibited acts<sup>228</sup>; and 2) alterable rules subject to public interests found in a particular time, or under certain circumstances, e.g., sanctions for violations of the rules.<sup>229</sup> Laws of the *Qur'an* are considered inalterable, while interpretations of *Sunnah* or secondary sources of law would be considered alterable. For example, the *Qur'an* requires *Shura* (consultation), but it does not specify the means and ways of implementing *Shura*.<sup>230</sup> Therefore there is overall flexibility and adaptability inherent to the function of *Sharia* law, but

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<sup>225</sup> CEDAW, Initial and Second Periodic Reports, Saudi Arabia, UN Doc CEDAW/SAU/2, 14.

<sup>226</sup> Royal Decree No 24/2 (17/1/1425 H, 9 March 2004) Human Rights Commission (25 January 2011) <<http://www.haq-ksa.org7>>

<sup>227</sup> For example, the Human Rights Commission has not established an all-female branch, but only an online submission facility for women: Turki Al-Sabeil 'Saudi Human Rights Commission Launches Website' (23 March 2011) <http://www.aawsat.com/english/news.asp?section=1&id=11985>

<sup>228</sup> A term known as "nass" -defined as the following: "A statement that is fixed or explicit. Used in Islamic law to refer to an explicit statement within the Qur'an" John L. Esposito, *The Oxford Dictionary of Islam* (Oxford University Press, 2003) available at <http://www.oxfordreference.com/view/10.1093/acref/9780195125580.001.0001/acref-9780195125580-e-1723?rkey=z4QLIZ&result=172>

<sup>229</sup> Abn Alqeym Al Jozayh, *Eghathat Al Lahfan* (Maktabat A'atef, 2001) [Translation: *Relieving the Needy*] (A'atef Library, 2001) 330

<sup>230</sup> The Holy Qur'an 42:38; See also Yusuf Al Qaradawi 'Al Khasani's Al Aammah li Al Islam (Mua'ssat Al Resalah, 1993) [Translation: 'General Characteristics of Islam' (Al Resalah Publishers, 1993)] 222

not to the basic tenets that comprise the core beliefs. Accordingly, there is no deviation from the directives of the *Qur'an*, but as discussed below, disagreement exists as to the legitimacy or interpretation of secondary sources within *Sharia* law. The following is a discussion of what are considered to be the primary and secondary sources of law in Saudi Arabia.

### 2.3.1.1 *The Qur'an*

A lot has been written on the *Qur'an* as a source of law. Briefly, the *Qur'an* is religious scripture considered to be the literal word of God and was revealed to the Prophet Muhammad over a period of 21 years beginning in 610 AD. Muslims believe the *Qur'an* to be divine, infallible, and the highest source of law. Its 114 chapters are arranged by length and contain 6,239 verses.<sup>231</sup> As discussed within this chapter, the *Qur'an* is considered to be the constitution of Saudi Arabia yet a majority of its verses deal with religious directions and goals for daily life rather than the normal legal matters involved in government.<sup>232</sup> Only about three percent of the *Qur'an* deals with more universally accepted questions of a legal nature. Approximately 70 verses address matters of family law, 70 address other civil law issues, 30 verses address penal law, 20 address public and taxation law and 20 address matters relevant to international law.<sup>233</sup> Politicians, *ulama*, academics, and jurists look to the *Qur'an* for guidance and authority in making decisions, policy, or fatwa.

### 2.3.1.2 *The Sunnah*

The *Sunnah* supplements the *Qur'an*, with the *Qur'an* serving as the supreme written authority of *Allah*. The *Sunnah* is the teachings, speech, deeds, and approved practices of the Prophet Muhammad. Muslims try to find their guidance in life in the example of the Prophet.<sup>234</sup> Part of the *Sunnah* includes the *hadith*—written traditions, words, or deeds of Muhammad, witnessed

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<sup>231</sup> Kareem Elbayar, 'Reclaiming Tradition: Islamic Law in a Modern World' (Summer 2008) The International Affairs Review Volume XVII, No.1, The George Washington University's Elliot School of International Affairs online, < <http://www.iar-gwu.org/node/23> >

<sup>232</sup> See generally, Arthur Jeffrey, *The Qur'an As Scripture* (Russell F. Moore Company, Incorporated, 1952); See also Charles J. Adams, 'Islamic Faith' In R. M. Savory "(1<sup>st</sup> ed.) *Introduction To Islamic Civilization* (1976) 33-44,

<sup>233</sup> F.E. Peters, *The Monotheists: Jews, Christians, and Muslims in Conflict and Competition, Volume 2: The Words and Will of God* (Princeton University Press, 2003) 107

<sup>234</sup> John L. Esposito, *Dictionary of Islam* (1<sup>st</sup> ed., Oxford University, 2001) 35

or recounted by others—which aids in distinguishing between lawful and unlawful conduct.<sup>235</sup> Or more simply, when the *Qur'an*, or the revelations of Muhammad do not provide an answer on how to act in certain situations, *Sharia* law dictates that the answer should be searched for in the tradition and life of the Prophet.

The *Sunnah* was originally passed down by the companions of the Prophet after his death.<sup>236</sup> Because of the wide variety of *hadiths* that make up the *Sunnah*, multiple schools of Islamic law developed according to varying interpretations of the *Qur'an* and *Sunnah*. The four main schools of law, discussed below developed different methodologies for interpreting *hadith* or the *Sunnah*, and thereby produced different legal norms and *fatwas*.<sup>237</sup>

### 2.3.1.3 *Ijtihad: A Manifestation of the Rational Sources of Islamic Law*

*Ijtihad* is the practice of applying human reasoning to the sources of Islamic law—the *Qur'an* and *Sunnah*—in order to derive legal rulings.<sup>238</sup> A definition of *Ijtihad* is that it

‘may consist of an interpretation of the source materials and inference of rules from them, or it may consist of an opinion regarding the *Sharia* ruling on a particular issue. Since the divine revelation has come to an end with the demise of the Prophet, *Ijtihad* remains the main instrument of interpreting the divine message and relating it to the changing conditions of the Muslim community.’<sup>239</sup>

It is an accepted practice within Saudi Arabia and is also considered to be ancillary to the *Sunnah*. *Ijtihad* is used to fill in interpretive gaps or understandings in the *Qur'an* and teachings of the *Sunnah*.

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<sup>235</sup> James Wynbrandt, *A Brief History of Saudi Arabia* (2<sup>nd</sup> ed, Facts on File, Inc., 2004) 36

<sup>236</sup> Ruthven Malise, *Islam in the world* (2<sup>nd</sup> edition Oxford University Press, NY 2000) 74-75

<sup>237</sup> See Article 45 of the Basic Law of Governance 1992 ‘The sources of the deliverance of fatwa in the Kingdom of Saudi Arabia are God’s Book and the Sunnah of His Messenger. The law will define the composition of the senior ulama body, the administration of scientific research, deliverance of fatwa and its (the body of senior ulama’s) functions.’

<sup>238</sup> Mohammad Hashim Kamali, *Sharia: An Introduction*, 25.

<sup>239</sup> Ibid.



An important point of clarity to be made is that *Ijtihad* is a human exercise within the practice of *Sharia* law, subject to the fallibility of human reason and perspective. It is not the direct word of *Allah*, rather, it is the tool by which Muslim scholars strive to continually understand, obey and conform to the directive of *Allah*. There are different methodologies that can be used to determine or exercise *Ijtihad*. For instance, the discretionary power of jurists in Saudi Arabia is not constrained by either codified laws or judicial precedence, as the Kingdom does not have a comprehensive practice of either methodology. Instead, a judge is encouraged to use *ijihad* and reasoning in reaching resolution, without the obligation to follow previous personal or peer-based judgments. In other words, a judge in the Kingdom may adjudicate cases, ‘empowered by personal Islamic understanding, without recourse to previous decisions relating to similar cases.’<sup>240</sup> *Ijtihad* is a crucial tool used by the four religious schools of thought and the *ulama* within the Kingdom; it is the subjective justification behind *fiqh* and *fatwa*.

The following subsections are the commonly accepted means or methods used in *Ijtihad*, but their legitimacy is still disputed between the different religious schools of thought.

#### 2.3.1.3.1 *Ijmaa’ (Consensus of Religious Opinion or Interpretation)*

*Ijmaa’* is the consensus of religious scholars, or *ulama*. The four schools disagree as to when or how such consensus becomes legitimate and as to what constitutes a qualified legal scholar whose opinion counts for purposes of the consensus.<sup>241</sup> The Hanbali school rejects any consensus that is not linked back to the Prophet as a source of authority. Other schools defend *Ijmaa’* as being based on the *Qur’an* and *Sunnah*’s which mention that the Muslim community cannot come to a consensus on something erroneous.<sup>242</sup> The objective of consensus is to ensure obedience to the word of *Allah* through agreed-upon interpretations by communal leaders, but the problems associated with *Ijmaa’*, as opposed to *fiqh*, is that *Ijmaa’* claims a divine link to *Sharia* whereas *fiqh* admits human interpretation and error. Hence, some religious scholars take *Ijmaa’* to be illegitimate, bordering on heretic. As a result, *Ijmaa’* is not used often as a source

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<sup>240</sup> Esther Van Eijk, ‘Sharia and National Law in Saudi Arabia’ In Jan Michiel Otto (eds) *Sharia Incorporated: A Comparative Overview of the Legal Systems of Twelve Muslim Countries in Past and Present*, (Leiden: Leiden University Press, 2010) 139–180; See also Maha A.Z. Yamani, *Polygamy and Law in Contemporary Saudi Arabia* (UK Reading: Ithaca Press, 2008)

<sup>241</sup> Frank E. Vogel, *Islamic Law and the Legal System of Saudi: Studies of Saudi Arabia* (1<sup>st</sup> edn Brill Publishing 2000) 45-50

<sup>242</sup> *ibid* 46, See also The Holy Qur’an 4:115

of law as rarely can the four schools come to a consensus, much less recognize the source as legitimate.

#### 2.3.1.3.2 *Qiyas (Analogical Juristic Deduction or Reasoning)*

*Qiyas* is the practice of drawing analogies from the rules directly mentioned in the *Qur'an* and *Sunnah* to issues that are not addressed by them.<sup>243</sup> Often considered to be the fourth source of law, *Qiyas* tends to be recognized by the more liberal schools of law, but not the Hanbali school, which dominates in Saudi Arabia. The basis for *Qiyas* is provided in *Qur'an* 3:190: 'Lo! In the creation of the heavens and the earth and [in] the difference of night and day are tokens for men of understanding.'<sup>244</sup> This provides the ability to interpret revelation through reason and the intellect—the tokens of understanding refer to analogies made to God's words—and it is permitted for those who are able to use the ability properly.<sup>245</sup> Thus the practice of jurists exercising independent thought and reasoning was established, which in-turn determines practical legal decision-making through case-by-case factual analysis given the entirety of a circumstance.

#### 2.3.1.3.3 *Fiqh (Comprehensive Use of Tools from the Above to Create Jurisprudence)*

*Fiqh* is considered to be the law as interpreted and applied by the jurists through their interpretation of the *Qur'an* and *Sunnah*.<sup>246</sup> In Islam understanding, *Sharia* refers to the totality of God's will as revealed through the Prophet Mohammed. *Fiqh* is the science of jurisprudence and legal conclusions of the jurists.<sup>247</sup> In other words, *Sharia* is sacred, universal, and infallible, whereas *fiqh* is subject to human error and change.<sup>248</sup> The value of *fiqh* is its use as a tool to align legal norms to social norms within *Sharia*, and to create ascertainable or practical

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<sup>243</sup> Mohammad Hashim Kamali, *Sharia: An Introduction*, 19.

<sup>244</sup> The Holy Qur'an verse 190

<sup>245</sup> Herbert J. Liebesny, *The Law Of The Near East And Middle East: Readings, Cases And Materials* (1<sup>st</sup> ed. State University of New York Press, Albany, 1975) 1-44, 18

<sup>246</sup> Mohammad Hashim Kamali (n168), *Sharia: An Introduction*, 3.

<sup>247</sup> See Islamic Supreme Council of America 'Understanding Islamic Law', Section entitled 'Fiqh-Application of *Shari'ah* in Real Life' <[http://www.islamicsupremecouncil.org/understanding-islam/legal-rulings/52-understanding-islamic-law.html#\\_ftn2](http://www.islamicsupremecouncil.org/understanding-islam/legal-rulings/52-understanding-islamic-law.html#_ftn2)>

<sup>248</sup> See Muhammad hashim Kamali, 'Sources, Nature, and Objectives of *Sharia'ah*' (1989) *Islamic Quarterly* 33, no 4, 216; See also Khaled Abou El Fadl, *Speaking in God's Name: Islamic Law, Authority, and Women* (1<sup>st</sup> ed Oneworld Publications, 2001) 32-35

interpretations of individual rules of conduct.

Both men and women may participate in producing *fiqh*. In fact, in the early days of Islam, the Prophet's wives were teachers and transmitters of *fiqh*. For example, the Prophet's wife A'isha was one of the earliest and most authoritative figures who taught Islamic law and produced *fiqh*.<sup>249</sup> Because *fiqh* refers to a deep knowledge and understanding of Islamic law, this fact shows that early female figures in Islam were educated and were allowed to participate in legal discourses.

### 2.3.2 Interpretation of Saudi Law and Key Institutions

Saudi, or *Sharia* law is traditionally interpreted by *ulama* from the primary and secondary Islamic schools of thought (discussed below), while conventional laws are interpreted, based on the guidance of the *ulama*, through executive action, legislative policy, or judicial determination. The key institutions, as mentioned above, including the King, the Council of Ministers, the *Shura* Consultative Council, the Board of Grievances, and the *Sharia* Courts (family, property, civil and criminal matters). There are also associated subcommittees or tributary authorities such as the Committee and Police for the Promotion of Virtue and the Prevention of Vice, which enforces forbidden (*haram*) acts, including, but not limited to, impermissible gender mixing, acts of indency, or women taking action without the permission of their *Mahram*. The combination of both the *ulama* and the traditional mechanisms of government, i.e., the executive and legislative bodies, serve to interpret Saudi law as well as initiate policy reform, but tensions between these institutions or factions exist, rendering it less predictable which interpretation may or may not dominate or prevail. However, as with any governing regime or political policy, reforming interpretation is an intentionally slow process, allowing adequate time for debate and societal integration.

Again, in referring to a recent proposal from 2016 as an example of how interpretation works in key institutions, women and male supporters petitioned the *Shura* for abolishment of the guardianship system. The petition for abolishment was based on claims of the signatories that women have the right to be treated equally, without the need for permission of a male guardian

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<sup>249</sup> Mohammad Hashim Kamali, *Sharia: An Introduction*, 58.

for making decisions.<sup>250</sup> Further, the petition challenged the status quo in considering the guardianship system to be religiously based when in fact it is a ‘mere patriarchal system that violates women’s human rights.’<sup>251</sup> Despite obtaining over 14,000 signatures, the petition was essentially ignored by the governing bodies at first. Despite the institutional and societal obstacles, Saudi Arabia's King Salman issued an April 17, 2017 ministerial resolution in recognition of the proposal and the attention it garnered was significant in illustrating how interpretation in key institutions might function.<sup>252</sup> Such legal and policy-focused advocacy demonstrates the relevancy of the key institutions in initiating, upholding, or denying the rights of women in educational initiatives. While the *Shura* is reputed to be a more functional venue for discussion of gender-based matters, it proved that the deep roots of the patriarchal system remain.

### 2.3.3 Interpretative Disputes and the Role of Islamic Schools of Thought

In Islam, there are four religious schools of law: The Shafi’i, Hanafi, Maliki, and Hanbali schools.<sup>253</sup> The predominant school of law in Saudi Arabia is the Hanbali school,, followed by the Shafi’i, Maliki, and Hanafi schools. These schools are run by religious scholars (*ulama*) and serve as interpretive institutions for moral and social rules or practices within Saudi Arabia. The latter three schools developed progressive methods in interpreting legal sources, while the Hanbali school tends toward a literal, or textualist, interpretation of Islamic texts. The Hanbali school ‘does not recognize non-textual sources of law and rejects any innovation in religion.’<sup>254</sup> Saudi Arabia is one of the few Arab countries to primarily follow the Hanbali school, with the Hanafi school being the predominant school in the Middle East and “accounting for nearly a

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<sup>250</sup> ‘Women in Saudi Arabia want to be full-fledged citizens’ Deutsche Welle (DW online) <<http://www.dw.com/en/women-in-saudi-arabia-want-to-be-full-fledged-citizens/a-36015288>> ; See also Saudi Gazette ‘Irony of male guardianship in Saudi Arabia’ (Al Arabiya English, 9 October 2016) <<https://english.alarabiya.net/en/perspective/features/2016/10/09/Irony-of-male-guardianship-in-Saudi-Arabia-.html>>

<sup>251</sup> *ibid*

<sup>252</sup> [Arabic version] <<http://www.okaz.com.sa/article/1544493>>; Jon Sharman, ‘Saudi Arabia to let women work and study without man’s permission’ *Independent* (London, 6 May 2017) <<http://www.independent.co.uk/news/world/middle-east/saudi-arabia-male-guardianship-relax-women-work-study-gender-equality-a7721641.html>>

<sup>253</sup> Irini Kakoulidou, ‘The Background and Formation of The Four Schools of Islamic Law’ 1-14. <[https://www.academia.edu/2310961/The\\_background\\_and\\_formation\\_of\\_the\\_Four\\_Schools\\_of\\_Islamic\\_Law](https://www.academia.edu/2310961/The_background_and_formation_of_the_Four_Schools_of_Islamic_Law)>

<sup>254</sup> Hossein Esmaeili ‘On a Slow Boat Towards the Rule of Law: The Nature of Law in the Saudi Arabian Legal System’ (2009) 26 *Ariz. J. Int’l & Comp. L.* 1,5

third of the world's Muslims.”<sup>255</sup>

The Hanafi school was founded in 767 by Abu Hanifa in Iraq. It has significant presence in the Middle East and South Asia and is considered to have more liberal interpretations based on reason and *Qiyas*.<sup>256</sup>

The Maliki school in North, West and Central Africa is considered to be the most liberally-minded of the four schools. Founded by Malik ibn Abas, it holds as authoritative the “living tradition” (*vox populi*) of the Prophet in addition to the formal *Hadith*.<sup>257</sup> The Maliki school provides women more individual rights, and is said to have a more active link between law and society by focusing on living tradition rather than the historically written words.

The Shafi'i school provides a formalistic way of interpreting the *Sunnah*, based on the techniques of the famous theorist Muhammad al Shafi'i, by omitting and rendering inadmissible any tradition that is not directly traceable back to the Prophet himself.<sup>258</sup> Al-Shafi'i emphasized the importance of the chain of transmission of *hadith*, the *isnad* (links of transmission). Each *hadith* has an *isnad*, a chain of transmission including each individual person who heard the *hadith* from someone and then transmitted it to someone else. Each link in the chain is evaluated for his or her reliability, and usually a chain of transmission has to have no gaps in order to be a legitimate source of authority.<sup>259</sup> Each link must be an approved figure in the Islamic tradition, such as a companion of Muhammad or some other approved legal authority.

The Hanbali school was founded by Ahmad ibn Hanbal. It is the predominate school in Saudi Arabia, but the Saudi religious scholars are partially influenced by the Shafi'i school, and is often referred to as ultra-conservative in comparison to the other three schools.<sup>260</sup> It is the most

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<sup>255</sup> Herbert J. Liebesny, *The Law Of The Near East And Middle East: Readings, Cases And Materials* (1<sup>st</sup> ed. State University of New York Press, Albany, 1975) 1-44, 22

<sup>256</sup> John L. Esposito, *The Oxford Encyclopedia of the Modern Islamic World*, Chapter “Legal Thought and Jurisprudence”, (1<sup>st</sup> published, Oxford University Press 1995) 457

<sup>257</sup> John L. Esposito, *The Oxford Encyclopedia of the Modern Islamic World*, Chapter “Legal Thought and Jurisprudence”, (1<sup>st</sup> published, Oxford University Press 1995) 459

<sup>258</sup> Joseph Schacht, *An Introduction to Islamic Law* (Oxford: Oxford University Press, 1982) 59

<sup>259</sup> Werner Ende and Udo Steinbach, *Islam in the World Today: A Handbook of Politics, Religion, Culture, and Society* (Originally published as *Der Islam in der Gegenwart*, 5<sup>th</sup> edition, Cornell University Press 2010) 45

<sup>260</sup> Bo J. Theutenberg, ‘Fokratt och sakerhetspolitik’ (Nordstedt 1986), 562; See also Joseph Schacht, *An Introduction to Islamic Law* (Oxford: Oxford University Press, 1982) 58

resistant to liberal interpretation or progressive reform and least influenced by modern pressures or conditions.

Generally speaking, “the Hanbali school believes that consensus may arise only through the universal agreement of the Prophet’s contemporaries and his early followers, not contemporaries alive and agreeing today.”<sup>261</sup> Al-Zuhayli, wrote:

Consensus of scholars on a certain issue made earlier can be abrogated by the consensus made by a later generation if there were changes in the conditions which are for the common good of the people as time progresses. The followers of the Hanbalī school and some of the followers of the Hanafī school say that one can reformulate or abrogate a law developed by consensus at one time by a new law that fits the later circumstances.<sup>262</sup>

This is only a brief history and explanation of the approaches taken by each religious school of thought. It provides a valuable insight into not only how legal analysis operates within Saudi Arabia, but in how the rule of law is subject to religious moral interpretations. These classical jurisprudential school have often addressed gender issues through a particular interpretation of the rights and responsibilities of individuals to their creator, and to society as a whole. The importance of debates among different Islamic schools will be demonstrated through discussion of the lens of the Islamic conception of rights.

## **2.4 Islamic Rights Conceptions**

While secular legal frameworks are premised on the assumption that individual rights are constituted, defined and protected by legal institutions and societal participation, *Sharia* law sets out a dynamic body of rights, responsibilities and obligations based on an understanding of gender-related roles within the family and community according to the dictates of *Allah*. This distinction is illustrated by the rights-based paradigm underpinning first generation civil and political rights defined and elaborated by key international human rights law instruments,

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<sup>261</sup> Comment, ‘Islamic Law and Modern Government: Saudi Arabia Supplements the Shari’a to Regulate Development’(1979) 18 Columbia Journal of Transnational Law 413, 419

<sup>262</sup> *ibid*

on the other hand, the ‘collectivist’ form of second and third generation socio-economic rights that are more closely related to Islamic rights conceptions.<sup>263</sup>

Central to the Islamic rights paradigm is the sovereignty of Allah above all other man-made laws or societal mores, a concept most clearly embodied by the doctrine of *tawhid*. The concept of Tahwid speaks to the unity, equality and oneness of all humankind, as all are Allah creation.<sup>264</sup> In this regard, the Quran postulates: [w]e have bestowed dignity on the progeny of Adam... and conferred on them special favours.<sup>265</sup> The Islamic concept of dignity shares basic similarities of modern concepts of human dignity and basic equality between all human beings – the core pillars of modern (secular) human rights law.<sup>266</sup> However, the foundations of Islamic rights appear to diverge from the historic philosophical origins of modern (Western) rights discourses in significant ways.

The modern (Western) concept of rights can be traced back to premodern thinkers such as Aristotle to modern liberal thinkers such as Rousseau and Locke. While individual rights are generally defined negatively, as freedom from harm or undue interferences in an individual’s life and property. The Western rights-based paradigm is assumed to be concerned with the notion of individual self-interest. In conventional thinking, Islamic right frameworks tend to privilege general welfare and the attainment of social virtue through a collective effort over individual freedoms.<sup>267</sup> Accordingly, the Islamic framework establishes a stronger link between a person’s rights, which each flow from a divine source, and their corresponding duties to fulfil their religious obligations. After the duty to meet their obligations to the creator (fasting, praying, pilgrimage etc), the Islamic conception of rights elevates the welfare and benefit of all human beings.<sup>268</sup> In this sense, as Baderin notes, rights and duties are intimately connected in the context of the Islamic rights framework. Islamic law also regulates the relation between genders, a theme that will be returned to in the following chapters. These differences have also spurred attempts to develop human rights norms from within an Islamic law framework. In this

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263 Jason Morgan-Foster, ‘Third Generation Rights: What Islamic Law Can Teach the International Human Rights Movement’ (2014) 8(1) Yale Human Rights and Development Journal 67, 73.

264 Islamic Relief, ‘An Islamic Perspective on Human Development’ (*Islamic Relief*, 2014).

265 Qur’an 17:70.

266 *ibid* 4.

267 *ibid*.

268 *ibid*; Mashood A Baderin, *International Human Rights and Islamic Law* (OUP 2003) 40.

regard, Saudi Arabia has participated in two intergovernmental conferences- the Declaration of Human Rights (UIDHR) (1981) and the Cairo Declaration of Human Rights in Islam (1990).

The above should not suggest that the international human rights law and Islamic rights conceptions are fundamentally in conflict.<sup>269</sup> The presumption that the secular framework of international human rights laws is exclusively concerned with individual rights, defined as negative freedoms, mistakes the richness of the philosophical and historical origins of modern human rights law. After all, liberal giants as Mill recognised that individual rights only made sense if understood within the duties owed by each other and to the society as a whole, and these ideas have given rise to the development of so called positive rights, whereby the state and society have some responsibility to provide minimal social and economic protections to individuals, groups and communities.<sup>270</sup> Therefore, the modern and international human rights tradition is not necessarily in conflict to Islamic conception of duty and the collectivist conceptions of the common good that inform it.<sup>271</sup> One area of commonality can be found in forms of international consensus that have evolved over the past 5 decades over the existence of third generation social, economic and cultural rights. Such rights include the right to peace and development. These rights that have a firm basis in Islamic scripture.<sup>272</sup> Nonetheless, the rights and duties-based paradigms associated with international human rights and Islamic rights conceptions are perceived by some scholars as ‘two different attempts towards the same end: a structure of normative, social, political, and moral order.’ The concept of individual rights as negative freedoms has however taken precedence in international human rights law, limited only by the broad public policy exceptions that enable such rights to be curtailed only if they pose a significant threat to morality, public order and the general welfare. In Islamic discourses, the duties paradigm take a far more prominent role, with the Universal Islamic Declaration of Human Rights<sup>273</sup> stating that ‘[e]ach one of the Human Rights enunciated in this declaration carries a corresponding duty’.<sup>274</sup> This emphasis on duties over individual liberties does offer

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269 Jason Morgan-Foster, ‘Third Generation Rights: What Islamic Law Can Teach the International Human Rights Movement’ (2014) 8(1) Yale Human Rights and Development Journal 67, 73.

270 John Laws, ‘The Constitution: Morals and Rights’ (1996) 4 Public Law 627.

271 Jason Morgan-Foster, ‘Third Generation Rights: What Islamic Law Can Teach the International Human Rights Movement’ (2014) 8(1) Yale Human Rights and Development Journal 67, 73.

272 *ibid*

273 Universal Islamic Declaration of Human Rights 1981 < <http://www.alhewar.com/ISLAMDECL.html>>.

274 *ibid*, UIDHR Explanatory Notes 2, stating that ‘[t]he Western notion of individual self-interest as the antithesis of general welfare is thus theoretically absent in Islamic social thought’



governments with a great deal of leeway to determine how such rights will be limited when deemed in conflict with religiously derived duties.

Relatedly, a common Western assumption is that women's rights are entirely inhibited by the religion of Islam and law in Saudi Arabia. In reality, women are considered of equal status to men in the *Qur'an*, but different rules apply to each gender.<sup>275</sup> In truth, *Sharia* law preserves women's rights from birth until death.<sup>276</sup> Additionally, Islam encourages Muslims to treat their daughters, mothers, and wives with kindness.<sup>277</sup> It is the scope and means of gender-based and contingent rules that have become the source of gender discrimination, not the question of whether women are equal to men.

Confusion is also generated by the distinctive characteristics of a "right" as opposed to an "obligation" within *Sharia* law. To Islamic scholars, the fact that there is a distinction is well accepted but competing interpretations of what the *Qur'an* says about rights and obligations evokes endless intellectual clashes and leads to difference of opinions, or *fatwas*. For example, this occurs in the context of women's rights. An accepted premise amongst the schools of law is that a right entails optional courses of conduct that one has the right to choose from but can also voluntarily relinquish. To take this a step further, whilst the *Qur'an* teaches equality of males and females (and complimentary natural rights and obligations within a marriage), it does appear to ascribe different rights to men and women based on their natural strengths and weaknesses.<sup>278</sup> As discussed in greater detail in the next chapter, the guardianship concept derives from these teachings, but conflicting interpretations of these teachings, and of one verse in particular, have led to significant ambiguities and debate into what rights women actually have in Saudi Arabia.<sup>279</sup>

At the same time, it is worth noting that the *Qur'an* teaches that God created both men and women who are formed from the same soul, thereby granting women dignity and claims to

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<sup>275</sup> Abdur Rahman Doi 'Women in *Sharia*' (A.S. Noordeen, 1990) 135

<sup>276</sup> Yusuf Al-Hajj Ahmad, 'Encyclopaedia of Islamic Jurisprudence Concerning Muslim Women' (Darussalam, 2010) vol 2, 30; See also Abdur Rahman Doi, 'Women in *Sharia*' (A.S. Noordeen, 1990) 6

<sup>277</sup> Muhammad Zafrulla Khan, *Islam and Human Rights* (Islam International Publication, 1999) 103

<sup>278</sup> Joelle Entelis, 'International Human Rights: Islam's Friend or Foe-Algeria as an Example of the Compatibility of International Human Rights Regarding Women's Equality and Islamic Law' (1996) 20 Fordham International Law Journal 263.

<sup>279</sup> The Holy Qur'an "Men stand over the women through that with which God has preferred some of them over others and that which they expend of their wealth". (as interpreted by Tafsir Kashf Al-Asrar). Full reference

equal rights with men in all spheres of life (including education):

O mankind, fear your Lord, who created you from one soul and created from it its mate and dispersed from both of them many men and women. And fear Allah, through whom you ask one another, and the wombs.<sup>280</sup>

Accordingly, there is no debate in *Sharia* as to whether both genders have certain equal rights, such as the right to education, but the scope and means of each right is subjective, based on religious interpretation and secular public policy. The legal structure in Saudi Arabia creates obscure lines around the rights of individuals that are supported by religious interpretation, but may often contradict specific legal regulations or codes within Saudi Arabia's body of written regulations or non-religious laws (i.e., the Basic Law) that support human rights. Regulations that restrict the rights of women based on gender are provided without establishing written legal elements or tests as to when or how a woman's rights would equate to human rights.

## **2.5 Relationship Between Rights and Responsibilities in Saudi Law**

As noted above crucial to understanding *Sharia* is the notion that, unlike more universal notions of rights which focus on the individual, Islamic law emphasizes communitarian rights aimed at safeguarding the collective cultural, societal and religious identity of the whole.<sup>281</sup> The desires, needs, or rights of an individual do not take precedence above the good and benefit of the community, but instead serve to bolster the strength and longevity of the societal structure. Gender-based roles and the rights of women are also seen through this lens. In Saudi society, these longstanding theological debates have sparked larger questions around the extent to which men and women are assumed to have different (but equivalent) rights, owing to the unique attributes and nature of each gender and for the benefit of the nuclear family and the functioning of society-at-large.<sup>282</sup>

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<sup>280</sup> The Holy Qur'an 4:1 full reference is needed.

<sup>281</sup> Mohammad Hashim Kamali, *Sharia Law: An Introduction* (Oneworld Publications, 2008) 17.

<sup>282</sup> The Editors, 'How the West Misses the Point on Women's Rights in Saudi Arabia' (16 Nov 2016) World Politics Review online, <<http://www.worldpoliticsreview.com/trend-lines/20472/how-the-west-misses-the-point-on-women-s-rights-in-saudi-arabia>>, based on their interview with Katherine Zeopf, author of 'Excellent Daughters: The Secret Lives of Young Women Who are Transforming the Arab World' from the Pulitzer Center on Crisis Reporting,

On the broader question of the influence of human rights discourses on domestic law provisions, the Saudi government has historically defended the legitimate autonomy of its own domestic laws and traditions against foreign-imposed laws, norms and cultures. This should not suggest that human rights discourses have not emerged as a focus of government policy over the decades. In 1990 the member states of the Organisation of the Islamic Conference, including Saudi Arabia, adopted the Cairo Declaration on Human Rights in Islam, which was passed as a reaction to the universal character and definitions of “rights” within the United Nation’s Universal Declaration of Human Rights.<sup>283</sup> The Cairo agreement granted humans the right to “freedom and rights to a dignified life in accordance with the Islamic *Sharia*.”<sup>284</sup> Additionally, all treaties and international conventions ratified by Saudi Arabia include the reservation that under no circumstances shall the legal provisions of those agreements supervene *Sharia*.<sup>285</sup> Therefore, until actual laws or regulations are promulgated within Saudi Arabia, reform remains contingent on its acceptance by religious authorities.

Nonetheless, in recent times, Saudi Arabia has declared its intention to consider the shared norms or definitions of women’s rights of the wider international community, without relinquishing its own religious tradition, such as the reform of the guardianship system in 2017 and by increasing the access of women to additional fields of work through the creation of gender-segregated spaces.<sup>286</sup> Furthermore, the dual court structure in Saudi Arabia has undergone recent reforms to expand the access of women to the judicial process in matters of personal status issues (such as divorce) in the *Sharia* courts, access to appeals in employment discrimination and access to the Board of Grievances (now renamed the Administrative Court)

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<sup>283</sup> Cairo Declaration on Human Rights in Islam, Aug. 5, 1990, U.N. GAOR, World Conf. on Hum. Rts., 4th Sess., Agenda Item 5, U.N. Doc

<sup>284</sup> Ibid

<sup>285</sup> See for example of ‘reservation’ language Royal Decree No 25 Concerning the Kingdom’s Accession to the Convention on the Elimination of All Forms of Discrimination Against Women (28/5/1421 H, 28 August 2000). For text see: CEDAW, Initial and Second Periodic Reports, Saudi Arabia, UN Doc CEDAW/C/SAU/2; See also Articles 19-23 of the Vienna Conventions on the Law of Treaties, opened for signature 23 May 1969 (entered into force 27 January 1980) concerning the practice of reservations in international agreements.

<sup>286</sup> See ‘summary’ section on the Saudi Arabian Ministry of Foreign Affairs, ‘The Foreign Policy of the Kingdom of Saudi Arabia’ webpage (2017) <<http://www.mofa.gov.sa/sites/mofaen/KingdomForeignPolicy/Pages/ForeignPolicy24605.aspx>>; See also, section on ‘The Kingdom’s Stance on Some Issues’, article ‘Saudi Arabia rejects any interference in its internal affairs while it respects international charters not contradicting Islamic Sharia law’, (Saudi Arabian Ministry of Foreign Affairs (mofa) 2017) <<http://www.mofa.gov.sa/sites/mofaen/KingdomForeignPolicy/KingdomPosition/Pages/ArticleID20164271515472.aspx>>

for matters of injustice.<sup>287</sup> Expansion of access means increased potential for women to play active roles in personal legal matters, as well as to shed the confines of the guardianship system in being able to represent themselves in proceedings or to obtain the representation of a female attorney without the permission of a male guardian.<sup>288</sup>

The current ruling power of the Kingdom is considered to be reform-friendly and is inclined to consider adopting reforms to the rights of women and has the potential to benefit domestic economic diversification, yet any progressive action taken by the government faces the resistance of the conservative *ulama*. The *ulama* provide the scholarly interpretations of the *Sunnah* in the context of social policies and understandings. This is further effectuated by the independent nature of jurists who are free to interpret the *Qur'an* and the *Sunnah* in the context of personal status (i.e., marriage, divorce, custody, property ownership, and inheritance) and criminal law, both of which pertain to the legal restrictions of the rights of women and the implications of the guardianship practice in Saudi Arabia.

However, this does not have to be the case. For instance, in the 1960s King Faisal established an agenda to introduce girls' public education into the Kingdom.<sup>289</sup> The reforms were successfully implemented based on the King's cooperative efforts with *ulama*. The *Dar Al Hanan*, or the first public school academy for girls, was opened in 1960.<sup>290</sup> The initial reception by the *ulama*, however, considered this to be a moral corruption that would destroy the foundations of the Saudi Muslim family. The King, supported by influential men ("guardians") who had petitioned for the girls to stay in Saudi Arabia for their education instead of travelling to other neighbouring Muslim countries, convinced the more conservative and traditionally-

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<sup>287</sup> See Article 173, The Law of Sharia Procedure 2000 (Saudi Arabia) issued by Royal Decree No M/21 (20/3/1421 H, 23/6/2000) OG Umm al-Qura no 3811 (17/6/1421 H, 17/9/2000); See also Human Rights Watch, 'Saudi Arabia: Where Fathers Rule and Courts Oblige' (HRW, 18 October 2012) <<http://www.hrw.org/en/news/2010/10/18/saudi-arabia-where-fathers-rule-and-courts-oblige>>

<sup>288</sup> See Eleanor Abdella Duomato 'Women's Rights in the Middle East and North Africa 2009 - Saudi Arabia' (11 February 2009) Freedom House, Section entitled 'Non discrimination and Access to Justice'; See also Al Arabiya, 'Saudi Arabia Grants License To First Female Lawyer' (7 October 2013) <<http://english.alarabiya.net/en/perspective/features/2013/10/07/Saudi-Arabia-grants-license-to-first-female-lawyer.html>> ; See also Barry Rubin, *The Middle East: A Guide to Politics, Economy, Society and Culture, Volumes One-Two* (1<sup>st</sup> published 2012 Routledge 2015) 615

<sup>289</sup> Majed Alamri, 'Higher Education in Saudi Arabia' (2011) 11 *Journal of Higher Education Theory and Practice*, 88-91

<sup>290</sup> Amani Hamdan, 'Women and education in Saudi Arabia: Challenges and achievements' (2005) 6(1) *International Education Journal* 49-50; See also citations to Robert Lacey *The Kingdom: Arabia and the House of Sa'ud* (New York: Harcourt Brace Jovanovich, 1981) 368

minded *ulama* that *Sharia* does not oppose the education of women, and that by receiving an education, these girls would become better Muslim mothers and better contribute to the community.<sup>291</sup>

Consequently, this was the first notable modern advancement in women's rights, and led to the creation of segregated educational spaces between the boys and girls, as well as providing career opportunities for the educated girls to become educators themselves.<sup>292</sup> This case serves as an example of the potentially cooperative nature between religious moral constructs and non-religious laws within the Kingdom, thereby promoting the argument for further reforms to be made to women's right in education (as argued in this thesis), and also emphasizes the critical nature of interpretations in *Sharia* law.

The remaining question is about who has what responsibility in the determination, enactment, and enforcement of rights or obligations in Saudi Arabia. As discussed above, the Saudi Arabia Basic law delineates certain responsibilities of the state and rights of individuals; but the authority for each of these is *Sharia*. For rights and obligations under Saudi law, this responsibility becomes the object of legal contestation when it does not fall clearly within the bounds of religious interpretation *or* social or political domestic policy. One can easily how this may lead to conflicts of jurisdiction. In terms of women's right to education, for example, does it become the responsibility of the State, the *ulama*, or of individual citizens to defend and honour a woman's right to education? And, what means do each of these entities have to not only honour but enforce such rights? How are violations assessed and punished? As will be discussed in the context of international human rights, there are legal processes put in place to set expectations and to address violations. But, in Saudi Arabia, its legal system is devoid of case law and precedent, therefore it becomes difficult to provide consistent guidance into how legal violations are to be handled. Additionally, violations of religious tenets can be privately punished and are not subject to the oversight of the judiciary. In other words, the ambiguousness of the Saudi Arabia system results in an *ad hoc* assessment of rights, obligations

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<sup>291</sup> *ibid*

<sup>292</sup> See discussions in Annemarie Van Geel, 'Whither the Saudi Woman? Gender Mixing, Empowerment and Modernity' in Roel Meijer and Paul Aarts (eds), *Saudi Arabia between Conservatism, Accommodation and Reform* (The Hague: Netherlands Institute of International Relations 'Clingendael', 2012) 60. <[http://www.clingendael.nl/sites/default/files/20120000\\_research\\_report\\_rmeijer.pdf](http://www.clingendael.nl/sites/default/files/20120000_research_report_rmeijer.pdf)>; See also citation to Mai Yamani and Andrew Allen, *Feminism and Islam: Legal and Literary Perspectives* (Ithaca Press, 1996) 263

and responsibilities, leaving women vulnerable to subjective interpretation and discretionary enforcement by guardians invoking their “responsibilities” under *Sharia*.<sup>293</sup>

## 2.6 Conclusion

This chapter has analysed the legal structure of the Saudi system, introduced the concept of constitutional-based policies in order to paint a picture of how aspects of the Saudi and Islamic rights conceptions may empower or constrain women’s right to education in practical context. A further purpose of the chapter was to better explain the interaction of the governing religious and political authorities within the Saudi system, preparing the ground for a closer examination of the nexus between law, culture and religion in the next chapter. It has attempt to explore the centrality of Sharia under Saudi Arabia’s constitutional framework and the dynamic in ways that rights are defined in Islam and then implemented in the context of Saudi legal and social decision-making processes. The effort to define gender rights is first shaped by Islamic perspectives on the right-duty relation but the precise application of these abstract rights conceptions acquire concrete form by way of the formal and informal deliberative and discursive practices facilitated by Saudi Arabia’s constitutional framework. The debate on women’s rights are of course shaped by the policies, rulings and norms of the Saudi government, the *ulama* or the *Shura*, but they are also shaped from the bottom up as a result of evolving and fixed social attitudes and perspectives on the legitimate role, rights and responsibilities of genders in public spaces and in the private spaces of work and home life. In this regard, the debate on women’s rights cannot be explained by invoking zero sum concepts such as “tradition,” “modernity,” “progressive” or “conservative.” Such labels would fail to grasp the true nature and dynamics of any nation, not just that of Saudi Arabia. Although, there is no one-size-fits-all solution to these issues, this thesis strives to introduce feasible conclusions to the evolving questions of the international community regarding the status of women’s right to education and suggests reforms, where necessary, that would lead to the betterment of the Saudi society based a multi-dimensional understanding of what it means to be a member of the Saudi community, one that can accommodate a religiously and culturally

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<sup>293</sup> The Holy Qur’an 4:34, For instance supporters of right for punishment of women by family under the Guardianship system cite to the Qur’anic verse 4:34 ‘Men are the protectors and maintainers of women, because Allah has made one of them to excel the other, and because they spend (to support them) from their means.’

sensitive perspectives on women's rights. These issues are developed in the next chapter in the context of an Islamic perspective on the right to education.

## Chapter 3

### The Historical Development and Character of Rights under Islamic Law

#### 3.1 Introduction

This chapter establishes that the right to education for women is dependent on the full and free exercise of other rights and freedoms, including the freedom of movement, expression, speech and others. These rights are inhibited by national policies which legitimize, entrench and maintain forms of gender inequality and exclusion through legislation and policymaking, and in the Saudi context, by way of guardianship and gender segregation policies. It will be argued that the Saudi government's adoption of these policies does not constitute a faithful interpretation of scripture, but rather a male-centered reading of the spirit and text of Islamic primary and secondary sources of law. Moreover, this research contends that methods and sources of Islamic interpretation need to be treated not as static and unchanging, but an open-ended, dynamic and revisable. If properly interpreted under the spirit of the *Qur'an* and *Sunnah*, the legislative and policy-oriented actions taken by Saudi Arabia officials can simultaneously preserve directives of obedience to *Allah* and establish cultural norms or activities which promote not only the rights of women, but of the nuclear family, economic principles, property rights, and human rights practices, as described in the *Qur'an* and the secondary law sources of Saudi Arabia.

In the past years, the debates on the subject of women and their role in Saudi Arabia have caught the attention of the international community. Great emphasis has been placed on women's education and the right to acquire it in the Kingdom. One of the Saudi Arabia's educational policies most relevant to this research is to promote "belief in the One God, Islam as the way of life, and Muhammad as God's Messenger."<sup>294</sup> Part of this policy, inspired by the principles of Islam, is educating women about the importance of religion. As the policy states:

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<sup>294</sup> International Bureau of Education, "A National Report about Education in Kingdom of Saudi Arabia", (UNESCO, 2001, [http://www.ibe.unesco.org/fileadmin/user\\_upload/archive/International/ICE/natrap/SArabia\\_E\\_Scan\\_1.pdf](http://www.ibe.unesco.org/fileadmin/user_upload/archive/International/ICE/natrap/SArabia_E_Scan_1.pdf),



The purpose of educating a girl is to bring her up in a proper Islamic way so as to perform her duty in life, be an ideal and successful housewife and a good mother, ready to do things which suit her nature ..... [and that] women's right to obtain suitable education [is] on equal footing with me in the light of Islamic laws.<sup>295</sup>

To better explore women's education in Saudi Arabia, it is essential to first review the literature on the complex relation between Islamic society and women's rights to education, and the impact of culture on the issue. This will prepare the ground for the legal basis of the right to education under international in the context of Saudi Arabia's domestic legal system.

### 3.2 The Status of Women in Islamic societies

The rights of Muslim women is a subject that is discussed in Western media time and time again, particularly because of the apparent discrepancies and problems it creates. In fact, Islamic societies are often seen as regressive on the matter of women's rights. For instance, prominent critic Ayaan Hirsi Ali depicts an image of Islam as one that legitimises forced marriage, but it is arguable that she misattributes this as being a prescribed Islamic practice.<sup>296</sup> The issue is more complex and involves the interplay of sociological and cultural factors, often deviating from the true spirit of Islam.<sup>297</sup> As a matter of fact, the Islamic history does not depict oppression and degradation of women, with the *Qur'an* actually stressing the importance of giving women attention. In pre-historic Arabia, Islam represented a major development of the status and rights of women.<sup>298</sup> Aside from eradicating former traditions that are discriminatory to women, the *Qur'an* also granted rights to women during the seventh century, rights that Western women did not receive until of late.<sup>299</sup>

Women during the time of Muhammad were able to possess and manage property, assume complete legal personality and, according to some *Sharia* interpretations, could divorce based

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<sup>295</sup> "King Abdullah Bin Abdul-Aziz Project for Public Educational Development", 2011

<sup>296</sup> Jytt Klausen, *The Islamic Challenge: Politics and Religion in Western Europe* (Oxford University Press, 2005).

<sup>297</sup> Herbert Liebesny, 'Comparative Legal History: Its Role in the Analysis of Islamic and Modern Near Eastern Legal Institutions' (1972) 20(1) American Journal of Comparative Law 38, 46, 52

<sup>298</sup> Malin Delling, "Islam and Human Rights." Master Thesis (2004).

<sup>299</sup> Ann Elizabeth Mayer. *Islam and human rights: Tradition and politics* (Hachette UK, 2012).

on liberal reasons. Modern-day Muslim reformists and feminists claim that it is unfair that a religion that was originally intended to eradicate the prejudice against women in pre-Islamic Arabia is now being used as a way to maintain the diminish the inalienable rights bestowed to women by their creator.<sup>300</sup>

The above notwithstanding, there are verses of the Quran which imply different, or potentially inferior rights for women in certain legal circumstances. Verse 2:228 of the *Qur'an*, which is often used to highlight women's inferiority, states that "[women] have rights similar to those [of men] over them in kindness, and men are a degree above them."<sup>301</sup> Verse 4:34, which states that "Men are the protectors and maintainers of women, because Allah has given the one more (strength) than the other, and because they support them from their means,"<sup>302</sup> shows that since the man is the primary provider for the family, he possesses financial power over the woman and thus she must obey him. A verse of the Quran stipulates that one male equals two female witnesses in business agreements; while other verses imply that a woman is entitled to only half the inheritance of her brothers.<sup>303</sup>

Women residing in Islamic societies are currently pursuing ways to revive the more emancipatory *Qur'anic* verses and reinterpret those that have been applied in a patriarchal way, for instance: "Men are the support of women as God gives some of their wealth [to provide for them]... As for women you feel are averse, talk to them persuasively; then leave them alone in bed [without molesting them] and go to bed with them [when they are willing]" (*Qur'an* 4:34) and "God created spouses for you of your own kind so that you may have peace of mind through them" (30:21).<sup>304</sup> Contemporary female reformers are attempting to contextualise these verses to make them more equitable to women, and often do so by claiming that interpretations are contingent on changing gender roles.<sup>305</sup>

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<sup>300</sup> *Ibid.*, p. 98.

<sup>301</sup> *Ibid.*, p.107.

<sup>302</sup> *Ibid.* p. 111.

<sup>303</sup> Malin Delling . "Islam and Human Rights." Master Thesis (2004).

<sup>304</sup> Sonia D Galloway, *The Impact of Islam as a Religion and Muslim Women on Gender Equality: A Phenomenological Research Study*. (Nova Southeastern University, 2014).

<sup>305</sup> Adila Abusharaf,. "Women in Islamic communities: The quest for gender justice research." (2006) 28(3) *Human Rights Quarterly* 714, 719.

### 3.2.1 Interpretative Disputes and Fiqh <sup>306</sup>

*Fiqh* and *Sharia* are often translated as “Islamic law,” but their definitions are actually distinct. In brief, *Sharia* refers to the “eternal, immutable, and unchanging law as it exists in the mind of God,” and is “the ideal law as it ought to be in the Divine realm, and as such it is by definition unknown to human beings on this earth.”<sup>307</sup> On the other hand, *Fiqh* is the human law, and “the human attempt to reach and fulfil the eternal law as it exists in God’s mind,” and therefore it is fallible and not immutable.<sup>308</sup>

The four *Sunni* schools of law believe that the text of the *Qur’an* is the literal word of God, thereby making it eternally existent and unchanging.<sup>309</sup> The rigid adherence to the text of revelation is the main source of conflict within Islamic societies, according to Islamic feminists. Others argue that the interpretation of the *Qur’an* has become dominated by Muslim men.<sup>310</sup> Aslan also points out that since religion mostly consists of interpretations, what one chooses to follow and accept depends on what one wants to unearth from the texts.<sup>311</sup>

A significant portion of scholars studying women in Muslim societies, specifically female scholars who are of Islamic faith or Muslim background, devote some of their work to understanding various cultural beliefs and debates on female behaviours and roles. They also

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<sup>306</sup> “Fiqh” and “Sharia” are both often loosely translated into English as “Islamic law,” but they mean different things to Muslim scholars and in the Arabic language. Phillips, Bilal. “The evolution of fiqh: Islamic law and the madh-habs.” (2000). The literal meaning of “Fiqh” is “the true understanding of what is intended.” This term was used in a statement by the Prophet Muhammad, where he said, “To whomsoever Allah wishes good, He gives the Fiqh (true understanding) of the Religion.” Muslim, Imam, and Abdul Hamid Siddiqi. *Sahih Muslim: Being Traditions of the Sayings and Doings of the Prophet Muhammad as Narrated by His Companions and Compiled Under the Title Al-Jami'-us-sahih: with Explanatory Notes and Brief Biographical Sketches of Major Narrators*. Ashraf Islamic Publishers, 1990. However, Fiqh technically refers to the science of construing Islamic laws from evidence found in the various sources of Islamic law.

On the other hand, the literal meaning of “Sharia” is a “waterhole where animals group assemble daily to drink.” It also means “straight path,” as exhibited in the verse: “Then we put you on a straight path (*Sharia*) in your affairs, so follow it and do not follow the desires of those who have no knowledge” (Qur’an 45:18). In Islam, however, *Sharia* refers to the ideal version of Islamic laws that exist in God’s mind, and which Muslims attempt to discover for themselves. Therefore, the human attempts at discovering the truth of *Sharia* is Fiqh. Phillips, Bilal. “The evolution of fiqh: Islamic law and the madh-habs.” (2000).

<sup>307</sup> Abou El Fadl, Khaled, *The Great Theft: Wrestling Islam from the Extermists* (Harper Collins, 2005), 50.

<sup>308</sup> *Ibid.*

<sup>309</sup> Reza Aslan, *No god but God: The origins, evolution, and future of Islam* (Random House, 2011) 158.

<sup>310</sup> *Ibid.*, p. 69.

<sup>311</sup> Reza Aslan, *No god but God: The origins, evolution, and future of Islam* (Random House, 2011) 70.

focus on what Leila Ahmed has dubbed “Islam’s core discourses” – the *Qur’an*, the *Hadith*, and the *Sunnah* – and several other sacred texts.<sup>312</sup>

Two conclusions can be drawn from scrutinizing these texts. One is that the revelation of the *Qur’an* is naturally egalitarian and ethical in nature. The second is that the *Qur’an* is open to interpretation and the teachings found in it are, as Moghaddam says, ‘no more or less patriarchal than other major religions, especially Hinduism and the other two Abrahamic religions, Judaism and Christianity, all of which share the view of woman as wife and mother.’<sup>313</sup> Based on the first conclusion, it is not Islam itself that promotes gender inequality. Rather, it is Muslim societies’ gender-based idea of power coupled with patriarchal interpretations of the *Qur’an* and *fiqh* that encourage bias against women. Indeed, the core of the *Qur’an* has a predominantly egalitarian meaning.<sup>314</sup> Based on the second conclusion, the sacred texts of Islam are interpreted based on the context of a certain time and place, and thus are open to reinterpretation.

These religious texts can be interpreted according to one of two perspectives – either they can be taken to represent egalitarian perspectives, where men and women are equal, or they can be taken to provide misogynistic notions that highlight the disparity between genders and justify the superiority of men. Thus, it is important that they are constantly reinterpreted in order to remove archaic cultural practices and separate them from the actual *Qur’anic* message and customs.<sup>315</sup>

As stated in the *Qur’an*, women are equal to men, at least when it comes to their duties and their relationship with God. The *Qur’an* states: “O mankind, fear your Lord, who created you from one soul and created from it its mate and dispersed from both of them many men and women.”<sup>316</sup> Men and women have the same responsibilities in connection with worship, belief in God and practice of religious customs. Since Islamic scripture as divine law states that

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<sup>312</sup> Leila Ahmed. *Women and gender in Islam: Historical roots of a modern debate* (Yale University Press, 1992).

<sup>313</sup> Valentine M Moghadam, *Modernizing women: Gender and social change in the Middle East* (Lynne Rienner Publishers, 2003) 5.

<sup>314</sup> Priscilla Offenbauer, and Alice R. Buchalter. "Women in Islamic societies: A selected review of social scientific literature." Washington, DC: Federal Research Division, Library of Congress, 2005.

<sup>315</sup> Priscilla Offenbauer, and Alice R. Buchalter. "Women in Islamic societies: A selected review of social scientific literature." Washington, DC: Federal Research Division, Library of Congress, 2005.

<sup>316</sup> Qur’an 4:1.

women are born, just like their male counterpart, then they are considered equals. As the *Qur'an* notes, “and women shall have rights similar to the rights against [men] according to what is equitable.”<sup>317</sup> And elsewhere the *Qur'an* provides that “to men is allotted what they earn, and to women what they earn.”<sup>318</sup> In fact, the original religious texts generally portray Islamic women as pure, innocent creatures who cannot be more lured into sin than men.

While Muslim men and women have the same responsibilities with regards to religious practices, this equality is questioned where civil rights are concerned. According to Islamic teachings and the *Qur'an*, men and women do not have equal rights and responsibilities; the *Qur'an* says that “men have a degree (of advantage) over [women].”<sup>319</sup> This inequality is driven by juristic interpretations of *Qur'anic* verses or the narration of the *Sunnah* (*fiqh*). *Ijtihad*, however, offers a dynamic perspective for the renewal of religious *fatwas* and the legal tradition.<sup>320</sup>

The contribution of women to society is not restricted to political and social matters. As a matter of fact, they also have significantly participated in both professional and educational institutions in Muslim countries, as globalisation gradually produces a higher female presence in all sectors. The active role played by women in the modern age, in addition to the feminist movement, has led to increased pressure to “modify or weaken” some of the strict laws found in the *Sharia* regarding women with respect to several issues such as inheritance, divorce, marriage and other legal matters implicating Islamic conceptions of gender equality and hierarchy.<sup>321</sup> Law is both constituted by society and constitutive of it. Thus, informal cultural norms and expectations of women continue to inflect and shape Islamic hermeneutics and juristic interpretations of the *Qur'an* and *Sunnah*. The point of contention surrounds aspects of traditional law in Saudi Arabia which, as scholarly interpretations, are rooted in pre-Islamic (Arabian and Persian) customs, and those which can be taken as authoritative expressions of immutable divine law.

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<sup>317</sup> *Qur'an* 2:228.

<sup>318</sup> *Qur'an* 4:32.

<sup>319</sup> *Qur'an* 2:228.

<sup>320</sup> Hassan Ansari. The Shiite Interpretation of the Status of Women. Institute of Advanced Study. (2016) <https://www.ias.edu/ideas/2016/ansari-shiite-women>

<sup>321</sup> *Ibid.*

Jurists, and juristic practice, cannot always be divorced from the social and historical contexts in which those practices are embedded, leading to questions of what practices are culture and what are religious legal- though, in practice, the dividing line between religious obligation and cultural norms may not be as clear cut as sometimes implied. In Saudi society, as in Islam, a women's role as wife and mother is fundamental to the stability of a family and therefore of society.<sup>322</sup> A women's education or employment has traditionally been viewed with suspicion to the degree that a woman's independence threatens to undermine or destabilize the family unit or prevent her from carrying out her duties as wife and mother. Therefore, any aspects of a women's rights which have a firm theological grounding in the *Qur'an* and *Sunnah* may, nonetheless, be qualified or de facto denied on the grounds that the exercise of these rights interferes with a woman's caretaking responsibilities.

Consequently, in Saudi society, it falls to women to strike the correct balance between educational or employment-related pursuits and role as homemakers.<sup>323</sup> In this way, social expectations about the legitimate role of pious women in Saudi society may further entrench the public-private divide, confining women to the home while requiring them to seek permission of their husband before seeking employment, education or engaging in other recreational pursuits. While such restrictions may not be formally enforced, customary norms regarding the appropriate conduct of women in private and public life may exert a powerful compliance pull in terms of its ability to legitimate or stigmatize certain modes of social behaviour. Despite the relaxation of guardianship laws and suspension of the women-only driving ban, a Saudi female may encounter restrictions affecting her ability to freely or meaningfully participate in all aspects of public life. Forms of discrimination or unequal treatment may be direct for instance through religious rulings of scholars which mandate restrictions on a woman's right to travel and free movement. They may also be indirect or structural in nature, for instance, in the form of barriers to the labour market workplace or inequality in the educational facilities because of, for instance, segregation and higher levels of investment in "male" professions.<sup>324</sup>

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<sup>322</sup>Marianne Alireza, 'Women of Arabia'. (1987) 172 (4) *National Geographic*, 423-453.

<sup>323</sup>Salwa Abdul Hameed Al-Khateeb, *Female Employment and Family Commitment in Saudi Arabia: A Case Study of Riyadh City* (University College London, 1987).

<sup>324</sup>E.A. Doumato, 'Gender, Monarchy and National Identity in Saudi Arabia' (1992) 19(1) *British Journal of Middle East Studies*, pp.31-47: p.33.

### 3.2.2 The Tension between Modernist and Classical Perspectives on Islamic Fiqh

Let us turn once again to the source of interpretative controversies among the Ulema or scholars. The Islamic conception of gender relations from a *Qur'anic* perspective has, in classic Islamic jurisprudence at least, hinged on the meaning of the word *Qiwama*. This term derives from *Qur'anic* verses that are interpreted as saying that 'men (are) in charge of women',<sup>325</sup> for instance in the exegesis of the classic jurist Ibn Kathir who concluded that the *Qur'an*, and thus divine law, stipulates that: 'the man is responsible for the woman, and he is her maintainer, caretaker and leader...'<sup>326</sup> The concept of *Qiwama* is used to provide theological legitimacy and authority to the traditional division of labour between men and women, thereby establishing men as caretakers (or managers) or women.<sup>327</sup> Thus, it is the male or patriarch of the family that is responsible for the financial security of his family. By extension, a woman's place is in the home. In practice, the term has been construed as that which entrusts the male with the primary responsibility of making financial provisions for his wife.<sup>328</sup> However, many scholars have contested the classical understanding of this concept, specifically in relation to its practical application.<sup>329</sup> Kurzman has offered a more positive interpretation of *Qiywama*, as one which is not intended to indicate the superiority or mastery of men over women, but as an affirmation that a woman should not be subject to additional burdens which may affect her intrinsic biological and spiritual nature as mother and nucleus of the family.

“everything (a woman) needs to fulfil her primary responsibility comfortably should be supplied in society, by the male: this means physical protection as well as material sustenance”<sup>330</sup>.

It follows then as a mother has more influence and rights over her children and decisions affecting them, that any imbalance towards ultimate equality between man and husband be corrected by affording male rights over aspects of family life, in the interest of harmony and

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<sup>325</sup> *Qur'an* 4:34

<sup>326</sup> Tafseer ibn Kathir, Vol.4, 34.

<sup>327</sup> Anne Sofie Roald, *Women in Islam: The Western Experience* (Routledge, 2001).

<sup>328</sup> Ibid.

<sup>329</sup> Charles Kurzman, *Liberal Islam: A Source Book* (Oxford University Press, 1998) 138.

<sup>330</sup> Ibid.

good relations in the marital home. Yet such a position may muddy the issue of women's rights under Islam, including the right of women to seek education unimpeded.<sup>331</sup>

Some verses of the *Qur'an* have been interpreted as suggesting that the Prophet Mohammed preferred that women fulfil their obligations in the home when it is not necessary to work outside.<sup>332</sup> For example, the *Qur'an* states:

And stay in your houses, and do not display yourselves like that of the times of ignorance, and perform prayer and give zakah and obey Allâh and His Messenger. Allah intends only to remove from you the impurity (of sin), O people of the (Prophet's) household, and to purify you with thorough purification.<sup>333</sup>

The above verses are open to competing interpretations, however. The Shafi'i jurist Ibn Kather proposed that this verse was not intended to have general application but should be interpreted in historical context as an injunction directed to "the wives of the Prophet, and the women of the nation followed them in that".<sup>334</sup> By contrast, the Maliki scholar Ibn Qurtubi deduced a different set of juristic injunctions and rulings from the given *Qur'anic* verse. In his exegesis or *Tafsir*) he concluded that as, a general rule, that women should carry out most of her duties and activities, religious and personal, in the home.

Many within the Islamic tradition, and outside of it, most notably in feminist critiques, have challenged the use of *Qur'anic* verses as 'a licence to control women's lives'.<sup>335</sup> Saudi women are indeed beginning to challenge some classical position. *Haddad* and *Esposito*<sup>336</sup> have posited that Arab women have publicly contested their role in a constantly changing society for over a century. Both men and women have used the Islamic framework as basis for their arguments and have consulted the *Qur'an*, the *Sharia* and the teachings of the Prophet Mohammad to classify the rights of women in the modern era. While today's modernists are demanding a

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<sup>331</sup>Hani Abdulghani, 'Examining Obstacles to Saudi Women's Right to Work in the Kingdom of Saudi Arabia' (DPhil Thesis, Brunel University London 2016) 67.

<sup>332</sup> Hailh Al-Twijrih, *Women's Work in Islamic Jurisprudence* (Researcher Center for Women's Studies 2010) 40.

<sup>333</sup>*Qur'an* 33:33.

<sup>334</sup>Al-Dumashqi E, *Tafsir ibn Kather* (Dar Tibah 2002) chapter 6, 410.

<sup>335</sup>Saha Aljaouhari, *Between Obedience and Rebellion: A Field Study on the Young Women of Jeddah, Saudi Arabia* (University of Southampton, 2013) p 166.

<sup>336</sup> Yvonne Yazbeck Haddad, and John L. Esposito, eds. *Islam, gender, & social change*. (Meridian, 1998).



more open-minded Islamic interpretation using various sources, the traditionalists are utilising these very same sources to emphasise the limitations placed on a woman's role in society.<sup>337</sup>

Presently, however, the role of women is incessantly shifting in order to fulfil modern society's economic, societal and political needs. These shifts are more predominant (and subsequently more challenged) in Islamic majority societies.

As suggested above, the *Qur'an* has two opinions regarding a woman's role: (1) equality of men and women when it comes to religious obligations; and (2) women being placed under a man's care.<sup>338</sup> The *Qur'an* also states that while both men and women are equal in creation and in the afterlife, they were not identical. One of the verses of the *Qur'an* states that a woman's purpose is not the same as that of a man's, but, rather, men and women were created for each other's mutual benefit (30:21).<sup>339</sup>

Likewise, as narration of the *Sunnah* show, the Prophet Mohammad was not only an advocate for women's rights, he also established rights of inheritance, divorce, education, and ownership of property and took into consideration the opinion of women. As the Islamic societies face the challenge of modernising (or democratising in certain cases), women's rights issues will remain contentious.<sup>340</sup>

According to Mernissi, culture and history, both had a role in generating differences in gender. Hence, analysing Islam can become a vital tool in criticising and ultimately eradicating gender inequality that is being faced by women in Muslim societies.<sup>341</sup> Awina Wadud, as pointed out by Jawad,<sup>342</sup> is a supporter of applying a universal viewpoint when it comes to interpretations of the *Qur'an*. This viewpoint will look into a variety of issues, including economic, moral, social, political, and gender equality issues. If completely applied and understood, Wadud

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<sup>337</sup> *Ibid.*, p. 45.

<sup>338</sup> *Qur'an*, 4:34.

