



Male Guardianship over Women under Islamic *Shariah*, Saudi Arabia's Domestic Law and International Human Rights Law

A Thesis Submitted for the Degree of Doctor of Philosophy

By

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2018

Dedication

This thesis is dedicated to my treasured great parents, my wife, my daughter AL Anoud, and to my little baby.

Abstract

This thesis provides a conceptual analysis of the application of Islamic *Shariah* and international human rights law in the Kingdom of Saudi Arabia. It considers the jurisprudential roots of guardianship practices over women, its core concepts and key issues of dispute among Islamic scholars. Furthermore, it discusses the extent to which Saudi Arabia has managed to tackle the issue of women's rights in its territory.

The thesis examines the impact of guardianship and guardianship reforms on some of the women's rights in Saudi Arabia. Additionally, it considers the effects of the recent reforms relating to women's right to education, the right to work and the right to freedom of movement.

The thesis provides an overview of the recent reforms and the Vision 2030 strategy, which aim to resolve any issues or obstacles in regards to women's rights and accelerate positive changes to improve the status of women in Saudi Arabia. Moreover, this stresses the importance that Saudi Arabia attaches to the issue of women's rights.

The thesis finally analyses how Saudi Arabia's reliance on Shariah law ensures that the principle of equality between men and women is not undermined. Furthermore, this is achieved through the consideration of various factors such as the characteristics of men and women in Saudi society and the relationship between them.

The thesis finds that Saudi Arabia's laws aim to combat and eradicate violations of the principles established by Islamic *Shariah* relating to women's rights. Additionally, it finds that the practice of male guardianship over women is now covered by Saudi Arabia's legal framework pursuant to the recent legislation passed.

The thesis finally puts forth several recommendations to improve upon the current legal position. Additionally, if the recommendations are followed, they may potentially resolve many of the issues highlighted throughout the thesis.

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Acknowledgements

First of all, I extend my thanks to Allah Almighty, the most gracious and merciful who gave me strength and knowledge to complete this thesis.

I am sincerely thankful to The Custodian of the Two Holy Mosques, King Salman bin Abdul-Aziz Al Saud. May God save him and prolong his life for his unfailing support for higher education in the Kingdom, and his Royal Highness Crown Prince Mohammed bin Salman. This study would not have started without their support and the financial aid from AL-Baha University who fully sponsored my study in the UK.

My deepest appreciation goes to my supervisor Professor Manisuli Sseyonjo, who has always been inspiring and extremely helpful to me. It was a real honour to work under his supervision. Many thanks are also due to my second supervisor Professor Benedict Chigara and the entire faculty, library and administrative staff at Brunel University for their support and cooperation.

I would like to express my special gratitude to my mother and my father for their unconditional love and all kinds of support without which I would not have reached this stage, as well as my brothers and sisters for their encouragement. I am also grateful to my lovely wife for her love, patience and endless support.

Last but not least, many thanks go to my friends, colleagues and advisors for their guidance and motivation.

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Chapter One: Introduction

1.1 Background

Islamic *Shariah* has been interpreted as permitting male guardianship over female relatives. However, this has been an issue of debate among scholars.¹ Specifically, this aims to ensure that women are cared for and are financially stable. Moreover, the obligation seems to be limited to family members who are males (*wali* or *mahram*), and are closely related to the female (husband, father, grandfather, brother or son). Previously in Saudi Arabia, the customary application of male guardian-consent permitted some aspects of a women's interaction in the public sphere. There were a limited number of cases in which Saudi legislation explicitly mandated guardian approval as a legal requirement. Access and enjoyment of some public services, including the right to seek employment, open a bank account, or enrol on an educational course abroad were conditional on the consent of a guardian. These practices, whilst not formally required under existing regulations, were outlawed in part due to the guardianship requirement. Furthermore, it has been argued that substantive justification for this requirement is present in verses of the holy Quran and the narration of the Sunnah (The tradition of Prophet Muhammad Peace be upon him).²

On 18 April 2017, the Custodian of the Two Holy Mosques King Salman Bin Abdul Aziz issued a historic Royal Supreme Order eliminating the guardian-consent for women in the country.³ The Supreme Order No. 33322 of 21 Rajab A.H. 1438 (18 April A.D. 2017) provides for the following directives:

- All government entities shall refrain from requesting a woman to obtain a person's permission for them to provide services to her or conclude procedures for her;
- Government entities shall take the necessary action to provide appropriate transport for their female workers, where possible; – Employers shall provide transport for female workers, as required under the Labour Code;
- Support shall be provided to the Human Rights Commission for instituting programmes designed to increase the visibility of the international conventions to which the Kingdom has acceded, specifically through a

¹ See generally Hassan S. Al-Wilayah al'a an-nafs, (Guardianship over persons, Comparative study between the Shariah law and Egyptian law), Cairo, 1997, 5.

² According to Sheikh Abdullah Al-Manea, a member of the Council Senior of Scholars, women are guardians of themselves in all matters of their lives. However, the only exception of the mandate of women is in marriage, and a woman is equal to a man if she is capable of managing her affairs. Available on 'Al-Munai 'To Okaz, 'There Is No Guardianship over Woman Except in the Case of Marriage' (*Okaz*, 2016) <<https://www.okaz.com.sa/article/1073459/>> accessed 11 September 2017.

³ Fatima Al-Debis, 'Empowerment of Saudi Women without Guardian Consent' (*Okaz*, 2017) <<https://goo.gl/vrV3Qt>> accessed 18 August 2017.

comprehensive plan for raising awareness of women's rights, the media and educational and training institutions, in cooperation with the relevant authorities;

– Entities offering services for women shall disseminate directives and information concerning the related procedures on their official websites.⁴

Subject to this Supreme Order, all Saudi public officials are obliged to provide women with equal access to governmental services. The principal change introduced by this enactment is that women are no longer required to provide written or oral consent of their guardians as a condition to obtain these services, except where expressly provided for under existing state regulations, in accordance with Islamic *Shariah*.⁵ The guardianship reforms are just one of many modernising reforms introduced by King Salman.

While primarily addressed at state officials, the legal and social implications of the new Supreme Order arguably have the potential of reconstituting and transforming the very fabric of Saudi society itself. Effectively repealing many of the limitations placed on Saudi women under the existing guardian-consent requirement, the Supreme Order represents a landmark piece of legislation. No single omnibus law governing guardianship, and its statutory limits, existed in Saudi Arabia prior to the Supreme Order. A complex system of administrative procedures requiring guardian approval were, however, later codified through secondary acts of legislation (also known as delegated legislation) such as ministerial codes and policies.⁶ The Supreme Order clarifies state law by means of codifying legal protections for women seeking governmental services without a male guardian's consent 'unless there is a regulatory obligation for this request'.⁷ Governmental agencies have been instructed to begin drawing up a list of all existing policies and procedures requiring male guardian approval, except for those permitted by *Shariah*. Moreover, these procedures are to be reviewed, amended or repealed within a three-month period.⁸ The Supreme Order strongly implies that governmental authorities should use this period to begin dismantling all remaining aspects of the old guardian-consent requirement. As the sovereign authority of Saudi Arabia, any Supreme Order issued by the King will prevail over any governmental institution or ministry. With the implementation of the Supreme order, the enactment of the Supreme Order may conceivably spell the end of the enforcement of guardian-

⁴ Supreme Order No. 33322 of 21 Rajab A.H. 1438 (18 April A.D. 2017).

⁵ *ibid.*

⁶ Yahya Al Alhareth, 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.

⁷ Arab News, 'Saudi Women No Longer Need Guardians' Consent to Receive Services' (5 May 2017) <<http://www.arabnews.com/node/1094681/saudi-arabia>> accessed 23 October 2017.

⁸ *ibid.*

consent by public officials.⁹ Accordingly, the Supreme Order is a significant ‘moment’ in Saudi legal history, both discursively and in terms of legal practice.

As discussed in later chapters, the duty of guardianship finds its origin in religious rules and customary practice. Even before the reforms were introduced, a vibrant conversation was unfolding among Muslim scholars around the necessity of guardianship approval in cases which are not explicitly approved by the *Quran* and *Sunnah*.¹⁰ Leaving aside for the moment the religious limits of guardianship practice – a subject which will be addressed extensively in the following pages of this thesis – one could conceivably argue that some aspects of guardianship practice are as much rooted in local custom, history and culture as they are in scriptural exegesis.¹¹ Yet, the cultural origins of the meaning of guardianship and its application may imbue these informal practices with a different kind of social legitimacy.¹² The practice of guardianship has formed an integral part of the social and cultural landscape. However, such appeal to cultural arguments has a tendency to raise as many questions as provide answers to the legitimate relation between law and culture.

Legal scholars have long struggled with the extent to which social and cultural practices are tolerated or permitted, even when they conflict with positive law, whether in the form of state regulations or customary norms embodied by international human rights instruments. This dilemma is captured by Koh, who famously pondered: why do states obey international law?¹³ And yet, the better question is perhaps: why should states obey international law? Moreover, do states have a moral obligation to respect human rights, articulated in international legal processes, even when such rights conflict with national culture, tradition, identity and religion?¹⁴ Saudi Arabia is a sovereign state and it is accountable, in an ultimate sense, to its people and to its own constitutional laws and traditions. For Muslims, no secular law takes precedence over God’s law. As will be outlined in further chapters, this

⁹ *ibid.*

¹⁰ Islam.qa, ‘What is the Provision Preventing Girls from Studying at University?’ (*Islamqa.info*, 2012) <<https://islamqa.info/ar/187478>> accessed 3 December 2017.

¹¹ Lawrence Rosen, *Law As Culture: An Invitation* (Princeton University Press 2006) 12.

¹² Michel G Nehme, ‘Saudi Arabia 1950–1980: Between Nationalism and Religion’ (1994) 30 *Middle Eastern Studies* 930.

¹³ Harold Hongju Koh, ‘Why Do Nations Obey International Law?’ (Faculty Scholarship Series, Paper 2101, 1997) <http://digitalcommons.law.yale.edu/fss_papers/2101> accessed 22 December 2017.

¹⁴ Eric Posner poses the most pertinent question: Do states have a moral obligation to obey international law?, Eric Posner, ‘Do States Have a Moral Obligation to Obey International Law?’ (2003) 55 *Stanford Law Review* 1901. Posner states: ‘This Article assumes for the sake of argument that states can have moral obligations, 2 for if they could not, a fortiori they could not have a moral obligation to obey international law. But if states have moral obligations, there is a further question whether citizens and leaders inherit the state’s moral obligations (all or some of them).’ *ibid* 1902.

natural law principle is the foundational basis of Saudi Arabia's Supreme Order and the basis of its domestic law.¹⁵

Yet, we also know that the legal basis of guardianship is contested within the wider Muslim society. Modern Islamic scholars have called for a more emancipatory approach and often do so by pointing to the cultural (rather than legal and theological) groundings of certain customary practices observed by Arab or Islamic societies, including those related to guardianship consent.¹⁶ Islamic scholars, however, do not seek justification and authority in the writings of international lawyers or in the provisions of international human rights instruments. Instead, they make appeals to the idea that Islam defends, and even demands, the substantive protection of women's rights. Going further, these scholars have put forth a rousing defence of the claim that the equal dignity of men and women should be assured by the State, except where in direct conflict with the text and narration of the holy Quran or *Sunnah*.¹⁷

It is against the backdrop of such ongoing discourse and debates that this thesis proposes to examine the legal basis and effects of the guardianship system under Saudi law, before and after the reforms, and under wider perspectives on Islamic Shariah. The implementation of *Shariah*-governed Saudi law will also be assessed from the standpoint of international law, with a view to assessing the positive steps taken by the Saudi governments to meet its obligations under the relevant human rights treaties.

The approach of gender equality under Saudi law is based on the principle of complementary equality between men and women. This principle takes into account the characteristics of both sexes, and ultimately, justice. As a result, all governmental agencies are keen to ensure that all guardian approval related procedures are extensively reviewed and are then either abolished or amended. Such scrutiny should also extend to any remaining obstacles to the fair and equal provision of services related to guardian-consent, directly or indirectly. The government has indicated its commitment to gender equality by instructing government agencies to provide transportation for women seeking services.¹⁸ The Supreme Order confirmed that all necessary measures shall be undertaken by governmental

¹⁵ Frank Vogel, 'The Complementarity of Ifta' and Qada': Three Sa'udi Fatwas on Divorce' in Muhammad Khalid Masud, Brinkley Messick and David S Powers, *Islamic Legal Interpretation, Muftis and their Fatwas* (Harvard University Press 1996) 262.

¹⁶ Herbert J 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.

¹⁷ See, for example, Azizah Al-Hibri, 'A Study of Islamic Herstory: Or How Did we Get into this Mess?' (1982) 5(2) *Women's Studies International Forum* 207, 215.

¹⁸ Human Rights Commission, Saudi Arabia, 'How Is Equality Between Men and Women Made Under the Kingdom's Laws?' (*HRC*, 2017) <<http://www.hrc.gov.sa/ar-sa/HumanRightsInSaudi/Pages/equalityrights.aspx>> accessed 13 December 2017.

institutions to implement the Supreme Order which will be reviewed and rendered subject to enforcement procedures in the courts.

In the latter regard, it is notable that the new Supreme Order applies to the public acts of a government official, and therefore expressly regulates or controls areas where private individuals and entities oblige women to gain guardian permission. It is in relation to the customary limits of guardianship that the Supreme Order may bring about a change in social practice and custom, and it is here that the new reforms have the potential to be most transformative. The symbolic significance of the Supreme Order is undeniable where it represents an authoritative statement both of Saudi state law and Islamic *Shariah* (since all Saudi law must not only comply with Islamic requirements but also be constitutionally based on Islamic sources of law, ie the *Quran* and *Sunnah*). This may fundamentally alter the way private entities and institutions conduct their practice since the rationalisation for guardianship has always been, or at least in part, justified on religious grounds. If the government has issued the new law based on the implicit assumption that this law, as all Saudi law must be, is compliant with *Shariah*, then no employer or private organisation shall have any legal or religious ground on which to discriminate against women. On the other hand, the scope of the Supreme Order is delimited to public acts of authority and private acts of authority in the workplace and in other economic, social or cultural institutions which are directly controlled by state law and regulation.

Taking the above reforms as its starting point, this thesis considers the potential reach of the new easing of guardian-consent requirements law, specifically by focusing on the status of the law before and after the reforms. The following sections highlight the key legal issues and domains of laws explored and assessed in the following chapters.

1.2 Saudi Arabia in the 21st century

In order to understand the concept of guardianship, it is first important to consider the context of Saudi Arabia in the 21st century. Since its establishment in 1932, and especially since the discovery of oil, Saudi Arabia has undergone rapid changes, with a dramatic increase in living standards that has provided many citizens with substantial material wealth and access to exceptional healthcare and developed infrastructure.

However, due to Saudi Arabia's reliance on oil and the recent fall in oil prices, it has become essential for Saudi Arabia to reduce its dependency on oil. In 2016 the Saudi Arabian government published the Vision 2030 strategy, which sets out the steps that the Saudi government intends to take in order to diversify its economy, including increasing the level of non-oil revenues, reducing unemployment, developing the entertainment and tourism economies and increasing the funding available to small

and medium-sized enterprises. Moreover, Saudi Arabia affirmed its keenness to cooperate in any international effort(s) aimed at empowering women in various fields, work to eliminate all forms of discrimination and violence against them, and raise the cultural, economic and health levels in accordance with the principles and values of Islamic Shariah, as well as carry out extensive reforms to the education system.¹⁹ The success of the strategy will arguably be accelerated by an increased input from women in Saudi society, a domestic resource widely considered to be untapped by the Saudi economy.²⁰ Vision 2030 describes the women of Saudi Arabia as a 'great asset', and it has been widely suggested by commentators that reform of guardianship consent is regarded by the Saudi government as necessary to achieve the goals set out in the Vision 2030 strategy.

The Vision also provides a number of human rights, notably: the right to security, the right to health, the right to education and training, the right to work, the protection of the family, the empowerment of women, the promotion of participation in political and public life, freedom of association, and the right to cultural participation and activities such as sports, entertainment and other rights and support.²¹ According to Philip Alston, Special Rapporteur on Human Rights for the UN:

The Vision 2030 is 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.²²

The Vision 2030 strategy will be implemented and enforced domestically to enhance human rights and citizen welfare. Additionally, the Chairman of the National Society for Human Rights in Saudi Arabia Dr Mufleh AlQahtani stated that:

¹⁹ Saudi Arabia's Vision 2030 (25 April 2016) <http://www.vision2030.gov.sa/sites/default/files/report/Saudi_Vision2030_EN_0.pdf> accessed 13 December 2017.

²⁰ Saudi Arabia, 'Empowering Women Will Contribute to Financing Development and Interests: Vision 2030' (AAWSAT, 2017) <<https://aawsat.com/home/article/1044731/>> accessed 14 December 2017.

²¹ According to Dr Bandar bin Mohammed Al-Aiban President of the Human Rights Commission of Saudi Arabia the Vision of the Kingdom 2030 aims to achieve comprehensive development in terms of the legal constants and employ the country's potential and energies. For an accessible compendium, see Bandar Al-Aiban, 'Vision for the Kingdom in 2030 to Reach Comprehensive Development in Accordance with the Principles of Islamic Shariah and Exploit the Country's Potential and Energies' (HRC, 2017) <<http://www.hrc.gov.sa/ar-sa/News/Pages/news83.aspx>> accessed 13 December 2017.

²² OHCHR, '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>> accessed 13 December 2017).

The national vision will strengthen and pave the way for human rights and human well-being for all segments of society and establish sustainable development that will help achieve all aspirations and legal and humanitarian requirements. In addition, social welfare and development will be promoted and attention given to the family and the right to education and health, as well as the development of a social and economic system that supports the realization of basic social, economic and human rights of health, housing, and work. In addition, it will pay attention to the situation of women and youths and aim at raising the standard of living, and supporting the social system, human development and rights.²³

One of the most important aims of Vision 2030 is to empower and enhance women's rights. Furthermore, the Vision indicates that over 50 percent of Saudi universities' graduates are women. This empowerment has a large and positive impact on the economy and welfare of Saudi female citizens.²⁴

1.2.1 The concept of guardianship

The Quran provides that:

Men are the protectors and maintainers of women, because Allâh has made one of them to excel the other, and because they spend (to support them) from their means. Therefore the righteous women are devoutly obedient (to Allâh and to their husbands), and guard in the husband's absence what Allâh orders them to guard (e.g. their chastity, their husband's property).²⁵

Men should be the protectors of women. The concept of the male guardian-consent (*walia al'amr*) has traditionally been practised in Saudi Arabia as an assignment of a man whether a husband, father or son to care for a woman's affairs, including covering her expenses. Therefore, guardianship is not an excuse for controlling women, and infringing their rights remains limited to erroneous individual practices. State law has now combined with relevant institutions to counter and dissolve such practices.²⁶ It is arguable that the practical application of the concept of male guardian approval has

²³ National Society for Human Rights, 'The Chairman of the National Society for Human Rights Praises the Declaration of the National Vision 2030 and the Transformation Plan' (*NSHR*, 2016) <<http://nshr.org.sa/en/?news=the-chairman-of-the-national-society-for-human-rights-praises-the-declaration-of-the-national-vision-2030-and-the-transformation-plan>> accessed 16 December 2017.

²⁴ Saudi Arabia's Vision 2030 (n 21).

²⁵ Holy *Quran* 4:34.

²⁶ Committee on the Elimination of Discrimination against Women, 'Consideration of Reports Submitted by States Parties under Article 18 of the Convention, Combined Initial and Second Periodic Reports of Saudi Arabia' (30 September 2016) 40th Session CEDAW/C/SAU/3-4.

led to women in Saudi Arabia being indirectly limited in their rights to accept a job, travel and carry out affairs in the public or private sectors without consent from their guardian.²⁷

In spite of the changes brought in by the Supreme Order, certain elements of guardian approval remain, such as the requirement for a guardian's permission to get married in accordance with Islamic *Shariah* provisions. However, in Saudi Arabia the practice of male guardianship over women for marriage can be assigned to the remit of the courts if the woman is being abused by the guardian or does not have a guardian. Art 32-E of the Law of Procedures states: 'Without prejudice to the provisions of the Grievance Board Law, General Courts (currently Personal Status Courts) shall have jurisdiction over all cases outside the jurisdiction of Summary Courts. Specifically, they may consider the following: the marriage of women who have no guardians.'²⁸

The steps taken by Saudi Arabia thus far have been welcomed by the Committee on the Elimination of Discrimination against Women, the National Society for Human Rights in Saudi Arabia and others internationally as a major effort to strengthen women rights.²⁹ In light of these reforms, it is appropriate for this thesis to assess the legal framework of the doctrine of guardianship, the effect that it has had on women (and society in general) in Saudi Arabia, and the potential effects of the reforms on Saudi society.

The issue of male guardianship has been a longstanding matter of intense debate and contestation among Muslim scholars. The guardianship concept, in its most basic, non-delineated terms, is the requirement that a female must have a *mahram* (or similarly a *walia*), traditionally an adult male relative, who must specifically take care of her interests and affairs.³⁰ There is much debate as to the origin and function of this guardianship practice, and research for this thesis demonstrates a full spectrum of arguments and positions. Some scholars argue that it is not based in Quranic text at all, but rather, is an outdated figment of pre-Islamic patriarchal society, while others suggest it is a longstanding broad tool of the *Quran* that protects the rights of men and women equally. Another school of thought asserts that guardianship is a limited and pure tool for the rights of women in marriage, while other contemporary scholars argue that the concept has legitimacy but is due for reform.³¹

²⁷ Amani Hamdan, 'Women and Education in Saudi Arabia: Challenges and Achievements' (2005) 6 International Education Journal 42, 64.

²⁸ Saudi Law of Procedures Before Shariah Courts, Royal Decree No M/21/20 (19 August 2000).

²⁹ Committee on the Elimination of All Forms of Discrimination Against Women, 'Concluding Observations on the Combined Third and Fourth Periodic Reports of Saudi Arabia' (9 March 2018) C/SAU/CO/3-4, 15.

³⁰ Ibn Al-Qudama, *AlMughni*, vol 3 (Lebanon 1994) 98.

³¹ *ibid* ch 4.3.

In order to assess the impact and implications of the guardian-consent reforms in Saudi Arabia, this thesis examines how the legal system is instituted, ordered and balanced under the Basic Law of Governance in Saudi Arabia. Saudi Arabia has implemented Islamic jurisprudence. In this regard, the Basic Law of Governance of Saudi Arabia enshrines the constitutional supremacy of *Shariah*.³²

When examining this from a constitutional perspective, it becomes apparent that Islamic *Shariah* is the primary source of state legislation as well as the divine source of all valid and enforceable laws under the Saudi legal system.³³

Constitutional reforms in modern Saudi Arabia have included the implementation of the Basic Law of Governance, a law which codifies the principle that *Shariah* – the *Quran* and *Sunnah* – is the basis of Saudi law. Thus, it may be inferred that all Royal Decrees or Supreme Orders and more generally, all laws in Saudi Arabia are expected to be compatible with *Shariah*.³⁴

Similar compatibility requirements apply to the role of the courts, which must observe the provisions of *Shariah* to positively protect and enforce the rights of women if they are deemed to be in conflict with Islamic jurisprudence interpretations.³⁵ The Law of Procedures Before the Courts in Saudi Arabia provides that:

Courts shall apply to cases before them provisions of *Shari'ah* laws, in accordance with the *Holy Qur'an* and *Sunnah* of the Prophet (peace be upon him), and laws promulgated by the State that do not conflict with the *Holy Qur'an* and *Sunnah*, and their proceedings shall comply with the provisions of this Law.³⁶

In seeking to explore these issues, this thesis seeks to cast light on the implementation provisions of *Shariah* in relation to protecting and enforcing the rights of women.

1.2.2 Male guardianship and women's rights under Islamic *Shariah*

The issue of women's rights has become a divisive one. Conflicting ideas exist on what women are exactly permitted and forbidden to do in Islam. The Committee on the Elimination of Discrimination Against Women has cited the concept of male guardianship over women as an example of

³² Basic Law of Governance, Royal Order No A/91 (1 March 1992).

³³ Abdullah F Ansary, 'A Brief Overview of the Saudi Arabian Legal System' (*New York University School of Law*, July 2008) <http://www.nyulawglobal.org/globalex/Saudi_Arabia.html> accessed 13 December 2017.

³⁴ Saudi Law of Procedures Before Shari'ah Courts (n 30).

³⁵ Ali Barakat, *Mediator in Explaining the New Saudi Judicial System No. 78 for the Year 1428 AH* (1st edn, Law and Economics Library 2007) 39.

³⁶ Saudi Law of Procedures Before Shari'ah Courts (n 30) art 1.

discrimination and a limitation on women exercising their rights.³⁷ In light of the recent reforms, the Committee has appreciated the developments, recognising that the Saudi government is taking efforts to empower women and protect their rights, but it has also recommended that the state party should take all necessary measures to enforce all the reforms in order to entirely abolish male guardianship over women and other perceived cultural institutions that discriminate against women.³⁸ This thesis argues that such criticisms are misplaced, given that the reforms are not intended to abolish guardianship over women altogether as the principle has its basis in the holy *Quran*, but rather, are intended to ensure that the male guardianship system is implemented in such a way as to limit any arbitrary restrictions which disproportionately or unjustifiably limit or curtail the rights and autonomy of Saudi women.

In light of the above, this thesis will consider the laws that have been gradually implemented in Saudi Arabia to create a more expansive framework for women's rights, aside from the concept of guardianship. In this sense, while reforms shall be in line with *Shariah*, there is an argument that the conflict between international law and Islamic human rights conceptions are overstated. This potential for reconciliation between Western and Islamic jurisprudence suggests that a move towards modernisation in Saudi Arabia shall not come at the expense of constitutional references to *Shariah* and religious tradition. Instead, the protection of women's rights at a level equivalent to international standards can be sourced directly from Islamic *Shariah*, based on a 'best light' interpretation of *Shariah*.³⁹

This thesis considers that the review of existing human rights regulations and the proposed new laws in Saudi Arabia is an ongoing process that commensurates with the human rights conditions that are affected by modern variables and developments. The country, within the framework of its National Vision 2030 approved by the Council of Ministers,⁴⁰ is working to carry out wide reforms covering all areas and levels, including legislative, administrative, judicial and other structures.

³⁷ Committee on the Elimination of Discrimination against Women, 'Concluding Comments of the Committee on the Elimination of Discrimination against Women, Saudi Arabia' (14 January-1 February 2008) 40th Session CEDAW/C/SAU/CO/2, 3.

³⁸ Committee on the Elimination of All Forms of Discrimination against Women (n 31) 15.

³⁹ Committee on the Elimination of Discrimination against Women, 'Consideration of Reports Submitted by States Parties under Article 18 of the Convention, Combined Initial and Second Periodic Reports of Saudi Arabia' (30 September 2016) 40th Session CEDAW/C/SAU/3-4

⁴⁰ Saudi Arabia's Vision 2030 (n 21).

The Human Rights Commission in Saudi Arabia argued that the Saudi Law derived from Islamic *Shari'ah* implemented equality and justice in work and all aspects of social life, and the country believes that the integration of the gender relationship, including the rights of women, and the elimination of discrimination against them. It should be noted that the definition of 'discrimination against women' in Article 1 of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) is consistent with what is practised in Saudi Arabia, where there are no regulations or any decision or exclusion or restriction resulting to attenuation or frustration of recognition of women right in all fields. However, the principle of equality is protected under Articles 8 and 26 of the Basic Law of Governance, as it is essentially the opposite of discrimination, including discrimination against women.⁴¹

The status of women's rights in Saudi Arabia must be considered within the Saudi legal, social and cultural context, especially in the context of a society and economy undergoing rapid changes. To that end, this thesis begins with a historical perspective of cultural norms and Islamic.⁴² The thesis will argue that reform of the guardian-consent will complement and support the wider reform agenda set out in the Vision 2030 and will play an important role in ensuring that Saudi Arabia realises its goals.⁴³

In order to gain a better understanding of the division between the Saudi Arabian interpretation of women's rights and the international approach, this thesis analyses the concept of guardianship within the overarching concept of women's rights in Saudi Arabia using three legal frameworks:

- a) The international system of human rights protection;
- b) Islamic *Shariah* law, which includes the text of the *Quran* and the *Sunnah*; and
- c) The laws of Saudi Arabia specifically based on *Shariah*.

By focusing on a specific women's right in the following chapters, this thesis explores the multitude of layers in these three frameworks, with a view to better defining each source of authority and law. These are necessary for a proper analysis of 'human rights' norms as they apply in a non-Western state, and for discussions of not only the impact of existing practices on women's rights in Muslim society, but also the likelihood of any reforms. This thesis examines how the right to education, the

⁴¹ Committee on the Elimination of Discrimination against Women, 'Consideration of Reports Submitted by States Parties under Article 18 of the Convention on the Elimination of All Forms of Discrimination against Women: Responses to the List of Issues and Questions' (9 November 2017) 69th Session C/SAU/Q/3-4/Add.1, 23.

⁴² See Generally, Abdalla Mahfuth, *Rights and issues of women in our contemporary world* (King Fahad National Library 1996) 17-227

⁴³ See Full Text of Saudi Arabia's Vision 2030 (n 21).

right to work and the right to freedom of movement have been subject to the to the guardian-consent practice and have had an effect on women's rights within Saudi Arabia.

This thesis, relying on *Shariah* law, and international human rights law, makes the following propositions. Firstly, under the theory of Islamic scholarship and within the overall framework of international human rights law, Saudi Arabian domestic law reconciles women's rights with religious tradition. Secondly, it stresses the notion that empowering the women of Saudi Arabia and emphasising their contribution as members of society will focus reforms of toward women's rights to access education and pursue employment opportunities. Thirdly, it demonstrates that Saudi Arabia fulfils its *Shariah*-based and international obligations to provide socio-economic guarantees to the growing educated female workforce which strengthen the empowerment of women in Saudi Arabia whilst providing a broader base for the state in its quest to build the more robust and diversified economy envisioned by the Saudi government in the Vision 2030 strategy.

1.2.3 Male guardianship and international human rights law

Male guardianship over women in Saudi Arabia has come under intense scrutiny internationally in recent years, centring on the way in which guardianship has restricted women's basic human rights. Furthermore, it appears frequently in the concluding comments of the Committee on the Elimination of Discrimination against Women and the comments of other human rights bodies and organizations in respect of the human rights situation in Saudi Arabia.⁴⁴ However, direct criticism of guardianship over women is made on the part of those who believe that the practice aims to infringe women rights or diminish their status. Although guardianship over women means as previously mentioned the assignment of a man whether a husband, father or son to care for a woman's affairs, including covering her expenses, it does not mean, nor does it ever justify, control of a woman or diminution of her status. It is important to note that the misunderstanding of the principle established in Islamic *Shariah* for controlling women and infringing their rights remains limited to erroneous individual practices. Furthermore, misuse of guardianship seems to be prohibited under Saudi law and institutions appear to have been established to combat and tackle any cases.⁴⁵

⁴⁴ Committee on the Elimination of Discrimination against Women, 'Consideration of Reports Submitted by States Parties Under Article 18 of the Convention, Combined Third and Fourth Periodic Reports of States Parties Due in 2013' (30 September 2016) CEDAW/C/SAU/CO/3-4, 23.

⁴⁵ *ibid.* The Ministry of Islamic Affairs in Saudi Arabia Call and Guidance undertakes awareness raising campaigns to develop awareness of women's rights through the 360 Call and Guidance offices which it supervises. Awareness of women's rights is also disseminated in mosques and in radio and television programmes by members of the Council of Senior Scholars, other scholars and Islamic jurists who issue admonitions concerning the rights of women and cite Sharia texts that point to the requirement to protect, honour and respect women's rights. They and other agencies that have undertaken awareness raising efforts

This thesis considers Saudi Arabia's obligations to international human rights treaties and instruments. At the international level, Saudi Arabia and other Muslim (majority) countries contributed to the drafting of the Universal Declaration of Human Rights (UDHR) and its bill. As a matter of fact, the UDHR includes some provisions that are incompatible with Islamic *Shariah* values, particularly Article 18.⁴⁶ In addition, the reason that Saudi Arabia as a Muslim (majority) country did not implement the provisions of the UDHR in its legal system was due to the UDHR being a non-binding declaration. As a result, Abiad argues that there was not thought to be a need for concrete measures to be taken by the states to implement the provisions.⁴⁷ Generally speaking, Saudi Arabia is a member of international and regional human rights treaties based on its Islamic and international status as a founding member of a number of international and regional organizations, including the United Nations, and based on its recognition of the importance of international and regional solidarity to strengthen and protect human rights. For example, it is party to the major United Nations conventions relating to human rights:

1. The International Convention on the Elimination of All Forms of Racial Discrimination (1965).⁴⁸
2. The Convention on the Elimination of All Forms of Discrimination against Women (1979).⁴⁹
3. The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984).⁵⁰
4. The Convention on the Rights of the Child (1989).⁵¹

have played a major role in correcting erroneous practices stemming from an incorrect understanding of Sharia provisions on the rights and duties of men and women. They also seek to correct objectionable practices that are based on a misunderstanding of guardianship and custodianship and the complementary roles of men and women enjoined by the Islamic Sharia, which takes into account the features and characteristics of each sex, without the slightest oppression of either men or women, in full harmony with human nature to ensure the stability, prosperity and progress of society. In addition, the General Presidency of Youth Welfare takes advantage of the interest in sports of young men and women, who constitute the largest segment in Saudi society, to raise their awareness and educate them in human rights, particularly the rights of women, through athletic clubs and activities. See Committee on the Elimination of Discrimination against Women (n 28).

⁴⁶ Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III) art 18.

⁴⁷ Nisrine Abiad, *Shari'ah, Muslim States and International and Human Rights Treaty Obligations: A Comparative Study*, (London: British Institute of International and Comparative Law, 2008).

⁴⁸ International Convention on the Elimination of All Forms of Racial Discrimination (adopted 21 December 1965, entered into force 4 January 1969) 660 UNTS 195.

⁴⁹ Convention on the Elimination of All Forms of Discrimination against Women (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13.

⁵⁰ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85.

⁵¹ Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3.

Although the state has ratified the CEDAW under Royal Decree No M/25 28 August 2000, it did so with reservations that it would not comply with any provisions of CEDAW that contradicted *Shariah* law.⁵² Regionally, Saudi Arabia became party to the Arab Charter on Human Rights (ACHR) under Royal Decree No M/19 24 March 2009.⁵³

The wider literature surrounding human rights and Islam is primarily concerned with the issue of 'compatibility' between rights discourses generated in a predominately Western, individualistic and secular context, and access to those rights in countries where the Islamic religion forms the basis of culture, law and governance.⁵⁴ In many respects, this supposed conflict ascribes a unitary and static identity to Islamic societies and cultures, reproducing orientalist discourses that suggest that Islam, and by extension, Islamic societies, have failed to change or evolve since the medieval period.⁵⁵ As such, they are considered to be 'stuck' in an outdated religious paradigm and have not benefited from the 'progress' effected during the European Reformation and Enlightenment.⁵⁶ This discourse is extremely problematic and serves to reify a number of orientalist tropes and stereotypes rather than critically and productively examining contemporary Islamic societies on their own terms.⁵⁷ This thesis suggests that it is important to recognise Western human rights discourses as culturally located within Western culture, and that equivalent concepts and principles behind human rights within other cultures should be based on their own cultural norms and history.⁵⁸ From this perspective, it may be suggested that there is sufficient scope within the *Shariah* and Islamic tradition itself to act as a vehicle for the advancement of women's rights. In addition, Saudi Arabia's approach to human rights is through justice. The founder of Saudi Arabia king Abdulaziz Bin Abdul Rahman ALSaud stated that:

Any of our parish who feels oppressed or suffers an injustice should wire or mail the complaint free of charge to us on our own expense, on the other hand competent employees shall accept such wired and or mailed complaints that were delivered by our people even if they are posted against any of the royal family members(my sons and grandsons). However, Any of the officers who gives a try to discourage our parish from submitting their complains, regardless of their significance, or even those who try to influence their vehemence, must know very well that we will impose severe punishment on them. I don't wish to

⁵² Committee on the Elimination of Discrimination against Women (n 47) 13, 14.

⁵³ Arab Charter on Human Rights (signed 22 May 2004, entered into force 15 March 2008).

⁵⁴ Nadir Hashemi and Emran Qureshi, 'Human Rights' in 'The Oxford Encyclopedia of the Islamic World' <<http://www.oxfordislamicstudies.com/print/opr/t236/e0325>> accessed 13 December 2017.

⁵⁵ Shadi Mokhtari, 'The Search for Human Rights within an Islamic Framework in Iran' (2004) 94(4) *Muslim World* 478.

⁵⁶ Christopher de Bellaigue, 'Stop Calling for a Muslim Enlightenment' (*The Guardian*, 19 February 2015) <<https://www.theguardian.com/world/2015/feb/19/stop-calling-for-a-muslim-enlightenment>> accessed 13 December 2017.

⁵⁷ Gabriele Marranci, 'Multiculturalism, Islam and the Clash of Civilisations Theory: Rethinking Islamophobia' (2004) 5(1) *Culture and Religion* 105, 117.

⁵⁸ Raimundo Pannikar, 'Is the Notion of Human Rights a Western Concept?' (1982) 30 (120) *Diogenes* 75, 77.

hear about any oppressed or wronged. I don't wish to bear any guilt that has been caused by the oppression or not being able to rescue wronged people or even to give support to those wronged until they get their rights.⁵⁹

Based on the above, it may be inferred that justice to some extent has arguably been achieved. Additionally, it seems that Saudi Arabia is attempting to integrate gender relationships in a human rights-based way, namely, in relation to women's rights and the elimination of discrimination against women.

The impetus for reform can be justified based on Islamic and international human rights perspectives. Islamic Shariah champions third generation rights and it is this area that *Shariah* perspectives can be most easily reconciled with international human rights instruments and norms.⁶⁰ The recognition given to these so-called 'third generation' rights in Saudi Arabia, and in other Islamic legal systems, often goes beyond the 'liberal' rights conceptions advocated in non-Islamic jurisdictions.⁶¹ This, it is argued, is the lasting legacy of liberal theories of rights which emphasise civil and political rights at the expense of economic, social and cultural rights which have been given more limited recognition under international human rights law. For its critics at least, international human rights law is in fact little more than a contingent expression of a particular (Western) tradition of modern liberal rights theory 'made universal'. While claiming to empower women, liberal rights theories tend to rely on a familiar public/private distinction.⁶² As feminist theorists have long contended, liberal rights emphasise abstract individual rights, thereby obscuring 'lived' experiences of overt or institutional discrimination.⁶³ Others argue that liberal notions of equality suppress the legitimate diversity represented by local culture, norms and collective notions of identity.⁶⁴ From the Islamic perspective, the liberal foundations of modern human rights law may serve only to further disempower women. By 'privatising' morality and placing 'culture' outside the realm of law and legitimate public

⁵⁹ Bandar Al-Aiban, 'The Custodian of the Two Holy Mosques Enacted Laws that Preserve Human Rights' (2013) 1 Rights 7.

⁶⁰ Jason Morgan-Foster, 'Third Generation Rights: What Islamic Shariah Can Teach the International Human Rights Movement' (2005) 8(1) Yale Human Rights and Development Journal 67, 116.

⁶¹ *ibid.*

⁶² 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.; Duncan Kennedy, 'The Structure of Blackstone's Commentaries' (1978) 28 Buffalo Law Review 205, 209; Hilary Charlesworth, 'Feminist Methods in International Law' (1999) 93(2) American Journal of International Law 379, 383; 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* (Routledge 1995) 126.; See Generally, Cornell and Others, *Deconstruction and the Possibility of Justice* (Routledge 1992) 68-94

⁶³ Lisa H Schwartzman, *Challenging Liberalism: Feminism as Political Critique* (Penn State University Press 2006).

⁶⁴ Joseph M Schwartz, *The Future of Democratic Society: Rebuilding Social Solidarity in a Fragmented America* (Routledge 2008) 179.

contestation – all the while professing its neutrality to economic or gender ‘difference’ – mainstream rights discourse may further marginalise and exclude women by failing to recognise the different social and economic roles they inhabit.⁶⁵ Classic Islamic perspectives would argue that these cultural and social differences are but a reflection of the ‘essential’ biological differences between men and women, differences that the creator has purposefully intended.⁶⁶

1.2.4 The reform of male guardian-consent

This thesis contends that the reform of the guardianship concept is both appropriate and necessary to enhance women rights. The guardianship concept has led to hardships and dysfunctional or discriminatory practices in women’s ability to work, freedom of movement, and education. For example, despite 51% of university graduates in 2015 being female, the labour force participation rate for women in Saudi Arabia remains at only 21%.⁶⁷ These statistics suggest that there is an increasingly large demographic of highly educated and qualified women whose talents are not being utilised or harnessed in the workforce for the benefit of the Saudi economy.

This thesis also argues the reform of the guardian approval is based on the *Shariah* without a dilution of the principles of *Shariah* and consistent with the religious and cultural beliefs of Saudi Arabian society. Saudi Arabia has already implemented reforms that benefit women’s rights, adhere to foundational norms and laws, and improve the domestic economy and overall future for the country. In addition, this thesis demonstrates that in accordance with the provisions of Islamic *Shariah* the state is keen to strengthen the equality between the genders.

1.3 Research questions

The aim of this thesis is to answer the following question:

What is the impact of male guardian-consent on Saudi women's rights to education, work and freedom of movement?

In order to answer the research question, the thesis addresses the following questions:

⁶⁵ Sangeeta Dhami and Aziz Sheikh, ‘The Muslim Family: Predicament and Promise’ (2000) 173(5) *Western Journal of Medicine* 352.

⁶⁶ Wadud (n 17) 64.

⁶⁷ See Saudi Gazette, ‘More Women than Men in Saudi Universities, Says 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>> accessed 19 October 2017; World Bank, ‘Labor Force Participation Rate’ <<https://data.worldbank.org/indicator/SL.TLF.CACT.FE.ZS>> accessed 19 October 2017.

1. Is male guardianship over women in Saudi Arabia consistent with *Shariah* and international human rights law?
2. To what extent do Saudi culture and Islamic interpretations of male guardianship affect Saudi women's rights?
3. What is the effect of the reforms of male guardianship over women on the likelihood of Saudi women obtaining equal rights under Saudi Arabian domestic law?

1.4 Research objectives

This thesis aims at the following objectives:

1. To investigate the male guardianship in relation to women's equal rights in *Shariah* and international human rights law.
2. To examine the impact of culture and Islamic interpretation on Saudi women's rights.
3. To identify the potential effects of the reforms of male guardianship over women.
4. To examine Saudi Arabia's compliance with its international law obligations and to consider whether there may be a reconciliation of the obligations of Islamic human rights law and international human rights law norms.

1.5 Importance of the study

The thesis endeavours to foster a better understanding of women's rights in Saudi Arabia and whether they fit into the norms of international human rights and Islamic *Shariah*. In light of the recent reforms of empowering women to access public services without the permission of their guardian and their potential effects, a direct analysis of male guardianship and the potential for reform within Saudi Arabia is the most effective means of reaching this understanding. This research aims to offer an in-depth discussion of how the reforms will operate and consider the potential effects of the reforms on Saudi society. Additionally, this thesis considers the guardianship system within the Saudi legal framework as a whole and whether more can be done to provide women with equal rights based on Islamic principles.

1.6 Methodology

This thesis adopts a textual analysis methodology. The research begins by examining the concept of guardianship under the core sources for Saudi Arabian and Islamic Shariah, the *Quran* and *Sunnah*. Additionally, the thesis expands its scope to secondary sources, including, *madhabs* (Islamic school of thought/Islamic jurisprudence), *ijma* (consensus), *fuqaha* (classical Islamic scholars or jurists), state *fatwas* and regulations, and finally jurist rulings and opinions. The secondary sources are based on the primary sources for Islamic Shariah but are often subjective in practice, and act as the centrifugal force for scholarly and public debate on women's rights. Any attempt to deconstruct and examine the rights of women under the guardianship in Islamic Shariah, and following legal reforms in Saudi Arabia, requires a comprehensive understanding of the underpinning doctrines and texts.

The analysis expands to study three legal frameworks of international human rights law and societal norms, as well as the concept of male guardianship as applied in Saudi Arabian and Islamic Shariah. The study breaks down the three constructs into human rights legal and scholarly texts, traditions and interpretations, and then as necessary applies the primary and secondary sources for each of these frameworks. Analysed sources include print materials, publications and statements by Saudi Arabian religious and academic scholars, Muslim feminists, Muslim traditionalists, and secular traditionalists, Islamic scholars from Western-based educational institutions, international legal journal publications, scholarly articles, and textbooks.

The thesis identifies the main societal norms and categories of women's rights in Saudi Arabia, delineates the theory and practice for each of these rights, and then examines the implementation and function of the guardianship practice, as well as its impact on each of these rights. The thesis specifically focuses on education, freedom of movement and right to work.

1.7 Contribution to the field of study

This thesis is timely in light of the great changes introduced by the recent guardian-consent reform and driving laws in Saudi Arabia. Very little research has been done on this issue and these reforms were introduced during the time of the research. This thesis highlights that the reforms of empowering women without their male guardian-consent are a positive step towards equal rights of women in Saudi Arabia and suggests that this reform and others can result in equality for women in line with international law and with respect to *Shariah*. This thesis provides a valuable research opportunity to gain insights into the new reforms in Saudi Arabia which will contribute to strengthening the women rights in Saudi Arabia.

1.8 Thesis outline

There are eight chapters to this thesis. The first chapter serves as an introduction.

Chapter 2 examines the Saudi legal system, its legal sources and the structure of its judicial system, and focuses on the interpretation and enforcement of the new supreme order under the current Saudi legal system.

Chapter 3 moves on to a discussion of the international legal systems and Saudi Arabia's obligations under international law. This chapter reflects more broadly on the areas of conflict and compatibility between Islamic and secular human rights instruments.

Chapter 4 discusses the religious roots of the guardianship doctrine and the debates that have emerged between classical and modern Islamic scholars.

Chapters 5, 6 and 7 each focus on an individual human or gender-based right. These chapters follow a tripartite structure. First, the international legal basis of the right in question is examined. Second, the respective chapters will consider Islamic perspectives on these rights. Finally, the chapters will examine the legal practice of Saudi Arabia in a bid to understand the extent to which the government has met its obligations under *Shariah* and international law. The three chapters respectively examine the right to education, the right to work, and the freedom of movement.

Chapter 8 offers comprehensive conclusions and recommendations based on the research findings of this thesis. Ultimately, this thesis concludes that although the reforms to guardianship over women are positively effective, further reform may be appropriate. It contends that reform has a precedent in current law, adheres to the primary tenets of *Shariah* law, better aligns with the origins of *Shariah* law, and demonstrates to the international community that Saudi Arabian law, based on Islamic *Shariah* law, is just and equitable, and indeed promotes women's rights and gender equality.

Chapter Two: Male Guardianship over Women under Saudi Arabia's Domestic Law

2.1 Introduction

Drawing inspiration and impetus from the new guardianship reforms, Saudi governmental institutions have enacted a series of reforms which further clarify, delineate and expand the rights and status of women under the relevant Saudi law and domestic regulations.¹ These reforms include, but are not limited to, the women's empowerment without a consent of their guardian, the repeal of the ban on female drivers, as well as a host of secondary legislation aimed at arming Saudi women with a range of positive rights (such as education entitlements and transport provision for women in work).² By the same token, many of the reforms undertaken abolish or amend regulatory limitations to the rights enjoyed by women in the country, thereby protecting their rights against arbitrary or unjustified community cultural concepts (such as expanding the scope of free movement of Saudi women through abrogation of the laws disqualifying women from driving).³ These reforms are a significant step forward to enhance and protect women rights.

Before discussing how these reforms are to be enforced, and any future challenges which might result therein, it is necessary to begin with a brief overview of the Saudi legal system and the constitutional dynamics at play between the various branches of government.⁴ This line of enquiry will shed light on the more distinctive aspects of sources and processes of law-making, interpretation and adjudication within this evolving constitutional order.⁵ By highlighting the reach and import of Islamic *Shariah* law

¹ 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 <<https://ilr.law.uiowa.edu/print/volume-100-issue-3/the-times-are-they-a-changin-saudi-law-finally-addresses-domestic-violence-with-its-regulation-on-protection-from-abuse>> accessed 7 October 2017.

² National Society for Human Rights, 'The Chairman of the Society Affirms that the Supreme Court's Decision to Empower Women Without the Consent of their Guardian Will End the Problems Faced by Women!' (NSHR, 2018) <<http://nshr.org.sa/en/?news=the-chairman-of-the-society-affirms-that-the-supreme-courts-decision-to-empower-women-without-the-consent-of-their-guardian-will-end-the-problems-faced-by-women>> accessed 9 May 2018.

³ Okaz, 'Saudi Women Allowed to Drive in Historic Decision' (Okaz) <<http://www.okaz.com.sa/article/1575601/English/Saudi-Arabia-to-allow-women-to-drive-in-historic-decision>> accessed 15 November 2017.

⁴ See; Moneef N Mlafekh, 'Power and Autonomy in the Saudi State Case Study Analysis of Policy Implementation' (PhD thesis, The University of Sheffield 2010) 43-44.

⁵ For a detailed overview, see Abdullah F Ansary, 'A Brief Overview of the Saudi Arabian Legal System' (New York University School of Law, July 2008) <http://www.nyulawglobal.org/globalex/Saudi_Arabia.html> accessed 13 December 2017.

in all Saudi governmental, legal and societal institutions, this chapter will seek to explore how the new reform can source its legitimacy and authority from Islamic legal sources.

2.2 Inside the legal system of Saudi Arabia

The constitutional sources of the Saudi legal system encompass the more usual acts of executive power, legislation and secondary law-making, ie bylaws and ministerial orders etc. In the hierarchy of constitutional sources, however, Islamic *Shariah* is preeminent. One of the more remarkable features of the Saudi legal system is the basic role played by *Shariah* within the institutions of government. Islamic *Shariah* is not the sole preserve of any one state or government but represents a universal system of law.⁶ Interpretation of religious scripture in the *Quran*, and the narration of the life and times of the Prophet Muhammad (Peace be upon him), known as the *Sunnah*, is performed by the *Ulama*, ie those scholars and jurists who have been trained in religious science and methods.⁷ These jurists belong to recognised schools of Islamic *Shariah* and issue rulings on authoritative interpretations or opinions on matters of Islamic *Shariah*.

Saudi Arabia has a Council of Senior *Ulama* that wields persuasive religious opinions.⁸ This council delivers *fatwas* (mandates) that are based on the interpretation of the *Quran* and *Sunnah*.⁹ Similarly, in the judiciary, the courts are constitutionally obliged to apply the rules of Islamic *Shariah* to all cases that are brought before them.¹⁰ Disputes between individuals are heard by *Shariah* courts; these are effectively courts of general jurisdiction.¹¹

Thus far, the primary decision-makers adjudicating on women's rights have been the courts, namely, the public courts, which are collectively referred to as *Shariah* courts. This well-rooted tradition seems to have been abolished by the recent Supreme Order, which has eliminated the requirement of guardian-consent. Simply, this means that the consent of a male guardian is no longer required.

⁶ Eldin Abdel-Wahhab, 'Meaning and Structure of Law in Islam' (1962) 16 *Vanderbilt Law Review* 115, 121-123.

⁷ For a relevant discussion, see Mamoud Munes Tomeh, 'Persuasion and Authority in Islamic *Shariah*' (2010) 3(3) *Berkeley Journal of Middle Eastern & Islamic *Shariah** 141, 151.

⁸ See Saudi Royal Decree No 1/137 (30 August 1971).

⁹ *ibid.*

¹⁰ *ibid.*

¹¹ See Saudi Law of Procedures Before *Shariah* Courts, Royal Decree No M/21/20 (19 August 2000) art 24.

2.2.1 Creation of Saudi Arabia

The legal system of Saudi Arabia has its sources in ‘higher’ norms of Islamic *Shariah*.¹² At the same time, the Saudi legal system is grounded in processes of societal deliberation which emerge from the ground up. Put differently, Saudi Arabia’s legal system is centralised at the governmental level – the executive branches retain broad powers to enact regulations in accordance with the demands of Islamic *Shariah*, sovereignty or the public interest. Yet, there is a deep awareness within the Saudi government that for state regulations to be effective they must also attain religious legitimacy. Saudi Arabia has thus strived to reflect and preserve the culture, values and traditions of the people, many of which took root long before the modern state of Saudi Arabia was established in 1932.¹³

The historical origins of the modern state of Saudi Arabia can be traced to the mid-18th century. Made up of settled communities, tribal factions and diaspora, the country now known as Saudi Arabia was formed by an alliance struck between the various towns, tribes and regions dispersed across central Arabia.¹⁴ Before these social and political bonds of state, community and nationhood were solidified, Islam was a powerful influence in the region and is credited with bringing peace, moral order, stability and unity to warring communities.¹⁵ The rules of Islamic *Shariah* imposed a duty on political rulers to govern fairly and proscribed many barbaric cultural practices, for instance preventing girls from accessing education. National unity and the unifying concepts of a shared ethnicity, faith and history were further consolidated during the reign of King AbdulAziz may Allah have mercy on him from 1902 to 1930.¹⁶ Under his regency and, Saudi Arabia was transformed from a fragmented and fractious society into a stable and cohesive community governed under the general laws of *Shariah*.

This historical context reveals much about the nature of the Saudi legal system and the constitutional values which inform it.¹⁷ Before proceeding to assess the specific functions of government, including what scope there is for judicial review of the administrative system, including the conduct of the ministries and other governmental agencies, the next section reflects the tension between

¹² The Islamic foundation of the Saudi legal system was declared as early as 1950. See Royal Decree No 1320 19 July 1950.

¹³ Joseph Brand, ‘Aspects of Saudi Arabian Law and Practice’ (1986) 9 Boston College International and Comparative Law Review 1, 2-3

¹⁴ Abdulaziz H Al-Fahad, ‘Ornamental Constitutionalism: The Saudi Basic Law of Governance’ (2005) 30 Yale Journal of International Law 347, 378.

¹⁵ Malik reported: ‘The Messenger of Allah, peace and blessings be upon him, said, “I have been sent to perfect good character.”’ Source: al-Muwatṭa 1614, Grade: Sahih (authentic) according to Ibn Abdul Barr, Ash-Shatibi said, ‘The Sharia in its entirety only creates noble morals.’ Source: al-Muwaafaqaat 2/124.

¹⁶ Al-Fahad (n 14) 378-379.

¹⁷ Frank E Vogel, *Islamic Shariah and the Legal System of Saudi: Studies of Saudi Arabia* (BRILL 2000) 169-22.

modernisation and tradition in the Islamic world. This will prepare the ground for a discussion on how Saudi Arabia has brought these forces into harmony through law and social practice.

2.2.2 Relation between Islamic and comparative law in the Saudi legal system

With decolonisation, and the far-reaching influence of French law on the Middle East/North Africa (MENA) region,¹⁸ the legal systems of various Arab countries can be best described as an amalgam of codified civil law and Islamic *Shariah*.¹⁹ In the 1960s, Arab countries such as Egypt modeled their legal system on the French administrative system (or *droit administratif*); an Act would lead subsequent Egyptian governments to directly transpose elements of the French civil law code into national law.²⁰ The wholesale adoption of civil law models across the region notwithstanding, Gulf countries have struggled to reconcile this system of government – which is notable for the powers it divests to the state and governmental authorities – with the Islamic heritage and traditions of its people.²¹ Civil legal systems traditionally grant the executive branches with broad enabling powers to enact ministerial decisions or policies on sovereignty or public order grounds.²² Islamic prescriptions, by contrast, are inherently limiting of public powers and constrain the legislative or decisional autonomy of state authorities. In short, Islamic obligations bind all, state or private individual.²³

Taking the above into consideration, the constitutional order of Saudi Arabia typifies elements of a dual legal system in that it blends the civil law orientation with Islamic ‘supremacy’ clauses.²⁴ Similar

¹⁸ For background, see Ran Hirschl, *Constitutional Theocracy* (Harvard University Press 2010) 6.