<sup>339</sup> Sonia D Galloway, *The Impact of Islam as a Religion and Muslim Women on Gender Equality: A Phenomenological Research Study* (Nova Southeastern University, 2014).

<sup>340</sup> *Ibid.*

<sup>341</sup> Fatima Mernissi, *Women and Islam: An historical and theological inquiry* (South Asia Books, 1991).

<sup>342</sup> Haifaa Jawad, "Muslim Feminism: A Case Study of Amina Wadud's" *Qur'an and Woman*.(2003) 42(1) Islamic studies 107-125.

trusts that this *Qur'an*-based perspective on women can play a critical role in liberating and empowering women.<sup>343</sup>

However, in spite of the fact that emancipation of women is a major theme in the *Qur'an*, the debate regarding the roles of women remains a problem that Muslim societies face to date. In an argument by Abou El Fadl,<sup>344</sup> behind each revelation in the *Qur'an* concerning women was actually an intent to prevent inequality against women and to protect them from degrading situations. Despite this, the objective of improving a woman's status in society is being undermined by traditional beliefs in most contemporary Islamic societies. When creating laws that highlight gender inequality, national leaders should take note of how the *Sharia* appoints men as responsible for women. This idea can be challenging for those who want to modernise traditional Islamic views and apply them to present-day societies.<sup>345</sup>

Haddad and Esposito<sup>346</sup> enumerate three kinds of constitutional perspectives wherein the roles of a woman can be determined: (1) *al-taqlidiyya*, a traditional perspective where the woman's key role is as a wife and a mother and her identity is determined by her family relations; 2) *al-taqaddumiyya*, a more inclusive Islamic perspective where a woman's role is not limited to being a wife and a mother but also as a working-class individual who is cultured, educated and politically involved; and 3) *al-tawfiqiyya*, an accommodating perspective resulting in a compromise – the woman fulfils her traditional duties as a wife and mother but she is assured access to cultural, economic, political and social opportunities, as long as they do not disrupt the principles found in the *Sharia*. With the *Qur'an* instils that a man and a woman are equal in both this world and afterlife, but different in physical constitution, the task of battling gender inequality in Islamic societies will be a challenging one.<sup>347</sup>

Unfortunately, Muslim women living in Islamic societies may suffer from a degree of “hiddenness” and invisibility. The rationale behind the educational and social isolation of

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<sup>343</sup> Amina Wadud, *Inside the gender Jihad: women's reform in Islam* (oneworld Publications, 2013).

<sup>344</sup> Khaled Abou El Fadl, *The great theft: Wrestling Islam from the extremists* (New York: HarperSanFrancisco, 2005).

<sup>345</sup> *Ibid.*

<sup>346</sup> Yvonne Yazbeck Haddad, and John L. Esposito, eds. *Islam, gender, & social change* (Meridian, 1998).

<sup>347</sup> *Ibid.*

women is that it serves as a way to limit *fitna*, or public strife and discord.<sup>348</sup> The division between the private and public spheres is also allowed by religion, endorsed by ideologies and continuously upheld by religion-based personal and family laws, which see men as authoritative and women as inferior.<sup>349</sup>

As a diverse religion, Islam permits women in Islamic societies to contest the roles assigned to them by patriarchal beliefs. The situation in contemporary societies involves an internal struggle between conservatives, who want to continue oppressing women and make them subordinates, and activists who are fighting for the emancipation of women in economics, political involvement and education.<sup>350</sup>

Many remain critical of the rights of Muslim women living in Islamic societies, contending that they have suffered discrimination and restrictions on their rights and freedom. De Voe,<sup>351</sup> El Saadawi,<sup>352</sup> Delorme,<sup>353</sup> and Silvestri<sup>354</sup> argue that the political leaders and social structures have sanctioned the physical, psychological and legal inferiority of women, which being justified through religion, has led to an envisioned social reality wherein Islam is said to require women's subordination. The authors also believe that these archaic views run so deeply in Muslim communities that they are considered to be an absolute reality. For this reason, most religious leaders have become either reluctant or incapable of trying to challenge gender inequality.

In reality, the Prophet always found the liberation of women to be an essential part of the Islamic message.<sup>355</sup> For this reason, women contend that the *Qur'an* specifies an "ontological

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<sup>348</sup> Nimat Hafez Barazangi. "The Absence of Muslim Women in Shaping Islamic Thought: Foundations of Muslims' Peaceful and Just Co-Existence." (2008) 24(2) JOURNAL of Law and Religion 403-432.

<sup>349</sup> Nitza Berkovitch, and Valentine M. Moghadam. "Middle East politics and women's collective action: Challenging the status quo." (1999) 6(3) Social Politics: International Studies in Gender, State & Society 273-291.

<sup>350</sup> Reza Aslan, *No god but God: The origins, evolution, and future of Islam* (Random House, 2011).

<sup>351</sup> Pamela A De Voe, "Symbolic action: Religion's role in the changing environment of young Somali women." (2002) 15(2) Journal of refugee studies 234-246.

<sup>352</sup> Nawal El Saadawi, *The hidden face of Eve: Women in the Arab world* (Zed Books, 2007).

<sup>353</sup> C Delorme (2007). Equal rights, equal voices. Migrant women in the European Union. Brussels: European Women's Lobby.

<sup>354</sup> S Silvestri, *Europe's Muslim women: Potential, problems and aspirations* (Brussels: King Baudouin Foundation. 2008) Retrieved from <https://www.casaasia.es/pdf/12408100323AM1228381403691.pdf> on 28 October 2017.

<sup>355</sup> K Armstrong, *Islam: A short history* (New York: Random House LLC, 2002) 16.

equity” of man and woman and that they were created to share moral values and religious responsibilities to form a fair society.<sup>356</sup> According to Wright, there are three key problems that women in predominantly Muslim societies confront in the 21<sup>st</sup> century – personal autonomy, women’s rights and loss of belief. What makes matters more difficult is that these women’s lives differ by mode of production, class, time and place,<sup>357</sup> which is hindering them from working together towards a common goal.

In most Muslim societies, women live a significant part of their lives away from the public sphere. In the private sphere, these women engage in orthopraxy and work to learn more about the gender equality supposedly highlighted in the *Qur’an* but was destabilised by patriarchy and the influences of foreign ideas.<sup>358</sup> In an somewhat monolithic account it is assumed that for the Muslim woman, the home and family structure she belongs to are the centre of her world. By extension, women living in Islamic societies may be highly devoted to their religion and believe that family is an area where women claim demand equality between genders.<sup>359</sup> This, of course, paints too simplistic a picture of the archetypal Muslim woman, as touched upon in chapters 6.

### 3.2.3 Emerging Status of Women in Islamic Societies

From the above premises, scholars tends to assume that women in Islamic societies have constantly fought for basic rights and equality, given that their lives greatly differ according to class, time and place and means of production. According to Coleman,<sup>360</sup> religious and patriarchy conservatives have, over the years, worked together in order to suppress women, an act that still continues today in modern Middle East. Religious opinions, Coleman contends, further validate gender segregation, restricted roles in the society and severe punishment for

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<sup>356</sup> Halima Krausen, "A Female Imam?."(2013) 54(1) *Modern Believing*, 41-47; Amina Wadud, *Inside the gender Jihad: women's reform in Islam*. (oneworld Publications, 2013).

<sup>357</sup> Nikki R Keddie, and Beth Baron, eds. *Women in Middle Eastern history: Shifting boundaries in sex and gender* (Yale University Press, 2008).

<sup>358</sup> *Ibid*.

<sup>359</sup> Beverly Dawn Metcalfe, "Women, management and globalization in the Middle East." (2008) 83(1) *Journal of Business Ethics* 85-100; Tariq Ramadan, *Radical reform: Islamic ethics and liberation*. (Oxford University Press, 2009); Beverly Dawn Metcalfe, "Women, empowerment and development in Arab Gulf States: a critical appraisal of governance, culture and national human resource development (HRD) frameworks." (2001) 14(2) *Human Resource Development International*, 131-148.

<sup>360</sup> Isobel Coleman, *Paradise beneath her feet: How women are transforming the Middle East* (Random House Trade Paperbacks, 2013).

any alleged wrongdoings. To date, the rights of women remains one of the most controversial issues being faced by many governments in the Islamic world.<sup>361</sup>

Whatever one may think of these overly pessimistic accounts of women, and their lack of agency, it is fair to say that cultural and religious conflicts have undermined a more inclusive debate on women's rights. However, the Islamic world has seen some major shifts in the recent years, including: (1) women demanding for better economic and educational opportunities; (2) women seeking legal rights, specifically in the area of family law; (3) how new media, particularly television, influences the public's opinion on women's roles in the society; (4) women asking for a chance to have a political voice; and (5) a change in power from the privileged class to mass-based Islamist movements. Once developed, these shifts can be the key to enabling women to get involved in the society, especially in a social, political and economic setting.<sup>362</sup>

### 3.3 Education as a Key to Unlocking Human Potential

I discuss this in chapter 5 in greater detail but the right to education is well-established in Islam. The Prophet Mohammed, PBH, himself lacking a formal education,<sup>363</sup> called on his followers to seek knowledge and education.<sup>364</sup> The duty of all Muslims to enrich their knowledge, theological and general, is emphasised in a number of verses in the *Qur'an*.<sup>365</sup> Indeed, education is deemed an essential condition for fulfilling human duties to God. Knowledge, wisdom and truth are principles immanent in the *Qur'an*. With that in mind, knowledge is the second most used word in the *Qur'an* after the word "Allah" and the first revelation of the *Qur'an* was the word "Read" whose etymology is connected with that of "knowledge" and "

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<sup>361</sup> Robin Wright, *Rock the Casbah: Rage and Rebellion Across the Islamic World with a New Concluding Chapter by the Author* (Simon and Schuster, 2012).

<sup>362</sup> Isobel Coleman, *Paradise beneath her feet: How women are transforming the Middle East* (Random House Trade Paperbacks, 2013); Sonia D Galloway, *The Impact of Islam as a Religion and Muslim Women on Gender Equality: A Phenomenological Research Study*. (Nova Southeastern University, 2014).

<sup>363</sup> Al-Hibri-Azizah, "Islam, Law and Custome: Redefining Muslim Women's Rights". (1997) 12(1) American University International Law Review.

<sup>364</sup> Muhammad al-Ibrashi, AL-Tarbiyah Al-Islamiyah, Wa-Falsafatuha 53: "Pursuit of knowledge is the duty of every Muslim"; Scholars are the heirs of prophet"; "Pursue knowledge even if you have to travel as far as China"

<sup>365</sup> Al-Qur'an 20:114: "So high [above all] is Allah, the Sovereign, the Truth. And, [O Muhammad], do not hasten with [recitation of] the Qur'an before its revelation is completed to you, and say, "My Lord, increase me in knowledge."; Al-Qur'an 58:11: "God elevates by several degrees the ranks of you who believe and those who have knowledge"; Al-Qur'an 39:9 "Say, are those two equal, those who know and those who do not know?"

education.”<sup>366</sup> Without knowledge, a Muslim may recite his duties, and observe them, but cannot acquire the tools with which to deepen his or understanding of that faith.

The deeper structure *Qur'an* itself is understood to contain both absolute and dialectical knowledge: while certain verses contain certain metaphysical truths concerning the nature of the universe and man's duties to his creator, other verses are viewed to be more interpretatively open, reflecting a struggle by scholars and by the ordinary Muslim to fully comprehend their personal duties to the creator. In support of this idea, the *Qur'an* contains verses which recounts the 'similitude of those who were charged with the obligations of the Mosaic Law, but who subsequently failed in those obligations', likening the believer who simply performs religious acts without seeking the truth behind them with the 'donkey who carries huge tomes but does not understand them'.<sup>367</sup> Prominent Muslim jurists have, in this light, interpreted the following *ayah* as establishing the duty of compulsory education.<sup>368</sup> Another ayat states: 'Those who conceal from people the clear signs which we revealed and the guidance, after we made it clear to people in the Book, shall be cursed by God and others who are entitled to curse.'<sup>369</sup> Reinforcing the central relationship between piety and knowledge, Al- Hibri quotes a number of Muslim jurists who recognized the right to education as a duty owned not only by individuals to God, but equally of the ruler to his subjects.<sup>370</sup> Whilst not framed in the language of a "right", the explicit recognition of the importance of education and the pursuit of learning in the primary sources of Islam- the *Qur'an* and narration of the Prophet's teachings- appear to establish the free and equal access to education as a fundamental right, some centuries prior to its iteration in modern human rights instruments.

In the early history of Islam, women once took on important roles in the society, and were renowned in literature, politics, medicine and law. Some women were so learned that they trained male scholars in Islamic teachings and eschatology.<sup>371</sup> A number of scholars have

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<sup>366</sup> Abdulai Abukari, *Education of Women in Islam: A Critical Islamic Interpretation of the Qur'an*. Religious Education, (2014) 109(1) Religious Education 4, 23

<sup>367</sup> Al-Qur'an, 62:5

<sup>368</sup> Al-Qur'an 2:159 in Al-Hibri-Azizah, "Islam, Law and Custome: Redefining Muslim Women's Rights" (1997) 12(1) American University International Law Review.

<sup>369</sup> Al-Qur'an 2:159 in Al-Hibri-Azizah, "Islam, Law and Custome: Redefining Muslim Women's Rights" (1997) 12(1) American University International Law Review.

<sup>370</sup> Al-Hibri-Azizah, "Islam, Law and Custome: Redefining Muslim Women's Rights". (1997) 12(1) American University International Law Review.

<sup>371</sup> Al-Hibri-Azizah, "Islam, Law and Custome: Redefining Muslim Women's Rights". (1997) 12(1) American University International Law Review.

commented on the impressive political achievements of women in Islamic societies, even by the standards of women in contemporaneous Western societies.<sup>372</sup> As evidence of this, many students of Islamic history point to the example of Aysha, one of the Prophet's wives, who was a military leader, commanding a battalion of 30,000. The Prophet himself valued the judgement of Aysha, and sought her counsel on various issues, military and political.

The story of Aysha is still highly valued to this day as it paints a picture of how fundamental the role of Muslim women is to the society. But Aysha was not the only example of a woman contributing to the society. The first wife of Prophet Mohammed, Khadija, is the first successful businesswoman in the history of Islam, running a successful commercial enterprise,<sup>373</sup> while the Prophet's daughter, Fatima, was shown to be extremely active in the political arena. The Prophet's granddaughter, Sukie'na, was a renowned mathematician during her time. As chapter 5 develops further, one can conclude therefore that the equal right to access education for all, regardless of wealth and status, is not only acknowledged, but also, actively encouraged throughout the *Qur'an*, the Prophet's sayings and Muslim jurists' works. And yet, these conclusions would appear to stand in stark contrast to the common misconception that Islamic religious-law and history are steeped in patriarchy or misogyny. Nonetheless, one must recognise the difference between the different Muslim cultural practices and the normative teachings of the *Qur'an* and *Sunnah*. Women continue to face barriers, legal and structural, to gender equality for Saudi women in the educational and professional domains, and beyond.

### 3.3.1 Barriers to Rights in Religion and Custom

The previous section established that the right to education in Islam is an essential right, an area of analysis which will be discussed in greater detail in chapter 5. Suffice to say, that the right to education extends to both men and women. Notwithstanding the above, it is difficult to deny the existence of a gap between this religious ideal and Saudi Arabian practice. As suggested above, one possible cause of educational equality between men and women derives from classical interpretations put forward by Muslim scholars who, because they adopt a literalist approach to Islamic sources, fail to take sufficient account of modern realities of

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<sup>372</sup> Noha Ragab, "The record set straight: Women in Islam have rights." *Submission. org* (1995).

<sup>373</sup> Jamal A Badawi, *Gender equity in Islam*. Vol. 2. (IDM Publications, 2002).

Islamic societies. One such verse which is frequently relied upon as justification for denying women equal status to men as follows:

“Men are in charge of women by [right of] what Allah has given one over the other and what they spend [for maintenance] from their wealth. So righteous women are devoutly obedient, guarding in [the husband's] absence what Allah would have them guard. But those [wives] from whom you fear arrogance - [first] advise them; [then if they persist], forsake them in bed; and [finally], strike them. But if they obey you [once more], seek no means against them. Indeed, Allah is ever Exalted and Grand”<sup>374</sup>.

The above verse has been interpreted as evidence that God has seen it fit to endow men with an intellectual and reasoning ability larger than that of women..<sup>375</sup> These interpretations of the *Qur'an* have, regrettably, been instrumentalised in support of national laws, customs or norms which codify, entrench and normalise gender inequality, including by limiting educational opportunities for women.<sup>376</sup>

On the opposite side to Muslim literalists, are those Muslim scholars who advocate the “best light” interpretation of Islamic sources. Asifa Quraishi-Landes holds that the *Sharia* should be understood as a rule of law, rather than just a set of rules<sup>377</sup>. The difference is that the *Sharia* as a set of rules, encompasses only *fiqh* which allows for many interpretations so that those school of Islam that are the most dominant in their respective countries prevail, but when understood as a rule of law, it includes *siyasa*, or “law-making for the public good” and allows for more flexibility.<sup>378</sup> *Siyasa* has an advantage of being embedded in the Islamic sources, but not being so sclerotic that it would not be able to respond to changing circumstances of modern age. For example, *siyasa* would make it possible to respond to claims that women, unlike men, do not enjoy the right to education because of their inherent intellectual and biological

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<sup>374</sup> Al-Qur'an, 4:34

<sup>375</sup> Abdulai Abukari, *Education of Women in Islam: A Critical Islamic Interpretation of the Qur'an*. Religious Education, (2014) 109(1) Religious Education 4,

<sup>376</sup> Amani Hamdan, "Women and Education in Saudi Arabia: Challenges and Achievements." (2005) 6(1) International Education Journal 42-64.

<sup>377</sup> Quraishi-Landes Asifa, 'The Sharia Problem with Sharia Legislation' (2014) 41 Ohio North University Law Review

<sup>378</sup> Ibid



differences, by invoking a *hadith*: 'A mother is a school. If she is educated, then a whole people are educated,'<sup>379</sup> thereby arguing that women education serves the public interest, because they are in charge of family affairs and raise children.

As it could be seen, not only is it necessary and possible to interpret the *Sharia* in favour of women's rights to education, but it is also equally necessary to re-conceptualize the *Sharia* so that it encompasses lawmaking for the public good, in addition to doctrinal rules. Hence, if any improvement is to be made towards women's education in Saudi, conservative religious scholars and educators should recognise that women have, in the history of Islam, played a significant role as leaders. Muslims should strive to know more about their religion's history and its support of women's freedom, education and social and political advancements. Liberal religious scholars must also do their part in presenting Islamic teachings that liberate women, particularly those relevant to education. Additionally, the contributions of Muslim women to different fields must be taught to the people of Saudi, both men and women, to raise awareness.<sup>380</sup>

### 3.3.2 Women and Education in Saudi Arabia: Religious Prescription or Cultural Barrier?

The gender equalities and issues experienced by women in both the educational system and society in the Kingdom as a whole have been longstanding and ingrained in the culture, making it harder to extricate. In fact, in a study conducted by Rashti<sup>381</sup>, it was concluded that the necessity for focusing on female accomplishments in higher education serve as an important indicator for social development, which measures the conditions and statures in any country. This shows that, despite the obstacles, women in Saudi come up with their own ways to battle social injustice and gender inequality in education and all other aspects of life.<sup>382</sup>

What makes the situation of women in Saudi different from most is that their limited role in public lie. Western feminists have suggested that the disparity between genders is seemingly

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<sup>379</sup> Bin Malik, Anas Vol 1, Book 1, Hadith 224

<sup>380</sup> Amani Hamdan, "Women and Education in Saudi Arabia: Challenges and Achievements." (2005) 6(1) *International Education Journal*, pp. 54-55.

<sup>381</sup> G.R Rashti, Women and education in post revolutionary Iran (2003) A paper presented for the International Political Science Association Congress 2.

<sup>382</sup> Amani Hamdan, "Women and Education in Saudi Arabia: Challenges and Achievements." (2005) 6(1) *International Education Journal* 42-64.

formed by the usual absence and silence of women in their public life, which holds true for the women of Saudi Arabia.<sup>383</sup> Perhaps surprisingly, history suggests that Arab women were actually more involved in all aspects of life, whether economically, socially or politically. However, over time, some pre-Islamic practices resurfaced and were applied once more.<sup>384</sup> Unfortunately, these practices that promote gender inequality are so deep-seated in Muslim customs that they are usually mistaken for Islamic rules, even though most of these “rules” are not actually present in Islamic texts. In fact, human rights activists and Muslim feminists continue to argue that such practices do not truthfully represent what Islam is about.<sup>385</sup>

During the last 30 years, even with constant antagonism from conservatives, women in Saudi have gradually started to break the norm and attain their educational objectives. One of those who challenged the status quo was Dr. Fatima Naseef, an informal marriage counsellor and religious academic. She is recognised as the first woman ever in Saudi who was authorised to issue a Fatwa, a task that used to be strictly for men. During an interview with Dr. Naseef in 1994, she shared that while there were female professors and even deans, all rulings are decided on by male authorities.<sup>386</sup>

Due to a selective interpretation of Islam adopted by traditional religious scholars, education of women in Saudi Arabia represents a mixed picture.<sup>387</sup> and that the rules that Saudi Arabia applies to women is an evident example of how Islam was first used to refuse education of women as described below.<sup>388</sup> Also, it is customary in Islam that education is available for both men and women,<sup>389</sup> a rule that is supported by the 1970 Saudi education policy, wherein it is specified that both genders have the right to education.<sup>390</sup>

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<sup>383</sup> D Smith, *The Everyday World as Problematic*. (Toronto: Toronto University Press. 1987)

<sup>384</sup> Haifaa Jawad, *The rights of women in Islam: An authentic approach* (Springer, 1998).

<sup>385</sup> Camillia F El-Solh, and Judy Mabro. "Muslim women's choices: religious belief and social reality." (1994).

<sup>386</sup> Jan Goodwin "Price of Honor: Muslim Women Lift the Veil of Silence on the Islamic World (1994) 340-42, quoted in Pamela Goldberg, *Seeing Through Women's Eyes*." (1994) 11 *NYL Sch. J. Hum. Rts.* 603-611.

<sup>387</sup> Amani Alghamdi, "Bringing a global education perspective to understand" the other": A case study of Western myths of Muslim women." (2003): 1559-1559.

<sup>388</sup> Haifaa Jawad, *The rights of women in Islam: An authentic approach* (Springer, 1998) 28.

<sup>389</sup> Sherri Deaver, "The contemporary Saudi woman." *A world of women: anthropological studies of women in the societies of the World*. (New York: Praeger, 1980); Roula Baki, "Gender-Segregated Education in Saudi Arabia: Its Impact on Social Norms and the Saudi Labor Market." (2004) 28 education policy analysis archives 12; Mona AlMunajjed, "Women's education in Saudi Arabia: The way forward." (2009) 23(1) *Booz & Company*; Al Zouman, "highlighted the achievements of Saudi women in the era of King Abdullah bin Abdulaziz [online], althamena program report, mbc. net." (2014).

<sup>390</sup> Helen Chapin Metz, "Saudi Arabia: A Country Study. Washington, DC: Federal Research Division." In *Library of Congress*. (1993).

Public schooling in Saudi Arabia was established as early as the 1960s, which was the time when the first official girls' primary school was founded in Riyadh.<sup>391</sup> But before this school was erected, boys and girls went through informal schooling in order to learn religious rituals. Essentially, the purpose of education was to know about the *Qur'an*, the narrations of the Prophet Mohammed (*Hadith*) and the Prophet's opinion on certain matters obtained from the *Hadith* (*Sunnah*). Education was also meant to teach boys and girls how to pray and to live according to the rules of the faith.<sup>392</sup>

Although rote learning involved memorisation, it does not require actual reading,<sup>393</sup> which is why there are several men and women who are illiterate but can read the *Qur'an*. Technically, therefore, education in Saudi Arabia first occurred in the Kuttab, a section in a mosque where *Qur'an* recitation classes for children are being held. Girls were also taught in private tutorials, which were conducted within the homes of professional *Qur'an* readers. However, this education concludes once a girl reaches puberty, which is 'when strict seclusion at home began and veiling in public became mandatory.'<sup>394</sup>

In spite of this, the opinion of Abdul Aziz, the first founder and king of the Kingdom of Saudi Arabia, on education of women was mainly positive. As a matter of fact, he was vocal in his support, as seen in an exchange between him and St. John Philby, who is a British explorer who became an Islam convert and subsequently, an adviser and close friend of Aziz. In this conversation, Aziz mentions that women are permitted to read.<sup>395</sup> Is it to read or have the right to education? Doumato further states that majority of educational resources were reserved for boys, and that in the middle of the 18<sup>th</sup> century when religious revivalism was prevailing in Riyadh, it would be expected that there would be cognisance of the right of women to gain education about religion and that they will be allowed access to religious learning similar to their male counterparts since all these are recognized by the Wahabi belief. However, none of

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<sup>391</sup> Mona AlMunajjed, *Women in Saudi Arabia Today* (Springer, 1997).

<sup>392</sup> Amani Hamdan, "Women and Education in Saudi Arabia: Challenges and Achievements." (2005) 6(1) International Education Journal 42-64.

<sup>393</sup> Eleanor Abdella Doumato, *Getting God's ear: Women, Islam, and healing in Saudi Arabia and the Gulf* (Columbia University Press, 2000).

<sup>394</sup> Soraya Altorki, *Women in Saudi Arabia: Ideology and behavior among the elite* (New York: Columbia University Press, 1986) 19.

<sup>395</sup> Ibrahim Rashid, *Documents on the History of Saudi Arabia: Edited by Ibrahim Al-Rashid* (Documentary Publications, 1976).

these transpired.<sup>396</sup> Karmi argues that, while the statistics on education of women in Saudi Arabia displayed a vast improvement from what it was two decades prior, the certain barriers remain as discussed in chapter 6.<sup>397</sup>

According to historical records, the attempts of women to gain education date back to the 1940s, which was around the time when a female student by the name of Fatina Amin Shakir came to prominence. Lacey recounts the story of how the Ministry of Higher Education provided grants and sent some of Saudi's brightest men to study overseas. Wanting a chance at this opportunity, Fatina applied for the grant but was rejected by the Ministry, believing that permitting a young single woman to study overseas is an immoral act.<sup>398</sup>

Fatina, along with her father, appealed the rejection to King Faisal, who was a staunch advocate for education of women. With the King's help, Fatina went on to become of Saudi's first female PhD holder. For her thesis, she chose the modernisation of Third World nations as her topic. The thesis also included an interview with the King himself.<sup>399</sup> She graduated with a PhD on anthropology from Purdue University. Fatina deduced that denial of rights of women is not part of Islamic teachings. Rather, it is based on the authority of customary traditions or laws.<sup>400</sup>

The above developments appear to strengthen and facilitate the Saudi women's right to education because that right is not an isolated right, but one that is inextricably intertwined with the perceived role of women in Saudi Arabia's society and the associated treatment of women, whether it be through formal legal processes or in the family household.<sup>401</sup> This results in a doctrinal stand-off between the implementation of reforms that adapt current law to modern circumstances—e.g., the need to diversify the workforce by allowing educated women access to additional types of jobs—with conservative religious interpretations that restrict women's roles or movement outside of the home. In spite of some exceptions, similar to the case of

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<sup>396</sup> Eleanor Abdella Doumato, *Getting God's ear: Women, Islam, and healing in Saudi Arabia and the Gulf* (Columbia University Press, 2000) 38.

<sup>397</sup> Ghada Karmi. "Women, Islam and patriarchy." *Women and Islam: Images and Realities* (2005) 71.

<sup>398</sup> Robert Lacey, and Alan Haines. *The kingdom* (Canadian National Institute for the Blind, 1981).

<sup>399</sup> *Ibid.*; Saddeka Arebi, *Women and words in Saudi Arabia: The politics of literary discourse* (Columbia University Press, 1994).

<sup>400</sup> Saddeka Arebi, *Women and words in Saudi Arabia: The politics of literary discourse* (Columbia University Press, 1994) 217.

<sup>401</sup> Nouf Alsuwaida "Women's Education in Saudi Arabia" [2016] *Journal of International Educational Research*, 114-115.

persistent Fatina, for the longest time, women have been handed minimal opportunities in education. This is because of traditional religious principles and social conventions that involve gender-based roles. Such practises led to the belief that higher education is more important to men than women, which is why only a handful of schools for women were institutionalised.<sup>402</sup>

It is pertinent to note that, historically speaking, the law applied in Saudi Arabia has been as much a hindrance to the development and defence of women's rights as aspects of the conservative Saudi society, which is resistant to changing gender roles. The next section attempts to examine the competing interpretations and applications of these gender and role-based distinctions of rights, in order ultimately assess whether reform can improve the rights to women to access and obtain educational and educational resources without discrimination or prejudice.

### **3.4 Protection of Rights under the Applicable Saudi Laws and Codes**

The Basic Law of Governance sets out the system of governance, rights of citizens and powers and duties of the government.<sup>403</sup> From the outset, the Basic Law designates the *Qur'an* and *Sunnah* as the country's constitution.<sup>404</sup> Accordingly, it is well established that the government bases its legitimacy on its interpretation of *Shari'ah* and the Basic Law. As a result, Rajkhan points out that:

“the religious institution plays a crucial role in the kingdom's governance and has widespread influence over numerous prospects of the citizen's everyday lives”<sup>405</sup>.

In terms of the system of governance used, Article 8 of the Basic Law of Governance provides that:

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<sup>402</sup> Y A Alhareth, I. A. Dighrir, and Y. A. Alhareth. "Review of women's higher education in Saudi Arabia."(2015) 3(1) American Journal of Educational Research 10-15.

<sup>403</sup>The Basic Law of Governance no (a/90) March 1992.

<sup>404</sup>Ibid, Art 1, Chapter 1.

<sup>405</sup> Safaa Fouad Rajkhan, “Women in Saudi Arabia Status, Rights, and Limitations: A paper submitted for the degree of Master of Arts in Policy Studies ” (University of Washington Bothell) June 2014

“governance in the Kingdom of Saudi Arabia shall be based on justice, shura (consultation) and equality in accordance with the Islamic Shari’ah.”

Article 17 further provides that labour is a basic constituent of the economic and social structure of the Kingdom and a private right that fulfils a social function in accordance with Islamic *Shari’ah*, which has been interpreted as providing women with a fundamental right to work.<sup>406</sup> Moreover, Article 27 states that the State will support the social security system and encourage institutions and individuals to participate in charitable work. Finally, Article 28 provides that

“The State shall provide job opportunities to all able bodied people and shall enact laws to protect both the employee and the employer”.

Taken together, the conclusion that may be reached from these articles is that the Basic Law of Governance provides Saudi citizens with a right to work, with no restrictions based on gender, and that it is a duty of the State to provide labour opportunities and to protect employees where necessary.<sup>407</sup> In reality, however, the rights of women are overlooked or not protected for a number of reasons that will be discussed further below.<sup>408</sup>

In addition to the Basic Law of Governance, the Saudi Labour Code also contains a number of provisions that are relevant to the right of women to work in Saudi Arabia. Indeed, the Labour Code has granted the right to work for all citizens, both men and women. This right has been introduced in Article 3 of the Labour Code, which states that:

“work is the right of every citizen. No one else may exercise such right unless the conditions provided for in this Law are fulfilled. All citizens are equal in the right to work”.<sup>409</sup>

From the outset, it is also extremely important to acknowledge that when implementing the Labour Code, Article 4 provides that the employer and the worker shall adhere to the provisions

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<sup>406</sup>Hani Abdulghani, ‘Examining Obstacles to Saudi Women’s Right to Work in the Kingdom of Saudi Arabia’ (DPhil Thesis, Brunel University London 2016) 67., 55.

<sup>407</sup>Ibid.

<sup>408</sup>Amelie Le Renard, ‘Only for Women: Women, the State, and Reform in Saudi Arabia’ (2008) 62 *The Middle East Journal* 610.

<sup>409</sup>Saudi Arabia Ministry of Labor. *The Labor Code Article 3*, available at [http://www.saudiarabien.diplo.de/contentblob/2761466/Daten/850057/Arbeitsrecht\\_SDA.pdf](http://www.saudiarabien.diplo.de/contentblob/2761466/Daten/850057/Arbeitsrecht_SDA.pdf)

of *Shari'ah*.<sup>410</sup> The Labour Code applies to and governs the employment relationship between the two parties.

An entire section in the Labour Code is dedicated to the employment of women. For example, Article 149 and 150 prohibit women being employed in certain roles, with the stated objective being to protect them. Article 149 provides that:

“Women shall work in all fields suitable to their nature. It is prohibited to employ women in hazardous jobs or industries: women’s employment shall be prohibited or restricted under certain terms”.<sup>411</sup>

Moreover, Article 150 provides that:

“Women may not work during a period of night the duration of which is not less than eleven consecutive hours, except in cases determined pursuant to a decision by the Minister.”<sup>412</sup>

Some commentators point out that these articles are intended to protect women from hazardous or dangerous jobs because of their nature as women and that they are based on *Shari'ah* principles that life should be protected. However, the fact that there are no equivalent laws to protect the life of men from dangerous jobs would appear to suggest a disparity in treatment of men and women under the Labour Code.<sup>413</sup> In addition, the Labour Code gives no further explanation of what standards are to be applied in the enforcement of these articles. In respect of Article 150, further regulations have been issued to allow the Labour Minister to make exceptions to Article 150 and to allow women to work at night in certain cases, including if the role relates to health or education or in the case of emergency.<sup>414</sup> However, the effect of these regulations do not allow women to have autonomy about whether to work at night, as Article 150 provides that any such exceptions are at the behest of the Labour Minister.

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<sup>410</sup>Ibid. Article 4.

<sup>411</sup>Ibid. Article 149.

<sup>412</sup>Ibid. Article 150.

<sup>413</sup>Hani Abdulghani, ‘Examining Obstacles to Saudi Women’s Right to Work in the Kingdom of Saudi Arabia’ (DPhil Thesis, Brunel University London 2016) 67.

<sup>414</sup>Regulation of Saudi Labour Minister no. (1/2838), 2007.

Articles 151-156 of the Labour Code exhibit special advantages and support granted to working women in areas such as maternity and widowhood leave entitlements: six weeks paid and fifteen days paid, respectively.<sup>415</sup> Working mothers who return to work while continuing to breastfeed are allowed to leave work an hour early each day for six months to feed their babies.<sup>416</sup> Articles 155 and 156 prevent employers from terminating employment or given notice of such a termination while a woman is on maternity leave.<sup>417</sup> These provisions are considered to be quite forward-thinking in terms of women's rights.

Further to the Labour Code, a number of royal decrees have been issued by the State. Alhussein asserts that:

“royal decrees have been a primary vehicle for changing and challenging conservative norms and customs-allowing women greater access to job opportunities and public office and increased visibility in the public sphere”<sup>418</sup>.

That being said, it is fair to say that a number of royal decrees have reinforced barriers to female labour participation in Saudi Arabia. For example, Royal Decree number 759/8 stressed the importance of gender segregation in workplaces<sup>419</sup>. This reinforced Royal Decree Number 11651, which banned women from working in any place that may lead her to be mixed with men, whether in a government department or in a public or private institution.<sup>420</sup>

A reading of the Basic Law of Governance and the Labour Code provisions in isolation would appear to suggest that the Saudi Labour Law is very progressive in terms of female labour rights. But while these rights should be considered a major breakthrough, the level of ambiguity in respect of their application, and the fact that they are only applicable to women that are already part of the labour force, and do not refer to a woman's general right to work, mean that, in practice, working women in Saudi continue to face explicit and implicit discrimination, with commentators such as Abalkhail suggesting that this is mainly due to “individual

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<sup>415</sup>Saudi Labour Law, Royal decree no. M/51, Part IX Employment of Women.

<sup>416</sup>*Ibid.*

<sup>417</sup>*Ibid.*

<sup>418</sup> Eman Alhussein, ‘Triangle of Change: the situation of women in Saudi Arabia’ (NOREF, 2014) <<https://www.files.ethz.ch/isn/181922/ef4fe5e44ede4d362d60a6804ed40437.pdf>> accessed 21 August 2017.

<sup>419</sup> Royal Decree Number 759/8 for the year 5/10/1421/10/5

<sup>420</sup> Royal Decree Number 11651 for the year 16/5/1403/5/16



interpretations of labour law that reflect cultural norms”.<sup>421</sup> In fact, although the Labour Code would appear to protect women’s rights in the working environment, in practice its application has resulted in the suppression of women’s employment in many sectors, due to the overarching perception that women should be protected.<sup>422</sup>

Since 2005 there have been a number of transformative royal decrees issued following King Abdullah’s ascendance to the throne, which have become a primary vehicle for changing and challenging conservative norms and customs, as will be considered below. Although these royal decrees have led to some advancement in the rights of women to work, the Saudi government have tried to balance the advancements with the orthodox interpretation of *Shari’ah* and the cultural restrictions that pervade through Saudi society. These obstacles will be considered next.

### **3.5 Regulatory and Policy Barriers Affecting Equality in Rights to Education**

#### **3.5.1 The Doctrine of Guardianship in Saudi Arabia and its basis in *Sharia***

The male guardianship (*Mahram*) system is not a comprehensively codified law in Saudi Arabia but is a traditional cultural practice rooted in Islam, tribal custom, and judicial interpretation of *Sharia* law. Interestingly, the current form of the practice only developed in the late 1970s and 1980s.<sup>423</sup> It is the practice by which women, and girls, are required to have a male guardian (*wali*) who maybe their father, brother, husband, uncle or another similar male family member (*mahram*, or a relative a woman is not permitted to marry). The guardian has the authority and duty to “protect” the interests of the woman, or her property, and to offer her his wisdom in either making certain decisions on her behalf or by providing his permission to her decisions.<sup>424</sup> Specifically, authority is granted in the areas of marriage and divorce, travel,

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<sup>421</sup> Ronald J. Burke, Astrid M. Richardsen, *Women in Management Worldwide: Signs of Progress* (Taylor & Francis 2016) 332.

<sup>422</sup> Hani Abdulghani, ‘Examining Obstacles to Saudi Women’s Right to Work in the Kingdom of Saudi Arabia’ (DPhil Thesis, Brunel University London 2016) 67.

<sup>423</sup> Anne-Maria Bissada ‘Breaking Down Saudi’s male guardianship system’ (24 February 2017) rfi online, <<http://en.rfi.fr/middle-east/20170224-breaking-down-saudi-s-male-guardianship-system>> ; See also Michael L. Ross, ‘Oil, Islam, And Women’ (2008) *American Political Science Review* 107-123

<sup>424</sup> Dr. Nadir Ahmad Al-Nasahawi, *Mauqif al-Sharia min tawalli almara’ li-‘aqd al-nikhah* (‘The Sharia position regarding a woman conducting marriage ceremonies’), *Al-Daar al-Arabiyyah linashr*, 12; See also Dr Hassan S.

education, employment, financial matters, and health care. As defined in a United Nations Special Rapporteur report on violence against women:

Legal guardianship of women by a male, is practised in varying degrees and encompasses major aspects of women's lives. The system is said to emanate from social conventions, including the importance of protecting women, and from religious precepts on travel and marriage, although these requirements were arguably confined to particular situations.<sup>425</sup>

The definition of guardian definition of *mahram*, or its plural *mahaarim* (i.e. relatives with whom marriage is forbidden) is, in classic Islamic jurisprudence, frequently justified with reference to the following *Qur'anic* verses:

Do not marry any of the women whom your fathers had married, excluding what is already past. ....This is Allah's ordinance for you. As to others than these, it is lawful for you to seek [union with them] with your wealth, in wedlock, not in license. For the enjoyment you have had from them thereby, give them their dowries, by way of settlement, and there is no sin upon you in what you may agree upon after the settlement. Indeed, Allah is all-knowing, all-wise.<sup>426</sup>

In this regard, the very concept of guardianship, for instance, practised in Saudi Arabia can be seen to have evolved from within the legal-*Qur'anic* traditions and until, recently, explicitly mandated by Saudi law. Often regarded as "sponsorship" rather than guardianship, the practice is considered to be a responsibility of men in Islam, whose objective is to guarantee the rights of both men and women and to ensure family stability as a means of communal stability. According to the teachings of the *Qur'an* and *Sunnah*, it is not meant to be a means of control or constrain freedoms, but is instead meant sanctify the roles of each gender in their obedience

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Al-Wilayah al'a an-nafs, 'Guardianship over persons, Comparative study between the Sharia law and Egyptian law' (Cairo, 1997) 5

<sup>425</sup> Yakin Erturk, 'Report of the Special Rapporteur on violence against women, its causes and consequences: Mission to Saudi Arabia' (14 April 2009) United Nations

<sup>426</sup> *Qur'an*, 22:24.

to *Allah*.<sup>427</sup> The practice involves providing guidance in important decisions in a young girl or woman's life, such as marriage or contracts for property, by a person who allegedly has their best interest in mind and has wisdom with respect to the consequences of such decisions that the woman lacks.<sup>428</sup> As will be argued in this thesis, it is the departure from the principles of *Sharia* in applying the guardianship system which leads to the segregation and control of women, not the directives or motivations behind the practice itself. This is an important distinction maintained throughout this thesis, but the question remains whether the distortions of the practice can ever be eliminated or whether they are inherent and therefore perpetually prohibitive and would require the complete rejection of the practice as the only likely remedy.

The guardianship system traditionally applied in the context of family law, domestic violence, inheritance and economic issues. As a consequence, courts consider guardianship-related matters or decisions as personal, non-judicial, determinations to be settled amongst the family or individuals, but that perspective has been evolving to provide women more access to the judicial system to defend their rights against domestic violence, forced marriage, protection of property, the right to obtain a college degree, and the right to accept employment.<sup>429</sup> Additionally, specific regulations fell within the purview of the guardianship system, including requirements for male consent for issuing travel documents, registering for birth certificates or death reports, enrolling in education, applying for educational scholarships, and being released from state institutions (like prisons or rehabilitation health centres).<sup>430</sup>

The highly discrepant guardianship practice, and the decision-making capabilities of women, hinge entirely on the personal nature or personality of the guardian and his relationship with the woman.<sup>431</sup> For instance, a more liberal-minded guardian will equate to more freedom in

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<sup>427</sup> Syed Mumtaz Ali, Custody and Guardianship in Islam (9 February 2011) <<http://www.fatwa.org.za/IslamicLaw/Custody%20and%20Guardianship%20in%20Islam.htm>> ; See also, Ahmad Bin Hanbl, Musnad Al Imam Ahmad (Dar Aljel, 1420) Hadith no 25027.

<sup>428</sup> Abdul-Rahman Al-Sheha, *Women in Islam and Refutation of Some Common Misconceptions* (Abu Salman Deya ud-deen Eberle Translation: World Organisation for Presenting Islam, 1997) 74

<sup>429</sup> Amira Sonbol, 'Women in Shari'ah Courts: A Historical and Methodological discussion' (2003) 27(1) Fordham International Law Journal, 225-253; See also Human Rights Watch 'Saudi Arabia: New Law to Criminalize Domestic Abuse' (3 September 2013) <<http://www.hrw.org/news/2013/09/03/saudi-arabia-new-law-criminalize-domestic-abuse>>

<sup>430</sup> See Cydney Joyner 'Brother, may I?: Saudi Arabia's male guardianship system' (7 November 2016) Campbell Law Observer, Campbell School of Law online <<http://campbelllawobserver.com/brother-may-i-saudi-arabias-male-guardianship-system/>>

<sup>431</sup> See generally David Commins, *Islam in Saudi Arabia* (I.B. Tauris, 2015) 74-75

choices for and by the woman, whereas a conservative or traditionally-minded guardian will control each facet of personal decision-making or actions by the woman including when or whom she marries, when she is permitted to leave the home, and how she socially interacts with others.<sup>432</sup> This can be contrasted with other Islamic countries that have undergone voluntary secular reform in areas such as family or economic law.<sup>433</sup>

The asymmetrical treatment of gender rights, and responsibilities finds some basis in classical legal and exegetical traditions.<sup>434</sup> The idea of male custodianship over women in certain aspects of public and private life (in marriage or the freedom to travel unaccompanied) has had long-standing support in Islamic legal discourse. As will be explored in later sections, the dual concepts of *Qiwamah* (curatorship)<sup>435</sup> and *wilayah* (guardianship)<sup>436</sup> have been used to define and justify the special responsibilities exercised by men over women in their care.<sup>437</sup>

The concept of equal but different rights between women and men can be traced to the *Qur'anic* verse 4:34—“Men are the protectors and maintainers of women, because God has given the one more [strength] than the other, and because they support them from their means”<sup>438</sup>—as well as the obligation of women to “obey” their guardian in a positive sense by raising children, maintaining the household and protecting the sanctity of the family for the benefit of the community.<sup>439</sup> However, as with all things in the *Sharia*, which is a dynamic and holistic system, the Islamic tradition includes competing interpretations of this verse by religious, academic, and legal scholars, which leads to different conclusions with respect to supporting, reforming or dismantling gender related discrimination or barriers.

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<sup>432</sup> Anthony Avice Du Buisson, ‘A Kingdom of Tears: Male Guardianship in Saudi Arabia’ (Areo Magazine online, 13 December 2016) <<https://areomagazine.com/2016/12/13/a-kingdom-of-tears-male-guardianship-in-saudi-arabia/>> ; See also generally David Commins, *Islam in Saudi Arabia* (I.B. Tauris, 2015)

<sup>433</sup> Ran Hirschl ‘The Political Economy of Constitutionalism in a Non-Secularist World’, Chapter 7, as edited by Tom Ginsburg, *Comparative Constitutional Design* (First published 2012, Cambridge University Press, 2012) 173-174.

Dr Al-Saleh, M. Fiqh ul –Usrah ‘inda al-imam sheikh il-Islam Ibn Al-Taimiyya, (1996), 1<sup>st</sup> Ed, v 2, 602,10.

<sup>435</sup> This concept “denotes a husband’s authority over his wife and his financial responsibility towards her,” discussed in Ziba Mir-Hosseini and Mulki Al-Sharmani and Jana Rumminger (eds) *Men in Charge?: Rethinking Authority in Muslim Legal Tradition* (Oneworld Publications, 2015) 17.

<sup>436</sup><sup>436</sup> This concept “denotes the right and duty of male family members to exercise guardianship over female members,” in ibid Ziba Mir-Hosseini and Mulki Al-Sharmani and Jana Rumminger (eds) *Men in Charge? op cit* p 217.

<sup>437</sup> Ziba Mir-Hosseini and Mulki Al-Sharmani and Jana Rumminger (eds) *Men in Charge?: Rethinking Authority in Muslim Legal Tradition* (Oneworld Publications, 2015) 17.

<sup>438</sup> The Holy Qu’ran 4:34

<sup>439</sup> Hammuda Abdul-Ati, ‘The Status of Woman in Islam’ (8 July 2011) <[http://www.islamic-world.net/sister/status\\_of\\_woman2.htm](http://www.islamic-world.net/sister/status_of_woman2.htm)>

Prior to the recent relaxation of the guardianship law, all women were required to gain the permission of her guardian for individual actions, including, but not limited to, verifying her identification in court appearances or filings, transferring ownership of property, or in recording a legal address for purposes of obtaining a National ID card.<sup>440</sup> The highly discrepant guardianship practice, and the decision-making capabilities of women, hinge entirely on the personal nature or personality of the guardian and his relationship with the woman.<sup>441</sup> For instance, a more liberal-minded guardian will equate to more freedom in choices for and by the woman, whereas a conservative or traditionally-minded guardian will control each facet of personal decision-making or actions by the woman including when or whom she marries, when she is permitted to leave the home, and how she socially interacts with others.<sup>442</sup> This can be contrasted with other Islamic countries that have undergone voluntary secular reform in areas such as family or economic law.<sup>443</sup>

Taking the above as a starting point, the application of these concepts and other religious requirements in Saudi Arabia has not always advanced the rights and freedoms of women in practice, even if the aim of these concepts has been to establish equitable, chaste and beneficial relations between the sexes. The prohibition on inter-mixing (*Khalwah*),<sup>444</sup> for instance, has played a central role in restricting the educational opportunities of women in the country. However, classical jurisprudence on the meaning and application of such concepts is deeply historically specific and highly questionable.<sup>445</sup> In the above regard, modern (non-classical interpretations) of concepts underpinning the system of guardianship, such as *qiwāmah* and

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<sup>440</sup>See for discussion on women being required to produce proof of a 'family registry' in order to obtain a National ID Card, Hala Aldosari 'Family Identification Documents for Saudi Women: An Identity Dilemma' (2 March 2016) The Arab Gulf States Institute in Washington <<http://www.agsi.org/family-identification-documents-for-saudi-women-an-identity-dilemma/>> ; See also generally Md. Muddassir Quamar 'Sociology of the Veil in Saudi Arabia: Dress code, Individual Choices, and Questions on Women's Empowerment' (24 May 2016) Digest of Middle East Studies Vol 25, Issue 2 Fall 2016, 315-337

<sup>441</sup> See generally David Commins, *Islam in Saudi Arabia* (I.B. Tauris, 2015) 74-75

<sup>442</sup> Anthony Avice Du Buisson, 'A Kingdom of Tears: Male Guardianship in Saudi Arabia' (Areo Magazine online, 13 December 2016) <<https://areomagazine.com/2016/12/13/a-kingdom-of-tears-male-guardianship-in-saudi-arabia/>> ; See also generally David Commins, *Islam in Saudi Arabia* (I.B. Tauris, 2015)

<sup>443</sup> Ran Hirschl 'The Political Economy of Constitutionalism in a Non-Secularist World', Chapter 7, as edited by Tom Ginsburg, *Comparative Constitutional Design* (First published 2012, Cambridge University Press, 2012) 173-174.

<sup>444</sup> In support of this legal opinion, they draw on the sayings of the Prophet, who was narrated to have said 'Make a space between men and women' Ibn Kathir, Tafsir, L'exégèse Du Qur'an 949, 950.

<sup>445</sup>Human Rights Watch, 'Human Rights Abuses Stemming from Male Guardianship and Sex Segregation in Saudi Arabia (2008) <<https://www.hrw.org/reports/2008/saudi-arabia0408/4.htm>>

*wilāya*, have emerged as the focal point of a modern or reformist Islamic perspectives, implicating wider issues around the interpretation and narration of the Qu’ran and *Sunnah*. Offering an alternative to liberal feminism, a growing number of Muslim scholars now work within the Islamic tradition to explore the historically significant role of culture in subjugation of women across Muslim societies.<sup>446</sup> More importantly, these scholars now reject what they contend are outmoded (usually literalist, classical perspectives) on the hierarchy between men and women (based on the ideals of male as provider for women, in exchange for fulfilling her duties in the home), as developed in chapter 5.<sup>447</sup> These scholars draw the reader’s attention to aspects of the *Qur’anic* text and Prophetic traditions which vindicate, rather than undermine, the ideal of gender equality (i.e. ‘there is no preference of one over the other except in relation to obedience [of God]’).<sup>448</sup> The contention of these scholars is that the deep structure of the *Qur’anic* scripture is egalitarian in ethos, and that the very verses which encourage respect, compassion and mercy among the genders have been minimised or excluded from discussion of male authority over women.<sup>449</sup> This egalitarian view of gender relations in Saudi Arabia may provide the necessary context and inspiration on the important issue of how Saudi Arabia approaches the rights of women, in the realm of education, work and beyond, from within the Islamic tradition, as well as outside of it (including through its ratification and participation of international human rights treaties and organisations). That is to say, Saudi Arabia may draw vindication for enhanced rights protection, and the gradual societal eradication of gender discrimination in Saudi Arabia, by looking to Islam itself.

### 3.5.2 Restrictions on Freedom of Movement in the Saudi Legal Structure

While the guardianship practice itself and gender segregation debates are pertinent, given Saudi Arabia’s Vision 2030, the issue most relevant to a woman’s right to education is whether or not she has access to job opportunities or the ability to teach her children as an extension of her

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<sup>446</sup> Azizah Al-Hibri, *A Study Of Islamic Herstory: Or How Did We Get Into This Mess In Women Am Islam* (PP 1982) 214, 215.

<sup>447</sup> For example, see Amina Wadud, *Qur’an and Woman: Rereading the Sacred Text from a Woman’s Perspective* (New York: Oxford University Press, 1999).

<sup>448</sup> *Ibid.*

<sup>449</sup> The *Qur’anic* text includes references to *ma’rūf* (common good) and *mawaddah wa’rahmah* (love and compassion), which, while informing some of the classical conceptualisations of marriage, appear to play a secondary role in comparison to the idea of male authority as seen to emerge from verse 4:23 of the *Qur’an*. See also Ayesha S. Chaudhry, *Producing Gender-Egalitarian Islamic Law: A Case Study of Guardianship (Wilayah) in Prophetic Practice in Men in Charge: Rethinking Authority in Muslim Legal Tradition* (OneWorld Publications, 2015)

right to education. Collective restrictions on freedom of movement exist within the legal structure of Saudi Arabia and are directly linked to whether or not women can participate in educational activities, much less seek to rely, through judicial or administrative mechanisms, their general human rights.<sup>450</sup> For example, provisions such as the ability of women to work may be lawfully protected but are restricted in practice because of the custom obliging women to prioritize their obligations to the household over employment. Equally, a woman's right to higher education may exist, and the relaxation of the guardianship rules may have eliminated previous restrictions on freedom of movement but women are still required, as a matter of law, to obtain the permission of a male guardian to register for classes or travel abroad for a graduate education program or conference.<sup>451</sup> Another recent example that garnered media attention was the granting of permission to four Saudi women by the Saudi Arabia government to participate in the 2016 Olympics, despite there being a ban on women's participation in sports within Saudi Arabia based, in part, on the risk of gender-mixing.<sup>452</sup>

Under the previous law, a guardian retained control and authority over a woman in her ability to access viable employment or travel independently. For example, officially, while a Saudi woman has also enjoyed a right to work, receive medical treatment or enrol in a university without her guardian's permission "on the books", the practical reality was quite different.<sup>453</sup> Women were often restricted from obtaining an education because they had no driver to transport them to class.<sup>454</sup> Notably, at some universities, female students were prevented from leaving their campus without a legal guardian, even in cases of illness.<sup>455</sup> Additionally, the guardian's approval would determine a woman's ability to seek judicial or criminal redress,

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<sup>450</sup> See AFP 'Saudi Strips Commission on Promotion of Virtue and Prevention of Vice of Powers to Arrest' (AFP 13 April 2016) < <http://english.ahram.org.eg/NewsContent/2/8/199483/World/Region/Saudi-strips-Commission-for-Promotion-of-Virtue-an.aspx> > ; See also 'Commission for the Promotion of Virtue and the Prevention of Vice' (Americans for Democracy & Human Rights in Bahrain, 2015) < [http://www.adhrb.org/wp-content/uploads/2015/04/2015.03.31\\_Ch.-1-CPVPV.pdf](http://www.adhrb.org/wp-content/uploads/2015/04/2015.03.31_Ch.-1-CPVPV.pdf) >

<sup>451</sup> Arab News '200 Women Allowed by Courts to Travel Alone' (ArabNews 29 July 2016) <<http://www.arabnews.com/node/961461/saudi-arabia>>

<sup>452</sup> Julia Case-Levine, 'Saudi Arabia lets women compete in the Olympics, but bans them from playing sports back home' (Quartz, 8 August 2016) <<https://qz.com/752289/even-as-saudi-female-olympians-compete-women-face-discrimination-back-home/>>

<sup>453</sup> Human Rights Watch, 'Boxed In: Women and Saudi Arabia's Male Guardianship System' (2016) <<https://www.hrw.org/report/2016/07/16/boxed/women-and-saudi-arabias-male-guardianship-system>>

<sup>454</sup> See for example Royal Decree No. 80/1631 of July 30, 1980 [in relation to the Saudi mufis' positions on meetings between the genders]. For religious justification of this rule see Al Shuway ir, Majm 'Fatawva Wa-Maqalat Matanawwi'a' 5:236-24 1.

<sup>455</sup> *ibid.*

obtain a National ID card, vote or even purchase real property.<sup>456</sup> The guardianship practice has become a means of control, contradicting the intention to provide protection and security in *Sharia* law. It became a tool of female subjugation, not liberation, and denied them rights.

The nature of some of the traditional gender-based practices began to draw global media interest. For example, the 2011 “Women2Drive” campaign was condemned by Saudi’s conservative religious government, and the Council of Senior Religious Scholars who issued a *fatwa* declaring:

Women driving leads to many evils and negative consequences... [including] mixing with men without her being on her guard... *Sharia* prohibits all things that lead to vice. Women’s driving is one of the things that leads to that. This is well-known.<sup>457</sup>

While the ban is supported by a *fatwa*, legally speaking, Saudi Arabia domestic law did not officially ban women from driving. Instead, it mandated that a person may only drive if they have a driver’s license and the law prohibits women from obtaining a driver’s license, thereby instituting an unofficial legal ban on their ability to drive through a licensing restriction.<sup>458</sup> Significantly, former King Abdullah had long expressed support for women driving when society is ready for it,<sup>459</sup> reinforcing the ways in which the political organs depend on social and religious acceptance for legitimacy.<sup>460</sup>

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<sup>456</sup> Frances Raday, ‘Gender And Democratic Citizenship: The Impact Of Cedaw’ (2012) 10(2) International Journal of Constitutional Law 512.

<sup>457</sup> Human Rights Watch, ‘Boxed In: Women and Saudi Arabia’s Male Guardianship System’ (Human Rights Report online, 16 July 2016) < <https://www.hrw.org/report/2016/07/16/boxed/women-and-saudi-arabias-male-guardianship-system> >

<sup>458</sup> Sameena Nazir and Leigh Tomppert, *Women’s Rights in the Middle East and North Africa: Citizenship and Justice* (Freedom House 2005) 262; See also ‘Traffic Law In Saudi Arabia’ [http://www.rt.gov.sa/files/rt\\_policy.pdf](http://www.rt.gov.sa/files/rt_policy.pdf).

<sup>459</sup> SUSRIS ‘King Abdullah Interview Redux’ (Saudi-US Relations Information Service, 6 August 2008) Archived from the interview of the King by Journalist Barbara Walters, originally distributed on 22 October 2008, < <http://susris.com/2008/08/06/king-abdullah-interview-redux/> >

<sup>460</sup> Kholoud T. ilal, Safiyyah R. Scott, and Nina Maadad, ‘The political, socio-economic and sociocultural impacts of the King Abdullah Scholarship Program (KASP) on Saudi Arabia’ (2015) 4(1) International Journal of Higher Education 254



Now that the ban on female drivers in Saudi Arabia has been lifted,<sup>461</sup> and the guardianship requirements for obtaining governmental services relaxed, strict gender segregation remains one of the more contentious practices, garnering worldwide media attention. This practice reflects a broader attitude towards women's rights that is also present in the context of their right to education. However, generally speaking, a woman's right to education is a much less stigmatized or dramatized debate.<sup>462</sup> Education policy debates centre on expanding access to universities, fields of employment, employment benefits, and the ability of a woman to accept a position or to be educated in a specific field without the consent, compliance, or intrusion of a male guardian, or the implication of such by a potential employer or official at an institution of higher education.

### 3.5.3 Gender Segregation

In Saudi Arabia, the concept and practice of gender mixing is called “*ikhtilat*” and has become a cornerstone of the Kingdom's interpretation of *Sharia* law.<sup>463</sup> The practice began with the separation of men and women in educational settings and expanded to other areas of society.<sup>464</sup> Again, it is not a law that derives from the *Qur'an*, but a contingent practice based on religious interpretation and social policy. In current practice, men and women are permitted to mix in public spaces under limited circumstance, historically, and in custom, under the watchful eye of a guardian or related custodian.<sup>465</sup> This includes work, educational and social settings, resulting in gender-specific schools, factories, and businesses. Similarly related is the concept of *khalwa*, where an unrelated man and woman meet privately without the presence of a third party. This is considered to be *haram* (forbidden). In the past a woman found to have engaged

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<sup>461</sup> Human Rights Watch, ‘Saudi Arabia: As Women's Driving Ban Ends, Provide Parity’ (27 September 2017), <<https://www.hrw.org/news/2017/09/27/saudi-arabia-womens-driving-ban-ends-provide-parity>>

<sup>462</sup> See generally Larry Smith and Abdulrahman Abouammoh, ‘Higher Education in Saudi Arabia: Reforms, Challenges and Priorities’ (6 February 2013) Higher Education in Saudi Arabia, Volume 40, 1-12; See Angus McDowall, ‘Saudi Arabia aims for social overhaul in reform plan’ (Reuters Business News, 8 June 2016) <<http://www.reuters.com/article/us-saudi-plan-society-idUSKCN0YU1KE>>

<sup>463</sup> See for discussion on gender segregation, Eleanor Abdella Doumato, ‘Obstacles to Equality for Saudi Women. In The Kingdom of Saudi Arabia, 1979–2009: Evolution of a Pivotal State’ (2009) *Viewpoints* Special Edition, The Middle East Institute: Washington, D.C., pp. 23; See also Madawi Al-Rasheed, *A Most Masculine State: Gender, Politics, and Religion in Saudi Arabia* (2013) Cambridge: Cambridge University Press, Cambridge Middle East Studies No. 43, ISBN-13: 9781139602839; See also Amelie Le Renard, *A Society of Young Women: Opportunities of Place, Power, and Reform in Saudi Arabia*. (2014) Stanford: Stanford University Press

<sup>464</sup> Roel Meijer, ‘Reform in Saudi Arabia: The Gender-Segregation Debate’ (2010) 17(4) Middle East Policy, 80-100, <<http://mepc.org/journal/middle-east-policy-archives/reform-saudi-arabia-gender-segregation-debate>>

<sup>465</sup> *ibid*

in *khalwa* is subject to severe personal punishment, or, alternatively, her reputation and that of her family can forever be marred.

Considerations into women's right to education raises the question of whether education is enhanced or inhibited by the mixing of genders or the creation of female-only spaces.<sup>466</sup> There is not a moral or socially-based answer or solution to this matter. Rather, what becomes evident is the conflicting legal opinions are based on the beliefs of the *ulama* with respect to women themselves and how their understanding of women translates to the rules that prescribe their behaviour and personal rights.<sup>467</sup> Arguably, this customary practice has meant that personal agency and power is removed from the women themselves.

Additionally, the segregation and gender-mixing restrictions are not only violations of CEDAW in discriminating against women, but may lead to violations of Saudi Arabia domestic law, for instance by violation discrimination related provisions of employment or by increasing the risk of domestic violence or harm against women which is formally a crime under Saudi law.<sup>468</sup> The consistent theme presented through research is that Saudi Arabia often has laws or regulations that appear to protect human or women's rights but their practical effectiveness of such rights protections are often undermined by weak enforcement mechanisms either a failure or by religious interpretations that have become social or legal policy, i.e., the (now abrogated) ban on driving and gender-mixing.

#### 3.5.4 Social Stigma and Economic Class

For Saudi women, reforming cultural and societal attitudes and stigmas against public discussion of social realities in order to promote genuine and lasting long-term change has proven to be more important than surface issues like dress and the right to drive.<sup>469</sup> The social

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<sup>466</sup> See generally Muddassir Quamar 'Education as a Ladder for Saudi Women: An Overview' (2013) 3(2) Journal of Arabian Studies: Arabia, the Gulf, and the Red Sea, 265-277

<sup>467</sup> Katherine Zoepf, 'Talk of Women's Rights Divides Saudi Arabia' *The New York Times* (31 May 2010)

<sup>468</sup> See generally, Aya Batrawy, 'Report: Saudi Women's Lives Dictated by Male Guardianship' (AP News 17 July 2016) <<http://bigstory.ap.org/article/8373e17c64224cfbb48e9c95b42de6dc/report-saudi-womens-lives-dictated-male-guardianship>> ; See also Michael Sianato and Chelsea Skojec '#SaveDinaAli Emerges as Saudi Arabian Woman Detained for Flying Without Male Guardian' (Observer 12 April 2017) <<http://observer.com/2017/04/save-dina-ali-saudi-arabian-woman-detained/>>

<sup>469</sup> Natana J. DeLong-Bas, 'The Freedoms Saudi Women Really Want' (2009) *Viewpoints* Special Edition, The Middle East Institute: Washington, D.C., 19

pressures that persisted under the guardianship system are relevant with respect to whether or not women, single or married, have jobs or a source of income; whether they can own and control their own property or finances; and whether they can pursue fields of education and careers beyond becoming nurses, doctors, teachers, shopkeepers, or domestic servants. For example, a rural family who tends sheep may have a more difficult time affording a car, much less paying an additional driver to transport a woman to classes or to a daily job. Interestingly, the ban on women driving (now abrogated) did not appear to apply to rural women in practice.<sup>470</sup> This differential treatment of urbanized and rural women reflects the creation of an elite class within Saudi Arabia during the oil boom of the 1980s. Urban dwelling families were stereotypically seen as more affluent than rural-dwelling families. Thus, the geographical-social classification has led to discrepancies between the perception and enforcement of the various gender-based policies against women. These economic discrepancies are also part of the larger discussion on education, which often affects the most vulnerable or disenfranchised women.<sup>471</sup> Thus a class dimension is created in the rights debate according to which women are seen as having financial or social status based on their ability to drive, obtain an education or the job position achieved.<sup>472</sup> It creates a multi-dimensional complication to the freedom of movement of women and the exercise of the right to education.

### 3.6 Social and Legal Reform: A Complementary Approach

In Saudi Arabia, one challenge has been the limited discussion on what equality in rights to education means in relation to other rights, such as a right to work or freedom of movement, is

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<sup>470</sup> See for discussion on geographical or class distinctions in women's rights, A. Van Geel 'Whither the Saudi Woman? Gender Mixing, Emowerment and Modernity in Saudi Arabia between Conservatism, Accommodation and Reform', edited by Roel Meijer and Paul Aarts, (2012) The Hague: Netherlands Institute of International Relations 'Clingendael.' 57-78 <[http://www.clingendael.nl/sites/default/files/20120000\\_research\\_report\\_rmeijer.pdf](http://www.clingendael.nl/sites/default/files/20120000_research_report_rmeijer.pdf)> ; See also E. Al Nafjan 'Opposition to a Saudi White Ribbon Campaign' (Saudiwoman's Weblog, 21 May 2013) <<http://saudiwoman.me/2013/05/21/opposition-to-a-saudi-white-ribbon=campaign>>

<sup>471</sup> See for general discussion Eleanor Abdella Duomato 'Obstacles to Equality for Saudi Women' (Middle East Institute, October 2009) <<https://freedomhouse.org>>; See also Eleanor Abdella Doumato, 'Women and Work in Saudi Arabia: How Flexible are Islamic Margins?' (1999) 53 (4) Middle East Journal, 570 <[Jstor.org/stable/4329391?seq=1#page\\_scan\\_tab\\_contents](http://Jstor.org/stable/4329391?seq=1#page_scan_tab_contents)>

<sup>472</sup> Amelie Le Renard, 'Only for Women: Women, the State, and Reform in Saudi Arabia' (2016) [online] <<http://www.jstor.org>. Available at [http://Women's Employment in Saudi Arabia A Major Challenge](http://Women's%20Employment%20in%20Saudi%20Arabia%20A%20Major%20Challenge)> ; See also Amelie Le Renard 'Young Urban Saudi Women's Transgressions of Official Rules and the Production of a New Social Group' (2016) 9(3) Journal of Middle East Women's Studies, 108-135, Available at <<http://muse.jhu.edu/article/517384>>

deafening.<sup>473</sup> From a universalist or Islamic feminist perspective, Saudi Arabia's ambivalence on issues of female chastity, remaining forms of guardianship based permission for travel and other aspects of family laws reinforces certain hierarchies between religious or political authorities and even amongst gender and class-based divisions.<sup>474</sup> As noted above ambivalence may also entrench some forms of gender-based social or economic exclusion. Thus, political or civil rights are diminished from within the legal structure itself, preventing the full realization of a meaningful right to education for women. As noted above, even now, a woman can only obtain a National ID card with proof of address, which must also be verified by a guardian.

Again, institutional and legislative reform can reverse these trends, but it takes active participation and advocacy by not only the governing bodies, but also religious authorities themselves. For instance, other Islamic countries, including Egypt, Morocco, and Algeria, have codified "legal amalgams of moderate Islamic sources and secular legal principles such as gender equality and procedural justice."<sup>475</sup> In Morocco, gender-based roles have been redefined through the elimination of the guardianship practice and declaring husbands and wives to have joint responsibility for the family.<sup>476</sup> Other countries, such as Egypt, Kuwait and Tunisia have also reformed personal status or family codes.<sup>477</sup> The unique challenge in Saudi Arabia is that this type of reform requires an erosion or dilution of the jurisdictional and interpretive authority of the religious elite, something that is often predestined to fail in Saudi Arabia's *Sharia* practice.<sup>478</sup>

From a cultural relativist perspective, this state of affairs is justified by the Islamic tradition

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<sup>473</sup> Ann Elizabeth Mayer 'Universal Versus Islamic Human Rights: A Clash of Cultures or a Clash with a Construct' (1994) 15 Mich. J. Int'l L., 382-383.

<sup>474</sup> See for general reference discussion in article regarding how the behavior of a State can demonstrate compliance, or non-compliance, and establishment of a rule of law or customary law, Krivenko, Ekaterina. *Women, Islam and International Law Within the Context of the Convention on the Elimination of All Forms of Discrimination Against Women*. 1st. 8. Boston: Martinus Nijhoff Publishers, 2009. 1-263. Print

<sup>475</sup> Ran Hirschl, 'The Political Economy of Constitutionalism in a Non-Secularist World', Chapter 7, as edited by Tom Ginsburg, *Comparative Constitutional Design* (First published 2012, Cambridge University Press, 2012) 173

<sup>476</sup> *ibid*

<sup>477</sup> Lynn Welchman, *Women in Muslim Family Laws in Arab States* (1st. Amsterdam: Amsterdam University Press, 2007) 71-76

<sup>478</sup> For discussion purposes see World News, 'Saudi cleric says male guardianship should apply only to marriage' (Reuters Online, 8 September 2016) <<http://www.reuters.com/article/us-saudi-women-rights-idUSKCN11E2AB>>

and cultural norms.<sup>479</sup> But critics of this position will argue that “moral standards that govern human behaviour are objectively derived from the nature of human beings and the nature of the world.”<sup>480</sup> There is again a middle ground to be found between universalist and relativist positions as discussed in chapter 5. That is, institutional or constitutional re-design can be used to ‘change human behaviour, by enlightenment and education, deterrence and enforcement, or by creating meaningful incentives for people (or groups) to behave in a desirable way.’<sup>481</sup> For women’s rights, this would require using both a religious and political approach. For instance, presenting arguments for different interpretations of the *Qur’an* and *Sunnah* or *fiqh* have *already* lead to the abolishment or reform of the guardianship system; the increased codification of family law and other legislative reforms that emphasise *Sharia* values of equality, justice, and mutual respect can be introduced.<sup>482</sup>

As will be discussed in later chapters, there have been recent trends of women using their education to persuade scholars of their errors in interpretation of *Sharia* law, using economic pressures, and advocating for the “Saudization” of the workforce by demanding the full inclusion of women in additional occupations. These efforts may help to reduce the resistance of the current political, religious, and legislative policies to change.<sup>483</sup>

### 3.7 Empowering Women through Structural Change

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<sup>479</sup> See Bassam Tibi, “Islamic Law/Shari’a, Human Rights, Universal Morality and International Relations”, (1994) 16 HRQ, 296, See also Abdullahi Ahmed An-Na’im ‘Towards a Cross-Cultural Approach to Defining International Standards of Human /rights: the Meaning of Cruel, Inhuman or Degrading Treatment or Punishment’ in Abdullahi Ahmed An-Na’im (ed.), *Human Rights in Cross Cultural Perspectives: A Quest for Consensus* (ed. 1992b, University of Pennsylvania Press)

<sup>480</sup> Kenneth Einar Himma , ‘Natural Law’ (Internet Encyclopedia of Philosophy, 2014) <<http://www.iep.utm.edu/natlaw/>>

<sup>481</sup> Ran Hirsht ‘The Epistemology of Constitutional Law’ Chapter 7 as edited by Tom Ginsburg ‘*Comparative Constitutional Design*’ (First Published 2012, Cambridge University Press) 174

<sup>482</sup> Issam Fares Institute for Public Policy and International Affairs, American University of Beirut ‘Women’s Citizenship Rights in Lebanon’ (Research, Advocacy & Public Policy-Making: Working Paper Series 8, May 2012) edited by Maya W. Mansour and Sarah G. Abou Aad, Available at: <[https://www.aub.edu.lb/ifi/public\\_policy/rapp/Documents/working\\_paper\\_series/20120504ifi\\_rapp\\_hrp\\_wps08\\_womens\\_citizenship\\_rights\\_in\\_lebanon\\_english.pdf](https://www.aub.edu.lb/ifi/public_policy/rapp/Documents/working_paper_series/20120504ifi_rapp_hrp_wps08_womens_citizenship_rights_in_lebanon_english.pdf)>

<sup>483</sup> See generally Fawziah Al-bakr, Elizabeth R. Bruce, Petrina M. Davidson, Edit Schlaffer, and Ulrich Kropiunigg, ‘Empowered but not Equal: Challenging the Traditional Gender Roles as Seen by University Students in Saudi Arabia’ (2017) 4(1), FIRE: Forum for International Research in Education, < <http://preserve.lehigh.edu/re/vol4/iss1/3>>

For a society such as Saudi Arabia's, the education and training of women guarantees that in each level of leadership and competence, women will have a place where they are subordinate and inferior to that of men's positions.<sup>484</sup> According to Smith, it is necessary for women to be able to learn to relate with other women and be able to treat one another as the source of knowledge in the society of Saudi. Because of the differences in cultural background and class, women in Saudi will have to disregard these factors and reach out to other women and unite with them in order to fight male dominance and gender equality in the society.<sup>485</sup>

Another imperative issue is the application of a single interpretation of the *Qur'an*<sup>486</sup> to emphasise the man's authority. From the perspective of conservative religious scholars, women are frequently depicted as irrational and prone to emotional instability. There are instances when *Qur'anic* text translations are too literal, thereby enabling conservative religious scholars to use Islam to exclude women's voices. Recently, however, Saudi women conducting an in-depth study about Islam are using religious ideology as an instrument to fight for issues experienced by women. These women are studying the supposed "legitimate language", which is language that cannot be opposed by men, to challenge the status quo and make a difference. Moreover, they are also exerting effort in studying Islamic law so they can use the religion to speak out.<sup>487</sup> Relevantly, the Kingdom's higher education system has only seen concerted efforts to improve gender inequality issues in the last decade or so.<sup>488</sup>

Literature provides that one of the main characteristics of culture is that it is not innate but learned, informally, through interaction, imitation and observation, and formally, through social institutions.<sup>489</sup> Literature also points out that the communication between men and women is shaped by several factors, specifically social, religious and cultural ones. Therefore,

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<sup>484</sup> D Smith, *The Everyday World as Problematic* (Toronto: Toronto University Press, 1987) 34.

<sup>485</sup> D Smith, *The Everyday World as Problematic* (Toronto: Toronto University Press, 1987) 35.

<sup>486</sup> Amani Alghamdi, "Bringing a global education perspective to understand" the other": A case study of Western myths of Muslim women." (2003): 1559-1559.

<sup>487</sup> Amani Hamdan, "Women and Education in Saudi Arabia: Challenges and Achievements." (2005) 6(1) International Education Journal 42-64.

<sup>488</sup> Delwin A Roy, "Saudi Arabian education: development policy." (1992) 28(3) Middle Eastern Studies 477-508.

<sup>489</sup> Larry A Samovar, Richard E. Porter, Edwin R. McDaniel, and Carolyn Sexton Roy. *Communication between cultures* (Nelson Education, 2015).

it is obvious that the influence of religious and social norms must be lessened so that women's learning abilities will not be too impacted.<sup>490</sup>

Wajeha Al-Huwaider, a prominent women's rights activist from Saudi, stated in an interview in 2007 that a vast percentage of women in Saudi Arabia have restricted freedoms because of the "shackles" that detain them, namely family, society, religious institutions, tribe and political organisation.<sup>491</sup> Yet, there are still some Saudi women who believe that male guardianship is necessary, including Rowdah Al Yousef, a women's rights activist known for taking on the "*My Guardian Knows What's Best for Me*" campaign, a movement that supports the continuance of guardianship to oppose women who would like to act freely as adults.<sup>492</sup> Given situations like this, if legislators want to successfully create new innovation and policies, they should first be fully aware of how religion and culture shape all attributes of life.<sup>493</sup> Creating better rules for education of women offers one potential avenue for inclusion.

In Saudi society, certain religious and social practises, i.e. gender segregation, mobility, early marriage, upholding family honour and veiling, are the top barriers to better women's higher education.<sup>494</sup> Almost all situations require segregation between genders, which undoubtedly affect how women can participate in education.<sup>495</sup> When literally translated, the *Qur'an* states that any form of interaction between a man and a woman who is unrelated or unmarried is prohibited.<sup>496</sup> Moreover, a man is not allowed to directly interact with a woman, even virtually<sup>497</sup> to prevent any feelings of sexual attraction (*fitna*).<sup>498</sup> Thus, gender segregation was applied to prevent women in Saudi to study only in certain subject areas, a move that consequently affects their professional life.

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<sup>490</sup> Abdallah Tubaishat, Arif Bhatti, and Eyas El-Qawasmeh. "ICT experiences in two different Middle Eastern universities." (2006) 3 *Issues in Informing Science & Information Technology*

<sup>491</sup> W Al-Huwaider, "For Saudi Women, Every Day is a Battle." (2007).

<sup>492</sup> Liz Leslie, "Saudi Feminism doesn't Mirror Western Ideas." (2011) *Muslim Voice*.

<sup>493</sup> Reem A Alebaikan, "Perceptions of blended learning in Saudi universities." (2010).

<sup>494</sup> Yahya Al Alhareth, "E-learning contribution to the enhancement of higher education opportunities for women in Saudi Arabia (Pilot study)." *US-China Education Review A& B*, USA 3, no. 9 (2013): 637-648.

<sup>495</sup> Al-Kahtani, Nouf KM, Julie JCH Ryan, and Theresa I. Jefferson. "How Saudi female faculty perceive internet technology usage and potential." (2005) 5(4) *Information Knowledge Systems Management* 227-243.

<sup>496</sup> Baki, Roula. "Gender-Segregated Education in Saudi Arabia: Its Impact on Social Norms and the Saudi Labor Market." (2004) 28(12) *education policy analysis archives*

<sup>497</sup> Al-Kahtani, Nouf KM, Julie JCH Ryan, and Theresa I. Jefferson. "How Saudi female faculty perceive internet technology usage and potential." (2005) 5(4) *Information Knowledge Systems Management* 227-243.

<sup>498</sup> Metz, Helen Chapin. "Saudi Arabia: A Country Study. Washington, DC: Federal Research Division." In *Library of Congress*. 1993.

Furthermore, since men are accountable for the women in their family, their consent is necessary whenever a woman has to leave the home.<sup>499</sup> Hence, with the culture, the mobility of women is extremely limited<sup>500</sup> and can easily affect their chances of getting a higher education. This control over women wanting to study abroad by means of male guardianship must be modified so women can have better opportunities for international education. Likewise, the inferiority assigned to women should be eradicated, with women being allowed to take control of their own lives.

Early marriage is a significant player in hindering women's education.<sup>501</sup> A lot of women have discontinued their studies in order to get married, especially in rural areas where marriage is seen as more important than education. Being forced into an early marriage can be detrimental to a woman's opportunity to gain a higher education.<sup>502</sup>

However, even though there are a number of issues that adversely affect women's education, the Saudi government has fully shown its support and dedication to promote women's access to better education. In the last decade, the government has been establishing more higher education institutions and allocating them across various areas in the country with the intention of making them accessible to all women.<sup>503</sup> This initiative was pushed forward by King Abdullah bin Abdulaziz, whose vision is to increase the role of women in Saudi's society. One of the King's study abroad programmes gave equal opportunity for men and women to receive education internationally, a big leap for female students. What is interesting is that King Abdullah's support for better women's education was successfully implemented without any opposition,<sup>504</sup> which indicates that there is an existing acceptance of women's role in education but it had to be backed by the government so it could come to fruition. Chapter 6 will expand on these ideas. What remains more critical from a legal perspective is how Saudi Arabia

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<sup>499</sup> Al-Kahtani, Nouf KM, Julie JCH Ryan, and Theresa I. Jefferson. "How Saudi female faculty perceive internet technology usage and potential." (2005) 5(4) Information Knowledge Systems Management 227-243.

<sup>500</sup> Suha Sabbagh, "Arab women between defiance and restraint." (1996).

<sup>501</sup> AlMunajjed, Mona. 'Women's education in Saudi Arabia: The way forward,' (2009) 23(1) Booz & Company

<sup>502</sup> Amani Hamdan, 'Women and Education in Saudi Arabia: Challenges and Achievements.' (2005) 6(1) International Education Journal 42-64.

<sup>503</sup> Ministry of Higher Education, the National Report June 2009, Saudi Arabia, Office of the Deputy Minister for Educational Affairs (2009),

<sup>504</sup> A Alzouman "highlighted the achievements of Saudi women in the era of King Abdullah bin Abdulaziz [online], althamena program report, mbc. net." (2014).



reconcile its customs and traditions with domestic legal reforms, including the Kingdom's decision to become party to various human rights treaties, as developed in the next chapter.

### 3.8 Conclusion

Discussing education of women in Saudi Arabia is virtually impossible to deliberate without having to bring up the political and social influences that led to the current standing of women in the field of education and more generally in society. Saudi Arabian women were first only informally educated, at their homes, and exclusively in the teachings of Islam, which was the only education deemed appropriate for them. With time and thanks to reforms implemented by the Saudi Arabia rulers, they were formally granted right to education, first at the primary level and then at the higher education level. The problem remains that, even with all advances at a normative level, there are many structural obstacles that need to be eliminated if women are to enjoy their given rights. In the first place, the system of gender segregation and the institution of guardianship that place women under the care of a male guardian, remain a barrier to equality in education, even as they are being reformed with the goal of expanding the workforce of Saudi Arabia, so that it includes women. Even with reform to the guardianship laws, these barriers are likely to remain in place, if prevailing cultural attitudes on gender roles are not changed accordingly and women no longer seen as having no identity of their own.

Further, discussion will show that unlike international human rights law, Saudi Arabia's *Sharia* law is a dynamic system intentionally designed to supervene the individualized rights perspective of international law for the betterment of the entire community. This preservation of the societal unit as well as religious and communal norms is highly important under *Sharia* law.<sup>505</sup> In this regard, culture, tradition, religion and lifestyle have significantly impacted how the right to education is defined and how it is perceived. The media often plays a significantly negative role in this regard. Indeed, as Hussain highlights, 'the media's generalization of Muslims... (produces) an inaccurate representation of Islam on the basis of a country's culture, which is mistaken to be religiously dictated.'<sup>506</sup>

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<sup>505</sup> Mohammad Hashim Kamali, *Sharia: An Introduction* (Oneworld Publications, 2008), 17.

<sup>506</sup> Tooba Hussain, "The Media's Portrayal of Islam: An Analysis of Methods and Implications" <<http://scarletreview.camden.rutgers.edu/archive/2016edition/Articles/mediaportrayal.html>>

The next chapter builds on these ideas to examine the international human rights basis for the right to education, thereby situating its analysis of gender discussion in Saudi Arabia's religious-cultural traditions in legal context.

## **Chapter 4**

### **The ‘Right to Education’ in International Human Rights Law**

#### **4.1 Introduction**

Universally, education is seen as one of the pivotal factors in determining the economic, social and political advancement of a society. On this basis, the key legal provisions relating to the right to education under international human rights law will be explored. This will involve an examination of the legal basis for the right of women to education under regional and international human rights treaties. In a second line of analysis, the chapter will consider regional Islamic human rights instruments and how these may differ from international human rights instruments in their scope and application. It is important to understand the basis of the right within each system. Indeed, the foundation of the right to education greatly informs what the right includes and how the holders of this right enjoy its benefits and protections. Different approaches have been taken by different societies within each system and these themes will be developed in more conceptual terms in the following chapter. Thirdly, the chapter will consider Saudi Arabia’s reservations under CEDAW, focusing on how these have been framed as a Sharia compliance issue. In a final line of analysis, the theoretical basis for human rights will be discussed. This will include a brief discussion of the universality of human rights as well as cultural relativism with consideration given to the impact of culture and different interpretations of Islam that will emerge as a focal point of Chapter 5.

#### **4.2 The Relationship between the “Consent” Model of International Law and Universal Rights**

Many have argued that Islam can play an extremely positive role in relation to human rights. Indeed, as Baderin highlights, ‘due to its very significant role in Muslim States, Islam can and should, where employed appropriately, provide the glue that can make human rights to stick and a channel to promote development in Muslim states.’<sup>507</sup> Accordingly, strong Islamic foundations for human rights are conceptually possible but their practical prospects ultimately

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<sup>507</sup> Mashood A Baderin, *International Law and Islamic Law* (2<sup>nd</sup> edn, Routledge 2016)

depend upon the outcome of the current discourses in Islamic countries. To begin to explore these issues, it is necessary first to examine how the right of education is defined and enforced at levels beyond the state, and hence beyond any particular context. This will then lead more particularly to a discussion of whether such norms can truly be said to have attracted broad political consensus or are- through processes of non-ratification and treaty reservation – subject to the vagaries of domestic law and implementation. These issues will be developed in the next chapter.

Ever since the Universal Declaration of Human Rights (UDHR) was adopted as a non-binding declaration it has been widely recognised as the underpinning of modern human rights law. It is the first and most well-recognised international human rights instruments, enshrines access to education as a fundamental right. It should be noted that the UDHR is a non-binding treaty in that it does not consist of self-executing provisions but requires states to implement legislation before they achieve the status of binding, effective, enforceable law.<sup>508</sup> Nonetheless, it should be noted that UDHR is broadly recognized as having achieved the status of customary international law. For those treaties that have attained the status of *jus cogens* (peremptory) norms, any failure to comply with (or entry reservations to) for instance, to universally accepted rights might be viewed as a violation of customary norms.<sup>509</sup> The assumption here is that customary law overrides the principle of “state consent” as the bedrock of classic conceptions of international law.<sup>510</sup> The traditional view of international law is that all states are sovereign and formally equal. As sovereign states, they exercise political and territorial independence and cannot be bound by any laws or treaties without consent. This bi-lateral and voluntarist conception of international law<sup>511</sup> is being challenged by the emergence of a more ‘people-centred’ conception of international law that no longer treats the state as the only or most important subject of international law.<sup>512</sup> In other words, States cannot disregard or violate norms that the international community has, as a whole, recognized certain rights as moral imperatives. This integrity of these fundamental rights should, therefore, be safeguarded,

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<sup>509</sup> *ibid*, paras 8-9.

<sup>510</sup> Oona Hathaway, *International Delegation and State Sovereignty* (2008) 71 *Law and Contemporary Problems* 115

<sup>511</sup> Katherine Brennan, “The Influence of Cultural Relativism on International Human Rights Law: Female Circumcision as a Case Study,” 7 (1988) *Law & Inequality* 367

<sup>512</sup> Teson ‘The Kantian theory of International law,’ (1992) 92 *Columbia Law Review* 53

irrespective of whether they are recognised as such by the relevant governments and afforded formal recognition by national law and courts.

According to this view, once a right is deemed to have attained broad (near-universal) recognition as a peremptory or *jus cogens* norm, it prevails over any conflicting law or provision of national law. In short, a customary norm of international law overrides the sovereign autonomy of states to determine which international obligations they will ratify and implement (as an expression of state “consent”). The difficulty, of course, is that there is no broad agreement on the precise content of these “rights”.<sup>513</sup> It may well be true that certain rights have indeed attained normative status as ‘universal’ right, such as a right to life, the broad acceptance of the right to education is less certain. Moreover, it is evident that many states qualify how such rights are to be defined and implemented in accordance with their own national legal systems and culture. Human rights frameworks created under the auspices of UN human rights bodies and other regional organization will provide national authorities with a margin of appreciation to interpret and apply human rights legislation in a manner that legal, political and religious traditions of their own legal systems.<sup>514</sup> The UDHR consists of broadly formulated principles and states have broad latitude to decide the precise scope and content of this right. In dualist legal systems, courts will only enforce aspects of these rights, however defined, that have a basis in the relevant national legislation.<sup>515</sup> The general recognition of a fundamental right to education does not mean that individuals can rely on the broad provisions of a treaty such as UDHR, regardless of its customary law status.<sup>516</sup> Moreover, States have the autonomy to enter reservations to a right enshrined in UDHR and have done so in respect of various international human rights instruments.<sup>517</sup> As an example of a dualist legal system, Saudi Arabia has emphasized its freedom to refuse recognition and enforcement to any treaty

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<sup>513</sup> See e.g. Tracy E. Higgins, “Anti-Essentialism, Relativism, and Human Rights,” 19 (1996) Harv. Woman. L.J. 89 and generally Michael Ignatieff. (ed.) *The Lesser Evil* (ed. 2004)

<sup>514</sup> Equal Rights Trust, ‘The Ideas of Equality and Non-Discrimination: Formal and Substantive Equality (2007) <http://www.equalrightstrust.org/ertdocumentbank/The%20Ideas%20of%20Equality%20and%20Non-discrimination%2C%20Formal%20and%20Substantive%20Equality.pdf>.

<sup>515</sup> Ian Brownlie, *Principles of Public International Law* (7th edn, OUP 2008) 31, 33.

<sup>516</sup> See Jeremy Walden, ‘Customary International Law: A Jurisprudential Analysis’, (1978) 13 Israel Law Review 86, at 87. For a critique see Jörg Kammerhofer, ‘Uncertainty in the Formal Sources of International Law: Customary International Law and Some of Its Problems,’ (2004) 15 European Journal of International Law 523

<sup>517</sup> Human Rights Watch, ‘Looser Rein, Uncertain Gain A Human Rights Assessment of Five Years of King Abdullah’s Reforms in Saudi Arabia’ (September 2010) <https://www.hrw.org/report/2010/09/27/looser-rein-uncertain-gain/human-rights-assessment-five-years-king-abdullahs>

provisions deemed incompatible with the “norms of Islamic law.”<sup>518</sup> There is some debate, for instance, about whether broad reservations on religious grounds undermine the object and purpose of the Convention and with article 28(2) of CEDAW.<sup>519</sup>

Several Muslim majority states, particularly Saudi Arabia, Syria and Iran, have expressed opposition to the idea of the universality of human rights. They argue that within *Sharia*’s legal framework, human rights are definite and thus, the UDHR does not apply to Muslim states. Because of this resistance, the cultural relativity versus universality of human rights has constantly been the subject of debates.<sup>520</sup>

Further discussed in chapter 5, the universality of human rights has been eagerly proposed by the UDHR, the Charter of United Nations<sup>521</sup> and other human rights organizations. They consider as universal the idea of human rights defined in the UDHR and other documents, including the International Covenant on Economic, Social and Cultural Rights 1966 (ICESCR) and the International Covenant on Civil and Political Rights 1966 (ICCPR).<sup>522</sup> Nevertheless, the notion of the universality adopts the perspective that human rights can be applicable to all individuals and circumstances no matter the cultural background, nationality, religion, race, political affiliations, and gender.<sup>523</sup> This position has its political implications in the fact that the international community is allowed to set human rights standards and monitor whether

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<sup>518</sup>1. In case of contradiction between any term of the Convention and the norms of Islamic law, the Kingdom is not under obligation to observe the contradictory terms of the Convention’. Saudi Arabia Reservation 1 to CEDAW.

<sup>519</sup> See Rebecca J Cook, ‘Reservations to the Convention on the Elimination of All Forms of Discrimination Against Women’ (1990) 30 Virginia Journal of International Law 643. The International Law Commission’s (ILC) Guide to Practice on Reservations to Treaties clarifies the appropriate framework on validity. A reservation will be incompatible with the object and purpose ‘if it affects an essential element of the treaty that is necessary to its general tenor, in such a way that the reservation impairs the *raison d’être* of the treaty’. UN Report of the Committee on the Elimination of Discrimination against Women, ‘General Recommendation No25’ in UNGA 59<sup>th</sup> Session (2004) UN Doc A/59/38/Supp<[http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolNo=A%2f59%2f38\(SUPP\)&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolNo=A%2f59%2f38(SUPP)&Lang=en)>

<sup>520</sup> Ahmari-Moghaddam Ali, *Towards International Islamic Human Rights: A comparative study of Islamic Law, Sharia, with universal human rights as defined in the International Bill of Human Rights* (University of Toronto (Canada), 2012).

<sup>521</sup> The Charter of the United Nations 1945.

<sup>522</sup> Shireen Hunter, and Huma Malik, eds. *Islam and Human Rights: Advancing a US-Muslim Dialogue*. No. 27. (Csis, 2005).

<sup>523</sup> Osaka Hurights, "Human Rights and Cultural Values: A Literature Review." *Human Rights in Asian Cultures—Continuity and Change*. (Delhi: Hurights Osaka 2010).

states conform to these standards enshrined by international law.<sup>524</sup> The idea of the universality of human rights is inseparable from natural law theory, which posits that laws that set the standards of moral behaviour exist independently of any positive law and can be accessed through reason alone and apply to all humans alike.<sup>525</sup> In the past, the source of these natural laws was considered to be divine, while today they are conceived of in secular terms as being inalienable and owed to all humans because they are inherent in human nature.<sup>526</sup> The proponents of cultural relativism, on the other hand, claim that cultural differences must be taken into account and that it is not possible to set cultural standards that would apply across all societies. They point to the fact that the international character of human rights has been used in the past as a disguise for cultural imperialism.<sup>527</sup>

On December 10, 1948, when the UN General Assembly passed the UDHR, some countries in Africa and Asia were not represented by it, even though the empires that colonised these continents were primary players in the human rights universalist project. Afterward, when the colonised nations gained their independence, a majority of them reasserted this declaration so they could become cooperative and functional members. At the same time, they expressed some reservations on selected articles that opposed their religious-cultural values.<sup>528</sup> These debates will be returned to in chapter 5.

### **4.3 ‘The Right to Education’ as a Fundamental Human Right**

The right to education has been recognised in several international instruments and non-binding declarations. From the outset, the importance of such a right must be acknowledged. As Saul points out, ‘the importance of the right to education lies both in the importance of education in

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<sup>524</sup> Ann Elizabeth Mayer, “Cultural Particularism as a Bar to Women’s Rights: Reflections on the Middle Eastern Experience’ in Julie Peters and Andrea Wolper (eds) *Women’s Rights, Human Rights: International Feminist Perspectives* (Routledge 1995),176

<sup>525</sup> Michael Boylan, *Natural Human Rights: A Theory* (CUP 2014).

<sup>526</sup> Ibid.

<sup>527</sup> Ann Elizabeth Mayer, “Cultural Particularism as a Bar to Women’s Rights: Reflections on the Middle Eastern Experience’ in Julie Peters and Andrea Wolper (eds) *Women’s Rights, Human Rights: International Feminist Perspectives* (Routledge 1995),176; Koskenniemi Marti, *The civilizing mission: International Law and the Colonial Encounter in the late 19<sup>th</sup> century* ( Bonn, 2004),

<sup>528</sup> Saira Bano Orakzai. "The rights of women in Islam: The question of ‘public’and ‘private’spheres for women’s rights and empowerment in Muslim societies." (2014) 2(1) *Journal of Human Rights in the Commonwealth*.

and of itself, and in its ability to contribute to the enjoyment of other human rights.’<sup>529</sup> The right of all to education is indisputable. This is because, the right to share in the heritage of mankind formed the basis of civilization. The right to access education should therefore not be denied to anyone.

#### 4.3.1 The significance of ‘The Right to Education’

From an international perspective, education as a human right has been said to comprise three elements. Firstly, as discussed in detail below, that the right to education is guaranteed legally for all without any discrimination. Secondly, those states have the obligation to protect, respect and fulfil the right to education. Thirdly, that there are ways to hold states accountable for violations or deprivations of the right to education.

In this section, the key provisions of the right to education in international law will be briefly outlined and discussed. Following on from this, the right of women to education will be explored. The discussion will then turn to the rights of women under Islamic human rights principles and instruments.

In this regard, it must be acknowledged that education is not a standalone right as it is inextricably linked with other human rights. Indeed, the right to education has been described as ‘an overarching right because its enjoyment empowers other human rights.’<sup>530</sup> Though adopted as 2000 declaration rather than a binding treaty, it is worth noting that World Conference for Education for All represents an emerging consensus that where the ‘right education is guaranteed, people’s access to and enjoyment of other rights is enhanced.’<sup>531</sup> Arendse further highlights that the right to education ‘unlocks the enjoyment of other human rights and ultimately empowers a person to play a meaningful role in society’<sup>532</sup>. This is because, only educated people generally acquire legal and economical instruments which assist

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<sup>529</sup> Ben Saul, David Kinley and Jaqueline Mowbray, *The International Covenant on Economic, Social and Cultural Rights: Commentary, Cases and Materials* (Oxford University Press 2014) 1086.

<sup>530</sup> Formisano Maritza Prada, *Empowering the Poor : Through Human Rights Litigation* (Manual), (UNESCO 2011) 47.

<sup>531</sup> Birutė Pranevičienė and Aurelija Pūraitė, “Right to Education in International Documents” (2010) <<https://www.mruni.eu/upload/iblock/e91/8praneviciene,%20puraite.pdf>>.

<sup>532</sup> L Arendse, “The Obligation to provide Free Basic Education in South Africa: An International Perspective”<<http://www.nwu.ac.za/sites/www.nwu.ac.za/files/files/p-per/issuepages/2011volume14no6/2011%2814%296ArendseFreeBasicEducationDOC.pdf>>



them with the struggle against poverty, social and economic discrimination. Accordingly, education plays a crucial role in the fulfilment of socio-economic rights. Indeed, education enhances a person's prospects of securing employment, which in turn secures access to food, housing and health care services. As a result, it has been noted that 'people who are left behind in education face the prospect of diminished life chances in many other areas, including employment, health, and participation in the political processes that affect their lives.'<sup>533</sup>

#### 4.3.2 'The Right to Education' in Instruments of Human Rights Law

The right to education itself was first recognized by Article 26 of the Universal Declaration of Human Rights (UDHR). It provides:

1. Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit.
2. Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance and friendship among all nations, racial or religious groups, and shall further the activities of the United Nations for the maintenance of peace.
3. Parents have a prior right to choose the kind of education that shall be given to their children.

It should be noted that, Saudi Arabia was one of eight nations that abstained from voting during the adoption of the UDHR. Under international law states are required to execute international treaties they have ratified or acceded to before any individual subject to the laws of that jurisdiction can directly rely on these rights and to have these enforced before the relevant courts.<sup>534</sup> The fact that Saudi Arabia not formally ratified the UDHR should not be taken to mean that Saudi Arabia does not take its human rights obligations seriously. Therefore it is necessary to examine the States duty to protect and bring into effect the right to education under the most important international human rights instruments.

As the text of Article 26 provides, the right to education comprises several different components. Firstly, Article 26 announces a universal commitment that the right to education

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<sup>533</sup> EFA Global Monitoring Report, *Reaching the Marginalised* (Oxford University Press 2010) 8.

<sup>534</sup> Farida Deif, 'Perpetual Minors: Human Rights Abuses Stemming from Male Guardianship and Sex Segregation in Saudi Arabia (HRW, 2008).

is “for everyone.” Secondly, this Article provides that elementary and fundamental education must be free, and technical and vocational education must generally be available. The second paragraph describes the purpose of the right to education in that its focus is the ‘full development of the human personality’ which in turn strengthens ‘respect for human rights and fundamental freedoms.’<sup>535</sup> Article 26 must also be read in conjunction with Article 2 of the Universal Declaration of Human Rights. Article 2 provides that ‘everyone is entitled to all the rights and freedoms set forth in (the UDHR) without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin property, birth or other status.’<sup>536</sup> Accordingly, ‘at a minimum, this entails that nobody should be discriminated against in as far as access to education is concerned.’<sup>537</sup> The right to education, therefore, accrues to every person on equal terms. States must, therefore, refrain from unfairly excluding any person from education on the basis of any of the criteria just outlined.

Following on from this, the right to education was further developed by the UNESCO Convention Against Discrimination in Education (1960). In further proof of the Kingdom’s commitment to international human rights (albeit with qualifications, discussed below, Saudi Arabia ratified the non-binding recommendations issued by UNESCO, and did so several decades ago in 1973).<sup>538</sup> This Convention came about because discrimination was found to be prevalent in education and it was felt that an international convention on the subject would be the best way to counter discrimination. Hence, Article 4(a) of this Convention requires state parties ‘to promote equality of opportunity and treatment in the matter of education and in particular to make primary education compulsory and free.’<sup>539</sup> In principle, this Convention is a guide for ensuring that everyone has the right to education. Like the Universal Declaration of Human Rights, the Convention against Discrimination in Education distinguishes two core elements of primary education, namely making it compulsory and making it free. That being said, this Convention contains a more detailed statement of what is meant by discrimination and outlines the legal obligations of governments relating to discrimination in education. Indeed, this Convention defined discrimination as ‘any distinction, exclusion, limitation and

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<sup>535</sup> Universal Declaration of Human Rights, Article 26.

<sup>536</sup> Universal Declaration of Human Rights, Article 2.

<sup>537</sup> Klaus Dieter Beiter, *The Protection of the Right to Education by International Law: Including a Systemic Analysis of Article 13 of the International Covenant on Economic, Social and Cultural Rights* (Koninklijke Brill 2006) 93.

<sup>538</sup> List of Signatory States <http://www.unesco.org/eri/la/convention.asp?order=alpha&language=E&KO=12949>

<sup>539</sup> Convention Against Discrimination in Education, Article 4(a).

preference” and identified race, colour, sex, language, social class, religion, political opinion and national origin as objects of discrimination in education.’ As a result, it is unsurprising that this Convention has been described as a “pioneering document” that helped to ‘clarify the meaning of the right to education.’<sup>540</sup>

The International Covenant on Economic, Social and Cultural Rights (1966) further strengthened the right to education. Although Saudi Arabia is not a signatory to this Covenant, it has made representations indicating a future intent to ratify the treaty.<sup>541</sup> Indeed, this instrument devotes two articles to the right to education, namely Article 13 and 14. Article 13 is the longest provision in the Covenant and has been deemed the ‘most wide-ranging and comprehensive article on the right to education in international law.’<sup>542</sup> In this regard, it is worth highlighting Article 13(1). It provides that,

The States Parties to the present Covenant recognize the right of everyone to education. They agree that education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms. They further agree that education shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups, and further the activities of the United Nations for the maintenance of peace.<sup>543</sup>

Article 13(1) therefore acknowledges that education is critical to the provision of basic needs that enhance the ability to participate in community life. Article 13(2) further confirms and adds detail to the UDHR’s commitment to the provision of free and compulsory primary education. Indeed, it emphasises the content of education in the Universal Declaration adding

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<sup>540</sup> Joel Spring, *The Universal Right to Education: Justification, Definition, and Guidelines* (Lawrence Erlbaum Associates 2008) 25.

<sup>541</sup> See Report of the Special Rapporteur, Dato’ Param Cumaraswamy, on the Independence of Judges and Lawyers: Report on the Mission to the Kingdom of Saudi Arabia, Submitted Pursuant to Commission on Human Rights Resolution 2002/43, UN ESCOR, Comm’n on Hum. Rts., 59th Sess, Item 11(d) of the provisional agenda UN Doc. E/CN.4/2003/65/Add.3, para.81.

<sup>542</sup> Birutė Pranevičienė and Aurelija Pūraitė, “Right to Education in International Documents” (2010) <<https://www.mruni.eu/upload/iblock/e91/8praneviciene,%20puraite.pdf>>.

<sup>543</sup> The International Covenant on Economic, Social and Cultural Rights, Article 13(1).

that it should enable “all persons to participate effectively in a free society”<sup>544</sup> among other goals.

Article 13 also reiterates the language of the Universal Declaration regarding primary and higher education but adds that secondary education, including technical and vocational, ‘shall be made generally available and accessible to all by every appropriate means and, in particular by the progressive introduction of free education.’ Unlike the UDHR, however, it withholds imposing any obligation for free provision of “fundamental” education. In this regard, it is worth highlighting that ‘the degree to which primary education is really free is determined by a number of direct and indirect costs such as school fees, expenses for textbooks and supplies, the cost of extra lessons, expenses for meals at school canteens, school transport, uniforms or other items of clothing and footwear, medical expenses, and boarding fees where applicable.’<sup>545</sup> Moreover, the full enjoyment of the right to education is often heavily contingent upon pre-existing educational infrastructure. This is acknowledged by Article 14 which attempts to address the practicalities of enforcement of the right to education. In doing so, Article 14 provides that States should work out and adopt a plan for the progressive implementation of the principle of compulsory education free of charge for all. There is a timescale for this. Indeed, states have two years in which to formulate a plan to implement universal primary education within its territory and a further reasonable number of years to carry out the plan.

The Committee on Economic, Social and Cultural Rights has adopted two General Comments on the right to education, namely General Comment No 11 Year and General Comment No 13. In General Comment 11, the Committee notes that the right to education can be classified as an economic right, a social right, and a cultural right, but in many ways, it is also a civil and political right, ‘since it is central to the full and effective realisation of those human rights as well.’<sup>546</sup> General Comment No 13, on the other hand, arguably provides the most comprehensive description of the content of the right to basic education in international law. Indeed, it provides:

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<sup>544</sup> The International Covenant on Economic, Social and Cultural Rights, Article 13(2).

<sup>545</sup> Audrey Chapman and Sage Russell, *Core Obligations: Building a Framework for Economic, Social and Cultural Rights*, (Hart Publishing 2002) 228.

<sup>546</sup> Committee on Economic, Social and Cultural Rights, General Comment 11, Plans of action for primary education (Twentieth session, 1999), U.N. Doc. E/C.12/1999/4 (1999).

[E]ducation is both a human right in itself and an indispensable means of realizing other human rights. As an empowerment right, education is the primary vehicle by which economically and socially marginalized adults and children can lift themselves out of poverty and obtain the means to participate fully in their communities. Education has a vital role in empowering women, safeguarding children from exploitative and hazardous labour and sexual exploitation, promoting human rights and democracy, protecting the environment, and controlling population growth. Increasingly, education is recognized as one of the best financial investments States can make. But the importance of education is not just practical: a well-educated, enlightened and active mind, able to wander freely and widely, is one of the joys and rewards of human existence.<sup>547</sup>

The Committee has also provided clarification on the scope and attributes of the right to education through the so-called 4A system framework. This framework aims to facilitate a holistic understanding of the right to education and analyses the obligations related to the right by breaking it down into four key elements, namely: availability, accessibility, acceptability and adaptability. Turning briefly to what exactly this means. Firstly, availability means that there must be functioning educational institutions with sufficient available programmes within the jurisdiction of the State Party. Secondly, accessibility has three overlapping dimensions namely non-discrimination, physical accessibility and economic accessibility. Finally, acceptability and adaptability means that education must be flexible so that it can adapt to the needs of changing societies and communities. One of the most important features of the right to education is accessibility. Indeed, according to the Committee, educational institutions and programmes must be accessible to everyone, ‘especially the most vulnerable groups, in law and in fact, without discrimination on any on any of the specified grounds.’<sup>548</sup> Unlike other elements of the right to education, the requirement of non-discrimination is not subject to progressive realisation. Hence, it must be implemented fully and immediately as it is not dependant on available resources. In other words, regardless of resources, states must provide education on the basis of equal opportunity.

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<sup>547</sup> Committee on Economic, Social and Cultural Rights, General Comment No. 13: The Right to Education (Art. 13) Adopted at the Twenty-first Session of the Committee on Economic, Social and Cultural Rights, on 8 December 1999 (Contained in Document E/C.12/1999/10).

<sup>548</sup> Ibid.

Finally, the Committee has developed the notion of a minimum core to explain the core substance of a right and the corresponding minimum obligations which states must comply with. This is particularly important when it comes to the compliance of states with their obligations. The right to basic education, like all human rights, imposes obligations on states. In particular, states must respect, protect and fulfil such rights. Firstly, the obligation to respect requires the state to refrain from impairing access to an existing right. Secondly, the obligation to protect requires states to take steps to protect people's existing access to a right and their ability to enhance and gain access to a right against interference by third parties. Thirdly, the obligation to fulfil means that the state must take positive steps to ensure that those lacking access to the enjoyment of right gain access.<sup>549</sup> The minimum core content is the "essence" of a right, meaning that essential element without which a right loses its substantive significance as a human right. As Arendse explains: [I]t is the floor beneath which the conduct of the state must not drop if there is to be compliance with the obligation. A failure to provide the minimum core obligations of a right, therefore, results in a breach of a particular right."<sup>550</sup>

Accordingly, it is the responsibility of governments to fulfil their obligations, both legal and political with regards to providing a good quality education for all. It is also up to government to implement and monitor education strategies to ensure that the right to education is more effective.

#### 4.3.3 The Rights of Women to Education

There are also several instruments which specifically address the right of women to education. Indeed, the UN General Assembly first attempted to deal with the problem of discrimination against women through the Declaration on the Elimination of Discrimination Against Women.

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<sup>549</sup> Being a state party to a convention places pressure on the state to fulfil the obligations under it. For instance, as per Paragraph 1, of General Comment No. 11 adopted in May, 1999 states: "Article 14 of the International Covenant on Economic, Social and Cultural Rights requires each State party which has not been able to secure compulsory primary education, free of charge, to undertake, within two years, to work out and adopt a detailed plan of action for the progressive implementation, within a reasonable number of years, to be fixed in the plan, of the principle of compulsory primary education free of charge for all. In spite of the obligations undertaken in accordance with article 14, a number of States parties have neither drafted nor implemented a plan of action for free and compulsory primary education."

<sup>550</sup> L Arendse, "The Obligation to provide Free Basic Education in South Africa: An International Perspective" <<http://www.nwu.ac.za/sites/www.nwu.ac.za/files/files/p-per/issuepages/2011volume14no6/2011%2814%296ArendseFreeBasicEducationDOC.pdf>>.

Firstly, this declaration acknowledged that, “discrimination against women, denying or limiting as it does their equality of rights with men, is fundamentally unjust and constitutes an offence against human dignity.”<sup>551</sup> Accordingly, this Declaration called on States “to abolish existing laws, customs, regulations and practices which are discriminatory against women and to establish adequate legal protection for equal rights of men and women.”<sup>552</sup> In terms of education specifically, Article 9 of this Declaration called for measures to eliminate discrimination against women in the field of education namely,

All appropriate measures shall be taken to ensure to girls and women, married or unmarried, equal rights with men in education at all levels, and in particular:

- a. Equal conditions of access to, and study in, educational institutions of all types, including universities and vocational, technical and professional schools;
- b. The same choice of curricula, the same examinations, teaching staff with qualifications of the same standard, and school premises and equipment of the same quality, whether the institutions are co-educational or not;
- c. Equal opportunities to benefit from scholarships and other study grants;
- d. Equal opportunities for access to programmes of continuing education, including adult literacy programmes;
- e. Access to educational information to help in ensuring the health and well-being of families.<sup>553</sup>

Following on from this, the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW) was adopted in 1979. Its preamble acknowledged that, despite the existence of other instruments, women still did not enjoy equal rights with men. If taken, the Convention imposes obligations on States to eliminate discrimination against women in political, social, economic and cultural fields. Like the Declaration, CEDAW devotes an entire article to the right to education. Article 10 of CEDAW provides that States “shall take all appropriate measures to eliminate discrimination against women in order to ensure to them equal rights with men in the field of education and in particular to ensure, on a basis of equality

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<sup>551</sup> Declaration on the Elimination of Discrimination Against Women, Article 1.

<sup>552</sup> Declaration on the Elimination of Discrimination Against Women, Article 2.

<sup>553</sup> Declaration on the Elimination of Discrimination Against Women, Article 9.

of men and women.”<sup>554</sup> Therefore, all parties to CEDAW are under an obligation to grant the right of education for women, and on the same equal footing as men. In order to give effect to this legal obligation of equality, it has been highlighted that there is a need to promote “gender-inclusive interpretations of treaty norms, gender-sensitive implementation practices, and gender-responsive remedies.”<sup>555</sup> In certain cultures, the education of women is considered a lower priority than that of men. State parties to the Convention for the Elimination of All Forms of Discrimination against Women are obligated to end discrimination against girls in education, including access to schooling, reduction of female dropout rates and programs for girls who have left school prematurely. This is a crucial to our understanding of the points of tension between Saudi Arabia’s domestic implementation of its obligations under CEDAW, and any derogations from these general principles based on mandatory norms of Sharia. These issues will be discussed below and in chapter 6.

Going to a more general point, various UN human rights treaty bodies have played an important role in promoting substantive equality for women beyond the existence of gender equality legislation. For example, the CEDAW Committee has considered the application of economic, social and cultural rights specifically to women in several areas. There is also a Commission on the Status of Women, which is tasked with promoting women’s rights in political, economic, civil, social and educational spheres. Saudi Arabia’s commitment under CEDAW is addressed below in section 4.6.

#### 4.3.4 Scope of the Right to Education under Saudi Arabia’s National Legal System

With regards to the right to education, it is even possible to argue that Saudi Arabia is actually ahead of the rest of the world in some respects. For instance, as early as 1932, Saudi Arabia set out an ambitious roadmap for education reforms within the Kingdom known as the Vision 2030 and the National Transformation Program. A key question, however, is how effective is the right to education within the Kingdom? A concern in this regard is that although women have the right to education, the denial of other rights restricts their ability to access to education. In particular, the lack of progress with regards to civil and political rights has concerned some

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<sup>554</sup> Convention on the Elimination of all forms of Discrimination Against Women, Article 10.

<sup>555</sup>Eibe Riedel, Gilles Giacca and Christophe Golay, *Contemporary Issues and Challenges: Economic, Social, and Cultural Rights: Contemporary Issues and Challenges* (Oxford University Press 2014) 139



commentators. Indeed, as Safaa Rajkhan points out, there are still a number of ‘legislative, social, educational and occupational constraints (which) prevent women from fully participating in the development process of their country.’<sup>556</sup> Accordingly, the fact that women in Saudi Arabia have restricted civil and political rights often impacts their ability to access education. Unfortunately, there is no getting away from the fact that the right to education often goes hand in hand with other rights. Rules regarding guardianship, assembly and segregation can cause problems. This has led some commentators to question the effectiveness of the right to education. At the very least, it is certainly fair to say that the current situation can at times result in an imbalance.

Overall, it is fair to say that the nature of the right to education is complex. On one hand, as Riedel asserts, the right to education can be recognised as a social and cultural right, with economic benefits.<sup>557</sup> For example, Article 2 of the Covenant Against Discrimination in Education permits the establishment and maintenance of private educational institutions provided they supplement rather than replace state education and provided they meet minimum standards. By way of example, education as a social and economic right<sup>558</sup> requires government to ensure that free and compulsory education is available to all children of school age.<sup>559</sup> The right to education can also be recognised as a civil and political right. In this regard, education as a civil and political right requires governments to allow the establishment of schools respecting freedom of and in education. For example, Article 18(4) of the United Nations International Covenant on Civil and Political Rights, records the states parties’ undertaking to

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<sup>556</sup>Safaa Fouad Rajkhan, “Women in Saudi Arabia Status, Rights, and Limitations” (June 2014) <<https://digital.lib.washington.edu/researchworks/bitstream/handle/1773/25576/Rajkhan%20-%20Capstone.pdf?sequence=1>>.

<sup>557</sup> *ibid*

<sup>558</sup> “Education is both a human right in itself and an indispensable means of realizing other human rights. As an empowerment right, education is the primary vehicle by which economically and socially marginalized adults and children can lift themselves out of poverty and obtain the means to participate fully in their communities. Education has a vital role in empowering women, safeguarding children from exploitative and hazardous labour and sexual exploitation, promoting human rights and democracy, protecting the environment, and controlling population growth. Increasingly, education is recognized as one of the best financial investments States can make. But the importance of education is not just practical: a well-educated, enlightened and active mind, able to wander freely and widely, is one of the joys and rewards of human existence.” Officer of the High Commissioner for Human Rights, CESCR General Comment No. 13: The Right to Education (Art. 13), <https://www.refworld.org/pdfid/4538838c22.pdf>

<sup>559</sup> See the argument developed by Riedel, n [497] who argues that free state education provides economic benefits and is therefore classified as economic right. “The right to education, recognized in articles 13 and 14 of the Covenant, as well as in a variety of other international treaties, such as the Convention on the Rights of the Child and the Convention on the Elimination of All Forms of Discrimination against Women, is of vital importance. It has been variously classified as an economic right, a social right and a cultural right.” [https://www.right-to-education.org/sites/right-to-education.org/files/resource-attachments/CESCR\\_General\\_Comment\\_11\\_en.pdf](https://www.right-to-education.org/sites/right-to-education.org/files/resource-attachments/CESCR_General_Comment_11_en.pdf)

have respect for the liberty of parents to ensure the religious and moral education of their children in conformity with their own convictions. Thus, it has been highlighted that the right to education ‘has been classified as an economic right, a social right and a cultural right...it is all of these...it is also in many ways a civil and political right, since it is central to the full and effective realization of those rights as well.’<sup>560</sup> In this respect, the right to education epitomizes the indivisibility and interdependence of all human rights.<sup>561</sup>

The right to education has also been strongly linked to the idea of empowerment. In particular, this can be seen in the approach of education in the context of group rights, sometimes referred to as “third-generation rights.” A good example of this can be found in the context of rights of indigenous peoples. Indeed, Article 29 of the International Labour Organisation Covenant provides that the aim of education is ‘the imparting of general knowledge and skills that will help children belonging to the peoples concerned to participate fully and on an equal footing in their own community and in the national community.’ The right to education has also been linked to the protection of culture. Article 13 and 14 of the United Nations Declaration on Rights of Indigenous Peoples Year, for example, provides the right of indigenous peoples ‘to establish and control their educational systems and institutions providing education in their own languages, in a manner appropriate to their cultural methods of teaching and learning’, while also providing for the rights of indigenous individuals to ‘have the right to all levels and forms of education (from) the State without discrimination.’

This section has demonstrated that the right to education is contained and enshrined within several international human rights instruments and soft law declarations. In the Western world, it is fair to say that there has been a general acceptance of civil and political rights. However, there appears to have been less emphasis on the protection of social, economic and social rights. Indeed, it has been highlighted that the precise normative content of most economic, social and cultural rights is substantially less well understood than that of political and civil rights.

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<sup>560</sup> Scott Leckie and Anne Gallagher, *Economic, Social, and Cultural Rights: A Legal Resource Guide* (University of Pennsylvania Press 2006) Chapter 11.

<sup>561</sup> It is also important to highlight the difference between economic and social rights on one hand, and civil and political rights on the other. Economic and social rights include the right to food, the right to health and the right to housing. On the other hand, civil and political rights include rights such as the freedom of expression, freedom of association or the right to political participation. It is not easy to explain the difference between these two sets of rights. See Magdalena Sepúlveda and María Magdalena, *The Nature of the Obligations Under the International Covenant on Economic, Social and Cultural Rights* (Intersentia 2003) 124.

However, there have been efforts made to better understand the right to education as a social, economic and cultural right.

It is important to refer again to the General Comment No relating to the right to education, in order to understand it as a social, economic and cultural right under international law, as well as its relationship with Saudi Arabia. The Office of the High Commissioner of Human Rights addressed this in a General Comment relating to the Right of Education, Adopted at the Twenty-first Session of the Committee on Economic, Social and Cultural Rights, on 8 December 1999. The first paragraph of the adopted document, is a great example of the international perspective on the right to education, as it concisely highlights the scope of education and its importance.<sup>562</sup> The International Covenant on Economic, Social and Cultural Rights (ICESCR) devotes two articles (Article 13 & 14<sup>th</sup>) to the right to education, with Article 13<sup>563</sup> being the most comprehensive article on the right to education in international human rights law. The General Comment, also noted in Paragraph 6, that education should have certain essential and interrelated features, namely: availability, accessibility, acceptability, and adaptability.<sup>564</sup>

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<sup>562</sup> Officer of the High Commissioner for Human Rights, CESCR General Comment No. 13: The Right to Education (Art. 13),

<https://www.refworld.org/pdfid/4538838c22.pdf>

<sup>563</sup> “Article 13: 1. The States Parties to the present Covenant recognize the right of everyone to education. They agree that education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms. They further agree that education shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups, and further the activities of the United Nations for the maintenance of peace. 2. The States Parties to the present Covenant recognize that, with a view to achieving the full realization of this right: (a) Primary education shall be compulsory and available free to all; (b) Secondary education in its different forms, including technical and vocational secondary education, shall be made generally available and accessible to all by every appropriate means, and in particular by the progressive introduction of free education; (c) Higher education shall be made equally accessible to all, on the basis of capacity, by every appropriate means, and in particular by the progressive introduction of free education; (d) Fundamental education shall be encouraged or intensified as far as possible for those persons who have not received or completed the whole period of their primary education; (e) The development of a system of schools at all levels shall be actively pursued, an adequate fellowship system shall be established, and the material conditions of teaching staff shall be continuously improved.

3. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to choose for their children schools, other than those established by the public authorities, which conform to such minimum educational standards as may be laid down or approved by the State and to ensure the religious and moral education of their children in conformity with their own convictions. 4. No part of this article shall be construed so as to interfere with the liberty of individuals and bodies to establish and direct educational institutions, subject always to the observance of the principles set forth in paragraph 1 of this article and to the requirement that the education given in such institutions shall conform to such minimum standards as may be laid down by the State.” (Text of ICESCR <https://www.ohchr.org/en/professionalinterest/pages/cescr.aspx>)

<sup>564</sup> (a) Availability. Functioning educational institutions and programmes have to be available in sufficient quantity within the jurisdiction of the State party. What they require to function depends upon numerous factors, including

Thus, despite the fact that there is an extensive legal framework surrounding the right to education, the right itself is not always realised in practice. This is primarily because the full realization of the right to education is often dependent upon the effective enforcement of States obligations. The realization of the right to education can therefore be hindered for a number of reasons. On one hand, the lack of financial and other resources in a particular state may hinder the full implementation of the right to education. On the other hand, restrictions to exercise the right to education is applied to specific vulnerable groups such as disabled persons, females or national minorities. States can also encounter problems when it comes to implementing the right of education in practice. Indeed, although ratification of an international treaty implies that governments have translated relevant provisions into their national legislation, in reality, this is not always the case. As highlighted by Praneviciene, ‘while there exists many possible legal mechanisms to safeguard the right to education, and the vast majority of states have adhered to international treaties... far fewer have implicated the corresponding provisions into their domestic law.’<sup>565</sup> Similarly, UNESCO has accepted that, ‘the reality is that political commitments reflected in declarations and legal obligations contained in ratified treaties are both far from being enshrined in the national legal frameworks of many countries.’<sup>566</sup> Accordingly, problems often arise when it comes to the applicability of the right to education. States may sign an international instrument, but to honour it by amending domestic law is an

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the developmental context within which they operate; for example, all institutions and programmes are likely to require buildings or other protection from the elements, sanitation facilities for both sexes, safe drinking water, trained teachers receiving domestically competitive salaries, teaching materials, and so on; while some will also require facilities such as a library, computer facilities and information technology; (b) Accessibility. Educational institutions and programmes have to be accessible to everyone, without discrimination, within the jurisdiction of the State party. Accessibility has three overlapping dimensions: Non-discrimination - education must be accessible to all, especially the most vulnerable groups, in law and fact, without discrimination on any of the prohibited grounds (see paras. 31-37 on non-discrimination); Physical accessibility - education has to be within safe physical reach, either by attendance at some reasonably convenient geographic location (e.g. a neighbourhood school) or via modern technology (e.g. access to a “distance learning” programme); Economic accessibility - education has to be affordable to all. This dimension of accessibility is subject to the differential wording of article 13 (2) in relation to primary, secondary and higher education: whereas primary education shall be available “free to all”, States parties are required to progressively introduce free secondary and higher education; (c) Acceptability - the form and substance of education, including curricula and teaching methods, have to be acceptable (e.g. relevant, culturally appropriate and of good quality) to students and, in appropriate cases, parents; this is subject to the educational objectives required by article 13 (1) and such minimum educational standards as may be approved by the State (see art. 13 (3) and (4)); (d) Adaptability - education has to be flexible so it can adapt to the needs of changing societies and communities

<sup>565</sup> Birutė Pranevičienė and Aurelija Pūraitė, “Right to Education in International Documents” (2010) < <https://www.mruni.eu/upload/iblock/e91/8praneviciene,%20puraite.pdf> >, p134.

<sup>566</sup> UNESCO, EFA Global Monitoring Report, “Education for all by 2015, Will we Make it?” (Oxford University Press 2007) 16

entirely different matter. Political commitments, and national sentiment over an issue can have a huge impact on and whether such a law is amended.

Now that problems of implementation and enforcement under the Western system have been discussed, it is now necessary to examine the rights of women under Islamic human rights principles and instruments. As noted, *Sharia* or Islamic law is supreme law of the land in Saudi Arabia, and if an international law instrument has to be signed then it must be consistent with *Sharia*.<sup>567</sup> Shah notes that:

[T]he Muslim states also argue that Islam is both a religion and scheme of law that includes its own rules of international law known as the *siyar*. Since Muslims believe Islamic law is divinely inspired, it has to be treated as though it supersedes all man-made laws.<sup>568</sup>

A modern methodological approach, suggested by An-Naim, a proponent of the new modernist movement<sup>569</sup> in Islam, is to select the texts from the *Qur'an* and the *Sunnah* that are consistent with international human rights standards.<sup>570</sup> While some scholars have questioned the validity of this methodology,<sup>571</sup> the Researcher argues the modernist method is the only way to reconcile Islam with the universal system of human rights.<sup>572</sup> No doubt there are certain

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<sup>567</sup> This fact is made explicit by the Basic Law, as Article 48 states that 'The courts will apply the rules of the Islamic Sharia in the cases that are brought before them, in accordance with what is indicated in the Book and the Sunnah, and statutes decreed by the Ruler which do not contradict the Book or the Sunnah'. Page 4, The International Journal of Human Rights, Volume 9, 2005 - Issue 4 Saudi Arabia and the international covenant on civil and political rights 1966: A stalemate situation.

<sup>568</sup> Niaz Shah, *Women, The Koran and International Human Rights Law: The Experience of Pakistan* (ed IV, Martinus Nijhoff, 2006) 3

<sup>569</sup> The modernist movement aims to achieve full 'reformation' of the Sharia.

<sup>570</sup> "[T]he only effective approach to achieve sufficient reforms of Shari'a in relation to universal human rights is to cite sources in the Qur'an and Sunnah which are inconsistent with universal human rights and explain them in historical context, while citing those sources which are supportive of human rights as the basis of the legally applicable principles and rules of Islamic law today." A.A. An-Na'im, *Towards an Islamic Reformation: Civil Liberties, Human Rights, and International Law* (New York: Syracuse University Press 1990), p.171.

<sup>571</sup> "...the Sharia is designed to regulate and govern Muslims' behaviour, but not vice versa. A. Al-hargan (2005) 'Saudi Arabia and the international covenant on civil and political rights: A stalemate situation,' (1966) 9(4) International Journal of Human Rights, 491

<sup>572</sup> See for a non-Islamic perspective Anne Elizabeth Mayer, "Cultural Particularism as a Bar to Women's Rights: Reflections on the Middle Eastern Experience", in J Peters and A Wolper (eds), *Women's Rights, Human Rights: International Feminist Perspectives*, (Routledge 1995) p. 9. Also, there is empirical evidence to suggest that many Islamic legal systems are a returning to a more traditional perspective that affords supremacy to Islamic law while rejecting the secularization of religious law and traditions. Dawood I Ahmed and Tom Ginsbury, 'Constitutional Islamization And Human Rights: The Surprising Origin And Spread Of Islamic Supremacy In Constitutions' (2013) 54(3) Virginia Journal of International Law 3, 6.

elements of international human rights law, which will maybe hard, if not impossible to reconcile with Islamic law.

#### 4.4 International Islamic Human Rights Framework

In an attempt to take ownership of human rights discourses articulated by non-Islamic legal systems, Muslim countries have begun to build consensus around a *Sharia*-compliant framework on rights.<sup>573</sup> This has led to concerted attempt to draft and adopt Islamic human rights treaties that are substantially equivalent to international human right instruments negotiated under the authority of the United Nations.<sup>574</sup> These efforts represent an attempt to reconcile aspects of UN treaties containing provisions that may conflict with Islamic law – primarily a right-based paradigm focused on first-generation (civil and political) rights.<sup>575</sup> Two treaties warrant further attention: the Universal Islamic Declaration of Human Rights (UIDHR) (1981) and the Cairo Declaration of Human Rights in Islam (1990). These instruments will be discussed below.

##### 4.4.1 Islamic Human Rights Instruments

The UIDHR was negotiated by representatives from Muslim countries including Saudi Arabia.<sup>576</sup> The preamble to the declaration affirms that no rights exists outside of those created by Allah, the creator of all humans. The preamble also states that an Islamic paradigm of rights offers mankind ‘an ideal code of human rights’, which aims at ‘eliminating exploitation, oppression, and injustice’.<sup>577</sup> Significantly, in accordance with Islamic conceptions of public duty, the Preamble also emphasizes that Muslim governments have a religious obligation to protect and give effect to all *Sharia* derived rights to their citizens.<sup>578</sup> In this sense, Islamic conceptions of law and rights are, at their highest ideal, meant to serve the interests of the collective, the Islamic *umma*. The collectivist and duty orientated paradigm of Islamic rights

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<sup>573</sup> Najmaldeen K. Kareem Zanki, “Codification of Islamic Law Premises of History and Debates of Contemporary Muslim Scholars,” (2014) 4(9) International Journal of Humanities and Social Science 134

<sup>574</sup> Ann Elizabeth Mayer, *Islam and Human Rights: Tradition and Politics* (WP 2012).

<sup>575</sup> Austin Dacey and Colin Kaposke, ‘Islam & Human Rights: Defending Universality at the United Nations’ (Center for Inquiry, 2008).

<sup>576</sup> National Society for Human Rights, *Conformity of the Saudi Rules and Regulations with the Convention on Basic Human Rights* (Saudi Arabia, National Society for Human Rights 2008) 196-198.

<sup>577</sup> *ibid*.

<sup>578</sup> Ann Elizabeth Mayer, *Islam and Human Rights: Tradition and Politics* (WP 2012).

can be contrasted with the Western legal tradition which appears to be firmly rooted in liberal ideals of individualism, self-determination and freedom from state interference in their private lives.<sup>579</sup> For this reason, Islamic human rights conception tend to emphasise third generation social, economic and cultural rights over first generation civil and political rights.