¹⁹ Boris Kozolchik, ‘Trends in Comparative Legal Research: Apropos Dainow’s The Role of Judicial Decisions and Doctrine in Civil Law and in Mixed Jurisdictions’ (1976) 24 *American Journal of Comparative Law* 100, 109.

²⁰ Egyptian Law No 112 of 1946 as amended by Law No 9 of 1949. See also Mustapa Wasfi and Ahkam Al-Egraat Al-Edariayay, *The Rules of Administrative Procedures* (2nd edn, 1972) (Egypt) 66; John H Merryman, J Lowell Gibbs and W Hao Li, *Law in Radically Different Cultures* (West 1983) 5, 15.

²¹ Nathan J Brown and Mara Revkin, ‘Islamic Shariah and Consitutions’ in Anver M Emon and Rumees Ahmed (eds), *The Oxford Handbook of Islamic Shariah* (Oxford University Press 2015) 1.

²² For a seminal article on the principles governing the French system of administrative justice, see AV Dicey, ‘The Droit Administratif in Modern French Law’ (1901) 17 *Law Quarterly Review* 302. See also Xavier Blanc-Jouvan, ‘Worldwide Influence of the French Civil Code of 1804, on the Occasion of its Bicentennial Celebration’ (Cornell Law School, Berger International Speaker Papers 5) <http://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=1003&context=biss_papers> accessed 20 December 2017.

²³ Scholars have noted that even the executive organs of government are expected to meet certain religious requirements, for instance: ‘[T]he constitutions of a number of predominantly Muslim countries may restrict to Muslim citizens the right to serve in government positions, particularly to hold executive power. This is achieved by requiring a specific Islamic oath or by stipulating that only Muslims can hold a given position.’ Tad Stahnke and Robert C Blitt, ‘The Religion-State Relationship and the Right to Freedom of Religion or Belief – A Comparative Textual Analysis of the Constitutions of Predominantly Muslim Countries’ (2005) 36 *Georgia Journal of International Law* 947, 974.

²⁴ Maren Hanson, ‘The Influence of French Law on the Legal Development of Saudi Arabia’ (1987) 2 *Arab Law Quarterly* 272, 283-285; Herbert J 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.

to the Egyptian constitutional experience, the administration has amassed a significant body of secondary or delegated legislation, encompassing a growing body of ministerial circulars, through laws and regulations. In contrast with many other Arab legal orders, however, Saudi Arabia has not instituted a civil law code, despite being influenced by civil legal systems.²⁵ At the same time, the country has adopted an uncodified form of Islamic *Shariah*. All civil law regulations and legislation must, accordingly, not violate the fundamental norms of *Shariah*. Saudi Arabia is not especially distinctive in this regard, and other Muslim (majority) countries will, to a greater or lesser extent, give recognition and weight to Islamic principles and precepts in the relevant rule-making, administration and adjudication processes.²⁶ The Kingdom is, however, wholly distinct in one crucial regard: Islamic *Shariah* is regarded not merely as a constitutive source of the Saudi legal system but as the Supreme Law of the legal system as a whole.²⁷

Saudi Arabia is relatively distinct because of its follow to the *Hanbali* school, a school of Islamic thoughts that encourages its followers to emulate the practices of the Prophet Muhammad (Peace be upon him).²⁸ However, there is no difference between any of the schools, and the state does not adhere to one doctrine without another. For instance, if the court finds strong evidence in any of the four schools of thought, the court must return to it and adhere to it.²⁹

Following the new regulatory reforms, the official Saudi position on the legality of male guardian-consent has undergone a shift.³⁰ This shift, which is specifically aimed at codifying or otherwise

²⁵ Nathan J Brown, 'Why Won't Saudi Arabia Write Down its Laws?' (*Foreign Policy*, 23 January 2012) <<http://foreignpolicy.com/2012/01/23/why-wont-saudi-arabia-write-down-its-laws/>> accessed 12 October 2017.

²⁶ See Shamsul Falaah, 'Theocratic Constitutionalism: A Discourse on the Political System, Democracy, Judiciary and Human Rights under Islamic Theocratic Constitutionalism' (2016) 2(2) *Waikato Islamic Studies Review* 66, 67. This describes three forms of Islamic constitutionalism as 'dominant constitutionalization' whereby Islamic norms are supreme and the primary source of law, 'delegate constitutionalization' whereby Islamic *Shariah* is incorporated into national law but the task of interpreting Islamic *Shariah* is left to judges and jurists, and 'coordinate constitutionalization' whereby there is some attempt at accommodation between Islamic and liberal principles such as rule of law, human rights and democracy. See, generally, Adel Omar Sherif, 'Separation of Powers and Judicial Independence in Constitutional Democracies: The Egyptian and American Experiences' in Eugene Cotran and Adel Omar Sherif (eds), *Democracy, the Rule of Law and Islam* (Kluwer Law 1999) 22-34.

²⁷ Liebesny (n 24) 46.

²⁸ A Royal Decree, issued in 1930, declared that '[i]t will be sufficient to rule by what is found in the authentic law books of the school of Imam Ahmed ibn Hanbal, which can be applied without the meeting of court members, while judgment with no basis in these text will require an obligatory meeting'. Cited in Fuaad Hamza, *Al-Bilad Al-Arabia Al-Saudiah* [Kingdom of Saudi Arabia] (1988) 175-176.

²⁹ For a discussion, see Mohammed Alfawzan, *New Judicial Organization in Saudi Arabia: Comparative Study of Fiqh* (1st edn, Law and Economics Library 2018) 58.

³⁰ For a broader discussion of the changing policy landscape in Saudi Arabia, see Jane Kinninmont, 'Vision 2030 and Saudi Arabia's Social Contract Austerity and Transformation' (Chatham House, Occasional Paper) <<https://www.chathamhouse.org/sites/files/chathamhouse/publications/research/2017-07-20-vision-2030-saudi-kinninmont.pdf>> accessed 16 October 2017.

removing barriers to women's rights in Saudi law, is but the latest manifestation in a series of modernising and 'rule of law' related transformations undergone by the state.³¹

2.2.3 Modern constitutional law of Saudi Arabia

The legal system of Saudi Arabia has experienced rapid change and evolution since 1992 when Saudi Arabia enacted its Basic Law of Governance.³² While Saudi Arabia does not have a written constitution per se, this Basic Law functions as an equivalent.³³ In effect, the constitutional framework of Saudi Arabia rests on three fundamental laws, each adopted under the authority and initiative of the great reformer of Saudi law, King Fahd ibn Abdul-Aziz. These laws are the Basic System of Governance;³⁴ the Consultative Council (*Shura* Council) Law;³⁵ and the Regional Law³⁶. These laws serve as the constitutional backbone – commonly referred to as the Basic Law – of the Saudi legal and political order. In their combined effect, these laws function as a kind of constitutional document and serve to define, constitute, allocate and distribute the powers and functions of government. Another legislative instrument of note is the Council of Ministers' Law which delineates the role and responsibilities of the powers of the Council of Ministers (the chief body responsible for developing policy)³⁷ and the structure of the Executive³⁸.

It is worth keeping in mind that many of the key institutions of the Saudi government had already been in existence for some time, and the Basic Rule of Governance (sometimes known as the Basic Law) merely describes the three branches of government (legislative, executive and judicial authorities), thereby codifying legal practice rather than establishing new institutions. The judicial order, for instance, was well established by this point.³⁹

³¹ Rashed Aba-Namay, 'The Recent Constitutional Reforms in Saudi Arabia,' (1993) 42 *International & Comparative Law Quarterly* 295, 295-296. For a cross-constitutional comparison of developments in Saudi Arabia, see Esther van Eijk, 'Sharia and National Law in Saudi Arabia' in Jan Michiel Otto, *Sharia Incorporated: A Comparative Overview of the Legal Systems of Twelve Muslim Countries in Past and Present* (Leiden University Press 2010) 139, 175.

³² Saudi Basic Law of Governance, Royal Order No A/90 (1 March 1992).

³³ Aba-Namay (n 31) 295.

³⁴ *ibid.*

³⁵ Saudi Shura Council Law, Royal Order No A/91 (1 March 1992).

³⁶ Saudi Regional Law, Royal Order No A/91 (1 March 1992).

³⁷ For a discussion on the early inspiration behind the creation of the Council of Ministers, see Charles W Harrington, 'The Saudi Arabian Council of Ministers' (1958) 117 *Middle East Journal* 1.

³⁸ Saudi Council of Ministers Law, Royal Order No A/13 (21 August 1993) art 29. Some have argued that the Law of the Council of Ministers has the character of a constitutional document. See, for example, Maren Hanson, 'The Influence of French Law on the Legal Development of Saudi Arabia' (1987) 2 *Arab Law Quarterly* 272, 283-285.

³⁹ *ibid.*

Article 1 of the Basic System of Governance codifies Islamic Shariah as the foundational source of all law in the Kingdom.⁴⁰ Whilst the Basic Law identifies the *Quran* and *Sunnah* as the constitutional foundation of Saudi Arabia, Islamic *Shariah* had been recognised as the supreme law of the land since the very creation of Saudi Arabia as a sovereign state.⁴¹ Islam therefore provides the constitutive basis and legitimation of all laws in the Saudi legal system. More fundamentally, Islamic faith creates the social fabric of Saudi society.

2.2.4 Substantive constitutionalism and the Islamic foundations of the Saudi legal system

The social contract formed between the Saudi government and its citizens is rooted in ideas of trust, of shared cultural ties, ties of kinship and a common history. Rooted in ideas of statehood and cultural nationalism,⁴² many of the operative provisions of Saudi Arabia's Basic Law emphasise the duties of the state to its citizens, the ethnic and historic heritage of the country, and its Islamic identity.⁴³ Key provisions articulate the rights and powers of the state and the rights of all citizens.⁴⁴

If there is a glue that holds the country together, it is not the ethnicity of its people but adherence to the Islamic faith and the fear of God.⁴⁵ As Brand notes:

The role of law in Saudi Arabia, as in Islamic societies generally, is not to create and protect the rights of citizens, a purpose common or civil law lawyers might assign to their legal systems, or to instruct citizens on ways they might become more perfect members of society, as socialist lawyers might observe about the role of law in their society. Islamic Shariah serves, and is the expression of, God's will. It both provides its adherents with the knowledge of their duties so that they might more properly conduct this life and prepare for the next and enforces God's will that one do what is morally proper and refrain from doing what is morally wrong.⁴⁶

As to its substantive aspects, sometimes called normative constitutionalism, the constitutional order of Saudi Arabia derives its authority from the two main sources of *Shariah*, the *Quran* and *Sunnah*. Interpretation of *Shariah* in the Saudi court system is derived from the philosophy of the schools of

⁴⁰ Saudi Basic Law of Governance (n 32) art 1.

⁴¹ See, for example, Saudi Law of the Judiciary, Royal Decree No M/64 (23 July 1975) art 26; see also Basic Law of Governance (n 32) arts 49 and 53.

⁴² On the idea of the social contract, see Jean-Jacques Rousseau, *The Social Contract* (Penguin 1968) ch 6.

⁴³ *ibid.*

⁴⁴ Saudi Basic Law of Governance (n 32) arts 23-43.

⁴⁵ Frank H Stewart, 'Tribal Law in the Arab World: A Review of the Literature' (1987) 19 *International Journal of Middle East Studies* 473.

⁴⁶ Brand (n 13) 6.

thought.⁴⁷ In addition to these sources, consensus of opinion and reason by analogy are relied upon to interpret *fiqh* (divine law).⁴⁸ Accordingly, courts must dispense justice, penal or administrative, in accordance with Islamic Shariah. Whilst Saudi judges are bound by the legal texts of the schools of thought, Vogel explains that judges enjoy a margin of discretion. Courts are consequently guided not only by the *fiqh* when adjudicating disputes but will also rely on their ‘understanding of the texts from the Qu’ran and Sunna that support these rules’.⁴⁹

In effect, the relationship established between civic and religious authorities is a variation on the separation of powers doctrine. In the Islamic constitutional framework of Saudi Arabia, however, the division of power not only centres around the balance to be achieved between executive and judicial functions but also regulates the boundaries between process of government and the substance (Islamic sources) of those laws. The former is the domain of civic administration, while the latter implies a substantive concept of constitutionalism based on natural principles of religious law. To correctly interpret and apply Islamic *Shariah*, religious jurists must participate in rule interpretation and consensus.

Before delving into the details of the bodies charged with making codified law in Saudi Arabia, it is necessary to understand that in Saudi Arabia there are two collaborating sets of law: *fiqh* and *siyasa*.⁵⁰ *Fiqh* are those rules discerned by religious scholars who issues rulings on the correct conduct for Muslim citizens.⁵¹ These rules regulate the mores and norms of all aspects of Muslim life.⁵² *Siyasa*, on the other hand, is that body of law created by temporal rulers (the legislature) and enacted for the public good.⁵³ Whilst the two authorities blend, it is clear from the constitution that those who enact *siyasa* must consult with those who proclaim *fiqh*. For example, The Basic Law of Governance includes principle of consultation article 8 states, “Governance in the Kingdom of Saudi Arabia shall be based on justice, shura (consultation), and equality in accordance with the Islamic Sharia”. Accordingly, Al-Rodiman argue that the law of Saudi Arabia has implemented the provision of *siyasa shari’yah*, which is the correspondence between *fiqh* and the requirements of governance. In addition, the King of Saudi

⁴⁷ Herbert Liebesny, *The Law of the Near East and Middle East: Readings, Cases and Materials* (SUNY Press 1975) 18.

⁴⁸ Frank E Vogel, *Islamic Shariah and Legal System: Studies of Saudi Arabia* (University Microfilms 1996) 141-142. See also Ansary (n 5).

⁴⁹ Vogel, *ibid*.

⁵⁰ Inaserledinellah Mahmood Abdelwahab, Karim Daghbouche and Nadra Ahmad Shannan, ‘The Algorithm of Islamic Jurisprudence (Fiqh) with Validation of an Entscheidungsproblem’ (2014) *Journal Academia* 1, 2-3. See also Asifa Quraishi-Landes, ‘The Sharia Problem with Sharia Legislation’ (2014) 41 *Ohio North University Law Review* 545.

⁵¹ Quraishi-Landes, *ibid* 547.

⁵² *ibid*.

⁵³ *ibid* 548.

Arabia may take any action required for the public interest, as long as it does not infringe Sharia. Moreover, the doctrine of *siyasah shar'iyah* authorise the judge to make religious ordinances in the best interests of good administration of government.⁵⁴

2.2.5 Organs of government

In order to grasp the dynamics of the legal system of Saudi Arabia, it is necessary to examine the primary sources of institutional legal power: the constitution itself; the legislature, which is composed of two major bodies, the Council of Ministers and the *Shura* Council.⁵⁵ In this regard, Saudi Arabia has an integrated legal system.⁵⁶ Despite the comprehensive overhaul of the Saudi judicial system in 2007,⁵⁷ *Shariah* courts are afforded comprehensive jurisdiction over all civil and criminal disputes.⁵⁸ However, the broad powers of these courts of general jurisdiction are limited by the specialised functions of the Board of Grievances (*Diwan al-Mazalem*) and specialised committees – both of which operate outside the traditional court structure.⁵⁹ A brief explanation of the main organs of Saudi government follows.

2.2.5.1 The legislative branch

The law-making organs of the Saudi government derive their prime directives from the Islamic authority of *Al-Siyasah al-Shar'iyah*. *Al-Siyasah al-Shar'iyah* refers to public policy (distinct from divine laws) made in the interests of good administration and the public interest. The doctrine of *Al-Siyasah al-Shar'iyah* is affirmed by Royal Decrees promulgated by the King or his delegates, such as ministers. Using this power, governmental institutions have authority to issue administrative ordinances or regulations known as *Nizam*.

Under Islamic principles of governance, regulations are to be based on consultation among parties and not on the commands of the ruling authority. Deliberation and consultation are consistent with Islamic *Shariah*.⁶⁰ Regulations are proposed by ministers and then drafted and approved by the Council of Ministers.⁶¹ All regulations are then published, at which point a Royal Decree becomes law.

⁵⁴ See; Abdulaziz S. Al-Rodiman, 'The Application of Shari'ah and International Human Rights Law in Saudi Arabia' (PhD thesis, Brunel University London 2013)30.

⁵⁵ Saudi Law of the Judiciary (n 41) art 26.

⁵⁶ 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.

⁵⁷ See Implementation Mechanism of the Judiciary Law and the Board of Grievances Law, Royal Decree No M/78 1 October 2007.

⁵⁸ Saudi Basic Law of Governance (n 32) art 49.

⁵⁹ See Implementation Mechanism (n 57).

⁶⁰ *ibid*.

⁶¹ *ibid*.

Ministers exercise their delegated authorities to adopt administrative or secondary legislation by way of ministerial declarations. The state is permitted to enact law provided these regulations fall within the scope of permissible laws, as defined under the abovementioned categories of Islamic Shariah. All law, whether issued as a Royal Decree or administrative circular have equal status as law. Both, however, are subordinate to Islamic *Shariah*.⁶²

The Islamic view of a legislature is that its members consist of people who are experts in both *Shariah* and modern jurisprudence and are proactive in the lives of the Muslim community.⁶³ The legislative branch in Saudi Arabia is, accordingly, structured to reflect the legal ideologies of *fiqh* and *siyasa*. While the unicameral legislative branch is collectively referred to as *Malik al Shura*, it is really made up of two councils: the Council of Ministers⁶⁴ and the *Shura* Council (*Majlis Shura*). The Council formulates *siyasa* (in effect the democratic basis of Saudi rule-making), while the *Shura* recommends regulations for Saudi society which involve *Shariah*.⁶⁵

Regulations issued by the legislative and executive branches acquire authority and religious legitimacy by finding substantiation in Islamic legal sources. The principal instrument by which such legitimacy is derived is the opinion of the *Ulama* (*fatwa*).⁶⁶ The *Ulama* (the mufti) exercises a degree of discretion when issuing a fatwa in accordance with the best interest of the public interest.⁶⁷ This aspect of Saudi rule is integral to the Kingdom's constitutional order. Religious scholars are treated as mutual partners in decision-making processes. Consequently, political and religious institutions (*ifta*) exercise joint constitutive authority to enact and formulate law and policy in the Saudi legal system.

2.2.5.2 Executive branch of government

The executive branches also establish Saudi law. Under the Saudi legal system, the Prime Minister (the King) and the Council of Ministers is vested with legislative authority to enact laws. The former does so by means of Royal Decrees which have the status of self-executing law, while the latter is empowered to issue decisions with binding effect.⁶⁸

Royal Decrees (sometimes referred to as Royal Orders or Supreme Order) are required to complement the law. In the constitutional framework of the Saudi legal system, the Prime Minister (the King) has

⁶² *ibid.*

⁶³ Vogel (n 49) 141-142.

⁶⁴ Saudi Law of the Council of Ministers, Royal Order No A/13 (1 August 1993).

⁶⁵ Jon Mahoney and Kamel Alboaoouh, 'Religious and Political Authority in the Kingdom of Saudi Arabia' (2017) 6(2) *Manas Journal of Social Science* <<https://philarchive.org/archive/MAHRAP-2>> accessed 14 October 2017.

⁶⁶ Muhammad Al-Atawneh, 'Religion and State in Contemporary Middle East: The Case of Saudi Arabia' (2006) 2 *Journal of Islamic Practice of International Law* 28, 34.

⁶⁷ *ibid.*

⁶⁸ Saudi Basic Law of Governance (n 32) art 45.

ultimate sovereign authority (subject to *Shariah*) over the legislature⁶⁹ and any law set out by the Council of Ministers.⁷⁰ This authority also extends to the sovereign's capacity to approve or invalidate domestic laws but also encompasses the power to uphold or reject international rules or treaties.⁷¹ The Council's role is to advise the prime minister and facilitate the country's development.⁷² As to its competences, the Council of Ministers represents 22 different government ministries and is presided over each week by the King or his deputy.⁷³ Its responsibilities encompass the drafting and oversight of suggested resolutions for decree on internal, foreign, economic, educational and defence policies as well as administrative matters of the state.

The Council functions in tandem with the *Shura* Council. Established in 1992, the *Shura* advises the Council on government policy and may submit regulations and bylaws to meet the public interest or to remove what it interprets as counter to the basic principles of Islamic *Shariah*. In its consultative status, the *Shura* serves as a quasi-regulatory authority which 'lays down regulations and motions to meet the interests of the state or remove what is bad in its affairs in accordance with the Islamic *Shari'ah*'.⁷⁴

More generally, the Council of Ministers has the power to set up committees. These are established with the specific remit of reviewing the policies and conduct of ministries or any governmental agencies.⁷⁵ One such body due to be established is a Committee charged with the task of overseeing the implementation of the Supreme order which empowering women to access public services without the consent of the guardian.⁷⁶

2.2.5.3 The judiciary

The Basic Rule of Governance contains provisions which provide for the establishment of a unified and *Shari'ah* compliant judiciary. The courts are to provide review functions in conjunction with a

⁶⁹ *ibid* arts 55, 56, 57.

⁷⁰ *ibid*. See also Saudi Council of Ministers Law Royal Order No A/13 (21 August 1993) art 29.

⁷¹ *ibid* arts 71 and 81. See also Abdulrahman Al-Yousif, 'Constitutional Order in the Kingdom of Saudi Arabia' (*Aljazeera*, 2013) <<http://www.al-jazirah.com/2013/20130208/rj2.htm>> accessed 9 May 2018.

⁷² Saudi Regional Law, Royal Order No A/91 (1 March 1992) art 5.

⁷³ *ibid*.

⁷⁴ *ibid* art 67.

⁷⁵ Mohammed AlAjaji, 'Saudi Laws Compendium' (Bureau of Experts at the Council of Ministers, 2018) <<https://www.boe.gov.sa/MainLaws.aspx?lang=en>> accessed 9 May 2018.

⁷⁶ See Ansary (n 5).

centralised administrative court known as the Board of Grievances and other supporting bodies.⁷⁷ Article 46 of the Basic System of Governance explicitly states that the judiciary is to act as an independent authority. Article 47 of the Basic Law guarantees the rights of all citizens to pursue justice through litigation in the courts, in accordance with procedures stipulated in the relevant procedure laws of the Kingdom.⁷⁸ Pursuant to Article 50, the King and his deputies are charged with the final authority to implement and uphold judicial rulings.

The Saudi court system is made up of three parts. The largest part is the *Shariah* courts. These are of general jurisdiction so they hear most cases in the legal system.⁷⁹ In establishing Islamic *Shariah* as the supreme law of Saudi Arabia, King Abdul Aziz established the very first *Shariah* courts. Some of the courts took the form of *qadi* courts, which refers to a magistrate or judge who presides over matters in accordance with Islamic *Shariah*. In addition to forming a central part of the administrative hierarchy of many Arab legal orders, these courts have traditionally exercised a wide range of extra judicial functions, including overseeing the mediation of disputes between governmental authorities and private entities, reviewing public acts or projects and, crucially, deciding legal issues related to personal status law.⁸⁰

Under current Saudi law, all statutes decreed by the legislature or King must also conform with the *Quran* and *Sunnah*.⁸¹ *Shariah* in the country is not codified but is instituted by *Shariah* courts. As such, judges and legal scholars (*Ulama*) have the position of lawful interpreters of *Shariah* and apply these to judgments or advice (*fatwas*) in cases before them.⁸²

Created under the 1975 Law of the Judiciary, and later reformed by King Abdullah bin Abdulaziz Al Saud in 2007, the Supreme Judicial Council (SJC) addresses administrative matters such as judge selection and establishment of tribunals and other specialist courts to implement the King's recommendations.⁸³ In the modern judicial system of Saudi Arabia, *Shariah* courts are organized into the following divisions: the SJC, higher courts, appeal courts and lower district courts. Separate from the *Shariah* courts are a variety of tribunals charged with hearing subject-specific cases such as

⁷⁷ See Saudi Law of the Board of Grievances, Royal Decree No M/51 (11 March 1982) art 1.

⁷⁸ Saudi Basic Law of Governance (n 32) arts 36 and 38. See also Abdullah Mari Qahtani, *Tatawwur Al-Ijraat Al-Jinaiyah Fi Al-Mamlakah Al-Arabiyah Al-Saudiyah* [The Development of the Law of Criminal Procedure in Saudi Arabia] (1998) 528.

⁷⁹ Saudi Law of the Judiciary (n 41) art 5.

⁸⁰ For a discussion on the legal procedure of these courts, see Brand (n 13) 9.

⁸¹ Saudi Basic Law of Governance (n 32).

⁸² Mashood A Baderin (ed), *Islamic Shariah in Practice* (Routledge 2017) 3.

⁸³ Saudi Law of the Judiciary (n 41) art 58.

banking and foreign investment.⁸⁴ Lastly, a newly restructured administrative judicial body known as the Board of Grievances has jurisdiction to review complaints against the government.⁸⁵

Administratively, the SJC plays a supervisory role over the entire court system and, alongside the High Court, has a critical role in developing general principles of law and precedent which may yet bind the lower courts.⁸⁶

Courts of first instance have jurisdiction over common criminal cases and civil cases on marriage, divorce, child custody and inheritance. First instance courts are divided into two types: summary courts and general courts. In the absence of codified guidance or case precedents, judges have the task of interpreting the *Quran* and *Sunnah* within *Shariah* doctrines.⁸⁷ In 2007 the King issued a decree in which specialized circuit courts appointed by the SJC were formed in an attempt to foster more transparency and consistency in the judicial system.⁸⁸ Certain matters were taken away from first instance courts and jurisdiction was transferred to these tribunals whose judges possess more expertise and training in the subject matter.⁸⁹ Currently, the tribunals hear the majority of commercial claims such as labour, commerce, insurance, banking and foreign investment.⁹⁰ However, in an effort to promote reform, the King also decreed the establishment of a tribunal to hear all family related matters such as divorce, alimony, child custody and juvenile cases.⁹¹

Within the restructured court system, individual regions and provinces can establish their own courts of appeal with jurisdiction over cases filed within that particular area.⁹² A primary function of these courts of appeal is to supervise how general and summary courts are interpreting and applying the legal rules and the provisions of regulations.⁹³ In criminal matters, Article 17 mandates that courts of appeal follow the recently decreed Law of Criminal Procedures.⁹⁴ This creates a potential for jurisdictional conflict between the SJC and other courts of general jurisdiction. For instance, Article 12

⁸⁴ Royal Embassy of Saudi Arabia, 'Legal and Judicial Structure' <<https://www.saudiembassy.net/legal-and-judicial-structure-0>> accessed 19 October 2017.

⁸⁵ Ansary (n 5).

⁸⁶ *ibid.*

⁸⁷ *ibid.*

⁸⁸ Saudi Law of the Judiciary (n 41) art 26; see also Faisal Al-Fadhel, 'The New Judicial System of Saudi Arabia' (2009) 75(1) *Arbitration Journal* 91, 94.

⁸⁹ See Ansary (n 5).

⁹⁰ *ibid.*

⁹¹ Angus McDowall, 'Saudi Arabia Opens Family Courts, First Step in Wider Legal Reform' (*Reuters*, 19 August 2014) <<https://uk.reuters.com/article/uk-saudi-courts-reform/saudi-arabia-opens-family-courts-first-step-in-wider-legal-reform-idUKKBN0GJ11R20140819>> accessed 19 October 2017.

⁹² Saudi Law of Criminal Procedure, Royal Decree No M/39 (16 October 2001) arts 2 and 194.

⁹³ See Court of Cassation website <<https://www.moj.gov.sa/ar/Ministry/Courts/Pages/courtOfCassation.aspx>> accessed 17 December 2017.

⁹⁴ Saudi Law of Criminal Procedure (n 97) art 25.

of the 2013 Law of Criminal Procedures states, '[i]f the Supreme Judicial Council does not affirm the relevant sentence in implementation ... said sentence shall be reversed and the case shall be remanded for reconsideration by *other* judges'.⁹⁵

The rise of specialized tribunals that have been granted jurisdiction over issues traditionally handled by judges and Islamic Shariah *jurists* on an individual level exemplifies the supreme status of Islamic Shariah within the hierarchy of constitutional sources within the overall legal system of Saudi Arabia. This may appear in Article 1 of the law of procedure before sharia courts which stated that: "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".⁹⁶

2.2.6 Review of governmental acts

The Board of Grievances is the body with central judicial authority to review administrative acts; including any dispute involving, or complaint raised against, governmental officials. The founder of an earlier incarnation of the Board, King Abdul Aziz, was so committed to justice that he, following Islamic tradition, vested in all citizens a general right of complaint against any official, regardless of their rank or seniority. This practice has deep roots in Islamic tradition and closely mirrors the modern practice of judicial review and natural justice as it has evolved in the modern legal systems of the other systems.⁹⁷ Additionally, the Board of Grievances has under it several administrative court across the country to carry out its intended functions.⁹⁸

In its current iteration, the Saudi Board of Grievances was formally constituted by ministerial decree, as governed by the Council of Ministers Law.⁹⁹ As to its features, the Board shares many similarities in functions and remit to the *Conseil d'Etat* – the supreme court for administrative justice in France.¹⁰⁰ When it was first established, the Board did not have authority to issue binding judgments but would instead submit its recommendations to the relevant ministerial department. Responding to concerns pertaining to its independence and uncertainty over its administrative versus adjudicative functions,

⁹⁵ *ibid* (emphasis added).

⁹⁶ The Law Of Procedure Before Sharia Courts 237 Royal Decree No. (M/21) 20 Jumada 1421 [19 August 2000] Umm al-Qura No. 3811 – 17 Jumada II 1421[15 September 2000].

⁹⁷ See Ansary (n 5). For a discussion in a parallel jurisdiction, see Jean-Marie Auby, 'The Abuse of Power in French Administrative Law' (1970) 18 American Journal of Comparative Law 148.

⁹⁸ See Generally, Board of Grievances, 'The Courts' (*Board of Grievances*, 2019) <<https://www.bog.gov.sa/en/AboutUs/BOGCourts/Pages/Default.aspx>> accessed 23 March 2019)

⁹⁹ The Saudi Board of Grievances was established pursuant to Royal Decree No M/51 10 May 1982.

¹⁰⁰ *ibid*.

the King adopted a series of reforms,¹⁰¹ culminating in the passing of a Royal Decree in 2007 which effectively converted the Board from a quasi-administrative body to a central judicial authority with broad subject matter jurisdiction to review any cases involving abuses of power and criminal acts of governmental authorities such as bribery, fraud or corruption.¹⁰² In the most recent reforms, a new Procedural Law of the Grievances Board was issued in 2013. Article 1 of the said act stipulates that the Board of Grievances shall apply the 'rules of the Islamic Shariah in accordance with the Quran, the Sunnah and laws not conflicting with the present Law, and their proceedings shall comply with the provisions thereof'.¹⁰³

The next section will consider specific constitutional dynamics in the Saudi legal system as viewed through the lens of modern constitutional discourse. This, in turn, will prepare the ground for a discussion on the impact and enforceability of the new supreme order which allows women to access public services without guardian-consent and rights-related reforms.

2.2.6.1 Male guardianship under Saudi Arabia's legal and institutional framework

More relevant to the aims and objectives of this thesis, it is essential to highlight that the requirements of guardianship practices have been misunderstood by some individuals. However, although differences between males and females have been clearly illustrated under Islamic *shariah*, they seem to exist to complement each other rather than render one sex inferior to the other. Thus, the intended goal here is to ensure that the relationship between men and women lead to stability, prosperity and the progress of the society and community in which they thrive in. Moreover, Scholars and Islamic jurists alike have issued admonitions which concern the rights of women in reference to *Shariah* texts which provide that women's rights are to be protected, honoured, respected, and more importantly, upheld. The correct definition of guardianship means the assignment of a man, whether a husband, father or son, to care for a woman's affairs, including covering her expenses. As stated earlier, *Shariah*

¹⁰¹ The Board of Grievances was granted judicial autonomy in 1968 through action of the King which amounted to the force of a Royal Decree. King's letter No 20942/1 1968. See also, Board Act, Royal Decree No M/51 21 May 1982.

¹⁰² Saudi Law of the Board of Grievances, Royal Decree No M/78 (1 October 2007) and Saudi Basic Law of Governance (n 32) art 46 pertaining to independent authority of the Board of Grievances. See also Ayoub M Al-Jarbou, 'Saudi Board of Grievances: Developments and New Reforms' (2011) 25(2) Arab Law Quarterly 177. Specifically, the Board restricted its authority to administrative actions, whereas previously it had also considered matters of a criminal or commercial nature. The only reservation of authority pertained to enforcement, consideration, and execution of domestic or foreign arbitration decisions and awards, regardless of the nature of the dispute.

¹⁰³ Board of Grievances Procedural Rules, Council of Ministers Resolution No 190 (19 June 1989) <<https://www.saudiembassy.net/board-grievances-procedural-rules>> accessed 23 December 2017.

guardianship and *qiwamahh* does not mean, nor does it ever justify, abusing a woman or diminishing her status.¹⁰⁴

Since the inception of the modern Westphalian legal order in the 19th century, which gave rise to the modern European nation state and the classic 'dualist' system of international law, the Islamic world has sought to reconcile two ideals: its longstanding fidelity to religious law and its embrace of modern constitutionalism. As well as evoking a 'core idea of law in terms that resonate deeply with the Islamic past', relatively secular countries such as Malaysia have enacted legislation which makes explicit references to *Shariah* principles, which are to be balanced against principles more closely associated with the Anglo-American experience of common law.¹⁰⁵ However, it is important to avoid drawing direct analogies between secular constitutions and the Saudi legal system, which regards Islamic *Shariah* as the foundation of its legal system and ultimate source of all valid law.¹⁰⁶

Constitutionalism, by the same token, is a notoriously elastic term, whose meaning is itself contested. A constitution, of course, is the instrument by which law-making processes are constituted, governed and distributed.¹⁰⁷ And yet, constitutionalism has another dimension not yet captured by the above description. These law-making processes are constitutive of the societies addressed by its rules and processes. In contemporary discourses, however, constitutionalism is an umbrella term used to denote a series of related values, including, inter alia, rights, separation of powers, rule of law and judicial autonomy.¹⁰⁸

Drawing on their Islamic traditions, many Muslim majority countries have deviated from the European form of secular constitutionalism, and have instead constructed an Islamic form of constitutionalism, thereby integrating a modernised form of religious governance into their legal systems. On this, An-Na'im notes:

By retaining this specific form of political and social organization after independence from colonial rule, Islamic societies have freely chosen to be bound by a minimum set of national and international obligations of membership in a world community of nation states. While there are clear differences in

¹⁰⁴ Committee on the Elimination of Discrimination against Women (n 47) 30. See also, Khaled Alsabt, 'Alqawaama' (*Khaledalsabt*, 2018) <<https://khaledalsabt.com/cnt/lecture/1475>> accessed 11 May 2018.

¹⁰⁵ Dawood I Ahmed and Tom Ginsbury, 'Constitutional Islamization and Human Rights: The Surprising Origin and Spread of Islamic Supremacy in Constitutions' (2013) 54 *Virginia Journal of International Law* 615, 616.

¹⁰⁶ Jan Michiel Otto, *Sharia and National Law in Muslim Countries: Tensions and Opportunities for Dutch and EU Foreign Policy* (Leiden University Press 2016).

¹⁰⁷ For instance, Whiteley and others contend the following: 'To the extent that the Basic Law can be considered an "informal" 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 Publications 2006).

¹⁰⁸ Neil Walker, 'The Idea of Constitutional Pluralism' (2002) 65 *Modern Law Review* 317, 344.

the level of their social development and political stability, all Islamic societies today live under national constitutional regimes.¹⁰⁹

Countries such as Tunisia and Egypt have enjoyed a revival of Islamic constitutionalisation, which has led to the incorporation of what can be termed Islamic 'supremacy clauses' into their constitutions. Egypt did so in the 1980s, with the result that Islamic Shariah is now accepted as a source of legislation.¹¹⁰ Interestingly, Egypt's constitutional court has started to interpret and apply this clause and the legal effects have been significant,¹¹¹ for example, private contracts that breach a fundamental Islamic Shariah principle can be invalidated. Moreover, courts have expressly affirmed that prospective legislation should give effect to and uphold broad 'universal principles' of *Shariah*. The purpose of these clauses is to ensure that Islamic Shariah is either the supreme source of law or at least a primary source of legislation. No secular or man-made legislation would be found valid in this form of constitution if it contravened an explicit command or prescription of the *Quran* or *Sunnah*. As is the case in the Saudi constitutional order, *Shariah* has not only been elevated to a primary source of legislation but has also been formally recognised as the ultimate source of law and authority.¹¹²

How then does Islam constitute and regulate the relationship between the Islamic state and Muslim society and what are the state's duties to its citizens in the above regard?

It is a commonly-held belief of Islamic scholars that Islamic Shariah gives rules and guidance that are suitable for all people in all periods of history. More crucially, such rules not only regulate the religious behaviour of individuals in their daily lives but also equally apply to government officials and institutions.¹¹³ Islam, in short, establishes a comprehensive set of rules and principles which transcend the ordinary distinction maintained between secular (civil) laws and religious (natural) law. By extension, Islamic Shariah erodes the liberal distinction maintained between public law and authority, on the one side, and the private sphere of rights, culture and economy, on the other. Indeed, there is much common ground to be found between the natural law traditions; a tradition that unites the

¹⁰⁹ Abdullahi Ahmed An-Na'im, 'Globalization and Jurisprudence: An Islamic Shariah Perspective' (2005) 54 *Emory Law Journal* 25, 48-49.

¹¹⁰ Constitution of Egypt 2012, art 2; Li-Ann Thio, 'Constitutionalism in Illiberal Polities' in Michel Roenfield and András Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press 2012) 133, 141.

¹¹¹ Baudouin Dupret, 'What is Islamic Shariah? A Praxiological Answer and an Egyptian Case Study' (2007) 24(2) *Theory, Culture and Society* 79, 87.

¹¹² Liebesny (n 24) 46.

¹¹³ See Sami Zubaida, *Law and Power in the Islamic World* (IB Tauris 2005) 175-176.

moral philosophy of Aristotle with the idea of a sacred or traditional law, associated with theologians such as Thomas Aquinas.¹¹⁴ These commonalities will be outlined below.

2.2.6.2 Human Rights protection in Saudi Arabia

The concept of civil liberties, human rights, and the rule of law system varies between Muslim (majority) countries. Whilst Islamic Shariah is often perceived to be in tension with modern constitutionalism, nothing could be further from the truth. Rather, constitutional developments that have unfolded in Egypt and elsewhere have reawakened an understanding within many Islamic societies that while governments are empowered to enact and apply their own laws, such laws must not violate *Shariah* or the public interest, the latter itself a principle protected by Islamic Shariah.¹¹⁵ Indeed, it is arguable that Islamic Shariah mandates governance values which are entirely consistent with, and may even precede, the sorts of values and principles are tended to be associated with 'rule of law', administrative justice and even participatory modes of governance (through consultation with religious scholars representing the public interest).¹¹⁶

Saudi Arabia has taken inspiration from Islamic principles of governance, for instance, by guaranteeing all its citizens certain constitutionally guaranteed fundamental rights. Article 8 of the Basic Law of Governance holds that the 'government in the Kingdom of Saudi Arabia is based on the premise of justice, consultation, and equality in accordance with the Islamic *Shari'ah*'.¹¹⁷ Moreover, the Basic Law of Saudi Arabia is comprehensive in relation to civil and political rights, for example, the law sets out the right to work (Article 28), education (Article 30), welfare (Article 27) and health care (Article 31) as state guaranteed.¹¹⁸ The Basic Law intends to strengthen and protect women's rights in accordance with Islamic *Shariah*.¹¹⁹

¹¹⁴ See William Hardie, *Aristotle's Ethical Theory* (Clarendon Press 1980). On moral absolutism, see Thomas Aquinas, *On Law, Morality and Politics* (Hackett 1988).

¹¹⁵ See Nayef Alwaqaa, 'The Basic Law of Governance in Saudi Arabia Contractual Study' (2018) 34 *Journal of Islamic Sciences* 1.

¹¹⁶ Seyyed Hossein Nasr, *The Heart of Islam: Enduring Values for Humanity* (Harper 2002). 'We must all seek to rediscover the heart of religion, which is also the religion of the heart, to drink deeply of the spring of wisdom gushing forth from the heart, to live in peace and harmony on the basis of the universal truths contained in the perennial wisdom shared by all traditions, and to love all of God's creation as the consequence of being ourselves touched by the love and compassion of the One who resides in our hearts.' *ibid* 315. See also, Anwar M Emon, *Islamic Natural Law Theories* (Oxford University Press 2010) and Nathan J Brown and Adel Omar Sherif, 'Inscribing the Islamic Shari'a in Arab Constitutional Law' in Yvonne Yazbeck Haddad & Barbara Freyer Stowasser (eds), *Islamic Shariah and the Challenges of Modernity* (AltaMira 2004) 55, 59.

¹¹⁷ *ibid*.

¹¹⁸ Saudi Basic Law of Governance (n 32).

¹¹⁹ Committee on the Elimination of Discrimination against Women (n 47) 7.

Dr Al-Qahtani, Chairman of the National Society for Human Rights, gave his support to the Supreme Court's decision to empower women without the consent of their guardian to apply for a national identity card. In addition, regulations passed by the executive have followed the Court's decision to allow women to enjoy all public services without any restrictions. As suggested in the previous chapter, the Royal Supreme Order on guardian-consent has effectively upended legal tradition by taking the line that 'women should not be required to obtain consent for services'.¹²⁰

The Royal Order should also be considered in light of wider reforms aimed at enhancing the participation of women in decision-making. Before his passing, the Custodian of the Two Holy Mosques King Abdullah bin Adulaziz Al-Saud opened up appointment to the *Shura Council* to women, decreeing that:

Because we refuse to marginalize women in society in all roles that comply with sharia, we have decided, after deliberation with our senior Ulama and others ... to involve women in the Shura Council as members, starting from the next term.¹²¹

Pursuant to this Royal Order, 30 women have been appointed to the Council since the King appointed the first woman minister in 2009.¹²² Furthermore, as will be detailed below, the Ministry of Justice has instituted several measures which enhance and enlarge the rights of women under the applicable personal status laws, including rules applicable to citizenship, divorce and custody.

2.2.6.3 Judicial independence of powers under the Saudi legal system

Whilst the balance of power which stands between the judicial and executive authority is an enduring preoccupation of constitutional lawyers everywhere, Saudi Arabia is distinctive from other legal systems, in the Arab world and beyond, in that its *Shariah* courts have maintained their status as courts of general jurisdiction. That is to say, *Shariah* courts have not lost these privileges, notwithstanding the restructuring of the court system and simplification of the judicial hierarchy. As to the power of the courts, the Basic Law of Governance affirms the independence of the judiciary from other branches of government.¹²³

The Basic Law of Governance does not establish provisions delimiting the review functions and competences of Saudi courts, except in the case of Islamic *Shariah*. Article 7 of the Basic System of

¹²⁰ National Society for Human Rights (n 2).

¹²¹ Frank Gardner, 'King Appoints Women to Shura Council' (*BBC*, 11 January 2013) <<http://www.bbc.com/news/world-middle-east-20986428>> accessed 15 October 2017.

¹²² *ibid.*

¹²³ Nathan J Brown, *Constitutions in a Nonconstitutional World: Arab Basic Laws and the Prospects for Accountable Government* (SUNY 2002) 20.

Governance instructs that '[g]overnment in Saudi Arabia derives power from the Holy Qur'an and the Prophet's tradition'.¹²⁴ At least on its face, the constitution demands that all law is to come from Islamic rather than secular sources. Pertinent to the study at hand, Article 26 of the same instrument in addressing the rights and duties of citizens posits that 'the state protects human rights in accordance with Islamic *Shariah*'.¹²⁵ Implicit in Article 26 is the concept that when the former conflicts with the latter, *Shariah* shall prevail. This is true as well in the provision for criminal law, which may explain why there is no established criminal code in Saudi law. Article 38 states that '[p]enalties shall be personal and there shall be no crime or penalty except in accordance with the *Shari'ah*'.¹²⁶

In the Saudi judiciary, the Western concept of precedent is, as yet, not widely adhered to and judges decide individual cases based on their own interpretation of *Shariah* and the circumstances surrounding each case.¹²⁷ Until the higher and appeal courts establish binding precedents for other courts to follow, there is no guarantee that a matter that has been adjudicated by a given court will be adjudicated in the same way by the same or another court. In this regard, the reform of the judicial system, supervised by the SJC, marks a departure point, laying down the groundwork for the unification of the court structure and the emergence of a common law system of jurisprudence based around judicial authority, binding precedent and general principles of law.¹²⁸

Moreover, any important legal judgments rendered by the *Shariah* courts are subject to final approval by the King.¹²⁹ This rule is codified by Article 55 of the Law of the Judiciary. Also, the king appoints the Supreme Judicial Council members and the chief of the High Court.¹³⁰ Subject to these reforms, the King is empowered to dismiss any judges, following an unsatisfactory ruling or decree which is contrary to Islamic *Shariah*.

Given the balance of powers between judicial and executive functions, particularly on questions relating to the interpretation of *Shariah*, it is necessary to briefly consider the methods, and methodological divergences, between the jurisprudential schools.

¹²⁴ Ayoub Al-Jarbou, 'The Role of Traditionalists and Modernists on the Development of the Saudi Legal System' (2007) 21 Arab Law Quarterly 197.

¹²⁵ *ibid.*

¹²⁵ Saudi Basic Law of Governance (n 32).

¹²⁶ *ibid.* Salman Muhammed AL-Subaie, 'The Right to a Fair Trial under Saudi Law of Criminal Procedure' (PhD Thesis, Brunel University, London, 2013) 113-114

¹²⁷ Mohammad Hashim Kamali, *Shari'ah Law: An Introduction* (OneWorld Publications 2008) 179 and Frank E Vogel, *Islamic Shariah and Legal System: Studies of Saudi Arabia* (Brill 2000) 140-142.

¹²⁸ Saad M al-Otaibi, 'The New Judiciary Law and the New Board of Grievances Law: Constitutional Reading,' (2007) al-ASR Magazine 1.

¹²⁹ Saudi Law of the Judiciary (n 41) art 55.

¹³⁰ *ibid.*

2.2.6.4 Male guardianship under Islamic Shariah interpretation in Saudi Arabia

The legal framework of Saudi Arabia is clear: *Shariah* holds primacy in legislative and judicial law-making. This is confirmed by the Basic Law of Governance in Article 1: 'Its religion is Islam and its Constitution is the Book of God and Sunnah of His Apostle.'¹³¹ The Kingdom has been on the path of social and economic reforms since 2007, which has now culminated in the new reforms of empowering women without their guardian-consent. These reforms are to bring Saudi Arabia into greater conformity with its international obligations under the applicable human rights treaties. Thus, to assess the recent reforms, it is helpful to review the Shariah sources, schools of Islamic thought and interpretive procedure.

2.3 Islamic *Shariah* sources

2.3.1 The Holy *Quran*

Drawing on the grammar of Kelsen's pure theory of law, the *Grundnorm* of the Saudi legal system rests in the divine revealed text of the *Quran*.¹³² Affirming the assumption that the *Quran* is the constitutive basis of the Saudi legal system, the Basic System of Governance makes numerous references to Islam, Islamic values and the subordination of state power to the supreme laws of Islamic *Shariah*.¹³³

Looking through an interpretive lens, the following text from the *Quran* appears to sanction, if not prohibition command, misuse of male guardianship over women: '... And women have rights similar to the rights of men in a just manner, and the men have a degree (of advantage) over them ...'.¹³⁴

However, as later chapters will show, there are many competing verses of the *Quran* which appear to ground relations between the sexes on the principle of equality.

2.3.2 *Sunnah*

The *Sunnah* refers to the words, actions and assertions of the holy Prophet; the lived example of Mohammed (Peace be upon him).¹³⁵ The *Sunnah* serves as the secondary source of law for interpretation. In this regard, it is seen as 'proof' of Islamic Shariah; in effect proof derived from the

¹³¹ Saudi Basic Law of Governance (n 32).

¹³² On Kelsen's pure theory of law, and *Grundnorm*, see Hans Kelsen, *Pure Theory of Law* (University of California Press 1967).

¹³³ Saudi Basic Law of Governance (n 32) art 1.

¹³⁴ *Quran* 2:228.

¹³⁵ Inshrah Khan, 'Concept of Mahram and Na Mahram in Islam' (*US Islam*, 2015)

<http://www.usislam.org/islam/Concept_Of_Mahram_And_NaMahram_In_Islam.htm> accessed 19 October 2017.

ultimate 'source' of all law divine, as revealed in the *Quran*.¹³⁶ The *Quran* and *Sunnah* are seen as complementary and integral. The *Quran* can be corroborated by the *Sunnah* and vice versa.

The *Sunnah* contains *hadiths*, scholarly collections of the sayings and deeds of Muhammad or a report about something he did.¹³⁷ Islamic legal scholars utilize these as adjuncts to the *Quran* in their development of the Islamic legal system.¹³⁸ Here, too, if we apply the interpretive lens, there is evidence to view male guardianship over women as the law. The Prophet Muhammad, Allah's Apostle, is reported to have 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 to 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]."¹³⁹

However, as will be explored in the forthcoming chapters, there are competing reports of the Prophet's statements which will be discussed in subsequent chapters.

2.3.3 Consensus

Consensus (*ijmā*) refers to the authoritative interpretations of *Shariah* by the Muslim community, in particular Muslim scholars, at any period of time, and on any Islamic principle.¹⁴⁰ It is utilised by scholars where interpretation is not clear based on a plain reading of the text of the *Quran* and narration of the *Sunnah*. Justification for consensus as a source of law is found in the *hadiths* where the Prophet is reported to have said: 'My people will never agree in an error.'¹⁴¹ The consensus has played a role under the Saudi legal system in respect of legal issues left unresolved by the *Quran* or *Sunnah*.

2.3.4 Reason by analogy

In Islamic *Shariah*, the deduction of legal prescriptions from the *Quran* or *Sunnah* by analogic reasoning (*qiyas*) provides the fourth source of law for Muslim jurists.¹⁴² *Qiyas* is a method of

¹³⁶ *ibid.*

¹³⁷ Harald Motzki (ed), *Hadith: Origins and Developments* (Routledge 2016) iv.

¹³⁸ *ibid.*

¹³⁹ Sahih Bukhari 3:29:85.

¹⁴⁰ Richard Bulliet and others, *The Princeton Encyclopaedia of Islamic Political Thought* (Princeton University Press 2012) 421.

¹⁴¹ Rom Landaue, *Islam and the Arabs* (Routledge 2007) 140.

¹⁴² James Pavlin and Sunni Kalam, 'Theological Controversies' in Seyed Hussein Nasr and Oliver Leaman (eds), *History of Islamic Philosophy* (Routledge 1996) 105.

deduction whereby jurists interpret laws on issues not explicitly dealt with by the *Quran* or *Sunnah*.¹⁴³ According to this method, the ruling of the *Quran* or *Sunnah* may be extended to a new problem based on the reasoning of the original law. An example is narcotics. The *Quran* prohibits alcohol, the rationale being that it intoxicates the mind.¹⁴⁴ Therefore, when presented with the issue of narcotics, which also intoxicate or pollute the mind, jurists extended the law against alcohol to narcotics by reason of analogy.

The sources of law from which jurists must derive law within the context of Islam are in hierarchical order: the *Quran*, the *Sunnah*, consensus and reason by analogy. There is no text in either the *Quran* or *Sunnah* that, on its face, conclusively mandates male guardianship except with certain exceptions as will be discussed in chapter 4.¹⁴⁵ Nonetheless, religious scholars have traditionally held male guardianship as mandated by Islamic legal sources, based on *hadiths* such as the following whereby the Prophet of Allah (Peace be upon him) stated: 'Man is the guardian of his family and every guardian has responsibilities towards those under his guardianship.'¹⁴⁶

2.4 Schools of Islamic thought

Islamic Shariah began to develop several hundred years subsequent to the Prophet Muhammed's death (Peace be upon him) in 632 CE.¹⁴⁷ He is God's apostle and the most pious of believers. All Muslims therefore consider his life and ways a model to follow.¹⁴⁸ The words and ways of the Prophet were collected by scholars into a collective body known as the *Hadith*. *Hadith* literature grew and developed into distinct schools of Islamic thought (*madhab*).¹⁴⁹ These schools are *Hanbali*, *Shafi'i*, *Maliki*, and *Hanafi*.¹⁵⁰ While all schools share many of the basic rules, they differ substantially as well. Methodologically, they are distinct in their theories of how to develop the law using the four agreed upon sources of *Shariah*: the *Quran*, the *Sunnah*, consensus, and reason by analogy.¹⁵¹

¹⁴³ Coulson (n 153) 172.

¹⁴⁴ *ibid*.

¹⁴⁵ *ibid*.

¹⁴⁶ Sahih al-Bukhari 6719, Sahih Muslim 1829.

¹⁴⁷ Toni Johnson and Lauren Vriens, 'Islam: Governing Under Sharia' (2011) 24 Council on Foreign Relations 1, 5.

¹⁴⁸ *ibid*.

¹⁴⁹ For an overview, see Amr A Shalakany, 'Islamic Legal Histories' (2008) 1 Berkeley Journal of Middle Eastern and Islamic Shariah 1, 12.

¹⁵⁰ Motzki (n 143) iv.

¹⁵¹ For an overview, see Joseph Schacht, 'Islamic Shariah in Contemporary States' (1959) 8 American Journal of Comparative Law 133.

2.4.1 Hanafi school

The *Hanafi* School originated from the teachings of Abu Hanifa who died in 767.¹⁵² *Hanafi madhab* uses *qiyas* as its method for legal reasoning.¹⁵³ However, there is also a reliance on personal opinion in interpreting the *Quran*. Its doctrines are considered some of the most popular in Shariah, especially on matters of criminal law, individual freedoms, marriage, and property.¹⁵⁴ This is evidenced by the *Hanafi* use of (juristic preference)¹⁵⁵ which may be used to mitigate harsh or unjust consequences that might arise from strict textual legal interpretation.¹⁵⁶ *Hanafi* jurisprudence has also been used as a residual source of law in the absence of explicit legislation or other constitutional provisions.¹⁵⁷

2.4.2 Maliki school

The *Maliki* school developed from the work of Imam Malik who died circa 795.¹⁵⁸ It differs from the three other Sunni schools of law in that, in addition to traditional sources of *Shariah*, it also uses the practice of the people of Medina (*Ahl al-medina*) as a source of interpretation.¹⁵⁹ According to the *Maliki* School, this source can at times supersede *hadiths* as the practice of the people of Medina is treated as a 'living *Sunnah*'.¹⁶⁰ This has resulted in a much smaller reliance on *hadiths* than other schools.¹⁶¹ Thus, many doctrines attributed to early Muslims such as Prophet's wives (peace be upon him), relatives and companions also serve as a source of law.¹⁶² As with the *Hanafi* School, *Maliki* jurisprudence also relies on personal opinion and judgment as a source of interpretation.

2.4.3 Shafi'i school

The *Shafi'i* school takes its origins from the theological work of Abu Abdullah ash-Shafi'i who died in 820.¹⁶³ The *Shafi'i* school treats the *Quran* and *Sunnah* as the preeminent sources of legal authority.

¹⁵² *ibid.*

¹⁵³ Research and Scientific Unit, *The Four Doctrines of Jurisprudence* (1st edn, Ifta Department 2015) 26.

¹⁵⁴ See eg, Baber Johansen, *The Islamic Shariah on Land Tax and Rent: The Peasant's Loss of Property Rights as Interpreted in the Hanafi Legal Literature of the Mamluke and Ottoman Periods* (Croom Helm 1988) 1.

¹⁵⁵ Shalakany (n 156) 67; see also Ya'akov Meron, 'The Development of Legal Thought in Hanafi Texts' (1969) 30 *Studia Islamica* 73.