The UIDHR does make reference to some first-generation rights found in UN treaty instruments, such as the right to life<sup>580</sup>, right to liberty<sup>581</sup>, right to a fair trial<sup>582</sup>, right to equality before the law<sup>583</sup>, freedom from torture<sup>584</sup> and the right to asylum<sup>585</sup>. However, restrictions are placed on the absolute rights of freedom of religion, freedom of association and free expression which are to be practised ‘in accordance with his religious beliefs.’<sup>586</sup> The right to a family life similarly made conditional upon its ‘conformity with his religion, traditions and culture.’<sup>587</sup> Nonetheless, it is arguable that the Islamic rights conceptions place a greater onus on socio-economic rights than UN instruments. Under the provisions of the UIDHR, both genders are guaranteed equal protections in connection with their right to property<sup>588</sup>, the right to equal wage for equal work<sup>589</sup>, non-discrimination in the workplace regard to work<sup>590</sup>, and the right to social security are afforded strong protections under this framework.<sup>591</sup> The Right to Education is also explicitly recognised as a right with a firm basis in Islamic jurisprudence, and as accordingly given concrete (positive law) expression under the UIDHR.<sup>592</sup>

The Cairo Declaration on Human Rights in Islam (CDHRI) was adopted by then-named Organisation of the Islamic Conference (OIC), KSA chairing the session. The declaration was submitted to the United Nations in 1993 for formal adoption as an international human rights treaty. Although rejected by the UN, this instrument continues to embody the Islamic

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<sup>579</sup> Jason Morgan-Foster, ‘Third Generation Rights: What Islamic Law Can Teach the International Human Rights Movement’ (2014) 8(1) Yale Human Rights and Development Journal 67, 73

<sup>580</sup>UIDHR,art II.

<sup>581</sup>UIDHR,art I.

<sup>582</sup>UIDHR,art V.

<sup>583</sup>UIDHR,art III (a).

<sup>584</sup>UIDHR,art VII.

<sup>585</sup>UIDHR,art IX.

<sup>586</sup>UIDHR,art XIII.

<sup>587</sup> UIDHR,art XIX.

<sup>588</sup> UIDHR,art XVI.

<sup>589</sup> UIDHR,art III (b).

<sup>590</sup>UIDHR, art III.

<sup>591</sup>UIDHR, art XVIII.

<sup>592</sup> Abdulai Abukari, Education of Women in Islam: A Critical Islamic Interpretation of the Qur’an. Religious Education, (2014) 109(1) Religious Education 4, 23.

commitment to human rights from within a religious framework.<sup>593</sup> The CDHRI enumerates many basic human rights but does so within the framework of *Sharia*.<sup>594</sup>

The Cairo Declaration also emphasises second-generation rights by requiring states to provide access and means to education<sup>595</sup>, without discrimination between men and women.<sup>596</sup> Notably, the CDHRI contains provisions affirming the equal dignity of women as well as formulating specific rights for women, including the right to financial independence, work and equal pay. Consistent with the principle *Qiwamah*, the CDHRI places an obligation on a husband to maintain and secure the welfare of his wife and family.<sup>597</sup> CDHRI does not however go as far as providing full equality for women in respect of certain issues explicitly regulated by the *Qur'an* and *Sunnah* such marriage, divorce and inheritance. This reflects the principle that because Islam imposes a duty on men to provide financially, this imbalance is corrected by strengthening their rights in other areas of private life.<sup>598</sup> More broadly, the CDHRI codifies many principles of classical Islamic jurisprudence, expressing the idea that men and women have equal dignity under Islam but that each has different rights as well as responsibilities.<sup>599</sup> This idea of different but equal treatment is a cornerstone of Islamic jurisprudence based on the classical division of labour of men and women (with males expected to perform their religious duties as financial providers and women expected to fulfil their responsibilities as mothers and in the home).<sup>600</sup>

In light of the above discussion, , it is possible to argue that Islamic countries including Saudi Arabia have developed human rights instruments and regimes that appear to embody similar principles to the UDHR, at least in respect of social and economic rights, even if these are qualified by the requirements of *Sharia*. Indeed, the Cairo Declaration goes further by

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<sup>593</sup> Ann Elizabeth Mayer, *Islam and Human Rights: Tradition and Politics* (WP 2012).

<sup>594</sup> *ibid.*

<sup>595</sup> CDHRI, art 9.

<sup>596</sup> CDHRI, art 13.

<sup>597</sup> CDHRI, art 6(b).

<sup>598</sup> Ziba Mir-Hosseini, 'Towards Gender Equality: Muslim Family Laws and the Shari'ah,' in Zainah Anwar (ed) *Wanted: Equality and Justice in the Muslim Family* (Musawah 2009) 31. See also Hammudah Abd al Ati, *Family Structure in Islam* (American Trust Publications 1977) 54-56.

<sup>599</sup> Mphutlane Wa Bofelo, 'Immodesty, Islam and the Gender Equity Movement' *Pambazuka News* (Nairobi, 1 April 2010)

<sup>600</sup> Ziba Mir-Hosseini and Mulki Al-Sharmani and Jana Rumminger (eds) *Men in Charge?: Rethinking Authority in Muslim Legal Tradition* (Oneworld Publications, 2015) 17.



strengthening non-discrimination rights, particularly in regard to socio-economic status<sup>601</sup>. This suggests that international human rights law and *Sharia* are compatible, especially in relation to second and third generation rights. Indeed, some have claimed that ‘third-generation solidarity rights are more developed in Islamic law than in international law’.<sup>602</sup>

There is however difference between Islamic human right frameworks on the relationship between rights and duties on each gender. It is arguable that the Islamic conceptions differentiate between the rights of genders and in doing so reveal an important philosophical difference between Islamic paradigms and the human-centred framework of international human rights treaties. As Baderin argues, ‘[p]rotecting the welfare of individuals does ultimately ensure communal...welfare and vice versa’.<sup>603</sup> In Islamic models, second and third-generation rights are given priority because there is greater emphasis on the idea that all of society, including governments, are subject to the higher Laws of Allah. This is supported by *Qur’anic* revelation that the Creator has “bestowed dignity on the progeny of Adam... and conferred on them special favours”.<sup>604</sup> The relationship between the genders, and between state and society are regulated by moral requirements of *Sharia*. In this regard, ‘[t]he Western notion of individual self-interest as the antithesis of general welfare is thus theoretically absent in Islamic social thought.’<sup>605</sup>

It is of course true that international human rights instruments balance individual rights with the broader public interest. Article 29 of the UDHR recognise limited circumstances under which rights can be suspended or curtailed if protection of this right would pose a threat to public welfare, security and order. However, a duty or social-contract based model of international human rights was rejected during the negotiations of International Bill of Human Rights giving rising to the first generation of human rights. Favouring an individual-centred paradigm of human rights based on the personal liberty and dignity of each human, the drafters of the earliest human rights instruments recognised the inherent danger of any approach that

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<sup>601</sup> CDHRI, art 1.

<sup>602</sup> Jason Morgan-Foster, ‘Third Generation Rights: What Islamic Law Can Teach the International Human Rights Movement’ (2014) 8(1) Yale Human Rights and Development Journal 67, 73.

<sup>603</sup> Ibid.

<sup>604</sup> Qur’an 17:70.

<sup>605</sup> Jason Morgan-Foster, ‘Third Generation Rights: What Islamic Law Can Teach the International Human Rights Movement’ (2014) 8(1) Yale Human Rights and Development Journal 67, 73.

conditions respect for fundamental rights on some corresponding duty to society.<sup>606</sup> Indeed, the whole purpose of human rights law is to protect individuals even when they have breached some element of the social contract, for instance by granting them rights to a fair trial when charged with a criminal offence or protecting their private life.<sup>607</sup> According to classic theories of international human rights law, and modern advocates of an individual-focused paradigm of international human rights law, a duty-based approach would give states too much power to suspend rights for individuals on arbitrary grounds of public policy, morality and safety.<sup>608</sup>

There rights centred approach of modern frameworks of international human rights law can be contrasted with the Universal Islamic Declaration of Human Rights<sup>609</sup> which states that '[e]ach one of the Human Rights enunciated in this declaration carries a corresponding duty'.<sup>610</sup> This does not mean that international human rights law and Islamic law cannot coexist or that they do not share similar goals.<sup>611</sup> Both models, rights and duty-based models should be understood as 'two different attempts towards the same end: a structure of normative, social, political, and moral order.'<sup>612</sup> These legal traditions may, nonetheless, have something to learn from the other. Indeed, Islamic human rights framework may provide a source of inspiration for the protection of social and cultural rights worldwide. There is now a drive towards imposing positive obligations on States to redress social inequalities. One can say that ICESCR is an example of this.<sup>613</sup> It is important, therefore, to understand how the normative basis of the Islamic worldview, with its emphasis human welfare and prevention of harm – and not simply the protection of “freedoms from” state intrusions of civil and political rights – may potentially empower individuals ruled under Islamic legal systems.<sup>614</sup> To the extent that Islamic law imposes a positive duty on States as well as individuals to promote the human dignity and basic

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<sup>606</sup> *ibid.* See also John Laws, 'The Constitution: Morals and Rights,' (1996)4 Public Law 627.

<sup>607</sup> Richard Falk 'Cultural Foundations for the International Protection of Human Rights'. In Abdullahi An-Na'im (ed) *Human Rights in a Cross Cultural Perspective: A Quest for Consensus* (University of Pennsylvania Press, 1994)

<sup>608</sup> *ibid*

<sup>609</sup> Universal Islamic Declaration of Human Rights 1981 < <http://www.alhewar.com/ISLAMDECL.html>>.

<sup>610</sup> *ibid*, UIDHR Explanatory Notes 2.

<sup>611</sup> Jason Morgan-Foster, 'Third Generation Rights: What Islamic Law Can Teach the International Human Rights Movement' (2014) 8(1) Yale Human Rights and Development Journal 67, 73.

<sup>612</sup> Jason Morgan-Foster, 'Third Generation Rights: What Islamic Law Can Teach the International Human Rights Movement' (2014) 8(1) Yale Human Rights and Development Journal 67, 73.

<sup>613</sup> International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 14531.

<sup>614</sup> *ibid*; Mashood A Baderin, *International Human Rights and Islamic Law* (OUP 2003) 40.

equality of all human beings,<sup>615</sup> it is necessary to consider how these ideas are implemented in practice. Specifically, how can Saudi Arabia achieve respect for social equality among its citizens without undermining respect for Islamic conceptions of family law, personal status and religious morality?

Saudi Arabia, as a country that derives its laws from *Sharia*, should be more committed to rights conceptions that protect religious concepts of welfare and morality. As such, the Kingdom will continue to elevate second and third generation rights above first generation rights.<sup>616</sup> Chapter 6 will consider how the right to education, including equality of access and enjoyment of a decent standard of education, is implemented in practice under Saudi Arabia's existing laws and policies. It is also implied that international norms do have a "compliance pull" and normative influence on Saudi Arabia's legal development.<sup>617</sup> While Saudi Arabia has not ratified key international instruments such as the ICESCR, it nonetheless conscious of its standing in the international community. At the same time, the Saudi leadership is not willing to sacrifice the supremacy of *Sharia* as applied by national courts under its domestic legal system in order to maintain good standing within the international community, including the effort to promote gender equality in educational initiatives, the recent decision to abolish the prohibition on women drivers and relax guardianship restrictions.<sup>618</sup> Any move to abandon its religious traditions in favour of secularisation would likely encounter a popular backlash.<sup>619</sup> As such, the Saudi government has been resistant to any imposition of norms that conflict with its historic religious and cultural traditions.<sup>620</sup>

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<sup>615</sup> Ibid 4.

<sup>616</sup> Ibid.

<sup>617</sup> Saudi Gazette, 'More women than men in Saudi universities, say ministry' *Al Arabiya English* (Riyadh, 2015). Rashed Aba-Namay, 'The Recent Constitutional Reforms in Saudi Arabia,' (1993) 42 *International & Comparative Law Quarterly* 295, 295-296 Human Rights Watch, 'Saudi Arabia: 'Unofficial' Guardianship Rules Banned' <<https://www.hrw.org/news/2017/05/09/saudi-arabia-unofficial-guardianship-rules-banned>> and 'Saudi Women Allowed to Drive in Historic Decision' *Okaz Newspaper* available at <<http://www.okaz.com.sa/article/1575601/English/Saudi-Arabia-to-allow-women-to-drive-in-historic-decision>>

<sup>618</sup> The law of procedure before the courts in Saudi Arabia stipulates: Courts shall apply to cases before them provisions of Shari'ah laws, in accordance with the Qur'an and Sunnah of the Prophet (peace be upon him), and laws promulgated by the State that do not conflict with the Qur'an and Sunnah, and their proceedings shall comply with the provisions of this Law. Law of Procedure before Shari'ah Courts, Royal Decree No. (M/21) 20 Jumada I 1421 (19 August 2000) article 1

<sup>619</sup> Safaa Fouad Rajkhan, "Women in Saudi Arabia Status, Rights, and Limitations: A paper submitted for the degree of Master of Arts in Policy Studies" (University of Washington Bothell) June 2014

<sup>620</sup> Shadi Mokhtari, 'The Search for Human Rights Within an Islamic Framework in Iran' (2004) 94(4) *Muslim World* 469.

The reform mission, upon which the Saudi state was founded, represents the main core of the government. This mission is based on the realization of Islamic rules, implementation of *Sharia*, and enjoining good and forbidding evil, as well as to reform the Islamic creed and purify it from heterodoxies. Therefore, it adopts its doctrine from the true Islamic principles that were prevailing at the very beginning of Islam.<sup>621</sup>

It is crucial to consider the positive basis of the right to education for all, and for women in particular under Saudi legislation and the judicial application of *Sharia*, as the next chapter will do.

For the moment, some general comments on the tension between the egalitarian quality of the right to education under Islam and differentiated regime that applies to women and men under parallel aspects of Saudi law and custom, particularly in the area of personal status law. To the extent that all rights are qualified by religious duty under the Saudi legal system, it is necessary to consider whether aspects of Saudi Arabia's legal system lead to the differential or even unequal treatment of men and women in the sphere of education.<sup>622</sup> This differential treatment, moreover, may be enshrined in the law, for instance, rules that prevent women from travelling abroad for education without her guardian's consent, or maybe more "structural" in nature,<sup>623</sup> for instance, by unequal access to "male-orientated" subjects such as engineering (because female-only universities tend to provide courses in "feminized" fields such as health care or teaching).<sup>624</sup> For the moment, however, it is necessary to consider whether Saudi Arabia's (*Sharia* derived) position on gender equality impacts its legal obligations under international law, specifically in connection with women's' rights.

The next section will consider how Saudi Arabia's claims to be able to reconcile its legal obligations under international human rights treaties with its constitutional commitments to *Sharia*. This will pave the way for the discussion of the discussion of how Saudi Arabia's

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<sup>621</sup> Ibid.

<sup>622</sup> Kelly Le Benger, 'Behind the veil: The state of women in Saudi Arabia' (Institute of Gulf Affairs, 2008) 14.

<sup>623</sup> Donna Sullivan, 'The Public/Private Distinction in International Human Rights Law' in Julie Peters and Andrea Wolper (eds), *Women's Rights, Human Rights: International Feminist Perspectives* (PP 1995) 126.

<sup>624</sup> Elin Andersson and Linn Togelius, 'Women oppressed in the name of culture and religion: Saudi Arabia and the Convention on the Elimination of All Forms of Discrimination Against Women' (Bachelor Thesis, Malmö University School of Global and Political Studies 2010) 3 <<http://muep.mau.se/handle/2043/11782>>.

(qualified) endorsement of, and participation in, the international human rights regime is brought into reconciliation with the ongoing enforcement of certain Islamic jurisprudential perspectives on women's rights. It is this mode of enquiry that will allow for a better understanding of this thesis central question: to what extent are discourses and practices that have historically limited Saudi women from obtaining equality in educational rights the consequence of customs that are cultural, rather religious, in nature?

#### 4.4.2 Saudi Arabia and its Ratification of International Human Rights Treaties

Under Saudi Arabia's Basic (constitutional) Law *Sharia* will prevail over any conflicting domestic or international law. It matters therefore how certain rights are privileged and balanced under the official *fiqh* (Islamic law jurisprudence) of Saudi Arabia. As mentioned above, Saudi Arabia did not participate in the vote for the Universal Declaration of Human Rights. Furthermore, it is not a party to the International Covenant on Civil and Political Rights or the International Covenant on Economic, Social or Cultural Rights.<sup>625</sup> But that is no reason, to not embrace as many elements of international human rights as possible. The areas of ICCPR and ICESCR which violate the fundamentals of *Sharia*, can be reserved, removing the compulsion on Saudi Arabia to enforce said instruments in their entirety.

It is noteworthy for instance that while the Kingdom of Saudi Arabia has not signed the ICESCR, it has nonetheless made statements in support of the Covenant.<sup>626</sup> The only barrier to the Kingdom's future ratification of the Covenant concerns the government's continued refusal to accept any binding legal obligations that conflict with the supremacy of *Sharia* under Saudi constitutional law. As Baderin highlights,

“[o]ften what makes the difference in the relationship between international human rights and Islamic law is the political will on the part of Muslim states to

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<sup>625</sup>Saudi Arabia's accession to the convention was formalised through the adoption of Royal Decree No 25 of 28/5 [Concerning the kingdom's accession to the Convention on the Elimination of All Forms of Discrimination against Women] on 28 August 2000.

<sup>626</sup> See Report of the Special Rapporteur, Dato' Param Kumaraswamy, on the Independence of Judges and Lawyers: Report on the Mission to the Kingdom of Saudi Arabia, Submitted Pursuant to Commission on Human Rights Resolution 2002/43, UN ESCOR, Comm'n on Hum. Rts., 59th Sess, Item 11(d) of the provisional agenda UN Doc. E/CN.4/2003/65/Add.3, para.81.

be committed to the fulfilment of their international human rights within their Islamic cultural and legal dispensations.”<sup>627</sup>

It should also be emphasized that Saudi Arabia’s membership in UIDHR and endorsement of the non-binding Cairo Declaration could arguably satisfy both elements of customary international law. The constitutive elements of customary law include recognition of the binding effect of international norms through expressions of state practice and legal opinions known as *opinion juris*.<sup>628</sup> By endorsing and ratifying these instruments, the Saudi government appears to have demonstrated, through Islamic legal opinion and state practice, its legal obligation to protect certain rights as enshrined in international human rights obligations. The status of first and second-generation civil and political rights are more contentious both from the standpoint of Islamic law, discussed above, and from the perspective of a consent-based theory of international law (given Saudi Arabia’s has not ratified key instruments). On third generation rights, including the state’s obligation to promote and protect the right of education, including the right to access education on a non-discriminatory basis, has a strong basis in Saudi state practice,<sup>629</sup> which presumptively based on the domestic implementation of *Sharia*.<sup>630</sup>

The above indicates that there is no particular conflict between Islamic notions of a right to education for all and the articulation of this same right under International human rights treaties (though the latter defines this right in more detail by setting out specific duties for states). This is not the point of controversy. What matters more is how certain rights and duties are balanced or privileged within an Islamic legal system.

When looking specifically at the right to education, it is also important to note that Saudi Arabia has ratified the UNESCO Convention against Discrimination in Education (CADE). The main

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<sup>627</sup> Mashood A Baderin (ed), *International Law and Islamic Law* (2<sup>nd</sup> edn, Routledge 2016) 31.

<sup>628</sup> Cairo Declaration on Human Rights in Islam (adopted 5 August 1990 UNGA Res 157 A(IV) (CDHRI) arts 9, 10.

<sup>629</sup> Saudi Gazette, ‘More women than men in Saudi universities, say ministry’ *Al Arabiya English* (Riyadh, 2015) <<https://english.alarabiya.net/en/perspective/features/2015/05/28/More-women-than-men-in-Saudi-universities-says-ministry.html>>

<sup>630</sup> UNESCO EFA 2000 Assessment, ‘Country Reports – Saudi Arabia’ (2000) <[http://www.UNESCO.org/education/wef/countryreports/saudi\\_arabia/contents.html](http://www.UNESCO.org/education/wef/countryreports/saudi_arabia/contents.html)>; See also Ministry of Education KSA, ‘The Development of Education’ (2003) [http://www.ibe.unesco.org/International/ICE47/English/Natreps/reports/sarabia\\_en.pdf](http://www.ibe.unesco.org/International/ICE47/English/Natreps/reports/sarabia_en.pdf). See also Amani Hamdan, ‘Women and Education in Saudi Arabia: Challenges and Achievements’ (2005) 6(1) *International Education Journal* 58.

obligation of States ratifying CADE is the elimination and prevention of discrimination, which includes any distinction, exclusion, limitation or preference which, being based on race, colour, sex language, religion, political or other national or social origin, economic condition or birth has the purpose or effect of nullifying or impairing equality of treatment in education.<sup>631</sup>

Similarly, CEDAW obliges Saudi Arabia to ‘take all appropriate measures to eliminate discrimination against women in order to ensure to them equal rights with men in the field of education.’<sup>632</sup> Despite ratification of both Conventions, critics often highlight several barriers which still exist that serve to prevent or hinder women from availing of their right to education as detailed in Chapter 6. For example, ‘the roles of Saudi women in society, labour laws and guardianship law.’<sup>633</sup>, as discussed in 4.5.3, have been identified as a few of the social issues which have hindered the Kingdom’s advancement in this regard. The Committee on the Elimination of Discrimination against Women has therefore encouraged Saudi Arabia to “raise awareness of the importance of education as a human right and as the basis for the empowerment of women.”<sup>634</sup> However, other laws within the Kingdom must be changed to accommodate the right of women to educate themselves, i.e. the right to acquire a passport to study abroad etc. But there is more that can be done.

How then is the right to education balanced against other duties or limitations on personal freedoms under the Saudi legal system?<sup>635</sup> Take for instance customary norms and judicial practices in the areas of family and personal status law. Applying the Hanbali *fiqh*, the official Islamic jurisprudential school of Saudi Arabia, Saudi jurists have stressed the duty of care owed by men to close female relations and the moral responsibilities of women. These moral responsibilities including limitations on intermixing, guardianship of women, the primacy of women’s role as mother and wife and so on.<sup>636</sup> Once again, Muslims believe that all rights

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<sup>631</sup> Convention against Discrimination in Education, Article 1 and 3.

<sup>632</sup> Convention on the Elimination of all forms of Discrimination Against Women, Article 10.

<sup>633</sup> Khadija Mosaad, “How will Saudi Arabia revamp its Education system?” (25 May 2016). <[https://www.fairobserver.com/region/middle\\_east\\_north\\_africa/will-saudi-arabia-revamp-education-system-11082/](https://www.fairobserver.com/region/middle_east_north_africa/will-saudi-arabia-revamp-education-system-11082/)>.

<sup>634</sup> The Committee on the Elimination of Discrimination against Women, Concluding Observations on the Elimination of Discrimination against Women: Saudi Arabia, Fortieth session (14 January-1 February 2008), paragraph 30.

<sup>635</sup> Sangeeta Dhami and Aziz Sheikh, ‘The Muslim Family: Predicament and Promise’ (2000) 173(5) Western Journal of Medicine 352.

<sup>636</sup> Farida Deif, ‘Perpetual Minors: Human Rights Abuses Stemming from Male Guardianship and Sex Segregation in Saudi Arabia’ (Human Rights Watch April 2008) 13

derive from God, and with these rights come responsibilities. A person should educate themselves but do so to follow the correct path. The pursuit of education to lead on astray from their religion would be considered immoral.<sup>637</sup> Ibn Qayyim al-Jawziyya, a well-known Hanbali scholar, has offered this opinion on the issue of free-mixing in educational institutions

Allowing women to inter-mix with men is the source of all trials and evils, and is one of the greatest causes of the descent of punishments and the cause of corruption of both the laity and elite. The mixing of men and women is a reason for the proliferation of promiscuity and fornication.

The President of the Scholarly Research and *Ifta* Committees, Saudi Arabia's supreme authority on matters of religious law and interpretation, also issued a fatwa in response to a request by a group of female students. These students studies at a University outside Riyadh and wished to travel from another city without a companion. In this authoritative fatwa, the President Committee pronounced on the impermissibility of unaccompanied travel:

The *Sharia* is based upon the principles of obtaining benefit and avoiding harm. Its necessary injunctions and aims include the protection of lineage and honour. The *Qur'an* and *Sunnah* have affirmed clearly the means to protect lineages and maintain one's honour, such as the prohibition of a woman entering seclusion with a stranger.

All rights protected under a *Sharia* framework, in other words, must be practised and implemented in a way that does not undermine the Muslim's obedience to their creator.<sup>638</sup> This has bearing on the extent to which the Kingdom's recognition and state implementation of gender equality legislation. The next section will consider the reservations that Saudi Arabia has entered to CEDAW on *Sharia* related grounds.

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<sup>637</sup> The General Presidency of Scholarly Research and Ifta in Saudi Arabia, 'Fatwas of The General Presidency of Scholarly Research and Ifta, First issue' (1411H) vol 71, 57.

<sup>638</sup> In the very first ayah surat al-Nisa', Qur'an 4:1 the Qur'an prescribes that all human are subject to equal dignity and brought under the same regime of law: "O people! reverence God (show piety towards God) who created you from one nafs and created from her (the nafs) her mate and spread from them many men and women; and reverence God, through whom you demand your mutual rights, and the wombs (that bore you), (for) God watches you."



#### 4.4.3 Saudi Arabia's Reservations to CEDAW

In the above regard, it is noteworthy that Saudi Arabia has ratified both the UN Convention on the Elimination of all Forms of Discrimination against Women (CEDAW) and the UNESCO Convention Against Discrimination in Education. This is all the more remarkable as many countries have yet to ratify the treaty.<sup>639</sup> Even the United States has yet to ratify the Convention. By acceding to CEDAW in particular, the Saudi government has signalled its commitment to gender equality within the framework of *Sharia*.

The CEDAW treaty is exclusively devoted to the protection and recognition of women's rights. The provisions of this treaty obliges all signatory parties to adopt all measures necessary to further equality between men and women and eliminate discriminatory domestic law provisions and policies.<sup>640</sup>

Articles 2 requires states parties to condemn discrimination against women in national courts and public institutions. Governments are also required to amend or abolish existing laws, regulations, customs and practices which discriminate against women.<sup>641</sup> One challenge may be that the underlying objective of CEDAW is to provide equality of rights between genders from the outset, at odds with the Islamic concept of equal but different treatment of men and women based on the Islamic understandings of gender roles in society.<sup>642</sup>

It has been established that Saudi Arabia has legal obligation to protect the rights of women, including any rights that may through their discriminatory application diminish their right to education. Some have argued that the provision which Saudi Arabia should further steps to comply with is Article 2(f) of CEDAW which requires all state parties 'take all appropriate measures...to modify or abolish existing laws...which constitute discrimination against

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<sup>639</sup> Ekaterina Y Krivenko, *Women, Islam and International Law within the Context of the Convention on the Elimination of All Forms of Discrimination against Women* (Brill 2009) 112

<sup>640</sup> CEDAW (adopted 1979 UNGA Res 180 A(34) (CEDAW) [www.un.org/womenwatch/daw/cedaw/cedaw.htm](http://www.un.org/womenwatch/daw/cedaw/cedaw.htm) .art 3.

<sup>641</sup> CEDAW, art 2.

<sup>642</sup> Robert M Cover, 'Obligation: A Jewish Jurisprudence of the Social Order' (1987) 5(1) *Journal of Law and Religion* 65, 73.

women'. However, as indicated above, Saudi Arabia has entered important reservations to the treaty before acceding to it.<sup>643</sup> Saudi Arabia's reservations to CEDAW are as follows:<sup>644</sup>

1. 'In case of contradiction between any term of the Convention and the norms of Islamic law, the Kingdom is not under obligation to observe the contradictory terms of the Convention
2. The Kingdom does not consider itself bound by article 9(2) of the Convention and paragraph 1 of article 29 of the Convention.'

The first element is a general reservation that indicates that the Kingdom's intention to only adhere to the Convention obligated to adhere to the Convention only where it is compatible with requirements of *Sharia*.<sup>645</sup> This reservation is much broader the most types of reservations because it applies to the entirety of the treaty and implies that Saudi Arabia is released from any obligation to comply with any provision that contradicts "norms of Islamic law".<sup>646</sup> Some aspects of Saudi law, such as the requirement of a guardians consent to work, to pursue education or to travel inside Saudi Arabia are being gradually relaxed under Prince Bin Salman's reforms. However, other aspects of religious law are still applied and these may either be treated as valid under Saudi Arabia's reservation to CEDAW. Women, for instance, are subject to dress requirements that are not imposed on men.<sup>647</sup> Their ability to obtain identification documents or travel abroad for education is also dependent upon the consent of a male guardian.<sup>648</sup>

It seems that the Kingdom has reserved for itself the ability to interpret the Convention and norms of Islamic law, without any international oversight, and this could be seen as problematic

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<sup>643</sup> CEDAW, 'Declarations, Reservations, and Objections to CEDAW' <[www.un.org/womenwatch/daw/cedaw/reservations-country.htm](http://www.un.org/womenwatch/daw/cedaw/reservations-country.htm)>.

<sup>644</sup> CEDAW, 'Declarations and Reservations' <[https://treaties.un.org/Pages/ViewDetails.aspx?src=TEXT&mtsg\\_no=IV-8&chapter=4&clang=\\_en](https://treaties.un.org/Pages/ViewDetails.aspx?src=TEXT&mtsg_no=IV-8&chapter=4&clang=_en)>

<sup>645</sup> Abdulaziz Al-Rodiman, 'The Application of Sharia and International Human Rights Law in Saudi Arabia' (DPhil Thesis, Brunel University 2013).

<sup>646</sup> Abdulaziz Al-Rodiman, 'The Application of Sharia and International Human Rights Law in Saudi Arabia' (DPhil Thesis, Brunel University 2013).

<sup>647</sup> CEDAW, art 1.

<sup>648</sup> CEDAW, art 15(4).

from the position of international law.<sup>649</sup> One possible objection that could be suggested is that the reservations broad application goes against the very object and purpose of the Convention and in particular article 28(2) of CEDAW.

Article 28.2 of CEDAW states that

“[a] reservation incompatible with the object and purpose of the present convention shall not be permitted.”<sup>650</sup>

It should be noted that Article 28(1) of CEDAW does not explain what makes a reservation incompatible with the purpose of the treaty. Instead, it only requires review by the UN Secretary-General. The reservation was accepted by the Secretary General and Saudi Arabia’s ratification of the treaty was accepted. However, Mtango argues that general nature of the reservation and the unilateral authority of Saudi Arabia to determine whether the Convention conflicts with domestic law is ‘difficult to reconcile with the object and purpose of CEDAW’.<sup>651</sup> It is important to consider the objective of the Convention as explained by the UN General Assembly, stated as:

To eliminate all forms of discrimination against women with a view to achieving women’s de jure and de facto equality with men in the enjoyment of their human rights and fundamental freedoms.<sup>652</sup>

Along the Vienna convention governing the framework on treaty law and interpretation, the International Law Commission’s (ILC) Guide to Practice on Reservations to Treaties offers more clarity on the issue of valid reservation.<sup>653</sup> A reservation will be incompatible with the object and purpose ‘if it affects an essential element of the treaty that is necessary to its general

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<sup>649</sup>1. In case of contradiction between any term of the Convention and the norms of islamic law, the Kingdom is not under obligation to observe the contradictory terms of the Convention’. Saudi Arabia Reservation 1 to CEDAW.

<sup>650</sup>ibid,arts 28, 29.

<sup>651</sup> Sifa Mtango, ‘A State of Oppression – Women’s Rights in Saudi Arabia’ (2004) 5(1) Asia Pacific Journal on Human Rights and the Law 49, 50.

<sup>652</sup>UN Report of the Committee on the Elimination of Discrimination against Women, ‘General Recommendation No25’ in UNGA 59<sup>th</sup> Session (2004) UN Doc A/59/38/Supp<[http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=A%2f59%2f38\(SUPP\)&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=A%2f59%2f38(SUPP)&Lang=en)>

<sup>653</sup> UNGA, ‘Report of the International Law Commission on the work of its 63<sup>rd</sup> Session’ (26 April-12 August 2011) UN Doc A/66/10/Add1<<http://legal.un.org/ilc/reports/2011/english/addendum.pdf>>

tenor, in such a way that the reservation impairs the *raison d'être* of the treaty.<sup>654</sup> A reservation found to impair the purpose of the treaty<sup>655</sup> - in effect the full equality of genders - may potentially sever it from the treaty or even invalidate the ratification of the treaty by a signatory state.<sup>656</sup>

The “*raison d'être* of the treaty can be discerned from Article 1 of CEDAW. This provision defines ‘discrimination against women’ as:

“any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.”<sup>657</sup>

Accordingly, the requirement of full equality may ultimately conflict with the more religiously orientated conception of rights implemented under Saudi Arabia’s domestic regime. On this issue, Saudi Arabia has entered a specific reservation to paragraph 2 of Article 9 which mandates that state parties ‘grant women equal rights with men with respect to the nationality of their children.’ By entering this reservation, Saudi does not consider itself bound by this specific provision. Under Saudi Law, the children of non-Saudi women are offered weaker rights than applicable to men of non-Saudi nationality.

#### 4.4.4 The Validity of Saudi Arabia’s CEDAW Reservations

It is not uncommon for States Parties to enter reservations to specific provisions and Algeria and Libya and France entered reservations to Article 9(2). Arguably, however, Saudi Arabia’s regulation on child nationality and the rights of the mother violates a substantive principle of CEDAW, that being the need to eliminate discrimination across all areas of domestic law and policy. Contrast this for example with the reservation entered by Algeria. As mentioned, Article

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<sup>654</sup>UNGA, Guideline 3.1.5.

<sup>655</sup>UNGA, Guideline 4.5.1.

<sup>656</sup> Marko Milanovic and Linos-Alexander Sicilianos, ‘Reservations to Treaties: An Introduction’ (2013) 24(4) *The European Journal of International Law* 1055, 1056.

<sup>657</sup> CEDAW, art 1.

2 requires states to enforce all necessary measures to promote equality and to abolish or modify any laws or policies that result in discrimination. Algeria's reservation is however applied in a more narrow and targeted manner, such that the Algerian government holds held itself bound by Article 2 generally, except where there is a direct conflict with the Algerian Family Code.<sup>658</sup> This reservation applies to a specific set of law and is consequently much more limited than a reservation based on a potentially broad understanding of *Sharia*.

By entering broad reservations to CEDAW, critics may suggest that Saudi Arabia has been given wide discretion to decide how it will protect specific human rights protections to women, applying discretionary interpretations of *Sharia* and related notions of public order, interest and security. It should be noted, for instance, that Article 27 of the Vienna Treaty states clearly that domestic law provision do not provide justification for non-implementation of treaty obligations.<sup>659</sup>

The above highlights a tension that international lawyers often confront. On the one hand, it is correct that Saudi Arabia should be free to observe its own laws, especially if these have the status of divine law.<sup>660</sup> Any requirement that women are provided with absolute equality in respect of civil rights, legal status and reproductive rights of women<sup>661</sup> may be viewed as profoundly destabilizing to Saudi Arabia's religious traditions and cultural identity. Regardless of these conflicts, Saudi Arabia has not withdrawn from the treaty, or made any statements indicating its intention not to be bound by the general provisions of CEDAW.<sup>662</sup>

At the same time, over-broad reservations can undermine the very purpose of a treaty and the equal treatment and protection of women's right.<sup>663</sup> This particularly true if the domestic law of a state, in this case *Sharia*, also demands it, such as the right to education. There is, however, a wider problem to do with the interpretation of *Sharia* under the Saudi legal system. The

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<sup>658</sup> CEDAW, 'Declarations and Reservations'

<[https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-8&chapter=4&clang=\\_en](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8&chapter=4&clang=_en)>

<sup>659</sup> Vienna Convention on the Law of Treaties, art 27.

<sup>660</sup> Abdulaziz Al-Rodiman, 'The Application of Sharia and International Human Rights Law in Saudi Arabia' (DPhil Thesis, Brunel University 2013).

<sup>661</sup> Sifa Mtango, 'A State of Oppression – Women's Rights in Saudi Arabia' (2004) 5(1) Asia Pacific Journal on Human Rights and the Law 49, 50.

<sup>662</sup> *ibid*.

<sup>663</sup> Amnesty International, 'Saudi Arabia: Amnesty International Submission to the UN Universal Periodic Review, Fourth Session of the UPR Working Group of the Human Rights Council' (Report) (February 2009) AI-Index MDE 23/029/2008; OHCHR, 'Status of Ratifications'

*Sharia* is not codified under Saudi law which means that Saudi courts have a lot of freedom to determine how they will interpret *Sharia*, including how rights and duties will be balanced, or certain freedoms restricted.<sup>664</sup> This may impact women's rights to education indirectly, while limiting their life chances in other related areas of life such as their ability to seek employment or study abroad. It is important to reiterate that the right to education cannot be understood in isolation from other rights that make equality of access and quality of education for men as well as women possible.

#### **4.5 Assessing the Theoretical Gap between Saudi Arabia's Commitments to International Law and *Sharia***

It is fair to say that things in the Kingdom of Saudi Arabia are certainly moving in the right direction. Indeed, over the last 50 years, significant progress has been made with regards to female education and literacy. Significant progress and innovation in the area of education has also been achieved. Overall, it is fair to say there is a general acceptance the right of women to education in the Kingdom of Saudi Arabia. Indeed, as pointed out, they have signed various international treaties, albeit with reservations. Saudi Arabia is also a signatory to the Cairo Declaration which alludes to the right of women to education. As Annemarie Profanter asserts,

[T]he Saudi Arabia of 2012 is vastly different from the Saudi Arabia of a century ago [...]. This country is like a sleeping giant that is just awakening and beginning to exert its influence in a rapidly changing political, economic and social world.<sup>665</sup>

Women in Saudi Arabia have interestingly managed to achieve such progress, without abandoning the deep-rooted traditions and Islamic principles. This is particularly the case in relation to their embrace of third generation rights. With the influence of Islam, rights within Islamic systems focuses on the rights of human kind, meaning that they can only be achieved and realised through collective participation, cooperation and agreement.

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<sup>664</sup> Joseph Brand. 'Aspects of Saudi Arabian Law And Practice,' (1986) 9 Boston College International and Comparative Law Review, 1, 9

<sup>665</sup> Hend T. Al-Sudairy, *Modern Woman in the Kingdom of Saudi Arabia: Rights, Challenges and Achievements* (Cambridge Scholars Publishing, 2017) 114.

The Saudi approach to women's right more generally shows a possible conflict between Saudi Arabia's interpretation of *Sharia* and the Kingdom's obligations under CEDAW to eliminate any difference in treatment between the genders. The general reservation to CEDAW implies that certain practices including gendered restrictions on travel, inheritance, testimony, divorce, the ability to obtain ID documents, rights of children depending on the nationality of the child and so forth are maintained and enforced in defiance of the non-discrimination provisions of CEDAW to which the Kingdom is party.<sup>666</sup>

As noted in Chapters 2 and 3, there are various restrictions regulating a women's visibility or participation in the public sphere under Saudi law, including their ability to move freely for work or education or to mix with men in colleges and universities in the absence of a male relative (*ikhtilat*). As alluded to, Saudi Arabia has historically imposed a general prohibition on unlawful seclusion of women, i.e. women conducting themselves without a guardian (*khalwah*). While guardianship laws are being gradually repealed, the application of this religion opinion has limited women's movement inside Saudi Arabia.<sup>667</sup> This principle still applies to women's travel outside the Kingdom as well. Before a Saudi woman is permitted to travel to countries outside Saudi Arabia, she must be accompanied by a male relative or mahram<sup>668</sup> or to obtain permission from her *waliyy* (guardian) under the applicable administrative regulations.<sup>669</sup> There are some exceptions to the mahram requirement, for instance if a woman is with her family or children and has obtained the permission of her guardian; for medical treatment and so on.<sup>670</sup>

It is therefore practically impossible to discuss women's education in Saudi Arabia without introducing the social and political forces that have shaped women's status not only in education but in society in general. Accordingly, when examining the right of women to education in Saudi Arabia, it is necessary to examine the position of women in wider society

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<sup>666</sup> Sifa Mtango, 'A State of Oppression – Women's Rights in Saudi Arabia' (2004) 5(1) Asia Pacific Journal on Human Rights and the Law 49,

<sup>667</sup> David Commins, *Woman in Saudi Arabia* (I.B. Tauris & Co 2017) 74.

<sup>668</sup> Vice Minister of the Interior's resolution: S2S/48 on the 2/5/1397H

<sup>669</sup> Vice Minister of the Interior's resolution no: 2S/690 on the 1/4/1397H.

<sup>670</sup> Case no 3/334 2007, Ministry of Justice, *Mudawanat al-Ahkam alQada'iyya*, 1<sup>st</sup> issue, 284-6.

within the Kingdom of Saudi Arabia. When one undertakes this assessment, it is apparent that culturally, Saudi Arabia is deeply conservative.<sup>671</sup>

It is open to question whether this differential treatment on men and women on certain issues is in fact required by *Sharia*. The differential treatment of men and women finds its basis in two concepts with some basis in *Qur'anic* and juristic traditions. These concepts are *Qiwamah* and *wilayah*. The first concerns the husband's authority over his wife in exchange for his financial responsibility to her while the second concerns 'the right and duty of male family members to exercise guardianship over female members,'<sup>672</sup> for instance when entering into marriage contracts. There is no firm consensus in Islamic scholarship on whom may act as a woman's 'guardian of affairs' (*waliyy al-amr*) is but for married women it is usually husband. These requirements do not apply to non-Saudi woman. Notably, there is no basis in *Sharia* discriminating on grounds of national origin. The same applies to a non-Saudi women's rights over her children. One possible argument is that guardianship practices in Saudi Arabia, which are now being gradually repealed<sup>673</sup> are in fact rooted in social customs and traditions rather than obligatory aspects of *Sharia*.<sup>674</sup> Alternatively, it can be suggested that while there is theological support in the *Qur'an* and *Sunnah* for the different treatment of genders under Saudi personal law, there are also some disagreement even among scholars on key issues of gender equality as discussed in the next chapter. Indeed, as Alghamdi highlights, 'some of the highly selective and narrow interpretation of Islam espoused by conservative religious scholars have had a restrictive impact on women's education (within Saudi Arabia).'<sup>675</sup>

Some Muslim women have offered new readings of these concepts in attempt to redefine gender roles from within the tradition.<sup>676</sup> Many women in Saudi Arabia appear to have achieved

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<sup>671</sup> See cases confirming restricting views of the personal freedoms enjoyed by women under aspects of Saudi Arabia's personal status law, including in respect of divorce and freedom of movement. Case no 16/41 2005, [23/2/1426] General Court of Riyadh, Saudi Arabia and Decision No 3/334 (21/12/1436 H SA), Judicial Judgments Journal (1<sup>st</sup> edn, 1428 H) 284, 286.

<sup>672</sup> *ibid*.

<sup>673</sup> B. Shanee, 'The Saudi Royal Decree Easing Guardianship Requirements For Women, And Responses To It In Saudi Arabia' *The Middle East Media Research Institute* (2 June 2017)

<sup>674</sup> Azizah Al-Hibri 'Islam, Law And Custom: Redefining Muslim Women 'S Rights,' 1997 12 *American University International Law Review* 1, 19

<sup>675</sup> Amani Hamdan, "Women and education in Saudi Arabia: Challenges and achievements" (2005) <<http://files.eric.ed.gov/fulltext/EJ854954.pdf>>.

<sup>676</sup> Ziba Mir-Hosseini and Mulki Al-Sharmani and Jana Rumminger (eds) *Men in Charge?: Rethinking Authority in Muslim Legal Tradition* (Oneworld Publications, 2015) 17.



empowerment through Islam, or rather by voicing their opinions through a lens of Islamic teachings.<sup>677</sup> As Hoda Al-Helassi, a current MP in Saudi Arabia has recently asserted, ‘women do have a voice and they do have the rights mainly because Islam gives us that right beyond anything else.’<sup>678</sup> It is therefore arguable that to interpret Islamic teachings in a way which denies women the right to education is misconstrued. Indeed, as another woman has pointed out,

Islam gives women the right to education, the right to work, the right to take part in public life, the right to say no to marriages, the right to inherit and own businesses. Why don’t we have these rights today? Because we are so far away from religion. Don’t let anyone tell you the problems women face here are because of religion. *Sharia* isn’t the problem; it’s the ignorance of the people and our traditions. I believe that if we had an Islamic state and lived by the true laws of religion, women would have everything.<sup>679</sup>

Scholars who endorse this type of view argue that a faithful reading of Islamic texts require equality between genders across all areas. If this argument is correct, the Saudi government should further steps eliminate the discrimination of women in educational areas and across all areas of law. In doing so, the Kingdom will not only be fulfilling its obligations under international law and treaties, but also giving effect to the constitutional (domestic) law of its legal system.

## 4.6 Conclusion

This chapter has noted that Saudi Arabia has taken an important step in ratifying CEDAW. However, the chapter has also noted that the sweeping nature of Saudi Arabia’s reservation to this treaty appears contrary to the aims of the treaty, a theme developed further in chapter 6. This chapter has also explored international and Islamic treaties on human rights to assess whether these conflict with or complement each other. In doing so, it has been established that

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<sup>677</sup> David H Warren and Christine Gilmore, ‘One nation under God? Yusuf al-Qaradawi’s changing Fiqh of citizenship in the light of the Islamic legal tradition’ (2014) 8(3) Contemporary Islam 219;

<sup>678</sup> Shakhawat Liton and Mohammad Al-Masum Molla, “Other side of Saudi women” (4 April 2017) <<http://www.thedailystar.net/frontpage/other-side-saudi-women-1386073>>.

<sup>679</sup> Cheryl Rubenberg, *Palestinian Women: Patriarchy and Resistance in the West Bank* (Lynne Rienner Publishers, 2001) 236.

each system acknowledges a right to education. It is difficult to determine whether the international standard of education is better than the standard of education set in Islam and vice versa. The West has tended to focus on the development of civil and political rights then progressed to discussion of the emergence of other rights. In contrast, economic and social rights are arguably more developed in Islamic countries with the right to education being in existence for many decades. However, it is also important not to conflate the legal application of Sharia in Saudi Arabia, and its potential conflict and compatibility with Islamic rights conceptions. In this regard, it is important to differentiate between the normative teachings of Islam and the diverse cultural practices among Muslim sects and Islamic countries.

One of the most common criticisms against Islam is that it treats women unjustly. It has been argued in chapter 3 that literal interpretations of the *Qur'an* have strongly influenced unjust behaviour towards women, especially with regards to education. Some commentators, particularly from the West, have accordingly argued that certain customs have been used to justify the oppression of women. This may be true, but the next chapter contends that the interpretation of Islam is multifaceted and does not impede the right of education for women. Indeed, essential Islamic teaching strongly encourages the education of women in religious, economic, political and social domains. Over the years however, certain pre-Islamic customs seem to have reappeared and gained a foothold. Indeed, some cultural customs have become entrenched in some Muslim cultures to the point that they are often accepted as Islamic rules.

Overall, the further advancement of a women's right to education within Islamic systems is fundamentally linked and dependent upon the true interpretation of Islam. Through the modernist approach of Islamic interpretation, a case can be made that the right to education made in the internationally can be achieved within the Islamic context as well. The next chapter will develop these ideas by exploring Islamic conceptions of education as a fundamental right and in doing so explore the relationship between Islamic debates on the relation between Islamic and human rights.

## Chapter 5

### The Concept of Educational Rights in Sharia: Reconciliation or Re-interpretation?

This chapter begins by situating the study of the rights of women in its broader context of Islamic legal history, building on the conclusion of chapter 4 where the international framework on the right to education and non-discrimination was analysed. Before we can explore the validity/compatibility of Saudi Arabia's general reservation to CEDAW and its potential implications for women's rights in Saudi Arabia, historically and in light of recent reforms, it is necessary to return to a more foundational question: what does it mean to speak about *Sharia* as an independent legal system in its own rights and as set of rules and principles that have been applied in the context of the Saudi legal system. To do this, it is necessary to examine the history and development of Islamic law and legal thought, as well as the wider debates that have shaped Islamic gender discourse on women's rights separate from a general right to education in Islam. In particular, the right of women to education will be examined by exploring different perspectives on the compatibility or conflict between the theoretical foundations of modern International Human Rights and Islamic traditions. This chapter will conclude that although each system has a different basis, each system has the potential to learn lessons, through interactions, from the other. The specific lessons to be learnt is outside the scope of this chapter but will be discussed further chapter 6.

#### 5.1 Introduction

The value of education is reinforced in the *Qur'an*. First brought to Mecca and Medina through the revelation of the *Qur'an* in the early 7th century,<sup>680</sup> the religion reached the territories of China in the East and Spain in the West and reached modern-day Western Spain making it the most rapidly spreading religion in human history.<sup>681</sup> It is arguable that the success of the religion is, in no small part, due to Islamic obligation to seek and spread knowledge. The

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<sup>680</sup> Thomas Walker Arnold, *The Preaching of Islam: A History of the Propagation of the Muslim Faith* (Constable 1913) and Aziz Al-Azmeh, *Islamic Law (RLE Politics of Islam): Social and Historical Contexts* (Routledge, 2013) 78

<sup>681</sup> *Ibid*, Arnold at 212.

religious imperative placed on Muslims (both men and women) to enrich their knowledge through reason and spiritual enlightenment applies to men and women.<sup>682</sup> As such, it is widely accepted that, as a matter of Islamic law and theology, education is an area in which Islamic law promotes full equality between the genders.

In principle, and as established in chapter 4, there is no inherent conflict between Islamic conceptions of rights, including the rights of women, and the certain social and economic rights enshrined and guaranteed under contemporary international instruments. There may, however, be certain philosophical and epistemological difference between these two models as explored below. In Islam, all rights are established by Allah, as sovereign creator of the moral and physical universe. As will be analysed in the foregoing analysis, in the classical exegetical tradition, these rights do not exist “out there”, as absolute or unqualified rights.<sup>683</sup> Rather, all rights are gifted to mankind by a sovereign creator; these rights cannot be created or perfected by legal authorities in the positivized sphere of state or international treaty law.<sup>684</sup> As moral rights, they come with other religious or social responsibilities.<sup>685</sup> These responsibilities may vary in nature and kind: such as an individual’s obligations to fulfil forms of worship to their creator; to fulfil their duties to their family in accordance with *Qur’anic* edicts, or a ruler’s duty to fulfil the social and economic needs of a community.<sup>686</sup> It is here that there is a potential for a conflict between the equal right to education and differentiated scheme of women’s rights in the areas of family life, free movement and other aspects of personal status law.<sup>687</sup>

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<sup>682</sup> Mohammed Shukri Hanapi, ‘From Jahiliyyah To Islamic Worldview: In A Search Of An Islamic Educational Philosophy’, (2013) 3(2) International Journal of Humanities and Social Science 213

<sup>683</sup> In the classical exegetical and legal tradition, education is moral imperative and exists prior to any positive enactment and enforcement of these rights, by law or policy. However, in Islam, rights do not exist “out there” as transcendental concepts which are due to all humans in the Kantian mould of deontological ethics. See e.g. Immanuel Kant, *Kant: The Metaphysics of Morals* (CUP 1996) 462

<sup>684</sup> Kevin Reinhart, ‘Islamic Law as Ethics’, (1983) 11(2) Journal of Religious Ethics 186, 196. Henry Corbin, *History of Islamic philosophy* (Routledge, 2014), 19 See also David A. Westbrook, ‘Islamic International Law and Public International Law: Separate Expressions of World Order’ (1993) 33 Virginia Journal of International Law 819, 842

<sup>685</sup> Irshad Abdal-Haqq, ‘Islamic Law: An Overview Of Its Origin And Elements’ (2002) 7 Journal Of Islamic Law and Culture 27, 48

<sup>686</sup> In Saudi Arabia and in most Arab culture, the idea of virtue is tied up with ideas of female modest, and male honour since it is the male’s duty to protect and preserve the female’s virtue. This idea of morality is best exemplified in the existence of gender segregation and kinship structure. See or instance, Nikki R Keddie and Beth Baron (eds), *Women in Middle Eastern history: Shifting boundaries in sex and gender* (YUP 2008) 106. For a further discussion see Bint-e-Islam\_Inshrah Khan, ‘Concept of Mahram and Na Mahram in Islam’ (US Islam, 2015)

<sup>687</sup> For example of restrictions or different treatment in connection with women’s rights see Jordinian Code Royal Decree No 343.57.1 (1957), As Amended By Royal Decree No 347.93.1 (1993) book 1, tit 3, ch 12, art 2; Egyptian Law 1931 (Egypt) art 280, act no 78; Syrian Code, book 1, tit 2, ch 3, arts 21-24; Tunisia Family Law Code 1956

## 5.2 Theoretical perspectives on the Relation between Islamic and International Human Rights: Conflict or Compatibility

Building on the previous chapter, this section will explore the theoretical justifications underlying human rights as the backdrop with which to compare Islamic and mainstream (Western) perspectives on the relation between them. The principle of universality of human rights is a fundamental principle associated with international human rights law. Universal human rights theory holds that human rights apply to everyone, simply because they are human. As a result, the concept of universality is ‘based on the inalienability of the rights and dignity of every person.’<sup>688</sup> Donnelly further explains that, “human rights are “universal” rights in the sense that they are held “universally” by all human beings.”<sup>689</sup> The view that people have rights simply because they are human suggests that human rights are intrinsic and cannot be earned or lost during one’s life. A universalist perspective on human rights suggests therefore that basic human rights ‘do not vary as a result of religious diversity, cultural differences, or historical context.’<sup>690</sup> Universality is therefore closely linked with the idea that human rights are inalienable, indivisible, interdependent and interrelated. The principle of universality is also strongly related to that of equality or non-discrimination. Indeed, the issue of universality has been tied to the legitimacy and authority of human rights, as well as to the way in which human rights operate at a grassroots level.

Universal human rights standards have been enshrined in a range of international treaties that establish legal rules and principles for States within the sphere of human rights protection. For example, the UN Charter encourages ‘respect for human rights and for fundamental freedoms for all without distinction.’<sup>691</sup> The principle of universality was further emphasised in the Universal Declaration of Human Rights. Indeed, the UDHR’s preamble appeals to the “inherent dignity and...equal and inalienable rights of all members of the human family,” stating that “human rights should be protected by law” and that all “human beings are born free

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(Tunisia). For an overview see Azizah Al-Hibri, ‘Islam, Law And Custom: Redefining Muslim Women’s Rights’ (1997) 12(1) American University Journal of International Law and Policy 1, 42

<sup>688</sup>Rainer Arnold, *The Universalism of Human Rights* (Springer 2013) 406.

<sup>689</sup>Jack Donnelly, “The Relative Universality of Human Rights” (2007) <[www.du.edu/~jdonnell/papers/relative%20universality%20hrq%20rev1.doc](http://www.du.edu/~jdonnell/papers/relative%20universality%20hrq%20rev1.doc)> .

<sup>690</sup> Debra L. DeLaet, *The Global Struggle for Human Rights: Universal Principles in World Politics* (2<sup>nd</sup> edn, Cengage Learning 2015) 45.

<sup>691</sup> Charter of the United Nations, Chapter 1, Article 1(3).

and equal in dignity and rights.” Furthermore, Article 2 of the UDHR asserts that human rights ‘belong to all humans regardless of race, colour, sex, language, religion, political or other opinions, national or social origin, property, birth or other status.’ It has also been noted that the UDHR claims and prescribes universality by, ‘the inclusion of universalist language such as all, everyone (and) no-one.’<sup>692</sup> It can accordingly be argued that the UDHR began to establish a global practice of moral rights for all human individuals. Through time, such moral rights began to exist independently and were realised and developed through the body of international law.

Many states also endorsed their commitment to a universal concept of human rights at the 1993 World Conference on Human Rights in Vienna, where they adopted a declaration reaffirming “the solemn commitment of all States to fulfil their obligations to promote universal respect for, and observance of, all human rights and fundamental rights in accordance with the Charter of the United Nations, other instruments relating to human rights and international law.”<sup>693</sup> In doing so, states accepted that ‘the universal nature of these rights and freedoms is beyond question.’<sup>694</sup> Article 5(1) of the Vienna Declaration further provides that, ‘while the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms.’ Therefore, it can be argued that although international human rights law acknowledges a basic level of human rights for all human beings, it also enables and facilitates all cultures to flourish. This argument is supported by the adoption of the Universal Declaration on Cultural Diversity in 2001 and the Convention on the Protection and Promotion of the Diversity of Cultural Expressions in 2005.

Nevertheless, universal assurances of human rights do not automatically translate into human rights protection for all. This is because the global human rights regime relies heavily on national implementation of internationally recognized human rights, as enshrined in international law instruments. As Ssenyonjo asserts, ‘although we have human rights

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<sup>692</sup> Jonathan Russell, “Human Rights: The Universal Declaration vs The Cairo Declaration” <<http://blogs.lse.ac.uk/mec/2012/12/10/1569/>>.

<sup>693</sup> Vienna Declaration and Programme of Action, Adopted by the World Conference on Human Rights in Vienna on 25 June 1993, Article 1.

<sup>694</sup> Ibid.

universally, simply as human beings, we enjoy them as a result of contingent political and legal practices.’<sup>695</sup>In this regard, the enforcement of international human rights is generally left to sovereign states. Subject to a few and limited exceptions, States have the power to implement human rights as they see fit. An unfortunate consequence of this is that human rights are not always implemented or enforced. This is due to several reasons. Indeed, as Ramcharan points out,

Human rights are still not effectively assured in practice in most of the world's countries. Clashes of interest, overriding reasons of State, sudden, sharp changes in economy and in social relationships, the vicissitudes of national and international policy, intergroup antagonisms, fluctuations in power relationships, the pressures of egoism, intolerance and obscurantism, the pretexts afforded by circumstances – all these are continually responsible for shameful retreats.<sup>696</sup>

Resultantly, the level of human rights protection afforded to individuals, ultimately depends upon the country in which they reside.

It should also be noted that attacks on the universality of human rights have been widespread. As highlighted by Balabanova, the universality of human rights has been

[c]hallenged by those who disagree that there can be only one legitimate of the human rights doctrine, with views ranging from those suggesting that human rights should be thought of not so much as a single, unified doctrine but as a number of significantly different moral and cultural outlooks to those that completely dismiss the very idea of universality.<sup>697</sup>

As a result, often, the universality of human rights is questioned by duty bearers rather than right holders. In this regard, Navanethem Pillay argues that the principal challenge is that concept of universality of human rights is instrumentalised as a ‘means for some States to avoid

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<sup>695</sup> Manisuli Ssenyonjo, *International Human Rights Law: Six Decades After the UDHR and Beyond* (2<sup>nd</sup> edn, Routledge 2016) 42.

<sup>696</sup> Jochen von Bernstorff, “The Changing Fortunes of the Universal Declaration of Human Rights: Genesis and Symbolic Dimensions of the Turn to Rights in International Law”, (2008) 19(5) *Eur J Int Law*, 903-924.

<sup>697</sup> Ekaterina Balabanova, *The Media and Human Rights: The Cosmopolitan Promise* (Routledge 2015), 20.

giving effect to the whole set of human rights.’<sup>698</sup> Even if that is not the case, the Human Rights Council has emphasised that there appears to be significant differences in opinion surrounding a number of issues including ‘the specific meaning and content of universal human rights, the manner in which human rights should be weighed against each other and the ways in which human rights should be implemented in national and regional contexts.’<sup>699</sup>

A common challenge to the universality of human rights is the concept of cultural relativism. This view maintains that what the West considers universal norms in human rights are not applicable in other cultures. Langlois, for example, argues that, ‘human rights are argued to have developed from Western culture and thus they are inappropriate in application to other cultures.’<sup>700</sup> O’Byrne similarly asserts that, ‘claims based on universal human rights are therefore at risk of being a risk of cultural hegemony.’<sup>701</sup> Other cultural relativists, such as Pollis, Schwab and Huntington reject universal human rights as a manifestation of Eurocentric arrogance or as an illusion doomed to collapse.<sup>702</sup> Thus, according to Huntington, the only way in which people from other civilisations can have full access to human rights is for them to essentially adopt “Western” values and implicitly convert to Western civilization. An-Naim has noted, [w]hile the universality of human rights cannot be recognized among believers unless they accept it as a consistent with their religious beliefs, the integrity of religious faith and its relevance to the lives of its adherents independent on the effective protection of human rights.’<sup>703</sup>

In connection with the above, Bielefeldt points out that: ‘[T]o divide the idea of human rights into Western, Islamic and other culturally defined conceptions, however, would be the end of

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<sup>698</sup> Navanethem Pillay, “Are Human Rights Universal?” (2008) <<https://unchronicle.un.org/article/are-human-rights-universal>>.

<sup>699</sup> Geneva Academy, “Universality in the Human Rights Council: Challenges and Achievements: Research Brief” (December 2016) <<https://www.geneva-academy.ch/joomlatools-files/docman-files/Universality%20in%20the%20Human%20Rights%20Council%20-%20Challenges%20and%20Achievements.pdf>> .

<sup>700</sup> Matthew Lower, “Can and should Human Rights be Universal?” (December 2013) <<http://www.e-ir.info/2013/12/01/can-and-should-human-rights-be-universal/>>.

<sup>701</sup> Ibid.

<sup>702</sup> This point of view is not uncommon. Scholars of religion and law, such as Abdullah A. An-Nai’m have emphasized the same.

<sup>703</sup> An-Na’im, Abdullahi A., and Louis Henkin. “Islam and Human Rights: Beyond the Universality Debate.” *Proceedings of the Annual Meeting (American Society of International Law)*, vol. 94, 2000, pp. 95–103. JSTOR, JSTOR, [www.jstor.org/stable/25659365](http://www.jstor.org/stable/25659365).



universal human rights.’<sup>704</sup> From his perspective, the language of human rights would thus simply be turned into a rhetorical weapon for intercultural competition. He, therefore, strives to provide a critical defense of universal human rights in a way that gives room for different cultural and religious interpretations and, at the same time, avoids the pitfalls of cultural essentialism.

However, it has also been noted by scholars that the attraction of certain values, not commonly found in non-western countries may have been underestimated by the likes of Huntington and Mahatir.<sup>705</sup> For instance, democracy stands high on the wish lists of many Muslim majority states.<sup>706</sup> Hence, it is possible that Islamic principles and certain internationally accepted values could be amalgamated in one manner or another for the betterment of society.

### **5.3 Islamic Perspectives on Reconciling Sharia and Human Rights Law**

If the above section pointed to the apparent impasses that exists between universalist versus relativist positions on human rights law, it is fair to say that such debates are also being replicated from within the Islamic world. Niaz Shah has dealt with several, and seemingly conflictual, approaches towards human rights in the Islamic world and its relationship to the international human rights regime.<sup>707</sup> Shah identifies these as: secular, non-compatible, reconciliatory and interpretive.<sup>708</sup> These cannot be dealt with exhaustively here, but it is worth highlighting some of the key hallmarks of these interpretative stances. Shah notes that there are handful of secular-minded Muslim scholars who appear to suggest that applying international human rights law can be unproblematically transposed and applied in Muslim states, since there is no fundamental conflict between the two systems and each may co-exist in harmony.<sup>709</sup> As

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<sup>704</sup> Heiner Bielefeldt, ““Western” versus “Islamic” Human Rights Conceptions: A Critique of Cultural Essentialism in the Discussion on Human Rights”, (2000) 28 Political Theory, 90, 92.

<sup>705</sup> “The attraction of these Western innovations for many in non-Western countries is certainly greater than Mahathir and Huntington suppose. Opinion polls regularly show that democracy stands high on the wish list of populations in Muslim countries (Hofmann 2004; Inglehart and Norris 2004; Pew Global Attitudes Project 2003).” Wetenschappelijke Raad voor het Regeringsbeleid, and Scientific Council for Government Policy. “The Development of Law And Legal Systems,” P 13. *Dynamism in Islamic Activism: Reference Points for Democratization and Human Rights*, (Amsterdam University Press, Amsterdam, 2006), 109–152

<sup>706</sup> Ibid.