¹⁵⁶ Kamali (n 131).

¹⁵⁷ Robert D Crane, 'Islamic Shariah: A Thematic Primer on Human Rights' (*American Muslim*, 2010) <http://theamericanmuslim.org/tam.php/features/print/islamic_law_a_thematic_primer_on_human_rights> accessed 21 October 2017.

¹⁵⁸ Delfina Serrano, 'Malikis' (Oxford Bibliographies, 30 July 2014) <<http://www.oxfordbibliographies.com/view/document/obo-9780195390155/obo-9780195390155-0082.xml>> accessed 22 October 2017.

¹⁵⁹ Shalakany (n 156) 70.

¹⁶⁰ *ibid.*

¹⁶¹ *ibid.*

¹⁶² Hussein Aly Al-Muntazery, *Kitab Al-Hudud* (no publication date).

¹⁶³ Ahmed al Shamsy, 'Shafi'is' (Oxford Bibliographies, 19 May 2011)

Consensus and reasoning by analogy carry lesser weight in interpreting *Shariah*.¹⁶⁴ Only when a jurist is faced with theological ambiguity may consensus be employed. If there is no consensus, the jurist will look to reason. This school is considered among the more conservative ones, although many of its students hold wide views on religious practice.¹⁶⁵

2.4.4 Hanbali school

Hanbali is followed by more conservative Muslims. In social and religious application, the *Hanbali* School is the most conservative *madhab*.¹⁶⁶ However, it is the most liberal in most commercial matters which would explain *Shariah* courts' tacit acceptance of specialized courts in those areas. The application of *Shariah* law is derived through the practice of independent reasoning (*ijtihad*) by scholars to determine *fiqh*, the promulgation of Islamic doctrine in both substantive law and legal methodology.¹⁶⁷ The four primary sources of law, in hierarchical order, are used to determine *Hanbali fiqh*: the *Quran*, *Sunnah*, consensus and reason by analogy.¹⁶⁸

2.5 Historical and Present contexts of guardianship

Confronted with social change, Muslim (majority) countries have wrestled with the need to develop a more nuanced approach to Islamic *Shariah* and interpretative tradition. In Saudi Arabia, this balance has tilted in favour of religious obligations, both personal and civic. Religious clerics have traditionally played a significant role in maintaining standards of conduct between men and women in the Kingdom.¹⁶⁹ The recent reforms of empowering women without the consent of the guardian changed the conversation, bringing new opportunities to set precedent on the balance to be struck between religious and rights within the competing branches of law.

In Saudi Arabia, as in most Islamic cultures, the requirement for women is modesty and for men honour, which goes hand in hand with following the religious rules.¹⁷⁰ This latter tradition is intimately connected with the concept of modesty and the male's duty to protect and preserve the female's

<<http://www.oxfordbibliographies.com/view/document/obo-9780195390155/obo-9780195390155-0082.xml>> accessed 22 October 2017.

¹⁶⁴ *ibid*.

¹⁶⁵ *ibid*.

¹⁶⁶ Mohammad Kamali, *Principles of Islamic Jurisprudence* (Islamic Texts Society 1991) 217.

¹⁶⁷ Ali Khan, 'The Reopening of the Islamic Code: The Second Era of *Ijtihad*' (2003) 1 *University of St Thomas Law Journal* 341.

¹⁶⁸ Baber Johansen, 'Signs as Evidence: The Doctrine of Ibn Taymiyya (1263-1328) and Ibn Qayyim Al-Jawziyya (D. 1351) on Proof' (2002) 9 *Islamic Shariah and Society Journal* 168, 191.

¹⁶⁹ Yusuf Sidani, 'Women, Work and Islam in Arab Societies' (2005) 20(7) *Women in Management Review* 498.

¹⁷⁰ Alifita, 'Fatwas of the Standing Committee' (2018)

<<http://www.alifita.net/Fatawa/fatawaChapters.aspx?languagename=ar&View=Page&PageID=6556&PageNo=1&BookID=3>> accessed 29 June 2018.

virtue. The primacy of feminine modesty is exemplified in the existence of gender segregation and kinship structure.¹⁷¹ Both in public and in private, women are required to be modest around men who are not their husbands or *mahram*.¹⁷² Husbands and *mahram* assume the role of *wali*, or protector of his female ward and her modesty.¹⁷³ It is from this tradition that the concept of male guardianship arose. Male guardianship over women as a legal tenet has developed so that men have the assignment to care her life affairs.¹⁷⁴

Following the waiver of the guardian approval requirements, the Saudi government is committed to adopting more measures on women's rights issues as they relate to the country's law, civil law procedure and administration, ie the issue of driving permits. Notably, the Supreme Order empowers women to exercise their rights by abolishing male guardian entirely.¹⁷⁵

In traditional Islamic legal thought, the personal and private freedoms of women are typically assumed to fall within the mandatory rules of Islamic *Shariah*. As such, the new reforms enshrine legal protections for women, beyond their dealings with the civil service. Nonetheless, this thesis would argue that the new reforms represent a great reform not in form or substance but in the 'shifting of mindsets'.¹⁷⁶ The nature and sources of Saudi law remain touched, as is legitimate, but the boundary between what belongs to the sacred and what to the civic is shifting, as is the way in which constitutional sources are interpreted and juristic reasoning performed. Consequently, every indication suggests that the government and its representatives are sincere in their desire to move

¹⁷¹ Nikki R Keddie and Beth Baron (eds), *Women in Middle Eastern History: Shifting Boundaries in Sex and Gender* (Yale University Press 2008) 106.

¹⁷² Khan (n 140).

¹⁷³ *ibid*.

¹⁷⁴ Committee on the Elimination of Discrimination against Women, 'Consideration of Reports Submitted by States Parties under Article 18 of the Convention, Third and Fourth Periodic Reports of Saudi Arabia (30 September 2016) 40th Session CEDAW/C/SAU/3-4.

¹⁷⁵ Al-Jazirah, 'Royal's Order to Empower Saudi Women Without Requiring the Consent of their Guardian' (2017) <<http://www.al-jazirahonline.com/news/2017/20170504/108442>> accessed 19 October 2017.

¹⁷⁶ I borrow this phrase from Martii Koskeniemi, who argues law can only transform lives and society when it does not treat cultures, states or legal orders as closed universes, which are impenetrable to change or outside influences, ideas or restraints. This is a more dynamic understanding of law. Secondly, this is a constitutionalism that cares less for 'architectonics', ie the structure and division of powers, the constitutional document and other formal features of a legal system or constitutional document. At the same time, this is not a defence of global form of constitutionalism, where all societies are governed by a unified and hierarchical law (descending from the peremptory norms and institutionalised claims for universal rights and descending downwards to state law, informal law, religious law, customs etc, each deemed to hold less weight than the category of law above it). In the case of Saudi Arabia, the change is not substantive. Islamic *Shariah* still prevails over any conflicting law or regulation. What matters, however, is how such reforms can be justified by appealing to Islamic methods and sources. Martii Koskeniemi, 'Constitutionalism as Mindset. Reflections on Kantian Themes about International Law and Globalization' (2007) 8 *Theoretical Inquiries of Law* 9.

forward to more modern legal institutions based on rule of law, transparency, administrative legality and rights protection.

The religious institutions such as the Council of Senior *Ulama* are considered joint participants in the Saudi legal order. The functions and powers of these bodies are established by Royal Decree. Subject to this Decree, *Ulama* is empowered to issue recommendations on 'religious issues related to common law, which are to facilitate the king's decisions'.¹⁷⁷ Notably, the Basic Law of Governance also affirms the Role of the *Ulama* to adopt any bylaws necessary to 'attain welfare and avoid harm in the affairs of the state, in accordance with the general rules of Islamic *Shariah*'.¹⁷⁸ This open-ended provision provides much scope for interpretative freedom in the development of Saudi state Laws and Regulations.

The next section attempts to illustrate these ideas in the context of Saudi Arabia's efforts for amending the law proscribing women drivers.

2.6 Saudi Arabia's efforts to support women's rights

In a remarkable development, on 26 September 2017, a Supreme Order was issued by the Custodian of the Two Holy Mosques King Salman bin Abdulaziz Al Saud, subject to which previous restrictions on the rights of Saudi women to drive vehicles or apply for driving permits were effectively rescinded.¹⁷⁹ Effective from 10 October 2018, the order amends the previous traffic laws and implementing regulations.¹⁸⁰ Pursuant to the text of the decree lifting the ban on women drivers, a high-level committee will be established with the responsibility of reviewing the existing regulation and procedure to determine how such reforms are to be enforced.¹⁸¹

Prior to the latest legal reforms, the law and practice of guardianship, both customary and statutory, was broadly construed. Customary limits on the freedom of movement of women in public spaces, outside the family home, were extended to the forms of transport that they were permitted to use, as well as the circumstances governing their use.¹⁸² Women in Saudi society were discouraged from

¹⁷⁷ Saudi Royal Decree No 1/137 (n 8).

¹⁷⁸ Saudi Basic Law of Governance (n 32) art 67.

¹⁷⁹ Okaz (n 3).

¹⁸⁰ *ibid*.

¹⁸¹ Soraya Altorki, 'The Concept and Practice of Citizenship in Saudi Arabia' in Suad Joseph (ed), *Gender and Citizenship in the Middle East* (Syracuse University Press 2000) 215-236.

¹⁸² Fatimah S Baeshen, 'How Economic Reform Will Help Women Drive in Saudi Arabia' (19 June 2017) <<http://time.com/4824171/women-drivers-saudi-arabia/>> accessed 20 December 2017.

driving, with or without their guardian's approval.¹⁸³ The effect of this rule – which was de facto enforced as a state law – was to further bolster the more extended customary application of guardianship related norms and practice, including by limiting opportunities for women to travel to work or enrol in educational courses.¹⁸⁴

The above-discussed reforms – encompassing both the eliminating of guardian-consent requirements law and the Supreme Order lifting the ban on driving – make explicit reference to the constitutional law of Saudi Arabia as grounded in Shariah. The Saudi Arabian government takes its religious, and therefore constitutional, obligations seriously.¹⁸⁵ Indeed, the text of the lifting of the driving ban order is framed in highly conciliatory and accommodating language, and stresses the need to assure religious legitimacy in all acts of law-making.

The legislative debate around the reform and repeal of the driving ban highlights the legal and social dynamics of the Saudi Law order, despite being based on a handful of regulations. As will be discussed in later chapters, guardian-consent restricts the movement of women and does so based on an authoritative (if contested) interpretation of Islamic *Shariah*. Addressing the jurisprudential debate that has surrounded the permissibility of women drivers under a literal interpretation of the Quran and Sunnah, the drafters of the new driving reforms explicitly address the concerns of the Ulama and senior religious experts, thus giving evidence to the application the Islamic principle of consultation.

A legislative note accompanying the driving order strikes a sensitive balance between religious opinion and the dilution of legal controls on certain freedoms.¹⁸⁶ Moreover, this note suggests that the original religious justification for the ban, which is the defence of public safety and morality, no longer provides justification for the rule. As suggested above, the restriction on driving was formerly justified by the need to protect the safety of women and to maintain public decency. Applying a purposive interpretation of Islamic legal sources, the Saudi government has weighed the possible threat posed to safety and morality against the possible harms that may result in continued application of the rule, in accordance with the values of Islam, and with God's law as the guardian of public morality.¹⁸⁷ Moreover, it is accepted these values can be achieved through other less restrictive measures. The goal of public safety in modern-day Saudi Arabia, in other words, can be achieved without enforcing an absolute ban on female drivers and, indeed, it is acknowledged that that any justification for

¹⁸³ *ibid.*

¹⁸⁴ David Commins, *Women in Saudi Arabia* (IB Tauris 2017) 74.

¹⁸⁵ For an overview of the relationship between *Ulama* and the political leadership in classical Islam see Muhammad Qasim Zaman, *The Ulama in Contemporary Islam: Custodians of Change* (Princeton University Press 2002) 58-59.

¹⁸⁶ Okaz (n 3).

¹⁸⁷ *ibid.*

continued application of this restriction on freedom of movement no longer rises to a religious obligation.¹⁸⁸

The legislative note also makes reference to the economic benefits of permitting women to drive.¹⁸⁹ Accordingly, the rationale behind Saudi Arabia's comprehensive reforms are consistent with the religious definition of *almasaleh almursalah*, a policy used to reduce societal harms and further the public interest, whilst also advancing the social mobility of women in the emerging labour markets.¹⁹⁰ The goal of social and economic development, ie inclusion and integration of women in the workplace, can be held to have substantive justification in Islamic legal sources.

The new reforms can thus be seen to have a sound public policy justification, without offending the constitutional requirements of *Shariah*. This approach is consistent the idea that Islamic *Shariah* allows for a degree of flexibility in rule interpretation as best reflects the needs and requirements of the societies in which they are applied.

Regarding legal infrastructure, the cancellation of the women guardian's approval to access the governmental services may catapult the Saudi government toward a stronger rule of law in which transparency and accountability are embedded into the judicial system. This would be achieved through a new conception of judicial review.

Prior to the most recent of reforms to the judicial system, these tribunals were not brought under the general jurisdiction of *Shariah* courts, leading to a fragmented judicial structure – a deficiency underscored by the absence of judicial precedent. In an attempt to curb arbitrary judgments from case by case decisions of *Shari'ah* courts, the King has recently recommended the SJC set up an official website to publish Islamic legal rulings. This is in order to encourage scholars to rely on precedent and would go some way toward a more transparent judiciary.¹⁹¹ The newly reorganised system does seem to portend greater unification among lower courts and *Shariah* courts.

Another significant implication of the new women's rights reforms is that the Supreme Court's decision to empower women will contribute to solving a number of issues such as obtaining a passport or a national identity card. In addition, the *Shura* and *Ulama* have all voiced support for the Supreme

¹⁸⁸ *ibid.*

¹⁸⁹ *ibid.*

¹⁹⁰ Al-Arabiya, 'Senior Scholars Supported the Decision to Drive Women to the Car' (2017) <<https://www.alarabiya.net/ar/saudi-today/2017/09/27>> accessed 29 October 2017.

¹⁹¹ Joseph Kéchichian, *Legal and Political Reforms in Saudi Arabia* (Routledge 2012) 31.

Order and many reforms in general. Moreover, the Supreme Order must be implemented and committed by each branch of government.¹⁹²

2.6.1 Administrative justice and review of administrative acts

The Saudi government's approach to rights legislation bears comparison with other common law jurisdictions. In such countries, any rights qualified on public policy grounds are made subject to constitutional standards of legality, proportionality, necessity and the doctrine of least restrictive measures.¹⁹³ These principles have been vindicated by various human rights committees and courts when addressing the constitutionality of any public acts which impinge upon the fundamental rights and freedoms of individuals.

Saudi Arabia is steeped in a rich tradition of administrative 'rule of law', and justice and trust between ruler and ruled have always been the bedrock of the Islamic tradition.¹⁹⁴ All members of society, from the highest to the lowest-ranking official, to the ordinary citizen, are bound by common religious duties and norms.¹⁹⁵ Public trust is deemed so intrinsic to the act of governance in Saudi Arabia that officials found to have abused their powers or have engaged in misconduct are subject to severe penalties under the law.¹⁹⁶

The revered King Abdul Aziz, the founder of the current system of administrative justice, imposed on civil servants a duty to remain impartial; to act within the powers conferred upon them by their principals (ie supervisors), and to refrain from exceeding those powers.¹⁹⁷ These legal principles bear a striking resemblance to many elements of the common law system and indices of constitutional 'rule of law', including, inter alia: non-arbitrariness, the delegation doctrine (and doctrine of ultra vires powers), separation of powers, administrative justice and judicial independence.¹⁹⁸ While we tend to

¹⁹² National Society for Human Rights (n 2).

¹⁹³ See, for example, Eva Brems, 'Don't Use a Sledgehammer to Crack a Nut': Less Restrictive Means in the Case Law of the European Court of Human Rights' (2015) 15(1) Human Rights Law Review 139.

¹⁹⁴ Faisal Bin Misha'al Bin Sa'ud Al-Sa'ud, 'The "Open Councils" and the Islamic Concept of Rule in Saudi Arabian Politics' (Gulf Centre for Strategic Studies 2003) ch 6.

¹⁹⁵ Ahmed al-Malki, 'Careful Reading in the Judiciary and Board of Grievances Laws' (Bureau of Investigation and Prosecution Forum, 21 October 2007).

¹⁹⁶ Saudi Law of the Board of Grievances (n 81) art 2.

¹⁹⁷ Birgit Krawietz, 'Justice as a Pervasive Principle in Islamic Shariah' in B Krawietz and H Reifeld, *Islam and the Rule of Law Between Sharia and Secularization* (Konrad-Adenauer-Stiftung 2008) 39-41. For a common law perspective on judicial activism, see Richard Etkins, 'Judicial Supremacy and the Rule of Law' (2003) 119 Law Quarterly Review 127. For a feminist critique of rule of law as an ideology that masks inequality under the pretence of formal equality, see Margaret Thornton, 'Feminist Jurisprudence: Illusion or Reality?' (1986) 3 Australian Journal of Law and Society 5, 7.

¹⁹⁸ See, for instance, TRS Allan, 'The Rule of Law as the Rule of Reason: Consent and Constitutionalism' (1999) 115 Law Quarterly Review 22.

associate these ideals with the modern constitutional legal system, such values are also deeply embedded in the social values of Arab societies, and enriched by their Islamic heritage.¹⁹⁹

A regulation adopted in 1982 led to further reforms, thus consolidating the status of the Board of Grievances as a judicial authority operating in parallel to *Shariah* courts. The Board now operates independently of the Ministry of Justice, thereby strengthening its separation from the executive branches of government.²⁰⁰ It should be emphasised, however, that along with a president and vice president, the Board is required to have members specialized in law and *Shariah*.²⁰¹

2.6.2 Implementation of the guardian-consent reform

Saudi courts now have the opportunity to create solid procedure and judicial precedent. The effect of precedent on the Saudi legal system will almost certainly bring positive change. Legal controls on judicial decisions increase clarify citizens or residents legal rights and enhance the door to access to equal treatment before the law.

What remains to be seen is whether failure to comply with the new Supreme Order offers grounds for review by the Board of Grievances (Administrative Court). To date, a great majority of disputes brought before the Board involve disputes between governmental authorities and private contractors. However, the scope of the Board's jurisdiction broadly and the administrative court has authority to hear disciplinary actions raised against civil servants.²⁰² Moreover, pursuant to Article 8 of Saudi Law of the Board of Grievances, the Board has jurisdiction to adjudicate any cases in which an objection is raised against an administrative act or decision on grounds of lack of jurisdiction; breach of natural justice or Saudi civil or criminal procedure; or violation or erroneous application of an existing regulation or law.²⁰³ On the face of it, the Board would have jurisdiction over an act or decision by a Saudi official in breach of existing regulations. It is entirely possible, therefore, that a decision to withhold or deny governmental services without the permission of a guardian would be covered by the above-mentioned provisions.

¹⁹⁹ Saudi Law of the Board of Grievances (n 81) arts 1 and 2.

²⁰⁰ The decisions of the Board can be appealed, in the final instance, to the King. See Saudi Council of Ministers Resolution No 241 (23 June 1987) Concerning Commercial Disputes Settlement.

²⁰¹ Saudi Law of the Board of Grievances (n 81) art 8.

²⁰² *ibid* art 1.

²⁰³ *ibid* arts 6 and 10; Procedural Rules before the Board of Grievances Council of Ministers Resolution No 190, 20 June 1989, arts 18, 35, 40.

In the presence of a specialized personal status court with general jurisdiction, or a personal status law (also known as the family law code), *Shariah* courts will continue to have general jurisdiction.²⁰⁴ It is clear, for instance, that a Saudi female citizen who is denied transport or consent to work, as permitted by the Supreme Order, and in accordance with the renewed interpretation of Islamic *Shariah*, may raise an action before the specialized court.

On the issue of the authority of Supreme Order under the hierarchy of sources of law, a Supreme Order represents binding law and is moreover taken as an authoritative statement of *Islamic Shariah* since no legislation enacted can contravene *Islamic Shariah* as a matter of Saudi constitutional law, which also means that no court may refuse to enforce it. Prima facie, as the Supreme Order is effective immediately, any person, specifically women, may rely upon this law to enforce their rights before the courts, for instance, to raise a complaint against an employer or to bring a complaint against a governmental agency that has denied her services.²⁰⁵ In this optimistic light, the Supreme Order may even impose a positive duty upon states to actively provide services which enable women to exercise their rights (ie the free provision of transport or free access to education etc.). The Saudi government has also already taken steps in this direction as will be discussed in chapters 5, 6 and 7.

The situation changes when we move from the public domain, or the domain of work, commerce and education, to the private sphere of family life. As noted above, the guardianship reforms primarily address the decisions of public officials.²⁰⁶ What, if any, impact will the new reforms have on the rulings and decisions of specialised tribunals and courts with authority to hear and resolve personal disputes relating to divorce, custody and marriage? In relation to family law or the personal status code, following recent reforms, a dispute pertaining to family law issues including divorce, custody or other aspects of personal status are to be settled in the relevant regional courts.²⁰⁷ Such courts can be made up of one or more judges as indicated by the SJC and can be established in areas that lack them.

²⁰⁴ Ministry of Justice, 'The Organisational Structure of the Courts' (2018) <<https://www.moj.gov.sa/ar/Ministry/Courts/Pages/StructureCourts.aspx>> accessed 1 January 2018.

²⁰⁵ Mohamoon, 'The Kingdom's Lawyers' (2018) <http://mohamoon-ksa.com/default.aspx?action=PREVIEW_CONTENT&id=117755&TreeTypeID=4&NodeID=114867&FullPath=,13737,114863,114867> accessed 1 January 2018.

²⁰⁶ For a parallel analysis, see Aihwa Ong, 'State Versus Islam: Malay Families, Women's Bodies, and the Body Politic in Malaysia' in Aihwa Ong and Michael G Peletz (eds), *Bewitching Women, Pious Men: Gender And Body Politics in Southeast Asia* (University of California Press 1995) 159; Abdulkadir Hashim, 'Coping with Conflicts: Colonial Policy Towards Muslim Personal Law in Kenya and Post-Colonial Court Practice' in Shamil Jeppie and others (eds), *Muslim Family Law in Sub-Saharan Africa: Colonial Legacies and Post-Colonial Challenges* (Leiden University Press 2010) 221.

²⁰⁷ Implementation Mechanism (n 57) sec 1(6)(2).

In the past few months alone, the Ministry of Justice approved a plethora of proposals and adopted procedures designed to safeguard the safety and dignity of women. In a notable development, the head of the SJC, Waleed Al-Samaani, issued a directive obliging all courts in the Kingdom to accept national identity cards in lieu of the presence of two witnesses in personal status cases.²⁰⁸ Acting on the recommendations of the Ministry of Labour, the Justice Ministry also approved procedures which aim to prevent and regulate the marriage of minors. Subject to these procedures, a male cannot marry a female 'who is 17 years or less' without the approval of a specialized personal status circuit court.²⁰⁹

In a further development, the Council of Ministers instituted an alimony fund for divorced women and their children, consistent with the Quranic principles of redistribution and limitations on excessive hardships resulting from the termination of a contract. Pursuant to the law establishing the subsidy, the governance board of the fund will have power to determine the amount of financial assistance that will be dispensed to the beneficiary and how such funds will be distributed and for what duration.²¹⁰

In a third decision, the SJC also attempted to harmonise principles applied in cases involving child custody, and did so by proposing a legal model which all courts are expected to adhere to in the resolution of such disputes.²¹¹ A final reform is designed to remove barriers to women who wish to practise law. Women can now practise law after completing a three-year diploma and professional traineeship or internship programme.²¹² As a result, Saudi women have greater incentives to participate and shape the practice and development of law in Saudi Arabia.

2.7 Conclusion

The primary purpose of this examination has been to evaluate the possible effect the reform will have on both the future of male guardian-consent (women's rights) and the legal infrastructure of the Saudi Kingdom (rule of law). As discussed, the laws of Saudi Arabia seem to comply with the requirements

²⁰⁸ Ministry of Justice, 'The Organisational Structure of the Courts' (2018)

<<https://www.moj.gov.sa/ar/Ministry/Courts/Pages/StructureCourts.aspx>> accessed 1 January 2018.

²⁰⁹ Fatima Al-Dabis, 'Justice Ministry Takes Lead in Empowering Women'

<<http://saudigazette.com.sa/article/515194/SAUDI-ARABIA/Saudi-women>> accessed 23 December 2017.

²¹⁰ Al Arabiya, 'Saudi Arabia Approves Four Decisions in 10 Days to 'Boost Women's Rights' (15 August 2017)

<<https://english.alarabiya.net/en/News/gulf/2017/08/15/Saudi-ministry-approves-four-decisions-in-10-days-to-empower-women-.html>> accessed 23 December 2017.

²¹¹ Nadia Al-Fawaz, 'Decision to Grant Mothers with Children Custody Rights Welcomed' (*Arab News*, 5 November 2014)

<<http://www.arabnews.com/saudi-arabia/news/655231>> accessed 23 December 2017.

²¹² Fatima Al-Dibais, 'Female Lawyers to Enjoy Equal Rights' (Saudi Gazette, 20 December 2017)

<<http://saudigazette.com.sa/article/523419/SAUDI-ARABIA/Female-lawyers-to-enjoy-equal-rights>> accessed 23 December 2017.

of *Shariah*. It is important to note that no Saudi scholars and government officials believe that the reform is not compatible with the public interest.

The Saudi government should be credited for the efforts with which it has attempted to dismantle barriers to the rights and freedoms of women in Saudi Arabia, in accordance with its obligations under Islamic *Shari'ah* and the general system and principles of international law. The effect of these legal reforms on women's rights will be monumental as the Ministry of Education has confirmed that women are not required to have the consent of their guardian to provide services.²¹³

Islamic *Shariah* has priority in the Saudi legal system but there are basic disagreements between its rulings and the opinions of jurists affiliated with other jurisprudential positions. Moreover, legal practice, including the necessity of guardianship, is highly variegated across Islamic legal systems. These challenges are further exacerbated given the nature of the legislation, including most notably the new legal reforms. Before the reforms, ministerial representatives were required guardian-consent to provide any public services. This system made it exceedingly difficult for women to challenge this condition.

The new legislation has altered the landscape, effectively waiving the requirement of guardian-consent. Governmental services cannot now insist on proof of consent as a condition of providing services. However, consonantly with *Shariah*, the new law does explicitly affirm that all policies limiting women's rights, particularly in relation to freedom of movement rights, should be repealed and replaced as a matter of state law.

The above issues will be developed in the next chapter, which focuses more particularly on Saudi Arabia's obligations under international law, and the conflict, if any, which exists between domestic constitutional sources of law, ie *Shariah*, and international human rights instruments.

²¹³ Abdullah Garmin, 'Guardian Consent is Not a Condition for Providing Services to Women' (*Okaz*, 2018) <<https://www.okaz.com.sa/article/1558467/>> accessed 7 December 2017.

Chapter Three: Reconciling *Shariah* Interpretation of Male Guardianship and International Human Rights in Saudi Arabia

3.1 Introduction

Saudi Arabia is an example of a dualist legal order. A legal system which is described as dualist is one in which 'the constitution ... accords no special status to treaties; the rights and obligations created by them have no effect in domestic law unless legislation is in force to give effect to them'.¹ In monist legal systems, by way of contrast, the provisions of a ratified treaty produce immediate legal effects in the legal system of the contracting state upon its ratification.²

In Saudi Arabia's system of government, the Custodian of the Two Holy Mosques is responsible for supervising the application of *Shariah* as the king and prime minister.³ The Council of Ministers headed by 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 principles of the Saudi constitution on the other, the latter should always prevail.⁴ Article 1 of the Basic Law asserts that the 'Holy *Qur'an* and the Prophet's *Sunnah* (Prophet Muhammad Peace be upon him) serves as the constitution of Saudi Arabia'.⁵ However, Saudi Arabia did not play a part in the establishment of the definitions and interpretations of human rights in the UDHR and other international human rights instruments, which can be used to assess the compatibility of international human rights standards with mandatory provisions of *Shariah* as these are applied and enforced under the legal system of Saudi Arabia.⁶ It is necessary to note that the definitions and specifications of human rights in the UDHR and other international human rights instruments were founded by Western country members.⁷ The absence of input by Muslim states has created a conflict between international human rights law and Islamic texts.⁸ Of course, the tension between international rights regulation and its domestic enforcement is by no means new. According to

¹ Anthony Aust, *Modern Treaty Law and Practice* (Cambridge University Press 2007) 181, 187.

² Ian Brownlie, *Principles of Public International Law* (7th edn, Oxford University Press 2008) 31, 33.

³ Saudi Law of the Council of Ministers, Royal Order No A/13 (1 August 1993) art 12; Saudi Basic Law of Governance, Royal Order No A/91 (1 March 1992) art 5.

⁴ Saudi Basic Law of Governance (n 3) arts 7, 45 and 46.

⁵ *ibid* art 1.

⁶ Abdulaziz Al-Rodiman, 'The Application of Shari'ah and International Human Rights Law in Saudi Arabia' (PhD thesis, School of Law, Brunel University 2013) 39. For more discussion, see Henry J Steiner, Philip Alston and Ryan Goodman (eds), *International Human Rights in Context: Law, Politics, Morals* (Oxford University Press 2008) 58-150.

⁷ For more discussion, see Steiner, Alston and Goodman (n 6) 58-150.

⁸ Jan Michiel Otto, *Sharia Incorporated: A Comparative Overview of the Legal Systems of Twelve Muslim Countries in Past and Present* (Leiden University Press 2016) 167.

Baderin, when Muslim (majority) countries did not accept or refused to apply their commitments which contradicted Islamic *Shariah* principles, they should have in fact challenged the interpretations of international human rights as not being consistent with the provisions of *Shariah*. Indeed, as suggested above, contemporary debates on human rights are commonly framed in oppositional terms of universalism v cultural relativism, and similarly, legal monism v legal pluralism.⁹ Such debates represent the conflict which connects the human rights treaties which are declared to embody and give effect to universal rights, on the one hand, and the autonomy of the sovereign nation state to withhold its consent to any rule or obligation which threatens the legitimate diversity of its own local laws, tradition and legal system, on the other.

This thesis looks to move beyond the conceptual categories of universalism, on the one hand, and cultural relativism, on the other. The first offers a defence of a robust protection of human rights which are assumed to have attained a self-evidently universal status, and are therefore, or ought to be, guaranteed by all states. In this sense, one can regard international human rights treaties as one of the greatest successes of the modern era. However, one can also argue that the modern paradigm of international human rights can sometimes neutralise, obscure and delegitimise cultural differences under the banner of neutral, universal and natural rights which belong to all humanity.¹⁰ On the other hand, the thesis also looks to move beyond an uncritical defence of sovereignty or cultural diversity. Culture or cultural practices should not offer a pretext under which national laws which actively discriminate against certain groups (ie women) are simply tolerated, ignored or legitimated.¹¹ The next section will consider the theoretical foundations of modern international human rights law in order to prepare the ground for a discussion of the extent to which Islamic and international human rights conceptions can, or should, be reconciled.

⁹ Mashood A Baderin, 'A Macroscopic Analysis of the Practice of Muslim States Parties to International Human Rights Treaties: Conflict or Congruence?' (2001) 1(2) Human Rights Law Review 267.

¹⁰ Ruth Buchanan and Sundhya Pahuja, 'Legal Imperialism: Empire's Invisible Hand?' in Paul A Passavant and Jodi Dean (eds), *Empire's New Clothes: Reading Hardt and Negri* (Routledge 2004); Partha Chatterjee, *The Nation and its Fragments: Colonial and Post-Colonial Histories* (Princeton University Press 1993); Anders Stephanson, *Manifest Destiny: American Exceptionalism and the Empire of Right* (Hill and Wang 1995); Giorgio Agamben, *Homo Sacer: Sovereign Power and Bare Life* (Stanford University Press 1998) 72; Adam Isaiah Green, 'Queer Theory and Sociology: Locating the Subject and the Self in Sexuality Studies' (2007) 25(1) Sociological Theory 32.

¹¹ Nehal Bhuta, 'Rethinking the Universality of Human Rights: A Comparative Historical Proposal for the Idea of "Common Ground" with Other Moral Traditions' in Anver M Emon, Mark S Ellis and Benjamin Glahn (eds), *Islamic Shariah and International Human Rights Law: Searching for Common Ground?* (Oxford University Press 2012).

3.2 Emergence of international human rights law

With the creation of the United Nations in 1945, a plethora of UN human rights instruments were enacted, many of which overlap with women's rights despite more broadly enshrining human rights for all 'peoples' under international law. The 1966 International Covenant on Economic, Social and Cultural Rights (ICESCR), for instance, requires state parties to guarantee equal rights to men and women to the enjoyment of all the rights contained within the Covenant.¹² The Covenant similarly calls upon member states to guarantee fair wages and equal remuneration for equivalent work without distinction, including discrimination based on gender.¹³ In the same vein, the International Covenant on Civil and Political Rights (ICCPR) guarantees the equal enjoyment of the rights contained within to both genders¹⁴ while also prohibiting the death penalty on pregnant women¹⁵ and giving the right to men and women of marriageable age to marry and form a family.¹⁶

The Covenants, along with the UDHR, are significant since each guarantee freedom of thought, conscience and religion,¹⁷ the right to a private life,¹⁸ equality before the law,¹⁹ the right to work,²⁰ the right to the attainment of the highest standard of physical and mental health²¹ and protection of the family²². Each Covenant serves to advance both men's and women's rights, and while Saudi Arabia is not party to either, there is significant overlap between the rights enshrined and those provided for by Saudi domestic law, and more broadly *Shariah*, as discussed above. In particular, there is no conflict between Islamic *Shariah* and social, economic and cultural rights, which have a strong basis in Islamic jurisprudence. A degree of conceptual conflict does, however, exist broadly within the two legal traditions in connection with women's rights.

¹² International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) art 3.

¹³ *ibid* art 7(i).

¹⁴ International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) art 3.

¹⁵ *ibid* art 6(5).

¹⁶ *ibid* art 23.

¹⁷ *ibid* art 18.

¹⁸ *ibid* art 17.

¹⁹ *ibid* art 14.

²⁰ ICESCR (n 12) art 6(1).

²¹ *ibid* art 12(1).

²² *ibid* art 10(1).

3.3 Theoretical foundations of modern human rights law

In scholarship concerning human rights and international law, human rights are frequently understood as a 'Western' construct, originating in Western Europe, and having their roots in philosophical and historical trends that emerged in a modern Western context.²³ This has led some scholars to assert that human rights have 'limited applicability' to other cultures.²⁴ This is somewhat of an overstatement that has been criticised for its tendency towards cultural essentialism, and refers to a process of historicisation in the 'West', in which European and North American history is understood through a teleological narrative prism, driving inexorably towards an ideal form of 'progress'.²⁵ The tendency to associate contemporary human rights discourses with the relatively recent idea of the 'West' as a unified cultural entity is not wholly inaccurate as many of the historical foundations and concepts upon which these discourses are based did appear in Western Europe as a result of a series of specific historical events.²⁶ However, this does not mean that human rights are an essential part of 'Western' cultures. In other words, 'the idea of human rights is not 'Western' in the emphatic sense of the word as if this idea were deeply rooted in the genes of the Occident'.²⁷

This major caveat notwithstanding, there has been a tendency to refer to 'Western' human rights discourse as indicative of a certain historical and philosophical foundation for the modern international definition and implementation of human rights. Moreover, the idea of 'Western' human rights has been articulated in opposition to other conceptions or interpretations of the idea of human rights including, for example, Islamic conceptions. Both Western and Islamic conceptions of human rights have been ascribed certain foundational claims and characteristics, some of which align (eg, assertions of human dignity) and some of which appear to be in contradiction (ie whether secularism or religiosity operates as the basis for securing human rights).²⁸

²³ Heiner Bielefeldt, "'Western' versus 'Islamic' Human Rights Conceptions: A Critique of Cultural Essentialism in the Discussion on Human Rights' (2000) 28(1) *Political Theory* 90, 100.

²⁴ Adamantia Pollis and Peter Schwab, 'Human Rights: A Western Construct With Limited Applicability' in Adamantia Pollis and Peter Schwab (eds), *Human Rights: Cultural and Ideological Perspectives* (Praeger 1979) 1.

²⁵ Bielefeldt (n 23) 100.

²⁶ *ibid.*

²⁷ *ibid.*

²⁸ Riffat Hassan, 'Are Human Rights Compatible with Islam?: The Issue of the Rights of Women in Muslim Communities' (University of Louisville) <<http://www.iemed.org/documents/novesrealitats/Strawson/a.pdf>> accessed 20 January 2018.

The Western human rights tradition is embedded in the philosophical debates of the Enlightenment, particularly concerning individual freedom, the state and natural law.²⁹ Human rights have their origins in the concept of natural law, which was developed by Hellenistic philosophers and referred primarily to the innate system of rights and responsibilities pertaining to the individual, aside from his role as a citizen of a city-state.³⁰ In the early Christian and medieval periods, natural law doctrines were understood in a heavily Christian framework, and related to the prescribed social framework that Christian ethics and morality demanded.³¹ International human rights law's reference to universal rights can be traced back to natural law theory. Natural law theory describes the 'natural' order of the world which humans may access through reason, and which provides laws that determine moral and acceptable behaviour. These laws were 'discovered', rather than invented, and are therefore regarded as having universal applicability.³² In the medieval period, natural law was concerned with the divine and not with any form of articulated relationship between the individual and the state, and was used in this way to support the notion of the divine right of kings.³³ However, the separation of the spiritual and temporal spheres in post-Reformation Europe led Enlightenment philosophers to establish a new discourse of natural law predicated on social contract theory.³⁴ In this approach, there was an articulated relationship between the individual and the state in which the former looked to the latter as the vehicle through which their natural rights could be secured.³⁵ As a result, natural law was removed from the religious sphere, most notably in the philosophy of John Locke, and placed greater emphasis on the individual and the rights that were accorded to him; rights which at the time tended to be based on the notion of freedom of life, liberty and property.³⁶

The salient features of human rights in the Western tradition are therefore as follows. First, the ideological basis for human rights is secular, based on Enlightenment principles of the separation of Church and State and the need to relegate religion and religiosity to the private sphere.³⁷ As such, the rights expressed in the International Bill of Human Rights (IBHR) are conceived of in humanistic, secular terms, with an emphasis on natural law as expressed apart from divine will, despite the fact

²⁹ 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).

³⁰ Ann Elizabeth Mayer, *Islam and Human Rights: Tradition and Politics* (Westview Press 2012).

³¹ Stephen J Pope, 'Natural Law and Christian Ethics' in Robin Gill (ed), *The Cambridge Companion to Christian Ethics* (Cambridge University Press 2012).

³² Michael Boylan, *Natural Human Rights: A Theory* (Cambridge University Press 2014).

³³ Peter Stanlis, *Edmund Burke and the Natural Law* (Routledge 2009).

³⁴ *ibid.*

³⁵ *ibid.*

³⁶ Mayer (n 30).

³⁷ Genevieve Souillac, *Human Rights in Crisis: The Sacred and the Secular in Contemporary French Thought* (Lexington Books 2005).

that the governing morality underpinning Western rights conceptions crystallised within a Judeo-Christian cultural context.³⁸ The secular basis for Western human rights has engendered opposition in societies where religion plays a more active social and political role as it appears to undermine certain core religious beliefs.³⁹

The second key feature of the Western human rights discourse is its emphasis on the individual. The primary unit of analysis, and the overriding priority at the heart of the IBHR, is the individual, which proposes an ideological worldview that is not necessarily shared in non-Western cultures.⁴⁰ For example, in Islamic or Chinese societies, there is a much stronger emphasis on the needs of the community, as opposed to the needs of the individual, meaning that Western human rights discourses do not necessarily easily translate into this context.⁴¹

The third salient feature of Western rights conceptions is the understanding of the term 'right' as an entitlement, often referring to a freedom *from* something (ie, freedom from oppression or discrimination).⁴² Once again, this may conflict with non-Western cultures where rights are construed rather in terms of active duties towards the community.⁴³ This is particularly true within Islamic rights conceptions.⁴⁴ The Western understanding of the legal term 'right' is quite specific, and broader definitions have been offered to suggest that in fact rights theory does not necessarily have to follow this conceptualisation. The term 'right' in a legal sense may be interpreted as a relationship between two actors and as such may connote an associated responsibility or duty.⁴⁵

3.4 Harmonising the Islamic and Western human rights paradigms

Modern structures of international law have developed since the founding of the United Nations. These can be arranged into three generations of human rights law, which have brought together the focus of international law on the state as a subject of international law with the belief in keeping states accountable for human rights at the domestic level. These three generations of human rights are civil and political; social, economic and cultural; and collective or solidarity. These are categorised as such

³⁸ Michael J Perry, *A Global Political Morality* (Cambridge University Press 2017).

³⁹ Ann Elizabeth Mayer, 'Universal Versus Islamic Human Rights: A Clash of Cultures or a Clash with a Construct?' (1994) 15 *Michigan Journal of International Law* 307.

⁴⁰ Rowan Cruft, 'Human Rights, Individualism and Cultural Diversity' (2005) 8(3) *Critical Review of International Social and Political Philosophy* 265.

⁴¹ RJ Vincent, *Human Rights and International Relations* (Cambridge University Press 1986).

⁴² Nigel E Simmonds, *Central Issues in Jurisprudence* (Sweet and Maxwell 1986).

⁴³ Costas Douzinas, 'Are Rights Universal?' (*The Guardian*, 11 March 2009) <<http://www.guardian.co.uk/commentisfree/libertycentral/2009/mar/11/liberty-central-deconstructing-rights>> accessed 18 January 2018.

⁴⁴ Bassam Tibi, 'Islamic Shariah/Shari'a, Human Rights, Universal Morality and International Relations' (1994) 16 *Human Rights Quarterly* 277.

⁴⁵ Nigel E Simmonds, *Central Issues in Jurisprudence* (Sweet and Maxwell 1986).

according to the fact and on the basis of Europe's Enlightenment and the French Revolution, under which liberty, equality and fraternity were devised.⁴⁶

Civil and political rights would come to dominate in the first treaty, the UDHR, and their role was to protect the rights of individuals from being violated by a sovereign power.⁴⁷ The UDHR provides that all humans have a right to liberty and security of the person, with any restrictions and in accordance with the law. They also have a right to fair trial, justice and procedural fairness, as well as equality before the law, freedom of thought and conscience, freedom of religion, freedom of association, freedom of assembly, the freedom of movement, the principle of non-discrimination and freedom from torture and slavery.⁴⁸

Social, economic and cultural or second generation rights are primarily enunciated in the ICESCR, including the right to self-determination, progressive development, social security, family life, education, health, work, fair wages and a decent living, as well as the right to form trade unions. Third generation or collective rights are, however, less developed or remain unofficial under international law, with limited agreement on specifics and implementation through treaties, although some are contained in early treaties, including the right to self-determination in the UN Charter, UDHR and ICESCR, the rights of minorities to enjoy their own culture in the ICCPR, and the right to natural resources in the ICESCR. Broadly, they include the right to peace, healthy environment, public welfare, education, culture, communication and development.

Western legal discourse placed a great deal of emphasis on the first generation rights and downplayed the second and third which, in turn, were championed within Islamic jurisprudence, which can be explained by a different emphasis on the right-based and duty-based paradigms within these legal systems.⁴⁹

From a liberal rights-based perspective, the pursuit and realisation of gender equality is straightforward⁵⁰ – men and women have equal rights under the law, and such rights cannot be qualified or made conditional upon cultural norms, state policies or religious duty. Yet liberal conceptions also have their discontents. In classic liberal theory, at least, rights are often framed in

⁴⁶ Karel Vasak, 'A 30 Year Struggle' (1977) UNESCO Courier 29.

⁴⁷ Patrick Macklem, 'Human Rights in International Law: Three Generations or One?' (2015) London Review of International Law 20.

⁴⁸ Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III).

⁴⁹ Jason Morgan-Foster, 'Third Generation Rights: What Islamic Shariah Can Teach the International Human Rights Movement' (2014) 8(1) Yale Human Rights and Development Journal 67, 73.

⁵⁰ *ibid.*

economic terms as negative rights, ie as freedoms of the individual from the state.⁵¹ Only by reining in state power can the individual fulfil his destiny and pursue the liberal promise of 'life, liberty and happiness' under the law. Structural critiques of law have long taken aim at the highly individualised, rationalistic and abstract conceptions underpinning liberal rights conceptions.⁵² To the extent that liberal (rule of law) theories conceptualise rights as disembodied constructs, divorced from factors of history, culture and context, they are accused of marginalising the identity, experiences and perspectives of women. Feminists have long argued that the liberal conception of rights rests on the public/private distinction, thereby reinforcing the exclusion of women from public life.⁵³ In turn, experiences of isolation, abuse or exploitation in the realm of family and culture are silently reinforced or legitimated by law. By turning a blind eye to hierarchies and experience of domination in the private worlds of work, family and cultural practice, the private experiences of women are removed from the sphere of public law. Can we find inspiration, therefore, in the Islamic tradition?

The argument that Islamic Shariah is incompatible with international human rights laws is very much dependent upon the emphasis placed between, on the one hand, the rights-based paradigm of first generation rights and Western-influenced development of international human rights law and, on the other hand, the second and third generation duties-based paradigm which has a stronger basis in Islamic texts and jurisprudence.⁵⁴ Whereas the Western rights-based paradigm is concerned with the notion of individual self-interest, the duties-based paradigm of Islamic Shariah is focused on general welfare and the attainment of social virtue through a collective effort.⁵⁵

However, there is an argument to be made that, in spite of the perceived divergences, Western rights discourses *are* compatible with other cultural systems in which the duty paradigm is more dominant. In early Western human rights discourse, from Aristotle to Rousseau and Mill, the prevailing understanding of natural rights was often accompanied by an implicit responsibility on the part of the individual to act as a citizen within human society, therefore describing a certain form of respect for

⁵¹ 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* (Westview Press 1994) 138.

⁵² Duncan Kennedy, 'The Structure of Blackstone's Commentaries' (1978) 28 Buffalo Law Review 205, 209; Hilary Charlesworth, 'Feminist Methods in International Law' (1999) 93(2) American Journal of International Law 379, 383; 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* (Routledge 1995) 126.

⁵³ *ibid.*; Catherine A MacKinnon, 'Feminism, Marxism, Method and the State: An Agenda for Theory' (1982); See Generally, Cornell and Others, *Deconstruction and the Possibility of Justice* (Routledge 1992) 68-94

⁵⁴ Morgan-Foster (n 49) 73.

⁵⁵ *ibid.*

the will of the community.⁵⁶ For Mill, individual duty was not incompatible with liberal values.⁵⁷ Such understanding has, however, been superseded by the individual rights paradigm within international human rights law as a result of protracted negotiations during the formulation of first generation rights that make up the IBHR. Although references to the duty exist, such as Article 29 of the UDHR, which enshrines a duty to the community while subjecting individual rights to limitations such as morality, public order and the general welfare, the duties paradigm was rejected on the grounds that it would run contrary to the ‘empowering’ nature of individual rights.⁵⁸ In contrast, the Universal Islamic Declaration of Human Rights⁵⁹ made clear that ‘[e]ach one of the Human Rights enunciated in this declaration carries a corresponding duty’.⁶⁰

However, both rights and duties-based paradigms must be understood as ‘two different attempts towards the same end: a structure of normative, social, political, and moral order’,⁶¹ with Islamic Shariah’s primary objective of human welfare and prevention of harm sharing a common goal with the overarching objective of international human rights law – the welfare and benefit of all human beings.⁶² As Baderin argues, ‘[p]rotecting the welfare of individuals does ultimately ensure communal ... welfare and vice versa’.⁶³ Islamic Shariah’s purpose, therefore, means that a duties-based paradigm has an end goal and cannot merely be viewed as deontological – in essence, the traditional distinction between deontological and teleological is not applicable in this regard. Moreover, as Morgan-Foster points out, if one accepts the shared common goal between international human rights law and Islamic Shariah, the ideal approach must be the combination of the two.⁶⁴ There is no need for mutual exclusivity when these legal traditions balance one another – contemporary *Shariah* interpretations enjoy a comparative advantage in social and cultural rights, while international human rights enjoy an advantage in first generation rights. After all, at the core of the *Quran*’s revelation is the assertion that God conferred dignity on mankind: ‘We have bestowed dignity on the progeny of Adam ... and conferred on them special favours.’⁶⁵

In addition to this, the doctrine of *tawhid*, which asserts a unified perspective in which all creation is unified and attributed to one source (God), serves to present a holistic worldview that reinforces the

⁵⁶ John Laws, ‘The Constitution: Morals and Rights’ (1996) 4 Public Law 627.

⁵⁷ Morgan-Foster (n 49) 73.

⁵⁸ *ibid* 73.

⁵⁹ Universal Islamic Declaration of Human Rights (adopted 19 September 1981).

⁶⁰ *ibid*, UIDHR Explanatory Notes 2.

⁶¹ Morgan-Foster (n 49) 73.

⁶² *ibid*; Mashood A Baderin, *International Human Rights and Islamic Shariah* (Oxford University Press 2003) 40.

⁶³ *ibid*.

⁶⁴ Morgan-Foster (n 49) 73.

⁶⁵ *Holy Quran* 17:70.

notion of equality and oneness in all of God's creation.⁶⁶ These foundational beliefs within the Islamic faith reinforce the notion that Islam supports the notion of human dignity and basic equality between all human beings.⁶⁷ This is the common thread linking both paradigms that can be found in third generation solidarity rights which place the emphasis on duties and group solidarity. They include the right to a healthy environment, the right to peace and the right to development.⁶⁸ The right to development, encompassing both individual and social responsibility, with its emphasis on social justice and egalitarianism, is among the most important messages of the *Quran*.⁶⁹ The right to peace is equally important for Islamic Shariah, being present in a traditional peace greeting and more than one hundred Quranic verses.⁷⁰ It is in the domain of third generation rights that two legal cultures can converge by incorporating a duties-based paradigm into international human rights law.

3.5 Islamic *Shariah* human rights framework

One of the consequences of the increasingly pluralistic debate among Islamic scholars is the fact that the term 'human rights' no longer holds the same stigma in many Muslim societies, and may be productively debated without raising concerns of western cultural and the eradication of traditional Islamic values and culture.⁷¹ This indicates the manner in which contemporary Muslims have taken ownership of human rights discourses and begun to define international consensus and agreements within a *Shariah* framework. At a state level, in recent decades, a number of international organisations and nations, including Saudi Arabia, have endeavoured to establish international agreement on a framework for human rights, resulting in treaties that mirror the broader international human rights norms as defined through the United Nations.⁷² These efforts represent an attempt to define an Islamic, *Shariah*-based framework for human rights, based on the widespread assumption that Western-defined rights conceptions contain elements that may come into conflict with Islamic Shariah – primarily first generation rights under a right-based paradigm. The two major agreements that are considered here are the Universal Islamic Declaration of Human Rights (1981) (UIDHR) and the Cairo Declaration of Human Rights in Islam (1990) (CDHRI). These instruments will be discussed below.

⁶⁶ Muhtari Aminu-Kano, 'An Islamic Perspective on Human Development' (Islamic Relief 2014).

⁶⁷ *ibid* 4.

⁶⁸ Morgan-Foster (n 49) 73.

⁶⁹ *ibid* 93.

⁷⁰ *ibid*.

⁷¹ Shadi Mokhtari, 'The Search for Human Rights within an Islamic Framework in Iran' (2004) 94(4) *Muslim World* 478.

⁷² Mayer (n 30).

3.5.1 International Islamic human rights framework

The UIDHR was developed by Islamic councils in Western Europe, specifically London and Paris, with the participation of representatives from Egypt, Pakistan, Saudi Arabia and other Muslim states, and restates the principles of basic human rights using Islamic jurisprudence. The preamble to the declaration explicitly roots human rights in a religious framework, in a departure from the traditional secular framework that dominates at the international level, and specifies that Islam provides a comprehensive code of human rights whose aim is to confer honour and dignity on all and eliminate exploitation, oppression and injustice. The declaration locates human freedom and dignity with God as the divine origin of human rights, and Muslim governments are construed as being under a divine obligation to ensure those rights for their citizens.⁷³

As discussed above, the UIDHR contains a number of first generation rights, such as the right to life,⁷⁴ right to liberty,⁷⁵ right to a fair trial,⁷⁶ right to equality before the law,⁷⁷ freedom from torture⁷⁸ and the right to asylum⁷⁹. However, the right to freedom of belief, thought and speech⁸⁰ is enshrined in these instruments, Islamic human rights discourses do recognise some qualifications to certain civil and political rights. Freedom of expression, for instance, is not an absolute right and Muslims are prohibited from engaging in slander, defamation, causing outrage to public decency and ridiculing religious beliefs, both Muslim and non-Muslim.⁸¹ This is in line with international human rights law and Western practice, albeit with some divergence. Both international and domestic legal regimes have since attached duties and responsibilities to the right, including paragraph 3 of Article 19 of the ICCPR which restricts expression on the grounds of the rights or reputation of others and for the protection of national security, public order and public health or morals. Article 20 of the ICCPR also prohibits the incitement to discrimination, hostility or violence against national, racial or religious groups.

The European Convention on Human Rights⁸² (ECHR) and the United Kingdom's implementation of the ECHR into domestic law via the Human Rights Act 1998 go further in the scope of this negative

⁷³ Mayer (n 30).

⁷⁴ UIDHR (n 59) art II.

⁷⁵ *ibid* art I.

⁷⁶ *ibid* art V.

⁷⁷ *ibid* art III(a).

⁷⁸ *ibid* art VII.

⁷⁹ *ibid* art IX.

⁸⁰ *ibid* art XII.

⁸¹ Austin Dacey and Colin Koproske, 'Islam & Human Rights: Defending Universality at the United Nations' (Position Paper of the Center for Inquiry International, UNHRC, 17 September 2008).

⁸² Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights as amended).

right, subjecting it to the interests of national security, territorial integrity or public safety; the prevention of disorder or crime; the protection of health or morals; the protection of the reputation or rights of others; preventing the disclosure of information received in confidence; or maintaining the authority and impartiality of the judiciary.⁸³ Therefore, the UIDHR reference to freedom of speech generally matches international standards, while the reference to public decency and attacking religious beliefs is the equivalent of both Articles 19 and 20 of the ICCPR – a restriction based on public morality and protection from incitement based on religious grounds.

There is, however, in the Islamic jurisprudential tradition a broad and unequivocal emphasis on socio-economic rights such as the right to property,⁸⁴ the right to equal wages for equal work,⁸⁵ the freedom from impermissible discrimination with regard to work,⁸⁶ the right to education,⁸⁷ and the right to social security⁸⁸. The UIDHR drew little international criticism but it has been suggested that this was due to the extremely equivocal tone of the document, leaving considerable room for interpretation of first generation rights, particularly resulting from an English translation that removed several religious references.⁸⁹ For example, in Article XII, concerning religious freedom and belief, the English translation serves to obscure the fact that free speech is conditioned by a prescription against religious ‘abomination’.⁹⁰ This means that the document tends not to serve the interests of the individual but rather the interests of the collective, the Islamic *umma*. Indeed, the preamble states that ‘duties and obligations have priority over our rights’. This emphasis on the duties-paradigm does, however, leave considerable scope for interpretation regarding how this may affect the specific freedoms of the individual. Such vagueness means that it is of limited utility in answering specific problems relating to Islamic human rights, particularly the role and position of women and minorities and freedom of religion, as understood in international human rights law. Nevertheless, there are positive developments within the UIDHR, demonstrating not-insignificant parallels between its interpretation of Islamic Shariah and international human rights law more broadly.

The CDHRI was produced by the then-named Organisation of the Islamic Conference (OIC) and presented to the United Nations in 1993. Although the CDHRI was rejected by the UN, it remains an important statement of an Islamic commitment to human rights from within a religious framework, and is a significant diplomatic achievement. A number of Muslim (majority) countries have signed it,

⁸³ ECHR, art 10(2); Human Rights Act 1998, sch 1, art 10(2).