<sup>707</sup> Niaz Shah, *Women, The Koran and International Human Rights Law: The Experience of Pakistan* (ed IV, Martinus Nijhoff, 2006) 3

<sup>708</sup> Ibid at 3

<sup>709</sup> Shah, *ibid*, referencing Reza Afshari, ‘An Essay on Islamic Cultural Relativism in the Discourse of Human Rights’ (1994) 16 (2) Human Rights Quarterly 235, 236

Shah notes, those who claim the human rights can be simply exported to, or imposed upon, Muslim states often discount aspects of domestic law in Islamic states that appear to be contrary to core tenants of international human rights law, namely: the discriminatory treatment of minorities, including women, and aspects of personal status law i.e. family law that violate principles of equal treatment.<sup>710</sup>

At the opposite end of the argumentative spectrum, Shah notes that are those who claim that Islamic and international human rights law are inherently incompatible, based on the argument that: '[I]slam has its own distinct system of rights and duties,' while lauding the Islamic legal system 'for its eternity and antiquity.'<sup>711</sup>In support of this contention, these scholars will point to the anthropocentric, secular and liberal origins of modern human rights law, and refute its applicability under the Islamic system, given that only Allah has the power to grant rights not 'any king or any legislative assembly.'<sup>712</sup> Such scholars will tend to reinforce the religious and spiritual aspects of the Quranic text in order to emphasise that Sharia is fundamentally concerned with a Muslim's subservience to their creator, and is therefore less concerned with worldly matters or the pursuit of individual life, liberty and the pursuit of economic freedom or entitlement.<sup>713</sup> This appears to be a very narrow and doctrinal interpretation of the scope and content of *Sharia* and the rights of persons. Niaz Shah persuasively argues that the subject matter of the *Quran* is not merely concerned with practices of worship and religious ritual but is, in text as well as ethics, intimately concerned with relationships between humans, including the rights of woman.<sup>714</sup>

Scholars that tend to converge around the 'non-compatibility' school of thought also tend to denounce the intergovernmental regime of international human rights law on the grounds that this system merely reflects Western ideals and interest and is, consequently, merely the most

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<sup>710</sup> Shah (n 606) 4. See also Clark B. Lombardi & Nathan J. Brown, 'Do Constitutions Requiring Adherence To Shari'a Threaten Human Rights? How Egypt's Constitutional Court Reconciles Islamic Law With The Liberal Rule Of Law,' (2006) 21 American University Of International Law Review. 379, 404–05

<sup>711</sup> *ibid*

<sup>712</sup> Cited in Shah, *ibid* at 5. See Abul A'la Maududi Maududi, *Human Rights in Islam* (2nd ed. Islamic Publication, 1995) 12

<sup>713</sup> Clark B. Lombardi & Nathan J. Brown, Do Constitutions Requiring Adherence to Shari'a Threaten Human Rights? How Egypt's Constitutional Court Reconciles Islamic Law with The Liberal Rule of Law, (2006). 21 American University Of International Law Review. 379, 404–05

<sup>714</sup> *Ibid* at 6

recent iteration of Western Imperialism.<sup>715</sup> However, as Shah notes, while it may be necessary to challenge the assumption that international human rights law can be unproblematically ‘exported’ to Muslim societies, it may also be too sweeping a claim to suggest that such systems cannot cohere or co-exists in certain ways. The Researcher also believes that this type of argument tends to mirror the binary logic of cultural relativists or international relations theorists such as Huntington, who deny any points of convergence between Islamic law and international human rights law.<sup>716</sup> This Researcher contends that there is a possibility to carve out a middle ground between these two seemingly mutually exclusive views. The reason why they are considered to be at odds with each other is twofold: 1) the willingness of some proponents of cultural relativism to turn a blind eye to the most blatant violations of human rights in the name of cultural diversity, and 2) cherry picking by the most literalist views in Islam and neglecting the potential of interpreting Islamic sources in the best light.<sup>717</sup> The following discussion of Islamic sources below will demonstrate that the same ends (human welfare) can be achieved from within the Islamic framework.

In this regard, Shah also identifies a third colloquy of scholars who take a more nuanced approach, by suggesting that ‘Islamic human rights norms are compatible with international standards in many respects and that where they conflict, those areas could be reformulated and reconciled with international standards.’<sup>718</sup> Various scholars are thought to fall within this school of thought in so far as they unite around the common the project of ‘fusing [of] secular and Islamic principles can effectively promote human dignity.’<sup>719</sup> In many respects, the Researcher’s own perspective aligns somewhat with those like Monshipouri, who Shah also discusses.<sup>720</sup> Building on these ideas, he posits the thesis is that Western and Islamic perspective have something to learn from the other through process of mutual dialogue and accommodation.<sup>721</sup> Islamic societies may benefit from embracing some of the core ideals of

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<sup>715</sup> Ibid at 10. For an example of this type of criticism from within the Islamic world see Sara Ahmed, “Liberal Multiculturalism Is The Hegemony – Its An Empirical Fact” In Sara Ahmed, (Ed.) *Darkmatter: In The Ruins Of Imperial Culture*, (Ed., 2008) Ch. 1. For a more general critique see Emmanuelle Jouannet, *Universalism and Imperialism: The True-False Paradox of International Law?* (2007) 18 (3) *European Journal of International Law* 387.

<sup>716</sup> See Shah (n 606) 7

<sup>717</sup> Ibid 14-15

<sup>718</sup> Shah (n 606) 8

<sup>719</sup> Mahmood Monshipouri, *Islamism, Secularism and Human Rights in the Middle East*, (Lynne Rienner, 1998) 25

<sup>720</sup> Shah (n 606) 8-9

<sup>721</sup> Monshipour (n618) 9

the enlightenment such as civil society and human rights. At the same time, mainstream, largely Western-centric, human rights activists and ideologues should not deny the importance of culture – and by extension the divine claims made by Islamic law - in the promotion and diffusion of human rights.<sup>722</sup> There are some legitimate criticisms to be made of these types of claims. One is that there is implicit assumption in these types of approaches that Islamic societies may have to ‘catch up’ to an already ‘superior’ or idealised ideal of human rights. For this reason, the works of scholar Monshipouri could arguably be seen to privilege the secular conception of human rights, albeit by also recognising its ethno-centrism (hence the need for more cultural dialogue).<sup>723</sup> The other is that this account does not take full account of the fundamental –theological – differences that differentiates these two systems.<sup>724</sup>

Bassam Tibi adopts a more radical critique of the current opposition to international human rights discourses on anti-imperialist grounds.<sup>725</sup> Tibi effectively calls for Muslim society to level a challenge to the Western hegemony in the making and shaping of human rights law, through their active participation in the human rights agenda. Through these efforts, he goes on to argue, a truly global human rights framework may well emerge. Instead of simply being presented as a set of Western-oriented norms that claim false universality, Tibi proposes a new open and inclusive cultural dialogue that would require the redefinition of Islam not as a faith system but as, itself, a culturally-specific but permeable legal system. Rather optimistically, Tibi contends that this may not only have the benefit of subverting West dominance over such matters, it may also open up a space for a radical non-secular re-imagining of human rights – described as ‘the Islamization of human rights.’<sup>726</sup> In this vision, Islamic societies may be able exert a powerful some influence over the laws and policies of non-Islamic societies.

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<sup>722</sup> Bassam Tibi, ‘Islamic Law/Shari’a, Human Rights, Universal Morality and International Relations’ (1994) 16 (2) Human Rights Quarterly 277

<sup>723</sup> See generally Nora V. Demleitner, “Combating Legal Ethnocentrism: Comparative Law Sets Boundaries,” (1999) 31 Arizona Law Journal 737, 757 (“Some non-Western countries have responded to the claim of the existence of universal human rights with a charge of imperialism since they perceive some, usually Western, countries as attempting to impose their legal systems on others.”)

<sup>724</sup> Shah (n 606) 8-9. See also Asifa Quraishi, ‘Book Review of Islamism, Secularism and Human Rights in the Middle East By Mahmood Monshipouri,’ (2000) 22 (2) Human Rights Quarterly 625

<sup>725</sup> Tibi (n 621) 285-288

<sup>726</sup> Bassam Tibi ‘The European Tradition of Human Rights and the Culture of Islam’ In: An-Na’im and Deng (eds.) *Human Rights in Africa: Cross Cultural Perspectives* (Brooking Institutions, 1999) 117, see also Shah Shah (n 606) 9-10

Some take a less positive view of the Islamic world's potential influence, at least in its current form. They accept that existing aspects of Sharia, in Quranic text as well as in the form of the laws of Muslim nations, are indeed in conflict with international human rights law. Arguing of the need to 'mainstream' human rights in Islamic societies, scholars such as Abdullahi Ahmad An-Na'im see no choice but to radically reform the *Sharia*.<sup>727</sup> In support of this claim, An-Naim suggests that many verses of the *Quran* must be viewed in their proper historic context (for example verses that appear to support violence or forms of discrimination).<sup>728</sup> Adopting this line of argument to its fullest extreme, An-Naim suggests that Islamic societies only endorse those doctrinal aspects of the *Quran* and *Sunnah* that can be interpreted as being as substantially in line with, or supportive of, international human rights standards. An-Naim embraces those elements of Islamic jurisprudence that can be reconciled with current international human rights law, but he also calls upon Muslims to disregard Quranic verses dealing with war and state craft in favour of abrogated verses associated with the more peaceful period of Islamic history.<sup>729</sup> This position is highly controversial among conservative and liberally minded Islamic scholars, since it challenges both the Prophetic tradition on which the *Sunnah* is based, and more importantly, violates the fundamental message of Islam: no human creation may change or substitute their own judgment in place of the literal word of *Allah* as revealed in the *Quran*.<sup>730</sup>

While there may be need for reform of Islamic laws as they are applied in Muslim states, Shah notes that An-Naim's approach is unlikely to attract consent and legitimacy because it 'tries to change the understanding of the foundation of Islamic law, not to reform it.'<sup>731</sup> It is a methodology that deviates, both, from modernist and classical Islamic exegetical traditions.<sup>732</sup> Nor, as many of his critics suggest, does this methodology appear to help bring about a reconciliation between western legal traditions and traditional Islamic scripture. Any reconciliation between Islamic and international human rights discourses, as Shah compellingly notes, is not merely a cultural problem that can be neatly or fully resolved by be

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<sup>727</sup> Abdullahi Ahmed An-Na'im and Francis M. Deng, eds. *Human Rights in Africa: Cross-Cultural Perspectives* (Brookings Institution, 1990) 172, 179, discussed in Shah (n 606) 10

<sup>728</sup> An-Naim, *ibid* at 180, Shah, *ibid* 10-11

<sup>729</sup> *ibid*

<sup>730</sup> For a parallel analysis see Mashood A Baderin, 'The Role of Islam in Human Rights and Development' in Javaid Rehman and Susan Breau (eds), *Religion, Human Rights and International Law: A Critical Examination of Islamic State Practices* (Martinus Nijhoff Publishers 2007) 352

<sup>731</sup> Shah (n 606) 11

<sup>732</sup> *ibid*

inter and cross-cultural dialogue. This is also why it may be misleading to speak of ‘fusing’ elements from both traditions – this only begs the question: what it is that is being ‘fused’? To put the problem in less oblique terms, to the extent that it is possible to speak of a potential conflict between Islamic and modern human rights law, this conflict is fundamentally a theological-philosophical problem. That is to say, this conflict cannot be resolved by appealing to the more contingent, localised question of culture. Islam, after all, claims eternal validity. The modern paradigm of human rights, though in some sense a product of Western enlightenment, is a relatively modern, man-made and dynamic creation of the post-war international consensus. For this reason, critics of scholars associated with the ‘reconcilability’ school of thought will often argue that its advocates pay too little attention to, or are otherwise ignorant of, the theology underpinning Islamic rights conceptions, including the divine origins of all rights, discussed further in the next section.<sup>733</sup> At the same time, it is possible to argue that although there are invariable differences between international human rights and Islamic law in scope and applications, this does not mean that areas of commonality cannot be found or cultivated. This method of reconciliation is more likely to attract support from within the Muslim world because it is framed in the language and ideals of Islamic law, rather than being imposed from a ‘higher’ international order that claims false universality.

This takes us to a fourth school of thought that Shah has identified as a group of reform-minded scholars.<sup>734</sup> These scholars refocus the discussion not on the need to achieve some type of reconciliation between Islamic and international human rights standards, however illusory, but on Islam’s inherent capacity to meet the needs of the contemporary Muslim societies. In this way, these scholars argue that Islamic law can be reformed, not through the imposition of orientalist human rights discourses, but through a re-interpretation of Islamic legal sources.<sup>735</sup> It is in this light that we must consider the impetus for strengthened rights for women within the Islamic world, in education and in other realms of life.<sup>736</sup>

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<sup>733</sup> *ibid*

<sup>734</sup> *Ibid* at 13

<sup>735</sup> *ibid*

<sup>736</sup> For an excellent overview see Z. Mir-Hosseini, M. al-Sharmani and J. Rumminger (eds.), *Men in Charge? Rethinking Authority in the Muslim Legal Tradition* (Oneworld 2015), Z. Mir-Hosseini, M. al-Sharmani and J. Rumminger (eds.), *Men in Charge? Rethinking Authority in the Muslim Legal Tradition* (Oneworld 2015).

These Islamic reformers include Islamic feminists who argue for reform of discriminatory educational practices affecting the life chances of women.<sup>737</sup> They do so not on the basis that that Muslims societies require enlightenment or should otherwise uncritically accept the rules and traditions of Western legal systems, but because such a reading can be deemed consistent with a re-interpretation of Quranic texts. Islamic is a religion that holds the promise to be suitable for all times and places, and certain verses likewise can be seen to have been suitable for a period of history or narrow set of circumstances. Islamic reformers have argued of the need to reappraise certain orthodox interpretations that have ossified over time and to reconsider whether this interpretation reflects the original meaning or purpose of the verses. This provides the basis on which to consider certain verses of the *Quran* as unchanging and immutable and others as requiring a sensitive and contextual analysis of certain rule-interpretations in modern contexts. In regard to the scope and application of Saudi-specific laws, certain practices that have inhibited women's access to education, such as guardianship, can be revised or abrogated on the grounds of changed social circumstances, or because the jurisprudential justification for these practices is no longer as tenable as it was in previous historic periods.

To understand why this may be the case, it is necessary to consider the way that certain rule and rule-interpretative practices have evolved over the early period of Islam. This will provide the backdrop for a more nuanced assessment of why Muslim feminists have argued that 'current Islamic legal norms are based on a masculine and patriarchal interpretation of the Koran and suggest re-interpretation of the Koran (Quran) from the perspectives.'<sup>738</sup>

#### **5.4 Historical Evolution of Islamic Rights from antiquity to Modernity**

Islam is not only a religion. It is also a comprehensive way of life, given that it addresses ethics, economics, political systems, legal theories, behaviours, logic and other social issues.<sup>739</sup> Islam is the first religion in history to include a widespread concept of human rights,<sup>740</sup> which is based

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<sup>737</sup> Amina Wadud, *Qur'an and Woman: Rereading the Sacred Text from a Woman's Perspective* (New York University Press, 1999) 64.

<sup>738</sup> Shah (n 606) 13-14

<sup>739</sup> Shahab Ahmed, *What is Islam? The Importance of Being Islamic* (Princeton University Press, 2016), 194-195.

<sup>740</sup> Muhammad Sharif Chaudry, *Human Rights in Islam* (All Pakistan Islamic Education Congress, 1993).

on the notion of the equality of mankind and human dignity.<sup>741</sup> In verse 95:4 of the *Qur'an*, it is stated that the Almighty Allah created humans “in the best of moulds” and bestows rights to mankind on several aspects in life, i.e. economic, political, moral, religious, legal and social. In truth, it is said that Allah has given approval of human rights through the *Qur'an* (Al-*Qur'an*, 3:138).<sup>742</sup>

The Holy Prophet Mohammad's Farewell Sermon (*Khutbah Hijja-tul-Wada*)<sup>743</sup> provides support for living an ideal human life, while the objectives of Islamic law (*Maqasid al-Sharia*) is to retain at the highest level the interests of mankind.<sup>744</sup> These interests, which were awarded by Allah, are the individuals' divine rights, which cannot be changed, diminished or suspended under any situation, except as provided by the *Sharia*.<sup>745</sup> This means that these rights are permanent and sacred, unlike rights given by governments. In Islam, therefore, God gave the gift of rights to mankind and the state is unable to infringe on those rights.

The *Sharia*, as alluded to in chapter 3, serves as the framework for rights and responsibilities. The Oxford Dictionary of Islam defines *Sharia* as ‘God's eternal and immutable will for humanity, as expressed in the *Qur'an* and Mohammad's example (*Sunnah*), considered binding for all believers; ideal Islamic law.’<sup>746</sup> In the early history of Islam, scholars introduced beliefs, practices and particular rules on different issues Muslims deal with based on the *Qur'an* and *Sunnah*. Eventually, four Madhabs (schools of jurisprudence) developed that were devoted to by jurists and students. These Madhabs are Shafi, Malaki, Hanafi, and Hanbali and were within Islam's main *Sunni* sect.<sup>747</sup>

“*Haqq*” (*huquq* in plural form) is a Qura'nic term which means rights. Muhammad Arkoun states that the “Qura'nic term *al haqq* applies to God Himself as well as to the absolute

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<sup>741</sup> Qur'an 49:13.

<sup>742</sup> Qur'an 3:138.

<sup>743</sup> S. F. H Fiazi, *Sermons of the Prophet* (Islamic Book Foundation, 1987)

<sup>744</sup> Imran Ahsan Khan Nayazi, *Theories of Islamic Law: The Methodology of Ijtihad* (Adam Publishers, 1996).

<sup>745</sup> Shannon Dunn, "Islamic Law and Human Rights." In *The Oxford Handbook of Islamic Law*.

<sup>746</sup> John Esposito, *Oxford Dictionary of Islam*. (Oxford University Press. 2004)

<sup>747</sup> Wael B. Halleq, *An Introduction to Islamic Law* (Cambridge University Press, 2009), 31-37; Saira Bano Orakzai, "The rights of women in Islam: The question of 'public' and 'private' spheres for women's rights and empowerment in Muslim societies." (2014) 2(1) *Journal of Human Rights in the Commonwealth*.



transcendent truth.”<sup>748</sup> However, *huquq* do not refer to the usual legalistic rights involved in Western discourse. Rather, it is the right to become a recipient of particular responsibilities that shape the foundation of political and social organisation and human relations in Islam. In other words, *haqq* refers to something incumbent upon one to do.”<sup>749</sup> For Islamic jurists, the most universally-acknowledged rights theory can be split into three different kinds.

The first kind is referred to as the “rights of God” (*huquq Allah*). These pertain to duties that need to be accomplished simply because they are divine commands, regardless of personal interest or lack of resources to accomplish them. The rights of God refer to interests that serve the public wellbeing and which rid the world of evil.<sup>750</sup> Examples of such rights are the hajj (pilgrimage), prayers, Zakat (charity tax) and fasting.

The next type is the Rights of God’s servants (*huquq al-ibad*). These rights refer to those meant to protect the interests of an individual, although individuals are still responsible to God for fulfilment.<sup>751</sup> Examples include honouring contracts, sticking to promises and paying debts.

Finally, there are the rights shared between God and servants (*huquq Allah wa al Ibad*). These refer to rights that must be accomplished because are mandated by God but are still used to protect the interests of the public. In discussing human rights in Islam, Omar Siddiqui draws attention to the fact that the traditional human rights concept is reliant on the rights bestowed by God, whereas the Western concept of human rights hinges on the idea of rights on account of humanity.<sup>752</sup> Essentially, the source of obligation is the primary difference between the two traditions, but the objective and the outcome of both of these approaches remains the same: human welfare.<sup>753</sup>

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<sup>748</sup> Mohammad Arkoun. "The State, the Individual and Human Rights: A Contemporary View of Muslims in a Global Context." *The Muslim Almanac: The Reference Work on History, Faith and Culture and Peoples of Islam* (1995).

<sup>749</sup> Anver Emon, “Ḥuqūq Allāh and Ḥuqūq al-‘Ibād: A Legal Heuristic for a Natural Rights Regime.” (2006) 13(3) *Islamic Law & Society*, 328.

<sup>750</sup> *Ibid.*, p. 326.

<sup>751</sup> *Ibid.*, p. 457.

<sup>752</sup> Omar Siddiqui, "Relativism vs. universalism: Islam and the human rights debate." (2001) 18(1) *American Journal of Islamic Social Sciences*, 59-94.

<sup>753</sup> *Ibid.*

One stark distinction between Islamic law and positive Western law is that the former is theocentric, which means that God is its focal point and its perspective is largely religious. The latter, on the other hand, takes a secular approach. In a theocentric model, God is believed to be the source of all human life and, thus, is also the provider of human rights.<sup>754</sup> Verse 3:66 of the *Qur'an* also states that God is omnipotent and knows what humans do not and that the knowledge of humans is limited. Hence, a man should not have to make laws that protect the individual because God's divine law is already perfected and adheres to the best interest of both the individual and community.

International human rights law is mainly anthropocentric in nature, which means that it sees man as being at the centre of existence. Since it is secular in approach, no direct reference to God is made and the rights of a person are based only on humanity. Moreover, while religious freedom is considered a right of any human, it is not recognised as a basis for human rights. Because of this lack of reference to God in international documents, Muslims have argued among themselves whether or not these documents are applicable to Islamic law.<sup>755</sup> The main debate is between the advocates of humanist secular approach, and between those whose approach is equally humanist, but based on religious sources and inspired by faith. Both sides have their arguments. As Riffat Hassan stated:

Reference to God does not necessarily make sacred, nor does non-reference to God necessarily make profane any human document...a document such as the Universal Declaration of Human Rights which, though 'secular' in terminology, seems to be more 'religious' in essence than many '*fatwas*' given by Muslims and other religious authorities and agencies.<sup>756</sup>

However, it is not just the Muslims who push for direct reference to God (Allah) in the subject of human rights. During the drafting stages of UDHR, the Brazilian delegation requested that a reference to God be included in the first article, stating that: "All human beings are born equal

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<sup>754</sup> Baderin, Mashood A. "Dialogue Among Civilisations as a Paradigm for Achieving Universalism in International Human Rights a Case Study with Islamic Law." (2001) 2 Asia Pacific Journal on Human Rights and the Law: 1-41.

<sup>755</sup> *Ibid.*

<sup>756</sup> Riffat Hassan, 'On human rights and the Qur'anic perspective,' (1982) 19(3) Journal of Ecumenical Studies 51

in dignity and rights. (Created by God in his own image and resemblance) They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.”<sup>757</sup>

In the above light, it is necessary to reflect on the vital role Islam played in changing the social and political groundwork of tribal customary law during the life of Muhammad, in both theoretical and practical terms.

Out of all the verses of the *Qur'an*, only around 500 contain legal rules, though for the most part they did radically change the tribal customs of pre-Islamic societies, though they ended the practice of female infanticide and other family law matters.<sup>758</sup> Islam also strengthened the rights of women in areas such inheritance, allowing women to gain formal legal status under the traditional rules of pre-modern societies of early Islamic history and providing them their own financial independence and private property.<sup>759</sup> This change is what probably started the evolution of Islamic jurisprudence. Ever since the time that Islam was founded until today, the fundamental rules of *Sharia* have been equity, justice and morally-defined rights, because law and morality went hand-in-hand in the *Qur'anic* discourse.<sup>760</sup>

In Islam, human rights can be said to come from that which is divinely inspired and bestowed upon people by God, as opposed to secular rules, such that positive laws cannot take precedence over God's law.<sup>761</sup> In addition, Islam provides that there is no difference in the social interactions between individuals or between the state and the individual. According to Akhtar Khalid Bhatti, while Islamic law outlines how humans should act towards another, it also details the state's duties and functions to its people.<sup>762</sup> Whether these ideals are being fulfilled in contemporary Islamic societies is, however, a matter of deep controversy.

Applying concepts derived from *Qur'anic* revelation and the Prophetic tradition of *Sunnah*, the classical jurists of Islamic schools of jurisprudence developed rules restricting the ways in

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<sup>757</sup> Jane Adolphe, "The Holy See and the Universal Declaration of Human Rights: working toward a legal anthropology of human rights and the family." (2006) 4 Ave Maria L. Rev., 343.

<sup>758</sup> *Ibid.*, 22-25, 146.

<sup>759</sup> *Ibid.*, 23.

<sup>760</sup> See Wael B. Hallaq, "Groundwork of the Moral Law: A New Look at the Qur'an and the Genesis of Shari'a." (2009) 16 Islamic Law & Society, 239-279

<sup>761</sup> Anver Emon, *Islamic Natural Law Theories* (Oxford University Press, 2010)

<sup>762</sup> Bhatti, Akhtar Khalid. *The Holy Qur'an on human rights*. Royal Book Company, 1996.

which women in Islamic nations have navigated the public space.<sup>763</sup> These rules were designed to ensure the sanctity of marriage, the safety of unmarried women and the moral purity of the social order.<sup>764</sup> Many of these moral norms and conceptual schemes were endorsed by religious scholars in Saudi Arabia and have crystallised as customs that were routinely enforced by religious and regulatory authorities alike.<sup>765</sup> These norms have also acquired formality and binding legal implications through the enactment of governmental regulations.<sup>766</sup> The question at hand in this chapter is the extent to which theological-legal support for equality in the sphere of education must, as a matter of religious duty, be weighed and balanced against other rights-restricting interpretations of Islamic law.<sup>767</sup>

#### 5.4.1 The Root of an Islamic Concept of Education

It is useful to begin with a brief discussion about the concept of education in Islam, to prepare the ground for a discussion of the right of women to education. The word for knowledge in Arabic is '*ilm*' though the meaning of this knowledge goes beyond knowledge of the physical and material world.<sup>768</sup> For the followers of the faith, the pursuit of knowledge has a divine source.<sup>769</sup> The origin of Islamic law from the concept of *Fiqh*, which in terms describes the laws governing an Islamic legal systems.<sup>770</sup> The sources of these laws derive from the *Qur'an* and latterly from the *Sunnah*, the teachings and practices of the last Prophet and Messenger of Islam. In this sense, the *Qur'an* and *Sunnah* embody the highest sources of legal authority and

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<sup>763</sup> Juristconsults working in the classical exegetical tradition cite the Prophet's saying: Umm Salamah (May Allah be pleased with her) said that after Allah's Messenger (May peace and blessings be upon him) said 'as-Salamu 'Alaykum wa Rahmatullah' twice announcing the end of prayer, women would stand up and leave. He would stay for a while before leaving. Narrated by al-Bukhari under No 793. Ibn Shihab argued that it was necessary for men and women to be kept apart in the Mosque but also in other public spaces.

<sup>764</sup> Samia Bano 'Muslim Family Justice and Human Rights: The Experience of British Muslim Women' (2007) 2(2) Journal Comparative Law 38

<sup>765</sup> E Alhussein 'Triangle of Change: the situation of women in Saudi Arabia' (NOREF, 2014) <<https://www.files.ethz.ch/isn/181922/ef4fe5e44ede4d362d60a6804ed40437.pdf>>

<sup>766</sup> See for instance in Saudi Arabia See Fatwa No. 3633 (15/5/1401), 'The General Presidency of Scholarly Research and Ifta, Fatwas of The General Presidency of Scholarly Research and Ifta' 1st issue (1411H) vol 17, 223., discussed below.

<sup>767</sup> Jawad Syed, 'A context-specific perspective of equal employment opportunity in Islamic societies' (2008) 25(1) Asia Pacific Journal of Management 143.

<sup>768</sup> Franz Rosenthal, *Knowledge Triumphant: The Concept of Knowledge in Medieval Islam* (Vol 2, Brill 1970) 10-40.

<sup>769</sup> Mohammad Hashim Kamali, *Principles of Islamic Jurisprudence* (Islamic Legal Text society, 1989) 13

<sup>770</sup> See e.g. Abdullah An Naim, 'Sharia and Positive Legislation: Is an Islamic State Possible or Viable?' (2008) Yearbook of Islamic and Middle Eastern Law 5

legal system and therefore are the source from which all other rules of Islamic law or *fiqh* derive their authority.<sup>771</sup>

The birth of Islam and its spreading influence paved the way for the development of several offshoots of Islamic religious legal education, including Tafseer (*Qur'anic* Commentary), *Hadith* (words said and acts done by the Prophet), *Fiqh* (the rules and jurisprudence of Islam), *Usul Al-Din* (Theology) and *Ilm Ul Qirat* (Linguistic Science).<sup>772</sup> The body of law known as *Fiqh* refers to the laws of an Islamic legal system which derive from core religious texts of the *Qur'an* and the narration of the *Sunnah*.<sup>773</sup> The body of *fiqh* has given rise to a complex body of legal practices, rulings, norms and customs which are applied and observed across the Muslim world, on matters as diverse as the correct ways of performing religious rituals, contract law, and crucially, personal status law.<sup>774</sup> It is important to note that the *Sharia* consists more than a set of legal rules and prescriptions, but also provides a 'moral scheme' which regulates and constitutes various legal and societal relationships, between for instance the duties of rulers to its subjects, or the legitimate boundaries of the male-female relations.<sup>775</sup> All forms of Islamic knowledge are viewed as part of the constant search by humans to divine the will of their creator.<sup>776</sup>

At the root of Islamic law is the concept of a moral and legal framework that is applicable at all times and in all places. Extrapolating from the above, the supreme rules of the *Qur'an* and *Sunnah* have primacy over all forms of civil and political authority.<sup>777</sup> There is however another aspect of Islamic law and philosophy that allows for pluralism in legal opinion and, moreover,

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<sup>771</sup> Mahdi Zahraa, 'Unique Islamic Law Methodology and the Validity of Modern Legal and Social Science Research Methods for Islamic Research', (2003) 18(3/4) Arab Law Quarterly 215, 218-219

<sup>772</sup> Imran Ahsan Khan Nyazee, *Islamic Jurisprudence (UsulAI-Fiqh)* (Islamabad: Islamic Research Institute Press 2000) 50-80.

<sup>773</sup> For a comprehensive discussion on Islamic law and its sources see Mahdi Zahraa, 'Unique Islamic Law Methodology and the Validity of Modern Legal and Social Science Research Methods for Islamic Research', (2003) 18(3/4) Arab Law Quarterly 218, 231-242

<sup>774</sup> Ibid at 230-242

<sup>775</sup> Kevin Reinhart, 'Islamic Law as Ethics', (1983) 11(2) Journal of Religious Ethics 186 [describing the Shari'ah as an "independent scheme of moral categorization"].id 196.

<sup>776</sup> Zahraa, (n670) 215, 218, 220-221

<sup>777</sup> The textual authority for this principle derives from the Qur'an 3: 191 "Those who remember Allah standing, sitting, and lying down on their sides, and think deeply about the creation of the heavens and the earth, (saying): "Our Lord! You have not created this without purpose, glory to You! Give us salvation from the torment of the Fire". For an interesting discussion see Azizah Al-Hibri 'Islam, Law And Custom: Redefining Muslim Women 'S Rights', (1997) 12 American University International Law Review 1, 19

elements of rule re-interpretation to meet new the economic and social needs of society.<sup>778</sup> Writing in the 8<sup>th</sup> Century and 9<sup>th</sup> Centuries, the scholars of classical Islamic jurisprudence – Hanbali, Maliki, Hanafi and Shafi, laid the foundations for a second branch of Islamic law, known as *Usul al-fiqh*. This body of legal research refers to secondary methods of rule adaption and inference which are used primarily to interpret and supplement rules derived from the *Qur'an* and *Sunnah*.<sup>779</sup> Crucially, the classical scholars of Islamic jurisprudence accepted some form of independent reasoning in the development of rules to meet social needs.<sup>780</sup> This notion of independent is inscribed in scriptural texts in the concepts of *Ijtihad* and *istihsan*. The concept of *Ijtihad* is defined as follows:

*Ijtihad* is the mechanism by which Islamic law, as revealed in the *Qur'an* and the *Sunnah*, may be interpreted, developed and kept alive in line with the intellectual, political, economic, legal, technological and moral developments of a society.<sup>781</sup>

Another concept, *istihsan* with a basis in scriptural revelation proved to have equally profound impact on the history of Islamic thought.<sup>782</sup> *Istihsan* was therefore devised as a method of rule-interpretation whereby trained jurists could decide the best solution to a new problem and to do so by giving due account to overarching ideals of the *Qur'an*: equality among people, truth, justice and equity.<sup>783</sup> Crucially, this doctrine enabled the jurists of the age to apply a form of independent reason, applying their intellect and religious expertise, to determine the most appropriate rule for a matter left unregulated by the *Qur'an* and *Sunnah*.<sup>784</sup> According to Baamir and Bantekas:

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<sup>778</sup> Wael B Hallaq Authority, *Continuity and Change in the History of Islamic Law* (Cambridge University Press, 4ed 2004) preface, ix

<sup>779</sup> As noted above, the rules of fiqh derive from authoritative rules that derive directly from primary sources of textual authority (i.e scriptural revelation in the *Qur'an*) or the narration of the Prophet's practices (the *Sunnah*).

<sup>780</sup> Arshia Javed and Muhammed Javed, 'The Need of Ijtihad for Sustainable Development in Islam' (2011) 8 *IIUC Studies* 215, 216.

<sup>781</sup> Abdullah Saeed, *Islamic Thought: An Introduction* (USA and Canada: Taylor & Francis, 2006), 52. See also Zuraidah Kamaruddin and Wan Zailan Kamaruddin, 'An Analysis of Sis's Understanding Of *Ijtihad* From An Islamic Thought Perspective', (2012) 13 *Afkar* 33,35

<sup>782</sup> Wael who is this guy? Mohammad Hashim Kamali *Principles of Islamic Jurisprudence* (Islamic Legal Text society, 1989) 13

<sup>783</sup> Zuraidah Kamaruddin and Wan Zailan Kamaruddin, 'An Analysis of Sis's Understanding Of *Ijtihad* From An Islamic Thought Perspective', (2012) 13 *Afkar* 40

<sup>784</sup> Wael B Hallaq Authority, *Continuity and Change in the History of Islamic Law* (Cambridge University Press, 4ed 2004) 13-15

*Istihsan* allows judges and scholars some flexibility when interpreting the law to allow for the infusion of elements deemed useful. In other words, *istihsan* constitutes a permit for the spirit of the law to prevail over its letter.<sup>785</sup>

The development of concepts such as *Ijtihad* and *istihsan* paved the way for the development of an increasingly rich body of general principles.<sup>786</sup> As a result of their combined writings, the four orthodox schools gave rise to a corpus of general principles from which legal rules could be derived, or an opinion passed on an issue not explicitly addressed or contemplated in the *Qur'anic* text or Prophetic tradition. These sources included rule by analogy (*Qiyas*), and juristic consensus (*Ijmaa'*).<sup>787</sup> Supporting these sources of rule interpretation, which it must be recalled are treated as secondary, narrow and supplementary in scope, were a number of doctrines of rule re-interpretation including, but not limited to: the doctrine of juristic preference (*istihsan*); the presumption of continuity in rule interpretation (*istishab*); *urf* (custom); *masalih al-mursalah* (the law of suitability) and related principles such as *maslahah* (public interest).<sup>788</sup> These methods were important because they allowed for a more purposive and contextual mode of legal reasoning, thereby giving 'fresh sanctions and definitions to a variety of socio-legal contents not reflected in the earlier phase of the Islamic history.'<sup>789</sup>

There is a lot written on the above concepts but a very brief overview might be useful.

#### 5.4.2 The Concept of *Ijtihad*

In this dynamic period in the history of Islamic thought, spanning the periods of the 8<sup>th</sup> to the 12<sup>th</sup> Century, the process of rule-interpretation and adaptation allowed for schools to engage in a mutual process of dialogue and reflection.<sup>790</sup> The concept of *Ijtihad* became an important resource in the spread and development of Islamic thought, as jurists strived to perfect an acceptable balance between the dual forces of "continuity and change" in the application and

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<sup>785</sup> Abdulrahman Baamir and Ilias Bantekas, 'Saudi Law as Lex Arbitri: Evaluation of Saudi Arbitration Law and Judicial Practice' (2009 25(2) *Arbitration International* 266, 266.

<sup>786</sup> Harald Motzki (ed), *Hadith: Origins and Developments* (Routledge 2016) iv.

<sup>787</sup> The differences between these schools are too vast to accurately reflect here. However see Zahraa (n670) 230-242.

<sup>788</sup> Zahraa (n 670) 230-242

<sup>789</sup> Showkat Hussain, 'Coherence and Relativity of the Islamic Legal Theory: A Study of Methodology in Socio-legal Context', (2017) 8(1) *Journal of Humanities And Social Science* 59

<sup>790</sup> Ken Malik, *The Quest for a Moral Compass: A Global History of Ethics* (Atlantic 2014) 56

interpretation of *Sharia*.<sup>791</sup> Continuity between classical and modern interpretations of *Sharia* does not demand, as Hallaq suggests, ‘blind or mindless acquiescence to the opinions of others, but rather [] the reasoned and highly calculated insistence on abiding by a particular authoritative legal doctrine.’<sup>792</sup> Weaker opinions, with less authority could be routinely challenged sometimes on the basis on considerations of fairness, and sometimes supplanted with new rulings from other schools, while ensuring a degree of continuity with general principles derived from *Qur’anic* textual commands.<sup>793</sup> This is evidenced by the Hanafi use of *istihsan* (juristic preference) as a means of mitigating harsh or unjust consequences that might arise from strict textual legal interpretation.<sup>794</sup>

The above, however, should not be taken to suggest that there were not significant disagreements among religious scholars, from within and across schools. While this chapter, for reasons of scope, cannot do full justice to these debates, many of which require deep knowledge of the Islamic legal-theological tradition, suffice to say that the schools disagreed on the weight and limits of applying different proofs (consensus, analogy, custom, principle of continuity, juristic preference, public interest etc.).<sup>795</sup> Despite differences between the schools, all recognised that rule-interpretation practices could not be used to transgress an explicit textual command. The science of *usul al-fiqh* was, accordingly, developed to ‘regulate *Ijtihad* and to guide the jurist in his effort at deducing the law from its source and to [prevent] unqualified persons attempted to carry out *Ijtihad*.’<sup>796</sup> At the same time, there was an implicit acknowledgement among certain scholars that higher moral-regulatory purposes *Sharia* could not also be deduced from the explicit wording of religious texts alone.<sup>797</sup> In the sphere of gender relations, these interpretative challenges developed around the need to protect traditional ideals of family, piety and morality, on the one hand, and *Qur’anic* ideal of egalitarianism and social justice.<sup>798</sup>

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<sup>791</sup> Hallaq (n683) 15-17.

<sup>792</sup> *ibid*

<sup>793</sup> Hallaq (n 683) xi

<sup>794</sup> Mohammad Hashim Kamali, *Principles of Islamic Jurisprudence* (Islamic Legal Text society, 1989)

<sup>795</sup> Wael B Hallaq, ‘Ifta’ And Ijtihad In Sunni Legal Theory: A Developmental Account’ In Muhammad Khalid Masud and Brinkley Messick and David S Powers (eds), *Islamic Legal Interpretation: Muftis and Their Fathers Fatwas* (HUP 1996) 33

<sup>796</sup> Kamali (n 693) 13

<sup>797</sup> Khaled Abou El Fadl, *Reasoning with God: Reclaiming Shari’ah in the Modern Age* (Rowman and Littlefield, 2014) 298-299

<sup>798</sup> Asma Barlas, “Believing Women” in Islam: Unreading Patriarchal Interpretations of the *Qur’an* (UTP 2002) 123.



As noted above, juristic consensus was an important catalyst in the development of *Ijtihad*. By applying elements of reason and rationality, rather than “blind acquiescence” to established opinions, jurists exercised a degree of discretion when selecting among competing rule choices or rule-interpretations. The result was a more contextual, and purposive mode justice whereby a jurist could arrive at an opinion deemed most conducive to local needs and welfare of societies, even if this meant deviation from the rulings of another *fiqh* school.<sup>799</sup> However, this attempt to develop a more localised, context-appropriate and interpretatively open method of rule-interpretation would, paradoxically, lead to the uncritical acceptance of certain (and often highly subjective) interpretations of certain rules.<sup>800</sup> These developments as explained by De Jonge, this tendency to treat certain legal positions as authoritative. According to some scholars, the creative potential of *Ijtihad* was deprived of any force by the 15<sup>th</sup> Century. Over time, jurists associated from different schools would tend to become more dominant in particular regions or communities as rulings and opinions of jurists became inextricably intertwined with local culture and customs.<sup>801</sup>

#### 5.4.3 Hanbali *Fiqh* in the Saudi legal system: A Faithful Application of the Sources of Islamic Law?

Returning to the modern-day applications of *Sharia*, all Islamic legal systems adopt the Islamic methods of rule interpretation described above in one form or another. Interestingly, the influence of classical *fiqh* is most apparent in the privatised sphere of family law, with State authorities taking a more ambivalent approach to so-called ‘Islamic supremacy clauses’ on areas such economy or competition which, for reasons of expediency or self-interest, tend to be secularised and subject to political control.<sup>802</sup> The Egyptian, Syrian and Jordanian legal systems apply Hanafi *fiqh* as the basis of personal status and family law codes. The family law codes of Kuwait and Morocco are, by contrast, rooted in the teachings and interpretative

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<sup>799</sup> Khurstid Iqbal, *The Right to Development in International Law: The Case of Pakistan* (Routledge 2010) 175, 175.

<sup>800</sup> For a critique developed from within the Islamic tradition see Samira Ahmad, ‘Progressive Islam and Qur’anic Hermeneutics: The Reification of Religion and Theories of Religious Experience,’ *Muslim Secular Democracy* 76.

<sup>801</sup> For a historical perspective, see Joseph Schacht, *An Introduction to Islamic Law* (Oxford University Press, 1979) 62, 71-72

<sup>802</sup> Azzam Tamimi, ‘The Origins of Arab Secularism’ in Azzam Tamimi and John L Esposito (eds), *Islam and Secularism in the Middle East* (NYUP 2000) 13, 28. For a more general discussion, see D Ahmed and T Ginsbury, ‘Constitutional Islamization and Human Rights: The Surprising Origin and Spread of Islamic Supremacy in Constitutions’ (2013) 54 *Virginia Journal of International Law* 615

practices of the Maliki School.<sup>803</sup> The Hanbali school has historically been applied as the defacto official *fiqh* school of Saudi Arabia.<sup>804</sup>

More pertinently, jurists from within particular schools came to approach certain issues, including the rights of women, from within their own interpretative traditions.<sup>805</sup> For instance, the schools diverged in their interpretation of the circumstances under which a women's right to free movement can be legitimately restricted, under *Sharia*.<sup>806</sup> By placing greater emphasis on textual inferences and rule by analogy with the Prophet's sayings, the Hanbali school have generally favoured a far-reaching understanding of the constraints that may be legitimately placed on women's freedoms.<sup>807</sup> In turn, customary practices were treated as insuperable edicts derived from religious law, despite the variation in customary practices from one Islamic society to another.<sup>808</sup> Informal practice that were rooted in traditional (informal or customary) law become entrenched over time through the mutually reinforcing elements of social acceptance by Saudi society and through judicial recognition in traditional court structures.

In the above regard, certain rulings of Hanbali jurists have had a tremendous influence on Saudi society, shaping attitudes the most important questions of policy within the confines of national administrative processes and aspect of family law to the farthest reaches of private life and morality.<sup>809</sup> As noted, a degree of consensus has been achieved among the four schools on general principles of law. However, Ibn Hanbal, the founder of the fourth school of Hanbali school of jurisprudence is perceived to have diverged from the other *fiqh* schools in significant ways.<sup>810</sup> For instance, while *itishan* or *Qiyas* is recognised as a permitted 'proof', the Hanbali

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<sup>803</sup> Muhammad Iqbal, *The Reconstruction of Religious Thought In Islam* (Institute Of Islamic Culture 1986) 132.

<sup>804</sup> Nawaf E Obaid, 'The Power of Saudi Arabia's Islamic Leaders' (1999) 6(3) Middle East Quarterly 51, 58.

<sup>805</sup> Hallaq (n683) 131-132. [setting out the evidence based methods applied by the classical jurists].

<sup>806</sup> Peter R Knauss, *The Persistence of Patriarchy. Class, Gender, And Ideology in Twentieth Century Algeria* (Greenwood Publishing 1987) 127

<sup>807</sup> Al-Tamheed For Ibn Abdel-Bar, Part 21, 50. Irshad Abdal-Haqq, 'Islamic Law: An Overview Of Its Origin And Elements' (2002) 7 Journal Of Islamic Law and Culture 27, 48.

<sup>808</sup> Zafar Ishaq Ansari, 'Islamic Juristic Terminology Before Safi: A Semantic Analysis With Special Reference To Kufa' (1972) 19(3) Arabica 259; Riffat Hassan, 'On Human Rights And The Qur'anic Perspective' (1982) 19(3) Journal Of Ecumenical Studies 51

<sup>809</sup> Hallaq (n683) preface

<sup>810</sup> Livnat Holtzman 'Aḥmad b. Hanbal', in Encyclopaedia of Islam Three, eds. Gudrun Krämer (Brill, 2010) available at < [http://brillonline.nl/subscriber/entry?entry=ei3\\_COM-23414](http://brillonline.nl/subscriber/entry?entry=ei3_COM-23414)>. It is arguable that the work of Ibn Hanbal is often mischaracterised as giving rise to the strict branch of Salafism that would emerge resurgent in the 20<sup>th</sup> Century. See, for example, Henri Lauzière, *The Making of Salafism: Islamic Reform in the Twentieth Century* (Columbia University Press, 2015).

school has applied this doctrine narrowly.<sup>811</sup> More generally, the Hanbali school is generally perceived to have favoured a more literal approach to religious issues, and certain strains of Hanbali jurisprudence practised even today call for the return to practices adopted and endorsed during the life of the Prophet.

The origins of the strict literalism that has come to define the Hanbali school were present from the beginning. Writing in the 9<sup>th</sup> Century, the eponym of this school Ibn Hanbal offered a theological challenge to the concept of '*ijtihad*' and the use of subjective juristic reasoning to determining matters of Islamic law.<sup>812</sup> Ibn Hanbal countenanced that any deviation from the text constitute an illegitimate exercise of juristic innovation. Accordingly, the sole objective of properly trained religious jurist must be confined to the task of establishing what is permitted by scriptural revelation and what it is not; an enterprise that can only be undertaking by referring to religious texts alone.<sup>813</sup>

In the intervening years, certain scholars working in the Hanbali tradition offered a more dynamic approach to rule re-interpretation in cases of social or economic necessity.<sup>814</sup> However, practices of *Tafsir* and attitudes to the permitted methods of rule deduction and adaptation have not remained static, nor have they existed in a hermeneutical vacuum. Indeed, the history of the *fiqh* school has been shaped by external political forces.<sup>815</sup> By the 13<sup>th</sup> Century, a second wave of politically infused *Sunni* revivalism would emerge in the Hijaz (now Saudi Arabia). Lead by the writings of Ibn Taymiyya, the Hanbali school, now dominated large swathes of Arabia, launched an attack on the concept of juristic consensus by demanding complete adhere to the text of the *Qur'an* and the prophetic revelations of the *Sunnah*. These ideas gained prominence for centuries to come in Saudi Arabia.<sup>816</sup> Some centuries later, Ibn

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<sup>811</sup> See John Makdisi,, 'Legal Logic and Equity in Islamic Law', (1985) 33 American Journal of Comparative Law 63

<sup>812</sup> Saud Saleh AlSarhan, Early Muslim Traditionalism: Early Muslim Traditionalism: A Critical Study of the Works and Political Theology of Ahmad Ibn Hanbal (Doctoral Thesis, University of Exeter,2011) 28

<sup>813</sup> See Gibril F. Haddad, The Four Imams and Their Schools (London: Muslim Academic Trust, 2007), 301-302

<sup>814</sup> For a general overview, see Felicitas Opwis, 'Maṣlaḥa in Contemporary Islamic Legal Theory',(2005) 12(2) Islamic Law and Society 182

<sup>815</sup> Ali Khan, 'The reopening of the Islamic Code: the second era of *ijtihad*' (2003) 1 University of St Thomas Law Journal 341

<sup>816</sup> Saud Saleh AlSarhan, Early Muslim Traditionalism: Early Muslim Traditionalism: A Critical Study of the Works and Political Theology of Ahmad Ibn Hanbal (Doctoral Thesis, University of Exeter,2011) 28 and Ira Lapidus, "The Separation of State and Religion in the Development of Early Islamic Society,', 1975 (64) International Journal of Middle East Studies, 333, 370

Tamiyya is still the most widely cited authority on religious matters in modern state of Saudi Arabia. Under the enduring influence of his writings, the use of secondary rule deduction methods such as *Qiyas* has been applied narrowly in judicial practices and any attempt to abrogate established *fatwas* (religious rulings on a given legal issue) met with resistance.<sup>817</sup>

In other legal system, rules of *fiqh* only acquire binding effect and enforceability through statutory incorporation or codification under the relevant legal systems. However, in Saudi Arabia, *fiqh* rules derived from *Sharia* prevail over conflicting sources of law, including any international obligations to which the Kingdom is party.<sup>818</sup> Vogel elaborates

[I]n most Islamic states other than Saudi Arabia, the legal system is bifurcated: one part is based on man-made, positive (wadi) law; the other part on Islamic law. ... Saudi Arabia also has a dual legal system, but the relative roles of the two sides are reversed. The Islamic component of the legal system is fundamental and dominant. The positive law, on the other hand, is subordinate, constitutionally and in scope.<sup>819</sup>

On this point, Rogers notes that while the concept of *Ijtihad* is formally recognised under Saudi legal system, it is generally underused or disregarded by the religious authorities ( the ulama).<sup>820</sup> One scholar notes that religious authorities ‘became bound to respect, and to imitate without restatement or reformation, the rules laid down by their classical predecessors.’<sup>821</sup> Vogel, writing in 1975, came to a similar conclusion, noting that for the Saudi ulama:

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<sup>817</sup> See Caterina Bori, “Ibn Taymiyya wa-Jamā‘atuhu: Authority, Conflict and Consensus in Ibn Taymiyya’s Circle,” in (ed. Yossef Rapoport) *Ibn Taymiyya and his Times* (New York: Oxford University Press, 2010), 25

<sup>818</sup> constitution, Article I establishes the Qur’an and the Sunnah as the ‘formal’ constitution.” Kevin M. Whiteley, Brad S. Keeton, and Matthew T. Nagel, *Kingdom of Saudi Arabia (Al Mamlakah Al Arabiyah As Suudiyah)* (ICM Publication, 2006) <<http://law.wustl.edu/GSLR/CitationManual/countries/saudi-arabia.pdf>>.

<sup>819</sup> Frank Vogel, “Islamic Governance in the Gulf: A Framework for Analysis, Comparison, and Prediction” in Gary Sick and Lawrence Potter (eds), *The Persian Gulf at the Millennium; Essays in Politics, Economy, Security, and Religion* (Saint Martin’s Press 1997) 275. For an economic take on the duality of the Saudi legal system, see Amr Daoud Marar, ‘Saudi Arabia: The Duality of the Legal System and the Challenge of Adapting Law to Market Economies’ (2004) 19(1) *Arab Law Quarterly* 91, 112.

<sup>820</sup> Ibid. *Ijtihad* could be argued to deviate from the Hanbalite doctrine because it was mostly used by jurists to approved interpretations were not specifically prohibited but also not expressly permitted by the Qur’an and Sunnah. See Mohammed Ayoob, *The Politics of Islamic Reassertion* (Routledge 2014) 2-5

<sup>821</sup> Alice De Jonge, ‘Islamic law and the finance of international trade’ (1996) 96/4 Working Paper (Monash University, Syde Dept. of Banking and Finance) 1, 6.

...the virtue of the scholar seems to lie less in intellectual and technical attainments or virtuosity than in pious immersion in *Qur'an* and *Hadith* texts and the knowing and sincere application of these texts in all concrete rulings. ....To pass to modern Saudi Arabia, the usual *al-fiqh* positions [of the Saudi ulema] ... remain valid, as is confirmed on every hand.<sup>822</sup>

In an important move, the late King Abdul-Aziz issued a decree stating that no court or judge obligated to follow the rulings of the Hanbali fiqh school.<sup>823</sup> This should have enabled jurists to select among opinions of different *fiqh* schools, thereby ensuring a return to the original pluralist ethos of classical jurisprudence under the guiding principle of *Ijtihad*. It would also mean that acceptance of a particular rule interpretation on one set of issues would not preclude scholars from applying the rulings of another scholar on different issue, if justified on religious or other grounds.<sup>824</sup> Excluding the role of customs, which has historically played a significant role in areas such as family law, there is nothing that should in principle prevent judges from applying the doctrine of *istihaan* or juristic preference in assessing contemporary issues around gender rights and economic necessity.<sup>825</sup> Nonetheless, it is worth noting that in practice, Saudi judges have almost exclusively relied on the narrowly formulated rulings of the 13<sup>th</sup> Century jurist, Ibn Taymiyyah, as discussed above.<sup>826</sup> For those most critical, the mechanistic application of *Ijtihad* in Saudi Arabia, and in other parts of the Muslim world, led to the 'fossilisation of Islamic society',<sup>827</sup> thereby preventing Muslim countries such as Saudi Arabia from achieving comparable levels of social and economic progress compared with the non-Muslim world.<sup>828</sup>

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<sup>822</sup> Frank Vogel, *Islamic Law and Legal System: Studies of Saudi Arabia* (Brill 2000) 77.

<sup>823</sup> Abdulrahman Baamir and Ilias Bantekas, 'Saudi Law as Lex Arbitri: Evaluation of Saudi Arbitration Law and Judicial Practice' (2009) 25(2) *Arbitration International* 266.

<sup>824</sup> G Sfeir, 'The Saudi Approach to Law Reform,' (1988) 36 *American Journal of Comparative Law* 729,730.

<sup>825</sup> On the root of this doctrine and its role in legal reform, see Mohammad Hashim Kamali, 'Istihsān and the Renewal of Islamic Law' (2004) 43(4) *Islamic Studies* 561, 562-563.

<sup>826</sup> Baamir and Bantekas (n 722) 265. Reflecting on the historical practice of the judiciary in Najd, Al-Khunain, notes: One of the most prominent features of that period was the reliance on the Hanbali School, ease of judicial procedure and simplicity. The judges were to meet people at home and in the market and might invite them to meetings in Riyadh to discuss some of the general affairs when presented to them. Nomination of a person to hold a judicial office would take place when they attended lessons in mosques and studying the books of Al-Hanbali *fiqh* [i.e. jurisprudence]. At the same time there was a need for judges even if they could not finish that study.] Abulla Al-Khunain, *Judicial System in Saudi Arabia* (Centre of Global Thought on Saudi Arabia 2015) 96.

<sup>827</sup> Muhammad Khalid Masud, 'Iqbal's Reconstruction of Ijtihad,' (Islamic Research Institute, 1995) 7

<sup>828</sup> Timur Kuran, 'Why the Middle East is Underdeveloped: Historical Mechanisms of Institutional Stagnation' (2004) 18(3) *Journal of Economic Perspectives* 78, 78

#### 5.4.4 Saudi Arabia in Modern Context: A Call for *Ijtihad*?

Once a country made of nomadic Bedouin and tribal associations, the Saudi state is a relatively new entity.<sup>829</sup> The discovery of Saudi Arabia transformed the destiny of Saudi Arabia, establishing it as economic power with an enviable welfare state. From the seventies onwards, women played a minimal role in public life, and the job sector, principally because there was little need in an over-supplied employment sector. The living standards of the average Saudi citizens compared favourably with many countries in the developed world, despite relatively low levels of educational achievement.<sup>830</sup> However, the rapid growth of Saudi Arabia's population and nationally owned oil sectors increased the Kingdom's dependency on foreign worker, in areas such as the energy and health sectors.<sup>831</sup> With the recent shocks to global oil prices and national debt on the rise, the Saudi government has been eager to reduce its dependency on petroleum exports and to diversify its economy.<sup>832</sup> To tackle the problems, the Saudi government has introduced several gender-related reforms including greater access to training and education in the professional sectors.<sup>833</sup> This ties into the the Researcher's argument that economic and human rights perspective can be mutually supportive from an Islamic and domestic policy point of view

However, women faced continued obstacles to full equality, many of which are rooted in cultural attitudes that are, in reciprocal ways, legitimised through the historic *fiqh* rulings. Outside the impediments to economic progress, the hollowing out of *Ijtihad*, along with the central position occupied by religious authorities under the Saudi legal system has also had gender rights.<sup>834</sup> Certain localised and inequitable interpretations of gender-relations have been treated as fixed and immutable, despite the passing of centuries of social and political changes. However, there is a danger of confusing two distinct realms of enquiry: what is or not permitted

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<sup>829</sup> Madawi Al-Rasheed, *A History of Saudi Arabia* (Cambridge University Press, 2002) 199

<sup>830</sup> For a discussion of the spread of capitalism in Islamic society see Peter Burns, 'From Hajj to Hedonism? Paradoxes of Developing Tourism in Saudi Arabia' in R Daher (ed), *Tourism in the Middle East: Continuity, Change and Transformation* (Clarendon 2007) 215-236.

<sup>831</sup> Tim Niblock, *Saudi Arabia: Power, Legitimacy and Survival* (Routledge 2004) 201

<sup>832</sup> *ibid*

<sup>833</sup> Shanee, 'The Saudi Royal Decree Easing Guardianship Requirements for Women, and Responses to It in Saudi Arabia' The Middle East Media Research Institute (2 June 2017) <<https://www.memri.org/reports/saudi-royal-decree-easing-guardianship-requirements-women-and-responses-it-saudi-arabia>>, See also Arab News, 'Letting Women Drive in Saudi Arabia Does not Conflict with Shari'ah Say Senior Scholars' (28 September 2017) <<http://www.arabnews.com/node/1168781/saudi-arabia>>

<sup>834</sup> Reinhart (n674) 193

by Islamic texts and the practice of interpreting what is or is not permitted by religious texts (hermeneutic).<sup>835</sup> The mere fact that certain readings of religious texts have routinely observed as the best and most authoritative interpretation is not itself evidence of their correctness. Islamic legal scholars arrive at different legal opinions from their own epistemic standpoints.<sup>836</sup>

It should be noted Islamic law provides it with its rule criteria which should not be confused the way in which particular legal orders interpret that criteria.<sup>837</sup> As discussed above, the science of *usul al-fiqh* enables to deduce the correct rule from textual sources. However, when the *Qur'an* is silent on an issue, jurists will often fill in the gaps by appealing to tradition or custom.<sup>838</sup> Robert Cover, a legal sociologist, has explored how religious authorities formulate accepted legal meanings from within a particular contexts<sup>839</sup> Rosen supports the idea that the process of interpretation is always in some sense tainted by a jurists subjective preferences since 'law is so deeply embedded in the particularities of each culture.'<sup>840</sup> In this regard, those who seek to revive the ideals of *ijtihad* have criticised the tendency of religious authorities working in the classical exegetical tradition to prioritise verses of the *Qur'an* which emphasize "difference" between the gender, while downplaying those which can be interpreted as urging equality, solidity and cooperation between the sexes. One such example is those verses which instruct authorities to protect and enforce an equal right to education.

To what extent then can *ijtihad* be renewed as the engine of social reform in Saudi Arabia, providing an intellectual resource by which to dismantle or revise rules which have traditionally been used to undermine the rights of women.<sup>841</sup> Attempts to modernise or reform certain gender-discriminatory policies in the legal-cultural contexts of Saudi Arabia have particular relevancy when considering the Kingdom's obligations under international law.<sup>842</sup> As will be shown, the Saudi government has also made significant reforms in the area of gender law. But

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<sup>835</sup> Kamali (n724) 5-8, 12-14

<sup>836</sup> Irshad Abdal-Haqq, 'Islamic Law: An Overview Of Its Origin And Elements' (2002) 7 Journal Of Islamic Law and Culture 27, 48.

<sup>837</sup> Ibid at 58.

<sup>838</sup> Lawrence Rosen, *The Anthropology of Justice: Law As Culture In Islamic Society* (CUP 1989) 17.

<sup>839</sup> Robert Cover, 'The Supreme Court 1982 Term, Foreword: Nomos And Narrative' (1983) 97 Harvard Law Review 4, 11.

<sup>840</sup> Lawrence Rosen, *Law as Culture: An Invitation* (PUP 2006) 12.

<sup>841</sup> Frank Vogel and Samuel Hayes, *Islamic Law and Finance: Religion, Risk and Return* (Kluwer Law International, 2008) 4, 9.

<sup>842</sup> See also David A. Westbrook, 'Islamic International Law and Public International Law: Separate Expressions of World Order' (1993) 33 Virginia Journal of International Law 819, 842

how should these changes be viewed as an illegitimate innovation from religious texts; as a more equitable re-reading of *Qur'anic* texts, or as re-adaptation of existing rules in light of social and economic change.<sup>843</sup>

While there have been important attempts to reform aspects of law relating to the freedoms of women impacting their equal access to educational services, the re-interpretation of rules regulating male-female relations remains contentious. This is because of some rules are widely accepted as having reached broad consensus among all *fiqh* schools and have thus attained 'universal' form of Islamic custom, despite the resistance to codification of Islamic *fiqh* rules in Saudi Arabia.<sup>844</sup> Some of these customs pertain to legitimate constraints on a woman's freedoms e.g., gender seclusion, or preferential treatment for men in the certain spheres (e.g. divorce, inheritance or custody).<sup>845</sup> Saudi rulers cannot pioneer the use of *Ijtihad* to displace these customs without the support of religious scholars, and indeed the acceptance of Saudi society. While Saudi Arabia is undergoing a seismic cultural shift, it is clear that the religiosity is deeply engrained in the history and formation of Saudi society. The following sections therefore explore the textual basis for an equal right to education in Islam, and the concrete application of this rights in historic-to modern contexts of Saudi Arabia.

## 5.5 Deriving a Right from the Islamic Concept of Knowledge

Umar Faruq Abd-Allah has argued that 'Islamic literacy' equips Muslims with the knowledge to comprehend their religious obligations, and to transform the societies for the collective benefit.<sup>846</sup> As implied in chapter 2, the religion of Islam places a duty on every Muslim, male and female, to acquire knowledge. Abbasi reinforces the centrality of knowledge to Islam in

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<sup>843</sup> Herbert J Liebesny, 'Comparative Legal History: Its Role In The Analysis of Islamic And Modern Near Eastern Legal Institutions' (1972) 20(1) The American Journal Of Comparative Law 38, 46.

<sup>844</sup> Ibid. Hallaq (n683)227-228. Hallaq notes :[Although the notion of necessity has been used to justify a number of departures from the stringent demands of the law, it is, like custom, restricted to those areas upon which the explicit texts of revelation are silent. Abe Yesuf, for instance, was criticized when he held the opinion – which ran against the dictates of Prophetic Sunna]. Id at 227

<sup>845</sup> Roel Meijer and Paul Aarts, 'Saudi Arabia between Conservatism, Accommodation and Reform' (Clingendael Research Report, 2012) and Ran Hirschl, 'Juristocracy vs Theocracy: Constitutional Courts and the Containment of Sacred Law' (2009) 1(2) Middle East Law and Governance 129

<sup>846</sup> Keith Hodyinson, *Muslim Family Law: A Sourcebook* (Croom Helm 1984) 285, 287;



his observations that ‘the first revelation upon the Holy Prophet...contained the commandment to ‘read’.<sup>847</sup>

### 5.5.1 The Egalitarian Basis of a Right to Education

In the *Qur’an*, Allah provides that ‘only those of His Servants who are learned truly, fear Allah.’<sup>848</sup> Indeed, the pursuit of spiritual enlightenment is considered to be an act of piety which superior even to the act of ritual prayer and worship (Ibbadat).<sup>849</sup> The Prophet, himself a great proponent of learning<sup>850</sup> is reported to have asked Allah, his creator, to enrich his knowledge in all matters.

The *Qur’an* for example states as follows:

Likewise, We have sent you (Our) Messenger from amongst yourselves who recites to you Our Revelations and purifies and sanctifies (your hearts and ill-commanding selves) and teaches you the Book and inculcates in your logic and wisdom and enlightens you (on the mysteries of spiritual gnosis and divine truth) which you did not know.<sup>851</sup>

The *Qur’an* also provides as follows:

He is the One Who sent a (Glorious) Messenger (blessings and peace be upon him) amongst the illiterate people from amongst themselves who recites to them His Revelations and cleanses and purifies them (outwardly and inwardly) and teaches them the Book and wisdom. Indeed, they were in open error before (his most welcome arrival)<sup>852</sup>

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<sup>847</sup> Raheeq Ahmad Abasi Women and education in Islam (2009) <<https://www.minhaj.org/english/tid/8535/Women-Education-in-Islam-article-by-dr-raheeq-ahmad-rahiq-ahmed-abbasi-nazim-e-aala-mqi-minhaj-ul-Qur'an.htm>>

<sup>848</sup> Al-Qurân, 35:28.

<sup>849</sup> Husam Muhi El Din Al-Alousi, The Problem of Creation in Islamic Thought, Qur’an, Hadith, Commentaries, and Kalam (National Print. and Publishing Company 1965) 209.

<sup>850</sup> My Lord! Increase me in Knowledge (as revealed in the Qur’an) Qur’an 20:114.

<sup>851</sup> Qur’an, 2: 151.

<sup>852</sup> Qur’an al-Jumu’a, 62:2

The Prophet is also observed, in a *hadith*, to affirm the duty of all Muslims to seek knowledge outside the realm of theology such as in the fields of philosophy or science, from within and outside their tribal and cultural associations. The Prophet is reported to have encouraged his followers to ‘seek knowledge even if you have to go as far as China, for seeking knowledge is a duty on every Muslim.’<sup>853</sup>

For *Al-Zarnūjī*, knowledge is central to Islamic ethics, and requires a dialectical relation between a theological and communitarian aspects of mutual learning. In this sense, the great classical scholars of Islamic jurisprudence, discussed below, have always recognised the indivisibility of law, ethics, science and economic knowledge advancement.<sup>854</sup> This is because an individual cannot serve the community without religious enlightenment. In turn the socio-economic security and welfare of a community is the best means of ensuring a population live their lives in accordance with the higher values of *Sharia*: truth, justice, and recognition of the equality of all men as servants of the one only creator (*tahwid*).<sup>855</sup> Islam Huda et al offer further explanation of the unity of divine and temporal knowledge (*tawhid*) in Islam.

The Islamization of knowledge should not be understood as intellectual effort to ‘Islamicize’ the ‘un-Islamic’ fields of knowledge but as a process of integrating Islamic ethical or *tawhidic* principles into modern thought. It means that the outcome will be a sort of hybrid knowledge formed from a blend of the Islamic norms and rational knowledge.<sup>856</sup>

### 5.5.2 Reconciling Equality with Differentiated Rights for Women in Classic Thought

In principle, and as alluded to in the previous chapter, there is no inherent conflict between Islamic conceptions of rights, including the rights of women, and non-discrimination provisions enshrined under International, including CEDAW to which Saudi Arabia is a State

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<sup>853</sup> Al-Albaani, *Silsalah Al-aHaadeeth Al-Da'eefah wa Al-MawDoo'ah*, vol. 1, pg. 600 - 609, hadeeth # 416

<sup>854</sup> Ibid see also Franz Rosenthal, *Knowledge Triumphant: The Concept of Knowledge in Medieval Islam* (Vol 2, Brill 1970) 10-40

<sup>855</sup> id

<sup>856</sup> Jibrail Huda et al, ‘Al-Zarnūjī’s Concept of Knowledge (‘Ilm)’, (2014) Sage Open 1, available at <<http://journals.sagepub.com/doi/pdf/10.1177/2158244016666885>>

4. On Islam’s capacity for legal pluralism see Wael B Hallaq Authority, *Continuity and Change in the History of Islamic Law* (Cambridge University Press, 4ed 2004) preface, 125-127

party . The modern Islamic scholar, Abbad notes that the ‘Islamic education strategy and practice have provided equal opportunities for both men and women.’<sup>857</sup> However, there aspects of how this right is applied from within the Islamic legal system of Saudi Arabia which may appear problematic from the standpoint of CEDAW’s non-discrimination provisions. There may also be certain philosophical differences with regard to the *Qur’anic* conception of the male-female relation<sup>858</sup>; the responsibilities of governments in balancing rights and religious traditions,<sup>859</sup> and, most importantly, the ethical or legal content of a given right such as right to education. <sup>860</sup>This brings us back to the tension between ‘continuity and change’ that has been present from the beginning of the classical Islamic juristic tradition, as described above. The source of interpretative controversy is rooted in a particular verse of the *Qur’an*:

Men are the protectors and maintainers of women, because Allah has made one of them to excel the other, and because they spend (to support them) from their means.<sup>861</sup>

Another verse states:

[...] And women have rights similar to the rights of men in a just manner, and the men have a degree (of advantage) over them.<sup>862</sup>

The interpretations of the above verse in classical *tafsir* has played a significant role in shaping the view of gender roles in the Islamic legal tradition. <sup>863</sup>The concept of *Qiwama* or curatorship has been a mainstay of the classical exegetical tradition. Implicit in this concept is the assumption male authority due to his role as patriarch and provider of the family unit. <sup>864</sup> In the

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<sup>857</sup> Mohammad Saiful Islam, “‘Importance of Girls’ Education as Right: A Legal Study from Islamic Approach’ (2016) 7(1) Beijing Law Review 6 <[https://file.scirp.org/pdf/BLR\\_2016010515081324.pdf](https://file.scirp.org/pdf/BLR_2016010515081324.pdf)>.

<sup>858</sup> Al-Muqrin M, ‘Al-Qiwāmah al-zawjiyyah: asbaabuha, dawabituha, muqtaḍāhā’, (Majalat al-adl 1427, 23)

<sup>859</sup> Mashood A Baderin, ‘The Role of Islam in Human Rights and Development’ in Javaid Rehman and Susan Carolyn Breau (eds), *Religion, Human Rights and International Law: A Critical Examination of Islamic State Practices* (Martinus Nijhoff Publishers 2007) 352.

<sup>860</sup> Leila Ahmed, *Women and Gender in Islam Historical Roots of a Modern Debate* (YUP 2011), ch 8.

<sup>861</sup> Qur’an, *al-Nisa*, v 34 (Noble Qur’an translation, Hilali-Khan).

<sup>862</sup> Qur’an 2:228

<sup>863</sup> *Tafsir Kashf Al-Asrar*

<sup>864</sup> Omaira Abou-Bakr, ‘The Interpretive Legacy of *qiwamah* as an Exegetical Construct’ in Ziba Mir-Hosseini and Mulki Al-Sharmani and Jana Rumminger, *Men in Charge? Rethinking Authority in Muslim Legal Tradition* (Oneworld 2015) 44, 45.

Islamic context, the differential treatment of men and women is formalised in the marriage contract. Marriage is defined as an exchange relationship whereby women agree obedience to their husbands in return for the promise of financial maintenance and security (*nafaqah*).<sup>865</sup> This legal relationship continues to structure aspect of family law in Muslim legal system, particularly in relations to child custody and divorce proceedings.<sup>866</sup> While this does not extend, as a matter of formal law, to sphere of education, where women are presumed to enjoy similar rights to men, there are nonetheless other state-mandated restrictions which have presented several structural barriers to equality in this areas.

In Saudi Arabia, the state-administered system of guardianship and associated restrictions on free movement and gender inter-mixing have impacted the ability of women to attain substantive equality with men in the educational sectors. As Hosemeni argues, '[b]ehind these laws and practices lies an ancient idea: men are strong, they protect and provide; women are weak, they obey and must be protected.'<sup>867</sup> This assumption has been reiterated by jurists such as I-Bayḍawī, who maintained that men were 'sovereign over women,' in the same way that political rulers are sovereign over their subjects.<sup>868</sup> It is important to note that the term *Qiwama* itself appears nowhere in the *Qur'an*, but is derived by jurists within the tradition from the adjective *qawwamun*, and made into a general guiding principle of gender inequality.<sup>869</sup> It is in this sense that classical interpretations of Islamic *fiqh* are *assumed* to have perpetuated and normalised customary attitudes to men's authority over women while giving legitimacy to laws that reinforce male-centric citizenship and personhood .<sup>870</sup> Many Muslims, including Muslim female scholars, reject these male-centric and articulate gender-equality discourses from within

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<sup>865</sup> Ziba Mir-Hosseini, 'Towards Gender Equality: Muslim Family Laws and the Shari'ah,' in Zainah Anwar (ed) *Wanted: Equality and Justice in the Muslim Family* (2009) (Musawah 2009) 31.

<sup>866</sup> See for example Case no 16/41 2005, [23/2/1426] General Court of Riyadh, Saudi Arabia. See also This is a *ḥadīth* of Amr Bin Shuaib from his father from his grandfather Abdullah Bin Amr Bin Al Aas. A woman said to the Prophet (pbuh): '[You see], this son of mine, for him my stomach was a vessel, my breasts were [his] irrigators, my lap was [his] container, and his father divorced me and wants to seize him away from me'. The Prophet (pbuh) said to her: You are more deserving than [your husband] until you marry.' This narration of the Prophetic practice has been influential in the development of family law codes. See Azizah Al-Hibri, 'Islam, Law And Custom: Redefining Muslim Women's Rights' (1997) 12(1) American University Journal of International Law and Policy 1, 42

<sup>867</sup> Ziba Mir-Hosseini and Mulki Al-Sharmani and Jana Rumminger (eds) *Men in Charge?: Rethinking Authority in Muslim Legal Tradition* (Oneworld Publications, 2015) 17.

<sup>868</sup> Al-Bayḍawī, *Anwār al-Tanzīl* (1968) vol 1, 217.

<sup>869</sup> Ziba Mir-Hosseini and Mulki Al-Sharmani and Jana Rumminger (eds) *Men in Charge?: Rethinking Authority in Muslim Legal Tradition* (Oneworld Publications, 2015) 17.

<sup>870</sup> Ayesha S. Chaudhry , Producing Gender-Egalitarian Islamic Law: A Case Study of Guardianship (Wilayah) in *Prophetic Practice in Men in Charge: Rethinking Authority in Muslim Legal Tradition* (OneWorld Publications, 2015)

the Islamic tradition.<sup>871</sup> Therefore, it is necessary to first begin by revisiting the scriptural evidence to support the claim that Islamic legal tradition provides women with full and equal rights to education.

## 5.6 An Islamic Interpretation of Male Rights Compared with Women's Rights

As noted in previous chapters, it cannot be overlooked that Islam was an emancipatory force in early Arabian societies. In the pre-Islamic paganism, women were systemically denied women any rights or stake in society.<sup>872</sup> The Prophet is narrated to have praised the women since 'shame did not prevent them from becoming learned in the faith.'<sup>873</sup> It follows that the Holy Prophet had a duty to teach and enlighten all humans, regardless of their gender. As such, it becomes difficult to justify the contention that the access of women can be limited without sound theological cause. The *Qur'an* states further as follows:

Read with the name of thy Lord who created everything. He created man from a hanging mass like a leech. Read, and thy Lord is the most Bounteous, who teacheth by the pen, teacheth man that which he knew not.<sup>874</sup>

The word 'man' as used in the *Qur'an* is confined to the proverbial use in the meaning 'mankind in general.'<sup>875</sup> Thus, it is not gender-specific and means both male and female persons. The *Qur'an* states 'Are those who know equal to those who do not know?' Only they will remember [who are] people of understanding.'<sup>876</sup> Classic perspectives on Islamic hermeneutics converge on the basic principle that a rule will apply equally to both genders, even when the masculine pronoun is invoked, unless the rule expressly provides different treatment. This linguistic convention has been widely accepted by scholars because other mandatory rules of Islam, including fasting and pilgrimage apply equally to men and women.<sup>877</sup> If the reference to men were to be taken literally, the mandatory obligation of all Muslims to observe fasting or pray daily would be rendered "null

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<sup>871</sup> Azizah Al-Hibri, *A Study of Islamic Herstory: Or How Did We Get Into This Mess In Women Am Islam* (PP 1982) 214, 215

<sup>872</sup> Al-Baladhuri, *Kitāb Futūḥ al-Buldān (or The Book of the Conquest of Lands)*.

<sup>873</sup> Mphutlane Wa Bofelo, 'Immodesty, Islam and the Gender Equity Movement' *Pambazuka News* (Nairobi, April 1 2010) <<https://www.pambazuka.org/gender-minorities/immodesty-islam-and-gender-equity-movement>>.

<sup>874</sup> *Qur'an*, 96: 1-5.

<sup>875</sup> Abbasi, note 45, 2.

<sup>876</sup> Surah Az-Zumar 39:9.

<sup>877</sup> *Ibid*.

and void.” A literal reading of verses in this context would produce an illogical result, since it is clear that these verses are intended to apply to all genders, regardless of the use of the male pronoun.<sup>878</sup>

As the above sections have described, there is nothing within the Islamic legal tradition which does not support equal rights to education for both genders. As Baderin highlights, ‘advocates of women’s rights can...find many provisions within Islamic sources for advocating and promoting positive development of women’s rights in Muslim states.’<sup>879</sup> The impetus for these educational strategies has become more pressing than ever. Islamic countries will have to adapt if they are to rise to the economic challenges of an ever-globalising economy.<sup>880</sup> Traditional attitudes to male-female relation are being reassessed in light of contemporary human rights discourses, some of which are being reframed and mainstreamed for Islamic societies with the adoption of the Cairo Declaration on Human Rights in Islam.<sup>881</sup> As a result, it is arguable that any law or rule that limits a women’s access to, and enjoyment of, educational rights is, in principle, contrary to the teaching of Islam.<sup>882</sup>

### 5.6.1 The Many Islams of the Muslim World

Feminists in the Western legal tradition have described how the exclusion of women from public life, while placing forms of gender oppression outside the realm of critical scrutiny.<sup>883</sup> It should be noted, however, that feminist critiques of Islamic societies have been viewed

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<sup>878</sup> Raheeq Ahmad Abbasi, ‘Women and Education in Islam’ (Minhaj-Ul-Qur’an International, 27 May 2009) <<http://www.minhaj.org/english/tid/8535/Women-Education-in-Islam-article-by-dr-raheeq-ahmad-rahiq-ahmed-abbasi-nazim-e-aala-mqi-minhaj-ul-Qur'an.html>>.

<sup>879</sup> Mashood A Baderin, ‘The Role of Islam in Human Rights and Development’ in Javaid Rehman and Susan Carolyn Breau (eds), *Religion, Human Rights and International Law: A Critical Examination of Islamic State Practices* (Martinus Nijhoff Publishers 2007) 352.

<sup>880</sup> World Bank, ‘Why Supporting Women’s Economic Inclusion is Vital for the GCC,’ (World Bank Magazine, September 2017) <<http://www.worldbank.org/en/news/feature/2017/09/29/why-supporting-womens-economic-inclusion-is-vital-for-the-gcc>>.

<sup>881</sup> Cairo Declaration on Human Rights in Islam (adopted 5 August 1990, UNGAOR Agenda Item 5 (CDHRI). The literature on these issues is extensive, see, for example, Austin Dacey and Colin Kaposke, ‘Islam & Human Rights: Defending Universality at the United Nations’ (Center for Inquiry, 2008); Shadi Mokhtari, ‘The Search for Human Rights Within an Islamic Framework in Iran’ (2004) 94(4) *Muslim World* 469 id. See also Jennifer S King, *Islamic Feminism vs Western Feminism: Analyzing a Conceptual Conflict* (Central Connecticut State University 2003).

<sup>882</sup> Amina Wadud, *Qur’an and Woman: Rereading the Sacred Text from a Woman’s Perspective* (Oxford University Press 1999) 64.

<sup>883</sup> Christopher de Bellaigue, ‘Stop calling for a Muslim Enlightenment’ *The Guardian* (Dubai, 19 February 2015) <<https://www.theguardian.com/world/2015/feb/19/stop-calling-for-a-muslim-enlightenment>>. On the concept of orientalism see the seminal work Edward Said, *Culture and Imperialism*, (Chatto and Windus 1993) 2

negatively as ‘orientalist’ in nature. In these narratives, Muslim women are portrayed in monolithic terms as victims who lack agency.<sup>884</sup> But Muslim women have also railed against the demonization of Islam<sup>885</sup> and embraced traditional perspectives, internalising assumptions of their religious duties to raise children so they may practise their faith correctly, and not transgress God’s will.<sup>886</sup> The Islamic World Council’s Cairo Declaration on Human Rights appears to reinforce this view by stating that education is a right only so far as it serves ‘the purpose of the [best] interest of the religion.’<sup>887</sup>

The Muslim world has had various collisions with the modern West, by way of colonial direct rule or through the transplantation of rules and doctrines from foreign legal systems. Saudi Arabia’s encounters with the non-Muslim world have largely been occurred through its emergence as a sovereign nation-state and consequent interfaces with the international community via treaty law.<sup>888</sup> These interactions have generated attempts to ‘reform’ Saudi state practices through soft forms of negotiation, public criticism and dialogue from within and outside the Muslim world.<sup>889</sup> While there have been successes in this areas, the reforms that have been put in place do not provide a full solution to structural forms of discrimination, for instance in cases where women choices are confined to their duties in the domestic sphere.<sup>890</sup> This is a critical issue since it is in these private space of home life where gendered forms of social control, alienation, even violence, are least visible.<sup>891</sup> As Shah notes:

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<sup>884</sup> Ann Elizabeth Mayer, ‘Cultural Particularism as a Bar to Women’s Rights: Reflections on the Middle Eastern Experience’ in Julie Peters and Andrea Wolper (eds) *Women’s Rights, Human Rights: International Feminist Perspectives* (Routledge 1995) 176, 177. For a counter argument see Carlo A Pedrioli, ‘Constructing the Other: US Muslims, Anti-Shari’ah Law, and the Constitutional Consequences of Volatile Intercultural Rhetoric’ (2012) 22 Southern California Interdisciplinary Law Journal 65, 108

<sup>885</sup> Gabriele Marranci, ‘Multiculturalism, Islam and the Clash of Civilisations Theory: Rethinking Islamophobia’ (2004) 5(1) Culture and Religion 105, 117

<sup>886</sup> Mashood A Baderin, ‘The Role of Islam in Human Rights and Development’ in Javaid Rehman and Susan Carolyn Breau (eds), *Religion, Human Rights and International Law: A Critical Examination of Islamic State Practices* (Martinus Nijhoff Publishers 2007) 352

<sup>887</sup> CDHRI, arts 9, 10.

<sup>888</sup> Abdullahi Ahmed An-Na’im, ‘Islamic Law, International Relations, and Human Rights: Challenge and Response’ (1987) 20 Cornell International Law Journal 317, 318.

<sup>889</sup> Victoria Nourse and Gregory Schaffer ‘Varieties of New Legal Realism: Can a New World Order Prompt a New Theory,’ 95 (2009) Cornell Law Review 61, 81

<sup>890</sup> Frances Raday, ‘Gender And Democratic Citizenship: The Impact Of Cedaw’ (2012) 10(2) International Journal of Constitutional Law 512

<sup>891</sup> Donna Sullivan, ‘The Public/Private Distinction in International Human Rights Law’ in Julie Peters and Andrea Wolper (eds), *Women’s Rights, Human Rights: International Feminist Perspectives* (PP 1995). See also Tom Throneburg Butler, ‘The Times: Are They a-Changin? Saudi Law Finally Addresses Domestic Violence with Its Regulation on Protection from Abuse’ (2014) 100(3) Iowa Law Review 1233

Feminist legal scholars have made a valid criticism of international human rights law in that it excludes women's rights and issues specific to them. The most important among them is the private sphere where women 'live out their life'.<sup>892</sup>

In the above regard, countries such as Turkey and Bangladesh adopt a more flexible approach when it comes reconciling religious tradition with the demands of economic modernisation. Women in Turkey have greater freedoms, higher access to the job market and therefore greater control over their financial circumstances than tends to be the case for women in Arab countries such as Saudi Arabia, Oman, Jordan and Syria.<sup>893</sup> One possible explanation for this is that the sources of Turkish law derive from a more pluralist set of influences, which include the (more liberal) Hanafi school- inspired Ottoman code and, later, during periods of British and French colonial occupation, elements of civil and common law borrowed from non-Islamic legal systems.<sup>894</sup> It is notable that Turkey has secularised its education, administration and legal system. As a result, religious strictures that have shaped gendered relations in more conservative societies, including prohibitions on intermixing or dress, are not enforced as law in Turkey, though they may be informally observed in the more traditionalist, rural parts of the country.<sup>895</sup>

In reality, however, the forces of secularisation in countries in North Africa and the Middle East, and indeed states like Turkey, have always existed in tension with religious traditionalism.<sup>896</sup> Turkey is not alone. Former colonies such as Egypt and Morocco have been experienced waves of *Sunni* revivalism. A case in point, the political constitution of Egypt has been amended to include so-called *Sharia* "supremacy clauses" whereby courts are obliged to

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<sup>892</sup> Niaz Shah, *Women, The Koran and International Human Rights Law: The Experience Of Pakistan* (ed IV, Martinus Nijhoff, 2006) 203

<sup>893</sup> UNDP, 'The Human Development Report 2016' (2016) [http://hdr.undp.org/sites/default/files/2016\\_human\\_development\\_report.pdf](http://hdr.undp.org/sites/default/files/2016_human_development_report.pdf) However see Frederick F. Anscombe, *The Ottoman Gulf: The Creation of Kuwait, Saudi Arabia, and Qatar* (Columbia University Press, 1997) 23

<sup>894</sup> On the cross-cultural influences shared among Islamic and non-Islamic civilisations see Bernard Lewis, *The Muslim Discovery of Europe* (Redwood Burn Ltd. 1982) 17-21

<sup>895</sup> However see case *Sahin v Turkey* (App no 44774/98) ECHR 10 November 2005

<sup>896</sup> Frank Vogel, "Islamic Governance in the Gulf: A Framework for Analysis, Comparison, and Prediction" in Gary Sick and Lawrence Potter (eds), *The Persian Gulf at the Millennium; Essays in Politics, Economy, Security, and Religion* (Saint Martin's Press 1997) 275 and D Ahmed and T Ginsbury, 'Constitutional Islamization and Human Rights: The Surprising Origin and Spread of Islamic Supremacy in Constitutions' (2013) 54 *Virginia Journal of International Law* 615



interpret legislation in accordance with mandatory principles of religious law.<sup>897</sup> It is worth noting, however, that despite the recent rise of political Islam in former colonies, *Sharia* has always had the most dominant influence in the area of family and personal status law, whereby the patriarchal gender system that exists in large swath of North Africa and Asia is rooted in pre-capitalist forms of social institutions including traditional family courts and arbitration.<sup>898</sup> This would lead to the development of a peculiar public-private distinction. Areas of public governance, in areas such as administration, economy and education were in effect ‘secularised’ within a dual legal system, while *Sharia* continued to have application in “privatised” area of family and personal status law.<sup>899</sup> Where disputes arise, whether in relation to child custody, inheritance or divorce, the only recourse that has been traditionally available is a form of informal justice through the Qadi courts. A number of scholars noted that while these traditional arbitration structures have historically claimed to base their decisions on *Sharia*, judges were not trained in Islamic law.<sup>900</sup> As a result, family arbitration processes were consequently highly informal and discretionary in nature, and oftentimes more closely rooted in local cultural practices than in religious knowledge. The line between a faithful interpretation of *Sharia* was, in turn, tainted by culturally specific attitudes to gender, many of which, according to Islamic feminists, were anathema to emancipatory aims of Islam.<sup>901</sup>

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<sup>897</sup> See Maurits Berger and Nadia Sonneveld, *Shari’ah and National Law in Egypt* in Jan Michiel Otto (ed), *Shari’ah Incorporated: A Comparative Overview of the Legal Systems of Twelve Muslim Countries in Past and Present* (Leiden University Press 2010) 51, 62

<sup>898</sup> Priscilla Offenbauer, ‘Women in Islamic Societies: A Selected Review of Social Science Literature’ (2005) A Report Prepared by the Federal Research Division, Library of Congress 1, 9-10 < [https://www.loc.gov/rr/frd/pdf-files/Women\\_Islamic\\_Societies.pdf](https://www.loc.gov/rr/frd/pdf-files/Women_Islamic_Societies.pdf) >.

<sup>899</sup> See generally Roula Baki, ‘Gender-segregated Education in Saudi Arabia: Its Impact on Social Norms and the Saudi Labor Market’ (2004) 12(28) Education Policy Analysis Archives.

<sup>900</sup> See John Hursh, ‘The Role of Culture in the Creation of Islamic Law,’ (2009) 84 Indiana Law Journal 1401 and Lawrence Rosen, *The Anthropology Of Justice: Law As Culture In Islamic Society* (1989) 17. [Rosen explains, ‘rather than being aimed simply at the invocation of state and religious power, rather than being devoted mainly to the creation of a logically consistent body of legal doctrine, the aim of the qadi is to put people back in the position of being able to negotiate their own permissible relationships without predetermining what the outcomes of those negotiations ought to be.’] However see Il-Hibri on how these practices have often been used to reinforce the unequal status of women in family law. Azizah Al-Hibri, ‘Islam, Law And Custom: Redefining Muslim Women’s Rights’ (1997) 12(1) American University Journal of International Law and Policy 1, 42 [noting that religious doctrine such as -Hibri, a particular doctrine that was used to dubious effect was that of the doctrine of *takhayur*, have been used to disregard authoritative opinions from other schools, often to the detriment of women’s rights in a family dispute].

<sup>901</sup> Priscilla Offenbauer, ‘Women in Islamic Societies: A Selected Review of Social Science Literature’ (2005) A Report Prepared by the Federal Research Division, Library of Congress 1, 9-10 < [https://www.loc.gov/rr/frd/pdf-files/Women\\_Islamic\\_Societies.pdf](https://www.loc.gov/rr/frd/pdf-files/Women_Islamic_Societies.pdf) >.

Saudi Arabia has a rather different history to many Arab and non-Arab Islamic nations, having resisted colonial occupation.<sup>902</sup> It has been established that Saudi Arabia was established as an Islamic state and that several provisions of its Basic Law reference the Islamic origins and history of the country as the glue that binds Saudi society.<sup>903</sup> It would not require a huge leap to imagine that unequal representation of women in education and the workforce is primarily a consequence of the influence of conservative religious heritage. Some contest this, arguing that endemic issues of gender inequality, even after the reforms, are due to longstanding failures of the Kingdom's economic policy.<sup>904</sup> This is explained by the fact that the Saudi government, a country rich in oil revenues, simply lacked the political motivation to improve educational opportunities for men and women.<sup>905</sup> Only now, several decades too late, is the Kingdom seeking to correct its policy failures in the face of economic necessity.

Expanding on these ideas, some suggest that the “choice” to exclude women from aspects of education and labour markets has very little to do with Islam. On this point, Mohammad Fadel contended that customary restrictions that have long been preserved in Saudi Arabia (and which CEDAW has classed as discriminatory such as the compulsory dress and guardianship) are ‘a matter of political will and not strict adherence to Hanbali law.’<sup>906</sup> In a similar vein, Hamdan posits that the seclusion of women in many Muslim-majority countries was not widely practised in Muslim societies and is a relatively new phenomenon.<sup>907</sup>

In the above regard, gender rights have emerged as the discursive battleground whereby women are treated either as vanguards of traditional religious values, or as passive victims of a patriarchal system rooted in religious law.<sup>908</sup> This points to a general tendency ‘to reduce the

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<sup>902</sup> Manfred Halpern, *Politics of Social Change: In the Middle East and North Africa* (Princeton University Press, 2015) 219

<sup>903</sup> Muddassir Quamar, ‘Islamic Modernism and Saudi Arabia: Confluence or Conflict?’ (2015) 2(1) *Contemporary Review of the Middle East* 71, 71-73

<sup>904</sup> Priscilla Offenbauer and Alice R Buchalter, ‘Women in Islamic Societies: A Selected Review of Social Scientific Literature’ (Library of Congress, November 2005).

<sup>905</sup> Karen Courington and Vanessa Zuabi, ‘Calls for Reform: Challenges to Saudi Arabia’s Education System’ (2011) 12(2) *Georgetown Journal of International Affairs* 137-144

<sup>906</sup> Cited in ‘Perpetual Minors: Human Rights Abuses Stemming from Male Guardianship and Sex Segregation in Saudi Arabia’ (HRW, 2008) at 11 < <https://www.hrw.org/report/2008/04/19/perpetual-minors/human-rights-abuses-stemming-male-guardianship-and-sex> >

<sup>907</sup> A Hamdan, ‘Women and Education in Saudi Arabia: Challenges and Achievements’ (2005) 6(1) *International Education Journal* 42, 42-43.

<sup>908</sup> John Rich, ‘Saving Muslim Women: US Policy and the War on Terror’ (2014) *International Affairs Review* 1

historical narrative of Islam to a general, social, or ideological meaning whether by traditional schools of Islam, later by orientalists, or later still by anthropologists and sociologists.’<sup>909</sup> However, it is arguable that these narrative choices are based on a false dichotomy. One adopts external or paternalistic view of the faith, despite lacking ‘insider’ knowledge of the complexities of Islamic legal method or any sensitive appreciation of its revolutionary role in transforming gender relations in areas such as law, justice and education. The other is characterised by an uncritical reverence or “blind imitation” of previous generations of Islamic jurists, a practice that prevents progress by denying women rights which the *Qur’an* itself protects.<sup>910</sup>

### 5.6.2 An Appeal to Inclusive Conception of Gender Jurisprudence

Throughout this thesis, there has been an attempt to demonstrate that the Saudi women’s right to fully exercise her rights to education is closely related to the society’s interpretation of Islamic principles. The thesis has also shown, in chapter 2, that any rights enshrined in Saudi law and constitution must be interpreted in accordance with *Sharia*, as stated in the Basic Law of Saudi Arabia. Islamic law constitutes an autonomous legal system and it would therefore be a mistake to treat *Sharia* and the interpretation of *Sharia* by Saudi institutions and society more generally as one and the same. A critical finding of this thesis is that there is nothing within the *Sharia* that indicates that women should not be permitted to receive education on an equal basis with men. In fact, the *Qur’an* and *hadith* affirms the women’s right to enrich their knowledge as a religious obligation, as well as a right.

As an Islamic legal system, Saudi Arabia draws much of its impetus from Islamic understandings of rights. However, while the right to education is firmly established in Islamic law, and in Saudi legislation, the interpretation and concrete application of this right in modern Saudi society is more contentious and warrants further protections and progressive reform. Islam has a firm basis in the Saudi legal imaginary and has come to shape societal mores in non-linear and complex ways. This takes us to the blurred boundaries between what is required by Islam as a matter of religious obligation, and what amounts to a social custom that has been

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<sup>909</sup> Mohammed A Bamyeh, *The Social Origins Of Islam: Mind, Economy, Discourse* (UMP 1999) 258.

<sup>910</sup> Peter R Knauss, *The Persistence of Patriarchy. Class, Gender, And Ideology in Twentieth Century Algeria* (Greenwood Publishing 1987) 127.

falsely elevated to the status of religious law.<sup>911</sup> The seclusion of women and the restriction of their access to education in the early days of the Kingdom are discussed as good examples of the arbitrary interpretation of the *Sharia* by conservative clerics and scholars and the imposition of conjecture and subjective reasoning as Islamic law. It is then argued that gender equality may be established by showing that the interpretation by conservative clerics and scholars is flawed because the *Qur'an* and *Hadith* may favour the education of women and their active participation in political and social life. This thesis has discussed how reform from within can allow the Kingdom to comply with its obligations under international law while remaining within the bounds of Saudi Arabia's interpretation of Islamic law.

As noted in Chapter 2, the *Qur'an* is the body of fundamental principles according to which Saudi Arabia is acknowledged to be governed. That is why the supreme law of the land is Islamic law or the set of rules and regulations derived from the interpretation of the *Qur'an*. However, Islamic law is not solely derived from the *Qur'an*. Where any relevant *Qur'anic* verse does not provide clear guidance on a given issue, recourse may be had to the *Hadith* (including the *Sunnah*), which discusses the remarks, beliefs and conduct of the Holy Prophet and his companions.<sup>912</sup> The link between the *Qur'an* and *Hadith* may be described as the association between revelation and reason, the two methods that are generally available to seekers of knowledge.<sup>913</sup> Thus, Islamic law is the marriage between the two methods or the explanation of revelation (*Qur'an*) using practical examples (*Hadith*).<sup>914</sup> Given that the *Hadith* contains several legal provisions that all Muslims must comply with, the official law in the court system of Saudi Arabia is a combination of both *Qur'anic* verses and the *Hadith*. However, neither the revelation nor this combination has been codified. Hence, the application of Islamic law is largely a matter of interpretation.

However, the interpretation of the *Qur'an* and *Hadith* is not a seamless process because ascertaining the authenticity of the relevant statement is required as a prior condition. Some statements classified as *Hadith* are considered good or authentic (*Hasan*), while others are

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<sup>911</sup> Azizah Al-Hibri 'Islam, Law and Custom: Redefining Muslim Women 'S Rights,' (1997) 12 American University International Law Review 1, 19

<sup>912</sup> S Zuhur, *Saudi Arabia* (ABC-CLIO 2011) 180.

<sup>913</sup> See Dallin H Oaks, *The Lord's Way* (Shadow Mountain 1991) 45-76.

<sup>914</sup> WB Hallaq, *An Introduction to Islamic Law* (Cambridge University Press 2009) 15.

deemed acceptable (*Maqbool*), weak and fake.<sup>915</sup> Thus, the acceptability of the statement attributed to the Holy Prophet or his companions is the first hurdle in the process of interpretation. The classification of such statements depends on the transmission chain of the statements and their consistency with the verses of the *Qur'an*. This explains why independent legal reasoning (*Ijtihad*) is also considered an important source of Islamic law.<sup>916</sup> In this study, this is described as a rule of interpretation because it is used to determine the meaning of a *Qur'an* verse or statement in the *Hadith* and how it ought to be applied. This section focuses on the rules of interpretation and does not dwell on the process of establishing the authenticity of the *Hadith*, which is beyond the scope of the study. With regard to the *Ijtihad*, it has been described as follows:

Legal reasoning (*Ijtihad*) is an untransmitted source of Islamic Law, whose emergence is due to the fact that Islamic jurists could not always interpret the language of the *Qur'an* and that of the *Sunnah* in the same way arriving at the same legal result, rather they frequently differ in their interpretations of certain *Qur'anic* verses and particular Prophetic traditions, reaching different legal rulings.<sup>917</sup>

However, the interpretation of the above verses is not only a matter of legal reasoning. There is yet another source of Islamic law (or rule of interpretation in this context) that is closely related to legal reasoning. This is consensus or *ijima*. It may be described as a general agreement of Islamic scholars in a given period on the exegesis of a particular statement that is subject to different opinions or views.<sup>918</sup> Consensus plays a very important role in the imposition of the reasoning of a group of Islamic clerics and scholars as to the authoritative interpretation of a *Qur'anic* verse. This may be positive or negative, depending on the moral preferences of the members of the group. Although Hallaq argues that the rules upon which there have been consensus are limited within Islamic law,<sup>919</sup> it remains that consensus has, in association with *Ijtihad*, enabled different clerics and scholars to impose subjective viewpoints

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<sup>915</sup> Ahmad ibn Al-Asqalani, *Ali al-Nukat Ala Kitab Ibn al-Salah* (Ajman, Maktabah al-Furqan) 81-95.

<sup>916</sup> Rafat Y Alwazna, 'Islamic Law: Its Sources, Interpretation and the Translation of It into Laws Written in English' (2016) 29(2) *International Journal for the Semiotics of Law* 251, 251.

<sup>917</sup> *Ibid*, 252.

<sup>918</sup> David Ingram, *Rights, Democracy, and Fulfilment in the Era of Identity Politics: Principled Compromises in a Compromised World* (Rowan and Littlefield 2004) 225.

<sup>919</sup> Hallaq, (n813), 22.

or moral preferences as the dictate of the Almighty. This is especially important in this study because clerics and scholars enjoy broad discretion in interpreting rules given that *Ijtihad* also involves preference (*istihsan*) which is an inference made on the basis of the revealed text.<sup>920</sup> Scholars are therefore free to make inferences which are based on subjective reasoning or personal values. This is reinforced by the obligation to consider public interest (*istislah*), although the concept itself is not enshrined in the *Qur'an*.

Given the open-ended nature of the concepts of consensus, preference and public interest, it is problematic that the interpretation of a given *Qur'anic* verse may be determined by the interpreter's subjective assessment of how the application of the verse may affect what he considers the welfare or well-being of the general public. It is no doubt even more problematic that an important part of Islamic law is subject to such subjective reasoning.<sup>921</sup> It is true that the flexible nature of Islamic law makes it adaptable to different societies and epochs. However, it is shown below that this flexibility has also enabled certain conservative clerics and scholars to impose their subjective reasoning and moral preferences on women's rights and freedoms. They have advocated for the strict literal interpretation of certain parts of the *Qur'an* that emphasise the women's subordinate role while they have overlooked other parts of the *Qur'an* that state clearly that men and women are equal.

Alwazna notes that the importance of interpretation does not lie in the different legal opinions of different scholars or jurists regarding a specific issue but in the way in which the interpretation is made.<sup>922</sup> Hence, the interpretation cannot be isolated from the *Qur'anic* verse's legal and linguistic contexts and all the events related to the relevant revelation. Nonetheless, it is argued here that the legal and linguistic contexts, the requirement of consensus, preference and the consideration of public interest do not guarantee objectivity and fairness. This is shown in the fact that the congruence of the subjective reasoning, preferences and considerations of public interest by conservative clerics and scholars has scaffolded the formal discrimination against women in many instances. This has for example resulted in women's limited access to education.

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<sup>920</sup> John Makdisi, 'Hard Cases and Human Judgment in Islamic and Common Law' (1991) 1 Indiana International and Comparative Law Review 191, 203-204.

<sup>921</sup> WB Hallaq, 'Was the Gate of Ijtihad Closed?' (1984) 16(1) International Journal of Middle East Studies 3, 3.

<sup>922</sup> Alwanaz, (n815), 253.

In chapter 3 it was noted that prior to the advent of Islam, women in many countries that are today Muslim-majority countries in the Middle East lived in subjugation and sometimes kept in servitude.<sup>923</sup> The *Qur'an* changed this state of affairs by recognising the shared values of respect, independence and dignity, and giving women the same rights as men regarding the access to education, employment and justice. It has been noted that the patriarchal gender system that was originally linked to the pre-capitalist forms of social institutions was well-established in a large swath of North Africa and Asia.<sup>924</sup> The introduction of Islam challenged this existing gender system. Thus, Hamdan contended that the seclusion of women in many Muslim-majority countries is a relatively new phenomenon.<sup>925</sup> In early Muslim communities, male domination was countermanded as women were allowed to pioneer economic and socio-political events and take part in as many aspects of life as their male counterparts. It follows that the originalist interpretation of the early sources of Islam and the elimination of non-Islamic elements in such interpretation would favour the education of women and their active participation in political and social life.<sup>926</sup>

The unequal treatment of women therefore depends on the ability of these conservative clerics and scholars to impose their interpretation of *Qur'an* and the *Hadith* on the rest of society. This implies that gender equality may be established by showing that the interpretation by conservative clerics and scholars is flawed and the *Qur'an* and *Hadith* favour the education of women and their active participation in political and social life.

This Researcher draws on other scholars such as Rosen to argue that law shapes society, but that society also determines how laws are made and interpreted.<sup>927</sup> Many Islamic countries have embraced forms of economic modernisation, including by adopting aspects of Western commercial and finance law. However, progress in the areas of family and personal status law, many of which are rooted in pre-modern and often pre-Islamic customs, have remained

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<sup>923</sup> Mona AlMunajjed, *Women in Saudi Arabia Today* (Macmillan 1997) 15.

<sup>924</sup> Priscilla Offenbauer, 'Women in Islamic Societies: A Selected Review of Social Science Literature' (2005) A Report Prepared by the Federal Research Division, Library of Congress 1, 9-10 < [https://www.loc.gov/rr/frd/pdf-files/Women\\_Islamic\\_Societies.pdf](https://www.loc.gov/rr/frd/pdf-files/Women_Islamic_Societies.pdf) >

<sup>925</sup> A Hamdan, 'Women and Education in Saudi Arabia: Challenges and Achievements' (2005) 6(1) International Education Journal 42, 42-43.

<sup>926</sup> Olivier Roy, *The Failure of Political Islam* (Harvard University Press 1994) 38.

<sup>927</sup> Lawrence Rosen, *The Anthropology of Justice: Law As Culture In Islamic Society* (ed.1989) 17.

unaltered.<sup>928</sup> Indeed, countries such as Egypt and Saudi Arabia have often invoked “Islamic supremacy clauses” to oppose any state intervention into a male’s supremacy over his wife in the domestic household. This provides some explanation as to why certain structural limitations to a women’s ability to pursue education have existed, and continue to exist, even if the right itself is accepted within Islam. As these practices became more entrenched, and routinely upheld by religious courts or qadis, many Islamic societies simply stopped questioning whether such practices were required by Islam, or simply rooted in custom.

There has also been a tendency to overlook the significant role of women in early Islamic society. As noted in chapter 3, the testimony of the Prophet’s wife is recognised as an authoritative source of the *Sunnah*.<sup>929</sup> Yet, despite this, the contribution that women make to the *fiqh* (Islamic jurisprudence) is considered highly controversial, and the writings and opinions of female scholars are largely thought to fall outside the domain of accepted (classical) Islamic legal thought. As a result, existing perspectives on Islamic law and theory remains very male-centred. Once again, the exclusion and marginalisation of women from Islamic legal thought is a product of broader of historical forces, whereby customs and legal practices in Medieval Arab society (now, Saudi Arabia) were largely influenced by social conventions in the neighbouring Byzantine and Persian empires. Women in these societies were considered legal minors and lacked full citizen rights. It was the emergence of Islam that brought some form of recognition and liberation to women who had been until then been denied a voice or rights within pre-modern societies.

## 5.7 Conclusion

This chapter has attempted to demonstrate that there is no verse in the *Qur’an*, or teaching of the Prophet, as articulated in the *Sunnah*, which explicitly proscribe a women’s enjoyment of public or private learning, subject to the proviso that any educational pursuit falls within bounds of knowledge permitted by Islam or *fardh ayn*. However, beyond identifying education as a

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<sup>928</sup> See e.g. Azzam Tamimi, *The Origins of Arab Secularism*, in *Islam and Secularism in the Middle East* 13, 28 (John L. Esposito & Azzam Tamimi eds., N.Y. U. Press 2000)

<sup>929</sup> Allama Muhammad Iqbal, *The Reconstruction of Religious Thought in Islam* (M. Saeed Sheikh ed., Inst. of Islamic Culture 1986) 132



defacto compulsory requirement for all, the classical texts of Islamic jurisprudence do not specify how governments are to ensure that this right/obligation are achieved in law or fact.

When one considers the traditional representation of male-female relations in the classical *Qur'anic* exegetical-tradition, one might plausibly argue that the primary objective of a woman's education in Islam is to strengthen their religious literacy and to prepare them for their roles as daughters, sisters, wives and mothers.<sup>930</sup> On the other hand, it is possible to argue in favour of a purposive reading of the *Qur'an*, which upholds the equal dignity of men and women in all educational pursuits. In the Muslim world, the debate has shifted from the general right to equal access to education, to the precise "content" of the right, specifically whether women should be afforded the right to receive education to improve her economic or employment prospects on equal footing with men, as a matter of religious and state law. In the Saudi context, the above debate can be reframed particularly as a question of any limits that may be legitimately placed on the general right to equal access to education in light of the Islamic conception of the male-female relationship.<sup>931</sup> It is also notable that the Basic Law of Saudi Arabia, which sets out the supremacy of *Sharia* in the hierarchy of laws, does not provide for any rule, guideline or standard by which an irregular reservation can be judged as being incompatible or invalid under the country's national law.

When considering whether Saudi Arabia has been able to reconcile its *Sharia* 'supremacy clauses' with its obligations under CEDAW, it is important to reiterate that international law, Islamic law, and Saudi Arabia's national legal system are distinct legal regimes. International law is in principle based on a secularised system of state consent (treaty ratification) and the Westphalian principle of sovereignty.<sup>932</sup> In Islamic ethics, one cannot speak of a right to education under Islam, because a 'right' implies that which over a person can exercise choice or control. As such, it is necessary to consider how this *Qur'anic* concept of the male-female may have affected a women's right to affordable and accessible education on equal footing with their male counterparts and with what implications for Saudi Arabia's obligations under

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<sup>930</sup> See Valentine M Moghadam, 'Patriarchy in Transition: Women and the Changing Family in the Middle East' (2004) 35(2) *Journal of Comparative Family Studies* 137, 137-163; Ebrahim Moosa 'The Dilemma of Islamic Rights Schemes' (2001) 15(1) *Journal of Law and Religion* 15.

<sup>931</sup> Ekaterina Y Krivenko, *Women, Islam and International Law within the Context of the Convention on the Elimination of All Forms of Discrimination against Women* (Brill 2009) 112.

<sup>932</sup> See Martti Koskenniemi, "Introduction in M. Koskenniemi (ed.) *Sources of International Law* (ed., 2000) id at xi, xi-xii

CEDAW. At the same time, while there is evidence to support the claim of equality in the sphere of education, there is also countervailing scriptural authority for rules which restrict the way in which women navigate the spaces of public and private life. It is these restrictions that result in the imposition of indirect or structural obstacles to how women exercise their right to education in practice.<sup>933</sup>

Given the impact of cultural practices and specific interpretations of the right to education, it is now necessary to examine the right of women to education within the Kingdom of Saudi Arabia more closely. The next chapter will, therefore, draw a dividing line between religious restrictions affecting women's rights in Saudi Arabia before and after recent reforms.

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<sup>933</sup> Karen Courington and Vanessa Zuabi, 'Calls for Reform: Challenges to Saudi Arabia's Education System,' (2011) 12(2) *Georgetown Journal of International Affairs* 137, 145, 140

## Chapter 6

### Reassessing Education in Saudi Arabia in International Context

#### 6.1 Introduction

This chapter will synthesise the core themes developed in previous chapters. Focusing ultimately on legal reforms that appear to strengthen the rights of women in Saudi Arabia, the thesis considers the extent to which educational equality has in fact been achieved. More importantly, the chapter considers whether these educational reforms have been achieved that brings Saudi Arabia's dual, and sometimes conflicting, commitments into greater alignment: the modernising impulse of economic reform and the search for religious legitimacy.

Given the above, this chapter will consider the efficacy of measures undertaken by the Saudi government to promote equality of education and the elimination of gender discrimination, whether in law or in fact. In this regard, the chapter will devote significant attention to the extent to which Saudi Arabia's educational policy has succeeded in strengthening the economic status of women in a manner that is substantially consistent, both, with CEDAW requirements and the Islamic paradigm of gender and social-economic rights.<sup>934</sup> After highlighting the positive steps taken by Saudi Arabia to eliminate gender bias in the educational sectors, the chapter will proceed to identify remaining gender gaps in educational quality and outcomes.<sup>935</sup> From this standpoint, the chapter will go on to examine the structural causes for these inequalities and in doing so assess the complex religious, economic and cultural factors that have continued to stymie progress in this field.

In the final analysis, the chapter will conclude that there is no inherent conflict between a women's right to education in Islam. Nonetheless, the issue of gender equality has emerged as the site of discursive struggle between (non-Islamic) feminist/ cosmopolitan perspectives,<sup>936</sup>

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<sup>934</sup>Universal Islamic Declaration of Human Rights (1981) UIDHR, art XVI

<sup>935</sup> Amani Hamdan, 'Women and Education in Saudi Arabia: Challenges and Achievements' (2005) 6(1) International Education Journal 42, 64

<sup>936</sup> For a feminist take see Susan Judith Ship, 'And What About Gender? Feminism and International Relations Theory's Third Debate' in Claire Dorothy Turenne Sjolander and Wayne S Cox (eds), *Beyond Positivism: Critical Reflections On International Relations* (WP 1994) 138; For an explanation on what cosmopolitan perspectives

on the one hand, and forces of religious traditionalism, on the other. What is missing from these polemics, that is the supposed clash between International and Islamic rights conceptions, is that a debate that is now flourishing from within the Islamic world. By claiming to revive the emancipatory potential of Islam, self-described Islamic feminist and other ‘modernist’ thinkers have attempted to historicise certain patriarchal readings of scriptural revelation and Prophetic traditions.<sup>937</sup> In doing so, they argue that notions of male dominance in Saudi practice do not, as sometimes claimed, represent a set of incontrovertible religious truths. Rather, these practices often conflate elements of religious law with local custom and are therefore subject to challenge on grounds of international and Islamic law.<sup>938</sup>

In its more conceptual elements, the chapter will explore the blurred lines between religious, economic and cultural impediments to gender equality before reflecting on how such challenges may come to hinder the Kingdom’s economic progress.<sup>939</sup> The fulcrum of this analysis will be to argue that gender inclusion can be defended by appealing to an Islamic idea of gender equality that holds much in common with the aims and ideals of contemporary human rights law.

## 6.2 The Legal Basis for Education under the Saudi Legal System

The right to education is guaranteed under the Basic Laws of Governance. Article 13 of the Basic Law of Governance states:

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refer to see Noah Feldman, *Cosmopolitan Law?*, (2007) 116 Yale Law Journal 1022 and John Tasioulas, ‘Taking Rights out of Human Rights’ (2010) 120(4) *Ethics* 647, 678; Ziad Abu-Amr, ‘Critical Issues in Arab Islamic Fundamentalism’ in Martin E Marty and R Scott Appleby (eds), *Religion, Ethnicity, and Self-Identity: Nations in Turmoil* (UPNE 1997) 47

<sup>937</sup> Ziba Mir-Hosseini and Mulki Al-Sharmani and Jana Rummingner (eds), *Men in Charge?: Rethinking Authority in Muslim Legal Tradition* (Oneworld Publications 2015) 17.

<sup>938</sup> Firas Alkhateeb, *Lost Islamic History: Reclaiming Muslim Civilisation from the Past* (Oxford University Press 2014) 83.

<sup>939</sup> Francis Patalong, ‘Vision 2030 and the Transformation of Education in Saudi Arabia’ (*Al Tamimi & Co*, 2016) <<http://www.tamimi.com/en/magazine/law-update/section-14/august-2/vision-2030-and-the-transformation-of-education-in-saudi-arabia.html>> and Hani Abdulghani, ‘Examining Obstacles to Saudi Women’s Right to Work in the Kingdom of Saudi Arabia’ (DPhil Thesis, Brunel University London 2016) 67

“Education shall aim to instil the Islamic creed in the young, impart knowledge and skills to them, and prepare them to be useful members in building of their society, loving their homeland, and taking pride in its history”.<sup>940</sup>

Pursuant to this law, all rights and entitlements issued under various Saudi policies are as applicable to women as they are to men. This is significant on its own terms. Education is treated as the exclusive preserve of state policy in most legal systems, and consequently as an entitlement which is balanced against other fiscal and political considerations.<sup>941</sup> In Saudi Arabia, the right to free and equal education is constitutionally guaranteed.

### 6.2.1 Educational as General Right for All

Saudi Arabia has set out its commitments to provide free education for all citizens among all age groups, and has invested significant funds in foreign scholarship programmes. Though private schools have been in existence since the 1940s, a number of public schools have been established since the 60s.<sup>942</sup> More recently, the Kingdom has made significant investments in research and education in science, technology, engineering and medicine.<sup>943</sup> The rationale for these programs is consistent with the collectivist paradigm of Islamic rights conceptions, discussed in chapter 4, whereby ‘[p]rotecting the welfare of individuals does ultimately ensure communal...welfare and vice versa’.<sup>944</sup> Saudi Arabia has signed up to the Cairo Declaration on Human Rights in Islam and ratified the Arab Charter on Human Rights in 2016. While the Declaration is a political rather than a binding legal instrument, this does not mean that the instrument does not exert a form of soft or social power on signatory member states.<sup>945</sup> The Arab Charter binding obligations for signatory states. These include second-generation rights, such as the obligation to provide access and means to education,<sup>946</sup> the right to work, the right

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<sup>940</sup> Basic Law of Governance 1992, art 13.

<sup>941</sup> Abdullahi Ahmed An-Na'im, 'Islam, State and Politics: Separate but Interactive' (Brookings Institute, 2012) < [https://www.brookings.edu/wp-content/uploads/2012/04/2007islamforum\\_an-naim.pdf](https://www.brookings.edu/wp-content/uploads/2012/04/2007islamforum_an-naim.pdf).

<sup>942</sup> Maan Bin Abdul Haq Arif Khutani, 'Educational rights for women in Islamic and international human rights law: a study of theory and its application in Saudi Arabia' (DPhil Thesis, University of Wollongong 2013) 92.

<sup>943</sup> 'King Abdullah Bin Abdul-Aziz Project for Public Educational Development' (2011).

<sup>944</sup> Ibid.

<sup>945</sup> The instruments provides general guidance for the OIC member states in the field of human rights

<sup>946</sup> CDHRI, art 9.

to equal pay for equal work without discrimination between men and women<sup>947</sup> and the right to medical and social care.<sup>948</sup>

As noted in previous chapters, Saudi Arabia's engagement with international legal order has been checkered. As noted in previous chapters, Saudi Arabia is not yet a party to ICESCR or indeed the ICCPR. This is significant because Article 13 of the ICESCR mandates that 'education must be accessible to all, especially the most vulnerable groups, in law and fact, without discrimination.' Saudi Arabia has entered an objection to the treaty under Article 9, stating that *Sharia* offers strong protections against economic and social inequality.<sup>949</sup> It is arguable that while the Kingdom has chosen not to take the extra step of joining this Convention, it is nonetheless still possible to assess the country's progress against international benchmarks. As a result, it is important to emphasize the point that Saudi Arabia cannot as a matter of binding law be held to account for any domestic laws or practices deemed incompatible with the ICESCR or ICCPR (and enforced under the Committee's complaints and periodic reporting procedures). This does not mean, however, that aspects of these treaties, some of which have attained the status of customary law, cannot be used to evaluate and critique domestic norms and practices in the Kingdom.

In a General Comment No 13, the Committee on Economic, Social and Cultural Rights at the Twenty-first Session set out the relevant criteria used to determine State compliance with the Convention. Subject to these requirements, all State Parties to ensure physical access to educational facilities and, where this is not possible, to make adequate provision for distance-learning equivalents.<sup>950</sup> These recommendations aim to broaden educational access for individuals located in rural areas, for any economic or social disadvantaged groups that are

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<sup>947</sup> CDHRI, art 13.

<sup>948</sup> CDHRI, art 17(b).

<sup>949</sup> Article 34 of the Arab Charter states, "The eradication of illiteracy is a binding obligation and every citizen has a right to education. Primary education, at the very least, shall be compulsory and free and both secondary and university education shall be made easily accessible to all". However, the United Nations Office for the High Commissioner for Human Rights has criticised the charter for its failure to meet international norms and standards on the treatment of women and non-citizens. Arab Rights Charter deviates from International Standards, says UN Official' (UN News Center, 2008) <http://www.un.org/apps/news/story.asp?NewsID=25447#.WjgNIVWWbIV>. See also Douglas Remy, 'The Trouble with the Cairo Declaration' (The Bent Angle, 28 August 2011) <<https://thebentangle.wordpress.com/2011/08/28/the-trouble-with-the-cairo-declaration/>>

<sup>950</sup> UNCESCR 'General Comment 13 in 'Note by the Secretariat, Compilation of General Comments and General Recommendations adopted by Human Rights Treaty Bodies' (1999) UN Doc E/C.12/1999/10.

unable to attend classes etc. due to work or family commitments.<sup>951</sup> In a second recommendation, states are encouraged to enhance economic access to higher education, and to reduce costs that may discourage low-income groups from achieving their potential.<sup>952</sup>

Crucially, primary education should be made free at point of access to ensure that all children benefit from basic learning objectives. In a third recommendation, States should work towards improving pedagogical practices and other teaching methods. In a bid to reduce variation in educational standards and promote some degree of equivalency across state systems, states should seek to benchmark local methods of examination and teaching assessment against international standards in this area. States are also encouraged to modernise and streamline educational “content” (course curriculums etc.) thereby ensuring that students are equipped with the skills, experience and knowledge to meet the demands of future employers in the face of tectonic technological and industrial shifts.<sup>953</sup> In its General Comment No 2, the ICESCR Committee does however recognise that states have the right to design educational content that is ‘culturally appropriate’ to the local customs and traditions of the host state. This equivocation is, accordingly, designed to reassure states that the power to determine aspects of education resides ultimately sovereign authority of national governments.<sup>954</sup> In this regard, the Committee recommends the development of flexible educational methods that allow for a degree of “adaptation”, both to religious and cultural practices and the local needs of employers/industry.<sup>955</sup> While the Kingdom has not formally acceded to this baseline treaty, it is arguable that has already taken measures which are substantially compliant with, and perhaps go even further than, ICESCR’s recommendations in the sphere of education.<sup>956</sup>

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<sup>951</sup> *ibid*

<sup>952</sup> *Ibid*. See also Syliva Chant, ‘Women-headed households: Poorest of the poor? Perspectives from Mexico, Costa Rica, and the Philippines’ (1997) 28(3) Institute for Development Studies Bulletin 26, 48

<sup>953</sup> General Comment 13, *ibid*.

<sup>954</sup> *Id*. See generally, Maan Bin Abdul Haq Arif Khutani, ‘Educational rights for women in Islamic and international human rights law: a study of theory and its application in Saudi Arabia’ (DPhil Thesis, University of Wollongong 2013) 92

<sup>955</sup> Roberta Pennington, ‘Saudi plans major overhaul to poorly performing education system’ (The National, 11 December 2017)

<sup>956</sup> Jason Morgan-Foster, ‘Third Generation Rights: What Islamic Law Can Teach the International Human Rights Movement’ (2005) 8(1) Yale Human Rights and Development Journal 76, 116. See also Birutė Pranevičienė and Aurelija Pūraitė, ‘Right to Education in International Documents’ (2010) 3(121) Jurisprudence 133, 156 <<https://www.mruni.eu/upload/iblock/e91/8praneviciene,%20puraite.pdf>> See also Convention against Discrimination in Education (adopted 14 December 1960, entered into force 22 May 1962) 429 UNTS 93(UNESCO).

Before considering the measures taken to promote equality among the genders in the educational sphere, it is worth highlighting the general measures taken by Saudi Arabia to promote education for its society, and how these may impact the position of women in the country. As of 2019, the Kingdom has continued to prioritise education as a centrepiece of its economic modernisation reform program.<sup>957</sup> A staggering figure of \$51 billion has been allocated for educational policy (up from \$35 billion in 2011). A recent report states that the capital being invested in education is the ‘highest allocation for any sector (in Saudi Arabia), representing 21 percent of fiscal spending and 7 percent of total GDP.’<sup>958</sup> In the above regard, the Kingdom has made several efforts to improve the physical and economic accessibility of education, namely by increasing the number of public and private educational institutions which operate in Saudi Arabia.<sup>959</sup> Most government universities offer subsidised or tuition-free education and all Saudi citizens enjoy free access and other benefits (such as a stipend for accommodation or class materials). In many cases, international students are also eligible for free tuition, with the exception of some specialist degrees in areas such as petroleum and health. There is nothing within these policies that suggest women will not be granted access to these entitlements on a fair and equal basis.

The picture is less rosy when it comes to educational outcomes. Saudi Arabia has consisted ranked at the bottom of international assessment rankings.<sup>960</sup> Nonetheless, some progress has been made in the effort to level-up the quality of education, and 7 Saudi universities are ranked in the QS World University Rankings.<sup>961</sup> There is also some evidence to suggest that certain Universities are become leaders in areas of national importance, such as oil and gas. The Education Minister has made statements acknowledging significant failings in existing models of education and has called on authorities to ‘rethink education from preschool through

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<sup>957</sup> Roberta Pennington, ‘Saudi plans major overhaul to poorly performing education system’ (The National, 11 December 2017)

<sup>958</sup> Cited in Saudi education sector primed for private investment – Arabian Business and Industry (June, 2019) < <https://www.arabianbusiness.com/education/422287-saudi-education-sector-primed-for-private-investment>>

<sup>959</sup> IMF Report -Saudi Arabia 2019 Article Iv Consultation—Press Release and Staff Report, IMF Country Report No. 19/290 (September 2019)

<sup>960</sup> Roberta Pennington, ‘Saudi plans major overhaul to poorly performing education system’ (The National, 11 December 2017) < <https://www.thenational.ae/uae/saudi-plans-major-overhaul-to-poorly-performing-education-system-1.683557>>

<sup>961</sup> Ali Arabkheradmand, et al, ‘International Student Recruitment in Higher Education: A Comparative Study of the Countries in the Middle East.’ (2014) 8(10) International Journal of Social, Behavioral, Educational, Economic, Business and Industrial Engineering 3003, 3004



graduate schools.’<sup>962</sup> In these statements, the Minister has proposed an integrated approach to education policy based on a recognition that the country’s long-term economic and social growth will depend, both, on improved educational standards and diversification of the labour market. In this regard, the Saudi Education Policy identifies a clear link between education and economic development.

Forming scientific skills and attending to applied sciences in school to give the student the chance to practice handicraft activities, participate in production, and acquire experience in laboratories, construction work and farms... Studying the scientific principles of various activities so that the level of mechanical production will attain progress and invention.<sup>963</sup>

In a further step, the Saudi Arabian General Investment Authority (SAGIA) has taken steps to liberalise, and therefore open up market access, to education services. Several market access-impeding rules have been reformed and, as of the first financial quarter in 2019, there has been a reported 800% increase in the number of education-related companies licensed to operate in Saudi Arabia. <sup>964</sup>There have also been attempts to improve training and e-learning opportunities. These initiatives are designed to broaden access to further education for previously disadvantaged groups; a measure which may ultimately embolden women with family responsibilities to pursue career and educational opportunities from their homes. In an important step, the education ministry has partnered with industry giants such as Intel and Microsoft in a bid to establish the Kingdom as a regional leader in e-learning. Aljaber has said the following on these developments:

As one of the top ICT markets in the Middle East, Saudi Arabia’s projected e-learning growth raised the prospects of educational diversification at the same time as simultaneously attracting more international students into the kingdom. This move has widely boosted the government’s efforts towards eliminating

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<sup>962</sup> Ibid (quote from speech given by Dr Ahmed bin Mohammed Al-Issa at Yidan Prize Summit, Hong Kong, 11 December 2017)

<sup>963</sup> International Bureau of Education, ‘A National Report about Education in Kingdom of Saudi Arabia’ (UNESCO, 2001) <[http://www.ibe.unesco.org/International/ICE/natrap/SArabia\\_E\\_Scan\\_1.pdf](http://www.ibe.unesco.org/International/ICE/natrap/SArabia_E_Scan_1.pdf)>.

<sup>964</sup> Saudi private sector education demand to double by 2030: Colliers – Argaam Note (June , 2019) <https://www.argaam.com/en/article/articledetail/id/614121>

barriers to education, most of which are established along gender and religious lines.<sup>965</sup>

## 6.2.2 Saudi Educational Policy and International Norms of Social and Economic Rights

The above discussed initiatives appear to substantiate Saudi Arabia's commitment to free and equal access to high quality, cross-disciplinary, flexible and forward-looking education. We can draw here on criticisms of an empty "culture of formalism" that has sometimes skewed the way in which commentators approach the issues of the Muslim world's participation in the international legal order. This culture of formalism is best described by Marti Koskeniemi when he admonishes the tendency to treat international law as little more than a 'framework for deferring substantive resolution,' whereby a commitment to international human rights values is based on mechanistic processes of treaty-making, committees and other bureaucratic processes.<sup>966</sup> In this regard, Saudi Arabia may well be viewed as a case study of the gap between, on the one hand, 'empty' human rights rhetoric (whereby states benefit from the patina of legitimacy through their formal participation in international treaty frameworks) and, on the other, the actual day-to-day business of governing in the benefit of society.<sup>967</sup> It is entirely possible to argue that state practice in Saudi Arabia could, as a matter of law and principle, be substantially aligned with international norms, but done in a way that does not compromise the integrity and supremacy of *Sharia* under its domestic law.<sup>968</sup> The reality for women in Saudi Arabia may, however, indicate otherwise. At the very least, two further questions can be asked. Firstly, have Saudi Authorities taken adequate measures to eliminate or reduce forms of discrimination against women. Secondly, are these forms of discrimination prescribed or otherwise justified by mainstream interpretations of *Sharia* or are these gendered

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<sup>965</sup> Abdullah Aljaber, 'E-learning policy in Saudi Arabia: Challenges and Successes,' (2018) Research in International and Comparative Education 176 (online) <<https://journals.sagepub.com/doi/full/10.1177/1745499918764147>>

<sup>966</sup> Martti Koskeniemi, *The Gentle Civilizer Of Nations: the rise and fall of international law 1870-1960* (200) 500

<sup>967</sup> Martti Koskeniemi, *The Fate of Public International Law: Between Technique and Politics*, (2007) 70 Modern Law Review 1. See also Nikki R Keddie, *An Islamic Response To Imperialism: Political And Religious Writings Of Sayyid Jamal Ad-Din "Al-Afghani"* (UCP 1983) 107.

<sup>968</sup> Amnesty International, 'Saudi Arabia: Amnesty International Submission to the UN Universal Periodic Review, Fourth Session of the UPR Working Group of the Human Rights Council' (Report) (February 2009) AI-Index MDE 23/029/2008; OHCHR, 'Status of Ratifications'. See also CB Lombardi, 'Constitutional Provisions Making Sharia "A" Or "The" Chief Source Of Legislation: Where Did They Come From? What Do They Mean? Do They Matter?' (2013) 28(3) American University International Law Review 733, 746

practices better described as expressions of cultural norms and prejudice that are nonetheless routinely disguised as having a basis in religious law and obligation.

Putting these questions aside for a moment, it is possible to start from a “top-down” “constructivist”, and ultimately positive, view of the normative influence of the international human rights discourses.<sup>969</sup> As Anne Marie Slaughter and other cohorts of “process theory”<sup>970</sup> have postulated, international decision-making processes can exert a significant “compliance power” on ‘illiberal’ states.<sup>971</sup> International discourses on human rights can establish a political consensus around which states converge and thereby exercise “soft” influence on powers that do not wish to fall out of step with shared values of an “international community.”<sup>972</sup> In this regard it is notable that Saudi Arabia has identified gender inclusion as a centrepiece of its reform strategy. As well as ratifying the Convention on the Elimination on Discrimination and implementing several reforms to male guardianship system, the 2030 Saudi Vision makes several references are made to the importance of education, especially in respect of the education and employment of women.<sup>973</sup> According to Philip Alston, Special Rapporteur on Human Rights for the UN:

If it is to succeed fully, Vision 2030 should also be seen as a transformational opportunity to enhance gender equality, especially of women and girls in the lower-income quintiles. Recent Saudi history teaches us that the lifting of traditional cultural restrictions on women greatly enhances the prospects of economic and societal progress. The 2012 decision to allow women to work in the retail sector, such as supermarkets, transformed public spaces and enabled millions of women to enter the labour force.<sup>974</sup>

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<sup>969</sup> See generally, Jutta Brunnée and Stephen J Toope, ‘International Law and Constructivism: Elements of an Interactional Theory of International Law’ (2001) 39 *Columbia Journal of Transnational Law* 19

<sup>970</sup> See e.g. Anne-Marie Slaughter, ‘Global Government Networks, Global Information Agencies, and Disaggregated Democracy’ (2003) 24 *Michigan Journal of International Law* 1041 and Harold Koh, ‘Why Do Nations Obey International Law?’ (1997) 106 *Yale Law Journal* 2101

<sup>971</sup> See on this Gerry Simpson, (ed.) *Great powers and Outlaw Nations* (ed.2004) 171.