⁸⁴ UIDHR (n 59) art XVI.

⁸⁵ *ibid* art III(b).

⁸⁶ *ibid* art III.

⁸⁷ *ibid* art XXI.

⁸⁸ *ibid* art XVIII.

⁸⁹ *ibid*.

⁹⁰ *ibid* art 12.

despite their different approaches to, and interpretations of, *Shariah*.⁹¹ The CDHRI contains a number of enumerated human rights, couched in an Islamic perspective, and derived from *Shariah*. It affirms many of the basic human rights guaranteed by the UDHR.⁹²

Nevertheless, it moves the relationship and overlap between *Shariah* and international human rights law closer together, developing on the groundwork of the UIDHR. It states that all men are equal in terms of basic human dignity and forbids discrimination on the basis of gender, religion, race, age, political affiliation or social status in relation to the aforementioned dignity and their basic obligations and responsibilities.⁹³ It affirms the right to life and declares the preservation of human life as a duty prescribed by *Shariah*.⁹⁴ Further, it declares that all men are equal⁹⁵ and provides for the right to asylum,⁹⁶ equality before the law, freedom from arbitrary arrest and the right to a fair trial.⁹⁷ It also recognises freedom from torture as a peremptory norm⁹⁸ and prohibits resorting to any means which could result in the genocidal annihilation of mankind⁹⁹.

Similarly to the UIDHR, the CDHRI contains some provision for the protection of religious minorities, asserting that no one should be forced to convert from their religion,¹⁰⁰ particularly through the exploitation of poverty and ignorance. In practice, this means that freedom of religion is only guaranteed to non-Muslim minorities. Moreover, freedom of expression is conditioned on not being contrary to *Shariah*, with an emphasis on public morality¹⁰¹ but without reference to slander, defamation or national security. There is a further departure from the UIDHR in relation to racial incitement: Article 22 of the Cairo Declaration prohibits inciting nationalistic or doctrinal hatred or any actions that may cause incitement of any form of racial discrimination. This moves the states parties closer to Article 20 of the ICCPR, which references national, racial or religious incitement to discrimination, hostility or violence.

With regard to second generation rights, it obliges states to provide access and means to education,¹⁰² the right to work, the right to equal pay for equal work without discrimination between men and

⁹¹ Mayer (n 30).

⁹² *ibid*.

⁹³ Cairo Declaration on Human Rights in Islam (adopted 5 August 1990) art 1(a).

⁹⁴ *ibid* art 2(a).

⁹⁵ *ibid* art 1(b).

⁹⁶ *ibid* art 12.

⁹⁷ *ibid* art 19.

⁹⁸ *ibid* art 20.

⁹⁹ *ibid* art 2(b).

¹⁰⁰ *ibid* art 10.

¹⁰¹ *ibid* art 22.

¹⁰² *ibid* art 9.

women,¹⁰³ the right to medical and social care,¹⁰⁴ and the right to property¹⁰⁵. The CDHRI also covers third generation rights, guaranteeing the right to live in a clean environment¹⁰⁶ and prohibiting colonialism and declaring the right to self-determination, independence and control over wealth and natural resources.¹⁰⁷

3.5.2 Human rights instruments and women's rights

In relation to women, the CDHRI affirms the equal *dignity* of women and defines their own specific rights, including the right to operate as a civil entity, financial independence, work and equal pay.¹⁰⁸ In many respects, the CDHRI mirrors and confirms much of the substance of the UDHR, while also expanding the scope of non-discrimination, particularly in regard to socio-economic status.¹⁰⁹ It demonstrates that there is no conflict between international human rights law and *Shariah* with regard to second and third generation rights, particularly in light of the objective of both legal traditions vis-à-vis human welfare. If there is a conflict, it is because 'third generation solidarity rights are more developed in Islamic *Shariah* than in international law'.¹¹⁰

Islamic nations have, through their adoption of these instruments, recognised first-generation rights that appear to comply with the IBHR, particularly *jus cogens* norms including the prohibition of torture. The language of the UDHR is, however, more equivocal on other rights, including the status and rights of women and minorities. Certainly, the CDHRI places a specific condition on these human rights by stating that all provisions must be subject to *Shariah*. The interpretation of *Shariah* on many of these key questions is open to considerable debate. A possible criticism of these instruments, therefore, is that these implicitly or explicitly uphold or permit traditional interpretations of *Shariah* rather than individual human rights *per se*. However, this criticism fails to recognise that the above instruments are the product of political compromises and negotiations among 45 members of the OIC. This points to the difficulty in achieving consensus on interpretations of Islamic *Shariah* while also leaving open the possibility of varying interpretations by individual states.

International law is premised on the notion of the sovereign autonomy and consent of all states. By extension, the 'formal equality' of all states – encompassing notions of the inviolability of the territorial and political independence of all sovereign states – is the bedrock of classic conceptions of

¹⁰³ *ibid* art 13.

¹⁰⁴ *ibid* art 17(b).

¹⁰⁵ *ibid* art 15.

¹⁰⁶ *ibid* art 17.

¹⁰⁷ *ibid* art 11(b).

¹⁰⁸ *ibid* art 6(b).

¹⁰⁹ *ibid* art 1.

¹¹⁰ Morgan-Foster (n 49) 73.

international law. Indeed, international human rights regimes have long permitted national courts a margin of appreciation to interpret and apply human rights legislation in a manner that reflects the constitutional and of their own legal systems.¹¹¹ For instance, the European application of freedom of speech stands in contrast to the legal tradition of the United States and may be viewed as a conflict of values, requiring the balancing and reconciling of liberal principles.¹¹² In the same manner, the application of Islamic Shariah requires the balancing and reconciling of rights and duties, from the right to freedom of expression to the duty to not offend public morality.

With regard to the family, the right to marriage and family are balanced by the imposition of duties on each gender, including maintenance on the part of the husband. The conceptual challenge, from a international human rights perspective, is that such duties come into conflict with and are contrary to individual rights as provided by international human rights law, thereby exceeding the limits permitted by Article 29 of the UDHR. Therefore, the CDHRI encapsulates the conflict between rights and duties-based paradigms, and the impact that this has on first, second and third generation rights. Individual duties, ultimately, take priority over individual rights; '[t]he Western notion of individual self-interest as the antithesis of general welfare is thus theoretically absent in Islamic social thought'.¹¹³ At the same time, widely accepted interpretations of Islamic Shariah suggest that countries such as Saudi Arabia will remain more committed to the pursuit of second and third generation rights, while Western states demand the realisation of first generation rights.¹¹⁴

The understanding and application of first generation rights appears, in principle, difficult to reconcile. This conflict leads to accusations of violations of international human rights law, such as not eliminating discrimination against women and ensuring gender equality provided by the CEDAW. The next section will move on from the more theoretical discussion of the points of conflict and complementarity between Islamic and international human rights regime to an analysis of how such conflicts are approached or reconciled from within the legal system of Saudi Arabia. Despite the international human rights stating that women are equal to men in human dignity and that all individuals are equal before the law, Saudi Arabia has a different perspective derived from the Islamic

¹¹¹ 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>> accessed 20 January 2018.

¹¹² Wojciech Sadurski, *Freedom of Speech and its Limits* (Kluwer Academic 1999) 181.

¹¹³ Morgan-Foster (n 49) 73.

¹¹⁴ *ibid.*

Shariah, namely in relation to the principle of complete equality between the two sexes based on complementarity and justice in the relationship between men and women.¹¹⁵

3.6 Key human rights treaties applicable to women's rights

Saudi Arabia has not acceded to the ICESCR and ICCPR but has done so to a number of other international human rights treaties: the 1984 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (in 1997), the 1989 Convention on the Rights of the Child (in 1996), the 1996 International Convention on the Elimination of All Forms of Racial Discrimination (in 1997) and the 1979 Convention on the Elimination of All Forms of Discrimination Against Women (in 2000).¹¹⁶ At the time of accession the Saudi government indicated that it intended to give effect to the norms of international human rights law that were found in the treaties.

Saudi Arabia's accession to CEDAW in 2000 was an important step for a country which always maintained the principles of Islamic *Shariah* on gender equality and legal protection of women. Through its ratification of the UN treaty, the government of Saudi Arabia signalled to the wider international community its preparedness to implement key human rights conventions which have attracted broad, or near universal, membership and recognition.

With the formulation of the CEDAW, international human rights law now specifically focuses on women's rights, requiring states parties to provide equality between men and women and eliminate discrimination based on gender within their domestic law. CEDAW therefore mandates states parties to give effect to the treaty's provisions through the appropriate use of legislation, ensuring women their fundamental freedoms and human rights on a basis of equality with men.¹¹⁷

The United Nations Commission on Human Rights established the Commission on the Status of Women (CSW) in 1946 as a sub-commission. After approximately two decades of attempts to address gender issues, the CSW created a comprehensive document encompassing women's rights. CEDAW 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 into force.

¹¹⁵ Committee on the Elimination of Discrimination against Women, 'Consideration of Reports Submitted by States Parties under Article 18 of the Convention, Combined Initial and Second Periodic Reports of Saudi Arabia' (30 September 2016) 40th Session CEDAW/C/SAU/3-4.

¹¹⁶ 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.

¹¹⁷ Convention on the Elimination of All Forms of Discrimination Against Women (adopted 18 December 1979, entered into force 3 September 1981) art 3.

The CEDAW, 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. By ratifying the contract, member states bind themselves to end discrimination in all forms against women through the effective use of legislation that ensures women their fundamental freedoms and human rights.

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.

Articles 2 requires states parties to condemn discrimination against women and to take concrete steps to eliminate such discrimination, including by establishing legal protections through public institutions and national courts and by modifying or repealing laws in whatever format as well as customs and practices that discriminate.

This can be consistent with Islamic *Shariah* principles. The duty of complementary equality between men and women -based paradigm inherent within *Shariah*, on which Saudi Arabia grounds its domestic law, leads to a achieve justice dynamic with regard to women's rights, including the strengthening of women's rights and the eliminating discrimination against any women.¹¹⁸ Furthermore, CEDAW 'prohibits the discrimination of women solely on the ground of sex, as well as promoting equality between men and women in all spheres of life'.¹¹⁹ The Convention seeks to achieve this by addressing the civil rights, legal status and reproductive rights of women. States parties are therefore obligated to 'pursue by all appropriate means and without delay a policy of eliminating discrimination against women'.¹²⁰

Similarly, the Saudi Nationality Law regulates all issues concerning the right of qualified persons to acquire Saudi nationality without being discriminated against on the basis of gender. In this regard, Saudi Arabia is consistent with the convention which states that '[s]tates parties shall grant women equal rights with men with respect to the nationality of their children'.¹²¹ This right guaranteed by the above law which grants the right to the children of a Saudi woman married to a foreign man, upon

¹¹⁸ Committee on the Elimination of Discrimination against Women, 'Consideration of Reports Submitted by States Parties Under Article 18 of the Convention, Combined Third and Fourth Periodic Reports of States Parties Due in 2013' (30 September 2016) CEDAW/C/SAU/CO/3-4.

¹¹⁹ 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.

¹²⁰ CEDAW (n 121) art 2.

¹²¹ *ibid* art 9.

their attainment to the age of majority the right to obtain Saudi nationality if they meet the legal conditions.¹²²

Under the Saudi legal system, women are guaranteed equality based on the principle of complementary equality between men and women. However, the Committee on the Elimination of Discrimination against Women argues that guardianship imposed restrictions on women which did not apply to men.¹²³ Despite the Committee's view on the topic, Aldhamshi responds by suggesting that guardianship generally strengthens human rights. In particular, this seems to be due to guardianship imposing roles on men such as caring for women's' needs which also includes covering expenses, and that it does not imply or justify in any way, shape, or form male domination or the inferiority of women.¹²⁴

Viewed from the standpoint of international law, what obligations are owed by Saudi Arabia under CEDAW in light of state reservations? To answer this question, one has to first consider the legal status and effects of a reservation which is deemed incompatible with the object and purpose of the treaty. A number of states have formulated reservations to human rights treaties, including to CEDAW, by referring to Islamic or domestic law.¹²⁵ Regardless of the debate over relativism and universalism, the Islamic international human rights framework and the dualist approach of Saudi law, the Saudi reservations to CEDAW must rest upon an analysis of international law. These issues will be explored in more detail below.

3.7 Saudi Arabia's reservations to CEDAW

Under international law states are required to execute international treaties they have ratified or acceded to. States are required to adopt the necessary measures to ensure that their national laws comply with international human rights standards. In turn, any individual subject to the laws of that jurisdiction should be able to rely upon these rights and to have these enforced before the relevant courts. However, Saudi Arabia appears to appreciate the importance of international and regional cooperation to strengthen and protect human rights. Therefore, it always seeks to protect human rights in accordance with the Islamic *shariah* and its internal laws.¹²⁶ Additionally, this is evidenced in

¹²² Committee on the Elimination of Discrimination against Women, 'Consideration of Reports Submitted by States Parties Under Article 18 of the Convention, Combined Third and Fourth Periodic Reports of States Parties Due in 2013' (30 September 2016) CEDAW/C/SAU/CO/3-4.

¹²³ Mtango (n 124) 50.

¹²⁴ Abdalmajeed Aldhamshi, *Rights of Married Women in the Judicial System in Saudi Arabia* (Human Rights Commission Media and Publication Center 2015) 24.

¹²⁵ 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.

¹²⁶ Committee on the Elimination of Discrimination against Women (n 119) 17.

Saudi Arabia's most recent State Party Report to the Committee on the Elimination of Discrimination against Women where it affirmed that it had taken the key measures and efforts that it has adopted to guarantee the rights of women. However, Saudi Arabia also stated that it aspires to further strengthen women rights by taking further steps, namely, passing additional legislation, adopting more measures, and preparing programmes and plans based on the provisions of CEDAW.¹²⁷

While some Muslim countries have not ratified CEDAW at all, many, including Saudi Arabia, have ratified with reservations.¹²⁸ It is also worth noting that the CEDAW Committee has clarified that the object of the Convention is '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'.¹²⁹ However, the Convention does not set out what legal consequences follow from invalid reservations, nor what happens if an objection is brought before the Committee to an incompatible reservation.

Enforcing their rights under the Vienna Convention on the Law of Treaties (VCLT), Saudi Arabia and other Muslim states, such as the UAE, Algeria and Libya, entered reservations to CEDAW upon ratification or accession. Saudi Arabia's reservations to CEDAW were given thus:¹³⁰

1. In case of contradiction between any term of the Convention and the norms of Islamic Shariah, 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 part, a general reservation directed at the entire Convention, goes further than traditional reservations made to treaties. Subject to this reservation, Saudi Arabia expressed its intention to be bound by provisions of the Convention only to the extent that these do not come into conflict with the provisions of Islamic *Shariah*. From the standpoint of Committee on the Elimination of

¹²⁷ Committee on the Elimination of Discrimination against Women, 'Consideration of Reports Submitted by States Parties Under Article 18 of the Convention, Combined Third and Fourth Periodic Reports of States Parties Due in 2013' (30 September 2016) CEDAW/C/SAU/CO/3-4. 51

¹²⁸ CEDAW, 'Declarations, Reservations and Objections to CEDAW' <www.un.org/womenwatch/daw/cedaw/reservations-country.htm> accessed 13 December 2017.

¹²⁹ Committee on the Elimination of Discrimination against Women, 'General Recommendation 25' (2004) UN Doc A/59/38(SUPP) Annex I, para 4.

¹³⁰ CEDAW, 'Declarations and Reservations' <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8&chapter=4&clang=_en> accessed 1 October 2017.

Discrimination against Women, this general reservation is arguably in conflict with the object and purpose of the Convention and with Article 28(2) of CEDAW.¹³¹

Saudi Arabia's specific reservation to paragraph 1 of Article 29 which concerns arbitration between two parties in the event of a dispute over interpretation, with the option to subsequently refer the dispute to the International Court of Justice (ICJ), creates no difficulty. It follows a number of similar reservations made by parties such as France and was made pursuant to Article 29(2). However, it should be noted that the definition of "discrimination against women" in article 1 of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) is consistent with what is acknowledged in the Kingdom. Additionally, there are no regulations or any decision or exclusion or restriction resulting from it Attenuation or frustration of recognition of women in all fields.¹³²

3.8 The reservations to treaties under general international law

On a practical level, it is crucial to make a distinction between the legal rules of the treaty and the application of the provision generally reserved. While the former issue can only be ascertained with reference to rules governing the conditions under which reservations can be made under the treaty, resolving the latter relies on the general international law. In the light of this, the next section considers whether the general reservation falls foul of customary norms on treaty interpretation provided for under the VCLT, as compared with the rules that govern reservations under CEDAW, as well as jurisprudence on this matter.

3.8.1 Validity of reservations under general international law

The Vienna Convention provides the legal framework which governs treaty law and interpretation. In an attempt to balance potentially contrasting legal regimes and issues of sovereignty, states are permitted to condition their treaty obligations through the formulation of reservations. The VLCT¹³³ defines a reservation as:

[a] unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State.¹³⁴

¹³¹ Committee on the Elimination of All Forms of Discrimination Against Women, 'Concluding Observations on the Combined Third and Fourth Periodic Reports of Saudi Arabia' (9 March 2018) C/SAU/CO/3-4, 11.

¹³² Committee on the Elimination of Discrimination against Women, 'Consideration of Reports Submitted by States Parties Under Article 18 of the Convention, Combined Third and Fourth Periodic Reports of States Parties Due in 2013' (30 September 2016) CEDAW/C/SAU/CO/3-4.

¹³³ Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1151 UNTS 331.

¹³⁴ *ibid* art 2(d).

Pursuant to Articles 28-29 of the VCLT, reservations are a mechanism which permits states to expressly state their opposition to certain provisions it does not wish to be bound by. Reservations may, therefore, modify, qualify or exclude the legal effect of a provision.¹³⁵ Further, reservations are typically formulated with the intention of subordinating treaty obligations to those of the reserving state's national laws and sovereignty.¹³⁶

Interestingly, Article 28(1) does not set forth in a specific manner the situation in which a ratifying state can issue a reservation but rather in a passive manner states: 'The Secretary-General of the United Nations shall receive and circulate to all States the text of reservations made by States at the time of ratification or accession.'¹³⁷

The VCLT, which Saudi Arabia ratified in 2003, moved international law forward from the conditions initially laid out in the ICJ's *Reservations to the Genocide Convention* Advisory Opinion,¹³⁸ which had originally established 'a rigid system requiring unanimous acceptance of reservations by all treaty parties'.¹³⁹ Broadly speaking, the impact of the VCLT was the creation of a flexible system that encouraged the same level of membership of multilateral treaties by accepting the differences between states as much as possible whilst maintaining the integrity of these treaties, ie their object and purpose.¹⁴⁰ This gave states parties to a treaty the authority to make reservations whilst preserving the overarching objectives and provisions. For Saudi Arabia, this fit its dualist framework, allowing it to maintain two distinct and separate systems side-by-side.¹⁴¹ However, the VCLT did little to create an objective method of assessing the validity of a reservation, ultimately dependent upon individual states determining whether it was agreeable to a treaty's object and purpose, and if not objecting to it.¹⁴²

Although a useful starting point, it is worth noting that the VCLT does not offer clear guidance on the legal effects of incompatible reservations.¹⁴³ A cursory appraisal of Articles 19 to 22, particularly when

¹³⁵ Malgosia Fitzmaurice, 'The Practical Working of the Law of Treaties' in MD Evans (ed), *International Law* (2nd edn, Oxford University Press 2006) 73.

¹³⁶ David Sloss, 'The Domestication of International Human Rights: Non-Self-Executing Declarations and Human Rights Treaties' [1999] 24 *Yale International Law Journal* 129.

¹³⁷ VCLT (n 139) art 28(1).

¹³⁸ *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* (Advisory Opinion) 1951 [18]-[20] <<http://www.icj-cij.org/files/case-related/12/4285.pdf>> accessed 13 December 2017.

¹³⁹ Marko Milanovic and Linos-Alexander Sicilianos, 'Reservations to Treaties: An Introduction' (2013) 24(4) *The European Journal of International Law* 1055, 1056.

¹⁴⁰ *ibid.*

¹⁴¹ Sloss (n 142) 129.

¹⁴² Milanovic and Sicilianos (n 145) 1056.

¹⁴³ Articles 20 and 21 of the VCLT set out the consequences of reservations and objections to them.

read in light of the ICJ's *Reservations to the Genocide Convention* opinion,¹⁴⁴ strongly suggests that it is for each contracting state to determine, for itself, whether a reservation is compatible with the treaty's object and purpose.¹⁴⁵ However, reservations are only compatible with international law if reservations as a whole are not explicitly prohibited within the treaty text.¹⁴⁶

3.8.2 Reservations under the applicable rules of CEDAW

CEDAW, in accordance with Article 19 of the VCLT, does not explicitly prohibit reservations in general, or on specific grounds. Instead, Article 28(2) gives effect to Article 19(c) of the VCLT, prohibiting as it does a reservation that is 'incompatible with the object and purpose of the present convention'.¹⁴⁷

Incompatibility, within the realm of logic, is defined as 'two or more propositions that cannot be true simultaneously'.¹⁴⁸ However, Article 28(1) of CEDAW does not specify the manner in which a reservation may be formulated, but instead declares that the UN Secretary-General shall receive and circulate the text to all states parties. Saudi Arabia's reservations, therefore, comply with the legal requirements.

The International Law Commission's (ILC) Guide to Practice on Reservations to Treaties clarifies the appropriate framework on validity.¹⁴⁹ 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'.¹⁵⁰

Reservations must be worded in a manner that will allow its meaning to be understood. Saudi Arabia's reservation arguably meets with these two conditions, in addition to a further guideline that permits reservations relating to domestic law only insofar as it does not affect an essential element of the treaty.¹⁵¹ As per the guidelines, a reservation that fails to meet the conditions is null and void, which in effect severs it from the treaty. This leaves the state party with a choice – remain a party to the Convention by withdrawing its 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.¹⁵²

¹⁴⁴ *Reservations to the Convention* (n 148); Catherine Redgwell, 'Universality or Integrity? Some Reflections on Reservations to General Multilateral Treaties' (1994) 64(1) *British Yearbook of International Law* 245.

¹⁴⁵ Redgwell, *ibid*.

¹⁴⁶ VCLT (n 139) art 19(a).

¹⁴⁷ *ibid* arts 28, 29.

¹⁴⁸ *Oxford English Dictionary* (Oxford University Press 2018).

¹⁴⁹ UNGA, 'Report of the International Law Commission on the work of its 63rd Session' (26 April-12 August 2011) UN Doc A/66/10/Add1.

¹⁵⁰ International Law Commission, *Guide to Practice on Reservations to Treaties* (UN 2011) guideline 3.1.5.

¹⁵¹ *ibid* guideline 3.1.5.5.

¹⁵² *ibid*.

The approach of Saudi Arabia highlights the compatibility between the Islamic *Shariah* provisions and the obligations under international law to eliminate discrimination against women. On a fundamental level, the general reservation does not mean that the state is unable to meet its obligation under Article 2(f) to 'take all appropriate measures ... to modify or abolish existing laws ... which constitute discrimination against women'. This principle is covered in article 8 of the Basic Law of Governance, which states, "Governance in the Kingdom of Saudi Arabia shall be based on justice, *shura* (consultation), and equality in accordance with the Islamic *Sharia*". This article seems to indicate the principle of equality, which is the exact opposite of discrimination, including discrimination against women. Moreover, article 26 of the same law states that "The State shall protect human rights in accordance with the Islamic *Sharia*".¹⁵³ These provisions appear to forbid discrimination against women. Furthermore, the provisions arguably encourage the establishment of foundations aimed to strengthen and protect human rights, including women's rights. An example of a governmental foundation which does this is the Human Rights Commission. The Human Rights Commission is tasked with conducting continuous reviews of existing laws and recommending amendments as evidenced by article 5(2) of its statute.¹⁵⁴

In practice, the Human Rights Commission conducts awareness programmes which in turn seem to educate individuals on human rights.¹⁵⁵ A successful achievement of the Human Rights Commission is its ability to effectively deal with complaints made by individuals whom have had their rights breached. The Human Rights Commission deals with complaints through three tracks; firstly, it receives a statement from the authority that has allegedly violated an individual's right. Secondly, specialists are dispatched to assess the situation and ensure adequate procedures have been taken by the concerned authorities. Finally, they provide legal consultancy to the parties affected in order to ensure they take the most suitable procedural steps to proceed.¹⁵⁶

It is clear therefore Saudi Arabia reserves the right to comply with CEDAW only if it is not in conflict with Islamic *Shariah* principles. However, the Committee on the Elimination of Discrimination against Women notes that the reservation, which makes broad reference to domestic religious law but

¹⁵³ Committee on the Elimination of Discrimination against Women, 'Consideration of Reports Submitted by States Parties Under Article 18 of the Convention, Combined Third and Fourth Periodic Reports of States Parties Due in 2013' (30 September 2016) CEDAW/C/SAU/CO/3-4.

¹⁵⁴ *ibid.*

¹⁵⁵ Human Rights Commission, 'Annual Report' (2017) available at: <<https://bit.ly/2UceWv4>> 78-89

¹⁵⁶ *ibid.* 70-76

without specifying its contents, is a precautionary measure at its core. As such, it does not hamper the contracting party's implementation of the Convention.¹⁵⁷

3.8.3 Third party objections

Any contracting party to the treaty in question may challenge the application of the Convention to Saudi Arabia, as stated in the following provision:

[a]ny dispute between two or more States Parties concerning the interpretation or application of the present Convention which is not settled by negotiation shall, at the request of one of them, be submitted to arbitration ...¹⁵⁸

On this view, if a third state considers that a reservation is contrary to the object of a treaty, it should make an objection to that effect. The views and objections of other contracting parties do not, however, definitively clarify the situation with regard to validity. The UK, among others, objected on the grounds that a general reservation made with reference to domestic law, without indicating its contents, does not explain the extent to which reserving state accepts the CEDAW obligations.¹⁵⁹ France took the view that a reservation of indeterminate scope provides no guidance as to which provisions are affected, while also making the provisions of the Convention completely ineffective.¹⁶⁰ These objections had limited effect because, while the VCLT permits objections by states parties,¹⁶¹ those reservations do not prevent the treaty from entering into force between the objecting state on the one hand, and the reserving one on the other, unless the former expresses a contrary intention.¹⁶² No such intentions were expressed, with France stating that '[t]hese objections do not preclude the Convention's entry into force between reserving state and France'.¹⁶³

Article 21 VCLT states that the provisions to which the reservation relates do not apply between a reserving and objecting state to the extent of the reservation, which potentially means the entire Convention does not apply between reserving state and each objecting state. A credible argument can therefore be made that a state's obligations under a human rights treaty should not depend on objections made by a third party. The reciprocity of state obligations should, in principle, have little

¹⁵⁷ Committee on the Elimination of Discrimination against Women, 'Consideration of Reports Submitted by States Parties Under Article 18 of the Convention, Combined initial and second periodic reports of Saudi Arabia' (15 February 2008) 40th Session CEDAW/C/SAU/2; CEDAW/C/SAU/Q/2 and Add.1.

¹⁵⁸ *ibid.*

¹⁵⁹ CEDAW, 'Objections, United Kingdom' (6 September 2001).

¹⁶⁰ CEDAW, 'Objections, France' (26 June 2001).

¹⁶¹ VCLT (n 139) art 20.

¹⁶² *ibid* art 20(4)(b).

¹⁶³ CEDAW (n 168).

bearing in the human rights context since such rights are addressed to individuals and not states.¹⁶⁴ Contrary to this view, the UN Human Rights Committee (HRC) argued that the purpose of the ICCPR was 'to create legally binding standards for human rights by defining ... and placing them in a framework of obligations which are legally binding for ... [s]tates which ratify'.¹⁶⁵

Therefore, in human rights treaties, reservations to peremptory norms would be unacceptable. In the same way, reservations to non-discrimination provisions, and the guarantees afforded to citizens of states parties, would be unacceptable¹⁶⁶ as they would violate customary international law.¹⁶⁷

At this point, we are confronted with the thorny question of which body or subject is competent to assess the validity or invalidity of a reservation which has been made in a manner deemed inconsistent with the object of the treaty. The HRC in its general comment on reservations to the ICCPR¹⁶⁸ made the argument that human rights treaties 'are not a web of inter-[s]tate exchanges of mutual obligations'¹⁶⁹ but instead address rights and obligations to individuals. Moreover, the validity of a reservation is not dependent upon objections, with the Committee pointing out that '[t]he absence of protest by [s]tates cannot imply that a reservation is either compatible or incompatible with the object and purpose'.¹⁷⁰ One could make the same argument in regard to the presence of objections; the failure of the UK and France to state that their objections that precluded entry into force between them and state does not mean that the reservation is valid, nor would it have any bearing on the rights afforded to citizens.

Human rights courts appear more willing to condemn reservations which fall foul of minimal standards of international law than has previously been the case.¹⁷¹ Extrapolating from the recent European Court of Human Rights (ECHR) judgment in *Belilos*, there is some legal support for the claim that a customary norm has emerged, or is now emerging, whereby impermissible or invalid reservations to human rights treaties are treated as if they had not been formulated at all.¹⁷² This has been described

¹⁶⁴ 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.

¹⁶⁵ *ibid* para 7.

¹⁶⁶ *ibid* paras 8-9.

¹⁶⁷ *ibid* para 9.

¹⁶⁸ ICCPR, '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.

¹⁶⁹ *ibid* para 17.

¹⁷⁰ *ibid*.

¹⁷¹ *Belilos v Switzerland* ECHR 1988 VI 132; *Weber v Switzerland* ECHR (1990) VI 177.

¹⁷² *ibid*; Roberto Baratta, 'Should Invalid Reservations to Human Rights Treaties Be Disregarded?' (2000) 11(2) European Journal of International Law 413, 416.

as the 'Strasbourg approach' to invalid reservations.¹⁷³ On the other hand, any argument implying that a reservation on *Shariah* grounds effectively voids ratification of the treaty is likely to cause some disconcertion in the Middle East. Islamic nations are likely to regard this as an attempt to impose on them an ethno-centric (Western) model or system of human rights protection as a condition for allowing them future participation in the wider 'international community'.¹⁷⁴

The HRC has taken a more modest view of this issue:

The normal consequence of an unacceptable reservation is not that the covenant will not be in effect at all for a reserving party. Rather, such a reservation will generally be severable, in the sense that the covenant will be operative for the reserving party without benefit of the reservation.¹⁷⁵

However, it should be borne in mind that the HRC was referring to a specific and not a general reservation. The difficulty, then, is that monitoring bodies created by human rights treaties have reached different conclusions on the validity of reservations, and in doing so have departed both from state practice and international doctrine.¹⁷⁶ If a monitoring body is charged with the competence to assess issues around the appropriate interpretation of a human rights agreement, or its application, one can plausibly argue that the body should also be given the power to decide whether an incompatible reservation is admissible, severable or otherwise has a nullifying effect on the reserving state's membership of the treaty framework. Going further, such a body may also be judged to have the power to enforce the application of the reserved treaty provision vis-à-vis the reserving state.¹⁷⁷

In the final analysis, the competency of a committee to assess the validity of an incompatible reservation will depend on whether this jurisdictional authority is attributed to the body under the provisions of the relevant treaty. While a committee can only assert an inherent power to assess irregular or incompatible reservations if it has the proper jurisdiction to do so, state practice indicates that a third party is free to dispute invalid reservations or to raise objections, and that this may impact the general perception of the legitimacy, and hence validity, of an irregular or disputed reservation.¹⁷⁸

¹⁷³ 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.

¹⁷⁴ Nora V Demleitner, 'Combating Legal Ethnocentrism: Comparative Law Sets Boundaries' (1999) 31 *Arizona State Law Journal* 737, 757.

¹⁷⁵ UNHRC.

¹⁷⁶ Baratta (n 180) 415-417.

¹⁷⁷ Redgwell (n 150) 26.

¹⁷⁸ *Belilos v Switzerland* ECHR 1988 VI 132.

At any rate, the mere fact that a monitoring body is competent to assess the validity of a reservation does not empower that body with an additional right to take measures beyond that which is ordinarily available to it. For instance, the CEDAW Committee can only issue advisory opinions and recommendations. Accordingly, any opinion on the validity of a reservation would remain just that, advisory and not formally binding on the reserving or objecting parties. Moreover, while CEDAW has been set up to deal with violations of the rights protected under the treaty, it does not necessarily follow that a member state which has made an invalid reservation is therefore obliged to observe the reserved provision.¹⁷⁹ Certainly, the monitoring body may make pronouncements on the legality of a reservation. However, the question of its legal effect or inadmissibility (or invalidity) must be treated separately from the jurisdiction of conventional courts or bodies under the particular provisions of a human rights treaty.

It is important to note that governments will reassert the exclusivity of their own laws and legal system, and in doing so guard against the extraterritorial application of laws or decisions issued in a foreign jurisdiction. Resistant to any international rules or decisions which may circumscribe the sovereign power and authority of national authorities or courts, states often enter reservations for reasons of policy, power and politics. These justifications are, of course, to be distinguished from matters of law and doctrine, and in particular, the question of the legality or appropriateness of an instrument or measure from the standpoint of Saudi constitutional law and *Shariah*.

As will be explored in later chapters, these divergent perspectives expose a tension between international legal doctrine and the legal realist's preoccupation with 'state practice'.¹⁸⁰ The former is premised on the assumption of the supremacy of international law. At the very least, these theories accept that international rules can constrain the exercise of sovereign power where serious violations of human rights are concerned, even when the offending states have expressly consented to be bound by such rules (so-called monist theories of international law).¹⁸¹ The latter set of theories affords centrality to sovereign authority and autonomy of the nation state, and by extension of the same logic, the international law principle of state consent (so-called dualist theories of international law).¹⁸²

¹⁷⁹ Redgwell (n 150) 245.

¹⁸⁰ James Boyle, 'Legal Realism and the Social Contract: Fuller's Public Jurisprudence of Form Private Jurisprudence of Substance' (1993) 78 Cornell Law Review 371.

¹⁸¹ Hans Kelsen (ed), *General Theory of Law and State* (Lawbook Exchange 1945); Ernst-Ulrich Petersmann, 'Human Rights, International Economic Law and 'Constitutional Justice' (2008) 19 European Journal of International Law 769; Bardo Fassbender, 'The United Nations Charter as the Constitution of the International Community' (1998) 36 Columbia Journal of Transnational Law 529.

¹⁸² Jean L Cohen, 'Whose Sovereignty? Empire versus International Law' (2004) 18(3) Ethics and International Affairs 1, 2; Andreas L Paulus, 'Jus Cogens in a Time of Hegemony and Fragmentation: An Attempt at a Re-appraisal' (2005) 74(3) Nordic Journal of International Law 297, 298.

3.9 The enduring relevance of the dualist worldview

Insofar as the CEDAW is littered with reservations justified by sovereignty, religious and cultural grounds, the proclaimed universality of human rights, and in particular the rights of women, would seem to rest on very shaky ground.¹⁸³ Indeed, the very prevalence of reservations, declarations and other statements which aim to qualify the scope and legal effects of international human rights treaties would seem, in one sense, to reinforce the cultural specificity or relativity of human rights which might otherwise be declared universal.¹⁸⁴ This approach is in line with its dualist approach where domestic law and international law are not unitary, thus allowing the state to retain sovereignty over its own legal processes.¹⁸⁵

In the classic Westphalian conception, the sovereign nation state exercises full sovereign (and territorial) control over its own domestic legal and political affairs.¹⁸⁶ International law, on this view, is 'still largely non-hierarchical, voluntaristic and contractual in nature'¹⁸⁷ and, consequently, conditioned on the requirement of state consent. In short, this means that a state cannot be bound by international laws or obligations except by sovereign consent.¹⁸⁸ This requirement is a foundational principle of international treaty-based law. Whereas the notion of state consent is central to our understanding of the exercise of sovereign authority at levels beyond the state, the 'dualist' account of international law also claims an autonomous and internally hierarchical legal system at the level of the nation state.¹⁸⁹ In short, the state has authority and autonomy to determine the laws that will apply to it and in what manner.¹⁹⁰ On the other hand, reservations which aim to nullify the operative provisions of treaties which the state has itself signed up to have the effect of seriously undermining

¹⁸³ See Generally, 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, 643-716

¹⁸⁴ *Ibid*; Mashood A Baderin and Manisuli Ssenyonjo, *International Human Rights Law: Six Decades after the UDHR and Beyond* (Routledge 2016) 43-45; VCLT (n 139) arts 19-22.

¹⁸⁵ Sloss (n 142) 129.

¹⁸⁶ William Twining, 'Globalization and its Implications for Legal Thought' (unpublished draft, 30 January 2009); Neil Walker (ed), *Sovereignty in Transition* (Bloomsbury Publishing 2003); Neil Walker, 'Taking Constitutionalism Beyond the State' (2008) 56(3) *Political Studies* 519.

¹⁸⁷ Sabino Cassese, 'Is There a Global Administrative Law?' in Armin von Bogdandy and others (eds), *The Exercise of Public Authority by International Institutions: Advancing International Institutional Law* (Springer 2010) 761.

¹⁸⁸ The principle of state consent is closely bound up with the idea that all states are formally equal and have autonomous legal orders.

¹⁸⁹ Neil Walker, 'Constitutionalism and Pluralism in Global Context' in Matej Avbelj and Jan Komárek (eds), *Constitutional Pluralism in the European Union and Beyond* (Bloomsbury Publishing 2012) 17, 18.

¹⁹⁰ Oona Hathaway, 'International Delegation and State Sovereignty' (2008) 71 *Law and Contemporary Problems* 115; Ruth Buchanan and Sundhya Pahuja, 'Law, Nation and (Imagined) International Communities' (2004) 8 *Law Text Culture* 137, 140.

the integrity and effectiveness of human rights law and the protections provided therein.¹⁹¹ We are confronted once more with the apparent conflict between the theoretical foundations of international human rights law, rooted in Kantian theories of rights, and the non-secular natural law foundations of *Shariah*. Within the Saudi legal order, this raises important questions as to how the Saudi government can reconcile its domestic law with the remaining rights-based obligations under CEDAW such as freedom of movement and access to education as will be discussed in later chapters.

While Islamic *Shariah* forms the basis of Saudi Arabia's Constitution, the actual process for determining the constitutionality of any rule or decision on *Shariah* compliance grounds remains defined by *Quran* and *Sunnah* and subject to the judgments of scholars of *Shariah*.

3.10 Conclusion

The above discussion highlights the adherence to *Shariah* by the Saudi constitutional order. This is manifested both in the relations between legal and political authority, that is between the executive branches of government and the judicial autonomy of its courts, religious or otherwise. This adherence is replicated also in Saudi Arabia's rather reconciliation or coordination with international human rights law. Saudi Arabia asserted that its reservation was a precautionary measure to ensure that it was not put in a position where international law could take precedence over Islamic *Shariah*. However, Saudi Arabia has since asserted that it believes that the Convention is broadly compatible with *Shariah* and that Islamic *Shariah* is compatible with women's rights.¹⁹²

Building on the apparent tension between universal and relativist theories of law, this thesis seeks to carve out a middle ground between the conservative seer of universalistic or relativistic perspectives and between dualist or monist theories of international law. As suggested above, *Shariah* law and international human rights law are grounded in seemingly distinct theoretical foundations. As the next section will show, this should not be taken to mean that international human rights are substantially at odds with Islamic legal jurisprudence or vice versa. Rather, a faithful reading of Islamic legal sources and traditions are, arguably, highly sympathetic to, and protective of, the rights of women. Taking this argument to its logical conclusion, the Saudi government is seeking to adopt the necessary measures to eliminate discrimination against women, not merely in relation to its obligations under international law and treaties, but also as a constitutional requirement of its own *Shariah* governed legal system.

¹⁹¹ Hanna Beate Schöpp-Schilling, 'Treaty Body Reform: The Case of the Committee on the Elimination of Discrimination Against Women' (2007) 7(1) Human Rights Law Review 201, 201-224

¹⁹² Ibid.

Chapter Four: Islamic *Shariah* Perspective on Guardianship: *Qiwamah* and *Wilayah* in the Classical Tradition and the Restrictions on Women's Freedoms

4.1 Introduction

This chapter considers the jurisprudential roots of guardianship practices, its core concepts and key issues of dispute among Islamic scholars. The Islamic legal tradition has historically accorded differentiated rights to men and women. The asymmetry in the treatment of genders by the legal tradition both in classical Islamic *Shariah* has many implications on women's place in the public domain.¹ These consist primarily of restrictions on the ability to be present in professional and educational settings without being accompanied by a related male, and perhaps more importantly, restrictions on the ability to travel freely. Those restrictions affect the possibilities afforded to women as students, professionals, and generally as members of the community who operate in public places and contribute to the general good. The purpose of this chapter is to investigate the theoretical and theological foundations of this asymmetry within the legal Quranic tradition. The chapter shows the gender hierarchy that underlies modern restrictions on women was conceptualized under the dual concepts of *qiwamah* (curatorship) and *wilayah* (guardianship), which have a long history of exegetical and legal scholarship supporting them. While *qiwamah* stems largely from the Quranic edict '*al-rijalu qawwamuna 'ala l-nisa'*', which will be discussed below in depth, *wilayah* was constructed from a combination of Quranic and prophetic sources.

The encounters of the Muslim world with the modern West, in most cases in the form of colonialism or the emergence of a modern nation-state, have generated a long tradition of reform aimed at deconstructing the assumption of men's authority over women that pervades the legal and exegetical tradition.² As early as the nineteenth and early-twentieth century, self-proclaimed modernist writings appeared as a challenge to the traditional patriarchal interpretations of gender norms in Islamic *Shariah*. Some of those works consciously identified as feminist. One of the most iconic and controversial works in this movement is Qasim Amin's *Liberation of Women*.³ Amin's work was criticised as an uncritical adoption of liberal values that is not sufficiently rooted in the Islamic tradition.⁴ Another influential work is Tahir al-Haddad's *Women in the Shari'a and in Our Society*, a

¹ Ziba Mir-Hosseini, Mulki Al-Sharmani and Jana Rumminger (eds), *Men in Charge?: Rethinking Authority in Muslim Legal Tradition* (Oneworld Publications 2015) 17.

² *ibid* 43.

³ Qāsim Amīn *Two Documents in the History of Egyptian Feminism* (TAUCP 2005).

⁴ Leila Ahmed, *Women and Gender in Islam Historical Roots of a Modern Debate* (Yale University Press 2011) ch 8.

work that explicitly adopted as its goal the re-interpretation of gender relations through an egalitarian framework.⁵

Haddad was one of the ground-breaking who attempted a project of feminist reinterpretation through a historicist re-reading of the Quranic tradition. For Haddad, unlike Amin, a new reading of gender roles in the Islamic tradition must begin from a distinction between principles that are essentially tied to the message of Islam, such as equality among all humans, and those that are historically contingent, such as the authority of males over females. This historicist approach goes deeper into placing specific patriarchal readings within a gradual scheme of reform. For Haddad, Islam, at its core, is a message of equality, but social reform had to be gradually accomplished to slowly erase the legacy of male-domination of pre-Islamic societies. The tradition of feminist re-reading of gender relations in the Islamic traditions continued in both Arab-Muslim and Western scholarship, with figures such as Amina Wadud, Fatima Mernissi, and more recently Kecia Ali, questioning the foundations of the Quranic readings upon which gender inequality was built in Islamic Shariah.⁶

Drawing on this rich tradition of feminist approach, this chapter will argue that the formation of those two concepts had a particular history within the traditional interpretive sciences. This history is very specific and contingent, in the sense that other interpretations could have been possible both because of the contextual elements of those statements, and the possibilities afforded by the Quranic text more broadly. A re-interpretation that does away with male domination is, therefore, possible, and has been in fact defended by many modern scholars. One of the central advantages of such re-interpretation efforts is that they advance an egalitarian view of gender relations from within the textual and moral parameters of the tradition, without adopting a primarily secularist stance that attempts to marginalise the legal-exegetical tradition. This possibility will be examined concerning the concept of *qiwamah* in the second section, and the concept of *wilayah* in the third. Before analysis commences, a brief examination of the restrictions on women's right of movement will be offered and other related rights stemming from the idea of *mahram* and the prohibitions on seclusion with a non-related male and the inter-mixing between genders (*ikhtilaṭ*).

⁵ Husni Ronak and Daniel L Newman (eds), *Muslim Women in Law and Society: Annotated Translation of al-Tahir al-Haddad's Imra'atuna fi 'Ishari'a wa 'l-mujtama with an Introduction* (Routledge 2007).

⁶ Amina Wadud, *Quran and Woman: Rereading the Sacred Text from a Woman's Perspective* (Oxford University Press 1999); Fatima Mernissi, *The Veil and the Male Elite: A Feminist Interpretation of Women's Right in Islam* (Mary Jo Lakeland trans, Basic Books 2006); Kecia Ali, *Sexual Ethics and Islam: Feminist Reflections on Qur'an, Hadith and Jurisprudence* (Oneworld Publications 2016).

4.2 Women's rights under Islamic *Shariah*

In this section, the thesis will briefly examine the limitations on the women's movement in Saudi laws and discuss some of their justifications within the Islamic legal tradition. This introductory overview will then allow us to move towards a deeper examination of the legal-theological foundations of gender imbalance in the Islamic tradition, which can be located within the ideas of *qiwamah* and *wilayah* as formulated within the legal *Quranic* tradition. Before those limitations are surveyed, however, a few words need to be said on a central guiding principle that shapes the ways in which women's freedoms are limited, namely the idea of prohibition of marriage (*mahaarim*).

4.2.1 Concept of *mahram* and prohibited *khalwah*

The notion of a non-marriageable relative (*mahram*), while not in itself a justification for the limitations on women's freedoms that this thesis is concerned with, plays a central role in determining how a woman can navigate the public space in Saudi Arabia. This, in turn, has implications on central rights. The definition of *mahram*, plural *mahaarim* (ie relatives with whom marriage is forbidden) follows from the provisions of the following Quranic verses:

Do not marry any of the women whom your fathers had married, excluding what is already past. That is indeed an indecency, an outrage and an evil course. Forbidden to you are your mothers, your daughters and your sisters, your paternal aunts and your maternal aunts, your brother's daughters and your sister's daughters, your [foster-]mothers who have suckled you and your sisters through fosterage, your wives' mothers, and your stepdaughters who are under your care [born] of the wives whom you have gone into—but if you have not gone into them there is no sin upon you—and the wives of your sons who are from your own loins, and that you should marry two sisters at one time—excluding what is already past; indeed Allah is all-forgiving, all-merciful and married women excepting your slave-women. 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.⁷

The above verses are seen to create two opposing spheres that define the types of cross-gender relations, and therefore intermixing, that are recognised by the tradition. On the one hand, there are women with whom men may theoretically have lawful sexual relations, and on the other there are those with whom this is impossibility due to close family ties. The *mahram*, ie the person with whom marriage is prohibited, is therefore a close family member, which means that, not only is intermixing with such sexually unavailable persons allowed but the male *mahram* will also frequently act as an

⁷ Holy Quran 22:24.

intermediary who affords the woman the opportunity to interact with other non-*mahram* males. The *mahram*, in addition, is seen as the adult male who looks after and attends to his family's matters, especially the women in the home. An example would be the husband or whoever is prohibited from marriage to a given female due to the proximity of family relationship, such as her consanguine father, son or brother, as well as such relatives from a milk-kinship or foster relationships.⁸ The identification of a *mahram* follows from the rules pertaining to the prohibition on marriage due to blood relations or other forms of kinship or marital ties, as largely set out in the above verse. These include, for any individual male, his female descendants and ancestors, siblings, in-laws, nieces, and those related by milk-kinship. The rules of *mahram* apply to other categories on a temporary basis, such as a sister-in-law, while the marriage to her sister is still in force. This category, however, does not enjoy the full degree of *mahram*-related permissions, such as the possibility of being together in seclusion or being alone on a journey.⁹ Because of the central role the *mahram* plays in granting women access to 'foreign' men, they exert a certain degree of religious obligation in the process of delineating the shape and extent of freedoms afforded to women.

The practical implication of this broad separation of males into marriageable and non-marriageable (or *mahram*) is a religious prohibition on mixing with male colleagues in a manner that would amount to presence in seclusion (*khalwah*), unless a *mahram* is present. For practical reasons, this is hard to guarantee in a work environment at all times.¹⁰ The General Presidency of Scholarly Research and *Ifta* has several *fatwas* on this matter. The regulation of impermissible *khalwah* in the absence of a male *mahram* is usually the result of legal reasoning based upon the prophetic saying: 'A man should not remain in seclusion with a woman except in her husband or *mahram*'s presence.'¹¹ This saying was understood to mean that it is not permissible for a man to be in seclusion with a woman in a place where both cannot be seen by anybody else, except when a *mahram* is present with them.¹² In another *fatwa*,¹³ this notion was extended to prohibit the presence of an unrelated (marriageable) male and female in a public place where they can speak privately without being heard. This broad prohibition applies to situations in which they are present in a place of work or elsewhere. In practice,

⁸ Ibn Al-Qudāmah, *AlMughnī* (Lebanon 1994) vol 3, 98.

⁹ N Al-Nashawi, *alkhalwah wal-athaar almutaratibah alaiha fi al-Shariah al-islamiyyah* (2004) 175.

¹⁰ *Khalwah* is defined by Al-Nashawi as a man being alone with a woman in a place where they cannot be observed by anyone else. This is irrespective of whether she is his wife, engaged to him, a relative or a non-relative.

¹¹ *Fatwa* No 4246, The General Presidency of Islamic Research and *Ifta*, *Fatwas* of the Permanent Committee for Scholarly Research and *Ifta*, first edition, (seventeenth issue – 1411 H), 57.

¹² General Presidency of Scholarly Research and *Ifta*, 'Fatwas of The General Presidency of Scholarly Research and *Ifta*, First issue' (1411H) vol 71, 57.

¹³ *Fatwa* No 7584, The General Presidency of Islamic Research and *Ifta*, *Fatwas* of the Permanent Committee for Scholarly Research and *Ifta*, first edition, (seventeenth issue – 1411 H), 57.

this set of prohibitions mean that a woman can only be without a *mahram* when residing at home with other women.¹⁴ It is clear that this position results in some restrictions on women in their professional and educational endeavours.

Recently, as discussed in the previous chapters there were reports of the efforts made in the direction of greater empowerment of women in the public sphere. A Supreme Order dated 24 April 2017, based on recommendations from the Council of Ministers, instructed all state agencies to grant their services to women without approval from their guardian. This is a significant reform to remove the limitations imposed on women through the requirements of *wilayah*. Furthermore, the instruction issued to governmental agencies does in itself grant greater freedom of movement or suspend the restrictions imposed by the prohibitions on inter-mixing as described in the present section without any conflict with the principals of the Islamic *Shariah*.

4.2.2 Provisions pertaining to *ikhtilat* (inter-mixing)

Another aspect of the notions of *khalwah* and *mahram* is the general prohibition on inter-mixing of different genders, which also leads to legal limitations on women in the public space. Most of the *fuqaha* believe the inter-mixing between genders is not permissible. Ibn Al-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. The mixing of men and women is a reason for the proliferation of promiscuity and fornication.¹⁵

The evidence cited by Ibn Al-Qayyim for this approach is the prophetic *hadith*: 'I am not leaving a more severe test for men, after my departing, than that of women', and the prophetic tradition: 'Make a space between men and women.'¹⁶ Regardless of the difference of opinions among Muslim scholars on this matter, the religious scholars do not, as a rule, permit free-mixing between men and women.

Sheikh Abdul Aziz bin Baz, a Mufti and Saudi scholar, pointed to the following evidence, among much more, that it is prohibited for men and women to mix:¹⁷

O you who have believed, do not enter the houses of the Prophet except when you are permitted for a meal, without awaiting its readiness. But when you are invited, then enter; and when you have eaten, disperse without seeking to remain for conversation. Indeed, that [behaviour] was troubling the Prophet,

¹⁴ Council of Ministers Resolution No 53 of 1993.

¹⁵ M Ibn Qayyim al-Jawziyya, *At-Turuq Al-Hukmiyyah fi As-Siyaasah Al-Shar'iyyah* (Lebanon) 237.

¹⁶ *ibid* 238.

¹⁷ See Provisions of Ikhtilat between Men and Women and its Impact <<https://binbaz.org.sa/fatwas/10797/>> accessed 30 April 2017.

and he is shy of [dismissing] you. But Allah is not shy of the truth. And when you ask [his wives] for something, ask them from behind a partition. That is purer for your hearts and their hearts. And it is not [conceivable or lawful] for you to harm the Messenger of Allah or to marry his wives after him, ever. Indeed, that would be in the sight of Allah an enormity.¹⁸

In explaining this Verse, Ibn Kathir maintained that '[i]f one wants to take something from a woman, one should do so without looking at her. If one wants to ask a woman for something, the same has to be done from behind a partition'.

Among the arguments presented in support of the prohibition of inter-mixing is the fact that the Prophet ruled that men and women should be separated, even in mosques, God's most revered and preferred place. This was done by their physical separation. Men were requested to stay in the mosque after completing obligatory prayers so that the women would have adequate opportunity to leave the mosque; a special door was even assigned to them for this purpose. There is ample evidence of this practice within the Prophet's Sunnah.¹⁹ The Council of Senior Scholars even issued a resolution that prohibits men and women mixing freely when attending weddings.²⁰ This principle has bases in the Islamic *Shariah* principles. Also, the Permanent Research Council issued a fatwa in which it was stated that female students were barred from groups of mixed males and females on school trips because this constituted free-mixing.²¹

4.2.3 Provisions on women's movement and travel

The previous sections examined the basic opinions on the seclusion of unrelated men and women and the inter-mixing of genders in professional and educational contexts or otherwise. Attention now turns more specifically to the particular limitations on movement and travel that follow from the

¹⁸ *Holy Quran* 33:53.

¹⁹ 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. Ibn Shihab said that he thought that the staying of the Prophet (May peace and blessings be upon him) was in order for the women to be able to leave before the men who wanted to depart.' Narrated by al-Bukhari under No 793.

Abu Dawood under No. 876 narrates the same hadith in *Kitab al-Salaat* under the title 'Insiraaf an-Nisaa' Qabl al-Rijaal min al-Salaah' (Departure of Women before Men after the Prayer). Ibn 'Umar said that Allah's Messenger (May peace and blessings be upon him) said: 'We should leave this door (of the mosque) for women.' Naafi' said: 'Ibn 'Umar never again entered through that door until he died.' Narrated by Abu Dawood under No 484 in '*Kitab as-Salah*' under the Chapter entitled: 'at-Tashdid fi Thalik'.

Abu Hurayrah said that the Prophet (May peace and blessings be upon him) said: 'The best of the men's rows is the first and the worst is the last, and the best of the women's rows is the last and the worst in the first.' Narrated by Muslim under No 664.

²⁰ *Fatwa* No 20609, The General Presidency of Islamic Research and *Ifta*, Fatwas of the Permanent Committee for Scholarly Research and *Ifta*, first edition, (seventeenth issue – 1411 H), 323.

²¹ *ibid*.

general prohibition on seclusion with a 'foreign' male without a *mahram*. The prohibition on inter-mixing of genders, it must be noted, is not a restriction on the ability to attend a workplace or on movement and travel more generally. This restriction is only for the sake of women safety and security. However, nowadays there is no justification for the continuation of the prohibition on inter-mixing of genders. As result, the law of Saudi Arabia and relevant institutions guaranteed the protection and integrity of women. Also, all the institutions are combat to eliminate practices which may impede women rights.²² For instance, *Fatwa* No 9022 states explicitly that a woman may not travel alone in the absence of a *mahram*, and that the *mahram* must be a related male. Specifically, the woman must travel with a *mahram* except if the journey is 'safe'. Likewise, she should not travel while in a state of *khalwah* (seclusion), without a *mahram*. In addition, the Permanent Committee issued a *fatwa* as follows: 'It is not permissible for [a woman] to travel by [herself] with a man who is not one of [her] *mahrms*. This is an unlawful *khalwah*.'²³

Limited exceptions are made when the travel is deemed mandatory, such as the obligatory *hajj* (pilgrimage) and paying visits to parents. In the case of the obligatory pilgrimage, the *Hanafi* school and the *Hanbali* school are in favour with the presence of a mahram obligatory. The Maliki and *Shafi* schools permit travel for pilgrimage without a mahram if the journey is secure. Different legal schools differ, however, on what precisely constitutes a 'safe' trip. By contrast with all other schools which require a mahram for any kind of non-obligatory travel, the *Hanafis* allow travel without a mahram for short distances.

The General Presidency of Scholarly Research and *Ifta* has issued many *fatwas* concerning women's travelling arrangements, especially when it comes to its effects on the right to education. The leading edict is in relation to a group of female students studying at Al-Riyadh University (now King Saud University) from outside Riyadh, and staying at the Umm al-Mu'minin residence facility, who would often travel to Jeddah or Dhahran by air on weekends and public holidays. The university administration decided that the female students must be accompanied by a *mahram* on each journey between those cities. This, however, was not feasible for all the students, which led to complaints from the female students affected by this policy. The students argued that Islamic Shariah permitted their travel under these circumstances as the journey was relatively short. In their argument, the

²² Committee on the Elimination of Discrimination against Women, 'Consideration of Reports Submitted by States Parties under Article 18 of the Convention, Combined Initial and Second Periodic Reports of Saudi Arabia' (30 September 2016) 40th Session CEDAW/C/SAU/3-4.

²³ *Fatwa* No 17455. *Fatwa* No 3633. The General Presidency of Islamic Research and *Ifta*, *Fatwas* of the Permanent Committee for Scholarly Research and *Ifta*, first edition, (seventeenth issue – 1401 H), 306.

students relied on the following 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.'²⁴

The Permanent Committee responded with a *fatwa* that maintained that:

The *Shari'ah* 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.

The *fatwa* concluded that the female students were not allowed to travel between those specific cities, as close as they may be, without the presence of a male relative. It follows from the reasoning in this *fatwa* that a woman cannot travel in any way without a *mahram* unless it was 'safe' and obligatory travel under very limited conditions.²⁵

4.3 Women's movement while travelling outside Saudi Arabia

It has been shown so far that the general prohibition on unlawful seclusion (*khalwah*) is prohibited. This principle has not been seen to impose limitations on women's travel outside the Kingdom as well. Regarding a Saudi woman travelling to countries outside Saudi Arabia, it is necessary for her to either be accompanied by her *mahram* or to obtain permission from her *waliyy* (guardian) in accordance with the Vice Minister of the Interior's Resolution No S25/48 of 1977 and Resolution No 25/690 of 1977.²⁶ However, Saudi women are permitted to travel abroad without a *mahram* in the following situations: if the woman is with her family or children and has obtained the permission of her guardian; if the woman is old; if a woman has obtained permission from her guardian for reasons of medical treatment, giving birth or family circumstances; or in case of Saudi female doctors or nurses who are travelling abroad in an official capacity.

4.4 The principle of *al-qiwamah* (curatorship)

In the previous section, some of the provisions imposed on women's presence in the public sphere were examined, whether as professionals, students or simply on their ability to move in cities and countries. Those provisions were shaped by a set of concepts revolving around the prohibition of seclusion (*khalwah*) and inter-mixing (*ikhtilat*) of men and women in the absence of an unmarriageable

²⁴ Muslim 433, vol 1.

²⁵ *Fatwa* No 2642. The General Presidency of Islamic Research and Ifta, *Fatwas of the Permanent Committee for Scholarly Research and Ifta*, first edition, (seventeenth issue – 1411 H), 310.

²⁶ See the last section of the present chapter for more on the concept of guardianship.

male relative (mahram). The asymmetry in the treatment of men and women in those situations is more deeply rooted in two primary concepts that have broad presence in the Quranic and juristic traditions: *qiwamah* and *wilayah*. These two concepts are widely seen within the tradition as the foundations of the relation between genders in Islamic Shariah. A re-reading of these two concepts, and the exploration of possibilities within the sacred text beyond them, are at the core of some of the most recent Muslim scholarship attempts to redefine gender roles from within the tradition.²⁷ Whereas the first 'denotes a husband's authority over his wife and his financial responsibility towards her', the second 'denotes the right and duty of male family members to exercise guardianship over female members',²⁸ such as in entering into marriage contracts. In this section, the theological-legal foundations of those restrictions will be considered by investigating the idea of *qawamah*, its implications and intrinsic limitations. By highlighting the range of opinions and justifications that underlie the legally entrenched gender-inequality in the Islamic tradition, the limits and shortcomings of the interpretations of those concepts will become apparent. Not only do various interpretive methods allow for the reconsideration of the ideas of *qiwamah* and *wilayah* but the body of Quranic text and Prophetic tradition also offers broad opportunities for an egalitarian understanding of gender relations beyond the restrictive ideas of guardianship and curatorship. By seeing the historicity and contingency of those interpretations, it is possible to conceive of an Islamic legal domain in which women practice their freedom of movement within the frameworks of the Quranic message.

4.4.1 Theoretical and theological foundations of *qiwamah*

The Islamic legal tradition understands the idea of *qiwamah* in a number of ways. The first way pertains to curatorship over a minor. This is a form of guardianship that the *aqadi* (judge) approves for a person of sound mind, to manage the affairs of a minor. The same applies to the court-appointed curator in charge of managing the legal affairs of a mentally incapacitated individual. The difference between the natural guardian (*waliyy*) and the *qayyim* (curator) is that the *waliyy* is appointed by the sole force of law due to some degree of minority or legal incapacity, whereas the *qayyim* is appointed by the court in specific situations. The court has broad discretion in appointing the curator, who could be male or female. For example, a woman may be a curator over her son's property.²⁹ More on guardianship (*wilayah*) will be provided in the next section.

The second use of the term *qayyim* applies to the person in charge of managing a charitable endowment according to the terms specified in the documents establishing the *waqf*. The manager of a *waqf* is also commonly referred to as the *nazir* (supervisor). The third type, which is what will concern

²⁷ Mir-Hosseini, Al-Sharmani and Rumminger (n 1) 17.

²⁸ *ibid.*

²⁹ *ibid* 262.

us here, is the authority exercised by a male over a female, which is seen by many jurists to derive from the Quranic message. The third type, which is the relevant type here, is the authority exercised by a male over a female, which is seen by many jurists to derive from the Quranic message. This is a type of authority that is granted to the husband by Islamic Shariah because of the general principle that a husband must provide for his wife, a principle that has several reciprocal consequences.³⁰

The idea that husbands are the ‘providers’ for their spouses, and the whole concept of *qiwamah* more generally, is widely seen to follow from the following Quranic provision:

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. Therefore, the righteous women are devoutly obedient (to Allah and to their husbands), and guard in the husband's absence what Allah orders them to guard (e.g. their chastity, their husband's property, etc.).³¹

Classical Islamic scholars have traditionally attributed the idea of men’s *qiwamah* over women to the perceived difference in character between the two sexes which allegedly makes the man the natural leader of the family unit. This view stemmed from a traditional understanding of gender roles within the family wherein childbearing and homemaking tasks lie primarily with the woman, while men generally are responsible for breadwinning and the safety of the family members. Because of this traditional division, the failure of a man to provide for his family was generally seen as a sufficient reason to deem his *qiwamah* invalid and, in some instances, to go as far as annul the marriage altogether. As Mir-Hosseini et al put it, ‘[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’.³²

One example can be found in the work of al-Zamakhsharī, who maintained that men are ‘better’, in reason, resoluteness, determination, strength, writing, horsemanship, among other attributes and skills.³³ This idea was pushed even further by al-Bayḍawī, who maintained that men were ‘sovereign over women’.³⁴

The various interpretations of the above verse in classical *tafsir* (interpretation) treatises played a significant role in shaping the view of gender roles in the Islamic legal tradition. It is important to note that the term *qiwamah* itself appears nowhere in the *Quran* but is derived by jurists within the

³⁰ M Al-Muqrin, ‘Al-Qiwāmah al-zawjiyyah: asbaabuha, ḍawabituha, muqtaḍāhā’, *Majalat al-adl* (Shawal 1427, 23) 12-13.

³¹ *Holy Quran* 4:23.

³² Mir-Hosseini, Al-Sharmani and Rumminger (n 1) 17.

³³ Al-Zamakhsharī, *al-Kashshāf ‘an Ḥaqā’iq Jawāmid al-Tanzīl* (al-Bābī al-Ḥalabī 1948) vol 1, 394.

³⁴ Al-Bayḍawī, *Anwār al-Tanzīl* (1968) vol 1, 217.

tradition from the adjective *qawwamun*, and made into a general guiding principle of gender inequality.³⁵ The term *qiwamah* comes from the root (q-w-m), which, in its basic form, means to stand up or be erect.³⁶ A related connotation pertains to being straight, and to having a solid, strong stature. Importantly, the root has two connotations that appear as far as possible from the idea of superiority: *qiyam* is to serve, to diligently ensure that a person's needs are met. On the other hand, to be *qayyim* is also to act fairly and to ensure that justice prevails in one's relations with others.³⁷ Other meanings include 'comply, proceed, provide for, revolt, endure, lift up'.³⁸

One trend in exegesis saw this idea of *qiwamah* as an indication of male intellectual superiority and domination over women. In *Aḥkam al-Qur'an*, al-Jaṣṣaṣ argued that, since men are deemed superior to women by divine decree, it would follow that men must be in charge and, consequently, women must follow them. Another consequence that follows from this presumption of superiority, which is particularly important for our purposes, is the fact that a male guardian will have the right to restrict a woman's freedom of movement within the confines of the divine law. In other words, a woman's movement outside the household becomes subject to a man's will. In return, a husband is expected to be responsible for sustenance to maintain this set of privileges.³⁹ This interpretation which assumes a clear superiority of men over women, however, was not unanimously accepted by Muslim scholars, and many alternative understandings were put forward. For example, it is often argued that 'preference' here is only a matter that follows from financial control and responsibility alone, and does not inhere in the gender itself. For instance, Abu Zaid argued that '[God] granted men more than women because they bear primary [financial] responsibility ... Men carry [greater] burdens in the degree of strength or in the measure of aspiration.'⁴⁰ Similarly, some scholars argued that: 'God singled out men for fortitude, and then commensurately increased their burden, for the burden is in accordance with the strength'.⁴¹ Accordingly, *qiwamah* was seen in this context to primarily result in responsibility rather than authority.

The interpretation reading of this verse, however, is not in any way the only available reading. In fact, as Omaima Abou-Bakr argues, the emergence of this particular reading as 'an independent and separate (trans-contextual) patriarchal construct' was part of a long history of interpretation that

³⁵ Mir-Hosseini, Al-Sharmani and Rumminger (n 1) 17.

³⁶ Muhammad Ibn-Mukarram Ibn-Manzur, *Lisan al-'Arab* (Dar al-Ma'arif 1982) 3781.

³⁷ *ibid* 3782.

³⁸ Mir-Hosseini, Al-Sharmani and Rumminger (n 1) 17.

³⁹ Al-Jassass, *Aḥkam al-Qur'an* (Beirut 1415) vol 2, 236.

⁴⁰ Mohammed Abu Zaid, *Legal Study of the Status of Women in Islam* (1st edn, Matbaeat Alaashri 2013) 196.

⁴¹ *Ibid* 197.

witnessed many transformations and evolutions.⁴² Another way of understanding this verse would consist in looking at the circumstances in which it was revealed. In his *Asbab al-Nuzūl*, al-Wahīdī related that:

This verse (Men are in charge of women ...) was revealed about Sa'd ibn al-Rabi', who was one of the leaders of the Helpers (*nuqaba'*), and his wife Habibah bint Zayd ibn Abi Zuhayr, both of whom were from the Helpers. It happened that Sa'd hit his wife on the face because she rebelled against him. Then her father went with her to see the Prophet, Allah bless him and give him peace. He said to him: 'I gave him my daughter in marriage and he slapped her'. The Prophet, Allah bless him and give him peace, said: 'Let her have retaliation against her husband'. As she was leaving with her father to execute retaliation, the Prophet, Allah bless him and give him peace, called them and said: 'Come back; Gabriel has come to me', and Allah, exalted is He, revealed this verse. The Messenger of Allah, Allah bless him and give him peace, said: 'We wanted something while Allah wanted something else, and that which Allah wants is good'. Retaliation was then suspended.⁴³

The circumstances of revelation of this verse, as related by al-Wahidi, illustrate the relatively egalitarian ethic that the Prophet sought to introduce into the fledgling Muslim community of Mecca. When taken into account, this historical context makes it much harder to argue that the verse establishes a clear hierarchy among genders. Based on this background, we can argue that the default position of revealed law was that of equality, which conflicted with the societal norms of that historical period. Besides historicisation through reference to the context of revelation, some contemporary scholars have also argued for the interpretation of this verse within the context of the Islamic principle of equality among all believers by reference to the degree of obedience to God (*taqwa*).⁴⁴

In this section, there is a range of possible interpretations of this verse, depending on the methodological stance of the exegete. In general, two dominant trends in the classical *tafsir* tradition can be observed, namely interpretation by prevalent traditions (*ma'thur*), and interpretation according to individual opinion (*ra'y*). Those variations in method, Abou-Bakr observed, generated divergent interpretations, and yet a strong patriarchal undercurrent remains dominant across theological and methodological affiliations.⁴⁵ As Abou-Bakr explains, the patriarchal tendency in interpretation emerged as an independent guiding principle, thus driving the concept of *qiwamah* from the descriptive to the normative, and from responsibility to authority. In other words, what was

⁴² Omaima Abou-Bakr, 'The Interpretive Legacy of *Qiwamah* as an Exegetical Construct' in Mir-Hosseini, Al-Sharmani and Rumminger (n 1) 44, 45.

⁴³ Ali Al-Wahidi, *Asbāb al-Nuzūl* (Mokrane Guezou trans, Royal Aal al-Bayt Institute for Islamic Thought 2009).

⁴⁴ Wadud (n 6).

⁴⁵ Abou-Bakr (n 47) 44, 45.

initially seen as a mere statement of fact (men tend to provide for women *as a social reality*), came to be seen in the tradition as a sweeping normative preference of men over women.⁴⁶ Interestingly, opposition to this standard patriarchal position can be found in the writings of some *Ash'ari* exegetes, such as Fakhr al-Din al-Razi.⁴⁷ While works within the classical *Ash'ari* school of theology are often overlooked by modern reformists for its perceived traditionalist tendencies, it may be necessary to explore the non-conformist work of later theologians such as al-Razi as examples of attempts to find egalitarianism within the Quranic interpretive tradition.

4.4.2 Obligations stemming from *qiwamah*

The *qiwamah* status was seen to entail several reciprocal obligations between spouses. The most important obligations following from *qiwamah* are the wife's duty of obedience to the husband and to remain within the family home.⁴⁸ Other obligations that form the marital status itself include mutual sexual availability and the prohibition to allow anyone in the house without the husband's permission. Most scholars maintain that *qiwamah* entails an obligation for the wife to obey the husband to the extent that such obedience does not conflict with divine injunctions.⁴⁹ Following the husband's wishes within the confines of the divine law is seen by many as integral to the very concept of *qawamah*. *Qiwamah*, however, does not extend to the wife's financial matters. The right to manage one's finances and wealth autonomously extends to any legally capable person regardless of gender. If she is incapacitated or is a minor then that right transfers to her natural guardian (*wali*) who may be her father, grandfather or son, which is the same for a minor or otherwise incapacitated male.⁵⁰

Residence in the marital home is an obligation that follows from the concept of *qiwamah*, this is considered religious and family matter more than a legal one. A woman should not leave her home without permission from her guardian (*waliyy*), and if she is married, from her husband as *qayyim*. For that, the prohibition from leaving the marital home without the husband's permission is one of the women religious duties on movement that scholars have argued follows from *qiwamah*.⁵¹ The prohibition from leaving the marital home without the husband's permission is one of the most significant restrictions on movement that scholars have argued follows from *qiwamah*. Coupled with the limitations on movement without a *mahram* described above, this obligation reinforces the view that women are expected to remain primarily within their restricted private spheres. The only

⁴⁶ *ibid* 46.

⁴⁷ Al-Rāzī, *al-Tafsīr al-Kabīr* (al-Maṭba'a al-Bahiyya) vol 10, 87.

⁴⁸ M Al-Saleh, *Fiqh ul –Ussrah 'inda al-imam sheikh il-Islam Ibn Al-Taimiyya* (1st edn, 1996) vol 2, 602.

⁴⁹ *ibid*.

⁵⁰ *ibid*.

⁵¹ Case no 3/334 2007, Ministry of Justice, *Mudawanat al-Ahkam alQada'iyya*, 1st issue, 284-6.

exception to this rule pertains to cases in which the wife leaves the marital home to procure necessities, such as food and essential supplies, when there is no one else available to do this for her, or when visiting either of her parents when they are sick. In such limited cases, she may leave the marital home without obtaining her husband's approval.⁵²

This obligation was detailed by al-Suyuti in the following terms: 'It is prohibited for [the wife] to leave without her husband's permission, except in case of necessity, such as obtaining food, in the absence of one who can get that for her.'⁵³

Al-Suyuti further relates a prophetic tradition that indicates the narrow interpretation of those exceptions: in the case of the death of a parent the wife was initially not allowed to attend the funeral but then was deemed 'forgiven' for it. Visiting her living parents is acknowledged as an obligatory 'maintenance of the ties of kinship' (*silat al-rahim*), and therefore constitutes a small exception to the rule. The exception applies in more limited terms to relatives other than the parents. The obligation is strengthened in case of illness of that relative because of the obligation to assist others in sickness. The most obvious example would be that of her mother or father becoming sick so that she would have a clear obligation to visit them.

While the wife's right to visit her sick parents applies even in the absence of consent from the husband and constitutes an exception to the general restriction on her movement, it is still seen as a narrowly defined exception rather than an intrinsic right. This can be seen in the tradition related by Suyūṭī in which a woman could attend her parents' funeral: 'Then Allah revealed to his Messenger that "I have forgiven her due to her obedience to her husband".'⁵⁴ It follows from this prohibition that the husband can prevent his wife from travelling and going out to work.⁵⁵ On the other hand, a man's *qiwamah* entails an obligation to provide financial support for his household within his means.⁵⁶ Women, by contrast, have full control of their wealth and do not have any obligation to provide financial support.⁵⁷

⁵² Gandour, 'Al-Ahwaal al-Shakhsiya fi al-tashri' al-Islami' ma bayan qanoon al-ahwaal al-shakhsiyya lilQada fi mahakim alKuwait' (2001) 271-2.

⁵³ *ibid.*

⁵⁴ *ibid.*

⁵⁵ Saleh (n 53) 600.

⁵⁶ M Al-Muqrin, 'Al-Qiwamah al-zawjiyyah: asbaabuha, dawabituha, muqtaḍāhā', *Majalat al-adl*, (Shawal 1427, 23) 12-13.

⁵⁷ The following Quranic verses are the basis of the obligation to offer financial support within the framework of *qiwamah*: 'and live with them honourably' [al-Nisa' 4:19]; '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-Talaaq 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].

4.4.3 The concept of *wilayah* and its implications

We have so far seen that the limitations on women's movement and overall circulation within the public spheres of labour and education can be traced back to a specific interpretation of the concept of *qiwamah*, largely seen to be derived from verse 4:23. This interpretation took the idea that men are meant to 'support' (*qawwamun*) women, which entailed a sense of clear superiority. Coupled with the prohibitions on seclusion with a non-related male and inter-mixing of genders, this perceived male superiority translated into an overall limitation on women's right to travel and function in the public domain, and granted male relatives (*maharim*) an excessive authority over women outside of the household.⁵⁸ The second aspect of male authority over women's right of movement can be seen to emerge from the closely related concept of guardianship (*wilayah*), which will be discussed in the present section. However, as will be seen in this section, the Quranic concept of *wilayah* offers broad opportunities for reconceptualisation, especially by focusing on the idea of *wilayah* as 'shared responsibility', which emerges clearly from some Quranic provisions.

4.5 Overview of the concept: Etymology and background

Wilayah, etymologically, stems from the root (w-l-a) which, according to Ibn Manzūr, denotes power (*qudra*), management (*tadbir*) and agency (*fi'l*). From the same root is derived the word *waliyy*, which is one of God's names, indicating God's sovereignty over the world. The etymological range that this root offers, it must be noted, varies between notions of authority and indications of support and solidarity. All the believers, for instance, are deemed to be mutual *waliyy*s (ie *awliya'*), meaning that they come to each other's support and defence (*nusra*). In this linguistic discussion, the meaning of *wilayah* with regard to gender relations is limited to representation for the formation of the marriage contract. Ibn Manzūr does not present *wilayah* as the exercise of authority of men over women but only as an act of representation aimed to ensure the validity of the marriage contract.⁵⁹ The same sense of solidarity and closeness is conveyed by Tahanawī in his *Kashshaf*. *Waliyy*, Tahanawī explains, comes from the verb *yali* which means to follow or be close to someone. In that sense, the political ruler is a *waliyy* because of the close attention the ruler ought to pay to furthering the community's interests. Another meaning of *waliyy* that Tahanawī mentions comes from the Sufi practice of referring to devout persons as *awliya'*.⁶⁰ The sense of solidarity and mutual cooperation is strong in the etymological origins of the word, yet becomes marginal in the tradition of legal interpretation. As will be shown, the *Quran* suggests that *wilayah* was intended in the sense of cooperation among

⁵⁸ Mir-Hosseini, Al-Sharmani and Rumminger (n 1) 17.

⁵⁹ Muhammad Ibn-Mukarram Ibn-Manzur, *Lisan al-'Arab* (Dar al-Ma'arif 1982) 4920, 21.

⁶⁰ A Muhammad 'lia ibn Alī Tahānawī, *Kitāb Kashshāf iṣṭilāḥāt al-funūn* (Dar Sadir 1980) vol 3, 1538.

genders. With the noteworthy exception of Ibn Kathīr, this conclusion seems to be lost on most classical interpreters.⁶¹

The meaning of *wilayah* that will concern us here is the authority to represent another in matters of law. Legally, *wilayah* means the power to represent another person in the performance of legally binding actions, which often applies to women and minors. *Wilayah*, in the sense of representation, is divided into general *wilayah*, which is linked to public interests (such as the governance of the ruler over the state), and private *wilayah*, which is linked to a particular individual's affairs, which are handled by a *waliyy* (agent).

When one is said to have *wilayah* over oneself, this is taken to indicate autonomy or the lack of dependence over another in the legal sense. Having *wilayah* over another person, by contrast, indicates the exercise of legal authority on behalf of that person, which is a form of legal guardianship. Private guardianship is a power granted by law to a specific person to protect or oversee the legal affairs of another.⁶² It is also defined as a power that grants the guardian the ability to conclude valid legal actions and contracts on behalf of the individual under their guardianship.⁶³

Private guardianship can be exercised over a person or over property. When exercised over a person, it can consist of a broad authority, in addition to an obligation to act in a manner that protects the well-being of this person, such as in the case of a minor. The guardian of a minor involves ensuring that the minor's growth and protection are ensured in a reasonable manner by the custodian. Another type of guardianship consists of representing another person in conducting a specific act, such as the conclusion of the marriage contract on behalf of an adult female by a designated male relative.

Both types of guardianship entail specific types of assistance that consider the beneficiaries' specific social circumstances. Custody in the case of a minor is granted to the parents, followed by grandparents according to a specific order of priority. In both the *Sunan* of Abu Dawud and the *Musnad* of Imam Ahmad, a prophetic tradition is related in which the Prophet (Peace be upon him) granted custody to a divorced mother who had not remarried. In Saudi Arabia, when a boy reaches the age of seven, he is given the choice between living with his mother or father. According to a *fatwa* of the General Presidency of Scholarly Research and *Ifta*, a girl should live with her father when she reaches the same age⁶⁴ but custody can remain with the mother if this is the girl's will. Saudi courts

⁶¹ *Tafsīr Ibn Kathīr* (2003) vol 2, 350.

⁶² Nadir Ahmad Al-Nasahawi, *Mauqif al-Shariah min tawalli almara' li-'aqd al-nikah* [Shariah Position Regarding a Woman Conducting Marriage Ceremonies], Al-Daar al-Arabiyyah linashr, 12.

⁶³ AF Hussain, 'AlWilaya 'ala annafs [Guardianship over persons]' 4.

⁶⁴ *Fatwa* No 14806. The General Presidency of Islamic Research and *Ifta*, *Fatwas* of the Permanent Committee for Scholarly Research and *Ifta*.

have decreed that the girl should remain with the mother in some cases if the mother has not remarried.⁶⁵ For instance, it was decreed that, in the case of an eleven-year-old daughter of divorced parents who had not remarried, the girl can choose to remain with her mother if she deems that in her best interest.

For our purposes, we must note that custody rules do not necessarily coincide with the rules granting guardianship over the well-being of a minor. While custody can be granted to either parent according to the considerations set out above, guardianship (*wilayah*) generally follows a scheme of blood-relation that grants preference to male relatives (*asabah*). This hierarchy is set out in the following order: (1) the ascendants of the paternal line, ie the father, paternal grandfather and so on, are given the first order of priority; (2) male descendants (ie sons, grandsons, etc) are given second order; (3) paternal consanguine brothers and their sons are in the third position; (4) finally, paternal uncles and the consanguine paternal uncle and the sons of each of these etc.

As we can see, the association of *wilayah* with *asabah* reinforces the principle of male authority that has been examined throughout this chapter. The foregoing is the set of paternal lines in the *Hanbali* school of law but there is an internal difference of opinion regarding the exact position of each category. Most scholars of Islamic Shariah, nonetheless, view guardianship as being specific to the *asabah* and not the maternal kin.⁶⁶ The principle of male priority in the exercise of *wilayah* (ie the principle of *asabah*) was also asserted in classical works across various schools. The prominent Maliki scholar Abu Walid b Rushd, in *Bidayat al-Mujtahid wa-Nihayat al-Muqtasid*, related that, generally speaking, scholars of various schools agree that a guardian (*waliyy*) must be a pubescent Muslim male. Adulthood was generally disputed as a condition since a non-adult pubescent can exercise guardianship over property. There have also been disagreements on whether good character (*adalah*) must be considered in designating a guardian. In all cases, blood-based guardianship (*wilayat al-nasab*) was seen to strictly follow the principle of the closer male relative (*tasib*). The same principles applied when it came to the designation of the male guardian for the conclusion of marriage.⁶⁷

While male predominance was the central feature of the legal tradition in its engagement with the idea of *wilaya*, the Quranic text is replete with opportunities to see the idea of *wilaya* in a more egalitarian light. As explained by Asma Lamrabet:

... some 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

⁶⁵ Case No 16/41 2005, [23/2/1426] General Court of Riyadh, Saudi Arabia.

⁶⁶ Ibn Al-Qudāmah (n 8) vol 3, 98.

⁶⁷ Ibn Rushd, *Bidāyat al-Mujtahid wa-Nihāyat al-Muqtaṣid* (Majid Hamawi (ed), Dar ibn al-Hazm 1995).

favour of other verses that are more difficult to interpret or whose application was contingent on the time of revelation.⁶⁸

Lamrabet provides verse 9:71 of the *Holy Quran*, 'the believers, men and women, are *awliya*' (allies) of one another' as one significant example. While this verse shows that the intention of *wilayah* in the Quranic text was primarily to encourage mutual solidarity among genders and different social categories, the concept was taken by the male-dominated legal tradition to indicate a purely patriarchal sense of male guardianship.⁶⁹ Rather than male authority, Lamrabet calls for an understanding of *wilayah* as a principle of 'shared responsibility'.⁷⁰

4.5.1 Guardianship in marriage

The most significant representation of male *wilayah* over women can be found in the need for a male representative of the bride for the proper conclusion of a marriage contract. Women cannot marry themselves lawfully without a guardian (*wali*). This can be found in both the classical Islamic *fiqh* tradition and Saudi laws. According to Article 32-E of the Saudi Law of Procedures before the Shari'ah Courts: 'Without prejudice to the provisions of the Grievance Board law: General Courts have the authority to conclude marriage contracts on behalf of women who have no guardians.'⁷¹

Most Muslim scholars hold that a woman cannot represent herself or, *a fortiori*, another person in the conclusion of a marriage contract. In other words, a woman cannot be her own *waliyy* or enjoy autonomy in entering a marriage relationship. A noteworthy exception to this is the position of the *Hanafi* school. Imam Abu Hanifa and his disciple Abu Yusuf, generally regarded as a major authority in *Hanafi* legal thought, both held that a sane adult woman can enter into a marriage contract without representation and can represent another in the conclusion of their marriage contract.⁷² Al-Saghirji explains that, concerning a woman's right to act as her own *waliyy*, it is the *Hanafi* position that the expression used by a woman is to be given meaning in the formation of a contract. If a free, discerning, adult woman marries herself or marries another through guardianship (*wilayah*) or as an agent, or appoints another to marry her, all those acts are deemed valid. That is the saying of the two sheikhs

⁶⁸ Asma Lamrabet, 'An Egalitarian Reading of the Concepts of Khilafah, Wilayah, and Qiwamah' in Mir-Hosseini, Al-Sharmani and Rumminger (n 1) 71.

⁶⁹ *ibid.*

⁷⁰ *ibid* 74.

⁷¹ Saudi Law of Procedures Before Shariah Courts, Royal Decree No M/21/20 (19 August 2000).

⁷² Al-Saghirji, *Al-Fiqh al-Hanafi wa adillatu* (Pakistan, 2000) vol 2, 140.

Abu Hanifa and Abu Yusuf, as well as Zufar and Hasan b Ziyad.⁷³ As Hallaq explains, this puts the *Hanafis* at odds with the majority of the jurists.⁷⁴

The *Maliki*, *Shafi* and *Hanbali* schools, by contrast, have taken the position that marriage is not valid if concluded by an adult, discerning woman as her own or another person's agent. In this regard, Saudi law follows the majority opinion of classical Islamic scholars. A woman can neither marry herself nor be a guardian or agent in marrying another according to Saudi scholars. They base this on the *hadith* related in al-Bayhaqi : 'There is no marriage except in the presence of a *waliyy* and two just witnesses' and 'any woman who marries without the permission of her *waliyy* then her marriage is void'.⁷⁵

Ibn Qudamah, in his authoritative compendium on *Hanbali* law, *al-Mughni*, held that:

[M]arriage cannot be performed without the presence of two Muslim witnesses, whether the couple are both Muslims, or only the husband is Muslim. This was stated by Ahmad [Ibn Hanbal], and it is the view of al-Shafi'i, because the Prophet (Peace be upon him) said: 'There is no marriage except with a *waliyy* and two witnesses of good character'.⁷⁶

In this regard, Saudi law follows the consensus of Islamic scholars. A woman can neither marry herself nor be a guardian or agent in marrying another according to Saudi scholars. In the case of a woman whose primary *waliyy* (father or grandfather) is absent, *wilayah* is transferred to the judge or local authority. In that case, she does not need to wait for her natural guardian to return to conclude the marriage. Nor does this situation confer the power to that authority to force her to marry. It is her absolute right to seek the return of her natural *waliyy* for consultation if she so wishes, unless she is happy to allow the local authority to take charge of her *wilayah* in marriage.⁷⁷

While *wilaya* is largely established within the legal tradition as a guiding principle in the conclusion of marriage that reflects male authority over women, it is not in any way the only or even main principle that describes the marriage relation in the Quranic and prophetic traditions. The Quranic 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 *Quran*. The domination of *qiwamah* and *wilayah* as the primary guiding principles of gender relations in Islam is, therefore, far from unquestionable. It is important to note that the legal tradition constructed through

⁷³ *ibid.*

⁷⁴ Wael B Hallaq, *Shari'a: Theory, Practice, Transformations* (Cambridge University Press 2009) 274.

⁷⁵ Sunan Abu-Dawud, Book 11 Book 11, Number 2080.

⁷⁶ Ibn Al-Qudāmah (n 8) vol 3, 98.

⁷⁷ *ibid* vol 2, 122.

the classical schools of law (*madhahib*) chose to articulate gender roles in a patriarchal manner. A choice that does not in any inevitable way follow from the spirit of the Prophet's message and the text of the *Quran*. As some scholars argue:

The concepts of *Qiwamah* and *wilayah* have mistakenly been understood as placing women under men's authority, with the result that they have become the building blocks of patriarchy within Muslim legal tradition. Those who seek to establish an egalitarian construction of gender rights in Muslim contexts must rethink and reconstruct these concepts and the readings of Islam's sacred texts on which they are based.⁷⁸

4.5.2 Guardianship and the need for consent

As has been indicated, the generally accepted prohibition on women to conclude their own marriage contracts is a major manifestation of male authority over women. The question arises, however, whether this authority can go as far as forcibly marrying a woman without her consent. The power of the legal guardian to impose a marriage contract by their sole will without the minor's approval is a matter that has raised much controversy, yet there is evidence against it in the prophetic tradition. For example, it was narrated by Khansa bint Khidam Al-Ansariyya that: 'her father gave her in marriage when she was a matron and she disliked that marriage. So, she went to Allah's Apostle and he declared that marriage invalid'.⁷⁹ Similarly, it was related by Abdur-Rahman bin Yazid and Majammi bin Yazid that: 'If you fear that you shall not be able to deal justly with the orphan girls then marry (other) women of your choice.'

And if somebody says to the guardian (of a woman):

'Marry me to so-and-so', and the guardian remained silent or said to him, 'What have you got?' And the other said, 'I have so much and so much (i.e. dowry or mahr)', or kept quiet, and then the guardian said, 'I have married her to you', then the marriage is valid (legal).

This narration was told by Sahl on the authority of the Prophet.⁸⁰ Another widely cited prophetic tradition enjoins Muslims to 'ask permission from the orphan girl (*yatima*) with regard to herself. If she is silent then she has consented, but if she refuses her guardian has no authority against her'.⁸¹

In addition to the above sources, this right is not sanctioned by any Quranic text. Even though nothing in the textual sources of Islamic Shariah grants the guardian the right to forcibly conclude a marriage

⁷⁸ Mir-Hosseini, Al-Sharmani and Rumminger (n 1) 17.

⁷⁹ Sahih Al Bukhari, vol 7, Book 62, 69.

⁸⁰ Sahih Al Bukhari, vol 7, Book 62, 70.

⁸¹ Abū Dawūd, *Kitāb al-Sunan* (Mu'sassasat al-Rayyan 1998) vol 3, 25.

contract without the principal's approval, most classical Islamic scholars generally maintain that guardianship with the right of compulsion (*wilayat ul-ijbar*) is applicable to anyone who needs marriage and is unable to choose a suitable spouse, whether that person is a male or female minor. Once the minor reaches the age of discernment, then the *wilayat al-ijbar* is terminated.⁸² It is also generally agreed that the *wilayat ul-ijbar* is the right of the father. The same principles that apply to minors are also applicable to adults who are non-discerning due to mental illness.

In *al-Mughni*, Ibn Qudamah held that:

The *fuqaha* are unanimous that the father has the right to compel his minor daughter to marry without her permission if the husband is suitable and she is yet to reach nine years of age. If she has reached nine years then there is no *wilayat ul-ijbar* and the father must seek her permission.⁸³

In reality, Ibn Qudamah was misrepresenting a characteristic *Hanbali* position as the opinion of the majority. As Wael Hallaq points out, the extensive rights given to the father to marry off his daughter were mainly held by the *Hanbalis* but not other schools.⁸⁴ Thus, the authority to forcibly conclude marriage regardless of a woman's will has been rejected by the majority of the Islamic schools of law. As well as not accepted in Saudi Arabia courts. Even where accepted, this authority was often limited to the previously married ward, and restricted by extensive conditions where it related to the virgin daughter.⁸⁵ Ghandour elaborates the conditions for *wilayat ul-ijbar* as follows: 'The husband must be a suitable and "equal" (*kuf*), the marriage must not cause her any harm, and must be in her best interests, that the father must not be oppressive to his daughter and there should not be any enmity between them.'⁸⁶ These conditions, while they restrict the male guardian's authority, maintain nonetheless the right in theory to marry a female without her consent. The practice of *wilayat ul-ijbar*, as can be seen, seems to clearly go against the Prophet's tradition. While the *hadiths* cited above may suggest that the guardian can disregard the woman's tacit rejection in the case of silence, arguing for the lawfulness of disregarding the woman's will altogether is a dubious interpretation at best.⁸⁷

Ibn Hazm of the *Zahiri* school, by contrast maintained that: 'It is prohibited for a pre-pubescent female to be married. It is furthermore prohibited for a father to marry his minor female until such a time

⁸² By contrast, Professor Awfi of the Islamic University of Medina says that 'a condition in a woman's marriage is her acceptance and her *waliyy's* acceptance. Awfi, *Alwilayah fi-Al-nikah*, vol 1 (2002) 67.

⁸³ Ibn Al-Qudāmah (n 8) vol 3, 98.

⁸⁴ Hallaq (n 79) 274.

⁸⁵ *ibid* 275.

⁸⁶ Ghandour (n 57) 162, 164.

⁸⁷ Ayesha S Chaudhury, 'Producing Gender-Egalitarian Islamic Shariah: A Case Study of Guardianship (Wilayah) in Prophetic Practice' in Mir-Hosseini, Al-Sharmani and Rumminger (n 1) 98, 99.

that she reaches majority and agrees to marriage'.⁸⁸ Along the same lines, Imam Al-Shawkani held that: 'the guardian has no right to force marriage upon his daughter'.⁸⁹

The above indicates that classical Islamic scholars differed on the availability and extent of the right of guardianship to grant authority to force a minor into marriage but the vast majority were against such authority. In the modern Saudi context, where this right is acknowledged, scholars also disagree on the *extent* to which this right is applicable. For instance, while they generally agree that a guardian must be present for the marriage to be concluded, there is a difference of opinion among scholars and the Saudi General Presidency of Scholarly Research and *Ifta* on whether the agreement of a guardian applies to the minor as well as to adult women.⁹⁰

Much attention has been given to the need for legislation that prevents abuse of the power of a guardian to conclude a marriage without the principal's consent, and to set a minimum age for marriage. These questions have led to numerous discussions, including opinion pieces, one of which argued that:

[T]he correct understanding from the sayings of the scholars..., is that the [authority to conclude marriage on behalf] of children, whether male or female, is to be until they reach the age of puberty. When they reach that age, they are to be given the choice as to whether to marry or not. When a girl reaches puberty, her opinion is to be sought, according to the prophetic hadith, "A maiden's instruction is to be sought and a virgin's permission is to be sought ... it is necessary that these incorrect forms of marriage be stopped from taking place in the kingdom of Saudi Arabia."⁹¹

Some legal experts, such as the Minister of Justice Dr Abdullah Al-al-Shaykh, said that the right of a guardian in respect of his minor must be restricted and that this is permissible under *Shariah* and under the Islamic legal maxim of repelling harm. According to Al-al-Shaykh: 'In the event of a minor being married, then such a minor has the legal right to either continue the marriage or end it, upon the minor's reaching majority. Furthermore, the minor who reaches majority will have the right to annul his or her marriage upon.'⁹² The view against marrying off minors against their will is also attributable to al-Shafi'i, who held that: 'It is not permissible for the father or grandfather to marry

⁸⁸ Ibn Hazm, *AlMuhalla bil-athaar, kitaab al-nikah*, vol 5 (Matter No 1826).

⁸⁹ Imam Al-Shawkani, *Fath alQadeer* vol 6, 475.

⁹⁰ Abdul-Qadir Zubair, *Wilayat Al-ijbar [Coercive Guardianship in Islamic Marriage]* (Islamic International Contact 1992).

⁹¹ al-Nujaymi, *al-Watan* (Saudi Arabia, 2008).

⁹² *ibid.*

her off until she reaches puberty and her opinion is sought, so that he does not place her in the bond of marriage while she dislikes that.’⁹³

4.6 Conclusion

In this chapter, the main conceptual foundations of the unequal treatment of genders as found in the classical religious and an exegetical tradition was examined.⁹⁴ The ideas that men exercise both *qiwamah* and *wilayah* over women have profound and long-standing support in legal discourse as well as in the tradition of narration and interpretation of Quranic and prophetic texts. However, as we have seen, the emergence of these two concepts as foundational for the overall subordination of women to and their reliance on men in the public domain is deeply historically specific and highly questionable. Drawing upon a long tradition of scholars writing and efforts, this chapter highlighted the ways in which those provisions could be re-read to accommodate a more egalitarian understanding of the relation between men and women in Islam. First, it is important to ask why these two ideas emerged as the guiding principles for gender relations in the legal tradition, even though the Quranic and prophetic corpus contains a wide range of principles and injunctions that transcend these two ideas, such as mercy (*rahmah*) and solidarity (*ta’awun*). Second, one should ask why the context of revelation and other possibilities of interpretation were not accounted for in the dominant approach to those ideas. As has been shown, alternative and very compelling interpretations would see *qiwamah* as a statement of socio-historical fact rather than an overarching legal principle or norm, and it is possible to see *wilayah* as a concept that pertains primarily to mutual solidarity among various social groups rather than the domination of one over the other. Finally, one is justified in asking why the general prophetic principle of equality (ie ‘there is no preference of one over the other except in relation to obedience [of God]’) has historically been excluded from discussion of male authority over women.

⁹³ Sayyid Sabiq, *Fiqh us-Sunnah* (1992) vol 2, Al-Shafi’i, 116.

⁹⁴ However, this view is contrasted by the opinion of the scholar Al-Munajjad who holds that there is no minimum age in marriage: ‘It is permissible to marry an orphan girl, who is one who has not yet reached the age of puberty; her maximum age is fifteen years according to the more correct opinion, although she may reach puberty before that. The Prophet (blessings and peace of Allah be upon him) said: “The orphan girl should be asked for permission with regard to her marriage; if she remains silent, that is her permission, but if she refuses then it is not permissible to force her into marriage.” The Prophet (blessings and peace of Allah be upon him) married ‘Aa’ishah (may Allah be pleased with her) when she was six or seven years old and consummated the marriage with her when she was nine, and his actions are legislation for this ummah. The Sahaabah (may Allah be pleased with them) also married women when they were minors and when they were adults, without specifying any particular age. No one has the right to introduce laws other than those which were prescribed by Allah and His Messenger, or to change the laws that were prescribed by Allah and His Messenger, because those laws are sufficient. Whoever thinks otherwise has wronged himself and has introduced laws for the people for which Allah has not given permission.’ Munajjed, *Fatwa* No 177280 Ruling on setting a particular age for marriage.

It can be concluded, therefore, that there is a wide range of interpretive opportunities that would allow us to advance an egalitarian view of gender relations within the confines of the Islamic legal tradition. These ideas will be returned to again in chapter 7 where there will be an attempt to understand the relationship between authority, custom and religious law in justifying restrictions on women's liberties.

The next section of the thesis will build on the theoretical framework developed in preceding chapters. Specifically, it will offer a substantive analysis of three rights, and will do so by considering their application from the perspective of the three distinct legal orders discussed above – Saudi Arabia's domestic legal order; the international human rights law protection and Islamic *Shariah* law. While each will be examined separately within each chapter, the objective of the foregoing analysis is to bridge the gap between them to develop the meaningful realisation of women's rights in Saudi Arabia.

Chapter Five: The Impact of Male Guardianship Consent and its Reforms on the Right to Education for Women in Saudi Arabia

5.1 Introduction

Saudi Arabia has publicly committed itself to transforming the scope of education in its Vision 2030 and National Transformational Program (NTP).¹ The aim of this reform agenda is to transition the Saudi economy away from reliance on oil revenue to a more balanced, investment-based model that aims to attract and retain national and international talent.² The NTP emphasises the need for improvements in recruitment, training and development of teachers, learning environments, curricula and teaching methods, and students' values and core skills, amongst other strategic objectives.³ The onus for securing delivery of this plan is on the Ministry of Education, since it places education as the fundamental building block of Vision 2030 as a whole.⁴

This chapter assesses the impact of male guardianship consent on the right to education in light of the most recent guardianship reforms. In a significant development, the new guardianship laws no longer restrict women's work to fields 'suitable to their nature'.⁵ Moreover, the Supreme Order is expected to bring a positive change to women's right to education by removing the previous requirement of guardianship approval and consent. In addition to assessing the recognition of the right, and access, to education for women in Saudi Arabia under the relevant legal frameworks – international law, *Shariah* law and domestic law. Also, this chapter assesses the socio-economic need for a more inclusive education policy in the context of Saudi Arabia's transforming society. Currently, Saudi Arabia is a society in flux, undergoing reforms dictated by its changing socio-economic context. It is within this context that the new reforms should be assessed, alongside broader economic reforms and legislative changes.⁶

¹ 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>> accessed 13 December 2017.

² *ibid.*

³ *ibid.*

⁴ *ibid.*

⁵ Supreme Order No. 33322 (2017), by which, among other things, all government entities are instructed to refrain from requiring a woman to obtain a male guardian's permission in order to have access to services and procedures, except where justified by law. See Committee on the Elimination of All Forms of Discrimination Against Women, 'Concluding Observations on the Combined Third and Fourth Periodic Reports of Saudi Arabia' (9 March 2018) C/SAU/CO/3-4, 2.

⁶ Ministry of Education, 'Week On Empowering Women' (2018) <<http://www.alriyadh.com/1609772>> accessed 13 December 2017.

This chapter begins with a general discussion on the public education system in Saudi Arabia and gradually lead up to specific debates in the field of education for women and male guardianship consent. A crucial component of gender equality is equal access to education for women and girls, and several studies have demonstrated the links between socio-economic development and the access to equal opportunities including equal participation in and access to education. While access to education for girls and women at all levels of education has increased in Saudi Arabia, the opportunities gained through education available and free of charge for both genders.⁷ in addition, The chapter aims to show that even though the current form of male guardianship consent creates some obstacles to educational equality in the country, the Supreme Order that removed these guardianship requirements offers a credible path towards this goal. It is argued that only by giving women the same access to educational opportunities will they enjoy appropriate recognition of their academic potential and be entitled to contribute to society in a meaningful way.

5.2 The right to education under the domestic law of Saudi Arabia

Saudi Arabia has given women's rights a high degree of importance, based on the principles and provisions of Islamic *Shariah* which require the preservation of their rights and respect for their dignity and deny any injustice to them. This is reflected in the legal and institutional frameworks that guarantee the protection of women's rights, foremost of which is the Basic Law on Governance which ensures that the Kingdom's governance is based on justice and equality, and that the state protects human rights in accordance with Islamic Shariah. In particular, it requires the judiciary to form a legal framework that protects and promotes women's rights, prohibits discrimination against them and broadens the scope of services provided to them. According to Bandar Al Aiban, the President of the Human Rights Commission, the proportion of girls in general and higher education is 52%.⁸ The illiteracy rate has also been reduced through the continuation of flexible programmes such as the Illiterate Society programme, the City of Illiteracy programme, the convoys of light, the Neighborhood programme and other programmes aimed at reaching female candidates in different regions,⁹ as well as lowering the dropout rate of female students in education. In addition to free public and university education, material and moral incentives are offered, including financial rewards for male students and female students. The enrolment of girls in scientific and voluntary disciplines, especially those required by the labour market, has been expanded and the decision is adopted as a curriculum for

⁷ Amani Hamdan, 'Women and Education in Saudi Arabia: Challenges and Achievements' (2005) 6(1) International Education Journal 42, 64.

⁸ Saudi Press Agency, 'Human Rights Saudi Strategy' (Makkah, 2018) <<https://goo.gl/JQQqKX>> accessed 15 April 2018.

⁹ *ibid.*

female students in public education. Despite all this, Al Aiban concludes that the CEDAW is the most important legal basis for the promotion and protection of women's rights under international human rights law.¹⁰

5.2.1 The right to education generally

The right to education has a firm legal basis and protections in international human rights law and has been recognised in several international instruments.¹¹ As Saul points out, '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'.¹²

The 'content' of this right is contested but existing instruments strongly indicate that the right to education comprises three interlocking elements: firstly, that the right to education is guaranteed legally for all without any discrimination; secondly, that states have the obligation to protect and fulfil the right to education; and 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 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.¹³

A putative right to education cannot be considered in isolation from other related rights. Indeed, any existing or emerging right to education should be regarded as a framework right whose 'enjoyment empowers other human rights'.¹⁴ This interdependency between educational rights and related social rights was affirmed at the World Conference on Education for All in 1990 where it was explicitly stated that access to, and enjoyment of, other social and economic rights are enhanced when the state guarantees and promotes equality in the access and availability of free education for all.¹⁵ Current perspectives on education have reflected on the necessary relationship between the free provision of education and economic development; an educated populace is the hallmark of an inclusive and prosperous society founded on the principle of equal dignity and respect for all citizens. Exploring the

¹⁰ibid.

¹¹ Manisuli Ssenyonjo, *Economic, Social and Cultural Rights in International Law* (Hart 2009) 356.

¹² 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.

¹³ Ssenyonjo (n 11) 558-623; See Generally, Kenneth Roth, 'Defending Economic Social and Cultural Rights: Practical Issues Faced by an International Human Rights Organization' (2006) 26 *Human Rights Quarterly* 63, 63-73

¹⁴ Maritza Formisano Prada, *Empowering the Poor: Through Human Rights Litigation* (UNESCO 2011) 47.

¹⁵ World Conference on Education for All (Jomtien, Thailand, 5-9 March 1990). 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>> accessed 19 June 2017.

relationship between economic development, social cohesion and rights protection further, Arendse notes that the robust recognition and enforcement of education-related rights has the power to improve the life chances of vulnerable or disadvantaged individuals but has a transformative effect on the structure and institutions of a society as a whole.¹⁶

UNESCO's Global Education for All initiative has detailed, with precision, the manifold ways that diminished early-start educational opportunities can significantly impede the life opportunities of young people or further marginalise individuals who already face direct and indirect barriers to 'employment, health, and participation in the political processes that affect their lives'.¹⁷ In this way, access to education is closely-related to broader public law values. In addition to empowering individuals in aspects of public life, education is often a powerful resource for women and girls who might otherwise face social and family pressures to forgo educational opportunities to pursue work. Robust protection of educational rights and related entitlements often provides the impetus for further social reforms, encouraging citizens to seek other human rights protections, while empowering women to actively participate in public life and contribute to public and private sectors development and reform.¹⁸

It is widely recognised that there is a close relationship between the right to education and the full enjoyment of associated social and economic rights.¹⁹ Levels of poverty and social and economic discrimination are high among populations who have been systematically denied substantive guarantees to affordable higher education, including university level education. Exclusion from education may also significantly deter vulnerable or marginal communities from exercising their legal rights or from utilising public resources to further their personal development. In short, unequal access to education, and structural barriers to its full enjoyment, has the effect of solidifying power structures in society by ensuring that educational opportunities are reserved for those with an already privileged status in society. Accordingly, education plays a crucial role in the full enjoyment of socio-economic rights.²⁰

¹⁶ Lorette Arendse, 'The Obligation to Provide Free Basic Education in South Africa: An International Perspective' (2011) 14(1) Potchefstroom Electronic Law Journal 20
<<http://www.saflii.org/za/journals/PER/2011/34.html>> accessed 19 June 2017.

¹⁷ UNESCO, 'Education for All Global Monitoring Report: Reaching the Marginalised' (UNESCO, 2010) 8
<<http://unesdoc.unesco.org/images/0018/001866/186606E.pdf>> accessed 13 December 2017.

¹⁸ Arendse (n 33).

¹⁹ Committee on Economic, Social and Cultural Rights, '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.

²⁰ Sylvia 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.

The right to education itself was first recognised by Article 26 of the UDHR.²¹ Pursuant to this provision, the right to education can be broken down into its constituent elements. First, Article 26 announces a universal commitment that the right to education is ‘for everyone’.²² Second, this article provides that elementary and fundamental education must be free, and technical and vocational education must generally be available.²³ The second paragraph describes the purpose of the right to education as the ‘full development of the human personality’ which in turn strengthens ‘respect for human rights and fundamental freedoms’.²⁴ Article 26 must also be read in conjunction with Article 2 of the UDHR, which provides that ‘everyone is entitled to all the rights and freedoms set forth in this Declaration without distinction of any kind’.²⁵

The right to education was further developed by the UNESCO Convention Against Discrimination in Education (1960).²⁶ 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’.²⁷

Attracting broad-based political support, the Convention has been widely celebrated as bringing greater determinacy and clarity to the meaning and definition of the right to education as set out in the UDHR.²⁸ The ICESCR in 1966 further enhanced the right to education, devoting two articles to it (Articles 13 and 14).²⁹ Article 13 is the longest provision in the Covenant and has been deemed to be the most all-encompassing and determinate article on the right to education in international law.³⁰ Article 13(1) 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 enable all persons to participate effectively in a free society ... for the maintenance of peace.³¹

²¹ Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III) art 26.

²² *ibid.*

²³ *ibid.*

²⁴ *ibid.*

²⁵ *ibid* art 2.

²⁶ Convention against Discrimination in Education (adopted 14 December 1960, entered into force 22 May 1962) 429 UNTS 93.

²⁷ *ibid* art 4(a).

²⁸ Joel Spring, *The Universal Right to Education: Justification, Definition and Guidelines* (Lawrence Erlbaum Associates 2008) 25.

²⁹ International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) art 3.

³⁰ Pranevičienė and Pūraitė (n 32) 156.

³¹ ICESCR (n 46) art 13(1).

Going further into the ICESCR, the Convention invites states to pursue ‘every possible means’ to enhance the access to, and availability of, free secondary education.³² The Convention also provides standards by which to assess whether states have implemented the necessary provisions to ensure that costs of education are ‘substantively’ free at the point of use. State authorities are accordingly required to eliminate any additional burdens assumed by the student which may hinder the free availability of, and access to, education, for instance by providing supplementary financial support for transport, clothing, school wear, medical expenses and accommodation expenses.³³ This reflects a consensus position within the Convention that the full enjoyment of the right to education is often heavily contingent upon a pre-existing educational infrastructure.

The Committee on Economic, Social and Cultural Rights has adopted two General Comments on the right to education, namely General Comment No 11 and General Comment No 13.³⁴ In General Comment 11, the Committee notes that the right to education is better described as an umbrella or framework right which brings under its scope and protection an assemblage of intersecting economic, social and cultural rights.³⁵ 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:

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, ... promoting human rights and democracy ... 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.³⁶

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’.³⁷ Unlike other elements of the right to education, the requirement of

³² *ibid* art 13(2).

³³ Audrey Chapman and Sage Russell, *Core Obligations: Building a Framework for Economic, Social and Cultural Rights* (Hart 2002) 228.

³⁴ Committee on Economic, Social and Cultural Rights, ‘General Comment 11’ in Secretariat, ‘Compilation of General Comments and General Recommendations adopted by Human Rights Treaty Bodies’ (1999) UN Doc E/C.12/1999/4 and E/C.12/1999/10.

³⁵ *ibid*.

³⁶ *ibid*.

³⁷ *ibid*.

non-discrimination is not subject to progressive realisation and can therefore be implemented fully and immediately without being dependent on available resources.

Finally, the Committee has developed the notion of a minimum core to explain the corresponding minimum obligations which states must comply with, including by implementing positive measures to ensure that those lacking access to the enjoyment of a right are able to gain access to it. The minimum core content, as Arendse elucidates, establishes the 'floor beneath which the conduct of the state must not drop if there is to be compliance with the obligation'.³⁸ A failure to provide the minimum core obligations of a right therefore results in a breach of a particular right and national governments are thereby required to monitor education strategies to ensure that the right to education is more effective.