<sup>972</sup> *ibid*

<sup>973</sup> Kingdom of Saudi Arabia Government, ‘National Transformation Programme 2020’ <[http://vision2030.gov.sa/sites/default/files/NTP\\_En.pdf](http://vision2030.gov.sa/sites/default/files/NTP_En.pdf)>

<sup>974</sup> ‘End of Mission Statement Special Rapporteur on Extreme Poverty and Human Rights, Professor Philip Alston on his visit to Saudi Arabia’ (OHCHR, 19 January 2017) <<http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=21094>>

Considered in this way, Saudi Arabia's commitment to establish equal rights to education and labour can be seen to be entirely consistent with Islamic law's conception of common welfare, while also sharing a common goal with the overarching objective of international human rights law – the elimination of all forms of discrimination.<sup>975</sup> It is also possible to contend that informal processes of norm formation in a globalizing world can shape social attitudes from the ground up. Recent statistics indicate that total of 24,498 female students were enrolled in higher education in 2014, with a total of 16,221 females reported to have undertaken Master's studies and a gross figure of 1,744 women enrolled in PhD programs as of 2014.<sup>976</sup> A high number of Saudi students enrol into international programs dispersed across 57 countries.<sup>977</sup> Governmental statistics indicate that 6,754 Saudi female students were enrolled in educational programs in Europe, and a gross figure of 18,221 female students in the United States.<sup>978</sup> At home, internet use in Saudi Arabia is the highest in the region, exposing to Saudi citizens to non-traditionalist 'foreign' ideas, images and influences. Reflecting on the 2030 Vision, Kinninmont notes:

[t]he new Saudi leadership sees a significant youth constituency that wants greater social freedoms, and that, at least in some areas, it is willing to meet their aspirations despite the objections of the traditionally powerful religious constituencies.<sup>979</sup>

This suggests that international discourses on gender that develop around formal juris-generative processes such as CEDAW treaty making processes may have a transformative effect: states have not only given their consent to be bound by international norms, these norms are also internalised from within the societies in which such norms are adopted.<sup>980</sup>

Regardless of how one might wish to explain or justify Saudi Arabia's commitments to education and labour sectors – that is, as primarily motivated by economic, political or religious

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<sup>975</sup> *ibid*; Mashood A Baderin, *International Human Rights and Islamic Law* (OUP 2003) 40.

<sup>976</sup> "More Women than Men in Saudi Universities, Says Ministry," *Al Arabiya*, May 28, 2015, <http://english.alarabiya.net/en/perspective/features/2015/05/28/More-women-than-men-in-Saudi-universities-says-ministry.html>.

<sup>977</sup> *ibid*

<sup>978</sup> *ibid*

<sup>979</sup> Jan Kinninmont, 'Vision 2030 and Saudi Arabia's Social Contract: Austerity and Transformation' (Chatham House, 2017)

<sup>980</sup> Judith Resnik, "Living Their Legal Commitments: Paideic Communities, Courts, and Robert Cover," (2005) 17 *Yale J.L. & Human.* 17, [describing 'the interactions between the state and paideic communities—and with the potential for such interactions themselves to be jurisgenerative moments']. *Id* at 26.

considerations – there is evidence of a “gap” between the Kingdom’s policy ideals and educational outcomes in reality.

Despite its policy commitments, Saudi Arabia ranks poorly on all indices of educational ranking systems, despite its relative wealth.<sup>981</sup> It is important to consider why this should be the case, given the high-levels of investment in education. Some commentators have contended that Saudi Arabia’s education system continues to perform relatively poorly because of certain (culturally entrenched) attitudes to education. To this point, scholars such as Courington and Alyami, have contended that the gap in educational standards are a consequence of a curriculum that remains focused on religious education and rote learning.<sup>982</sup> Despite acknowledging failures in educational policy, the Saudi ministry of education has resisted making comprehensive reforms to compulsory religious education, with adverse implications on the preparedness of Saudi graduates for the labour market. Again, such reforms may result in confrontations with the religious establishment, with Wrey positing the following:

Therein lies the dilemma facing Prince Mohammed. He knows that only a change in the ethos and structure of the education system, with much improved provision of science- and technology-based curricula, can prepare young Saudis for jobs in the new industries he envisages. But he is well aware that this will inevitably lead to tensions with the clerics whose support for the House of Saud is predicated on their control of the judiciary and education.<sup>983</sup>

This tension between the reformist and traditionalist voices in Saudi Arabia have continued to hamper attempts to implement more radical changes to educational policy.<sup>984</sup> There is a

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<sup>981</sup> Roberta Pennington, ‘Saudi plans major overhaul to poorly performing education system’ (The National, 11 December 2017) < <https://www.thenational.ae/uae/saudi-plans-major-overhaul-to-poorly-performing-education-system-1.683557>>

<sup>982</sup> Karen Courington and Vanessa Zuabi, ‘Calls for Reform: Challenges to Saudi Arabia’s Education System’ (2011) 12(2) *Georgetown Journal of International Affairs* 137-144; Rfah Hadi Alyami, ‘Educational Reform in the Kingdom of Saudi Arabia: Tatweer Schools as a Unit of Development’ (2014) 5(2) *Literacy Information and Computer Education Journal* 1515-1524

<sup>983</sup> Max Wrey, ‘Saudi education set to hamper reform goals’ (Financial Times, 29 June 2016) <<https://www.ft.com/content/febb3cfb-85be-32d7-aa75-e92d25d570b2>>;

<sup>984</sup> See Ann Elizabeth Mayer, ‘Cultural Particularism as a Bar to Women’s Rights: Reflections on the Middle Eastern Experience’ in Julie Peters and Andrea Wolper (eds) *Women’s Rights, Human Rights: International Feminist Perspectives* (Routledge 1995) 176, 177. For an economic perspective see Jason Tuvey of Capital Economics, quoted in Gavin O’Toole, ‘Can Saudi Arabia’s economic reforms succeed?’ (Al Jazeera, 2017) <<https://www.aljazeera.com/news/2017/11/saudi-arabia-economic-reforms-succeed-171125070840859.html>>

legitimate criticism to be made, however, around attempts to weaponise the language of human rights to compel states to reform or displace local and religious educational practices. Sudanese Judge Abdullahi Ahmed Na'im has advocated the position that there is no legitimate basis for international bodies to comment on the content of religious education.<sup>985</sup> Indeed, Na'im suggests that Saudi Arabia's decision to exercise strict control over the "content" of school curricula (including the mandatory and "rote" learning of the *Qur'an*) is an inevitable rebuke of orientalist attempts to impose culturally specific ideas about education that are remote from, or unacceptable, to large swathes of Saudi society.<sup>986</sup> But how far should local culture be relevant when determining the quality and access to education for women. These issues are taken in turn in the following section.

### 6.3 Saudi Arabia and CEDAW requirements on Gender Discrimination

Saudi Arabia ratified the UN Convention on the Elimination of all Forms of Discrimination against Women in 2001.<sup>987</sup> Prior to this, Saudi Arabia also became Party, through process of ratification, to an earlier instrument known UNESCO Convention Against Discrimination in Education in 1973.<sup>988</sup> The UNESCO Convention identifies non-discrimination as central underpinning principle of the Right to Education. Per these treaty commitments, Saudi has an obligation to eliminate any discrimination based on gender (as well as race etc.) under CEDAW, providing these do not directly contravene norms of *Sharia*.<sup>989</sup> This takes us to the core tension between Saudi Arabia's modernising and reformist impulses. As Badarin suggests that the main point of departure between Islamic law and International Human Rights law 'is the political will on the part of Muslim states to be committed to the fulfilment of their international human rights within their Islamic cultural and legal dispensations.'<sup>990</sup> It is on the

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<sup>985</sup> Abdullahi Ahmed An-Na'im, *Islam and the Secular State: Negotiating the Future of Sharia* (HUP 2008).

<sup>986</sup> Ibid. Abdullahi Ahmed An-Na'im, 'The Islamic Counter-Reformation' (2002) 19(1) *New Perspectives Quarterly* 31-32. For a theory discussion, See also David A Westbrook, 'Islamic International Law and Public International Law: Separate Expressions of World Order' (1993) 33 *Virginia Journal of International Law* 819, 860

<sup>987</sup> List of State Parties, see [Convention on the Elimination of All Forms of Discrimination against Women](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8&chapter=4&clang=_en) [https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-8&chapter=4&clang=\\_en](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8&chapter=4&clang=_en)

<sup>988</sup> For a list of state Parties see, <http://www.unesco.org/eri/la/convention.asp?order=alpha&language=E&KO=12949>

<sup>989</sup> As discussed in the previous chapter, Saudi Arabia has entered a broad reservation to the treaty. The substance of this reservation is that the Kingdom does not consent to being bound to any rule or provision deemed to violate fundamental principles of Sharia. Any treaty obligation understood to contravene these precepts will be regarded as null and void under domestic aspects of Saudi law and policy

<sup>990</sup> Mashood A Baderin (ed), *International Law and Islamic Law* (2<sup>nd</sup> edn, Routledge 2016) 31.

question of whether religious restrictions can be legitimately imposed on women, as a matter of state or customary law, that we find a potential collision between Saudi Arabia's Islamic traditions and the overarching aims of CEDAW.

Per Saudi Arabia's *Sharia* related reservations to CEDAW, it is necessary to return the focus on a women's right to education, in law and in fact, under various positive (regulatory) aspects of the Saudi system. This paves the ground for an assessment of the apparent gap between the 'ideal' of equality in education under Islamic and Saudi law and remaining social and customary barriers impacting the way women exercise this right in practice.

### 6.3.1 Gender (In)Equality under Saudi Education Policy

In line with Vogel's assessment of the dual aspect of the Saudi legal system, many aspects of Saudi Arabia educational policy are, directly or indirectly, influenced by Islamic law and tradition.<sup>991</sup> Prior to this introduction of a state education system, Saudi women were granted limited access to education which mainly consisted of religious class and recitation of the *Qur'an*. By the time girls reached puberty, a strict policy of segregation was enforced. As a results, girls were largely educated in the private confines of the family home. In the first significant reform, the late King Faisal bin Abdulaziz Al Saud established the first public school for girls.<sup>992</sup> In his public statements, King Faisal addressed the religious question, noting that enhanced educational opportunities for women were consistent with the textual edits of the *Qur'an*:

Is there anything in the Holy Qur'ān which forbids the education of women?  
...We have no cause for argument, God enjoins learning on every Muslim man  
and woman.<sup>993</sup>

However, the justification given for public schooling of women appeared to primarily rest on the link between public schooling and religious education. At this time, many resisted public

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<sup>991</sup> See n 76

<sup>992</sup> Amani Hamdan, 'Women and Education in Saudi Arabia: Challenges and Achievements' (2005) 6(1) International Education Journal 42, 64,

<sup>993</sup> *ibid*

schooling for women based on fears that this would undermine traditional values, including the sanctity of the family home. In this social-political organisation, a female could further cement her role of raising devout and morally respectable children, reinforcing the traditional gendered division of labour in the family home as the basis of a well-ordered, cohesive and morally robust society.<sup>994</sup> Given that males were the perceived as the natural bread-winners, parents were more likely to devote their financial resources to improving the educational prospects of their sons and heirs. In rural and low-income families especially, daughters received an informal education in religious literacy and home-making.<sup>995</sup>

Later efforts to introduce comprehensive public schooling for girls brought about a gradual change in cultural acceptance of women's education. In 2003, several by-laws were issued by the Higher Education Council that established for the first time the right of free primary education for all children aged between 6 and 15. For the first time in the Kingdom's history, females were given equivalent rights to receive free education in primary and secondary schools without discrimination. Some studies indicate that the Saudi government had made significant progress in implementing the equal provision of education for all young children, without discrimination.<sup>996</sup> A UNESCO report published this year indicates that Saudi Arabia, like other Arab states, has made great strides in accomplishing targets for universal primary school enrolment in line with international guidelines in this area.<sup>997</sup> State finance and public out-reach measures, countries such as Saudi Arabia have succeeded in reducing female drop-out rates, including by extending the age of compulsory education to the age of 15. Human Rights Watch confirms the positive impact of the law, and highlights a five-fold increase in female literacy rates in the Kingdom since 1970.<sup>998</sup>

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<sup>994</sup> Syliva Chant, 'Women-headed households: Poorest of the poor? Perspectives from Mexico, Costa Rica, and the Philippines' (1997) 28(3) Institute for Development Studies Bulletin 26, 48.

<sup>995</sup> Reema Alsweel, 'Education and the Role of Women in Saudi Arabia' (DPhil Thesis, George Mason University 2012) 5

<sup>996</sup> Amani Hamdan, 'Women and Education in Saudi Arabia: Challenges and Achievements' (2005) 6(1) International Education Journal 42. See also UNESCO Arab Regional Education Support Strategy 2016-2020 (2016)

<sup>997</sup> United Nations Economic and Social Commission for Western, - 'Against Wind and Tides: A Review of the Status of Women and Gender Equality in the Arab Region,' 2016, UN Report, E/ESCWA/ECW/2015/3) at 32-34.

<sup>998</sup> Farida Deif, 'Perpetual Minors: Human Rights Abuses Stemming from Male Guardianship and Sex Segregation in Saudi Arabia' (HRW, 2008)



Due to legally enforced system of gender segregation of males and females of a marriageable age, the Kingdom was slow to create opportunities for higher or tertiary education for girls. The first girls' polytechnic was established in 1970 in Riyadh. By the 1980s, ten more segregated colleges offering courses on languages, nursing, dentistry, geography, public administration, agriculture, home economics and education.<sup>999</sup> Scholars such as Yakin, have also noted rising number of females graduating since the 2004 law was first passed.<sup>1000</sup> As noted in Chapter 1, the Ministry of Education published statistics in 2016 indicating that in the Saudi Arabia there are more women studying in universities than men; more specifically, women constituted 51.8 per cent of Saudi university students. Prince Nora bint Abdul Rahman University is currently the largest women-only university in the world. Thus, it is also noted in Chapter 1 that in 2004, 79 per cent of all PhD degrees awarded in the Kingdom went to female research students. There are studies which suggest that affluent families within Saudi Arabia have largely benefited from social and political changes in Saudi society. A number of girls from elite families within the larger make-up of Saudi society have pursued education outside the Kingdom thereby exercising control and freedom over the quality of education available to them.<sup>1001</sup>

However, there have been suggestions that women's educational facilities are generally of lower quality in teaching and resources than those made available to men.<sup>1002</sup> This would appear to flout the non-discrimination provisions of CEDAW which require men and women share equal access to the 'same curricula, the same examinations, teaching staff with qualifications of the same standard and school premises and equipment of the same quality.'<sup>1003</sup> Another report indicates that with literacy rates of women above age of 15 are placed at 78.4%, compared to 88.6% for men. However, while male attendance at secondary school has reached 100% percent, this figure is lower for females (with compulsory enrolment for females in secondary education reaching 99.3%).<sup>1004</sup>

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999 UNCHR 'Report of the Special Rapporteur on Violence against Women, Its Causes and Consequences' (2009) UN Doc A/HRC/26/38 art 8.

1000 UNCHR, 3

<sup>1001</sup> Education for All: Literacy for Life' (UNESCO, 2006) <<http://unesdoc.unesco.org/images/0014/001416/141639e.pdf>>

1002 Madawi Al-Rasheed M, *A Most Masculine State Gender, Politics and Religion in Saudi Arabia* (CUP 2013) 12

<sup>1003</sup> Sifa Mtango, 'A State of Oppression – Women's Rights in Saudi Arabia' (2004) 5(1) *Asia-Pacific Journal on Human Rights and the Law* 49,56-57

Subject to Article 2 of CEDAW, member states are obligated to establish institutional and legal protections to women including by abolishing discriminatory law. Further to this, states are obliged to promote ‘equality between men and women in all spheres of life.’<sup>1005</sup> This supports the analysis in Chapter 5 where it was suggested that state measures aimed at eliminating discrimination in the sphere of education cannot be achieved in isolation from other aspects of law and policy which restrict a women’s participation in public life, or otherwise limit their ability to exercise “voice” or control over aspects of their personhood and family life. As one theorist puts it, ‘the importance of the right to education lies both in the importance of education in and of itself, and in its ability to contribute to the enjoyment of other human rights.’<sup>1006</sup>

This bears relevance to the foregoing discussion because, as alluded to in previous chapters, aspects of Saudi law and informal system of religious juristic practice have historically impeded women’s rights in more or less direct ways. It is necessary therefore to examine whether Saudi Arabia has effectively discharged its obligations under CEDAW to eliminate and tackle discrimination.

### 6.3.2 Direct and Indirect Discrimination

It remains open to question whether Saudi Arabia has eliminated all direct forms of gender discrimination in accordance with Article 2 of CEDAW. The Ministry of Education remained committed to gender inclusion and a number of measures have been put in place to increase participation of women in certain aspects of public life, including the appointment of 30 women to the *Shura* Council (an assembly which Saudi law-makers are required to consult before passing new legislation).<sup>1007</sup> Women are now permitted to practice law and may testify in courts. Notwithstanding these stand-alone policies, a number of ‘legislative, social, educational and occupational constraints [which] prevent women from fully participating in the

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<sup>1004</sup> United Nations Economic and Social Commission for Western, - ‘Against Wind and Tides: A Review of the Status of Women and Gender Equality in the Arab Region,’ 2016, UN Report, E/ESCWA/ECW/2015/3) at 32-33

<sup>1005</sup> Sifa Mtango, ‘A State of Oppression – Women’s Rights in Saudi Arabia’ (2004) 5(1) Asia-Pacific Journal on Human Rights and the Law 49, 50.

<sup>1006</sup> Ben Saul, David Kinley and Jaqueline Mowbray, *The International Covenant on Economic, Social and Cultural Rights: Commentary, Cases and Materials* (OUP 2014) 1086.

<sup>1007</sup> King Al-Saud issued a statement before reforming appointment practices, saying: “Because we refuse to marginalize women in society in all roles that comply with sharia (Islamic law), we have decided, after deliberation with our senior ulama (clerics) and others... to involve women in the Shura Council as members, starting from the next term,” cited in Frank Gardner, ‘King Appoints Women to Shura Council’ *BBC* (London, 11 January 2013) <<http://www.bbc.com/news/world-middle-east-20986428>>

development process of their country.’<sup>1008</sup> Under the previous system, women could not obtain civil and identification documents with the consent of a guardian under Article 76 of the Civic Affairs; Article 7 of the Political and Private Passports Law and Articles 5, 8 and 9 of the Bylaw of the Travel Documents Law.<sup>1009</sup> The effect of this legislation continues to impede the free movement of Saudi Arabian women.<sup>1010</sup> Another problematic example can be found in section 155 of the Education Policy. This provision prohibits the co-mixing of male genders in almost all levels of education, with the exception of pre-school learning below the age of 5.<sup>1011</sup> This policy offers an illustration of the ways in which religious and customary norms have been enforced as state policy. Policies such as these have proved potentially detrimental to educational prospects of women, impairing their ability to obtain financial assistance or travel to university without a guardian’s consent.

As Saudi Arabia has ratified the CEDAW,<sup>1012</sup> it is obliged to comply with Article 9 of the CEDAW Convention which calls for measures to eliminate discrimination against women in the field of education.<sup>1013</sup> Pursuant to Article 10 of CEDAW, the state of Saudi Arabia has a treaty obligation to implement all necessary measures to ‘eliminate discrimination against women thereby engendering equal rights of access and treatment for men and women.’<sup>1014</sup> It is open to question whether Saudi Arabia has taken the necessary measures to both ensure that women are subject to unequal or discriminatory treatment which is not justified by a necessary public policy aim. This brings the reader into confrontation the extent to which the Saudi government may have been to justify these (ostensibly) gendered restrictions as falling under the legitimate scope of Saudi Arabia’s CEDAW reservations. From the outset, it is necessary to establish that mere differential treatment may not be sufficient to establish “discrimination” unless it could be shown that differences in educational practice has some detrimental impact

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<sup>1008</sup> SF Rajkhan, ‘Women in Saudi Arabia Status, Rights, and Limitations’ (MA Thesis, University of Washington Bothell 2014)

<sup>1009</sup> Bureau of Democracy, Human Rights and Labor, Country Reports On Human Rights Practices For 2011, (United States Department Of State, 2012) 17.

<sup>1010</sup> ‘Second Report on the Status of Human Rights in the Kingdom of Saudi Arabia’ (The National Society for Human Rights, 1431AH/2010)

<sup>1011</sup> CEDAW, art 10(b).

<sup>1012</sup> Convention on the Elimination of all Forms of Discrimination against Women (adopted 18 December 1979, entered into force 3 September 1981) UNGAOR Res 34/180 (CEDAW) art 20.

<sup>1013</sup> *ibid*, art 9.

<sup>1014</sup> *ibid*, art 10.

on educational access, quality or outcome.<sup>1015</sup> These issues have yet to be tested in the Saudi courts.<sup>1016</sup> Nonetheless, it is given the above, it is difficult to avoid the conclusion that a rule requiring women to seek guardian consent before they are permitted to obtain civil documents, or travel educational facilities would constitute a form of direct discrimination, since male students are not subject to the same requirement. Consider now the fact that literacy rates of women above age of 15 are placed at 78.4%, compared to 88.6% for men. Can the lower rate of literacy be considered causally related to, for instance, the restrictions on gender mixing which apply to both genders but which are more likely to disadvantage women and therefore a form of indirect discrimination? And, going further, would the same legal reasoning be applicable to other informal cultural practices that are legitimated by the courts, or on which the Saudi government purports to take a 'neutral' position.<sup>1017</sup>

Evidently, it is difficult to establish a clear causal link between certain customary practices, for instance, those that reinforce the traditional attitudes to a women's role in the home, and its potential impacts on female literacy rates, in the past, or on future generations. In recognition of the politically charged nature of these issues, the United Nations Sub-Commission on the Prevention of Discrimination does not provide for a definition of 'discrimination'. The Human Rights Committee's General Comment No. 18 has also taken a rather ambivalent position on the nature and definition of discrimination and states, instead, that 'the enjoyment of rights and

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<sup>1015</sup> Ekaterina Y Krivenko, *Women, Islam and International Law within the Context of the Convention on the Elimination of All Forms of Discrimination against Women* (Brill 2009) 112

<sup>1016</sup> Broadly speaking, direct discrimination is said to have occurred when an individual is treated less favourably on the grounds of prohibited criterion, such as ethnic origin, gender, disabilities etc., that a person would such characteristic would have been in a comparable situation. This is the definition provided for under section 13 of The UK Equality Act 2010. most obviously if, for instance a male student was afforded a privilege or some other form of preferential treatment to a woman in a comparable situation. The preference may have occurred in the past, present or even in a hypothetical future scenario. As Maliszewska-Nienartowicz notes:

'the causation of the less favourable treatment and comparability of situations play an important role in the context of direct discrimination.....consequently in context of direct discrimination the link with the ground on which it is based is strong both in form and in substance.' Justyna Maliszewska-Nienartowicz, 'Direct and Indirect Discrimination in European Union Law – How to Draw a Dividing Line?,' (2014) 2(1) *International Journal of Social Sciences* 41, 43. By contrast, indirect discrimination occurs when a provision, practice or criteria which is neutral on the face of it, nonetheless has the effect of disadvantaging a particular group such as women relative to the position of another in comparable situation. Using the jurisprudence of the Court of Justice as a guideline, a measure or provision may not necessarily fall foul of CEDAW's non-discrimination protections if it can be shown that they are 'objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.' See the decision in *Teuling*, 30/85 [1987] ECR 249

<sup>1017</sup> Frances Raday, 'Gender And Democratic Citizenship: The Impact Of CEDAW' (2012) 10(2) *International Journal of Constitutional Law* 512

freedoms on an equal footing...does not mean identical treatment in every instance.’<sup>1018</sup> One illustration of the arms-length approach by human rights bodies can be seen in the CEDAW Committee decision in *Rahime Kayhan v. Turkey* where the CEDAW Committee has shown itself reluctant to interfere in state processes by classifying certain practices discriminatory.<sup>1019</sup>

A further complicating factor is that no sharp distinction between formal and informal practices in the context of direct and indirect discrimination. Discriminatory cultural practices and attitudes around, for example, the domestic responsibilities of women have sometimes been given force in *Sharia* courts, in Saudi Arabia and beyond.<sup>1020</sup> A Public Court in Riyadh ruled that a woman was not prohibited to seek employment without the permission of her husband.<sup>1021</sup> Under these traditional rulings, a woman cannot leave home without just cause (as defined by standards of customary interpretations of *Sharia*), and courts have sanctioned women for checking into hotels alone,<sup>1022</sup> renting accommodation, or travelling abroad without their *mahram's* permission.<sup>1023</sup> This is by no means a phenomena unique to Saudi Arabia or the Arab world. A Philippines trial court upheld discriminatory provisions relating to a women’s right to seek divorce on the Islamic grounds that the measure was based on a legitimate policy aim and therefore a ‘necessary and practical’ measure for ensuring harmony and stability in the family home.<sup>1024</sup>

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<sup>1018</sup> Li Weiwei, ‘Equality and Non-Discrimination Under International Human Rights Law’ (Research Notes, Norwegian Centre for Human Rights 2004) 7, 14.

<sup>1019</sup> *Rahime Kayhan v. Turkey* CEDAW ‘Communication No 8/2005’ (27 January 2006) UN Doc CEDAW/C/34/D/8/2005. The complainant, a female Turkish teacher had been dismissed from her teaching position, submitted a communication to the Committee on the Elimination of Discrimination against Women under the optional Protocol (which Saudi Arabia has not yet ratified). In the submissions put before the Committee. Ms Kayhan stated by dismissing her for refusing to stop wearing a headscarf, Turkey was in breach of article 11 of the Convention, and had violated ‘her right to work, her right to the same employment opportunities as others, as well as her right to promotion, job security, pension rights and equal treatment.’ The Committee found the case to be inadmissible on the grounds that the complainant failed to exhaust all domestic remedies. The Committee also noted that the Committee would consider the discrimination as one that was more likely to succeed as discrimination based on gender, and not on religion. However, the position of the Committee appeared to be validated by the case of *Sahin v. Turkey* before the European Court of Human Right in Strasbourg (Ct. of Human Rights, App. No. 44774/98, 44 Eur. H.R. Rep. 99 (2005)) where the court ruled that Convention for the Protection of Human Rights and Fundamental Freedoms was not violated, nor could discrimination be established on grounds of gender discrimination simply because a secular country places a ban on wearing religious clothing in institutions of higher education. Arguably, the decision not to find for discrimination was itself based on an ethno-centric position on the undesirability or subjugation imposed on women by dint of wearing the hijab.

<sup>1020</sup> ‘Conformity of the Saudi Rules and Regulations with the Convention on Basic Human Rights’ (National Society for Human Rights, 2008) 196, 198.

<sup>1021</sup> Decision No 3/334 (21/12/1436 H SA), Judicial Judgments Journal (1<sup>st</sup> edn, 1428 H) 284, 286.

<sup>1022</sup> Andrew Hammond, ‘Saudi Arabia Opens Its First Women-Only Hotel’ *Independent* (Riyadh, 20 March 2008) <<http://www.independent.co.uk/news/world/middle-east/saudi-arabia-opens-its-first-women-only-hotel-798417.html>>

<sup>1023</sup> Mtango (n904).

<sup>1024</sup> Tamar Ezer and others, ‘Protecting Women ’S Human Rights: A Case Study in The Philippines’ (2011) 18(3) Human Rights Brief 1, 4.

If the relation between a state's obligation under international law and the domestic (judicial) enforcement of *Sharia* exists in tension with the other, it can also be said that the relation between religion and culture is equally elusive. Islam establishes its own independent validity criteria which exists independently of anyone legal system. At the same time, the application of *Sharia* in local contexts is always already somehow informed by historic and cultural factors. How, then, can Islam provide independent standards by which to critique social and legal practices within Islamic societies? The tendency to confuse law and culture brings criticism from inside and outside the Islamic community. In order to discredit the claim that certain practices have been used to maintain male-domination or other discriminatory practices, religious authorities will emphasize the correctness of their interpretation of texts and the authenticity of the *hadiths* on which they rely.<sup>1025</sup>

In the above regard, Egypt has gone significantly further than Saudi Arabia in its explanation of the reasons why the concept of non-discrimination as the elimination of all legal inequality cannot be easily reconciled with the *Qur'anic* model of gender relations. In its reservation to Article 16 of CEDAW Egypt states that an Islamic idea of equality 'is not premised on the elimination of legal, political, economic and social distinctions based on sex', but rather the 'equality between the sexes...predicated upon "equivalency" and "complementarity" of rights and duties.'<sup>1026</sup> On this specific point, Baki stated that:

[t]he *Qur'an* gave women equal, but not identical, rights with men on personal, civil, social, and political levels...Neither the *Qur'an* nor the *Hadith* prevented women from joining in public life. However, the *Qur'an* did warn that the mixing of the sexes could lead to "seduction and the evil consequences that might follow."<sup>1027</sup>

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1025 Ismail K Poonawala, '9 Muhammad 'Izzat Darwaza's Principles Of Modern Exegesis: A Contribution Toward Qur'anic Hermeneutics, In G R Hawting and Abdul-Kader Shareef (eds), *Approaches To The Qur'an* (Routledge 1993) 225, 230.

<sup>1026</sup> Anjali Sara Bonner, 'Muslim States' Reservations to CEDAW and Possibilities for the Reconciliation of Shari'a Law with International Women's Rights Norms' (2009) 3 Hong Kong Journal of Legal Studies 27, 33,-34.

<sup>1027</sup> Roula Baki, 'Gender-segregated Education in Saudi Arabia: Its Impact on Social Norms and the Saudi Labor Market' (2004) 12(28) Education Policy Analysis Archives 1

This idea of equal but different treatment underpin the central concepts of Islamic law and has widely informed juristic processes in Saudi Arabia. This brings us to the question of whether gender restrictions impacting educational rights can be said to be based on a legitimate policy objective, in this case, respect for *Sharia*. In order to explore these issues, the next section identifies specific applications of unequal treatment in Saudi Arabia, and the religious justification on which they have been based. This will pave the way for a discussion of the extent to which these have been repealed or preserved, and with what implications for Saudi Arabia's commitments under CEDAW.

#### **6.4 The Relation between Saudi Law and International Law in Light of Islamic Practices**

Article 1 of CEDAW defines 'discrimination against women' as:

any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.<sup>1028</sup>

When considering the nexus between *Sharia* and International Law, many verses of Islamic emphasize the need for equality, solidarity and cooperation between the sexes, but there are also *Qur'anic* edits which underscore the differences between them, in law and obligations.<sup>1029</sup> To take one example outside the sphere of education, in Saudi Arabia, the right to marry without a guardian's consent or to determine the nationality of a child (depending on the father's identity) are not seen as private matters.<sup>1030</sup> Indeed, reforms to this area have been long resisted precisely because of the threat these would pose to the cultural identity of Saudi society. As such, there are aspects of Islamic male-women relation may appear problematic

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<sup>1028</sup> *ibid* 1.

<sup>1029</sup> For a parallel analysis, see Robert M Cover, 'Obligation: A Jewish Jurisprudence of the Social Order' (1987) 5(1) *Journal of Law and Religion* 65, 73.

<sup>1030</sup> Ziba Mir-Hosseini, 'Towards Gender Equality: Muslim Family Laws and the Shari'ah,' in Zainah Anwar (ed) *Wanted: Equality and Justice in the Muslim Family* (2009) (Musawah 2009) 31.

within the Islamic legal system of Saudi Arabia which may appear problematic from the standpoint of CEDAW's non-discrimination provisions.

It is also important to avoid the categorical mistake of treating Islamic law and of Saudi law as one and the same thing. The legal foundation of Saudi Arabia derives from *Sharia*, but practices of rule-interpretation do not exist in a socio-cultural vacuum. Moreover, Saudi Arabia has historically been associated with a particular school of Islamic jurisprudence or *fiqh*; one that has favour continuity with prophetic traditions. These can be contrasted with other madhabs (schools) that allow for a higher degree of rule-adaption in the face of social or economic need.

As discussed above, classical Islamic jurisprudence underwent a period of tremendous innovation in the 8<sup>th</sup> to 12<sup>th</sup> Centuries, many of their rulings and opinions acquired a fixity in the centuries that followed.<sup>1031</sup> From the 12<sup>th</sup> Century onwards, the differences between the schools deepened, often in ways that became more and more associated with particular regions and cultures. The Shafi and Maliki schools, for example, gave greater weight and authoritativeness to narrow methods of rule-adaption than the Hanbali school, which was predominant in Arabia became associated with a more literal and conservative strain of religious-legal thinking.<sup>1032</sup> Traditional interpretations of the *Qur'anic* text and the Prophetic tradition have acquired the status of informal customary (religious) law in and these norms have historically (and routinely) enforced as directly effective law by qadi courts and administrative agencies.

#### 6.4.1 The Guardianship Regime and Restrictions on Gender segregation

As noted in previous chapters, the doctrine of guardianship has, until the most recent reforms, been seen to legitimise men's authority over women as well as male-centric notion of citizenship and personhood. A rule requiring all females to be accompanied by a mahram was enacted as formal law by way of Royal Decree no. 5351.<sup>1033</sup> Religious police (the agency for

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<sup>1031</sup> Wael Hallaq, 'On the Origin of the Controversy about the Existence of Mujtahid and the Gate of Ijtihad' (1986) 63(24) *Journal of Studies Islamica* 129, 129-130. See also Khaled Abou El Fadl, *Reasoning with God: Reclaiming Shari'ah in the Modern Age* (Rowman and Littlefield, 2014) 298-299

<sup>1032</sup> Hossein Esmaeili, 'On a Slow Boat towards the Rule of Law: The Nature of Law in the Saudi Arabian Legal System' (2009) 26 *Arizona Journal of International and Comparative Law* 2.

<sup>1033</sup> 118/mn/ (19/6/1399h).



the Prevention of Vice and Protection of Virtue) were issued powers to routinely monitor and punish any persons found to have violated these laws.<sup>1034</sup> The guardianship rules were also codified in various administrative resolutions, including the vice Minister of the Interior's resolution S2S/48 and 2S/690.

The observance of the doctrine of male guardianship is generally assumed to impact Saudi women's enjoyment of several rights, including women's rights to education, employment, freedom of movement, health, equality in marriage, and equality before the law. Access to education for women was, accordingly, subject to the approval and discretion of their male guardians.<sup>1035</sup> Some reports even indicate that some guardians chose to remove women from all levels of education.<sup>1036</sup>

Another rule applied with wide effect is the general prohibition on inter-mixing of different genders, which also leads to legal limitations on women in the public space. The classic jurists were broadly in agreement that inter-mixing between genders was not permitted in line with Islamic conceptions of morality and public decency. Ibn Qayyim al-Jawziyya argued that,

Allowing women to inter-mix with men is the source of all trials and evils, and is one of the greatest causes of the descent of punishments and the cause of corruption of both the laity and elite. The mixing of men and women is a reason for the proliferation of promiscuity and fornication.<sup>1037</sup>

In the context of Saudi legal system, the supreme religious authority, the General Presidency of Scholarly Research and *Ifta* issued rules requiring female seclusion (*khalwa*) in the absence of a male mahram. The evidence for this rule, which finds no explicit basis in the *Qur'an*, is most commonly derived from the following Prophetic saying: 'Make space between men and women.'<sup>1038</sup> The Hanbali school that prevails in Saudi Arabia has interpreted this narration of

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<sup>1034</sup> 118/mn/ (19/6/1399h).

<sup>1035</sup> Ranad Abdel-Matloub Moawad, 'Women's Rights under the Guardianship Wilayah of Male Relatives in Saudi Arabia' (Law and Society in the Middle East and North Africa) 12.

<sup>1036</sup> Amani Hamdan, 'Women and Education in Saudi Arabia: Challenges and Achievements' (2005) 6(1) International Education Journal 42, 64

<sup>1037</sup> Ibn Qayyim al-Jawziyya M. *At-Turuq Al-Hukmiyyah fi As-Siyaasah Al-Shar'iyyah* (Lebanon) 237.

<sup>1038</sup> *ibid* at 237, 238.

the *hadith* as a general rule proscribing both men and women being alone in the company of the other, except in the presence of a wali (male relative).<sup>1039</sup>

Following Hanbali *fiqh*, the Saudi General Presidency of Scholarly Research issued several *Fatwas*<sup>1040</sup> prohibiting men and women from free-mixing at public events.<sup>1041</sup> On the face of it, these types of religious-regulatory restrictions did not appear to conflict with, or undermine, a women's educational rights under the Saudi legal system. In practice, however, restrictions on intermixing may also significantly inhibit the educational choices available to women. One illustration of this is a fatwa, again issued by the Presidential Council,<sup>1042</sup> that explicitly proscribes schools from organising co-educational initiatives, including by forbidding girls of primary school age and above from attending school trips. In effect, this may have meant that boys were able to enjoy educational other extra-circular activities that girls were often excluded from (since the majority of funding for such activities continued to flow to the default male-centric school system). Moreover, since females were assumed to have the primary responsibility of guarding their modesty in public, including by avoiding interaction with males in professional and educational life, the prohibition on inter-mixing may be considered, from a CEDAW perspective, as a discriminatory provision within the context of an educational system that strives for equality.

A further example of the asymmetrical (power) relations that have historically been maintained and legally enforced under Saudi religious-regulatory restrictions concern the restrictions placed on free movement. In contrast with the Hanafi schools, the Hanbali school, which underpins much of Saudi law, considers the presence of a guardian is obligatory, regardless of the length of the journey.<sup>1043</sup> Prior to the recent reforms, and pursuant to *Fatwa* no. 9022, any women who travelled a certain distance alone or in the presence of a marriable male would have violated the principle of non-seclusion.<sup>1044</sup> Beyond limiting freedom of movement, these

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<sup>1039</sup> The General Presidency of Scholarly Research and Ifta, 'Fatwas of The General Presidency of Scholarly Research and Ifta, First issue' (1411H) vol 71, 57.

<sup>1040</sup> *op cit* Fatwa no 7584.

<sup>1041</sup> Resolution No 52 (4/4/1397H) Fatwa No 20609, 'The General Presidency of Scholarly Research and Ifta, Fatwas of The General Presidency of Scholarly Research and Ifta' 1st issue, 1411H, vol 17, 223.

<sup>1042</sup> *ibid.*

<sup>1043</sup> Ibn Abdul Barr, *Al-Tamheed* vol 21, 50. The Mālikī and Shāfi'ī schools permit the travel to pilgrimage without *mahram* if the journey is secure.

<sup>1044</sup> There were exceptions to the rule, such travel for the purposes of a family visit.

restrictions limited the abilities of women to participate in the public arena including their capacity to travel to a workplace or place of education.

Several *fatwas* issued by the Permanent Committee address travel arrangements for women, including those directly concerning the ways in which a female receives education.<sup>1045</sup> A Fatwa was issued in response to a dispute between female students and a local University (now known as King Saud University). Subject to a policy issued by the University's administration, females were not prohibited to travel unaccompanied to and from the Universities without a guardian. This policy proved impractical for many of the female students and some raised a complaint. In the arguments put forward to the Committee, it was noted that *fiqh* schools did permit certain forms of unaccompanied travel for short distances (for instance Hanafi and Maliki).<sup>1046</sup> The Permanent Committee rejected these arguments and issued a ruling clarifying the position under Saudi religious law.

The *Sharia* is based upon the principle of moral good and avoiding harm.....including the protection of lineage and honour.... such as the prohibition of a seclusion of a woman with a male stranger'<sup>1047</sup>

Subject to this *fatwa*, females were generally forbidden from travelling in seclusion. While the Committee justified its decision by appealing to authoritative texts and sources of Islam, there is another way of approaching these issues. The protection of female honour has a basis in Islam but it is a concept that is equally rooted in certain customs that had long been adhered to in Saudi Arabia over centuries, and before the formation of the modern Saudi state.<sup>1048</sup> It is also relevant that other *fiqh* schools, who also engaged in process of rule-interpretation and adaptation, took a less literal approach of the relevant *Qur'anic* verses in order to arrive at more equitable, and less restrictive conclusion.

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<sup>1045</sup> Fatwa No 17455.

<sup>1046</sup> Ibid. In their argument, the students relied on the prophetic hadith: "It is unlawful for a woman who believes in Allah and the last day that she travels the distance of three nights without a *mahram* accompanying her."

<sup>1047</sup> Fatwa No 2642.

<sup>1048</sup> Shoshana Shmulovitz, 'The Saudi women2drive campaign: just another protest in the Arab Spring' (2011) 5(14) Tele Aviv Notes 1.

The above notwithstanding, the more conservative strain of religious thought that has prevailed in Saudi Arabia, often in ways that are inseparable from cultural and historical aspects of Saudi society, has been formalised as law.<sup>1049</sup> Due to the unique system of power-sharing between religious and political authorities in the formation of the Saudi state, the *fatwas* of senior ulema (scholars) have often carried significant weight under the Kingdom's legal system. Religious *fatwas* have been enforced both by administrative authorities responsible for providing educational and other essential services, and by Saudi Arabia's equivalent to the religious police.<sup>1050</sup> In this way, social norms and laws (issued through state legislative processes) have a mutually reinforcing effect on the other.

#### 6.4.2 Discriminatory Aspects of Saudi Gender Law and Policy

To the extent that Saudi authorities enforce religious-regulatory restrictions, they do so on the basis of certain (albeit dominant) interpretation of Islamic *fiqh* (rules derived from the *Qur'an* and *Sunnah*). But some of these interpretations seems to be more obviously rooted in policy than in *Sharia*. In an interesting deviation from textual edits, no travel restrictions are enforced against non-Saudi women.<sup>1051</sup> This is a more flexible and pragmatic interpretation of the seclusion and guardianship related edict, since neither the *Qur'an* and *Sunnah* permits any discrimination on the grounds of nationality or ethnic origin. Given that there is no *Qur'anic* basis for discrimination on ethnic grounds, it is interesting to note that under Saudi law children of women of a different nationality are subject to less favourable treatment than their male equivalents.<sup>1052</sup> In recognition of the fact that this constitutes direct form of discrimination in law, the Saudi government has entered a reservation to Article 9(2) of CEDAW which requires state parties to 'grant women equal rights with men with respect to the nationality of their children.' But, to extent that these rules do not have a firm basis in scriptural authority, it is difficult to see how they can be justified within the scope of the general *Sharia* reservation.

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<sup>1049</sup> Iqal Hadari-Bedouin, 'Conflict and the Formation of the Saudi State' in Madawi Al-Rasheed and Robert Vitalis eds. *Counter-Narratives: History, Contemporary Society and Politics in Saudi Arabia and Yemen* (Palgrave Macmillan 2003) 35-37.

<sup>1050</sup> Kelly Le Benger, 'Behind the veil: The state of women in Saudi Arabia' (Institute of Gulf Affairs, 2008) 13

<sup>1051</sup> Husni Ronak, and Daniel L Newman (eds), *Muslim Women in Law and Society: Annotated Translation of al-Tahir al-Haddad's Imra'atuna fi 'lsharia wa 'l-mujtama with an Introduction* (Routledge 2007).

<sup>1052</sup> Law of the Saudi Arabian Nationality 1954, issued by Royal Decree 8/20/5604 (Umm Al-Qura No 1539, 16/3/1374H) and Law of Marriage of Saudi Citizen with a Non-Saudi (12/20/1422 H), No 874 [Arabic].

Given these restrictions, there is some question as to whether Saudi Arabia can be said to have fully complied with its obligations under international law, and whether it has taken the requisite steps to eliminate non-compliant aspects of Saudi law and customary practice.

The international response to Saudi state practice has varied. Saudi Arabia has ratified the International Labour Organisation (ILO) Convention, which notably includes provisions on gender equality, and non-discrimination.<sup>1053</sup> While critical of Saudi's record of non-compliance with discrimination related provision, the ILO Committee has welcomed steps taken by the Saudi government to aligns its laws with international norms.<sup>1054</sup> Human Rights Watch had also admonished the Kingdom for maintaining personal status law in violation of the concept of human dignity and equality.<sup>1055</sup> While the CEDAW committee has acknowledged that Saudi Arabia has made progress in narrowing the gender gap in educational outcomes, it has recommended that the Kingdom implement necessary reforms to eliminate discrimination against women.

In respect of CEDAW, the until-recently widely adhered to guardianship law imposed restrictions on women which are not applied to men. Thus the CEDAW obligation to eliminate restrictive practices targeted at women is contravened and guardianship practices deemed to be directly discriminatory.<sup>1056</sup> In respect of Article 1, it is arguable that discrimination has occurred when men are not subject to the same rules with regards to marital or custody rights,<sup>1057</sup> or freedom of movement.<sup>1058</sup> For access to education,<sup>1059</sup> a violation of CEDAW can be said to have occurred when women face less favourable treatment to men in terms of comparable level of access or quality of education, thereby denying them equality of opportunity.<sup>1060</sup> It should also be noted that the under the Convention, Saudi Arabia is obligated take all necessary measures to eliminate forms of indirect discrimination, namely the stereotyping of roles based on gender,<sup>1061</sup> such as unequal access to fields or areas of professional life that are traditionally male-dominated. These aspects of Saudi law and

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<sup>1053</sup> Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III) (UDHR) art 5.

<sup>1054</sup> ILO CEACR Observation: Ratification 1978 for Saudi Arabia (106th ILC session 2017).

<sup>1055</sup> HRW (n 1).

<sup>1056</sup> Mtango (n 904) 51

<sup>1057</sup> CEDAW, art 1.

<sup>1058</sup> CEDAW, art 15(4).

<sup>1059</sup> CEDAW, art 10.

<sup>1060</sup> Mtango (n 904) 57

<sup>1061</sup> CEDAW, art 5(a).

customary practice pose challenges to Saudi Arabia's implementation of norms as provided by CEDAW.

#### 6.4.3 Reforming Saudi Law through the Soft Power of International Law

In the above regard, the Kingdom's general reservation to CEDAW exposed a fundamental tension between Saudi Arabia's interpretation of *Sharia* and its obligations under Article 2(f) of CEDAW which obliges all Member States to 'take all appropriate measures...to modify or abolish existing laws...which constitute discrimination against women.' It is difficult to see how this aim can be accomplished if Saudi Arabia retains the right to disregard a core provisions of the treaty, indeed the very rationale for the treaty: the elimination of discrimination against women. As noted in the previous chapter, the International Law Commission's (ILC) Guide to Practice on Reservations to Treaties<sup>1062</sup> states that a reservation will be incompatible with the object and purpose 'if it affects an essential element of the treaty that is necessary to its general tenor, in such a way that the reservation impairs the *raison d'être* of the treaty.'<sup>1063</sup> Furthermore, a reservation must be formulated in language that will allow its meaning to be understood by third party states and by any persons affected by them.<sup>1064</sup>

It is arguable that, prior to the new guardianship reform, Saudi Arabia did not meet these conditions: it had maintained, and failed to take appropriate measures to eliminate, a number of laws and practices with discriminatory effects for women, and did so on the grounds of unspecified reference to *Sharia*.<sup>1065</sup> The most obvious example of direct discrimination was Saudi Arabia's reservation to Article 9(2) addressing the rights of children based on the parent's nationality. Saudi Arabia has stated that these provisions – which are in apparent conflict with core objectives of CEDAW – fall under the legitimate scope of *Sharia*, but offered no clear reasons for why this was the case. This is all the more dubious because, as addressed above, the justification for unequal treatment on grounds of ethnicity appears to have little basis in the *Qur'an* or *aHadith*.

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<sup>1062</sup> UNGA, 'Report of the International Law Commission on the work of its 63<sup>rd</sup> Session' (26 April-12 August 2011) UN Doc A/66/10/Add1 <<http://legal.un.org/ilc/reports/2011/english/addendum.pdf>>.

<sup>1063</sup> UNGA, Guideline 3.1.5.

<sup>1064</sup> UNGA, Guideline 3.1.5.2.

<sup>1065</sup> UNGA, Guideline 3.1.5..5.

It is also critical to note that references to national law provisions do not usually provide sufficient defence against a breach of the principle of non-discrimination (arguably a pre-emptory norm of international law, following the ICJ's *Reservations to the Genocide Convention* Advisory Opinion.).<sup>1066</sup> In the above regard, Article 27 of the Vienna Convention of the Law of Treaties (VCLT) states that existing provisions of domestic law do not exempt states fulfilling treaty obligations (since an act of treaty-making indicates a state's intention to be bound by obligations, even those which abrogate or supervene over existing provisions of domestic law).<sup>1067</sup>

Contrary to the argument developed above, one could take the counter position to conclude that *Sharia* constitutes a source of fundamental constitutional law. Therefore, under Saudi Arabia's monist legal system, national public policy on matters of mandatory religious and traditional law should take priority over any other sources of law.<sup>1068</sup> Even if this "realist" critique of international legal positivism could be defended, the Saudi government had failed to clarify which of its obligations under the CEDAW were not applicable, based on a transparent, reasonable and proportionate applicable of the relevant rules of *Sharia*.

There are other country examples that have proposed a narrower, and more proportionate, reservation based on religious grounds. Thus, in contrast with the broad coverage of Saudi Arabia's reservation, Algeria entered a more precisely formulated reservation to Article 2, stating that it would seek to promote equality of men and women, on the condition that it was not in conflict with the Algerian Family Code. At the same time, if the ILC guidelines are correct, a reservation that is not compatible with the object of the treaty, or insufficiently precise as to its aim and justification, can be rendered void<sup>1069</sup> and treated as severable from the instrument ratifying a treaty.<sup>1070</sup>

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<sup>1066</sup> Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide (Advisory Opinion 1951) < <http://www.icj-cij.org/files/case-related/12/4285.pdf> >

<sup>1067</sup> VCLT, art 27.

<sup>1068</sup> In view of Saudi Arabia's monarchical system of government, the King of Saudi Arabia exercises sovereignty authority in a dual capacity as both the head of the State, and as the guardian of the Islamic faith (and *Sharia* compliant law). The King is charged with the task of ensuring that should a conflict arise between Saudi Arabia's treaty obligations under international law (or for that matter any domestic rule or law) on the one hand, and the Islamic foundation of the Saudi constitution, the latter should always prevail. .

<sup>1069</sup> UNGA, Guideline 4.5.1.

<sup>1070</sup> In theory, Saudi Arabia could reservations by notification to the Secretary-General of the UN, in accordance with Article 28(3) of CEDAW, or declare that it is no longer bound by CEDAW<sup>1070</sup>.

The VCLT permits third party states to enter objections to reservation before an instrument ratifying a convention is adopted by consensus.<sup>1071</sup> It is worth noting that the United Kingdom and France raised objections with the CEDAW Committee at the accession stages, over Saudi Arabia's reservation as a condition of ratification. Both countries noted that a general reservation based on a generic reference to mandatory domestic law, without identifying the applicable rules or legal basis, did not only create uncertainty over which provisions of CEDAW the Kingdom was bound by, but also undermined the principle of reciprocity among states.<sup>1072</sup> Due to the principle of formal equality among states under international law, however, the legal consequences that flow from a third party objection are often highly circumscribed in their legal effects. An objection to a reservation, in other words, often serves as little more than a public statement of disapproval and less like an instrument that is likely to effectuate a change in state practice. This goes to a more general limitation of international law's compliance power. Treaties bodies such as the CEDAW Committee have few enforcement instruments at their disposal, and those which are available to them often lack "teeth".

Regional human rights have favoured a more activist stance on the admissibility of irregular reservations. In the now famed "Strasbourg approach", the European Court of Human Rights, in the *Belios* ruling,<sup>1073</sup> appeared to offer support for the view that an invalid reservation, i.e. one found to breach fundamental human protections, could be treated as *prima facie* null and void, in the sense of having no legal effect at all on the obligations of the reserving party.<sup>1074</sup> It is difficult how to see a general reservation nullifying the Kingdom's membership of the treaty would it be in the interests of women, to oblige the Saudi government to withdraw from the treaty as a whole.<sup>1075</sup> A treaty between the reserving and objecting states may still come into force as was the case for Saudi Arabia and objecting parties.<sup>1076</sup> The Civil and Political Rights Human Rights Committee (HRC), by contrast, has taken a more balanced position on

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<sup>1071</sup> VCLT, art 20.

<sup>1072</sup> CEDAW, 'Objections, United Kingdom' (6 September 2001); CEDAW, 'Objections, France' (26 June 2001).

<sup>1073</sup> *ibid*; Roberto Baratta, 'Should Invalid Reservations to Human Rights Treaties Be Disregarded?' 11(2) *European Journal of International Law* 413, 416

<sup>1074</sup> Bruno Simma 'Reservations to Human Rights Treaties — Some Recent Developments', in Gerhard Hafner and others (eds), *Liber Amicorum Professor Seidl-Hohenveldern — in Honour of His 80th Birthday* (Brill 1998) 30.

<sup>1075</sup> Catherine Redgwell, 'Universality or Integrity? Some Reflections on Reservations to General Multilateral Treaties' (1994) 64(1) *British Yearbook of International Law* 26.

<sup>1076</sup> VCLT, art 20(4)(b).



state's rights, stating that the: 'normal consequence of an unacceptable reservation is not that the covenant will not be in effect at all for a reserving party....[but that it will] generally be severable, in the sense that the covenant will be operative for the reserving party without benefit of the reservation'.<sup>1077</sup> However, here is where international law compliance mechanisms appear to be most lacking: there is no mechanism in international law that could be used to compel Saudi Arabia to withdraw an irregular reservation.

#### 6.4.4 A Process-Theory Perspective on Treaty Compliance

The critical point to be taken from the above discussion that human rights courts and committees adopted different positions on the validity of reservations.<sup>1078</sup> In the case of Saudi Arabia, these broader debates on the validity or admissibility of a reservation are somewhat academic. Which, if any, body would the authority to determine that Saudi Arabia's reservation was incompatible with the objective of a treaty? And with what legal consequences for how Saudi Arabia enforces its own domestic laws vis-à-vis the *Sharia*-element of a general reservation?<sup>1079</sup> The idea that a States may come to improve gender rights protections by means of an abstract discussion on the invalidity of reservations is likely to hold water in the 'real world' contexts of state and international politics. There is, however, a broader normative point to be made. An argument that Islamic states should not accede to human rights treaties unless they are prepared to set aside or sever any reservations they may have on grounds of Islamic or tradition will only hinder international consensus around human rights norms.<sup>1080</sup> Why should Islamic nations have to relinquish their sovereign right and authority to determine how laws shall be applied or interpreted in their own territories as a condition of their participation in the international order.<sup>1081</sup>

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<sup>1077</sup> UNHRC 'CCPR General Comment No 24' in 'Note by the Secretariat, Compilation of General Comments adopted by Human Rights Treaty Bodies' (1994) UN Doc CCPR/C/21/Rev.1/ Add.6

<sup>1078</sup> R Baratta, 'Should Invalid Reservations to Human Rights Treaties Be Disregarded?' 11(2) *European Journal of International Law* 413, 416-417

<sup>1079</sup> Catherine Redgwell, 'Universality or Integrity? Some Reflections on Reservations to General Multilateral Treaties' (1994) 64(1) *British Yearbook of International Law* 26.

<sup>1080</sup> Tracy E. Higgins, "Anti-Essentialism, Relativism, and Human Rights," (1996) 19 *Harvard Woman. L.J.* 89 and Ann Elizabeth Mayer, 'Cultural Particularism as a Bar to Women's Rights: Reflections on the Middle Eastern Experience' in Julie Peters and Andrea Wolper (eds) *Women's Rights, Human Rights: International Feminist Perspectives* (Routledge 1995) 176, 177.

<sup>1081</sup> Nora V Demleitner, 'Combating Legal Ethnocentrism: Comparative Law Sets Boundaries' (1999) 31 *Arizona State Law Journal* 737, 757.

There is a case to be made in favour of interpretative flexibility on issues of treaty compliance and reservations, for reasons that are much rooted in the tradition of legal pragmatism.<sup>1082</sup> This theoretical stance reflects the idea that different cultures and legal systems may diverge on fundamental issues of law and morality (a concept known as ‘value relativism’).<sup>1083</sup> It has already been suggested that the goal of empowering women through strengthened rights of education can only be effectively achieved if they are supported by other rights which ensure that they are able ‘are able to participate in all areas of life on an equal basis.’<sup>1084</sup> Nonetheless, the CEDAW Committee also recognises that inevitable fact of cultural, as well as legal, as pluralism. In so far as states are expected to work towards the goal of gender equality in all areas of life, these aims should be considered in light of the principle of legitimate diversity in respect of regulatory, cultural and economic variation across states.<sup>1085</sup> Thus, the Committee recommends that the states should work progressively towards ‘gender-inclusive interpretations of treaty norms, gender-sensitive implementation practices, and gender-responsive remedies.’<sup>1086</sup> This provides States with a degree of discretion to develop rules aimed at tackling institutional or structural forms of discrimination in the areas of schooling, reduction of female dropout rates and post-education career pathways.<sup>1087</sup>

This characterisation of international law as dynamic process of mutual accommodation offers a useful departure point from the law/politics dualism that has defined theories of international law. On the one hand there are those who see international law in formalistic terms as a rule-

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<sup>1082</sup> For a discussion of the pragmatic style of argument see Robert B. Westbrook, ‘Pragmatism and Democracy: Reconstructing the Logic of John Dewey’s Faith,’ in Robert Westbrook et al. (ed.) *The Revival of Pragmatism: New Essays on Social Thought, Law and Culture* (ed., 1998) id at 128

<sup>1083</sup> Myres S. McDougal et al., ‘The World Constitutive Process of Authoritative Decision-Making,’ (1967) 19 J. Legal Education. 253 [referring to a process in which interpretative communities create “reciprocal demands, expectations, identities and operational patterns” which then lead to “specialized institutional practices” that stabilize “stable contacts” or restore “severed relations.”] id at 254-55

Katherine Brennan, ‘The Influence of Cultural Relativism on International Human Rights Law: Female Circumcision as a Case Study,’ (1988) 7 Law & Inequality. 367.

<sup>1084</sup> *ibid.*

<sup>1085</sup> Nehal Bhuta, “Rethinking the Universality of Human Rights,” in Anver Emon, Mark Ellis and Benjamin Glahn (ed.) *Islamic Law and International Human Rights Law: Searching for Common Ground?* (ed, 2012). See also Jean L. Cohen, ‘Whose Sovereignty? Empire versus International Law,’ 18 (2004). *Ethics & International Affairs*. 1, 2 and Pierre Legrand, “What “Legal Transplants” in David Nelken & Johannes Feest (eds.), *Adapting Legal Cultures* (ed. 2001) [Legrand calls for a recognition of “difference” in response to imperialising demands for convergence.]

<sup>1086</sup> Eibe Riedel and Gilles Giacca and Christophe Golay, *Economic, Social, and Cultural Rights: Contemporary Issues and Challenges* (OUP 2014) 139.

<sup>1087</sup> CEDAW, art 10.

based international order based on near-universal human rights.<sup>1088</sup> On the other hand, there is the pessimism of the legal realists who regard conflict and competition between sovereign states as impregnable fact of life.<sup>1089</sup> The author argues that in each of these argumentative extremes captures the complex interplay between local and global forces within the contexts of Saudi Arabia. Arguably, process theories of international law hold far more explanatory power when considering recent shifts in Saudi legal practice and policy.

Under the leadership of Prince Mohammed Bin Salam, a number of legal and administrative reforms are in the process of being rolled out,<sup>1090</sup> with direct and indirect implications for gender equality in education. The formal requirement of the veil has been lifted, the religious police have been stripped some of their absolutist powers, and women are allowed to attend social events. Most significantly, the Royal Decree issued in 2017 effectively lifts all restrictions imposed on women under guardianship system unless stipulated by law. Certain restrictions, it has to be said, remain in force, such as the requirement of guardian consent in marriage or the right to travel abroad, including for education purposes.

It is in the above regard, Saudi Arabia can be seen to be introducing gradual reforms that bring into ever closer compliance with international norms. It follows that a flexible approach to treaty implementation, one that takes due account of cultural differences while providing States the leeway to make incremental reforms that will be acceptable to the national public, has been a relatively successful strategy. But as this next section will show, this does not mean that there is not more work to do.

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<sup>1088</sup> Erika de Wet, 'The Emergence of International and Regional Value Systems as a Manifestation of the Emerging International Constitutional Order,' (2006) 19 *Leiden Journal of International Law* 611. William Scheuerman, 'The Center Cannot Hold': A Response to Benedict Kingsbury' in Henry S. Richardson and Melissa S. Williams (ed.) *Moral Universalism and Pluralism* (ed.2009) ["[C]osmopolitans offer a no-less one sided universalistic approach to the international order than one-sided pluralist account of the realists since they devalue the fact of pluralism and exaggerate the extent to which shard agreement on deeply controversial issues is possible at the international level".] Id at 205, 207.

<sup>1089</sup> Martti Koskenniemi, "Introduction in M. Koskenniemi (ed.) *Sources of International Law* (ed., 2000) id at xi, xi–xii [describing the realist stance as one which identifies as the only valid formal sources of international law those derived from state consent.]

<sup>1090</sup> Full Transcript of Prince Mohammed bin Salman's Al Arabiya interview (Al Arabiya, 25 April 2016) <<https://english.alarabiya.net/en/media/inside-the-newsroom/2016/04/25/Full-Transcript-of-PrinceMohammed-bin-Salman-s-Al-Arabiya-interview.html>>

## 6.5 The Impetus for Legal Reform

A perennial theme of this thesis is that the right to education could contribute to economic development in Saudi Arabia, including measures aimed at facilitating the sustainable growth and diversification of Saudi Arabia's labour force.<sup>1091</sup> These aims are to be achieved by stimulating private sector innovation, thereby fueling demands for new jobs. In effect, the Saudi 2030 Vision is the Kingdom's take on a post-industrial "new deal": a blueprint for enhancing domestic productivity, jobs growth, public-private partnership and ongoing investment in infrastructure.<sup>1092</sup> Education, specifically international equivalence across educational outcomes, methods and 'content', is the backbone of this economic program. Private reforms, job growth and investment in Saudi Arabia will depend to a large extent on the skills, knowledge and talent of the local workforce.

As well as setting out an ambitious program for economic development, the Kingdom has pledged to oversee a number of symbolically significant reforms aimed at strengthening the personal and participatory rights of women in all areas of public life.<sup>1093</sup> These reforms have been well publicised and would seem, in part, motivated by a desire to improve the Kingdom's standing in the international community. These social reforms are also a harbinger of a country in transition, economically and culturally, with a growing youth population.<sup>1094</sup> While gender rights have been emerged as a centrepiece of the country's modernisation agenda, these reforms form part of a broader strategy to establish as a hub of tourism, culture and commerce. In this sense, economic and social reform are considered two pillars of the same modernisation strategy. Economically, higher levels of gender integration in the local workforce would help to reduce the Kingdom's dependency on expatriate workers and the burden this creates on the national economy.<sup>1095</sup> It has already been noted that the higher female employment rates could

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<sup>1091</sup> Heritage Foundation, 2018 Index of Economic Freedom: Saudi Arabia <<https://www.heritage.org/index/country/saudi-arabia>>

<sup>1092</sup> Anthony Shoult, 'Privatisation and Economic Reforms' in Anthony Shoult ed, *Doing Business with Saudi Arabia* (3<sup>rd</sup> edn, GMB Publishing 2006) 111

<sup>1093</sup> Ahmed Ali Alhamzi, 'What does it look like to be in a Mixed-Gender Environment: A Phenomenological Study of the experience of Saudi International Students in a Mixed Gender Environment' (DPhil Thesis, RMIT University 2013) 78.

<sup>1094</sup> Courtney Freer, 'Concerts, Cinemas and Comics in the Kingdom: Revising the Social Contract after Saudi Vision 2030' (London School of Economics: Middle East Centre, 26 May 2017)

<sup>1095</sup> Russell H. Spitler, *Blurry Vision: Institutional Impediments to Reform in Saudi Arabia* (September 2017) International Archive of the Naval Postgraduate School 12

have an exponentially positive effect on the Kingdom's Gross Domestic Product, with women accounting for 56.5% of all graduates from tertiary institutions.<sup>1096</sup>

### 6.5.1 Legal Protections and Unequal Outcomes

In line with the new guardianship reforms, all state agencies are required grant services to women without approval from their guardian.<sup>1097</sup> Decisions such as these make provide positive proof of Saudi Arabia's ongoing effort to eliminate discriminatory practices in accordance with its obligations under international law

As Alston has suggested,<sup>1098</sup> recent social reforms to aspects of employment law and guardianship may yet prove to be transformative, offering women opportunities to obtain independence in ways that have the potential to subvert cultural biases and gender stereotypes. Women are no longer forced to seek career opportunities deemed 'suitable to their nature.'<sup>1099</sup> They are free to drive and travel freely (inside the Kingdom), strengthening their independence and, consequently, their ability to make different and broader educational and career choices.<sup>1100</sup> In this regard, it should be noted that current Saudi Labour Law, which has been in effect since 2006, incorporates provisions which mitigate against the indirectly discriminatory effects of sex segregation, for instance by requiring employers to establish separate facilities for women.<sup>1101</sup> A further regulation also authorises private enterprises to employ females without seeking a special licence.<sup>1102</sup> The question for Saudi Arabia is how and whether, in practice, it may be possible to achieve full economic equality, or promote new businesses, when the cost of improving female inclusive policies increases over time.

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<sup>1096</sup> 'More Women than Men in Saudi Universities, says Ministry' Al Arabiya (Riyadh, 2015) <<https://english.alarabiya.net/en/perspective/features/2015/05/28/More-women-than-men-in-Saudi-universities-says-ministry.html>>

<sup>1097</sup> [Arabic version] <<http://www.okaz.com.sa/article/1544493> ; Jon Sharman, 'Saudi Arabia to let women work and study without man's permission' *Independent* (London, 6 May 2017) <<http://www.independent.co.uk/news/world/middle-east/saudi-arabia-male-guardianship-relax-women-work-study-gender-equality-a7721641.html>>

<sup>1098</sup> End of Mission Statement Special Rapporteur on Extreme Poverty and Human Rights, Professor Philip Alston on his visit to Saudi Arabia' (OHCHR, 19 January 2017) <<http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=21094>>

<sup>1099</sup> "'Unofficial' Guardianship Rules Banned' (HRW, 2017) <<https://www.hrw.org/news/2017/05/09/saudi-arabia-unofficial-guardianship-rules-banned>>

<sup>1100</sup> Nicole Gaouette and Elise Labotte, 'Saudi Arabia to Let Women Drive at Last' *CNN* (Londo, 27 September 2017) <<http://edition.cnn.com/2017/09/26/politics/saudi-arabia-woman-drive/index.html>>

<sup>1101</sup> Kelly Le Benger, 'Behind the veil: The state of women in Saudi Arabia' (Institute of Gulf Affairs, 2008) 13.

<sup>1102</sup> Hamdan (n 935).

There are aspects of the above reforms which require further scrutiny. Under the new reforms, all relevant ministries, which would include the educational authorities, are simply required to “re-examine” policies pertaining to guardianship. There is no formal requirement within the wording of the decree that requires administrative authorities in health care or education, for example, to positive steps to ensure that women are not being prevented from exercising their legitimate rights. Much will depend on courts. It is not clear whether a woman claiming discrimination could request a judge to enforce her right to education when facing threats or other barriers. Moreover, the decree does not fully eliminate the prohibitions on seclusion and inter-mixing as described above. Indeed, Abdulghani contends that meaningful gains gender-inclusive labour policies have ‘stalled in Saudi Arabia for many years because official directives or initiatives do not have legislative power or protection.’ <sup>1103</sup>

The very real silences of Saudi Arabia’s administrative reforms, including gender-inclusive strategies in education, the exclusive focus formal aspects of Saudi law and regulatory framework is not without its blind spots. The content of education in Saudi Arabia, as mentioned previously, remains heavily focused on aspects of religious law and consequently fails to prepare graduates for the challenges of the labour market.<sup>1104</sup> Furthermore, there is evidence to suggest that attempts to institutionalise a general right of free and equal primary and secondary education have not necessarily matched by meaningful gains in women’s access to economic resources, particularly for women in the lower-income bracket.<sup>1105</sup> The UNESCO report notes in the above regard;

High female unemployment, and has helped to maintain the traditional, gender-based division of labour ...[and] also reinforces inequalities at multiple levels. Rural women, in particular, remain at a significant disadvantage in accessing basic services such as health care, education and other social infrastructure.

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<sup>1103</sup> Examining Obstacles to Saudi Women’s Right to Work in the Kingdom of Saudi Arabia’ (DPhil Thesis, Brunel University London 2016)

<sup>1104</sup> Max Wrey, ‘Saudi education set to hamper reform goals’ (Financial Times, 29 June 2016) <<https://www.ft.com/content/febb3cfb-85be-32d7-aa75-e92d25d570b2>>; Karen Courington and Vanessa Zuabi, ‘Calls for Reform: Challenges to Saudi Arabia’s Education System’ (2011) 12(2) Georgetown Journal of International Affairs 137-144; Rfah Hadi Alyami, ‘Educational Reform in the Kingdom of Saudi Arabia: Tatweer Schools as a Unit of Development’ (2014) 5(2) Literacy Information and Computer Education Journal 1515-1524

<sup>1105</sup> As illustrated in the various UNESCO Education for All reports referred to in this chapter.

Meanwhile, poor urban dwellers are confronted by soaring housing prices and a lack of social safety nets.

On the face of it, these inequalities are attributed to long-standing attitudes toward women in Arab Muslim countries, on the one hand, and economic instability in the labour market on the other. It is also important to note that high levels of youth unemployment apply to both men and women in Saudi Arabia.<sup>1106</sup> Rapid population growth, a large public sector and slow progress in new markets have all contributed to high unemployment rates. Gender stereotypes may, nonetheless, disadvantage women in indirect ways. Where demand exceeds supply, particularly in a cultural environment where men are regarded as the breadwinners, employers may be reluctant to hire women for senior or high-paid positions.<sup>1107</sup>

Discrimination on grounds of gender, as the above analysis has shown, cannot be uncovered by simple examination of specific laws that promote or legitimate the unfavourable or unfair treatment of women. As suggested above, formal inequality must be examined together with structural and institutional discrimination.

#### 6.5.2 Cultural Barriers to Educational Equality: Moving Beyond Law

It is a fallacy to assume that any “gender gap” that subsists in Saudi Arabia whether in terms of educational or economic opportunities, are solely attributable to religious restrictions. To make this assumption is to grossly oversimplify the developmental histories of Arab and non-Arab Muslim societies. Islamic societies are not a monolith, nor are the women of Saudi Arabia. There is a growing body of research which supports the claim that such religious practices are anything but uniform across all Muslim societies, and that there is significant variation in how religious principles derived from *Sharia* are applied in one Islamic legal context versus another. Nonetheless, as Syed proffers ‘local traditions in the interpretation and enactment of Islam within each society must not be ignored.’<sup>1108</sup> Viewed in this light, there is ‘not one, but many Islams’, and the experiences of women subject to its law varies in the extreme, from being

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<sup>1106</sup> Jane Kinninmont, ‘Vision 2030 and Saudi Arabia’s Social Contract: Austerity and Transformation’ (Chatham House, 2017)

<sup>1107</sup> As illustrated in the various UNESCO Education for All reports referred to in this chapter.

<sup>1108</sup> Jawad Syed, ‘A context-specific perspective of equal employment opportunity in Islamic societies’ (2008) 25(1) Asia Pacific Journal of Management 143.

‘strictly closeted’ to circumstances in which they ‘exercise far greater control over their own lives.’<sup>1109</sup>

Given the above, it is important to investigate whether existing forms of gender bias are the product of institutionalised discrimination maintained through law, or whether they are rooted in local culture, custom and traditions.<sup>1110</sup> With this in mind, Article 6 of CEDAW states that cultural and social norms cannot be used as defence for the systematic abuse of women’s rights.<sup>1111</sup>

Women have yet to achieve parity with men in every academic and vocational field in Saudi Arabia, which is by no means a phenomena unique to the Arab or Islamic world.<sup>1112</sup> As with education, there is nothing within the Islamic tradition that prohibits women from seeking ‘legitimate work of their choice’, providing they ‘possess the required skills and expertise and they are not exposed to any hazards therefrom.’<sup>1113</sup> Data contrasting female employment in Arab and non-Arab Islamic societies and countries does, however, indicate a more pronounced gender gap in countries such as Saudi Arabia, Oman and Kuwait. This is to be contrasted with the effects of gender-inclusive educational strategies in countries such as the United Kingdom and the United States which have generally led to increases in female employment levels. However, increased funding and the mandatory attendance of girls in primary and secondary education does not appear to have produced a similar Saudi Arabia, and female employment levels continue to remain low in many Islamic Arabic countries.<sup>1114</sup> It is important to consider the reason for these anomalies by offering some final thoughts on the interdependencies of law and culture in the historic regulation of gender rights in Saudi Arabia.

Scholars such as Rajkhan have argued that certain entrenched attitudes around the role of women as primary caregivers continues to deter women from pursuing education after they

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<sup>1109</sup> *ibid*

<sup>1110</sup> *ibid*.

<sup>1111</sup> CEDAW, art 6..

<sup>1112</sup> Hamdan (n 935).

<sup>1113</sup> Baderin (n 889).

<sup>1114</sup> UNDP, ‘The Human Development Report 2016’ (2016) <[http://hdr.undp.org/sites/default/files/2016\\_human\\_development\\_report.pdf](http://hdr.undp.org/sites/default/files/2016_human_development_report.pdf)>.



have completed the compulsory term of secondary education.<sup>1115</sup> Women who do enter into further education may struggle to obtain private sources of funding, because of the social stigma surrounding their decision to postpone marriage, thereby widening the socio-economic gap between married and unmarried women. Despite efforts to widen gender access to high growth sectors such as IT, engineering or geology, women are generally encouraged to pursue more traditionally 'feminised' course choices in the fields of nursing and teaching. These informal (structural and cultural) barriers may strengthen the sense of exclusion from male-orientated fields such as engineering and geology.<sup>1116</sup> Since these fields tend to attract a better quality of teaching and research, it is arguable that women in Saudi Arabia tend to be placed at a competitive disadvantage even before they enter the job market. These factors, combined with other regional disparities in wealth and access to education represent a type of structural barrier to substantive equality between the genders, even if both sexes enjoy the same right to education in law.

Disparities in the quality of education may also be due to religious-regulatory standards, such as the prejudicial effects of gender segregation on the way recruit universities teachers from the available list of candidates. Some researchers have suggested that male students are generally afforded better quality instruction from better-trained teachers.<sup>1117</sup> Of the statistics reported, current figures suggest that women's colleges receive a mere 18% of the total budget allocated for education, with the remainder of the budget going to male-only institutions.<sup>1118</sup> There is some anecdotal evidence to suggest that women do not obtain equal access to educational resources available to men. For instance, King Saud University has partnered with US universities to create an international centre on business studies. Though this partnership is specifically designed to harness the talent of graduates, the centre is located on the men's campus. In cases such as these, women are afforded less favourable treatment because of institutionalised restrictions on gender-mixing.<sup>1119</sup> In another setting, Saudi women were denied rights to participate in an educational workshop in Qatif. The discriminatory effects of

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1115 Elin Andersson and Linn Togelius, 'Women oppressed in the name of culture and religion: Saudi Arabia and the Convention on the Elimination of All Forms of Discrimination Against Women' (Bachelor Thesis, Malmö University School of Global and Political Studies 2010) 3.

1116 *ibid*

<sup>1117</sup> Hamdan (n 935).

<sup>1118</sup> Roula Baki, 'Gender-segregated Education in Saudi Arabia: Its Impact on Social Norms and the Saudi Labor Market' (2004) 12(28) Education Policy Analysis Archives 1-4

<sup>1119</sup> Karen Courington and Vanessa Zuabi, 'Calls for Reform: Challenges to Saudi Arabia's Education System' (2011) 12(2) Georgetown Journal of International Affairs 137, 145, 140.

this decision could have been mitigated has the government held a similar event for the exclusive attendance of female participants. Despite requests, however, the government refused to provide funding for an equivalent women-only event.<sup>1120</sup>

The above examples strongly indicate gendered asymmetries in allocation of funding, training and career development.<sup>1121</sup> It follows that formal guarantees of equal access will not be adequate to address the “gender gap” if the Saudi government does not take additional proactive steps to address remaining of direct or indirect discrimination.

At the same time, it is difficult to conclude that Saudi Arabia’s educational policy is neither singularly empowering or disempowering for women because experiences will vary greatly. Factors of age, geographical location, status, wealth, patrimony and other familiar connections will have more or less bearing on the relationship between access to education and personal and economic empowerment.<sup>1122</sup> Many have rejected the accusation of gender bias in the Saudi education, contending that women actually benefit from a professional advantage because there is less competition for university and work placements than is the case for their male counterparts.<sup>1123</sup> Al-Jawini, for example, posits that males are subject to stricter testing and examination criteria, resulting in better overall grades for female students.<sup>1124</sup> However, this perception may also conceal certain implicit biases around the intellectual capabilities of men versus women (women do better because markers go easy on them).

If we can argue that the “gender gap” continues to be a problem, it is necessary to consider whether this is the result of cultural and religious factors. If they are, indeed, based on religious justifications, the more important question is whether such inequalities are nonetheless legitimate, proportionate and justified when weighed against other provisions of Saudi law, including mandatory requirements of *Sharia*.

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<sup>1120</sup> US Department of State, ‘Annual Human Rights Report Submitted to Congress’ (2008) 2061; US Department of State, ‘2008 Country Reports on Human Rights Practices’ (25 February 2009) <<https://www.state.gov/j/drl/rls/hrrpt/2008/nea/119126.htm>>.

<sup>1121</sup> UNCHR, art 9.

<sup>1122</sup> See for example, Soraya Altork, ‘Family Organization and Women's Power in Urban Saudi Arabian Society,’ (1977) 33 *Journal of Anthropological Research* 277-

<sup>1123</sup> Hamdan (n 935).

<sup>1124</sup> Al-Jawini, Dr. Mariam. (2003). Deputy Principal of the girls' school at the Islamic Saudi Academy

The above analysis takes us full circle to matter of where, and how, to draw the line between aspects of Saudi law which are correctly based on mandatory rules of *Sharia* and those which are contestable and “cultural” in nature. The law/culture divide brings critiques from ‘within’ Islamic discourse and without. If this distinction is collapsed, religious law loses its critique of social practices of modern-day Islamic societies.

### 6.5.3 Reconciling *Sharia* and International Human Rights Norms in Saudi Arabia

With the guardianship reforms, Saudi Arabia’s constitutional settlement is also in a state of flux: religious norms are being redefined partly in response to changing economic and social needs, and partly in response to a more amorphous set of external pressures, of which the treaty-based regimes of international law are just one element.<sup>1125</sup> In an important symbolic move, King Abdullah dismissed a religious cleric who had made public statements criticising gender mixing. The head of the religious police in Mecca was also reinstated, having been previously been removed, due to religious criticism, for making statements in support of some forms of gender mixing.<sup>1126</sup> This may appear to be evidence of the Kingdom’s gradual ‘turning away’ from religious traditionalism. While it might be tempting to approach the issue of modernisation versus religious traditionalism in zero-sum terms, with *Sharia* being downgraded in the order of state priorities, this is to suppose, falsely, that certain linguistic and cultural interpretations of *fiqh* were necessarily the best interpretation of religious texts in the first place, and therefore should be seen as fixed and unchanging.<sup>1127</sup> This author would put the case different. That is, it is possible to suggest that changes in rule-interpretation practices may come to be seen not as an illegitimate innovation from religious texts or Prophetic tradition, but as an enduring testament to Islam’s inherent capacity for innovation and reform.<sup>1128</sup>

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<sup>1125</sup> Hani Abdulghani, ‘Examining Obstacles to Saudi Women’s Right to Work in the Kingdom of Saudi Arabia’ (DPhil Thesis, Brunel University London 2016) 67. See also Soualhi Younes, ‘Islamic Legal Hermeneutics: The Context and Adequacy of Interpretation in Modern Islamic Discourse’ (2002) 41(4) *Islamic Studies* 585, 585-586. For broader inspiration, the author drew his ideas from Martii Koskenniemi, ‘Constitutionalism As Mindset. Reflections on Kantian Themes About International Law And Globalisation’ (2007) 8(1) *Theoretical Inquiries in Law* 9

<sup>1126</sup> Hamdan (n 935)

<sup>1127</sup> Hassan Al-Turabi, ‘On the position of women in Islam and in Islamic society’ (Islam for Today, 2004) <<https://www.peacepalacelibrary.nl/ebooks/files/turabi.pdf>>

<sup>1128</sup> See for instance Amina Wadud, *Qur’an and Woman: Rereading the Sacred Text from a Woman’s Perspective* (OUP 1999) 97.

It has already been noted that Islamic jurisprudence acquired a certain rigidity after a certain period of Islamic history, a phenomena described as the ‘closing of the gates of *Ijtihad*.’<sup>1129</sup> In Saudi Arabia, political and historical events conspired to assure to the dominance of a certain localised and customary form of Hanbali *fiqh* in the area of religious ritual and law, even if no rule prevented authorities from applying the rulings and opinions of another recognised *fiqh* schools.<sup>1130</sup> It could be argued, optimistically, that the new Saudi leadership has defended a return to pluralism that would come to define the formative period of classical Islamic jurisprudence. If this is a fair assessment, religious leaders would be encouraged to draw from the teachings of other *fiqh* schools, so that they may disregard less authoritative or inequitable legal opinions in search of ‘true’ or ‘moderate’ Islam.<sup>1131</sup> In terms of rule-justification, the relaxation of guardianship rules can be defended even from a strict interpretation of the *Sunnah*. If restrictions on women’s rights are in fact based on a legitimate policy objective - the protection of Islamic conceptions of morality and chastity - the same aim can now be accomplished through less restrictive means. For instance, the rule-justification for segregation in the workplace can be achieved by requiring employers to provide separate facilities for women, or by equalising the educational resources made available to female-only universities.<sup>1132</sup>

Viewed through this lens, these processes of rule re-interpretation and adaptation may also establish new opportunities for a constructive dialogue from within and outside Islamic faith communities.<sup>1133</sup> There has always been a recognition among the earliest scholars that Islam is a living instrument, a religious for men and women ‘for all times and all places.’<sup>1134</sup> Through the act of reclaiming and reviving the under-used Islamic methods of rule adaptation (*ifta*) or

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<sup>1129</sup> Joseph Schacht, *An Introduction to Islamic Law* (Oxford University Press, 1979) 62 71-72.

<sup>1130</sup> Ayoub Al-Jarbou, ‘The Role of Traditionalists and Modernists on the Development of the Saudi Legal System’ (2007) 21 Arab Law Quarterly 191, 197

<sup>1131</sup> ‘I will return Saudi Arabia to moderate Islam, says crown prince.’ Guardian (October, 2017) <<https://www.theguardian.com/world/2017/oct/24/i-will-return-saudi-arabia-moderate-islam-crown-prince>>.

Interestingly, in early statements, the Crown Prince made references to “true Islam”. In later statements, tellingly, this phrasing has been replaced with references to a “moderate Islam”. Message From Hrh Prince Mohammed Bin Salman Bin Abdulaziz Al-Saud – Statement on the 2030 Vision <<https://vision2030.gov.sa/en/vision/crown-message?>>

<sup>1132</sup> Human Rights Abuses Stemming from Male Guardianship and Sex Segregation in Saudi Arabia’ (HRW, 2008) <<https://www.hrw.org/reports/2008/saudi-arabia0408/4.htm>>

<sup>1133</sup> Bakare Najimdeen, ‘From the Fiqh of Minority to Cosmopolitan Fiqh: An Analysis’ (2014) 11(1) Policy Perspectives: The Journal of the Institute of Policy Studies 38.

<sup>1134</sup> Muhammad Khalid Masud and Brinkley Messick and David S Powers (eds), ‘Muftis, Fatwas. And Islamic Legal Interpretation’ In *Islamic Legal Interpretation: Muftis and Their Fathers* (HUP 1996) 7

the doctrine of public policy exceptions to rule (as al-maslahah al-murslah), it seems entirely reasonable that Saudi Arabia should seek to see to depart from established custom so that it might better harness the talent of its female population from an integrated workforce in the benefit of the whole of Saudi society.<sup>1135</sup> There is nothing within scripture, or Islamic legal practice, which prevents women from playing an integral role in the development of Islamic societies.<sup>1136</sup>

The above analysis brings us back to the ideas set out in the introduction of the chapter. The question that follows is this: to what extent can gendered practices in conflict with Saudi Arabia's obligation under CEDAW be reformed by drawing on the moral and intellectual resources of Islam itself? A purely economic rationale for social change will fail to achieve the necessary level of moral and religious legitimacy in elements of Saudi society. Indeed, if reform is achieved too rapidly, the social cohesion and stability of the Kingdom may be imperilled, antagonising influential conservative elements of society who may rebel against a perceived threat to their faith and to their traditions.<sup>1137</sup> Change must come from within Muslim society, and cannot be imposed top-down by the state, or externally imposed through the disciplining effects of international law. Baderin develops a similar argument, postulating that: 'Due to its very significant role in Muslim States, Islam can and should, where employed appropriately, provide the glue that can make human rights stick and a channel to promote development in Muslim states.'<sup>1138</sup> It is only by invoking the idea that the *Qur'an* itself carries an emancipatory message, one based on cooperation and solidarity among the sexes,<sup>1139</sup> that is space is carved

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<sup>1135</sup> Wael B Hallaq, 'Ifta' And Ijtihad In Sunni Legal Theory: A Developmental Account' In Muhammad Khalid Masud and Brinkley Messick and David S Powers (eds), *Islamic Legal Interpretation: Muftis and Their Fathers Fatwas* (HUP, 1996) 33, 36. See also Nimat Hafez Barazangi, 'The Absence of Women in Shaping Islamic Thought: Foundations of Muslims' Peaceful and Just Coexistence', (2008) 24(2) *Journal of Law and Religion* 403, 403.

<sup>1136</sup> Islamic Relief, 'An Islamic Perspective on Human Development' (Islamic Relief, 2014).

<sup>1137</sup> Al Mukhtar, *History of Saudi Arabia in the Past and Present*, Part 2, 283

<sup>1138</sup> Mashood a. Baderin, 'The Role of Islam in Human Rights and Development in Muslim States,' in *Religion, Human Rights and International Law: A Critical Examination of Islamic State Practices* (Nijhoff, 2007) 358

<sup>1139</sup> In the field of Islamic hermeneutics, we can take linguistic example of how certain interpretations can be used to support conflicting perspectives. The word waliyy has been used to denote male guardianship waliyyah over awomen because, etymologically, it is derived from one of Allah's names and his sovereignty over his creators. This verses has been interpreted in accordance with other verses such as "... And women have rights similar to the rights of men in a just manner, and the men have a degree (of advantage) over them..." (2:228). But the root of this word in Arabic can also denote more egalitarian notions of equality, cooperation solidarity. This associations of this word with a more cooperative conceptions of the relations between men and women is however largely overlooked in classical jurisprudence, See Nadir Ahmad Al-Nasahawi, *Mauqif al-Sharia min tawalli almara' li-'aqd al-nikah* (The Sharia position regarding a woman conducting marriage ceremonies), Al-Daar al-Arabiyyah linashr, 12

out for *Qur'anic* understanding of women's rights; one that is substantially in keeping with the aims of international human rights law.<sup>1140</sup> The next will conclude by offering some final thoughts on debates between modernist and classical positions from within the Islamic legal colloquy. It is necessary therefore to draw intellectual inspiration from within the dynamic history of Islamic legal thought, and to reflect a broader debate between so-called classical and 'modernist' perspectives on Islam.<sup>1141</sup>

## 6.6 From an International to an Islamic Conception of Equality: A Common Purpose

If gender-inclusive re-readings of the *Qur'an* have theological merit, it is necessary to distinguish "absolute" truths of Islamic, that is rules that codify the essential message of Islamic, and the more interpretatively-open verses of the *Qur'an*.<sup>1142</sup> Invoking the concept of *Ijtihad*, Al-Hibri argues are certain gendered verses of the *Qur'an* are amenable to dialectical forms of reasoning, allowing the jurist to re-evaluate the justness of certain established rules, rule-interpretations and customs.<sup>1143</sup> One way in which this more dialectical mode of reasoning can be achieved is by historicizing the meaning and definition of gendered concepts such as *qiwamah* (curatorship), *wilayah* (male guardianship) or *ikhtilāf* (seclusion). The assumption of the male's authority over females in classical exegetical tradition stems from certain linguistic interpretations *Qur'anic* verses and the narration of the *Sunnah* as discussed in previous chapters.<sup>1144</sup> It has already been suggested that linguistic-textualist practices do not

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<sup>1140</sup> Indeed as Morgan-Foster notes third generation solidarity rights are [] more developed in Islamic law than in international law.' See J Morgan-Foster 'Third Generation Rights: What Islamic Law Can Teach the International Human Rights Movement' (2005) 8(1) Yale Human Rights and Development Journal 76, 83

<sup>1141</sup> These modernists are sometimes described as "liberal Islam" see Charles Kurzman, 'Introduction: Liberal Islam and its Islamic Context' in Charles Kurzman (ed), *Liberal Islam, A Sourcebook* (OUP 1998). It is worth mentioning that the term "liberal" within the context of what is entirely different legal tradition, in many ways antithetical to the principles of liberalism, may be more negative than it is positive.

<sup>1142</sup> Zafar Ishaq Ansari, 'Islamic Juristic Terminology Before Safi: A Semantic Analysis with Special Reference To Kufa' (1972) 19(3) Arabica 259; Riffat Hassan, 'On Human Rights And The Qur'anic Perspective' (1982) 19(3) Journal Of Ecumenical Studies 51.

<sup>1143</sup> Azizah Al-Hibri, 'Islam, Law And Custom: Redefining Muslim Women's Rights' (1997) 12(1) American University Journal of International Law and Policy 1, 25. See also Sai Bhatawadekar, 'Islam in Hegel's Triadic Philosophy of Religion', (2014) 25(2/3) Journal of World History 397. See also Safdar Ahmad, 'Progressive Islam and Qur'anic Hermeneutics: The Reification of Religion and Theories of Religious Experience,' Muslim Secular Democracy 76,77.

<sup>1144</sup> For example "... And women have rights similar to the rights of men in a just manner, and the men have a degree (of advantage) over them..." Qur'an. 2:228. Or the narration of Prophetic practices such as Prophet of Allah stated: 'Man is the guardian of his family and every guardian has responsibilities towards those under his guardianship'. In support of gender seclusion, there is a hadith the states Allah's Apostle said: "A woman should not travel except with a Dhu-Mahram (her husband or a man with whom that woman cannot marry at all according

exist in a hermetic vacuum, which is to say that jurists do not approach matters of interpretation ‘neutrally.’<sup>1145</sup> Rather, religious texts cannot be separated from the scholar or jurist’s own implicit cultural and linguistic biases, often in ways that reinforces, negates or excludes from view<sup>1146</sup> the lived experiences of women in modern-day Islamic society. In these ways, the day-to-day realities of social-economic inequality are masked or concealed under the pretext of a formal adherence to the ‘letter’ of religious texts.<sup>1147</sup> Furthermore, by claiming detached neutrality on matters of religious law, a rigid adherence to the classical exegetical tradition has served to place cultural criticism outside the realm of theological contestation and scrutiny.<sup>1148</sup> This can go unnoticed because modern jurists can claim that they are only following the opinions of their classical predecessors.<sup>1149</sup> It is this ‘closure’ to a more pluralist set of voices, including female voices, that has compelled some Islamic scholars to urge a more inclusive and reflexive approach to *Qur’anic* exegesis and juristic methods (the use of *qiya* etc).<sup>1150</sup>

Using the hermeneutic devices of rule reinterpretation, some scholars argued of a need to reconceive any *Qur’anic* statements that support a traditional understanding of curatorship (*Qiwamah*) most derived from the *Qur’anic* edict “al-rijālu qawwāmūna ‘ala l-nisā’. This edict has been construed as providing a *Qur’anic* framework for male’s authority over women, whereby a women’s obedience to her husband (*tamkin*) is exchanged for his duty to provide financial maintenance and protection (*nafaqah*).<sup>1151</sup> Some scholars suggest, that while Islamic

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to the Islamic Jurisprudence).” A man got up and said, “O Allah’s Apostle! I intend to go to such and such an army and my wife wants to perform Hajj.” The Prophet said (to him), “Go along with her (to Hajj).”

<sup>1145</sup> Reza Aslan, *No God But God: The Origins, Evolution, And Future Of Islam* (Random House 2011) 70.

<sup>1146</sup> ‘Religious Police in Saudi Arabia Arrest Mother for Sitting with a Man’ *Times OnLine* (London, 7 February, 2008)

<sup>1147</sup> See Ziba Mir-Hosseini, ‘Religious Modernists and the ‘Woman Question’: Challenges and Complicities’ in Eric Hooglund (ed), *Twenty Years of Islamic Revolution: Political and Social Transition in Iran Since 1979* (SUP 2002) 2. For practical context, see Sonia D Galloway, *The Impact Of Islam As A Religion And Muslim Women On Gender Equality: A Phenomenological Research Study* (Nova Southeastern University 2014). See also Sangeeta Dhami and Aziz Sheikh, ‘The Muslim Family: Predicament and Promise’ (2000) 173(5) *Western Journal of Medicine* 352

<sup>1148</sup> Ziba Mir-Hosseini, ‘Religious Modernists and the ‘Woman Question’: Challenges and Complicities’ in Eric Hooglund (ed), *Twenty Years of Islamic Revolution: Political and Social Transition in Iran Since 1979* (SUP 2002) 2

<sup>1149</sup> Peter A Samuelson, ‘Pluralism Betrayed: The Battle between Secularism and Islam in Algeria’s Quest for Democracy’ (1995) 20 *Yale Journal of International Law* 309, 358

<sup>1150</sup> Fatima Mernissi. *The Veil and the Male Elite: A Feminist Interpretation of Women’s Rights in Islam* (Basic Books 1991) 113.

<sup>1151</sup> Under this framework, males have a degree of authority over women: “and live with them honourably” [al-Nisa’ 4:19. Other verses state: “Let the rich man spend according to his means; and the man whose resources are restricted, let him spend according to what Allah has given him. Allah puts no burden on any person beyond what He has given him”[al-Talaq 65:7] “but the father of the child shall bear the cost of the mother’s food and clothing on a reasonable basis” [al-Baqarah 2:233]

concept of curatorship for instance, could be justified in pre-capitalist feudal or mercantilist societies, whereby women ceded some personal autonomy for financial and personal security in the context of a marital exchange relationship.<sup>1152</sup> However, the economic circumstances faced by men and women are now changing, which could be taken to imply that the basic justification for rules derived from certain established concepts (such as *Qiwamah*) should be reassessed or abrogated where appropriate.<sup>1153</sup>

This ‘re-reading’ also appears to be substantiated by a contextualised reading of the *Qur’an* whereby Allah, swt, ‘granted men more than women because they bear primary [financial] responsibility ...and carry [greater] burdens in the degree of strength or in the measure of aspiration.’<sup>1154</sup> Arguably, therefore, the *Qur’anic* basis for curatorship was based on the principle of solidarity and responsibility rather than ‘authority.’ This subtle difference in meaning casts a new light on certain history and customary attitudes around female ‘obedience’, dependency and seclusion in areas of public and private life. In contemporary Saudi society, women have an important role to play in national economic development strategies, meaning that they will share the financial burden with men (suggesting that a condition of the marital exchange relation has now changed). It is possible to argue that women have an equal duty to pursue education so that they might also provide for their families and use their intellect to deepen their spiritual knowledge while helping to smooth Saudi Arabia’s transition from a commodity to a knowledge-based economy.<sup>1155</sup> Indeed, state assistance for families through welfare packages has already been scaled-down, and women may have little choice but to supplement the family income through paid employment.<sup>1156</sup> Similarly, while it may have been logical to restrict freedom of movement or maintain men-only spaces at the time of Prophet, these restrictions are not well-founded in the context of modern Saudi society where it is generally safe for women to travel unaccompanied. Any concerns around the need to ensure appropriate behaviour between the sexes can also be achieved through rules which are less unfavourable to women than they have historically been for men.

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<sup>1152</sup> Ziba Mir-Hosseini, ‘Towards Gender Equality: Muslim Family Laws and the Shari’ah,’ in Zainah Anwar (ed) *Wanted: Equality and Justice in the Muslim Family* (2009) (Musawah 2009) 31

<sup>1153</sup> Azizah Al-Hibri, *A Study of Islamic Herstory: Or How Did We Get Into This Mess In Women Am Islam* (PP 1982) 214, 215

<sup>1154</sup> *Tafsir Kashf Al-Asrar*.

<sup>1155</sup> Mtango (n 904), 67

<sup>1156</sup> See Lyn Welchman, ‘A Husband’s Authority: Emerging Formulations in Muslim Family Laws’ in Mashood A Baderin (ed), *Issues in Islamic Law* (Vol II, Routledge 2014) 142-143



There is Islamic precedent for the gradual reform of social practices. For instance, the *Qur'an* prescribes the consumption of alcohol, but this rule was introduced gradually, thereby enabling societies to adapt to these rule changes and limiting any hardship imposed on individuals as a result. Gradualism and rule adaptation are consequently already an established part of Islamic law and custom.<sup>1157</sup> Guided by this ethic, rules that may have appeared ethically and practically necessary in the time of the Prophet can be interpreted anew in the face of societal change. Read in this light, it is possible to argue that any direct or indirect barriers to female education no longer have the same relevance in the modern economy. There have been criticisms of such so-called modernist re-interpretations of classical exegesis, mainly by those who fear that these interpretations involve an illegitimate deviation from doctrinal orthodoxies, and are consequently not adequately rooted in the Islamic legal tradition.<sup>1158</sup> This attitude of resistance and rigidity runs counter to verses of the *Qur'an* that make explicit references to notions of equality and equal dignity between sexes in work and in all other areas of life, for instance: 'so their Lord accepted of them....Never will I allow to be lost the work of any of you, be he male or female. You are (members) one of another.'<sup>1159</sup>

The above verse reinforces the *Qur'anic* ideals of mutuality, solidarity and equal dignity between men and women as the creations of a supreme and sovereign God. This message is also imparted in Surat al-Rum where the *Qur'an* instructs male and females to live in harmony and tranquillity with the other, and urges believers to take heed of this instruction as a 'sign to ponder.'<sup>1160</sup> An egalitarian reading of these verses may be taken to mean that the principle of equality between sexes is a central and underpinning principle of the Islamic faith. Any rules or principles derived from conflicting verses should, arguably, be deemed secondary and subordinate to these higher moral and regulatory principles.

The most optimistic way of perceiving reforms in Saudi Arabia is to argue that the new leadership in Saudi Arabia has implicitly appealed to this more purposive idea of Islam - one that maintains fidelity to the core message of Islam, rather than a rigid adherence to custom –

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<sup>1157</sup> Shaheen Sardar Ali, 'Women's Human Rights in Islam: Towards a Theoretical Framework' (1997-98) 4 Yearbook of Islamic and Middle Eastern Law 117.

<sup>1158</sup> Leila Ahmed, *Women and Gender in Islam Historical Roots of a Modern Debate* (YUP 2011), ch 8.

<sup>1159</sup> *Qur'an* 3:195.

<sup>1160</sup> *Qur'an* 30:21.

as a way of gradually phasing out the guardianship system. Further social reforms are likely to follow as women play a larger role in public institutions, and are consequently better positioned to shape local attitudes and decision-making practices.<sup>1161</sup> To the extent that authorities make ‘choice’s when determining the meaning they will ascribe to certain verses, and which they will reject, it is more important than ever that Saudi Arabia should devise educational strategies in light of the *Qur’anic* ideas of solidarity and cooperation in male-female relations.<sup>1162</sup> This forms the basis of shared consensus around the principle of dignity that has the as yet unexplored potential to unite Islamic and contemporary human rights discourses under a common framework.<sup>1163</sup>

## 6.7 Conclusion

This chapter has attempted to explore the relationships between distinct but overlapping legal systems: the Saudi legal system, the independent system of *Sharia*, and the international human rights framework on gender rights. In doing so it has attempted to unite and analyse the themes explored in this thesis under a synoptic conceptual framework. It has attempted to flesh out and connect ideas developed in previous chapters, by teasing out the internal tension between the theological basis for a general right of education and differentiated regime of rights that have been maintained in many Islamic societies, particularly in the private worlds of the workplace and family life. It has also attempted to unpack the relation between the domestic (judicial) enforcement of *Sharia* as practised in local and traditional settings and Saudi Arabia’s obligations under International law.

While there is no inherent conflict between the right to education in Islam and the legal basis for such a right under international law, the chapter has attempted to expose areas of conflict and convergence between these two frameworks. The chapter has shown that certain religious and customary practices that have been historically observed with binding effect in Saudi

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<sup>1161</sup> Caryle Murphy, ‘Saudi Arabia’s Youth and the Kingdom’s Future’ (Middle East Program Occasional Paper Series, Woodward Wilson International Center for Scholars 2012).

<sup>1162</sup> Reza Aslan, *No God But God: The Origins, Evolution, And Future Of Islam* (Random House 2011) 70.

<sup>1163</sup> Christopher McCrudden, ‘Human Dignity and Judicial Interpretation of Human Rights (2008) 19 European Journal of International Law, 655

Arabia have limited women's freedoms in certain areas,<sup>1164</sup> often in ways that interfere with the educational prospects of women. The existence of these barriers suggest that Saudi Arabia has more to do if it is to eliminate discriminatory laws and provisions as per its obligations under CEDAW.<sup>1165</sup> Remaining cultural and institutional barriers have also contributed to inequality in educational access and outcomes. The chapter, therefore, concludes that Saudi will need to forge a more inclusive approach to women's participation in society if it is to meet the economic challenges of the new century. This will require the Saudi government to take positive steps to address structural and institutionalised discrimination which has prevented progress in this area.

Drawing on the idea of international law as an ongoing process of dialogue between Islamic scholars and the wider world, the chapter considered the ways in which Saudi Arabia's new leadership may yet reconcile its international commitments with obligations under *Sharia*. Traditional and religious legal structures have treated Islamic law as a 'closed' legal system, but this may be changing. The chapter notes that Saudi Arabia is undergoing a momentous period of social and constitutional change and that may have the effect of bringing Saudi Arabia into ever closer compliance with the overarching aims of CEDAW and other applicable international legal instruments. Through its engagement with discourses from within and outside the Islamic world, the country is beginning to reform practices that have previously been discriminatory to women, but has done so incrementally, so as to ensure that the domestic implementation of gender policies achieve social and religious legitimacy.<sup>1166</sup>

In this light, the chapter has surmised that while right-restricting rules have been place since the very creation of the Saudi state, and have been done so in apparent fidelity to the country's deep-rooted Islamic history, the very fact that these are now being remade and reinterpreted, is testament to the flexibility that is inherent to the religion of Islam itself. The conclusion chapter will build on the above insights by setting out actionable reform proposals. These reforms may

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<sup>1164</sup> Eleanor A Doumato, 'Gender, Monarchy and National Identity in Saudi Arabia' (1992) 19(1) British Journal of Middle Eastern Studies 31, 47.

<sup>1165</sup> CEDAW 'Consideration of Reports Submitted by States Parties Under Article 18 of the Convention, Combined Initial and Second Periodic Reports of States Parties: Saudi Arabia' (16 August 2007) UN Doc CEDAW/C/SAU/2, 07-29667.

<sup>1166</sup> 'Labour Market Reforms to Boost Employment and Productivity in the GCC: Minutes of the Annual Meeting of Ministers of Finance and Central Bank Governors' (IMF, 5 Oct 2013) 25, 27 <<http://www.imf.org/external/np/pp/eng/2013/100513.pdf>>

help Saudi Arabia implement meaningful reforms towards achieving equivalence in all aspects of educational reform. Through these reforms, the Kingdom will be better in a position to deliver on its economic development programs and, more importantly, do so not by rejecting its Islamic traditions, but by reviving the Islamic tradition of juristic innovation in service to the higher *Qur'anic* ideals of solidarity and cooperation between the genders. <sup>1167</sup>

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<sup>1167</sup> *Tafsīr Ibn Kathīr* (2003) vol 2, 350 (noting the Qur'an verses which emphasize equal respect and dignity among the sexes, an idea that is missed by much Islamic commentary. On the juristic creativity that is inherent in Islamic method and rule interpretation, particularly where it serves the economic benefit of society, see Habib Ahmed, 'Islamic Law, Adaptability and Financial Development' (2006) 13(2) *Islamic Economic Studies* 84, 84.

## Chapter 7

### Conclusion

#### 7.1 Overview

This thesis has offered a critical assessment of the right to education for women in Saudi Arabia, in law and in practice. It attempted to answer and explore the research questions and aims, identified in chapter one, concerning whether women in Saudi Arabia have a justifiable entitlement to unlimited and unhindered access to education for three principal reasons. First, it argued that the right to education is a human right and therefore belongs justifiably to women as to men. Secondly, it is claimed that women's right to education finds strong support in Islamic law and can be advanced within the framework of *Sharia*. Thirdly, with the diversification of its economy, the thesis proposed that Saudi Arabia is compelled to provide educational opportunities to its female citizens in anticipation of a future need to integrate more people into the workforce.

In seeking to examine, and ultimately defend, the above claims, the thesis has explored the women's rights in Saudi Arabia from an economic, religious, and legal lenses. There is a strong practical dimension to the research focus. Indeed, this Researcher argues that Saudi Arabia has introduced several important gender-related reforms, including the relaxation of the guardianship system and the practice of gender segregation. This thesis has claimed that these reforms are not solely motivated by the need to amend existing discriminatory laws and procedures, nor is merely the outcome of the Kingdom's desire to improve its international image. Rather, the drive to improve women's access to education and the workforce is as likely to be influenced by the seismic economic and societal changes that Saudi Arabia is currently undergoing.<sup>1168</sup> Of course, the economic perspective only helps the reader to understand why reform has been so rapid in the last decade. It does not, however, provide us with an insight into how such reforms impact the experiences of women in Saudi Arabia, and the attitudes they face in all areas of public and private life. Therefore, the thesis focuses on the status of women

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<sup>1168</sup> Francis Patalong, 'Vision 2030 and the Transformation of Education in Saudi Arabia' (2016) Al Tamimi & Co <<http://www.tamimi.com/en/magazine/law-update/section-14/august-2/vision-2030-and-the-transformation-of-education-in-saudi-arabia.html>>

in Saudi Arabia from a legal and institutional standpoint. On this basis, the thesis has considered the rights of women under three intersecting legal orders: the Saudi legal system, Islamic Law, and International Human Rights law.

Applying a critical perspective, the thesis has concluded that Saudi Arabia has made great strides in widening access to high-quality education for women in Saudi Arabia. In many respects, Saudi Arabia has promoted educational rights that are substantively aligned with standards set out relevant international human rights treaties such as the International Covenant on Economic, Social and Cultural Rights, even if Saudi Arabia has elected not to ratify this treaty. However, the Saudi government has taken the important step of ratifying the Convention on the Elimination of All Forms of Discrimination against Women, a clear symbol to the international community that Saudi Arabia is committed to the goal of gender inclusion and equality.<sup>1169</sup> In this regard, the Saudi leadership has been effective at eliminating institutional discrimination that Saudi women have experienced under the now partially repealed guardianship system and other informally enforced practices of Islamic law. These gains, notwithstanding, this thesis has challenged the assumption that a gender-neutral right to access to education under Saudi law amounts to substantially equal treatment.<sup>1170</sup>

To the extent that women still experience forms of discrimination, many deeply rooted in informal practices of family and private life, this thesis considers whether different treatment of men and women is, necessarily, illegitimate, or inequitable from the standpoint of Islamic law and society.<sup>1171</sup> Put differently, this thesis also considers whether it can be suggested that Islamic law provides a distinct theological justification of the differentiated rights and responsibilities between men and women.<sup>1172</sup> If this claim is based on a sound interpretation of Islamic sources and rule-interpretation, then mere evidence of a different treatment of genders does not necessarily constitute discrimination from the standpoint of the Islamic legal tradition,

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<sup>1169</sup> Sifa Mtango, 'A State of Oppression – Women's Rights in Saudi Arabia' (2004) 5 Asia Pacific Journal on Human Rights and the Law 49, 50. CEDAW Art 2, Saudi Arabia's accession to the convention was formalised through the adoption of Royal Decree No 25 of 28/5 [Concerning the kingdom's accession to the Convention on the Elimination of All Forms of Discrimination against Women] on 28 August 2000.

<sup>1170</sup> Frances Raday, 'Gender and Democratic Citizenship: The Impact Of CEDAW', 2012 10(2) International Journal of Constitutional Law, 512 <<https://academic.oup.com/icon/article/10/2/512/666068>>

<sup>1171</sup> Fatima Sadiqi and Moha Ennaji, 'The Feminization of Public Space: Women's Activism, The Family Law, and Social Change in Morocco', (2006) 2 Journal of Middle East Women's Studies, 86

<sup>1172</sup> Fatima Mernissi, *The Veil and the Male Elite: A Feminist Interpretation of Women's Rights in Islam* (1991) 113

even if it appears to be at odds with the (liberal, secular, and egalitarian) philosophical underpinnings of the modern system of international human rights law.<sup>1173</sup> This thesis contests this argumentative perspective by contending that while *Sharia* does accord different rights and responsibilities to men and women in certain areas of life, overall, Islamic is unequivocal in its support of education as a right belonging to all.

More generally, this thesis has proposed that it is possible to make the case that no specific conflict exists between international and Islamic human rights conceptions, particularly in the realm of social and economic rights.<sup>1174</sup> Moreover, it is possible to argue that religious justifications have been used as a pretext to justify the suppression of women's rights for cultural or historic reasons, often in ways that seem to flout scriptural revelation or the Prophetic Tradition.<sup>1175</sup> Assuming, therefore, that many historic and existing barriers to full and equal rights to education for women are based in culturally specific interpretations of *Sharia*, this thesis concludes by arguing in a defence of interpretation of *Sharia* that best supports the *Qur'anic* ideas of tolerance, peace and justice for all people, in all times and places. It is this purposive idea of the Islamic legal tradition that can provide the inspiration for further reform of legal and cultural practices that have long prevented women in Saudi Arabia from achieving their personal potential in a way that helps the economic development of Saudi society as whole.<sup>1176</sup> In the same way that individual rights protection can also be seen to support the more pragmatic, collectivist goal of economic development, legal reform can, over time, promote a gradual change in conservative social attitudes in a manner that is consistent, both, with Islamic ideals and the aspirations of the international community.

It has already been noted that Islamic feminists have already drawn upon the emancipatory and empowering nature of early Islam, and the role of women within these societies. In doing so, they have looked to cast new light on those verses of the *Qur'an* that appear to support female

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<sup>1173</sup> Sammena Nazir, 'Challenging Inequality: Obstacles and Opportunities Towards Women's Rights in the Middle East and North Africa,' (2005) 5 JIJIS 31, 38, 39, 40, 42

<sup>1174</sup> E. Yakin, 'Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development' in Report of the Special Rapporteur on violence against women, its causes and consequences, UN General Assembly, Eleventh Session Agenda item (3) [2009] p.9

<sup>1175</sup> John Hursh, 'The Role Of Culture In The Creation Of Islamic Law,' (2009) 84 Indiana Law Journal 1401, 1409

<sup>1176</sup> E. Yakin, 'Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development' in Report of the Special Rapporteur on violence against women, its causes and consequences, UN General Assembly, Eleventh Session Agenda item (3) (2009) p.9

subordination such as: “Men are the support of women as God gives some of their wealth [to provide for them].<sup>1177</sup> However, many Islamic feminists have begun to offer new interpretations of these verses as discussed in chapter 6, suggesting that in women in modern Islamic societies are increasingly financially independent. This implies that verses that require female obedience to their husband in exchange for financial security no longer have the same currency in modern economic societies, where more and more women have joined the workforce out of necessity more than desire. In any case, many liberal scholars of Islamic texts have claimed that the meaning of such verses is not absolute and, as with all texts, how one chooses to understand such verses ultimately depends on a person’s own subjective experiences, biases and cultural preferences.<sup>1178</sup> The only way to challenge certain orthodox interpretations of *Sharia*, particularly when disguised as religious obligation rather social norm, is to include women more fully in the development of the law, and to provide them will meaningful opportunities to shape religious and public discourses.

The above point emphasizes the importance of empowering women to achieve education. This will not only support women to achieve financial independence but also allow them to practice their faith using their own knowledge. By empowering women through educational opportunities, this can also avoid the dangers of treating women from Muslim societies as passive victims, as they are often portrayed in Orientalist discourse. It is not difficult to see why a strategy of imposing a Western ideal of female emancipation that involves breaking down family institutions or abandoning social customs will be looked on dimly by Muslim women, as well as broader society. The better argument is that Islam does not deny women the right of education but instead compels all to enrich their spiritual and intellectual knowledge for their own betterment. By opening up Islamic traditional jurisprudence to a broader range of voices, women too can play a role in deciding the role that Islam should play in shaping Saudi Arabia’s economic modernisation agenda. The highest principle of Islam is that all humans are subject to the commands of their divine creator (*tawhid*), and this requirement extends to all who would misuse their power to deny any beings any rights issued by *Allah*. All humans (rulers, and all genders) are equal in the eyes of the creator. In the very first ayah surat al-Nisa', the *Qur'an* instructs that all human were made from the same soul. It states, accordingly:

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<sup>1177</sup> Sonia D Galloway, *The Impact of Islam As A Religion And Muslim Women On Gender Equality: A Phenomenological Research Study* (Nova Southeastern University, 2014).

<sup>1178</sup> Reza Aslan, *No God But God: The Origins, Evolution, And Future Of Islam* (Random House, 2011) 70.



‘O people! reverence *Allah* (show piety towards *Allah*) who created you from one *nafs* (soul) and created from her (the *nafs*) her mate and spread from them many men and women; and reverence *Allah*, through whom you demand your mutual rights, and the wombs (that bore you), (for) *Allah* watches you.’<sup>1179</sup>

As oft alluded to through the thesis (in chapter 2, 3 and 5), the Prophet Mohammed is also reported to have treated women, and his wives, with respect and dignity. It is arguable that it is a principle that should be given primacy before any rule justifying the different treatment of men and women on religious grounds is applied. It should also be noted that Islamic principles also emphasize notions of redistributive justice, mutuality, collectivism, truth and self-discipline. Courts and ruling authorities must consider these principles when enacting or enforcing laws that limit female rights, even if this means recognizing that classical exegetical Islamic tradition is based on the recognition of “difference” in the legal treatment of men and women.

Moreover, the tradition of gradual social change is recognised within the *Qur’anic* text. This concept of gradualism allows for certain rules (expects these which are obligatory) to be revised and altered to meet the new social needs and requirements of societies.<sup>1180</sup> This suggests that any cultural or legal barriers that remain in Saudi Arabia can be defended as forcefully from an Islamic perspective as they can from an international human rights perspective. In the light of this more inclusive and emancipatory ideal of Islamic law and thought, the next section will consider areas deserving of practical reform in Saudi Arabia.

## **7.2 Practical Reform Recommendations**

This thesis has contended that there are strong economic as well as ethical arguments for supporting the equal and comprehensive access to education for women in Saudi Arabia, as well as to challenge certain culturally entrenched attitudes to the male-female relation. Saudi Arabia is experiencing a moment of profound change. In the past, the Kingdom has relied on almost exclusively on oil export revenues as source of wealth, and any social unrest or tensions

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<sup>1179</sup> Qu’ran 4:1,

<sup>1180</sup> Ibid

between the conservatives and progressive forces in the country could be pacified through the governmental provision of high-paid public sector jobs and welfare entitlements.<sup>1181</sup> As oil revenues dwindle, and youth unemployment escalates, the social landscape of the Kingdom is shifting. A largely young population is more engaged with the global world than ever, as social media use and international travel and education exposes a new generation to less traditional views. High rates of employment have also hastened the Saudi government's program to grow new industries in the science and technology fields.

### 7.2.1 Economic Empowerment

The Saudi Vision 2030, the Kingdom's economic modernisation blueprint, emphasises the need to invest in human capital, identifying the diversification of a commodity to a knowledge economy as a necessary step towards cultivating a skilled local workforce.<sup>1182</sup> This shift does not only strengthen the economic competitiveness of Saudi Arabia in the modern century, it also carries significant implications for the way that women may come to access the workforce.<sup>1183</sup> At the height of the oil boom, most assets were owned by the state, resulting in a bloated public sector. With most jobs taken up by males under a system of patronage, relatively affluent women became part of the leisure class, while poorer women were forced into low-skill jobs or left to rely on state benefits. The capacity for Saudi Arabia to integrate women into a diversified workforce will depend on the affordable access to high-quality education. The requirement that women attain equal rights to access to training and educational services in fields such as science and technology has never been more vital. The text of the Basic Law of Governance demonstrates a clear example of how Saudi law can be applied without significant deviation from Islamic principles of international human rights treaties to which it is a member. The Basic Law, in other words, is effectively a 'bill of rights.'<sup>1184</sup> As noted in Chapter 1 and 6, there has been an upward trend in the admission of female students since the beginning of this century. As discussed in chapter 6, however, the mere existence of

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<sup>1181</sup> Ricardo Hausmann and Roberto Rigobon, *An alternative interpretation of the 'resource curse': Theory and policy implications* (National Bureau of Economic Research, 2003) 6

<sup>1182</sup> Hani Abdulghani, "Examining Obstacles to Saudi Women's Right to Work in the Kingdom of Saudi Arabia: A Thesis submitted for the Degree of Doctor of Philosophy" (Brunel University, London) January 2016, p67

<sup>1183</sup> Eman Alhussein, 'Triangle of Change: the situation of women in Saudi Arabia (NOREF)' <https://www.files.ethz.ch/isn/181922/ef4fe5e44ede4d362d60a6804ed40437.pdf>

<sup>1184</sup> Hailh Al-Twijrih, *Women's Work in Islamic Jurisprudence* (Amal Al-mara fi Al-Fiqh Al-Islami, Arabic, Researcher Center for Women's Studies 2010) 40.

equal rights under the law to seek work or education<sup>1185</sup>, however, does not provide an adequate guarantee that substantive gender equality in the access, provision, and quality of education will be achieved in practice. Rather, the Saudi government must take positive steps to ensure that women have access to the same quality of resources, teaching, institutional resources, and training facilities as men.<sup>1186</sup> Hence, although there are more female students in universities, women-only currently accounts for 4.6 per cent of all private-sector jobs. This may, in turn, be explained by the fact that female students mostly take majors in education and the social sciences and therefore end up in the public sector.<sup>1187</sup> However, any legal reforms must be culturally appropriate and innovative, thereby ensuring that the type of economy envisioned by the Kingdom in the Vision 2030 can be reconciled *Qur'anic* ideals.

One institutional barrier has stemmed from the historic role of the guardianship system in limiting a women's freedom of movement. Migrant workers or poorer women were often isolated from society, often unable to access the employment market (or obtain rights to obtain health care or education). These restrictions were not simply confined to the private spaces of home and family life but codified in various laws and enforced by administrative officials. The decision to effectively abolish the requirement of guardian consent for women who seek to travel to work, or enrol in higher education is likely to have a profoundly transformative effect - not only for women affected by these policies, but for a society that has been conditioned to see such restrictions as a religious requirement and thus entirely acceptable.<sup>1188</sup> How these changes are applied and enforced in Saudi Arabia will have a big impact on whether or not it can be said that Saudi Arabia is attempting to create true equality between the sexes and could be the first step towards a more equal and prosperous economy for all citizens.<sup>1189</sup>

Reform of the guardianship system, in the above regard, does not mark the beginning of full equality for women. As noted in chapter 3, educational equality will only be achieved if other

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<sup>1185</sup> See Saudi Labour Law, Royal decree no. M/51, Part IX Employment of Women

<sup>1186</sup> Committee on the Elimination of Discrimination against Women, Convention on the Elimination of All Forms of Discrimination against Women, fortieth session, Summary record of the 816th meeting held at the Palais des Nations, Geneva, on Thursday, 14 January 2008, CEDAW/C/SAU/CO/2.

<sup>1187</sup> Nicolas De Walle, 'Privatization in Developing Countries: A Review of the Issues' (1989) 17(5) World Development 601

<sup>1188</sup> Arab News, 'Saudis reluctant to marry women in mixed jobs', (22 January 2016) < Saudis reluctant to marry women in mixed jobs> and Arab News, 'Hafiz being abused by educated, idle women', < <http://www.arabnews.com/news/483821>>

<sup>1189</sup> Mai Yamani, 'Some Observations in Women in Saudi Arabia' in Mai Yamani and Andrew Allen (eds), *Feminism and Islam: Legal and Literary Perspectives* (New York University Press 1996) 263, 274

orthodox interpretations of religious texts such as gender segregation and *qiwāmah* are revisited and reconsidered. Chapter 6 argued that significant barriers continue to exist in respect of the education of women in Saudi Arabia, for instance, forms of social pressures placed on women to pursue studies in fields ‘suitable to their nature.’ These restrictions do not derive from Islamic law or from Saudi legislation but stem from cultural barriers and attitudes that deeply rooted in Saudi culture and custom as discussed above. Indirect forms of discrimination such as structural and cultural barriers to the right to education in Saudi Arabia are also considered in relation to the recognition of the right to education in international rights human rights law in chapters 4 and 6. Drawing on the perspective of Islamic feminists, it is argued that a more inclusive and less culturally specific interpretation of traditional doctrines can be achieved by looking within the jurisprudential framework of *Sharia*, without being too seeing to be excessively deferential to ‘Western’ ideals of human rights that might attract accusations of imposition of cultural ideals antithetical to Islam.

#### 7.2.2 Constitutional Reform and Empowering Women Through Law and Public Participation

At present, there is little legislative detail or case law dealing with Saudi Arabia’s obligations to positively protect women’s rights in accordance with domestic or treaty-based international law. To illustrate the uncertainty this creates, it is not entirely clear how the reform of guardianship will be enforced in practice. The pursuit of gender equality can only be achieved if certain rights, such as the right to education are strengthened and upheld by a government and judiciary that is committed to recognising and enforcing women’s complaints against an employer, a spouse or indeed a governmental official that has restricted the rights to substantially equivalent rights to education as their male counterparts. Once again, this will ensure that Saudi Arabia can achieve reform not by the ‘top-down’ imposition of judgements and rulings issued by human rights committees, by ‘from within’ the Saudi legal system itself.

However, the vision of a Saudi Arabia that actively protects and police against human breaches may be difficult to achieve in the absence of wider constitutional reform.<sup>1190</sup> Women should play a greater role in law-making and decision-making processes. The Saudi government has

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<sup>1190</sup> Abdulaziz Al-Fahad, ‘Ornamental Constitutionalism: The Saudi Basic Law of Governance,’ 30 Yale Journal of International Law (2005), p.383

taken some positive steps in this direction. In 2013, King Abdullah appointed 30 women to the *Shura* Council.<sup>1191</sup> Any laws used to remove barriers to women's rights to participate in public life, and to live free of undue restraints in the domestic sphere (such as restrictions on freedom of movement) does not necessarily ensure that these will be accepted by the public, or routinely championed by the courts. To protect women's rights, domestic courts must take an active role in penalising any official or private individual that restrict women and their rights to study, work, or travel. However, challenges remain. As it stands, certain doctrines such as judicial independence are not well established under the Saudi legal system.<sup>1192</sup> No system of legal precedent exists and cases are not generally published, contributing a potential lack of transparency, subjectivity and arbitrariness in judicial rulings (particularly where courts may exhibit certain cultural or personal biases on issues such as women's personal status rights etc). There have been attempts to overhaul the Kingdom's hitherto disorganised judicial system. The Supreme Judicial Council has recommended that courts uphold the judgements of the newly established Appeal and Supreme courts.

Mere political or policy-related reform will not be sufficient to transform attitudes, since there are too many other factors that have historically impeded the rights of Saudi women, including the inconsistent interpretation of *Sharia*; the historic influence of religious authorities under the Saudi legal system; and informal attitudes in the family home that still restrict women from effectively accessing higher education institutes and workplaces.

Codification of Islamic standards would contribute to the development of concrete legal standards that would empower women who have been de facto excluded from legal recourse (due to the requirement of guardian consent) to better understand their rights.<sup>1193</sup> Moreover, increased public discourse on the importance of educating women may also enable communities to understand the positive economic effects of integrating women into aspects of public and financial life. Public education of this type may also help to stimulate a more inclusive conversation that can more effectively bring about long-lasting social change across public and private sectors, in both the urban and rural elements of society. Religious authorities

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<sup>1191</sup> BBC, 'King Appoints Women to Shura Council' (BBC 11 January 2013) < <http://www.bbc.com/news/world-middle-east-20986428>

<sup>1192</sup> See Faisal Al-Fadhel, 'The New Judicial System of Saudi Arabia' (2009) 75(1) *Arbitration Journal* 91, 94.

<sup>1193</sup> Najmaldeen K. Kareem Zanki, "Codification of Islamic Law Premises of History and Debates of Contemporary Muslim Scholars," (2014) 4(1) *International Journal of Humanities and Social Science* 134

such as Council of Senior Scholars and the General Presidency of Scholarly Research may also play an important role in shaping understandings and balanced input from such bodies will provide much needed-legitimacy to any further reform to certain religious customs such as inter-mixing. Codification would also bring greater clarity in connection with *Sharia* related-treaty reservations entered by the Saudi government.

### 7.2.3 Strengthened Participation in International HR Regimes and Independent Oversight

Building on the above, this thesis proposes that Saudi Arabia continue to participate in the international discourse on human rights. Once again, it is important to note that certain rights have a strong basis under Islamic law, particularly social and economic rights. The Cairo Declaration on Human Rights, to which Saudi Arabia is a party, emphasises the duty of rulers to provide their citizens with certain economic rights to avoid hardship. This concept of Islam as religion inherently concerned with justice, mercy and equity can provide a bridge between Islamic and international rights conceptions. By focusing on areas of common ground between Islamic and liberal human rights traditions, the impetus for reform in Saudi Arabia can be driven less by reasons of economic utility (an argument that is unlikely to attract the consent of the more conservative elements of Saudi society) than by calling upon believers to use the reason that their creator has endowed in them.

In this way, Saudi Arabia can strengthen its reputation as the leader of social and economic reform in the Gulf region, while continuing to comply with Islamic tenets. To further cement its status as a member of the UN Human Rights Council, Saudi Arabia should take further steps to ensure the effective implementation of provisions of CEDAW into domestic law (such as taking measures to eliminate cultural bias against genders). By choosing to enter a specific reservation to the Convention on the Elimination of Discrimination of Women (as opposed to a general reservation) and by ratifying the international Covenant on Economic, Social and Cultural Rights, Saudi Arabia could demonstrate to the world that recent milestones to integrate women in public life (such as the relaxation of the guardianship system) are not cosmetic but are evidence of the Kingdom's serious to promoting equal opportunities for women. These aims could be further strengthened should Saudi Arabia reconsider its decision not to ratify the ICESCR on the basis that these rights are already protected by Saudi Arabia's ratification of other international treaties and the *Sharia*. The extra step of ratifying this treaty, and amending its domestic law accordingly, would send a strong message of the seriousness with which Saudi

Arabia was now seeking to protect, respect and fulfil women's right to work, study and travel under that treaty.

### **7.3 Avenues for Future Research**

This thesis has demonstrated that women in Saudi Arabia should have unlimited and unhindered access to education and that this entitlement finds strong support in Islamic scripture and can be advanced within the framework of *Sharia*. It has also determined that the impediments imposed on women's to education are not based on the objective interpretation of *Qur'anic* verses and statements attributed to the Holy Prophet.

It is shown that although there are established rules of interpretation in Islamic law, deference to open-ended concepts such as legal reasoning, consensus, preference and public interest can be used to strengthen women's freedoms, instead of restrict them. It is also argued that the *Qur'an* describes the man's role in society in different verses as constituting duties, and the duties include supporting and providing correlative benefits to women rather than imposing burdens on them. Hence, it is concluded that as research and dialectics continue to open the Saudi society to scientific viewpoints, objective evidence that gender inequality in educational institutions is *Sharia*-noncompliant will compel more institutions to discard conservative opinions and old prejudices, and the patriarchal gender system that is characterised by male domination and restrictive codes of behaviour for women will be dismantled. Future areas of possible research could consider the relation between gradual legal reform and social change.

In the case of Saudi Arabia, any radical overhaul of the personal status law, including remaining customs in the area of public morality, divorce and family life will need to be sensitively balanced against with respect for the country's conservative traditions. Further research avenues are therefore opened up to a study of how informal cultural attitudes and other 'unobserved' attitudes or customs in the hidden spaces of family life affect a women's educational and employment opportunities, as well as qualitative research on the number of women that are entering into professions closed off to them, the pay gap, and the scope for some type of positive discrimination to attract women into certain professions where they are at a disadvantage.

In line with the 2030 Vision, further attempts to level up, and increase the number of high-quality female institutions, including transparency on job rates, wages, further education and training for women, will do much to strengthen the rights of women in Saudi Arabia. Transparency, however, will only solve part of the problem. Courts will need to play a more active role in promoting a culture of rights and Saudi legislators should seek to build on the efforts to expand the numbers of women eligible for political and decision-making positions in the government. The social, economic and civic inclusion of women in society will also help to strengthen and diverse Saudi Arabia's economic future. Education is the bridge for social acceptance of a women's rights and dignity in all aspects of society, as required under international law and *Sharia*. It remains to be seen whether Saudi Arabia will seize this moment and take further positive steps to empower Saudi females for the good of all in society.

#### **7.4 Further Opportunities for Research**

This thesis has focused on the right to education in Saudi Arabia, focusing on the relationship between Sharia and international law in shaping domestic law and decision-making processes in this regard. It has also reflected on the economic benefit that may result from strengthened rights protection of women in supporting the economic development goals of Saudi Arabia. However, the broader significance of this study is not necessarily limited to the specific legal system of Saudi Arabia, and few studies have sought to analyse the Right to Education in Islamic law in cultural and economic context as this research has attempted to do. Further studies may be developed in specific Islamic country contexts, each with their own unique cultural and legal environments, for the purpose of examining how the rights of women to education can be furthered around the world in light of the needs, realities and self-determination of women in the Islamic world. These studies may therefore examine the empirical realities of women in different societies, in light of specific educational policies in place under the relevant system of governance, taking into account the dynamic relation between religion and culture in the development of domestic laws and judicial practices. This will allow for the cultivation of a broader debate among Muslim societies over how best to promote economic modernization goals in a manner that is consistent with fundamental norms of Sharia and emerging norms of international human rights law.



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