5.2.2 The right of women to education

A number of instruments specifically address the right of women to education. The UN General Assembly first attempted to deal with the problem of discrimination against women through the CEDAW. Firstly, this Convention acknowledges 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'.³⁹

Accordingly, this Convention calls 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'.⁴⁰

In terms of education specifically, Article 9 of this Convention calls for measures to eliminate discrimination against women in the field of education,⁴¹ and Article 10 provides that states are to implement all necessary measures to eliminate discrimination against women, thereby engendering equal rights of access and treatment for men and women.⁴² The CEDAW Committee has considered the application of economic, social and cultural rights to women and has recommended that states progress equal rights for men and women by the adoption of 'gender inclusive interpretations of treaty norms, gender sensitive implementation practices, and gender responsive remedies'.⁴³ State

³⁸ Arendse (n 33).

³⁹ Convention on the Elimination of All Forms of Discrimination Against Women (adopted 18 December 1979, entered into force 3 September 1981) art 1.

⁴⁰ *ibid* art 2.

⁴¹ *ibid* art 9.

⁴² *ibid* art 10.

⁴³ Eibe Riedel, Gilles Giacca and Christophe Golay, 'Economic, Social, and Cultural Rights: Contemporary Issues and Challenges' (Oxford University Press 2014) 139.

parties to the Convention are obligated to end discrimination against girls in education, including access to schooling, reduction of female dropout rates and programmes for girls who have left school prematurely.⁴⁴

5.2.3 Regional instruments

A number of regional instruments include provisions which impose upon states a strong duty to guarantee the right to education and other enabling rights. Protocol No 1 to the ECHR provides that 'no person shall be denied the right to education' and ensures respect for the right of parents to ensure education in conformity with their own religious and moral convictions.⁴⁵ Education is also mentioned in various articles of the European Social Charter with regard to the employment of children, vocational guidance and training for disabled persons.⁴⁶

The African Charter on the Rights and Welfare of the Child provides that every child shall have the right to education.⁴⁷ The Preamble makes clear that this instrument was carefully drafted to take account of the unique factors faced by African children, which include 'their socio-economic, cultural, traditional and developmental circumstances, natural disasters, armed conflicts, exploitation and hunger'.⁴⁸

The ACHR has also alluded to the right to education. Article 34 of the 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.⁴⁹

That being said, the United Nations Office for the High Commissioner for Human Rights has highlighted that this Charter contains provisions that do not meet international norms and standards, including the treatment of women and non-citizens.⁵⁰

⁴⁴ CEDAW (n 56) art 10.

⁴⁵ Protocol No 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms (Protocol of Paris) (entered into force 18 May 1954) as amended by Protocols 11 and 14.

⁴⁶ European Social Charter (Revised) (adopted 3 May 1996, entered into force 1 July 1999) (1996).

⁴⁷ African Charter on the Rights and Welfare of the Child (adopted 1 July 1990, entered into force 29 November 1999) art 11.

⁴⁸ *ibid*, Preamble.

⁴⁹ Arab Charter on Human Rights (signed 22 May 2004, entered into force 15 March 2008).

⁵⁰ UN News, 'Arab Rights Charter Deviates from International Standards, says UN Official' (30 January 2008) <<http://www.un.org/apps/news/story.asp?NewsID=25447#.WjgNIVWWbIV>> accessed 21 December 2017.

The above examples strongly indicate that regional human rights documents generally pay more attention to specific cultural, religious and moral issues when it comes to the protection of human rights in particular geographic areas.

5.2.4 Scope of the right to education

The above analysis has strived to show the complex scope and content of a putative right to education.

The general right to education appears to comprise four separate rights, namely:

- a) a right of access to such educational establishments as exist;
- b) a right to an effective (but not the most effective possible) education;
- c) a right to official recognition of academic qualifications; and
- d) a right not to be disadvantaged in the provision of education ... without reasonable and objective justification.⁵¹

General Comment 11, as discussed above, expressly affirms that education rights provide the very resources by which an individual can enhance their knowledge in the market of ideas and shape their economic destiny, thereby establishing a nexus between economic rights and citizenship.⁵² In this respect, the right to education epitomises the indivisibility and interdependence of all human rights. By championing first and second-generation rights to the exclusion of social, economic and cultural rights, mainstream international law has implicitly elevated classic liberal principles to embody universal value or universal (natural) law. As international actors build a consensus around the importance of framework rights such as education, there is some movement away from individual rights to rights which address the communities in which individuals live.

Furthermore, the right to education can be recognised as an economic, social and cultural right. For example, Article 18(4) of the ICCPR records the state parties' undertaking to have respect for the liberty of parents to ensure the compatibility of their children's education with their own religious and moral convictions.⁵³ As Leckie and Gallagher explain, 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'.⁵⁴

⁵¹ ICESCR (n 36) para 6.

⁵² Committee on Economic, Social and Cultural Rights (n 51) art 4.

⁵³ International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) art 18(4).

⁵⁴ Scott Leckie and Anne Gallagher (eds), *Economic, Social, and Cultural Rights: A Legal Resource Guide* (Penn Press 2006) 333, 335.

Viewed through this lens, the right to education represents a discursive shift in international law and practice. International law has traditionally privileged individual rights, principally through its conceptual reliance on liberal principles. Here, the 'self' is afforded centrality over community, and economic (property) based privileged over community-centred conceptions of rights. By extension, a sharp divide is maintained between formal law – the sphere of state-centred and treaty-based international law – and informal law. It is in the realm of 'private law' to which religious, cultural and economic norms and hierarchies are confined, thereby rendering unequal distributions of power, justice or wealth outside the legitimate scope of public contestation and reform.

In conventional thinking, social and economic rights – such as the right to food, health and housing – are, broadly, positive in character and thereby require state authorities to take steps to enhance the life circumstances of individuals by means of a series of entitlements. By contrast, civil and political rights, which include fundamental freedoms of expression, association and the right to political participation, are typically framed as negative rights; rights, in other words, which are 'designed to keep government out of the lives of individuals'.⁵⁵ This distinction is, however, not always clear-cut. Indeed, the academic literature as well as the jurisprudence of the major human rights supervisory bodies show that positive and negative duties are part of the normative requirement of both sets of rights.

The generational development of rights discourse suffers from ongoing challenges, including the indeterminate and hortatory terms in which many third-generation rights are framed. Take, for instance, the idea that education is inextricably linked with empowerment, particularly in the context of group rights. Affirming this link, 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'.⁵⁶

The right to education has also been linked to the protection of culture. Article 13 of the United Nations Declaration on Rights of Indigenous Peoples, for example, recognises the rights of people to control the transmission of culture between generations, including the right to 'transmit to future generations their histories, languages, oral traditions, philosophies, writing systems and literatures', consistent with local methods of teaching and learning.⁵⁷ The above instruments, many of which do

⁵⁵ Magdalena M Sepúlveda Carmona, *The Nature of the Obligations Under the International Covenant on Economic, Social and Cultural Rights*, vol 18 (Intersentia 2003) 124.

⁵⁶ ILO Convention C169: Indigenous and Tribal Peoples Convention (adopted 27 June 1989, entered into force 5 September 1991) art 29.

⁵⁷ Declaration on the Rights of Indigenous Peoples (adopted 13 September 2007) art 13.

not create binding obligations on states, aim to reconcile respect for universal rights with respect for local traditions.

The theoretical relation between universal and local rights conceptions raise questions which go to the heart of the broader themes explored in this thesis: sovereignty, religious autonomy and the demand for a more substantive conception of rights.⁵⁸ For instance, if a state is to guarantee rights of education, how much protection is sufficient, and what steps should be taken to empower individuals towards a more meaningful conception of education beyond creating a free public schooling system. Questions also remain over whether the right to education has attracted the necessary level of state support to have attained the status of customary international law. Many of the instruments discussed above do not formally bind states or impose transitive legal obligations on states even though their 'compliance pull'⁵⁹ may be significant on the path to the emergence of a putative right to education. There are questions to address regarding whether international law should really be regulating the education policies of states, a matter which falls firmly under the domain of national law and policy.⁶⁰ Finally, if states are encouraged to take due consideration of local knowledge, traditions and educational methods, particularly when such protections are guaranteed under national law, a further question is the extent to which these considerations prevail even when, for instance, they result in different concepts of gender equalities.⁶¹ A paradigmatic example of how these differing, often competing, priorities play out is Saudi Arabia which has a constitutional obligation to enforce *Shariah*. As a sovereign state, it is entitled to develop policies that reflect its national and local traditions, including supreme norms of Islamic *Shariah*.

This section has demonstrated that the right to education is contained and enshrined in international and regional instruments. Despite the extensive legal framework surrounding the right to education, the right itself is not always realised in practice. Obstacles to the effective exercise of the right to education are applied to specific vulnerable groups, such as disabled persons, females or national minorities. As highlighted by Pranevičienė, '[w]hile there exists many possible legal mechanisms to safeguard the right to education, and the vast majority of states have adhered to international treaties

⁵⁸ Joseph HH Weiler, 'The Geology of International Law – Governance, Democracy and Legitimacy' (2004) 64(3) Heidelberg Journal of International Law 547, 560.

⁵⁹ Harold Hongju Koh, 'Transnational Legal Process' (1996) 75 Nebraska Law Review 181; Harold Hongju Koh, 'Why Do Nations Obey International Law?' (1997) 106 The Yale Law Journal 2101; Joshua Cohen and Charles F Sabel, '*Global Democracy*' (2004) 37 New York University Journal of International Law and Politics 763.

⁶⁰ Veerle Heyvaert, 'Levelling Down, Levelling Up, and Governing Across: Three Responses to Hybridization in International Law' (2009) 20(3) European Journal of International Law 647.

⁶¹ Katherine Brennan, 'The Influence of Cultural Relativism on International Human Rights Law: Female Circumcision as a Case Study' (1988) 7 Law and Inequality 367.

... far fewer have implicated the corresponding provisions into their domestic law'.⁶² Similarly, UNESCO has accepted that: '[t]he 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'.⁶³

Accordingly, problems often arise when it comes to the justiciability of the right to education. Now that problems of implementation and enforcement under the International system have been discussed, it is necessary to examine the rights of women under Islamic and related human rights discourses.

5.3 Perspectives on education under Islamic *Shariah*

Public education was in existence in early Islamic history. Some historical reports even suggest that women were participants in these early attempts to institutionalise education as Islam spread across vast regions of the world. While few women have been documented to have acquired a basic education in the early history of Islam, it is notable that this number includes the wives and female relatives of the Prophet, who were inducted into new fields and methods of learning in the pre-modern antecedents of business management studies and science.⁶⁴

Muslim women have also traditionally played prominent roles in society. Aisha, the wife of the Prophet Mohammed, led an army of 30,000 soldiers. In doing so, there is evidence of her discussing and negotiating various issues and political matters with the Prophet Mohammed, who freely acknowledged her wisdom.⁶⁵ As a result, it can be argued that women in Islamic societies reached political heights which were unparalleled by women in non-Islamic societies in the same period. Abukari narrates an account of the Prophet's dealings with women from the tribes of Medina. These beseeched the Prophet to provide a day on which women could pursue efforts to improve their literacy in Islamic issues. One woman was reported to have said: '[M]en have gone ahead of us (in terms of acquisition of knowledge). Therefore, appoint a special day for our benefit as well.'⁶⁶ The Holy Prophet met with his followers and granted the request for a special day on which to instil in women the message of the *Quran* and the commandments of Allah Almighty, without prejudice to

⁶² Pranevičienė and Pūraitė (n 32) 156.

⁶³ EFA Global Monitoring Report, 'Education for All by 2015: Will We Make it?' (UNESCO, 2008) 16 <<http://unesdoc.unesco.org/images/0015/001548/154820e.pdf>> accessed 13 December 2017.

⁶⁴ Al-Baladhuri, *Kitāb Futūḥ al-Buldān (or The Book of the Conquest of Lands)*.

⁶⁵ Ahd Alrasul, *Alaym Al-Salat Wa Al-Salam* (Dar Al-Ma'aref 1985) 188.

⁶⁶ Abdulai Abukari, 'Education of Women in Islam: A Critical Islamic Interpretation of the Quran, Religious Education' (2014) 109(1) Religious Education 4, 23.

their gender.⁶⁷ Praising the women of the Medina for their pursuit of knowledge, the Prophet remarked, 'how splendid were the women of the Ansar; shame did not prevent them from becoming learned in the faith'.⁶⁸

As discussed below, there is no express command, as revealed in the *Quran* or *Sunnah*, which explicitly proscribes a women's enjoyment of public or private learning, subject to the proviso that any educational pursuit falls within the bounds of knowledge permitted by Islam or *fardh ayn*.

To the above point, Al-Ghazali differentiates two categories of knowledge: *fardh ayn* and *fardh kifayah*. The first, *fardh ayn*, is knowledge that every Muslim must acquire in order that they might properly discharge all their duties to society, with consideration to their own relevant circumstances. The second, *fardh kifayah*, is defined as knowledge that the community as a whole needs, and can be satisfied if only some community members attain it.⁶⁹ The determination of *fardh ayn* is the subject of debate; some think that only the *Quran* and *Sunnah* should be included, and others believe that study of *fiqh* should also be a requirement.⁷⁰ Some traditional scholars argue for limiting teaching to the type and scope of knowledge that was widely available during the time of the Prophet and his Companions, while opposing intellectuals believe that 'unless Muslims studied the main currents of thought in their historical epoch, they will be unable to properly distinguish truth from falsehood'.⁷¹

5.3.1 Acquisition of knowledge includes women

It is perfectly credible to maintain the position that the acquisition of religious knowledge is obligatory for women in the same way as it is for men. As Aburki suggests, 'Islamic education strategy and practice have provided equal opportunities for both men and women'.⁷²

A basic principle of Islamic *Shariah* is that when a commandment is revealed, even if the masculine form of the word is used, the female gender is also included in this commandment. Indeed, as Abbasi

⁶⁷ Sahih al-Bukhari Hadith No. 341, Vol. 2

⁶⁸ Mphutlane Wa Bofelo, 'Immodesty, Islam and the Gender Equity Movement' *Pambazuka News* (Nairobi, 1 April 2010) <<https://www.pambazuka.org/gender-minorities/immodesty-islam-and-gender-equity-movement>> accessed 15 November 2017.

⁶⁹ Abi Hamid Al-Ghazali, *Ihya', Ulum Al-Din* (Mustafa al-Babi al-Halabi Press 1939) 33.

⁷⁰ *ibid.*

⁷¹ *ibid.*

⁷² 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> accessed 7 July 2017.

highlights, 'if this principle is rejected then the basic pillars of Islam such as prayer, fasting, pilgrimage and alms-due will become null and void for women'.⁷³

Women are, consequently, bound to fulfil their religious duties as prescribed by *Shariah*. Additionally, the *Quran* asks: 'Are those who know, equal to those who do not know? Only they will remember [who are] people of understanding.'⁷⁴ Islam therefore places a duty on every Muslim, male and female, to acquire knowledge. In the *Quran*, Allah provides that 'only those of His Servants who are learned truly, fear Allah'.⁷⁵ As a result, gaining knowledge is considered a superior act of worship in Islam. In modern terms, it has been argued that: 'the implication of these sayings of the Prophet ... is that every Muslim boy or girl, man or woman, should pursue his or her education as far as it is possible'.⁷⁶

In recent years, a woman's right to education has regularly featured in the contemporary debates on Islam and human rights. As Abbasi elaborates, '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'.⁷⁷

Great importance has accordingly been given to the process of seeking knowledge throughout the *Quran*. In Islam, knowledge comes before action. Indeed, there can be no action without knowledge and the importance of gaining knowledge must therefore not be underestimated. On the importance of knowledge, Allah commanded His Messenger to seek more of it, by saying, 'My Lord! Increase me in Knowledge'.⁷⁸ The Messenger therefore made seeking knowledge an obligation upon every Muslim. As the Prophet commended: 'Seek knowledge even if you have to go as far as China, for seeking knowledge is a duty on every Muslim.' The Messenger further provided that, 'whoever follows a path in the pursuit of knowledge, Allah will make a path to Paradise easy for him'.⁷⁹ Furthermore, Allah warned every Muslim against speaking without knowledge, stating: 'and follow not ... that of which you have no knowledge. Verily, the hearing and the sight, and the heart of each of those ones will be questioned (by Allah)'.⁸⁰

⁷³ Raheeq Ahmad Abbasi, 'Women and Education in Islam' (*Minhaj-Ul-Quran 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-quran.html>> accessed 6 July 2017.

⁷⁴ Holy *Quran*, 39:9.

⁷⁵ Holy *Quran*, 35:28.

⁷⁶ Islamic Bulletin, 'Women in Islam' <http://www.islamicbulletin.org/newsletters/issue_10/m.women.aspx> accessed 10 July 2017.

⁷⁷ Abbasi (n 90).

⁷⁸ Holy *Quran*, 20:114.

⁷⁹ Narrated by al-Bukhaari, *Kitaab al-'Ilm*, 10.

⁸⁰ Holy *Quran*, 17:36.

In consideration of the 'differences/sameness' of men and women (sometimes known as the nature/culture debate), certain feminists within the Western tradition have also advocated legal reforms which empower the essentially 'feminine' traits of women as care-givers in the home or the workplace.⁸¹ This is also the foundation on which classical jurists have often attempted to develop a framework in which women are afforded equal but different rights under Islam. Any rights which are available to men and women are conditioned upon their ability to perform their religious and social duties. An unwillingness or inability to fulfil these duties may, on one view, provide reasonable justification for withdrawing those rights, or denying these to begin with.⁸² One must, therefore, consider the specific purpose which Islam states that education should be available for women.

5.3.2 The legitimate purpose of education for women in *Islamic Shariah*

Returning to the question of equal access to and availability of education for women, there is within the existing scholarship a tendency to conflate distinct legal problems which each require a different method or process of intellectual enquiry. The first set of legal questions relates to the different biological or intellectual capacities of men and women to the extent that such a proposition can indeed be supported by authoritative statements of scripture or tradition. While it is an important question, this cannot be conflated with the separate enquiry into whether women should be afforded equal rights to receive education, or as will be discussed in the next chapter, to seek meaningful opportunities for gainful employment.

There is no doubt that Islam acknowledges the importance of education for women. In the Muslim world, the debate has shifted from the general right to equal access to education, to the precise 'content' of the right. When one does this, one might plausibly argue that the primary objective of women's education in Islam is to prepare them for their roles as daughters, sisters, wives and mothers.⁸³ As a *Hadith* provides: 'A mother is a school. If she is educated, then a whole people are educated.'⁸⁴ Islam recognises that the woman's role within the family is a crucial one because it is within the family that the next generation of Muslims are raised. Knowledge is therefore not only limited to religious knowledge but includes all forms of knowledge which benefit humanity. In fact,

⁸¹ Carol Gilligan, *In a Different Voice* (Harvard University Press 1982); Wendy W Williams, 'The Equality Crisis: Some Reflections on Culture, Courts and Feminism' (1982) 7 *Women's Rights Law Reporter* 21.

⁸² Abdullahi Ahmed An-Na'im, 'Islamic Shariah, International Relations, and Human Rights: Challenge and Response' (1987) 20 *Cornell International Law Journal* 317, 318.

⁸³ See, for example, Hammudah Abd al Ati, *Family Structure in Islam* (American Trust Publications 1977) 54-56.

⁸⁴ Anas bin Malik, vol 1, Book 1, *Hadith* 224.

some commentators have argued that Islam affords women the right to perfect their religious knowledge, the right to work, as well as the right to participate in serving their community.⁸⁵

It is possible to argue in favour of a purposive reading of the *Quran* which upholds the equal dignity of men and women in all educational pursuits. As Baderin highlights, ‘advocates of women’s rights can ... find many provisions within Islamic sources for advocating and promoting the positive development of women’s rights in Muslim states’.⁸⁶

As a result, it is arguable that any law or rule that limits a woman’s access to, and enjoyment of, educational rights is, in principle, contrary to the teachings of Islam. The foregoing analysis suggests that there is, nonetheless, a gap between the emancipatory ideals of Islamic principles and practice since Muslim women continue to experience challenges when it comes to gaining access to education.

5.4 Gap between the emancipatory ideal and cultural practice

Despite the emancipatory ideals of early Islam which had empowered women and girls who had previously been denied virtually all rights in pagan cultures that had preceded it, Muslim women, and indeed women everywhere, have been systematically denied rights to education. In Islamic societies, cultural discourses on sexual morality, gender mixing and the social role of women continue to impede progress in this area. Even when women have attained formal equality in education, Individual misuse of interpretations of legal postulates such as *qiwamah* and *wilayah* – concepts commonly understood to sanction men’s authority over women – reinforce what many would regard as an obstacle, principally by restricting women’s life choices, particularly those that operate outside of the family home.⁸⁷

As discussed in previous chapters, there have been attempts to articulate feminist discourses within the Islamic tradition. However, a traditional perspective on the male-female relationship continues to infect prevailing attitudes to a women’s place in society. Women are still primarily regarded as homemakers and mothers, and the marital contract is considered to be an exchange relationship in which the wife's submission and obedience to her husband (*tamkin*) is exchanged for protection and

⁸⁵ Haideh Moghissi, *Populism and Feminism in Iran: Women’s Struggle in a Male-Define Revolutionary Movement* (Palgrave 1994) 39, 80, 81.

⁸⁶ 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 2007) 352.

⁸⁷ Ayesha S Chaudhry, ‘Producing Gender-Egalitarian Islamic Shariah: A Case Study of Guardianship (Wilayah) in Prophetic Practice’ in Ziba Mir-Hosseini, Mulki Al-Sharmani and Jana Rumminger (eds), *Men in Charge?: Rethinking Authority in Muslim Legal Tradition* (Oneworld Publications 2015) ch 4.

financial provision (*nafaqah*) by her husband.⁸⁸ This exchange relationship continues to structure many provisions of family law in Muslim societies, widening the gap between the financial security of unmarried women who delay marriage in search of education or who are otherwise deprived of substantive equality of access to professional opportunities because of the pressure to marry. Other factors, such as poverty and the shortage of nearby schools, can also impact girls' education, particularly in remote areas.⁸⁹

The idea that men exercise both *qiwamah* and *wilayah* over women has profound and long-standing support in the tradition of narration and interpretation of Quranic and prophetic texts. As suggested in previous chapters, it is nonetheless incumbent on the scholar to examine why these two ideas emerged as the guiding principles for gender relations in the legal tradition when the *Quran* and *Sunnah* make reference to principles which take precedence over these ideals, such as mercy (*rahmah*) and solidarity (*taawun*). There is a lamentable tendency to overlook or misunderstand concepts within classic Islamic thought or to reflect on the deep tradition of critical thinking within its jurisprudential traditions. Concepts of *bida* (innovation) and *ijtihad* are foundational to Islam but their meaning is not well understood by many of its followers. For those who remain wedded to an excessively literalist perspective, concepts such as *bida*⁹⁰ are imbued with an overly negative meaning, at odds with the historical use of this concept, in order to discourage any innovation in thought or practice.⁹¹ Similarly, the rules governing the use and application of concepts aimed at encouraging reflexivity, flexibility and adaption in Islamic thought and practice are applied so rigidly and narrowly that the conception ceases to have any function in juristic practice at all. Others abandon tradition altogether or apply fundamental principles or juristic concepts so liberally that they impute to them a meaning which is so arbitrary or heterodox as to place these interpretations entirely outside the bounds of classical jurisprudence.⁹²

In common parlance, education is afforded a rather narrow definition which confines it to vocational training or academic learning. Yet, knowledge and truth, and related branches of philosophy (epistemology and ontology) are in some sense foundational to the intellectual and spiritual vitality of the Muslim community and to the practice of Islam. As Abd-Allah has argued, 'literacy' equips Muslims with the critical faculties and consciousness by which to comprehend their own personal and

⁸⁸ 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.

⁸⁹ *ibid.*

⁹⁰ Mohammed Abu Zaid, *Legal Study of the Status of Women in Islam* (1st edn, Matbaeat Alaashri 2013) 129.

⁹¹ *ibid.* 196.

⁹² Umar Faruq Abd-Allah, 'Innovation and Creativity In Islam' (Nawawi Foundation, 2006) 4, 4 <<http://www.sa-adah.org/wp-content/uploads/2014/11/Innovation-Paper1.pdf>> accessed 13 December 2017.

individual religious obligations and the societies which they wish to collectively become.⁹³ Indeed, theological literacy presupposes that all men and women will refine their knowledge through basic techniques of logic and reasoning; faculties which are formed and enhanced through education and literacy.

Traditional and male-dominated readings are increasingly out of step with human rights discourses, many of which are being refitted and mainstreamed for Islamic societies with the adoption of the CDHRI. Finally, the exchange relationship on which concepts such as *tamkin* and *nafaqah* rely no longer capture the realities of modern life in which men are often unwilling or unable to provide for their families and women wish to seek gainful employment. Gulf countries, as reported in a feature published by the World Bank, which have traditionally been able to supplement family incomes with state benefits, thus enabling a societal structure in which women stay at home, are now being forced to make public spending cuts as oil revenues dwindle.⁹⁴ Countries will have to adapt if they are to survive the pressures of an ever-globalising economy. 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 Saudi Arabia more closely.

5.5 Women's right to education in Saudi Arabia

Education is a fundamental right guaranteed by the Basic Law of Governance of the Constitution and the Educational Policy Document in Saudi Arabia.⁹⁵ Formal public schooling is a relatively recent innovation in Saudi Arabia and was institutionalised in the 1960s,⁹⁶ though some limited private schools existed as early as the 1940s.⁹⁷ The modern state of Saudi Arabia has placed education high on its social reform agenda. In many respects, Saudi Arabia has provided educational opportunities to citizens which equal, and even exceed, equivalent entitlements in the welfare systems of advanced Western societies.⁹⁸

⁹³ *ibid* 2, 3.

⁹⁴ 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>> accessed 13 December 2017.

⁹⁵ King Abdullah Bin Abdul-Aziz Project for Public Educational Development (2011).

⁹⁶ 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/>> accessed 21 December 2017.

⁹⁷ Reema Alsweel, 'Education and the Role of Women in Saudi Arabia' (DPhil Thesis, George Mason University 2012) 5 <<http://mason.gmu.edu/~ralsweel/portfolio/artifacts/Microsoft%20Word%20-%20Final%202.pdf>> accessed 21 December 2017.

⁹⁸ See Human Rights Commission, 'How is Equality Between Men and Women Made Under the Kingdom's Laws?' (HRC) <<http://www.hrc.gov.sa/ar-sa/HumanRightsInSaudi/Pages/equalityrights.aspx>> accessed 8 December 2017.

Article 13 of the Basic Law of Governance states: '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 their society, loving their homeland, and taking pride in its history.'⁹⁹

Following this directive from the Basic Law, the Council of Ministers developed the Education Policy Document to offer other guidelines regarding education in the country. To its credit, the Education Policy Document states that the government will offer free education at all levels and stresses the government's intention to invest in extensive technological and scientific developments for the promotion of human dignity and the betterment of conditions of life. The Document states that it will nurture in students a desire to work, urging individuals to excel in their work and emphasising its role in the construction of the nation by doing the following:

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.¹⁰⁰

These provisions imply an obligation on the state to ensure that all individuals in the country acquire education in an equitable manner. In addition, the Ministry of Higher Education believes that Saudi women have a role in community development that is complementary to the role of men.¹⁰¹

5.5.1 Education development in Saudi Arabia

Saudi Arabia's policy on education is influenced by Islamic principles, as derived from the *Quran* and *Sunnah*. Prior to the introduction of a state education system, Saudi women were granted limited access to education. Informal education was focused on imparting the religious doctrines of Islam to both boys and girls, consisting only of *Kuttab* classes that entailed the recitation of the *Quran*. Girls were informally educated in their homes, and professional *Quran* readers conducted the classes. At puberty, education for girls stopped, in accordance with the seclusion practices in place under Islamic tradition.

King Saud bin Abdul Aziz Al Saud, the then Crown Prince, made a pivotal decision in 1947 by setting up the first school for girls in Saudi Arabia inside the King Saud Palace. The King's daughters were the

⁹⁹ Saudi Basic Law of Governance, Royal Order No A/90 (1 March 1992) art 13.

¹⁰⁰ 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> accessed 13 December 2017.

¹⁰¹ Ministry of Higher Education, 'Saudi Women in Higher Education Report' (General Directorate of Planning, Indexing of the King's Library 1435H) 10.

first students of this school, and were soon joined by a large number of female students in the city of Riyadh. Four teachers were appointed to teach them subjects like Arabic, Mathematics, English, History and Geography, in addition to the compulsory *Quran* classes. This was followed by the establishment of another school by Princess Hessa bin Saud bin Abdul Aziz in 1956 and the King Saud University in 1957. The biggest milestone occurred in 1959 when King Saud issued a Royal Order to establish schools for the education of girls in the Kingdom.¹⁰² All throughout this process, King Saud was extremely supportive and passionate about his mission. His great efforts in launching the education of girls in the Kingdom is fondly remembered and appreciated to this day.¹⁰³

Education is mandatory and free in Saudi Arabia, and is divided into three stages: the primary stage consists of six years of study and the student begins this stage as a six-year-old; the intermediate stage consists of three years of study; the final stage consists of three stages of study, supervised by the Ministry of Education.¹⁰⁴ The government has also provided financial incentives to parents in remote areas to facilitate education for their daughters, thereby levelling the playing field for both genders in terms of educational development and inclusion.¹⁰⁵ Also, the Saudi government has prioritised the provision of education for all young children without discrimination. This policy has resulted in the achievement of significant milestones in ensuring compulsory education for citizens between the ages of 6 and 15.¹⁰⁶

Equality of access to education has more recently been extended to the tertiary level of education. The first girls' polytechnic was established in 1970 in Riyadh for those who had completed secondary school, and some ten similar colleges had opened by the 1980s. By then, women had access to a range of women-only campuses that taught subjects such as Arabic, English, History, Geography, Public Administration, Dentistry, Nursing, Economics, Agriculture, Nutrition, Home Economics and Education. By 2005, women were granted opportunities to pursue studies in a broader set of

¹⁰² Royal Order of 24 October 1979.

¹⁰³ Afayz ibn Zahir al-Sharari, 'King Saud Bin Abdulaziz and the Beginning of the Education of Saudi Girls' *Al Jazirah* (7 June 2008) <<http://www.al-jazirah.com/2008/20080706/wo3.htm>> accessed 1 December 2017.

¹⁰⁴ See Ministry Education, 'Education' <<https://www.moe.gov.sa/ar/HighEducation/thingstoknow/Pages/Education.aspx>> accessed 5 December 2017.

¹⁰⁵ Deanship of Admissions and Registration, 'Rewards' (*King Saud University*, 2019) <<https://dar.ksu.edu.sa/ar/remuneration>> accessed 28 March 2019; See Also, Human Rights Commission, 'How is Equality Between Men and Women Made Under the Kingdom's Laws?' (*HRC*) <<http://www.hrc.gov.sa/ar-sa/HumanRightsInSaudi/Pages/equalityrights.aspx>> accessed 8 December 2017.

¹⁰⁶ *ibid.*

disciplines, including biology, medicine, computer sciences and the humanities, resulting in increased participation of girls in less traditionally female-oriented fields.¹⁰⁷

Saudi Arabia has invested significant capital into professionalising its educational standards and bringing these into line with international benchmarks and best practices. For example, Article 233 of the general policy of education, which was issued by the Council of Ministers Decision No 779,¹⁰⁸ provides for free education of all types and at all stages. Article 15 of the Education Policy links education at all levels to the state's general development plan, which aims to achieve a sound partnership between men and women, and the Kingdom's belief in the important role of education in the achievement of sustainable development and the realization of human rights. Many efforts have been made to provide education and combat illiteracy on the basis of gender equality.¹⁰⁹ The following sections will consider structural obstacles to the equal access and treatment of women in respect of their educational rights and opportunities.

5.5.2 Equality of education in Saudi Arabia

As documented in research by Kutbi,¹¹⁰ certain positive changes have affected the status of women in Saudi Arabia, especially in relation to access to education. A UN report issued in 2005 estimated that approximately 83.3% of women had attained literacy, while a different report placed literacy for women above the age of 15 at 78.4%, compared to 88.6% for men.¹¹¹ The Concluding Observations of the Committee on the Elimination of Discrimination against Women states that there has been an increase in the rate of female enrolment at all levels of education.¹¹² This shows that literacy and

¹⁰⁷ Rashida Manjoo, 'Report of the Special Rapporteur on Violence against Women, its Causes and Consequences' (UNCHR, 2009) <<http://bit.ly/2kSBcuq>> accessed 21 December 2017.

¹⁰⁸ Council of Ministers Decision No 779 (26 November 1969).

¹⁰⁹ See Human Rights Commission, 'How is Equality Between Men and Women Made Under the Kingdom's Laws?' (HRC) <<http://www.hrc.gov.sa/ar-sa/HumanRightsInSaudi/Pages/equalityrights.aspx>> accessed 8 December 2017.

¹¹⁰ Alaa Kutbi, 'How Undergraduate Female Students in the Kingdom of Saudi Arabia Perceive Social Media as a Learning Tool: An Exploratory Study' (M.Ed. Thesis, University of Windsor 2014) <<http://scholar.uwindsor.ca/cgi/viewcontent.cgi?article=6289&context=etd>> accessed 13 December 2017.

¹¹¹ UNESCO, 'Country Reports – Saudi Arabia' (EFA 2000 Assessment, 2000) <http://www.UNESCO.org/education/wef/countryreports/saudi_arabia/contents.html> accessed 13 December 2017; see also Ministry of Education, 'The Development of Education' (2003) <http://www.ibe.unesco.org/International/ICE47/English/Natreps/reports/sarabia_en.pdf> accessed 13 December 2017.

¹¹² Committee on the Elimination of All Forms of Discrimination Against Women, 'Concluding Observations on the Combined Third and Fourth Periodic Reports of Saudi Arabia' (9 March 2018) C/SAU/CO/3-4, 11.

access to education have improved and they and they appreciate the positive trend in the acknowledgment of education as a right for all individuals in the country.¹¹³

In addition to the marked improvement of women's education in the last 20 years, Saudi Arabia continues making more measures to eliminate discrimination, cultural attitudes and other impediments to substantive equality between men and women in education¹¹⁴. The gender equality in education is guaranteed formally, and the reality in practice suggests that women have fully integrated into the educational system.¹¹⁵ Currently, women have achieved parity with men in every academic and vocational field. Women are more generally encouraged to seek out 'acceptable' jobs such as nursing, teaching, and other traditionally female-oriented occupations.¹¹⁶ Moreover, women can also join to the fields in higher education as men including engineering and aviation.¹¹⁷

5.5.3 Male guardianship consent and education policy

The recent reforms have supported women's rights and enabled them to access services without requiring the consent of others.¹¹⁸ In particular, a Supreme Order issued by King Salman on 18 April 2017 lifted all the restrictions that the guardian-consent imposed on Saudi women, unless stipulated in Saudi Law based on *Shariah*.¹¹⁹ A plain text reading of this Supreme Order, in addition to new reforms which permit women more independence, indicates that many of the above consent-based requirements will be waived, with positive impacts on the educational prospects of women.¹²⁰ Moreover, the President of the National Society for Human Rights in Saudi Arabia, Dr Mofleh Al Qahtani, argues that any relationship between the individual man or woman and the state does not require the consent of another person to complete that relationship or conduct; all men and women have equal rights in the face of the state; and if some behaviour of some family members harm this

¹¹³ EFA Global Monitoring Report, 'Education for All: Literacy for Life' (UNESCO, 2006) <<http://unesdoc.unesco.org/images/0014/001416/141639e.pdf>> accessed 13 December 2017.

¹¹⁴ Hamdan (n 7) 48.

¹¹⁵ *ibid*.

¹¹⁶ *ibid*.

¹¹⁷ Committee on the Elimination of Discrimination against Women, 'Consideration of Reports Submitted by States Parties Under Article 18 of the Convention, Combined Third and Fourth Periodic Reports of States Parties Due in 2013' (30 September 2016) CEDAW/C/SAU/CO/3-4.

¹¹⁸ Qasim Alkhubrani, *Al-Qahtani Reveals the Benefits of Empowering Women Without the Consent of their Guardian* (Sahifat Sabaq Al'iiliktrunia 2017) <<https://goo.gl/bkBrFT>> accessed 9 January 2018.

¹¹⁹ National Society for Human Rights, 'The Chairman of the Society Affirms that the Supreme Court's Decision to Empower Women Without the Consent of their Guardian Will End the Problems Faced by Women!' (*NSHR*) <<http://nshr.org.sa/en/?news=the-chairman-of-the-society-affirms-that-the-supreme-courts-decision-to-empower-women-without-the-consent-of-their-guardian-will-end-the-problems-faced-by-women>> accessed 9 March 2018.

¹²⁰ See Committee on the Elimination of Discrimination against Women (n 127).

family; Or guardian to demand the lifting of such damage, as provided for in the provisions of Islamic Shariah.¹²¹

An important issue concerns the binding effect of the new legislation. It is clear, for instance, that any internal policies adopted by governmental departments, specifically those relating to guardian-consent for educational pursuits, no longer have force and effect pursuant to the new law. This constitutes a powerful step towards empowering women in governmental and private sectors. Accordingly, the Ministry of Education has confirmed that women are not required to have the consent of their guardian to provide services.¹²²

5.5.4 Saudi Arabia's government efforts in the renaissance of women's education

The Saudi government is now cognisant of the reality that greater female education will lead to greater workforce participation and less reliance on foreign labour.¹²³ If Saudi Arabia is to adapt to the demands of an increasingly mobile global economy, including demands for a more inclusive approach to women's participation in society, it will need to undertake significant private and public-sector reforms, including implementing social and economic policies aimed at integrating Saudi Arabia's young population into a newly-diversified workforce. The education of women would expand the workforce of Saudi Arabia, which has been struggling with its need for expatriate workers who pose a serious challenge to its economy. Thus, investing in women's education could lead to exponential gains in the Kingdom's gross domestic product, with women accounting for 56.5% of all graduates from tertiary institutions, while men account for 43.5%. The 551,000 Saudi women currently pursuing bachelor's degrees constitutes an untapped resource hidden in clear sight.¹²⁴ According to the Human Rights Commission in Saudi Arabia, it is important to point out that the Kingdom's educational system is essentially based on equality between men and women in all its aspects, whether with regard to the mechanisms of admissions and enrollment, the curricula, the tests, the qualifications of teachers and lecturers, or the quality of facilities and study equipment. Women have received more attention in

¹²¹ Alkhubrani (n 140).

¹²² Abdulla Gharman, 'guardian consent is not a requirement for the provision of services to women' (*Okaz*, 13 July 2017) <<https://bit.ly/2X49gVB>> accessed 29 March 2019

¹²³ Gulf Cooperation Council, 'Labour Market Reforms to Boost Employment and Productivity in the GCC: Minutes of the Annual Meeting of Ministers of Finance and Central Bank Governors' (International Monetary Fund, 5 October 2013) 25, 27 <<http://www.imf.org/external/np/pp/eng/2013/100513.pdf>> accessed 13 December 2017.

¹²⁴ Al Arabiya, '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>> accessed 13 December 2017.

this aspect such as positive discrimination, especially with the continued establishment of a number of university cities for girls, such as in Princess Noura bint Abdulrahman University, Imam Muhammad bin Saud University and King Saud University.¹²⁵

In compliance with CEDAW, especially Article 10, Saudi Arabia guarantees equal rights for men and women in general. Article 29 of the Basic Law of Governance stipulates that: 'The State shall foster the sciences, arts and culture, and shall encourage scientific research, protect Islamic and Arabic heritage, and contribute to Arab, Islamic, and human civilization.' Also, Article 30 guarantees that the state 'shall provide public education and shall be committed to combating illiteracy'. Thus, in accordance with Islamic *Shariah*, in the Saudi Universities Law, the Civil Service Law and the Labor and Labor Law, women are treated the same as men in terms of degree, rank and other considerations. The curricula are equal and the opportunities are available for both in education, employment, training, etc. Saudi Arabia reinforces human rights and develops laws and policies that are inclusive of the participation of women. As a country ruled by Islamic *Shariah*, the new reforms have had a transformative effect on the educational prospects and related freedoms of women. For example, a judge of the Court of Appeal in Medina, Abdul Majid Aldahmachi, argues that courts positively enforce women rights in accordance with Islamic *Shariah* and Saudi law.¹²⁶ Currently, the new reforms require that government bodies do not withhold services if guardian-consent has not been obtained. Some guardians have misunderstood the concept of guardianship over women and this has led them to deprive women of their rights and arbitrarily abuse them. As a result, the reform is trying to strike a balance between the concept of guardianship and the preservation of the family as the nucleus of society, as stipulated in the Basic Law of the Kingdom, and the rights of women.

5.6 Reconciling rights to education under Saudi law, *Shariah* and international law

It is arguable that CEDAW and *Shariah* law both support the right of education for women. Education for women, based on Islamic principles, is not only a right but also a religious obligation.¹²⁷ A 'right' entails characteristics and options that one has the right to choose but also voluntarily relinquish, whereas an 'obligation' is a mandatory commitment. Islam allows any circumstance that can guarantee the achievement or fulfilment of specified obligations. In this way, the intention and

¹²⁵ See Human Rights Commission (n 124).

¹²⁶ Abdul Majid Aldahmachi, *The Rights of Married Women in the Judicial System of Saudi Arabia* (Human Rights Commission Media and Publications 2015) 22.

¹²⁷ Muhammad Al-Ibrashi, *Al-Tarbiyah Al-Islamiyah Wa-Falsafatuha* (Mustafa al-Babi al-Halabi Press 1975) 127, 131.

foundation of CEDAW and *Shariah* law are the same even though Saudi Arabia appears to have gone a step further, theoretically and practically, than international norms on human rights by placing the right to education as a religious and moral obligation.

The practice of states – the main bearers of obligations under international law – varies greatly. As Baderin highlights:

Often what makes the difference in the relationship between international human rights and Islamic Shariah 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.¹²⁸

It is noteworthy that Saudi Arabia did not participate in the vote for the UDHR and is not a party to the ICCPR or ICESCR. On a positive note, however, Saudi Arabia has ratified both the CEDAW and UNESCO's Convention Against Discrimination in Education.¹²⁹

Article 6 of CEDAW acknowledges that cultural and social norms may act as a source of abuses of women's rights.¹³⁰ Through the ratification of CEDAW on 7 September 2000, Saudi Arabia has assumed its obligation to end discrimination against women, although in case of contradiction between any term of the Convention and the norms of Islamic Shariah, the Kingdom is not under obligation to observe the contradictory terms of the Convention.¹³¹

The CEDAW Committee discourages any exclusion, distinction and restrictions based on gender which could nullify or impair the enjoyment, recognition or exercise of human rights and/or fundamental freedoms.¹³² To this end, it has obliged Saudi Arabia to engage in appropriate strategies and means of eliminating discrimination against women with immediate effect. Comparative jurisprudence on human rights, including the opinions of human rights committees, suggests that mere differences in the treatment of men and women do not constitute discrimination per se. However, any differential treatment should be legitimate, based on objective (ie published) legal standards which are known in

¹²⁸ Mashood A Baderin (ed), *International Law and Islamic Shariah* (2nd edn, Routledge 2016) 31.

¹²⁹ Convention Against Discrimination in Education (adopted 14 December 1960, entered into force 22 May 1962).

¹³⁰ CEDAW (n 56) art 6.

¹³¹ Committee on the Elimination of Discrimination against Women, 'Consideration of Reports Submitted by States Parties under Article 18 of the Convention on the Elimination of All Forms of Discrimination Against Women, Combined Initial and Second Periodic Reports of States Parties, Saudi Arabia' (29 March 2007) CEDAW/C/SAU/2.

¹³² Committee on the Elimination of Discrimination against Women, 'General Recommendation No 33 on Women's Access to Justice' (3 August 2015) CEDAW/C/GC/33, 4.

advance, as well as being reasonably justified and proportionate to the desired aim of the policy on which differential treatment is based.¹³³

One could argue that such imperatives are in conflict with the traditional legal discourses on gender differences and complementary gender roles in Islamic Shariah. Certainly, as discussed above, Saudi Arabia prohibits co-education at almost all levels of education, based on section 155 of the Education Policy; the mixing of boys and girls is only allowed in kindergarten.¹³⁴

Further questions have been raised over certain aspects of Saudi Arabia's educational policies and initiatives. As noted above, Saudi Arabia has established special universities for female students in accordance with international standards of education. This bringing the Kingdom's compliance with its international treaty commitments compatible with Islamic Sharia. It is notable that CEDAW requires that women be given access to¹³⁵ 'the same curricula, the same examinations, teaching staff with qualifications of the same standard and school premises and equipment of the same quality'.

Some authors argue that sex segregation of Saudi Arabian women provides them with a professional advantage since they do not have to compete for jobs with their male counterparts.¹³⁶ However, 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'.¹³⁷

Cosmopolitan perspectives on Islam have also taken umbrage at the use of anti-secularist religious laws or the use of cultural arguments as the basis on which to justify human rights violations. In response to these criticisms, representatives of the government of Saudi Arabia have argued that Article 7 of the Basic Law of Governance states that: 'Governance in the Kingdom of Saudi Arabia derives its authority from the Book of God Most High and the Sunnah of his Messenger, both of which govern this Law and all the laws of the State.' Moreover, the Law contains basic principles and provisions aimed at promoting and protecting human rights. Article 26 of the Basic Law of Governance states that: 'The State shall protect human rights in accordance with Islamic *Shariah*.'¹³⁸ As it has often been argued in other contexts, attempts to impose an ethno-normative conception of women's rights

¹³³ Christine Chinkin, 'Women's Human Rights and Religion: How Do they Co-exist?' in Susan Carolyn Breau and Javid Rehman, *Religion, Human Rights and International Law* (Martinus Nijhoff 2007) 45.

¹³⁴ See Manhal, 'Education Policy Document 1389' <<https://www.manhal.net/art/s/12262>> accessed 10 January 2017.

¹³⁵ CEDAW (n 56) art 10(b).

¹³⁶ Hamdan (n 7) 58.

¹³⁷ 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.

¹³⁸ Committee on the Elimination of Discrimination against Women, 'Consideration of Reports Submitted by States Parties Under Article 18 of the Convention, Combined Third and Fourth Periodic Reports of States Parties Due in 2013' (30 September 2016) CEDAW/C/SAU/CO/3-4.

on an unwilling population is often met with suspicion, attracting claims of cultural Secularism imposed by some Western regimes.¹³⁹ To this argument, critics have also railed against the demonisation of their culture, wherein Muslims are viewed as the 'others'. Forcing the people of Muslim countries to adopt Western ideas and a Western understanding of rights fails to take account of the cultural norms of Muslims.¹⁴⁰ Former Sudanese Judge Abdullahi Ahmed Na'im, who is now a professor of law at Emory University, argues that the curricula of Islamic schools are a reaction to the Western incursion. He claims that there should be no compulsion within religion to question the Islamic basis of education.¹⁴¹

Opposing the above-discussed perspectives, scholars such as An-Na'im reject the idea that there is an inherent conflict between Islamic and international human rights conceptions.¹⁴² It follows that cultural relativity cannot be used to justify the denial of basic rights that are accounted for in the *Quran* and authorities on Islam. Those that believe this belong to the school of Muslim feminists who argue that women's unequal status in Islamic culture is not due to inherent inconsistencies between *Shariah* and international human rights norms, but instead find its roots in the cultural norms which are prevalent in Islamic societies.¹⁴³ Baderin develops a similar argument, postulating that: '[D]ue 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.'¹⁴⁴

5.7 Conclusion

This chapter has assessed the impact of male guardianship consent on the right to education in light of the most recent guardianship reforms. Additionally, it examined the potential positive changes which may be expected due to the recent passing of the Supreme Order in terms of women's right to education, namely, by removing the previous requirement of guardianship approval and consent. Furthermore, it assessed the recognition of the right, and access, to education for women in Saudi

¹³⁹ 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.

¹⁴⁰ Mayer (n 158) 177.

¹⁴¹ Abdullahi Ahmed An-Na'im, *Islam and the Secular State: Negotiating the Future of Sharia* (Harvard University Press 2008).

¹⁴² Abdullahi Ahmed An-Na'im, 'The Islamic Counter-Reformation' (2002) 19(1) *New Perspectives Quarterly* (2002).

¹⁴³ Shahn Sardar Ali, *Conceptualising Islamic Shariah, 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).

¹⁴⁴ Baderin (n 104) 352.

Arabia under the relevant legal frameworks. Moreover, it assessed the the socio-economic need for a more inclusive education policy in the context of Saudi Arabia’s transforming society.

In particular, it was argued that while Saudi Arabia parallelise the same basic provisions of Article 26 of the UDHR and Article 13 of the ICESCR with regard to the provision of free primary and secondary school education for girls, women in Saudi Arabia in any case enjoy equal rights with men in accordance with the provisions of the Basic Law of the Kingdom and its educational regulations. Saudi legal practices that correspond with a number of customary international human rights norms on education, including educational and training programmes, ensure CEDAW concepts of non-discrimination and proportionality with respect to the Shariah grounds.¹⁴⁵

¹⁴⁵ Committee on the Elimination of Discrimination against Women, ‘Consideration of Reports Submitted by States Parties Under Article 18 of the Convention, Combined Third and Fourth Periodic Reports of States Parties Due in 2013’ (30 September 2016) CEDAW/C/SAU/CO/3-4.

Chapter Six: The Impact of Guardianship and Guardianship Reforms on the Right to Work for Women

6.1 Introduction

This chapter explores the right of women to work in Saudi Arabia, considering both Islamic principles and Saudi Arabia's relationship with this right under the international framework. The right to work, together with associated labour laws, represent the second generation of human rights legislation in which the traditional scope of human rights in the International arena was expanded to include economic and social rights.¹ It has been recognised in a number of international instruments, including CEDAW which Saudi Arabia is a party to.²

The right to work is recognised as an individual right that belongs to each person and is at the same time a collective right.³ It encompasses all forms of work, whether independent work or dependent wage work.⁴ The right to work is acknowledged as 'an important guarantee to allow a person to live his or her life with dignity'.⁵ Indeed, it has been highlighted that:

... the right to work brings dignity because it allows a person to choose their work, but also because it enables "personal development" and "social and economic inclusion ... through self-reliance, self-esteem and the sense of worth that comes from an individual's contribution to the economy and society."⁶

The right to work 'should not be understood as an absolute and unconditional right to obtain employment'.⁷ Instead, it should be considered as a civil liberty to choose to work freely and to be able to earn a living by means of the work chosen.⁸

¹ Adrian Vasile Cornescu, 'The Generations of Human Rights' in *Days of Law: Conference Proceedings* (1st edn, Masaryk University 2009) 4.

² See Article 11 of Convention on the Elimination of All Forms of Discrimination Against Women (adopted 18 December 1979, entered into force 3 September 1981) which states that 'States Parties shall take all appropriate measures to eliminate discrimination against women in the field of employment in order to ensure, on a basis of equality of men and women, the same rights, in particular: (a) The right to work as an inalienable right of all human beings.'

³ International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) art 6.

⁴ *ibid.*

⁵ Mirina Grosz, *Sustainable Waste Trade under WTO Law: Chances and Risks of the Legal Frameworks' Regulation of Transboundary Movements of Wastes* (Martinus Nijhoff 2010) 227.

⁶ Ben Saul, David Kinley and Jacqueline Mowley, *The International Covenant on Economic, Social and Cultural Rights: Commentary, Cases and Materials* (Oxford University Press 2014) 272.

⁷ ICESCR (n 3) art 6.

⁸ Grosz (n 5) 227.

It must also be acknowledged that the right to work is not a standalone right. Indeed, as Grosz highlights, the right to work is often 'perceived as a prerequisite to ensure the realisation of other human rights'.⁹ As a result, it is often very difficult to separate employment from related and sometimes competing policy areas and priorities.¹⁰ The right to work has therefore faced barriers that are markedly different from other rights.¹¹ As Chapman and Russell highlight:

Resistance to a right to work involves, at one level, the competing interests involved. If this right were to involve either individual entitlement to jobs or security from unreasonable loss of ongoing employment, it would directly conflict with the claimed need for the largely unfettered decision of the labour market and other markets at the core of modern capitalism.¹²

Accordingly, the right to work often has to be balanced against other rights, deemed by others to be of comparable importance.¹³ This is highlighted by the fact that the common discourse concerning rights to work or employment differs greatly from the context of most other socio-economic rights.¹⁴

In Saudi Arabia, the right of women to work has become one of the most significant topics of discussion, both within the state itself and internationally. This chapter sets out the argument that the right of women to work in Saudi Arabia is protected under Saudi Arabian law based on Islamic *Shariah*.

In examining the right of women to work in Saudi Arabia, this chapter assesses the history of the right of women to work there and the implementation of labour reforms, especially in light of recent reforms of guardian-consent. In addition, it examines the extent to which Saudi law aligns with international laws relating to the rights of women to work and their rights within the workplace. This chapter is divided into three key sections. In the first, the right of women to work under Islamic *Shariah* human rights principles will be explored. This will be followed by an examination of the recent reforms of the guardian-consent requirement and their effect on the right of women to work. In this regard, particular consideration will be given to the impact of culture and different interpretations of *Shariah*. This is because the historical conditions of Saudi Arabia are an essential aspect of understanding a woman's position in Saudi society. Secondly, the right of women to work will be analysed, especially in the aftermath of the guardianship reforms. Thirdly, the labour laws in respect of women will be

⁹ *ibid.*

¹⁰ Audrey R Chapman and Sage Russell, *Core Obligations: Building a Framework for Economic, Social and Cultural Rights* (Intersentia 2002).

¹¹ Manoj Kumar Sinha (ed), *Business and Human Rights* (Sage 2013) 371.

¹² Chapman and Russell (n 10).

¹³ Richard T DeGeorge, 'Part 1: Rights and Work – The Right to Work: Law and Ideology' (2008) 19 Valparaiso University Law Review 21.

¹⁴ Chapman and Russell (n 10).

discussed in light with the international approach to a woman's right to work, particularly in respect of international instruments to which Saudi Arabia is party. This section also examines the rights of women to work in other Muslim (majority) countries.

6.2 Legal basis of the right to work in international human rights law

The right to work was first officially protected by Article 23 of the UDHR,¹⁵ which provides as follows:

1. Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment.
2. Everyone, without any discrimination has the right to equal pay for equal work.
3. Everyone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection.
4. Everyone has the right to form and to join trade unions for the protection of his interests.

The right to work according to Article 23 therefore includes several elements. Firstly, it gives every person, regardless of gender, the right to gain access to the labour market. Secondly, individuals should be able to choose employment without interference from the government or other state authorities. Thirdly, it provides that the working environment must reach a certain standard, recognising that access to the labour market is useless if working conditions are not fair. The same is true for wages and the protection against unemployment. Finally, the right to work is a prerequisite for the protection against discrimination and freedom of association.

Saudi Arabia is a state party and member of a wide range of international treaties and United Nations conventions that protect human rights and, more specifically, the right of women to work.¹⁶ As a result of these treaties, Saudi Arabia is subject to certain requirements to protect women's right to work, including requirements and obligations to ensure equal access to paid employment, a requirement to remove any gender discrimination and to ensure equal opportunities and treatment between men and women in relation to their right to work.¹⁷

¹⁵ Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III) art 23.

¹⁶ International Convention on the Elimination of All Forms of Racial Discrimination (adopted 21 December 1965, entered into force 4 January 1969) 660 UNTS 195.

¹⁷ Committee on Economic, Social and Cultural Rights, 'General Comment No 18: The Right to Work' (6 February 2006) UN Doc E/C.12/GC.18, 13.

6.2.1 International Labour Organization

The International Labour Organization (ILO) was founded after the end of the First World War with the purpose of promoting peace and justice.¹⁸ Although the ILO Constitution does not articulate a right to work, its preamble states that ‘unjust or inhumane labour conditions produce unrest and imperil peace’.¹⁹ As a member state of this body, Saudi Arabia is required to implement all of the international provisions articulated by the ILO by adopting its recommendations and conventions.²⁰

There are four key ILO conventions that are relevant to women at work. These are: the Equal Remuneration Convention (No 100),²¹ the Discrimination (Employment and Occupation) Convention (No 111),²² the Workers with Family Responsibilities Convention (No 156),²³ and the Maternity Protection Convention (No 183)²⁴. Thus far, Saudi Arabia has ratified the Equal Remuneration Convention and the Discrimination (Employment and Occupation) Convention.²⁵

According to Convention No 111’s definition of ‘discrimination’, it includes:

... any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation.²⁶

As Saudi Arabia has ratified Convention No 111, it is obliged to apply it domestically. However, by interpreting the Saudi Arabian position as discussed in Section 2 to this definition, it would appear that Saudi Arabia is committed to both the convention and *Shariah* in the way it adopted the principle of equality between men and women.²⁷ It may also be argued that empowering women to access

¹⁸ Doris Weichselbaumer and Rudolf Winter-Ebmer, ‘The Effects of Competition and Equal Treatment Laws on Gender Wage Differentials’ (2007) 22(50) *Economic Policy* 236, 245.

¹⁹ ILO Constitution, Preamble.

²⁰ Roger Blanpain and others, *The Global Workplace: International and Comparative Employment Law Cases and Materials* (Cambridge University Press 2007) 19.

²¹ ILO Convention C100: The Equal Remuneration Convention (adopted 29 June 1951, entered into force 23 May 1953).

²² ILO Convention C111: Concerning Discrimination (Employment and Occupation) (adopted 25 June 1958, entered into force 15 June 1960).

²³ ILO Convention C156: Workers with Family Responsibilities (Technical Convention adopting proposals for Equal Opportunities and Treatment for Men and Women Workers and Workers with Family Responsibilities) (adopted 23 June 1981, entered into force 11 August 1983).

²⁴ ILO Convention C183: Maternity Protection Convention (Technical Convention adopting proposals for revision of Maternity Protection) (adopted 15 June 2000, entered into force 7 February 2002).

²⁵ ILO, ‘Ratifications for Saudi Arabia’

<http://www.ilo.org/dyn/normlex/en/f?p=1000:11200:0::NO:11200:P11200_COUNTRY_ID:103208> accessed 21 October 2017.

²⁶ ILO Convention C111 (n 23) add para.

²⁷ *ibid.*

services without the consent of their guardian has become an important pillar to supporting women's right to work and access services without requiring the consent of others. As result, this cancellation of guardian-consent requirement has confirmed that Saudi Arabia is obliged to adhere to its international commitments.

6.2.2 International Covenant on Economic, Social and Cultural Rights

The right to work was further developed by the ICESCR. Article 6 of the ICESCR acknowledges 'the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts'.²⁸

The right to work, as guaranteed in the ICESCR, affirms the obligation of state parties to assure individuals their right to freely chosen or accepted work, including the right not to be deprived of work unfairly. This definition underlines the fact that respect for the individual and his dignity is expressed through the freedom of the individual regarding the choice of work, while emphasising the importance of work for personal development as well as social and economic inclusion.

Article 7 of the ICESCR states that parties to the Convention must provide for 'equal pay for equal work without discrimination, provided that women shall be guaranteed employment opportunities on an equal basis with men, and shall draw remuneration equal to that of men'.

6.2.3 Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)

Perhaps the most important international treaty that Saudi Arabia has joined in respect of the right of women to work is CEDAW.²⁹ As a party to CEDAW, Saudi Arabia is required to comply with its provisions, including Article 11. Article 11(1) of CEDAW provides that state parties have to 'eliminate discrimination against women in the field of employment in order to ensure, on a basis of equality of men and women, the same rights'.³⁰

Article 11(1) (c) provides that women should have a free choice of profession and employment. This principle is protected by Article 3 of the Saudi Labour Law which states "Work is a right of the citizen". This right may be exercised if the conditions stipulated in this law are fulfilled. Also, Article 1 of the

²⁸ ICESCR (n 3) art 6.

²⁹ CEDAW (n 2).

³⁰ *ibid* art 11.

Civil Service Law states “Ability shall be the basis for the selection of employees to hold public positions”. This applied to male and female public sector without any discrimination.³¹

Article 11(2) of CEDAW further requires states to prevent discrimination against women ‘on the grounds of marriage or maternity’ in order to ensure their effective right to work.³² As a result of Article 11, Saudi Arabia is obliged to ensure that women have the right to the same employment opportunities, the right to a free choice of profession and employment, the right to promotion, training, job security and benefits, equal pay for equal work, equal access to unemployment, retirement, sick pay benefits and a right to a safe working environment.³³ It appears that Saudi law is fulfilling its obligations under these provisions. Commenting on its obligations to CEDAW, the Saudi government has stated that:

Saudi laws explicitly provide for the strengthening and protection of human rights. Chief among such laws are the Basic Law of Governance, Law of the Judiciary, Law of the Board of Grievances, Law of Criminal Procedures and other laws relating to the justice system. Other laws and regulations concerning labour, health, education and social insurance contain detailed provisions on human rights derived from the principles appearing in the Basic Law of Governance.³⁴

The ILO High-level Mission has acknowledged that the Saudi Arabian government has taken efforts to protect workers against discrimination.³⁵ In light of the guardianship reforms, it could be argued that Saudi Arabia is keen to complying with this Convention. Furthermore, a working group was formed in July 2016 to develop a national equality policy in conformity with Article 2 of the Convention.³⁶ However, the ILO Committee has suggested that efforts must be made to increase the participation of women in a wider range of sectors, not only those traditionally considered to be ‘suitable’, and has

³¹ The Civil Service System, Royal Decree No M/49 (27 June 1977) chs 2, 4 and 5; Regulation of Rights and Financial Benefits, Royal Decree No A/28 (22 June 2011); Saudi Labour Law, Royal Decree No M/51, Part IX Employment of Women.

³² *ibid.*

³³ Marsha A Freeman, Beate Rudolf and Christine Chinkin, *The UN Convention on the Elimination of All Forms of Discrimination against Women: A Commentary* (Oxford University Press 2012) 286, 288.

³⁴ Committee on the Elimination of Discrimination against Women, ‘Consideration of Reports Submitted by States Parties under Article 18 of the Convention, Combined Third and Fourth Periodic Reports of Saudi Arabia’ (30 September 2016) 40th Session CEDAW/C/SAU/3-4.

³⁵ International Labour Organization, ‘Individual Case (CAS) - Discussion: 2013, Publication: 102nd ILC session (2013)’ (*International Labour Organization*, 2013)
<https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:13100:0::NO::P13100_COMMENT_ID:3131834>
accessed on 12 April 2019

³⁶ *ibid.*; Committee on the Elimination of Discrimination against Women, ‘Consideration of Reports Submitted by States Parties under Article 18 of the Convention, Combined Third and Fourth Periodic Reports of Saudi Arabia’ (30 September 2016) 40th Session CEDAW/C/SAU/3-4.

urged the Saudi government to review Article 149 of the Labour Code 'to ensure that any restrictions on women's employment are strictly limited to maternity protection'.³⁷

6.3 Right of women to work under Islamic human rights principles

In Saudi Arabia, the right of women to work derives from *Islamic Shariah*, as interpreted within the Saudi legal framework. As this section will demonstrate, the Interpretation of Islamic jurisprudence has had a significant impact on women's right to access employment. In particular, the condition of the guardian-consent to work has resulted in some guardians arbitrarily denying women the right to work.³⁸

Principles of labour law are found within the Islamic tradition from the establishment of Islam.³⁹ Labour and work within Muslim society are connected with honour and respect, and evidence a perception that work contributes to the functioning of society.⁴⁰ The Prophet Muhammad is reported to have said that 'there is no better food than what has been earned by the use of both hands', and other Islamic traditions declare that work is an activity akin to prayer.⁴¹ This interpretation provides a religious and spiritual dimension to work and labour and suggests that it provides religious meaning in the life of the individual. It may be viewed as a public good, an expression of individual spirituality, and a duty incumbent on those who are able to 'produce more than they consume' within society.⁴² According to Zulfiqar, 'there is significant religious support for securing the rights of those who work. For instance, a Prophetic tradition reports that an individual who takes away rights of a worker should be considered an oppressor.'⁴³

Moreover, both Islamic tradition and *Shariah* appear to support the notion of the right to work, and the right to earn a living wage, under certain conditions.⁴⁴ Labour rights are therefore generally

³⁷ *ibid.*

³⁸ National Society For Human Rights, 'The Chairman of the Society Affirms that the Supreme Court's Decision to Empower Women Without the Consent of their Guardian Will End the Problems Faced by Women!' (*NSHR*, 2018) <<http://nshr.org.sa/en/?news=the-chairman-of-the-society-affirms-that-the-supreme-courts-decision-to-empower-women-without-the-consent-of-their-guardian-will-end-the-problems-faced-by-women>> accessed 9 March 2018.

³⁹ Iftikhar Ahmad, 'Religion and Labor: Perspective in Islam' (2011) 14(4) *Journal of Labor and Society* 591.

⁴⁰ Muhammed Sharif Chaudry, 'Fundamentals of Islamic Economic System' <http://www.muslimtents.com/shaufi/b16/b16_8.htm> accessed 13 December 2017; Mashood A Baderin, *International Human Rights and Islamic Shariah* (Oxford University Press 2003). 167-181

⁴¹ Muhammad Muhsin Khan (trs), *The Translation of the Meaning of Sahîh Al-Bukhâri* (Darussalam 1997).

⁴² *ibid.*

⁴³ Adnan A Zulfiqar, 'Religious Sanctification of Labor Law: Islamic Labor Principles and Model Provisions' (2007) 9 *University of Pennsylvania Journal of Labour and Employment Law* 433.

⁴⁴ Baderin (n 40). 167-181

culturally accepted within many Islamic societies and the legal codes of countries such as Jordan, Egypt and the GCC countries.⁴⁵

Although they are obviously not legal documents, there are a number of prominent examples in the *Quran* and *Sunnah* that demonstrate that women's right and ability to work are part of *Shariah*.⁴⁶ In the *Quran*, for example, it is stated that: 'He it is who has made the earth tame to you; so walk in the path thereof and eat of His Provision. And to Him will be the Resurrection.'⁴⁷

This verse has been interpreted as suggesting that not only does every human have the right to work without any conditions or limitations, including gender, but indeed every human *must* work in order to live.⁴⁸ The *Quran* and *Sunnah* also provide significant examples of women undertaking work in the public sphere, including commerce, industry and agriculture. In many cases, they are presented as taking on hard labour that would have traditionally remained the preserve of men. For example, the *Quran* provides the example of the daughters of the Prophet Shuaib who the Prophet Musa witnessed working in the field as shepherds because their father was too frail to tend the flock.⁴⁹ The *Quran* presents the story of the two daughters in admirable terms, demonstrating that women are capable of working and should not be excluded from labour, particularly where they must work to earn their living.

In the secondary sources, there is a *hadith* which quotes the Prophet Muhammed (Peace be upon him) as saying: 'Nobody has ever eaten a better meal than that which one has earned by working with one's own hands. The Prophet of Allah, Dawud, used to eat from the earnings of his manual labour.'⁵⁰

This *hadith* has been interpreted as demonstrating that *Shariah* encourages all people to gain from their own labour, and discourages economic reliance on others.⁵¹ Another *hadith* has also been interpreted as suggesting that the Prophet Muhammed encouraged people to cut and sell firewood in order to make a living, which again can be interpreted as discouraging economic reliance on others.⁵²

⁴⁵ Sawsan Abduljabbar, *Comparative Study of the Protection of Women's Employment at the International Level* (1st edn, National Center for Legal Publications 2015) 20.

⁴⁶ Leila Ahmed, *Women and Gender in Islam: Historical Roots of a Modern Debate* (Yale University Press 1992) 43.

⁴⁷ *Holy Quran* 67:15.

⁴⁸ Hani Abdulghani, 'Examining Obstacles to Saudi Women's Right to Work in the Kingdom of Saudi Arabia' (DPhil Thesis, Brunel University London 2016) 67.

⁴⁹ *Holy Quran* 28:23.

⁵⁰ Zulfikar (n 44) 433.

⁵¹ Abdulghani (n 48) 67.

⁵² Zulfikar (n 44) 433.

In addition to a general right of women to work, Islamic tradition provides examples of women in leadership positions, including the Queen of Sheba who is presented as a wise, firm and benevolent leader who, perhaps most significantly, acted independently.⁵³ Another example of a wise leader is Aisha, the youngest wife of the Prophet Muhammad (Peace be upon him), who was reportedly sought out for her advice and wisdom.⁵⁴ She also reportedly led troops during the Battle of the Camel.⁵⁵ Aisha once again offers an example of women within the Islamic tradition taking on leadership roles and participating actively in intellectual and public life. These examples would appear to demonstrate that Islamic tradition at the time of the Prophet Muhammed (Peace be upon him) did not question the notion of placing a woman in a significant leadership position.

Furthermore, Islamic traditions indicate that women were actively contributing to the economy. For example, the Prophet Muhammed's first wife (Peace be upon him), Khadija, is described as a highly successful businesswoman and merchant in her own right.⁵⁶ Her skill and success in the world of enterprise provides a clear precedent for the ability of women to engage in business and to lead and employ men.⁵⁷

As many passages of the *Quran* are subject to multiple interpretations, in passages relating to the rights of women, the interpretation that is utilised may be the one that is most closely related to another goal or right. For example, consider the following verse of the *Quran*: '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.'⁵⁸

Many scholars have argued that this passage can be interpreted as suggesting that no distinction is made in the *Quran* between the work of men and women and that, by extension, the right to work in Islam includes the right of women to work. Wahiduddin Khan, for example, has interpreted this passage to mean: 'I will deny no man or woman among you the reward of their labours. You are members one of another', while Tahir-ul-Qadri interprets the passage as 'I do not waste the wages of any labourer, whether man or woman'.⁵⁹ However, other scholars, such as Munshey, have interpreted

⁵³ *Holy Quran* 27:31-27:34.

⁵⁴ Hailh Al-Twijrih, *Women's Work in Islamic Jurisprudence* (Researcher Center for Women's Studies 2010) 40.

⁵⁵ Fatima Mernissi, 'Can a Woman Be a Leader of Muslims?' (Islamic Research Foundation International) <http://www.irfi.org/articles/articles_401_450/can_a_woman_be_a_leader_of_musli3.htm> accessed 14 October 2017.

⁵⁶ Yasmina Blackburn, 'Seven Remarkable Things About Khadija, Wife of the Prophet of Islam' (*Huffington Post*, 21 April 2015) <https://www.huffingtonpost.com/yasmina-blackburn/7-remarkable-things-about_b_7097606.html> accessed 14 October 2017.

⁵⁷ Ahmed (n 47) 43.

⁵⁸ *Holy Quran* 3:195.

⁵⁹ Mohammed Tahir-ul-Qadri, *Translation of the Holy Qur'an* (Minhaj-ul-Qur'an International 2005).

the term 'work' in the above verse as referring to good deeds.⁶⁰ The debate over the interpretation of this passage is just one example of the way in which various passages of the *Quran* can be used to further the objectives of the interpreter.

The above sources provide multiple examples of the right to work in Islam as one that is granted to both males and females. It is also clear that Islamic tradition provides for a number of prominent examples that suggest that women played an important role in society in the period during and shortly after the foundation of Islam. Jawad suggests that during that period women 'participated effectively in public life; took part in prayers at the mosque together with the men; joined their colleagues in military expeditions, travelled widely, and moved freely and mixed with men with self-respect and dignity'.⁶¹

Jawad suggests that, as a result of the transformation of the early Islamic community into an empire, women's rights were steadily eroded. She argues that Islam was the first culture to liberate women by granting them full rights of citizens and allowing them to play a full and positive role in society.⁶² She suggests that the contemporary restriction of women's rights in some Muslim (majority) countries is a result of interpretations of *Shariah* that have been taken out of context.⁶³

However, it must be noted, as Syed points out, that there is 'not one, but many Islams' and women's experiences in Islamic societies are subject to the variety of interpretations and practices of Islam in different parts of the world. He notes that these experiences range from:

[B]eing strictly closeted, isolated and voiceless within four walls, to situations where women have a far greater degree of freedom of movement and interaction, enjoy the right to work and to participate in public affairs, and also exercise a far greater control over their own lives.⁶⁴

The varying experiences of women in Islamic societies can be further illustrated by Data provided by the United Nations Development Program indicates that female economic activity in non-Arab Muslim countries is comparable to countries such as the USA and the UK, whereas in Arab Muslim countries

⁶⁰ Munir Munshey, 'The Holy *Qur'an* Translation' <http://www.answering-christianity.com/cgi-bin/Qur'an/Qur'an_search.cgi?search_text=&search_type=The+Entire+Noble+Qur'an&munir_munshey=1&B1=Search> accessed 15 October 2017.

⁶¹ Haifaa Jawad, *The Rights of Women in Islam: An Authentic Approach* (MPress 1998). 14-15

⁶² *ibid.*

⁶³ *ibid.*

⁶⁴ Jawad Syed, 'A Context-specific Perspective of Equal Employment Opportunity in Islamic Societies' (2008) 25(1) *Asia Pacific Journal of Management* 135, 143.

female employment levels continue to remain low.⁶⁵ This data would appear to suggest that the obstacles to the right of women to work in some state are a cultural issue. As noted by Syed, non-Arab Islamic societies such as Malaysia and Indonesia all provide more economic opportunities for women than countries such as Oman, Saudi Arabia, Jordan, and the United Arab Emirates. This claim appears the variation of culture; he also notes that ‘the role of local traditions within each society must not be ignored’.⁶⁶

However, there are also economic arguments put forward to explain this difference. According to Offenhauer and Buchalter: ‘the level of Muslim women’s participation in the paid labour force are best explained by a particular economy’s development strategy and consequent need for female labour rather than by, for example, religious or cultural beliefs’.⁶⁷ Offenhauer and Buchalter suggest that because of the high oil prices prior to the mid-1980s, countries such as United Arab Emirates and Saudi Arabia did not require female labour to grow, whereas countries that sought to develop through labour intensive industrial production, such as Malaysia and Indonesia, did.⁶⁸ Therefore, there does not appear to be any obstacles in Islamic tradition to prevent women from working. As Baderin highlights, ‘generally there is nothing within the Qur’an and Sunnah that specifically excludes women from doing any legitimate work of their choice, provided they possess the required skills and expertise and they are not exposed to any hazards therefrom’.⁶⁹

However, the purpose of this section is to show that *Shariah* law protected the right to work pertaining to women. As a result of this, the restrictions placed on a woman’s right to work in practice are often based on social context. As Baki states:

[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.⁷⁰

⁶⁵ United Nations Development Programme, ‘The Human Development Report 2016’ (2016) <http://hdr.undp.org/sites/default/files/2016_human_development_report.pdf> accessed 13 December 2017. 163-169

⁶⁶ Syed (n 64).

⁶⁷ Priscilla Offenhauer and Alice R Buchalter, ‘Women in Islamic Societies: A Selected Review of Social Scientific Literature’ (Library of Congress, November 2005).

⁶⁸ *ibid.*

⁶⁹ Baderin (n 41).

⁷⁰ 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.

Different traditional cultural views and economic circumstances have had a major impact on the rights of women to work in different Islamic societies. Given the variety of differences and the impact of culture, it is now necessary to specifically examine the right of women to work in Saudi Arabia.

6.4 Application of the right to work in Saudi Arabia

Throughout the history of Saudi Arabia, many women have been engaged in some form of work in industries such as animal husbandry and textile manufacturing.⁷¹ After the establishment of the Kingdom, Saudi society maintained a conservative tribal structure, although the oil boom of the 1960s and 1970s resulted in more openness being witnessed in the country.⁷² However, the Kingdom's regulations guaranteed the right to work and the national plan was focused on facilitating the fields of work of each individual capable of doing so in accordance with Article 28 of the Basic Law of Governance.⁷³ Internationally, Saudi Arabia has ratified a number of conventions that promote gender equality in the workplace; evidence suggests that Saudi Arabia has consistently committed itself to meeting international human rights standards in regards to women's right to work. It has done so by issuing regulations and measures to achieve this goal based on gender equality, with particular attention to women in achieving a number of objectives of successive development plans to improve women's enjoyment of their right to work.⁷⁴

Under Saudi law, the right to work is protected for both female and male in accordance with the principles of Islamic *Shariah*.⁷⁵ As discussed in the previous section, *Shariah* does not forbid women from working, and the Saudi Labour Law and Basic Law of Governance emphasise their compliance with *Shariah*.⁷⁶ In fact, Prince Mohammed bin Salman bin Abdulaziz Al Saud, Crown Prince, Deputy Prime Minister and Minister of Defense of Saudi Arabia has stated that:

In our religion there is no difference between men and women. There are duties to men and duties to women. There are different forms of equality. In the Saudi government women are paid exactly like men. We have regulations like this that are going into the private sector. We don't want divided treatment for different people.⁷⁷

⁷¹ Abdulghani (n 48) 67.

⁷² Eman Alhussein, 'Triangle of Change: The Situation of Women in Saudi Arabia' (NOREF, July 2014) <<https://www.files.ethz.ch/isn/181922/ef4fe5e44ede4d362d60a6804ed40437.pdf>> accessed 21 August 2017.

⁷³ Ministry of Economy and Planning Statistics, "'Millennium Development Goals': Kingdom of Saudi Arabia' (2008).

⁷⁴ Committee on the Elimination of Discrimination against Women (n 35).

⁷⁵ Sahar Alhabdan, 'Women Working in Saudi Arabia' (2015) *Indiana Journal of Global Legal Studies* 3.

⁷⁶ Abdulghani (n 48) 67.

⁷⁷ Alriyadh, 'In an Interview with the Magazine "The Atlantic" of America, Crown Prince: There Is no So-Called Wahhabism' <<http://www.alriyadh.com/1672718>> accessed 13 April 2018.

In recent years, the Saudi government has implemented a number of labour reforms.⁷⁸ This has led to a change taking place, particularly within the larger cities in Saudi Arabia.⁷⁹ In addition, with the government taking steps to diversify the Saudi economy in the wake of the drop in the price of oil, the potential for up to 30% of the population to join the workforce 'represents an enormous source for the Kingdom'.⁸⁰

The employment law framework in Saudi Arabia is based on the twin pillars of the Labour Code and the Implementing Regulations of the Labour Code.⁸¹ However, before exploring the key provisions of the Saudi Labour Code, it is important to be aware that the Basic Law of Governance also contains relevant provisions with regard to the right to work. The next section considers the laws and regulations that guaranteed the right to work in Saudi Arabia.

The Basic Law of Governance sets out the system of governance, rights of citizens and powers and duties of the government.⁸² From the outset, the Basic Law designates the *Quran* and *Sunnah* as the country's constitution.⁸³ Accordingly, the combined third and fourth periodic reports of states parties submitted by Saudi Arabia to the Committee on the Elimination of Discrimination against Women points out that:

The laws of the Kingdom guarantee the right to work without discrimination, as affirmed in previous reports of Saudi Arabia. National plans have focused on facilitating employment for all qualified persons in the government or private sector pursuant to article 28 of the Basic Law of Governance. This objective is achieved by enacting laws and regulations and adopting measures based on gender equality. Special importance is attached to women in order to achieve the objectives of successive development plans to enhance women's enjoyment of their right to work.⁸⁴

Article 8 of the Basic Law of Governance provides that: 'Governance in the Kingdom of Saudi Arabia shall be based on justice, shura (consultation) and equality in accordance with the Islamic Shari'ah'.

⁷⁸ Mona Almunajjed, 'Women's Employment in Saudi Arabia: A Major Challenge' <http://arabdevelopmentportal.com/sites/default/files/publication/235.womens_employment_in_saudi_arabia_a_major_challenge.pdf> accessed 13 April 2018.

⁷⁹ Arab News, 'Women to Constitute 28% of Saudi Arabia's Work Force by 2020' <<http://www.arabnews.com/node/1068131/saudi-arabia>> accessed 13 April 2018.

⁸⁰ Safaa Fouad Rajkhan, 'Women in Saudi Arabia Status, Rights and Limitations' (MA Dissertation, University of Washington Bothell, June 2014) page iv.

⁸¹ Royal Decree M/51 (n 32); Shearman & Sterling LLP, 'Understanding Employment Law in the Kingdom of Saudi Arabia' (November 2016).

⁸² Saudi Basic Law of Governance, Royal Order No A/91 (1 March 1992).

⁸³ *ibid* art 1, ch 1.

⁸⁴ Committee on the Elimination of Discrimination against Women (n 35) 38.

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 *Shariah*, which has been interpreted as providing women with a fundamental right to work.⁸⁵ 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.⁸⁶ In fact, the rights of women are looked or protected the right to work without discrimination, as affirmed in previous reports of Saudi Arabia.

In addition to the Basic Law of Governance, the Saudi Labour Code contains a number of provisions that are relevant to the right of women to work in Saudi Arabia. Indeed, the Labour Code grants the right to work to all citizens, both men and women. This right was 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.'⁸⁷

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 of *Shariah*.⁸⁸ 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, Articles 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.'⁸⁹ 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.'⁹⁰

⁸⁵ Abdulghani (n 48) 55.

⁸⁶ *ibid*.

⁸⁷ Saudi Labour Code, art 3.

⁸⁸ *ibid* art 4.

⁸⁹ *ibid* art 149.

⁹⁰ *ibid* art 150.

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 *Shariah* principles that life should be protected.⁹¹ 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.⁹² In this regard, the effect of these regulations is to ensure women protection about whether to work at night as Article 150 provides that any such exceptions are at the behest of the Labour Minister.

Articles 151-156 of the Labour Code set out 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.⁹³ 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.⁹⁴ Articles 155 and 156 prevent employers from terminating employment or giving notice of such a termination while a woman is on maternity leave.⁹⁵ These provisions are considered to be quite forward-looking 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'.⁹⁶

6.5 Culture and gender equality in relation to right to work

Culture, customs and practices appear to significantly impact on whether work for women ought to be circumscribed by requirements such as gender segregation. This can have a major impact on women realising their right to work in practice. For example, various rulings based on gender segregation have implicitly legitimised differences that prevent women in Islamic societies accessing high status or leadership roles.⁹⁷ Ouzgane, for example, asserts that: 'while the rights and freedoms

⁹¹ Abdulghani (n 48) 67.

⁹² Regulation of Saudi Labour Minister No 1/2838 (2007).

⁹³ Royal Decree No M/51 (n 32), Part IX Employment of Women.

⁹⁴ *ibid.*

⁹⁵ *ibid.*

⁹⁶ Alhussein (n 77).

⁹⁷ A *fatwa* issued by al-Azhar Fatwa Ulema Council in 1992 affirmed that women should not be appointed a judge, primarily based on the interpretation of al-Bukhari (4425): 'No people will ever prosper who appoint a woman in charge of their affairs.'

of women across the Muslim world vary, men have been able to misuse religion and culture to sustain and reinforce gender inequalities'.⁹⁸

This section considers some of the cultural obstacles impacting the right of women to work, as well as any relevant reforms in these areas.

6.5.1 Gender segregation and its impact on the equal access and availability of work

Despite the legal rhetoric of the Labour Code espousing the need for a greater economic role for women and measures for equal treatment, the culture and structure of the labour market emphasises gender segregation and gender-based occupations.⁹⁹ However, this does not affect Saudi women, due to the high acceptance of gender segregation in the Saudi culture. As Harrison notes that The Saudi women have made a notable progress in higher education and the national labour market. Women can exercise their right to work easily in their workplace.¹⁰⁰

The idea of gender segregation is guided by custom and *Shariah* law that reflects the need to 'protect' women from being subjected to sexual harassment or from being a source of temptation to men, which could result in a loss of morals and adultery.¹⁰¹ As a result of these customs, workplaces in Saudi Arabia are generally segregated and women are required to wear the veil (hijab) when in contact with men as a religious obligation.¹⁰²

The concept of women being employed continues to be a controversial topic in certain parts of some Islamic societies. As Syed notes, the idea of women being in paid employment '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'.¹⁰³

6.5.2 Culture of women's work

In Saudi society, it is believed that the role of women is fundamental to maintaining the structure of the family and therefore of society.¹⁰⁴ Women's employment can therefore be viewed as posing a

⁹⁸ Lahoucine Ouzgane, *Islamic Masculinities* (Zed Books 2006) 166.

⁹⁹ Baki (n 72).

¹⁰⁰ Nick Forster, *The Rise of Women Managers, Business Owners and Leaders in the Arabian Gulf States* (Cambridge University Press 2017) 277.

¹⁰¹ Ronald J Burke and Astrid M Richardsen, *Women in Management Worldwide: Signs of Progress* (Taylor & Francis 2016) 332.

¹⁰² *ibid.*

¹⁰³ Syed (n 64).

¹⁰⁴ Marianne Alireza, 'Women of Arabia' (1987) 172(4) *National Geographic* 423.

challenge to the apparent sanctity of the family unit and as questioning the societal role of women as mothers and wives. Therefore, a woman's right of employment in Saudi society often comes with the caveat that it must never be at the expense of family duties. The result is that the woman is left with the responsibility of balancing her activities effectively.¹⁰⁵

Some within Saudi Arabia still find women working culturally difficult to accept; an attitude fuelled by both concerns for women's well-being and safety in the workplace, and by the fact that they construe women's employment as a threat to patriarchal systems and traditional culture.¹⁰⁶ This plays into a divisive rhetoric which surfaces within Saudi society in which unwanted change and modernity are perceived to have a corrupting effect on Saudi ethical and moral values.¹⁰⁷

The concept of *qiwamah* in Islam establishes men as caretakers (or managers) of women.¹⁰⁸ In practice, it means that a man is entrusted with making provisions for his wife.¹⁰⁹ There are a number of interpretations of the practicalities of the application of *qiwamah*, with Kurzman suggesting that the concept is to ensure that women are not burdened with additional responsibilities which jeopardise their primary responsibility as child bearers and care givers.¹¹⁰ As Kurzman explains, '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'.¹¹¹

The concept stems from Quranic verses that are interpreted as saying that 'men (are) in charge of women'.¹¹² This verse was interpreted by Ibn Kathir as saying that 'the man is responsible for the woman, and he is her maintainer, caretaker and leader'.¹¹³ This interpretation has been used to support the view that only a man has the right to work in order to support his family and that, by extension, it is implied that a woman's place is in the home. However, according to Abdulghani, this implication is not necessarily accurate, and could, as a result, create confusion about women's rights.¹¹⁴

¹⁰⁵ Salwa Abdul Hameed Al-Khateeb, 'Female Employment and Family Commitment in Saudi Arabia: A Case Study of Riyadh City' (PhD Thesis, University College London 1987).

¹⁰⁶ EA Doumato, 'Gender, Monarchy and National Identity in Saudi Arabia' (1992) 19(1) *British Journal of Middle East Studies* 31, 33.

¹⁰⁷ William Ochsenwald, 'Saudi Arabia and the Islamic Revival' (1981) 13(3) *International Journal of Middle East Studies* 271, 272.

¹⁰⁸ Anne Sofie Roald, *Women in Islam: The Western Experience* (Routledge 2001).

¹⁰⁹ *ibid.*

¹¹⁰ Charles Kurzman, *Liberal Islam: A Source Book* (Oxford University Press 1998) 138.

¹¹¹ *ibid.*

¹¹² *Holy Quran* 4:34.

¹¹³ Tafseer ibn Kathir, vol 4, 34.

¹¹⁴ Abdulghani (n 48) 67.

Some passages of the *Quran* have been interpreted as suggesting that the Prophet Muhammed preferred women to work within the home when it was not necessary to work outside.¹¹⁵ For example, the *Quran* 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.¹¹⁶

The above text has been interpreted by scholars in a number of different ways. For example, according to Ibn Kathir, it refers to 'the wives of the (Prophet Peace be upon him), and the women of the nation followed them in that',¹¹⁷ whereas Ibn Qurtubi interpreted it to mean that, as a general rule, women should carry out most of their activities in the home.¹¹⁸ According to Wadud, this passage was intended to prevent women from making 'a wanton display of their beauty'.¹¹⁹

Another example from the *Quran* is the following:

O Prophet! Tell your wives and your daughters as all believing women, that they should draw over themselves some of their outer garments (when in public). This will be more conducive to their being recognised (as decent women) and not annoyed.¹²⁰

This verse has been cited as justification for both keeping women in the home as well as the requirement to wear the *hijab*.¹²¹ As can be seen from the above, the nature of the Quranic verses are used to justify concepts such as guardianship, *qiwamah* or a requirement to keep women in the home. Conservative interpretations of such Quranic verses have been commonly cited as justification for the prohibition on women leaving their homes unless absolutely necessary.¹²² However, Aljaouhari suggests that these interpretations are being used by men as 'a licence to control women's lives'.¹²³

¹¹⁵ Al-Twijrih (n 55) 40.

¹¹⁶ *Holy Quran* 33:33.

¹¹⁷ E Al-Dumashqi, *Tafsir ibn Kather* (Dar Tibah 2002) ch 6, 410.

¹¹⁸ *ibid*.

¹¹⁹ Amina Wadud, *Qur'an and Woman: Rereading the Sacred Text from a Woman's Perspective* (Oxford University Press 1999) 97.

¹²⁰ *Holy Quran* 33:59.

¹²¹ Ibrahim B Syed, 'Misinterpretation of *Qur'anic* Verses on Hijab' (IRFI)

<http://www.irfi.org/articles/articles_301_350/misinterpretation_of_qur.htm> accessed 19 October 2017.

¹²² Ann Elizabeth Mayer, 'Universal versus Islamic Human Rights: A Clash of Cultures or a Clash with a Construct' (1993-1994) 15 *Michigan Journal of International Law* 307, 332; Wadud (n 134) 97.

¹²³ Saha Aljaouhari, 'Between Obedience and Rebellion: A Field Study on the Young Women of Jeddah, Saudi Arabia' (PhD Thesis, University of Southampton, 2013) 166.

6.5.3 Saudi Arabia efforts toward women's right to work

In light of the above discussion on Saudi cultural norms, it is arguable that Saudi legislators are focused on the strengthening and protection of women's rights. Indeed, the imperative for reform in Saudi Arabia and the empowerment of women is most often associated with the welfare of citizens and the government keenness to protect basic rights, with women's employment by and large regarded as a somewhat benign issue that can be accommodated within an Islamic *Shariah*-based paradigm.¹²⁴

In recent years, a number of labour reforms applicable to both men and women have taken place in Saudi Arabia which aims to improve working conditions and access to employment. In 2012, a minimum wage was introduced in the public sector, and there have been plans for a number of years to introduce a similar initiative that would apply to private sector companies.¹²⁵ In 2013, a wage protection system was introduced specifically targeted at low wage earners and illegal employment in the private sector. This system was expanded in 2017 to become mandatory for all SMEs.¹²⁶ In addition, an unemployment assistance program (*Hafiz*) was established in 2011 and extended in 2014, which provides financial assistance for Saudi jobseekers.¹²⁷ The system treats men and women equally in terms of providing services.¹²⁸

A 2011 Ministerial Resolution on female employment in the retail sector ensured that shops that sell women's products (such as lingerie) must be staffed only by women, resulting in an increase of 160,000 women employed in the private sector since 2012.¹²⁹ In 2015, a Ministerial Resolution was passed that established additional benefits for women within the workplace, entitling women to ten weeks of maternity leave, access to childcare provision through their employer, and more generous annual leave.¹³⁰ This is a particularly important step forward as it impacts upon their capacity to work and juggle family life.¹³¹

¹²⁴ Baderin (n 41).

¹²⁵ Economist, 'Government Set to Raise Minimum Wage for Saudi Employees' (15 January 2014) <<http://country.eiu.com/article.aspx?articleid=1661428150&Country=Saudi%20Arabia&topic=Economy&subtopic=Forecast&subsubtopic=Policy+trends&u=1&pid=1851387169&oid=1851387169>> accessed 19 October 2017.

¹²⁶ See Proven, 'Wage Protection System Now Mandatory in 2017 for SMEs' (9 April 2017) <<https://proven-sa.com/2017/04/wage-protection-system-now-mandatory/>> accessed 19 October 2017.

¹²⁷ National Labor Gateway, 'Hafiz' <<https://www.taqaat.sa/en/web/guest/hafiz-searching-for-employment>> accessed 19 October 2017.

¹²⁸ Arab News, 'Hafiz Being Abused by Educated, Idle Women' <<http://www.arabnews.com/news/483821>> accessed 19 October 2017.

¹²⁹ See WAFA, 'Women's Work Guide in the Private Sector' (2018) <<http://www.wafa.com.sa/photoGallery/author/FTP/0005500055.pdf>> accessed 6 March 2018.

¹³⁰ *ibid.*

¹³¹ Abdulghani (n 48) 67.

Aside from legislation, the government has sponsored a variety of initiatives in recent years that are designed to improve women's prospects for employment. For example, the Saudi Vision 2030 strategy, established to develop the Saudi Arabian economy to be less dependent on oil, includes a number of comments on women's issues.¹³² The strategy provides that equal employment opportunities will be available to everyone. The document states that:

Saudi women are yet another great asset. With over 50 percent of our university graduates being female, we will continue to develop their talents, invest in their productive capabilities and enable them to strengthen their future and contribute to the development of our society and economy.¹³³

The Vision 2030 strategy aims to increase female employment from a stated level of 22% to 30% by 2030.¹³⁴ This strategy can be viewed in conjunction with the National Transformation Programme 2020, which makes reference to women's right to work in the public sector and considers how to develop access to employment for women.¹³⁵ Under this programme, it is intended that the percentage of female civil service employees will increase from 39.8% to 42%, as well as an increase in the number of females in high-ranking position to 5% from 1.27%.¹³⁶

With a number of these labour reforms intended to make a long-term impact in the labour market, statistics released by the Saudi Arabian government do not yet provide the full picture. However, the statistics that are available do appear to back up the view that the reforms are making an impact. For example, as discussed in the previous chapter, in 2015, over 51% of university graduates were women.¹³⁷ Statistics provided by the World Bank suggest that the labour force participation rate for women in Saudi Arabia was 21% in October 2017, up from 14% in 1992.¹³⁸

In addition, the position of women in the private sector is also increasing. In March 2017, a report from the Ministry of Labour claimed that the number of women working in the private sector had risen 130% in four years, from 215,000 in 2012 to 496,000 in 2016.¹³⁹ The report also indicated that

¹³² Saudi Arabia's Vision 2030 (25 April 2016)

<http://www.vision2030.gov.sa/sites/default/files/report/Saudi_Vision2030_EN_0.pdf> accessed 13 December 2017.

¹³³ *ibid.*

¹³⁴ *ibid.*

¹³⁵ Government of Saudi Arabia, 'National Transformation Programme 2020'

<http://vision2030.gov.sa/sites/default/files/NTP_En.pdf> accessed 19 October 2017.

¹³⁶ *ibid.*

¹³⁷ Saudi Gazette, 'More Women than Men in Saudi Universities, Say Ministry' (28 May 2015)

<<https://english.alarabiya.net/en/perspective/features/2015/05/28/More-women-than-men-in-Saudi-universities-says-ministry.html>> accessed 19 October 2017.

¹³⁸ World Bank, 'Labor Force Participation Rate' <<https://data.worldbank.org/indicator/SL.TLF.CACT.FE.ZS>> accessed 19 October 2017.

¹³⁹ See Wafa (n 145).

the percentage of women in the private sector's workforce had increased from 12% to 30% between 2011 and 2017.¹⁴⁰ Although these figures included expats, the report indicated that the number of women working in sectors such as banking and finance had increased dramatically. This represents an opening up of the professions deemed legally and culturally appropriate for women, and sets a precedent for more women to be involved in enterprise.¹⁴¹

One of the areas where women's employment has particularly developed in recent years is in entrepreneurship. Increasingly, Saudi women are playing a role in small- and medium-sized enterprises in which they are able to bypass guardianship restrictions by developing their own businesses in the home, with a 2015 study stating that 63% of Saudi women have unregistered businesses that they operate by relying on mobile phones and personal computers.¹⁴² This development offers an interesting perspective on the way in which Saudi women show their ability to contribute to the renaissance of the state.

A Supreme Order was issued in 18 April which empowers women to access services without the consent of the guardian, including gaining access to work and any rights guaranteed by *Shariah* and Saudi law. The Supreme Order was issued that provided that all government institutions in Saudi Arabia would be required to grant services to women without requiring their guardian's consent, unless such a requirement was stipulated in Islamic *Shariah*.¹⁴³ The Supreme Order required such government institutions to provide their female employees with suitable means of transportation.¹⁴⁴ As a result of these Orders, the National Society for Human Rights argued that the services would include a right for women to work, independently represent themselves in court, and obtain passports to without their guardian's consent.¹⁴⁵

6.6 Bringing Saudi labour laws into compliance with international law

The Vision 2030 strategy indicates that the Saudi government now clearly acknowledges the positive role which women's employment can play in furthering the development of the Saudi economy. Indeed, the increased number of government initiatives available for women demonstrates that their legal protection is being taken seriously and that steps are being put in place to ensure that women

¹⁴⁰ *ibid.*

¹⁴¹ *ibid.*

¹⁴² Afshan Aziz, 'Female Entrepreneurs Find Increased Success in KSA' (*Arab News*, 25 December 2015) <<http://www.arabnews.com/saudi-arabia/news/855451>> accessed 19 October 2017.

¹⁴³ Qasim Alkhubrani, 'Al-Qahtani Reveals the Benefits of Empowering Women Without the Consent of their Guardian' (*Sahifat Sabaq Al'iiliktrunia*, 2017) <<https://goo.gl/bkBrFT>> accessed 9 January 2018.

¹⁴⁴ *ibid.*

¹⁴⁵ Lulwa Shalhoub, 'Saudi Women No Longer Need Guardians' Consent to Receive Services' (*Arab News*, 5 May 2017) <<http://www.arabnews.com/node/1094681/saudi-arabia>> accessed 17 October 2017.

have a right to equal and fair working conditions. However, in practice, the protection of human rights in Saudi Arabia arguably meets the standards of the international human rights law framework in accordance with the provisions of Islamic *Shariah* law. This chapter now turns to consider this topic.

6.6.1 Eliminating discrimination under CEDAW

CEDAW, in its General Recommendation No 19, pointed to the fact that gender-specific violence, including sexual harassment in the workplace, can have a substantial effect on equality in employment. It recognises that ‘such conduct can be humiliating and may constitute a health and safety problem; it is discriminatory when the woman has reasonable grounds to believe her objection would disadvantage her in terms of employment ... or create a hostile working environment’.¹⁴⁶

In *Belousova v Kazakhstan*¹⁴⁷ the complainant claimed she had faced sexual harassment from her employer. In their decision, the CEDAW Committee explained that:

... the State party has taken all appropriate measures to ensure the effective protection of the author’s right not to be discriminated against by any person, organization or enterprise and has taken prompt and appropriate action to address and put an end to the claimed discriminatory treatment in the form of sexual harassment.¹⁴⁸

In its ratification of CEDAW, Saudi Arabia entered a general reservation that, where there was a contradiction between the Convention and Islamic *Shariah*, then it would not be obliged to adhere to the Convention’s provisions which contradict with Islamic *Shariah*. Such a reservation is difficult to reconcile with CEDAW, which seeks to eliminate discrimination against women and promote equality by imposing obligations on state parties to reform their laws and social practices to achieve this.¹⁴⁹ Indeed, the CEDAW Committee has claimed that such a reservation ‘is contrary to the object and purpose of the Convention’ and thereby desires the state party to ‘consider the withdrawal of its general reservation to the Convention’.¹⁵⁰

Article 2 of CEDAW requires state parties ‘to ensure’ compliance from their government organs with the treaty and ‘to take all appropriate measures’ to effect ‘the elimination of discrimination in all its

¹⁴⁶ Committee on the Elimination of Discrimination against Women, ‘General Recommendation No 19: Violence Against Women’ (1992).

¹⁴⁷ *Belousova v Kazakhstan* (13 July 2015) CEDAW/C/61/D/45/2012.

¹⁴⁸ Committee on the Elimination of Discrimination against Women (n 35).

¹⁴⁹ Sifa Mtango, ‘A State of Oppression – Women’s Rights in Saudi Arabia’ (2004) 5 Asia Pacific Journal on Human Rights 61.

¹⁵⁰ Committee on the Elimination of All Forms of Discrimination Against Women, ‘Concluding Observations on the Combined Third and Fourth Periodic Reports of Saudi Arabia’ (9 March 2018) C/SAU/CO/3-4, 4.

forms' and 'to modify or abolish existing laws, regulations, customs and practices'.¹⁵¹ The requirement is a 'positive' obligation on state parties to actively take steps to eliminate discriminatory laws and practices in their territory. Accordingly, Saudi Arabia, having ratified CEDAW, is bound under international law to promote the human rights of women in its territory by eliminating discrimination and ensuring equality with men.¹⁵² The Saudi government stated that the laws of Saudi Arabia require complete equality between men and women, taking into account the features and characteristics which differentiate the two sexes. For example, Article 8 of the Basic Law of Governance states that: 'Governance in the Kingdom of Saudi Arabia shall be based on justice, *shura* (consultation), and equality in accordance with the Islamic Sharia.'¹⁵³ Although the CEDAW Committee has acknowledged the reforms made by the Saudi government, also concerned about the absence of comprehensive and non-discriminatory legislation that the guarantee of complete equality.¹⁵⁴

Article 5(a) of CEDAW requires that states enact a positive obligation to modify social and cultural practices where there is a clash of domestic, social and cultural factors with CEDAW.¹⁵⁵ For instance, in the decision made by the CEDAW Committee in *Rahime Kayhan v Turkey*¹⁵⁶ the Committee found that the dismissal of a female Turkish teacher from her job on the grounds of wearing a headscarf in work was discrimination on the basis of her religion (although it should be noted that the CEDAW Committee did not consider the practice of wearing the headscarf to constitute discrimination based on gender).¹⁵⁷

The right of women to work under CEDAW is protected where obstacles to its access or discriminations are imposed in a manner that prevents equality of opportunity for women and men. Saudi women have the right to all of the freedoms of their male counterparts, and the state protects them where they provide employment opportunities on an equal basis as stipulated by the laws of the Kingdom and the provisions of Islamic Shariah.¹⁵⁸

¹⁵¹ CEDAW (n 2) art 11.

¹⁵² Committee on the Elimination of Discrimination against Women, 'Concluding Comments of the Committee on the Elimination of Discrimination against Women, Saudi Arabia' (14 January-1 February 2008) 40th Session CEDAW/C/SAU/CO/2 para 12.

¹⁵³ Committee on the Elimination of Discrimination against Women, 'Consideration of Reports Submitted by States Parties under Article 18 of the Convention, Combined Initial and Second Periodic Reports of Saudi Arabia' (30 September 2016) 40th Session CEDAW/C/SAU/3-4.

¹⁵⁴ Committee on the Elimination of All Forms of Discrimination Against Women, 'Concluding Observations on the Combined Third and Fourth Periodic Reports of Saudi Arabia' (9 March 2018) C/SAU/CO/3-4, 15.

¹⁵⁵ CEDAW (n 2) art 5.

¹⁵⁶ *Rahime Kayhan v Turkey* (27 January 2006) CEDAW/C/34/D/8/2005.

¹⁵⁷ Committee on the Elimination of Discrimination against Women, 'Decision of the Committee under the Optional Protocol to the Convention' (16 January-3 February 2006) 34th Session CEDAW/C/34/D/8/2005.

¹⁵⁸ Mtango (n 167) 61.

6.6.2 Islamic *Shariah* in relation to Saudi Arabia legal practice

The overall picture which emerges in this chapter is that the legislative framework enables Saudi women to work but only on terms dictated by Saudi cultural and religious norms. The Kingdom's laws and related institutions combine to combat and eliminate any discrimination or racism against women.¹⁵⁹

In order to be effective, the government has issued many government regulations, laws and decisions. For example, regarding the equality between men and women and the fight against discrimination in the workplace, labour law does not discriminate between women and men in rights and duties. There is also no discrimination in remuneration when the work of equal in value and quality. The Kingdom is also party to ILO Convention No 100 on Equal Remuneration and Convention No 111 on Discrimination in Respect of Employment and Occupation. Ministerial Decision No 2370/1 of 18 August 2010, which affirmed the prohibition of any discrimination in wages. In this regard, there is full equality between men and women in the job search subsidy. Also, women receive the same amount of benefit as men, as well as support for training and employment provided by the Human Resources Development Fund for women and men employed in the private sector both in terms of support for training costs and duration of support. The Labour Code took into consideration the nature of women and had a full section (section IX) which included additional provisions relating to their employment in the private sector to provide greater protection.¹⁶⁰

6.6.3 The need to codify Islamic *Shariah* provisions

Recently, there have been numerous calls for the codification of Islamic shariah provisions. Zada and Zada, for example, suggest that the codification of *Shariah* 'is imperative to bring about uniformity of law'.¹⁶¹ Abdul-Jawad and Zuhayli argue that the codification of *Shariah* would be advantageous for the following reasons:

- a) It prevents confusion and misunderstanding. The diverse range of interpretations on the same rulings can mean that it is very difficult for judges to interpret the law of the State.
- b) It assists in choosing the most appropriate opinion amongst many.
- c) It allows qualified scholars to extract reliable and appropriate rulings for Shari'ah sources.

¹⁵⁹ SPA, '20 Justice Resolutions to Balance the Rights of Saudi Women in Judicial Facilities' (18 April 2018) <<https://www.spa.gov.sa/1753625>> accessed 5 April 2018.

¹⁶⁰ HRC (n 18).

¹⁶¹ Sebghatullah Qazi Zada and Mohd Ziaolhaq Qazi Zada, 'Codification of Islamic Shariah in the Muslim World: Trends and Practices' (2011) 6(12) Journal of Applied Environmental and Biological Sciences 159, 160.

d) It can result in uniformity between judgments.¹⁶²

However, other scholars, such as Abu Zaid, reject these views, suggesting that codification negates the principle that verdicts are dependent on their individual context, and thus can vary according to time, place and other circumstances, and that codification could lead to distortion of *Shariah*.¹⁶³

In respect of women's rights in Saudi Arabia, proponents of codification suggest that it will help women to understand their rights under *Shariah* as well as clarifying, at an international level, what rights women have under *Shariah*.¹⁶⁴ It would also allow Saudi Arabia to ratify relevant international treaties with clear reservations to specific articles, instead of the general reservations expressed in respect of conventions such as CEDAW.¹⁶⁵

Shariah is a mechanism that can be used on behalf of human rights, not because it is fixed or God-given but because it is in fact flexible, allowing for interpretation by men and women, and adaptable to changing needs and changing cultural understandings.¹⁶⁶ Human rights and women's rights are both ambiguous in the language of Islamic texts, but this should not be seen as an obstacle to improving the status of women in Saudi Arabia. Quite the opposite, it is a flexible avenue through which their status can be enhanced to reach a standard that is equal to men's. Indeed, as discussed above, the gap between international law and Islamic human rights may be narrowing and the modernisation of Saudi Arabia is compliance with *Shariah* or Islamic tradition.

6.7 Conclusion

This chapter has explored the effectiveness of the right to work for women in Saudi Arabia. In doing so, it has been established that *Shariah* and international law protected the right to work. When it comes to women's right to work in Islam, it can be said that the Islamic tradition is subject to interpretation. When it comes to women's right to work in Islam, it is fair to say that the Islamic tradition is subject to interpretation. Indeed, as highlighted throughout, the ability of a Muslim woman to realise her right to work is partially linked to her society's interpretation of Islamic principles. As a result, women's right to work in Saudi Arabia is not only dependent on national law but also refer to *Shariah*, from which Saudi law derives its provisions as stated in the Basic Law. Accordingly, the control

¹⁶² Najmaldeen K Kareem Zanki, 'Codification of Islamic *Shariah* Premises of History and Debates of Contemporary Muslim Scholars' (2014) 4(9) *International Journal of Humanities and Social Science* 134.

¹⁶³ *ibid.*

¹⁶⁴ Abdulrhman Al-Shatry, *Codification of Shari'ah between Analysis and Prohibition* (Dar Alfadilh 2006).

¹⁶⁵ Abdulghani (n 48) 67.

¹⁶⁶ Nisrine Abiad, *Shari'ah Muslim States and International Human Rights Treaty Obligations: A Comparative Study* (British Institute of International and Comparative Law 2008) 62.

and rule over women's right to work in Saudi Arabia might be more effectively understood in terms of religious interpretation rather than in relation to domestic law. That being said, as this chapter has demonstrated, there is nothing in *Shariah* that indicates that women should not be permitted to work. In fact, there is an abundance of material that appears to affirm women's right and ability to work and their right to support themselves and their families. Overall, it is fair to say that the Saudi government is working towards promoting gender equality and empowering women through its recent development plan. Indeed, in recent years there has been a growing recognition on the part of the government that women have a right to work and the list of permissible fields has been expanded.

The Saudi government has legislated extensively to this effect and is encouraging women into non-traditional fields. As a result, Saudi women today enjoy a similar level of education to their male counterparts. Women in Saudi Arabia are increasingly participating in economic activities in both the public and private sector, despite societal challenges. This is primarily motivated by the economic need to develop the female workforce. However, these achievements have led to a true level of gender equality in Saudi Arabia.

Chapter Seven: The Impact of Male Guardianship on Women’s Freedom of Movement

7.1 Introduction

This chapter assesses the right to freedom of movement of women in Saudi Arabia following their empowerment after the lifting of the guardian-consent requirement. The right to freedom of movement comprises the ability to move freely inside one’s state, to change one’s residence and place of employment and to travel between countries. Previous chapters have focused on certain rights and their basis in international law and Islamic equivalents to prepare the ground for an evaluation of current practice and custom in Saudi Arabia. This chapter focuses more particularly on the origin of guardianship and its legal basis, thereby examining the boundary between law and custom in the evolution, and justification, of guardianship related norms and practices. Freedom of movement is recognised under various international, supranational and domestic human rights instruments. In Saudi Arabia, the right to freedom of movement is dealt with in two of the latest and much-discussed Supreme Orders – the new guardianship reforms and repeal of the driving ban – and remains one of the most recognised individual rights under the umbrella of international human rights law. This chapter therefore examines freedom of movement in Islamic *Shariah* and comparative jurisdictions as the backdrop by which to assess Saudi Arabia’s attempts to reconcile modern reforms with respect for religious tradition.

7.2 International law basis for the right to freedom of movement

The UDHR enshrines the right to freedom of movement. This right has been affirmed in various regional instruments and has achieved broad state support as an established norm of customary international human rights law.¹

¹ Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III); International Convention on the Elimination of All Forms of Racial Discrimination (adopted 21 December 1965, entered into force 4 January 1969); International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976); International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976); Convention on the Elimination of All Forms of Discrimination against Women (adopted 18 December 1979, entered into force 3 September 1981); Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990); Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987); International Convention on the Protection of the Rights of all Migrant Workers and Members of their Families (adopted 18 December 1990, entered into force 1 July 2003); Convention on the Rights of Persons with Disabilities (adopted 13 December 2006, entered into force 24 January 2007); International Convention for the Protection of All Persons from Enforced Disappearance

Article 13 of the UDHR defines the dual elements of the right to freedom of movement under international law:

1. Everyone has the right to freedom of movement and residence within the borders of each State.
2. Everyone has the right to leave any country, including his own, and to return to his country.²

The right has also been recognised in a multitude of subsequent international instruments. In 1988, the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities expressly affirmed that '[f]reedom of movement is a constituent element of personal liberty ... and it is a part of the right of "personal" self-determination'.³

Article 12 of the ICCPR, moreover, expressly provides that all persons lawfully resident 'within that territory' should enjoy liberty of movement and freedom to choose his or her own residence. The ICCPR further states that 'no one shall be arbitrarily deprived of the right to enter his own country' and should be accorded equal rights to leave any country, including the country of citizenship.⁴ A number of instruments also guarantee protections for refugees to leave their own country as an 'at risk person'.⁵ Having been granted refuge in the host state, the Refugee Convention makes express provisions for individuals not to be returned to their home state (non-refoulement) and to enjoy fundamental liberties including freedom of movement and travel once lawfully permitted in the host state, as national law allows. The EU has thus far established the most comprehensive system of freedom of movement and residence rights for EU citizens. Such rights, including rights of free movement, generally are subject to national conditions as specified by law, including any restrictions imposed for necessary and compelling reasons of public policy, public order, national security and morals.⁶

Restrictions on free movement are strictly construed under the various international law instruments. All individuals who raise a complaint against a state found to be in breach of these rights are guaranteed a remedy under Article 13 of the ECHR and Article 2(3) of the ICCPR. The Strasbourg Declaration on the Right to Leave and Return emphasises that the burden of justification lies with the state which must demonstrate that any limitation clauses are applied only in exceptional cases; for

(adopted 20 December 2006, entered into force 23 December 2010); Hugo Grotius, *Hugo Grotius on the Law of War and Peace* (Cambridge University Press 1925) 196.

² UDHR (n 1) art 13(1).

³ Commission on Human Rights, 'The Right of Everyone to Leave any Country, Including his Own, and to Return to his Country' (11 March 1985) UN Doc E/CN.4/Res/1985/22.

⁴ ICCPR (n 1) art 12.

⁵ UDHR (n 1).

⁶ CEDAW (n 1) art 2.

the specific purpose of achieving a legitimate policy aim; using measures proportionate to that aim; and subject to the requirement that authority is not abused or arbitrarily exercised.⁷ Moreover, any curtailment of freedom of rights is subject to scrutiny in accordance with applicable standards and norms of international law.

7.2.1 Right to freedom of movement for women

Article 15(4) of the Convention on Elimination of All Forms of Discrimination Against Women (CEDAW) provides that men and women be accorded the 'same rights with regard to the law relating to the movement of persons and the freedom to choose their residence and domicile'.⁸ Any policies or legal instruments in force which deny or diminish the legal capacity of women should, in accordance with normative criteria established under CEDAW, be rendered null and void.⁹ To the extent that guardianship denies women legal capacity on a par with the provision set out in CEDAW, including the ability to act on their behalf or on behalf of their children, any legislative provision or policy which permits this practice would appear to directly contravene a state's obligations under the Convention. In this regard, as an obligation under the treaty, states are encouraged to adopt measures aimed at furthering substantive gender equality in matters relating to family law and marriage.¹⁰ In response, the reports submitted by Saudi Arabia under Article 18 to the Committee on the Elimination of Discrimination against Women stated that: 'The Islamic Sharia and laws in effect in the Kingdom guaranteed complete legal capacity of women and their rights to conclude contracts and administer property.'¹¹ Moreover, the Basic Law of Governance under Article 18 states that:

The State shall guarantee the freedom and inviolability of private property ownership. Property may be seized only in the public interest, provided the owner is fairly compensated. An adult woman has full financial independence and liability. She may dispose of movable and immovable property, administer her financial affairs, engage in all commercial and economic activities, conclude sale and purchase contracts, lease, mortgage, bequeath and gift directly. She is free to obtain government financing for commercial enterprises, open accounts with banks, obtain financing and establish and manage companies of all types.¹²

⁷ Strasbourg Declaration on the Right to Leave and Return (adopted 26 November 1986); Galina Cornelisse, 'Freedom of Movement: The Right to Leave' in G Cornelisse (ed), *Immigration Detention and Human Rights: Rethinking Territorial Sovereignty* (Brill 2010) 149.

⁸ CEDAW (n 1) art 15(4).

⁹ CEDAW (n 1) art 5(A).

¹⁰ *ibid* art 16(1).

¹¹ Committee on the Elimination of Discrimination against Women, 'Consideration of Reports Submitted by States Parties under Article 18 of the Convention, Third and Fourth Periodic Reports of Saudi Arabia (30 September 2016) 40th Session CEDAW/C/SAU/3-4, 48.

¹² *ibid*

The UN Human Rights Committee has also urged the need for strengthened rights protections for women in respect of freedom of movement. In its General Comment, the Committee stated: '[I]t is incompatible with article 12, paragraph 1, that the right of a woman to move freely and to choose her residence is made subject, by law or practice, to the decision of another person, including a relative.'¹³

7.2.2 Scope of the right

The instruments and statements discussed above establish a legal basis for the recognition and enforcement of the right to freedom of movement. These rights are to be applied on a non-discriminatory and equal basis at least for the citizens of the state in which such rights are exercised. In international law, not all rights are absolute. Doctrinally, non-derogatory rights are distinguished from derogatory rights: states are permitted to suspend certain rights in order to create 'necessary' measures to fulfil public order requirements.¹⁴ Yet, even here rights cannot be relinquished indefinitely, and any limitation on such rights should be based on objective legal standards.

The scope of the right to free movement varies from one context or jurisdiction to another. Often, this right is balanced against other public policy considerations based on the context of the constitutional framework.¹⁵ While the scope of this right remains contentious, the right to travel does not usually have a gendered dimension outside of the Islamic world. Moreover, debates around the scope of this right have typically addressed the existence of a general right to intra-state travel, encompassing a person's right to travel between states, rather than the more specific question of barriers to intra-state travel, ie movement within the internal borders of a country. Scholars such as Sasse have examined the emerging body of comparative US jurisprudence on the right to free movement as one which has increasingly afforded protection under relevant 'equality clauses' of US constitutional and federal law.¹⁶

Courts in the United States have, for instance, demonstrated a willingness to interpret statutory clauses as providing an implied protection of the right to interstate travel.¹⁷ In *Paul v Virginia*, the

¹³ UN Human Rights Committee, 'General Comment 27' in Secretariat, 'Compilation of General Comments and General Recommendations adopted by Human Rights Treaty Bodies' (1999) UN Doc CCPR/C21/Rev.1/Add.9, para 6.

¹⁴ Jaime Oràà, *Human Rights in States of Emergency in International Law* (Oxford University Press 1992) 77.

¹⁵ Hurst Hannum, *The Right to Leave and Return in International Law and Practice*, vol 8 (Martinus Nijhoff 1987) 4.

¹⁶ Benjamin C Sasse, 'Curfew Laws, Freedom of Movement, and the Rights of Juveniles' (2000) 50(3) *Case Western Reserve Law Review* 661, 686; Zachariah Chafee, *Three Human Rights in the Constitution of 1787* (UKP 1957) 171, 181.

¹⁷ *Edwards v California* 314 US 160 (1941); Sasse (n 16) 686.

judgment centred on whether '[t]he right of a citizen of one state to pass through ... any other state'¹⁸ could be redefined as an anti-discrimination right, having a basis under US federal law (and in the international context, by way of state obligations under CEDAW). In arriving at this judgment, the US court remarked upon the necessary relation between the meaningful exercise of the right to travel and the 'enjoyment of life and liberty'.¹⁹ In another case, *Bray v Alexandria Women's Health Clinic*,²⁰ the court affirmed travel within a country as a right embodied by a general anti-discrimination principle enshrined in US federal law.²¹ The anti-discrimination (equal protection clause) principle²² was there construed as providing legal protections to individuals against the presence of two types of barriers: 1) 'the erection of actual barriers to interstate movement', and 2) differential treatment of intrastate travellers.²³ Challenges remain, however, as to the scope and limitations of this right.

The question of what types of governmental actions constitute legitimate restrictions to the right of freedom of movement raises wider questions of the lawful powers of public authority and related public policy arguments. In submissions in the US case *Haig v Agee*, the complainant argued that the agency's decision to revoke a passport would satisfy the threshold test of a violated right by the mere fact that such a policy or measure would deprive a citizen of due process guarantees, thereby impinging on that person's 'substantive' right to travel abroad freely.²⁴ The US courts have, however, taken a more ambivalent view of the content of this right. In the earlier *Kent v Dulles*²⁵ judgment, the US court confirmed that a person should not be denied liberty without due process.²⁶ The court proceeded to consider the legality of the US Secretary of State's actions in refusing to issue US citizens with passports, which thereby constituted a barrier to those citizens' right to travel internationally. The court's reasoning centred on the authority vested in the Secretary of State by Congress. In doing so, the court sidestepped the thorny questions of whether US authorities had violated rights protected under the Constitution, including by granting powers to state agencies which allowed for discretionary restrictions on the free movement rights of its citizens. Nevertheless, the court was at pains to maintain the distinction between the freedom to travel outside of the country and the right to travel within that country.²⁷ The reasoning of the court strongly implies that while permitted restrictions to

¹⁸ *Paul v Virginia* 75 US 168 (1869).

¹⁹ *Corfield v Coryell* 546 US 3230 (1823) 551.

²⁰ *Bray v Alexandria Women's Health Clinic* 506 US 263 (1993) 268, 274, 277.

²¹ *ibid* 277.

²² William Cohen, 'Congressional Power To Interpret Due Process And Equal Protection' (1975) 27(3) *Stanford Law Review* 603.

²³ *Bray* (n 20) 268, 274, 277; Sasse (n 16) 686; Chafee (n 16).

²⁴ *Haig v Agee* 453 US 280 (1981) 283, 287; Sasse (n 16) 686; Chafee (n 16).

²⁵ *Kent v Dulles* 357 US 116 (1958).

²⁶ *ibid* 125.

²⁷ *ibid* 306; Sasse (n 16) 686; Chafee (n 16).

the latter should be construed narrowly, states are afforded a wider margin of discretion to determine a policy that limits an individual's right to travel abroad.

European courts have accumulated a body of case law to address the scope of fundamental freedoms, including freedom of movement. They have, however, done so primarily in the context of a wider constitutional debate on the balance to be struck between economic and political rights.²⁸ Freedom of movement in the internal market is one of the four fundamental freedoms of Community law, and is accordingly given the highest normative status by the European Court of Justice (ECJ).²⁹ In the context of the EU, freedom of movement is classed as a freedom rather than a right, where 'rights' are defined as human rights while 'freedoms' are more commonly associated with the economic objectives of the entity, namely the elimination of all barriers to the internal market.³⁰ Landmark cases of the ECJ, including the *Omega* case, have addressed the conflict between these rights and freedoms.³¹ In the judgments of *Laval*³² and *Viking Line*,³³ the collective bargaining rights of workers, for instance, were found to be in direct conflict with freedom of movement. Seeking to reconcile competing principles in a flexible and equitable way, the European courts will apply general principles of European law, including the principle of proportionality, necessity and most appropriate measures.

7.2.3 Freedom of movement and its domestic enforcement

The right to freedom of movement is, as established above, subject to ongoing interpretation and judicial resolution, even among different national legal orders. There is a view among some international legal scholars that the international legal system is undergoing a process of rationalisation and formalisation.³⁴ The image of international law engendered by this process of 'constitutionalisation' sees the replacement of substantive judicial 'choices' – whereby courts decide 'hard cases' by applying non-legal ethical or political criteria – with the methods of formal legal

²⁸ Ruth Dukes and Emiliios Christodoulidis, 'Habermas and the European Social Dialogue: Deliberative Democracy as Industrial Democracy?' (2012) 18(4) *Industrial Union Rights Journal* 21.

²⁹ Sybe Alexander de Vries, *Tensions within the Internal Market: The Functioning of the Internal Market and the Development of Horizontal and Flanking Policies* (ISBS 2006); Sacha Prechal, 'Topic One: National Applications of the Proportionality Principle – Free Movement and Procedural Requirements: Proportionality Reconsidered' (2008) 35(3) *Legal Issues of Economic Integration* 203.

³⁰ Steven Greer, "'Balancing" and the European Court of Human Rights: A Contribution to the Habermas-Alexy Debate' 2004 63(2) *Cambridge Law Journal* 413.

³¹ Case 36/02 *Omega Spielhallen und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn* [2004] ECR I-9609.

³² Case 341/05 *Laval Un Partneri Ltd v Svenska Byggnadsarbetareförbundet* [2008] IRLR 160.

³³ Case 438/05 *International Transport Workers Federation and the Finnish Seamen's Union v Viking Line ABP and Oü Viking Line Eesti* [2007] ECR I-10779.

³⁴ Duncan Kennedy, 'The Disenchantment of Logically Formal Legal Rationality, or Max Weber's Sociology in the Genealogy of the Contemporary Mode of Western Legal Thought' (2004) 55 *Hastings Law Journal* 1031.

rationality that are constitutive of a 'gapless' legal system.³⁵ The hallmark of formal legal rationality is that cases can be decided from the existing rules of a more or less 'closed' legal order, thereby eliminating any arbitrariness occasioned from the subjective interpretation of indeterminate principles. But does the image of international law accurately depict the reality of international legal processes?³⁶ Where some international lawyers are optimistic that we are now beginning to witness the development of a common normative framework built around consensus, unity of legal principles and shared recognition of fundamental rights,³⁷ others see a confusing world made up of disordered, non-hierarchical legal systems, each interacting with the other in highly variable ways. For these scholars at least, instead of a unified, rational and coherent system of law, there is conflict, indeterminacy and incoherence.³⁸

Returning again to the matter at hand, it is evident that the matter of the scope and effects of a fundamental right is by no means settled even from within the particular constitutional context in which these rights are formulated.³⁹ There is, however, evidence to suggest that national courts are beginning to converge on their understanding of the normative core of this right. States are accordingly obliged to eliminate all arbitrary or illegitimate restrictions on the free movement of citizens within national borders, and competent authorities are increasingly expected to provide supporting legal documentation to allow citizens' entry and exit outside state territories.⁴⁰ While state authorities have a statutory power to (temporarily) revoke these rights where there is good reason for doing so, this power is also increasingly fettered by national anti-discrimination and equality legislation. Above all, freedom to travel, in all its forms, and in particular intra-state travel, is increasingly being recognised as a fundamental right from which states must not derogate, except when required by national law or where 'necessary' to achieve a legitimate public policy aim. The ECJ affirmed this in *Hristo Gaydarov v Director na Glavna direktsia*, where it ruled that: 'Member States essentially retain the freedom to determine the requirements of public policy and public security in

³⁵ Duncan Kennedy, 'Form and Substance in Private Law Adjudication' (1976) 89(8) *Harvard Law Review* 1685, 1691; Ronald Dworkin, 'Political Judges and the Rule of Law' in Ronald Dworkin (ed), *A Matter of Principle* (CP 1985) 12.

³⁶ Nico Krisch, *Beyond Constitutionalism: The Pluralist Structure of Postnational Law* (Oxford University Press 2010) 41, 42, 47, 235.

³⁷ Martii Koskenniemi, 'Legitimacy, Rights and Ideology: Notes Towards a Critique of the New Moral Internationalism' (2003) 7(2) *Associations: Journal for Legal and Social Theory* 349.

³⁸ Krisch (n 36) 41, 42, 47, 235.

³⁹ Dora Kostakopoulou, 'The European Court of Justice, Member State Autonomy and European Union Citizenship: Conjunctions and Disjunctions' in Hans-Wolfgang Micklitz and Bruno De Witte (eds), *The European Court of Justice and the Autonomy of the Member States* (Intersentia 2012) 175.

⁴⁰ Elspeth Berry, 'The Deportation of "Virtual National" Offenders: The Impact of ECHR and EU Law' (2009) 23(1) *Journal of Immigration Asylum and Nationality Law* 11.

accordance with their national needs, which can vary from one Member State to another and from one era to another.⁴¹

The ECJ, however, has sought to circumscribe the use of 'limiting clauses' which restrict human rights on public policy grounds, stating that in 'derogation from the fundamental principle of free movement of persons, those requirements must be interpreted strictly, so that their scope cannot be determined unilaterally'.⁴²

The above discussion has provided an insight into how courts have interpreted constitutional sources to adjudicate between competing rights and interests, or defined their own competence to review executive power in defence of constitutionally guaranteed rights.⁴³ Limitations on the powers of government and balancing rights are some of the hallmarks of legal systems grounded in principles of liberalism and rule of law.⁴⁴ However, comparative jurisprudence of the kind outlined above only takes us so far. How do such exercises in judicial balancing enable us to understand the rights of women in Saudi Arabia to exercise their rights of free movement? Since the *Quran* and *Sunnah* can be read as an endorsement of guardianship related principles, and also as mechanisms for safeguarding equality among men and women, interpretative controversy over the supremacy of each principle invariably arises.

7.3 The Application of freedom of movement under international law

Set against the backdrop of a state-centric system of international law, the scope of permitted restrictions to fundamental liberties, including the free movement of individuals within the state and the right to leave, is heavily reliant on the national legal context in which these rights are constituted or interpreted, the latter through incorporation of international legal standards into the relevant domestic law of a national legal system.⁴⁵ That is, the scope of such rights and legitimate restrictions therein, are shaped to a great extent by the relationship between authority, state law and the polity.⁴⁶ In conventional thinking, human rights are viewed as general in character, as rights available to all, and thus to be distinguished from more particularistic discourses on identity, nationhood and

⁴¹ Case 430/10 *Hristo Gaydarov v Direktor Na Glavan Direktsia 'Ohranitelna Politsia' Pri Ministerstvo Na Votreshnite Raboti* [2011] ECR I-11637, para 32.

⁴² *ibid.*

⁴³ Richard H Fallon, 'The Rule of Law as a Concept in Constitutional Discourse' (1997) 97(1) *Columbia Law Review* 1.

⁴⁴ David Dyzenhaus, 'The Rule of (Administrative) Law in International Law' (2005) 68(3/4) *Law and Contemporary Problems* 129; David Harvey, *Cosmopolitanism and the Geographies of Freedom* (Cambridge University Press 2009) 82.

⁴⁵ Cornelisse (n 7) 149.

⁴⁶ *ibid.*

citizenship.⁴⁷ Yet, the right to free movement has a strongly political component. States may seek to limit the right to leave a country for entirely understandable reasons. Individuals who are granted leave from their country are no longer subject to the jurisdiction and control of their home state and its laws. Similarly, an unconditional right to leave or travel may produce wider social, cultural or economic consequences for a country. If sufficient numbers leave their home territories, the cultural identity, order or social stability might be disrupted.

The nation state and national identity has since the 19th century been conceived of as the principal source from which legal norms and rights derive.⁴⁸ Indeed, the state has, in its modern guise, been conceived as having a unifying political function, binding individuals through the commonality of ethnicity, culture, history and territory.⁴⁹ This political conception of the state and republic has shaped our modern understandings of law and the sources of legitimate legal authority. The idea of citizenship, nationhood, identity and culture provides the social context in which to assess the social sphere: nationality became the principle means by which laws could be used to regulate the relationship between individual and society, specifically those governing personal status, capacity and family relationships.⁵⁰ Culture and cultural differences have also played a part, linking concepts such as nationality, tradition and culture, whether spiritual or historical.⁵¹ In this way, a dilution of culture is perceived as a threat to God, to ancestry and, in the final analysis, to a person's core identity.⁵² This image of culture as constitutive of law and nation is deeply rooted in the Catholic traditions.⁵³

Current debates on the scope of protections on which an individual may rely to protect their right to travel may appear remote from the more personal and localised question of the restrictions placed on women's freedoms under the doctrine, or duty, of guardianship. As has been shown, debates on

⁴⁷ Antonio Casesse, 'International Protection and the Right To Leave' in Antonino Giuffrè (ed), *Studi In Onore Di Manlio Udina* (MP 1975) 222, 234.

⁴⁸ Fleur Johns, 'International Legal Theory: Snapshots from a Decade of International Legal Life' (2009) 10(1) *Melbourne Journal of International Law* 1, 4; Martii Koskeniemi, 'Constitutionalism as Mindset: Reflections on Kantian Themes about International Law and Globalisation' (2007) 8(1) *Theoretical Inquiries in Law* 9.

⁴⁹ Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press 2004) 199, 204; Alexander Wendt, 'Collective Identity Formation and the International State' (1994) 88(2) *American Political Science Review* 384.

⁵⁰ Pierre Bourdieu, 'The Force of Law: Toward a Sociology of the Juridical Field' (1987) *Hastings Law Journal* 814; Hans K Lindahl, 'Constituent Power and Reflexive Identity: Towards an Ontology of Collective Selfhood' in Martin Loughlin and Neil Walker (eds), *The Paradox Of Constitutionalism: Constituent Power and Constitutional Form* (Oxford University Press 2008) 9.

⁵¹ Carl Schmitt (ed), *The Concept of the Political* (UCP 2008) 42; Majid Yar, 'Recognition and the Politics of Human(e) Desire' in Scott Lash and Mike Featherstone (eds), *Recognition & Difference: Politics, Identity, Multiculture* (Sage 2002) 122.

⁵² *ibid*; Friedrich Carl von Savigny, *System des Heutigen Römischen Rechts* (Veit 1841); Phillipe Nonet and Philip Selznick (eds), *Law and Society in Transition: Toward Responsive Law* (Harper & Row 1978) 115, 118 and Ronald Dworkin, *Law's Empire* (Harvard University Press 1986) 226, 227.

⁵³ Thomas Aquinas, *On Law, Morality and Politics* (Hackett 1988) I-II, 90, A1.

the 'constitutionality' of limiting clauses or other restrictions to the freedom of movement tend to be limited to cases involving individuals and to specific circumstances under which rights were suspended or violated. The situation changes when constitutional orders that enforce aspects of guardianship in Islamic societies are considered as a matter of law. In these contexts, rights restrictions are applied generally and have broader reach, whereby women are collectively afforded different, some would argue unequal, rights to men, regardless of the similarity of their circumstances.⁵⁴ The liberty and locomotion are the equality and dignity for all people, the foundational principle of the modern system of international human rights law.⁵⁵

The right to move freely is in many ways a primary or gateway right; without the ability to meaningfully realise and enjoy this freedom, taken for granted in nearly all societies, other freedoms are necessarily diminished or even jettisoned.⁵⁶

7.4 Freedom of movement in Islamic *Shariah*

Shariah guarantees freedom of movement to all Muslims and has made it essential to human rights. In fact, Islam describes many cases of movement as a requirement to be fulfilled by mankind. Humans are mobile creatures in their nature, in whom Allah endowed with sanity and appointed as a successor on earth to live in and eat from its fruit. Therefore, movement is considered a pillar of life and is just as important as water and oxygen. Moreover, it is a means to work and work is a means to earn a livelihood. Allah Almighty said:

Then when the [Jumu'ah] Salat [prayer] is ended, you may disperse through the land, and seek the Bounty of Allah (by working, etc.), and remember Allah much that you may be successful.⁵⁷

He it is Who has made the earth subservient to you (i.e. easy for you to walk, to live and to do agriculture on it); so walk in the path thereof and eat of His provision. And to Him will be the Resurrection.⁵⁸

In order to ensure this right and this freedom, Islam was keen on removing any obstacles that may hinder the travel of humans, thus ensuring their mental and physical safety. The Prophet (Peace be

⁵⁴ eg, Samia Bano, 'Muslim Family Justice and Human Rights: The Experience of British Muslim Women' (2007) 2(2) *Journal Comparative Law* 38; Ayelet Shachar, 'Privatizing Diversity: A Cautionary Tale From Religious Arbitration In Family Law' (2008) 9(2) *Theoretical Inquiries in Law* 573.

⁵⁵ Hendrik Hartog, "'The Constitution of Aspiration" and the Rights that Belong to us All' (1987) 74(3) *Journal of American History* 1013.

⁵⁶ David S Law and Mila Versteeg, 'The Evolution and Ideology of Global Constitutionalism' (2011) 99 *California Law Review* 1163.

⁵⁷ *Quran* 62:10.

⁵⁸ *Quran* 67:15.

upon him) said: 'Avoid sitting by the roadside.' The people then said, 'O Allah's Messenger (Peace be upon him), we cannot do without those meeting places in which we converse' So he said, 'Well, if you insist (on that) give the road its due rights.' They asked, 'What are the road's due rights?' He replied, 'Lowering your gaze, abstaining from anything offensive, returning salutations, enjoining the right [*maruf*] and forbidding from evil deeds [*munkar*].' This *hadith* directs people to avoid sitting by the roadside so as not to cause harm to passersby.⁵⁹ Moreover, and in order to guarantee this right, Islam has passed laws punishing those who hinder the paths of travellers or intimidate them by threats of death or theft. It has also enacted laws ending banditry. Allah Almighty said:

The recompense of those who wage war against Allâh and His Messenger and do mischief in the land is only that they shall be killed or crucified or their hands and their feet be cut off from opposite sides, or be exiled from the land. That is their disgrace in this world, and a great torment is theirs in the Hereafter.

Except for those who (having fled away and then) came back (as Muslims) with repentance before they fall into your power; in that case, know that Allâh is Oft-Forgiving, Most Merciful.⁶⁰

Although Islam grants the right to freedom of movement and protection to people during their travels, Islam has set out some restrictions in this respect. This is because if granted rights are freely given without any restrictions, this will lead to others having their rights restricted. This would cause a lot of harm and great disorder. Accordingly, not all movement is allowed; this right is subject to certain provisions so as to fulfill the purpose of travel within the boundaries of what is permitted. For women's freedom of movement, Islam grants such a right to both men and women but additional restrictions and provisions are applied in the case of women.⁶¹

7.4.1 Jurisprudential perspectives

As an autonomous legal order, Islamic Shariah provides the grounding for the family law practices of various Islamic states, including by delineating the rights and responsibilities of women in society. Yet, discourses on the rights of women, and the customary limits placed upon them, are often not formed by consensus around a single or authoritative interpretation of the *Quran*, or *fiqh*, and *Sunnah*, but the juristic rulings of the various Islamic schools of thought. Various scholars have highlighted the localised nature of Islamic legal practice, suggesting that Islamic Shariah defers to 'the local version of

⁵⁹ Sahih al-Bukhari 2465, vol 3, book 43, *hadith* 645.

⁶⁰ *Quran* 5:33, 34.

⁶¹ Ibn Qudama, Abu Mohammad Muwafaq Al-Deen Abdullah Bin Ahmad Bin Mohammad Bin Qudama Al-Jamaili Al-Maqdesi then Al-Dimashqi Hanbali, Al-Mughni, 1388 H, Cairo library.

what facts mean to people's relationships, allows facts to speak to their consequences through local custom, personnel, and standards'.⁶²

On the matter of legal issues which are not explicitly answered or resolved by the *Quran* and *Sunnah*, the Islamic rules of interpretation and construction are known as *ijtihad*.⁶³ Pursuant to this method, custom can be applied in respect of legal matters on which the *Quran* is silent on the proviso that the custom is consistent with the *Quran* and *Sunnah*.⁶⁴ Many jurists across geographical or cultural borders, accordingly, have disagreed with the adoption of certain customs.⁶⁵ However, in perhaps one of the most renowned *hadiths*, the Prophet himself stated that the scholar or *mujtahid* who erred in his judgments would nonetheless be granted rewards by Allah.⁶⁶ This *hadith* is often taken to mean that the mere struggle to perfect one's faith, and to deduce the correct legal answer to a theological or legal question, is itself a pious act.⁶⁷ Individuals, likewise, are under no compulsion to accept a particular school as no single school ranks above others in the global sense (though they may do in certain societies).⁶⁸ One could argue, consequently, that all Muslims exercise the freedom to choose among the schools of jurisprudence in good conscience.⁶⁹ Disagreement among Islamic scholars was accordingly viewed not as a trapping of faith, or evidence of the indeterminacy of its texts, but as a sign of Allah's mercy towards the imperfect knowledge of his creations.

Take, for instance, the disagreement around the circumstances under which a woman's right to free movement can be legitimately restricted under *Shariah*. The general ruling regarding a Muslim woman's travel is that she is not allowed to do so without a *mahram*. This rule is justified by reference to the Prophet who said: 'A woman who hopes for Allah and the hereafter must not travel for one day and one night except with a mahram.'⁷⁰

This *hadith* notwithstanding, some scholars disagree whether the presence of a *mahram* is obligatory during a woman's pilgrimage to Mecca. On this point, some scholars carve out a legal distinction between obligatory travel, which encompasses the religious duty to perform the *Hajj*, and non-obligatory travelling, such as visiting relatives. As for the *Hajj*, scholars are divided. *Hanafi* and *Hanbali*

⁶² Lawrence Rosen, *Law as Culture: An Invitation* (Princeton University Press 2006) 12.

⁶³ Wael B Hallaq, *A History of Islamic Legal Theories* (Cambridge University Press 1997) 259, 260.

⁶⁴ Abdur Rahim, *The Principles of Islamic Jurisprudence* (Kitab Bhavan 1994) 314.

⁶⁵ Muhammad Iqbal, *The Reconstruction of Religious Thought in Islam* (Institute of Islamic Culture 1986) 132.

⁶⁶ Sunan Abu Dawud, book 38, *hadith* 4461; Abu Abdallah Al-Bukhari, *4 Sahih Al-Bukhari Bi Hashiat Al-Sindi* (Dar Al-Ma'rifah, nd) 268.

⁶⁷ *ibid* 89.

⁶⁸ Nikki R Keddie, *An Islamic Response to Imperialism: Political and Religious Writings of Sayyid Jamal Ad-Din "Al-Afghani"* (UCP 1983) 107.

⁶⁹ 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.

⁷⁰ Sahih Muslim, Book of Pilgrimage, *hadith* 1338.

schools aver that the presence of a *mahram* is obligatory for all women seeking to travel.⁷¹ By way of contrast, the *Shafi* and *Maliki* schools postulate that the formal presence of a *mahram* is not obligatory, subject to the proviso that any single female travels with other women of good standing for the duration of the visit.⁷² As for women's non-obligatory travel, all scholars, except for those belonging to the *Hanafi* school, posit that a *mahram* is obligatory during travel regardless of the distance.⁷³ The *Hanafi* school qualifies this general prescription by requiring the presence of a *mahram* for travel that exceeds more than three days.

While the positions of the distinct schools of Islamic jurisprudence cannot be examined exhaustively, it is worth stating that most schools regard the *wali* (guardian) requirement as a protective measure and not as an encroachment on women's rights.⁷⁴ Consequently, a husband is entitled to prevent his wife from leaving the house except out of necessity, just as he can also prevent her from travelling.⁷⁵ This in turn provides justification and the rationale for the gender segregation rule according to which a woman must restrict herself to a *mahram* (non-marriable male) and avoid being in the company of other men without his presence.⁷⁶

There is disagreement among Islamic jurisprudential schools regarding the nature and duration of guardianship in marriage (*wilayah*).⁷⁷ Although *Hanafi* jurists opine that Islam endows women with the right to contract in financial matters, including marriage, without a guardian, it nonetheless urges that a woman should delegate these rights to a guardian where possible.⁷⁸ These scholars will quote the *hadith* in which the Prophet said: 'There is no marriage without [the permission of] the guardian.'⁷⁹ At the same time, there is historical evidence to suggest that the Prophet was exemplary in his treatment of women. There are several narrations which imply that the Prophet undertook domestic chores such as preparing meat and mending clothes which seem to contradict the gendered division of labour that is conventional practice in Islamic societies today.⁸⁰ Indeed, one can question what the Prophet's first wife, a business woman in her own right, might have made of rules restricting her free movement without her husband's consent.

⁷¹ Al-Tamheed for Ibn Abdel-Bar, Part 21, 50.

⁷² Al-Forou for Ibn Miflih, Part 3, 236.

⁷³ Ibn Qayyim Al-Jawziyya and Muhammad Ibn Abi Bakar, *Al-Turuq Al-Hukmiyyah Fi As-Siyaasah Al-Shar'iyyah* (International Law Books 2000) 237.

⁷⁴ Ahmad Ghandour, *Al-Amwal Al-Shakhstiyah Fi Al-Tashma' Al-Isla lu* (Jami'at Al-Kuwait Press 1972) 122, 136.

⁷⁵ Mohamad Bin Ahmad Al-Saleh, *Family Jurisprudence for Imam Sheikh Al-Islam Ibn Taimieh on Marriage and its Effects* (1st edn) 602, 610.

⁷⁶ *ibid.*

⁷⁷ *ibid* 135, 136.

⁷⁸ *ibid* 125, 126.

⁷⁹ Sunan At-Tirmidhi, *hadith* 1101; Sunan Abu Dawud, *hadith* 2085.

⁸⁰ Abu Al-Hassan Al-Nadawi, *Alsmah Al-Nabawiyah* (Dar Al-Shuruq 1977) 370.

7.4.2 Family law codes and their impact on free movement of women

Guardianship practices are widespread yet varied across Muslims societies today. Within these, the husband or male guardian is granted right over his female ward. As a religious duty, women should not leave her home without the permission of her guardian or husband if she is married.⁸¹ If the husband provides the wife with shelter and financial security, she is obliged to live with him in that home and take charge of domestic affairs.⁸² Subject to this relationship, a woman cannot depart from the family home except in cases of extreme necessity, such as visiting her parents. If a parent is ill, and her husband has refused permission to attend to her family, she is permitted to do so without his permission.⁸³ This practice has been enforced in courts in and beyond Gulf country states.

Underpinning the concept of guardianship is a variety of customs, juristic opinions and concepts already outlined elsewhere in this thesis. One is the condition that women seek the consent of their guardian before contracting to a marriage, a practice that has been codified as law in the family laws of various Gulf countries.⁸⁴ Another is the husband's right to *taah* (obedience) in the family law and *al-qararfi al-bayt* (staying put at home).⁸⁵ This latter principle establishes customary limits to the freedom of movement for women under the family codes of various Islamic Shariah systems. Subject to the *taah* requirement, a woman cannot leave her family home without the express consent of her husband. Failure to attain prior consent, or disobedience (*nushuz*), constitutes a breach of this duty, an act which may carry consequences for the wife, including cessation of financial maintenance, social exclusion or, in some cases, divorce.⁸⁶ Most family law codes establish a waiver to this consent requirement if the wife can provide a 'legitimate reason' for the breach, in accordance with the requirements of *Shariah*.⁸⁷ Permitted exceptions are typically governed by the customs of the relevant legal system and can include, inter alia, family visitations or travel for employment provided that the work undertaken is not objectionable as judged by the standards of religious law or custom.⁸⁸ It is

⁸¹ Al-Saleh (n 75) 602, 610.

⁸² Al-Forou (n 72) 236.

⁸³ Al-Insaf for Al-Merdawi, Part 3, 410, 412.

⁸⁴ Jordanian Code, Royal Decree No 343.57.1 (1957) as Amended by Royal Decree No 347.93.1 (1993) book 1, art 2; Egyptian Law 1931 art 280, Act no 78; Syrian Code, book 1, arts 21-24; Tunisia Family Law Code 1956; Personal Status Code Decree 1956 as amended 1993, book 1, art 6.

⁸⁵ 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.; Muhaniniad Abu Zahrah, *Al-Ahwal Al-Shakhsyah* 283 (3rd edn, Dar Al-Fikr Al-Ambi 1957) 93.

⁸⁶ Egyptian Law Act 1920, act 25; Al-Hibri (n 85) 42.

⁸⁷ Kawthar Kamel, *Shurut 'Aqd Al-Zawaj Fi Al-Shar'ah Al-Islamiyah* (Dar Al-I'tisam 1979) 71.

⁸⁸ Egyptian Code, art 1.

notable that some traditional scholars set limits to the number of times which a wife is at liberty to visit her family without the express approval of her husband-cum-guardian.

Most family law codes apply customary limits to the duty of *taah*, most of which apply when the husband violates his own religious duties based on the court's own interpretations of *Shariah*. The Jordanian Code explicitly identifies domestic violence and mistreatment as grounds for releasing women from the consent requirement.⁸⁹ The Kuwaiti Code goes further still, identifying 'untrustworthy' behaviour on the part of the husband toward his wife as grounds for ending of the duty of *taah*.⁹⁰ Correspondingly, family courts may approve a wife's decision to leave the family home if misconduct can be demonstrated on the part of the husband. The Explanatory Memorandum to the Kuwaiti Code directly references a verse of the *Quran* in which it is stipulated that the bonds of marriage should be based in 'tranquillity, affection and mercy'.⁹¹ Implicit in the Memorandum is an acceptance that a marriage is a holy sacrament between two parties. Following this logic, a wife's rights cannot be degraded, nor should she be treated as the chattel of her husband or reduced to a mere 'object of sexual enjoyment'.⁹² The legislative guidance accompanying the Kuwaiti Code marks a departure from classic juristic perspectives, striking a more equitable balance of rights and powers for both parties to a marital contract. While many provisions of the Code appear to vindicate a more egalitarian approach to gender relations, it is worth noting that local courts can compel a wife to return to the marital home if any freedoms exercised are later judged irreligious or objectionable. This imbues courts with broad discretionary powers.⁹³ Failure to comply with a court order may result in a judgment of disobedience, which may attract legal penalties, including forfeiture of marital assets or financial support.

Most family courts exercise these broad enforcement powers under the relevant codes of the jurisdiction. One exception is Morocco, which does not grant the husband rights to cease payment of maintenance, except by a court order and only when a judge has authorised financial penalties or punishment.⁹⁴

Similar restrictions are also applied in respect of a woman's right to seek divorce, the general rule being that this right is primarily vested with the husband. With the exception of the small number of cases in which the right to divorce passes from the husband to the wife, the female party in the marital

⁸⁹ Personal Status Code, arts 9-13.

⁹⁰ Kuwaiti Code, arts 29-30.

⁹¹ Explanatory Memorandum to Draft Personal Status Code, art 1; *Quran* 30:21.

⁹² *ibid*.

⁹³ Kuwaiti Code, art 87.

⁹⁴ Moroccan Code 1957, Royal Decree No 343.57.1 as Amended by Royal Decree No 347.93.1 (1993), book 3, ch 123.

relationship must seek remedy through informal family arbitration.⁹⁵ One remedy available to women is to request that a court sanction the customary practice of '*khul*'. Pursuant to this informal dispute settlement procedure, the wife agrees to provide financial compensation to her husband in return for a divorce decree. There are a limited number of grounds on which the wife can seek judicial annulment, separation or divorce, but the threshold is set high.⁹⁶ Failure to provide financial maintenance also constitutes a lawful ground for annulment or divorce.⁹⁷ Strikingly, the Tunisian Code deviates from customary practices in the region. Whereas other jurisdictions imbue the husband with stronger or unilateral rights to 'no fault' divorce, the Tunisian Code permits judicial divorce based on the mutual consent of both parties.⁹⁸ Pursuant to this procedure, courts may rescind the marital contract at the request of either party.

Many of the prescriptions described above originate in customs but have nonetheless acquired the status of law 'on the books' in Islamic legal systems, and even in those which do not treat Islamic *Shariah* as authoritative in the hierarchy of legal sources. We are on familiar ground here: gender inequalities are reproduced under a legal system which obscures, or legitimates, the domestic hierarchies which persist in the private and localised worlds of family, culture and economy.

7.4.3 The application of free movement of women

Shariah courts, in Saudi Arabia, are granted broad powers to protect women's free movement by rendering judgments as to the character of a woman, or by refusing grounds for a woman's lawful departure from the family home⁹⁹. However, courts beyond the state are granted broad powers to protect the unity of the family without considering the freedom of movement of women. In the case of *Asjari v Ermita*,¹⁰⁰ the Philippines Regional Trial Court of Misamis Oriental upheld discriminatory provisions of the *Shariah* and family law codes on public policy grounds.¹⁰¹ The express reason cited by the court in support of its decision was the need to promote harmony and 'family solidarity' in the private sphere. Granting a husband absolute authority over his wife was, accordingly, construed as a 'necessary and practical' measure for mitigating the potential for discord and conflict in the family home.¹⁰² The courts in Morocco and elsewhere have issued similar judgments. The burden of proof

⁹⁵ Muhammad Bin Juzayy, *Qawanin Al-Ahkam Al-Shar'rah* (Dar Al- 'Ilm Li Al-Malayin 1979) 243.

⁹⁶ Moroccan Code, arts 2-3; Kuwaiti Code, arts 120-42.

⁹⁷ Keith Hodkinson, *Muslim Family Law: A Sourcebook* (Croom Helm 1984) 285, 287.

⁹⁸ Tunisian Code, art 31.

⁹⁹ Abdalmajeed Aldhamshi, Rights of Married Women in the Judicial System in Saudi Arabia (Human Rights Commission Media and Publication Center 2015)16.

¹⁰⁰ *Asjari v Ermita* SP Civil Case No 2006-084.

¹⁰¹ Tamar Ezer and others, 'Protecting Women's Human Rights: A Case Study in the Philippines' (2011) 18(3) Human Rights Brief 1, 4.

¹⁰² *ibid.*

rests with the female party who must demonstrate just cause for her departure in accordance with Islamic norms.¹⁰³ With this, any sense that these norms should be reopened for religious questioning and evaluation recedes into the background.

Islamic scholars emphasise the literal and interpretative authenticity of the sources from which they draw, eager to dispel any claims of illegitimacy stemming from the influence of cultural or extra-legal factors in the narration and revelation of the *Quran* and *Sunnah*.¹⁰⁴ And yet, Western critics often make a similar argument in defence of their claim that religious law has been used primarily as a means of legitimating inequality, patriarchy and oppression from within Islamic societies.¹⁰⁵ Hursh draws on the work of Bamyeh to make this point, stating that there is 'a widespread effort to reduce the 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'.¹⁰⁶

As mentioned previously, in 18 April a new Supreme Order was enacted which empowered women to access any public services without guardian-consent on completely equal terms as men. This significantly protects the scope and effect of misused guardianship practices for women within the Kingdom.¹⁰⁷ Restrictions preventing women from attending public events, including sporting events, have also been lifted. Women can now obtain citizenship cards on their own behalf as well as seek educational opportunities and medical attention.¹⁰⁸

In a further Supreme Order issued in September 2017, additional restrictions were lifted. This stipulated that issuing driving licenses both male and female equally. These efforts are to strengthen the status of Saudi women within the society. As well as facilitating the ways of success in public and private life.¹⁰⁹ Such empowerment of women has led to changes in the labour market, to them obtaining appropriate opportunities in the development of the country and society and to making greater contributions to cultural and economic development. In addition, this development provides

¹⁰³ *ibid*.

¹⁰⁴ Ismail K Poonawala, '9 Muhammad 'Izzat Darwaza's Principles of Modern Exegesis: A Contribution Toward Qur'anic Hermeneutics' in GR Hawting and Abdul-Kareef Shareef (eds), *Approaches to the Qur'an* (Routledge 1993) 225, 230.

¹⁰⁵ John Hursh, 'The Role of Culture in the Creation of Islamic Shariah' (2009) 84 *Indiana Law Journal* 1401, 1411.

¹⁰⁶ *ibid*; Mohammed A Bamyeh, *The Social Origins of Islam: Mind, Economy, Discourse* (UMP 1999) 258.

¹⁰⁷ National Society For Human Rights, 'The Chairman of the Society Affirms that the Supreme Court's Decision to Empower Women Without the Consent of their Guardian Will End the Problems Faced by Women!' (2018) <<http://nshr.org.sa/en/?news=the-chairman-of-the-society-affirms-that-the-supreme-courts-decision-to-empower-women-without-the-consent-of-their-guardian-will-end-the-problems-faced-by-women>> accessed 2 January 2018.

¹⁰⁸ *ibid*.

¹⁰⁹ Bandar Alaiban, 'Women Driving the Car Leading to the Strengthening of the Right to Travel' (*Okaz*, 2018) <<https://goo.gl/jUm1oH>> accessed 16 June 2018.

a further example of efforts to ensure that social customs are responsive to the needs of Saudi society while maintaining respect for the Islamic principles on which it is based.

Unlike other core conventions, CEDAW does not operate under a guise of gender neutrality and is openly committed to eliminating discrimination against women, as opposed to promoting equal rights with respect to men.¹¹⁰ It recognises that ‘extensive discrimination against women continues to exist [and creates] an obstacle to the participation of women on equal terms with men in the political, social, economic and cultural life of their countries’.¹¹¹ It further seeks to address the question of cultural relativity regarding women’s rights. The cultural clash between universalism and relativism is expressly cited in CEDAW, which requires modification of cultural patterns of conduct or ‘custom’ which prejudice the advancement of women’s equality.

Women are often excluded from the hierarchies of power and are subject to male domination within the family.¹¹² Based on the premise that women have been, and continue to represent, a historically marginalised group, CEDAW was founded to establish an international bill of rights for women.¹¹³ It therefore embraces all aspects of women’s lives – political, public and economic – as well as those relevant to education, marriage and family.¹¹⁴ The concept of equality for women, or to be precise, how this equality should be practically implemented, has remained a divisive subject which has created tension between those who conceive of human rights in a structurally universal sense, and conservative Muslim society – this despite the Convention remaining one of the most ratified of the core international rights-based conventions, in place for over thirty years.¹¹⁵ The use of the term ‘culture’ rather than religion in the above passages relevant to CEDAW’s supremacy reflects a proposed adherence to both, in respect of the discourse through which rights have historically been accumulated.

Since CEDAW requires states to ‘accord to women, in civil matters, a legal capacity identical to that of men and the same opportunities to exercise that capacity’,¹¹⁶ its scope is broad and addresses all

¹¹⁰ Frances Raday, ‘Gender and Democratic Citizenship: The Impact of Cedaw’ (2012) 10(2) International Journal of Constitutional Law 512.

¹¹¹ CEDAW (n 1) Preamble.

¹¹² Heaven Crawley, ‘Women and Refugee Status: Beyond the Public/Private Dichotomy in UK Asylum Policy’ in Doreen M Indra (ed), *Engendering Forced Migration* (Oxford University Press 1999) 309; Reva B Siegel, ‘The Rule of Love: Wife-beating as Prerogative and Privacy’ (1995) 105 Yale Law Journal 2117; Committee on the Elimination of Discrimination Against Women, ‘Gender and Sustainable Development’ (2002) UN Doc A/57/38 (Part I) 424, 426.

¹¹³ Johanna E Bond, ‘Constitutional Exclusion and Gender in Commonwealth Africa’ (2007) 31(2) Fordham International Law Journal 31.

¹¹⁴ UNHRC, ‘General Comment 28’ in Secretariat, ‘Compilation for General Comments and General Recommendations Adopted by Human Rights Treaty Bodies’ (2000) UN Doc CCPR/C/21/Rev.1/Add.10 5, 32.

¹¹⁵ *Sahin v Turkey* App no 44774/98 (10 November 2005).

¹¹⁶ CEDAW (n 1) art 5(4).

instances where guardianship requirements restrict not only freedom of movement but also other tangential rights.¹¹⁷ Restrictions on freedom of movement often prevent women from availing themselves of other fundamental rights, such as the right to education. For example, article 10 of CEDAW states that ‘State Parties are to take all appropriate measures to ensure equal rights between men and women in education’. It is also explicit in demanding that ‘men and women be accorded the same opportunities to benefit from scholarships and other study grants’.¹¹⁸

Judged by the standards of international customary law and in terms of its treaty obligations under CEDAW, the freedom of movement of both women and men is something that must be implemented without discrimination by the Saudi government. Islamic *Shariah* is the basis of system in Saudi Arabia. The main principles are justice and equality, and a ban on all types of oppression and discrimination. For example, Article 8 of the Basic Law of Governance grants that principle. Therefore, all human rights laws of the Kingdom are based on the principle of equality through which justice is achieved, and all forms of unfair discrimination, including discrimination against women, are prohibited. In addition, all institutions in the country deal with people without discrimination.¹¹⁹

The notion that different treatment does not necessarily result in discriminatory or inequitable treatment was also highlighted by Egypt in its reservations to Article 16 of CEDAW where it expressed the opinion that ‘true equality’ is not simply equality before the law, and ‘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’.¹²⁰ It is this conception of equality which opens the door for reconciliation between the two opposing views of women’s rights, given that the desired outcomes of any state actions are essentially the same: the protection of women and their equitable status alongside men.

Several gender-aware commentaries of the *Quran* by scholars such as Riffat Hassan, Amina Wadud and Asma Barlas reinforce this assertion, as does the existence of divergent views within Islamic jurisprudence in relation to gender equality principles, categorised broadly by Adila Abusharaf as ‘traditionalist views’ (based on abstract interpretations of the *Quran*) and ‘moderate views’ which are

¹¹⁷ CEDAW, ‘General Recommendation 28’ in Secretariat, ‘Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies’ (16 December 2010) UN Doc CEDAW/C/GC/28, para 29.

¹¹⁸ CEDAW (n 1) art 10(d).

¹¹⁹ Committee on the Elimination of Discrimination against Women (n 11) 18. See Li Weiwei, ‘Equality and Non-Discrimination Under International Human Rights Law’ (Research Notes, Norwegian Centre for Human Rights 2004) 7, 14.

¹²⁰ 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.

more situational and cognisant of changes in gender roles.¹²¹ While critics are quick to assert that by infusing law with religious legitimacy is harmful to the advancement of women's rights, it should also be noted that the same methods have been proven to play a pivotal role in abrogating harmful discriminatory practices, such as the *fatwa* issued by Alazahar Alcherif in Egypt prohibiting child marriage.¹²²

7.5 Conclusion

The Basic Law of Governance and all laws in Saudi Arabia protect gender equality in Article 1 of the CEDAW. Many legal provisions prohibit women's rights infringement and unfair treatment of women.¹²³ Freedom of movement from the international human rights perspective is a principle right, and one that acts in support of many other rights. In this regard, both of the Islamic *Sharia* and international human rights law protect and strengthen the right of freedom of movement. Moreover, freedom of movement is a human right guaranteed by the Kingdom's regulations. For example, article 36 of the Basic Law provides that: "The State shall provide security for all citizens and residents on its territories. No-one may be confined, arrested or imprisoned without reference to the Law."¹²⁴ This is equally applied to both man and women in the Kingdom. Also, the Law of Travel Documents in article 6 stipulates that travel may not be prohibited except by a court order or a decision issued by Interior Ministeri for specific reasons related to national security and for a specified time period. In both cases, the prohibited person from travel shall be informed with a one-week maximum from the date of the judgment or decision prohibiting him from traveling.¹²⁵

Islam is a religion which proclaimed itself 'suitable for all times, all people and all societies.'¹²⁶ This flexibility, of course, has a fragmenting effect on jurisprudence,¹²⁷ suffusing the more religious aspects of the faith with the cultural norms and accompanying customs of the community from within which it was embedded. Family law courts apply Islamic jurisprudence to all matters falling under the domain

¹²¹ Adila Abusharaf, 'Women in Islamic Communities: The Quest for Gender Justice Research' (2006) 28(3) Human Rights Quarterly 714, 719.

¹²² Zafar Khan, 'Are Child Marriages Allowed in Islam?' (Islam Awareness, nd) <www.islamawareness.net/marriage/child/childmarriage.html> accessed 13 December 2017.

¹²³ See Committee on the Elimination of Discrimination against Women (n 11) 15.

¹²⁴ Committee on the Elimination of Discrimination against Women, 'Consideration of Reports Submitted by States Parties under Article 18 of the Convention, Combined Initial and Second Periodic Reports of Saudi Arabia' (30 September 2016) 40th Session CEDAW/C/SAU/3-4, 7.

¹²⁵ The law of Travel Documents issued by Royal Decree No . M / 24 dated 28/05 / 1421H, corresponding to 29/8/2000.

¹²⁶ Muhammad Khalid Masud, Brinkley Messick and David S Powers, 'Muftis, Fatwas and Islamic Legal Interpretation' in Muhammad Khalid Masud, Brinkley Messick and David S Powers (eds), *Islamic Legal Interpretation: Muftis and their Fathers* (Harvard University Press 1996)3.

¹²⁷ Wael B Hallaq, 'Lfta' And Ijtihad in Sunni Legal Theory: A Developmental Account' in Masud, Messick and Powers (n 126) 33.

of personal status law. Regarding the freedom of movement, Saudi Arabi has taken more steps on the international stage to better quantify what rights mean in the Muslim tradition, underscored by the fact Islam is founded on a sense of justice, and therefore basis of the domestic law. By adopting a teleological approach, it is possible to frame the desired outcomes of both of the apparently conflicting perspectives as being the same – the promotion of human welfare and the prevention of harm. Islam has granted Muslims freedom of movement and travel so as to fulfill their numerous different needs. However, Islam differentiates between woman and man in this regard in terms of rights. Islam has given both man and woman the complete right of movement and travel, while putting some restrictions on the movement of women in line with their feminine nature and capacities, in addition to general restrictions that apply to both sexes.

Chapter Eight: Conclusion

8.1 Introduction

This thesis has analysed from a variety of perspectives the reform that has empowered Saudi women by allowing them to access services without the consent of their guardian. It has explored the Saudi Arabian efforts to resolve the issues concerning women's rights. It has also assessed the possible impacts of the reforms from a legal standpoint. This has entailed a discussion of Saudi Arabia's compliance with its obligations under international human rights law, focusing on three rights of particular significance from a social, religious and human rights theory perspective (right to education, right to work and right to freedom of movement). This thesis has argued that whereas the Western perspective may assert that *Shariah* is naturally at odds with the equal treatment of women and men, this apparent tension between the concepts of universality of rights and their implementation in Islamic contexts can perhaps be reconciled by re-framing the dichotomy in terms of a teleological approach in which *Shariah* and the ethos of international human rights discourse can be aligned.

8.2 Summary

Saudi Arabia's laws, which are derived from Islamic *Shariah*, are based on the principle of equality between men and women. These take into account the characteristics and relationship between men and women, and ultimately justice. Saudi Arabia believes in the rights of women and the elimination of discrimination against women. It should be noted that the definition of 'discrimination against women' in Article 1 of CEDAW is consistent with what is practised in the Kingdom, where there are no regulations, decision or exclusion or restriction resulting from it.¹

The concept of guardianship has a greater foundation in cultural norms than it has in *Shariah* law. Legislation is often shaped by socio-cultural standards, just as these standards can be shaped by laws. In addition, guardianship is often considered to derogate from women's rights, while they represent principles that promote human rights in general. It should be noted that the abuse of these principles established by *Shariah* as a pretext for domination and violation of women's rights remains within the framework of the individual wrong practices that the Kingdom's laws and institutions are involved in combating and eradicating.²

¹ Committee on the Elimination of Discrimination against Women, 'Consideration of Reports Submitted by States Parties under Article 18 of the Convention, Third and Fourth Periodic Reports of Saudi Arabia (30 September 2016) 40th Session CEDAW/C/SAU/3-4.

² Abdalmajeed Aldhamshi, *Rights of Married Women in the Judicial System in Saudi Arabia* (Human Rights Commission Media and Publication Center 2015) 23.

The Vision 2030 strategy was drafted with the intention of accelerating positive change to improve the status of women in Saudi Arabia.³ The programme notes that Saudi women represent ‘a great asset’, which is an important element in the society of the state.⁴ The recent reforms appear to suggest that the Saudi government is serious about its efforts to resolve any problems or obstacles in regards to women’s rights. Currently, women are not required to gain the consent of their guardian to obtain public or private services unless there is a legal basis for this request, in accordance with the provisions of Islamic Shariah.⁵

Chapter 2 provided a deeper understanding of the legal system in Saudi Arabia. Based on *Shariah* law, the Basic Law of Governance operates as an equivalent to a constitution and has supremacy over any conflicting general principle or international law treaty provision.⁶ An isolated reading of the Basic Law of Governance of Saudi Arabia would appear to suggest that the Kingdom provides its female citizens with rights that equal, or in some cases exceed, the equivalent entitlements in advanced societies. The right to education and right to work, for example, are enshrined in the Basic Law with no express limitations on gender referred to. Controlling women and infringing their rights is therefore limited to erroneous personal practices. The law is a force to eradicate and eliminate such practices in cooperation with related institutions.

Chapter 3 examined Saudi Arabia’s obligations under international law. Despite having ratified a number of international law treaties that refer, in full or in part, to the rights of women, Saudi Arabia’s interaction with the relevant international committees that uphold these treaties has been positive, which has resulted in the Kingdom committing itself to its international obligations by putting in place policies that will assist it in complying with its international obligations in accordance with the principles of Islamic *Shariah* that protect human rights.⁷

Although some scholars have suggested that Islamic Shariah and international human rights law are fundamentally incompatible, the concepts of ‘universality’ are far from universal. Islamic history and traditions come from a broadly different background than Western traditions. Therefore, in Islamic societies, in order for human rights to gain broad acceptance and implementation, it is important to root them in Islamic tradition itself, such as through the reconciliation of Islamic Shariah and the third

³ Committee on the Elimination of Discrimination against Women, ‘Concluding Observations on the Combined Third and Fourth Periodic Reports of Saudi Arabia (14 March 2018) CEDAW/C/SAU/CO/3-4, 2.

⁴ See National Transformation Program 2020, ‘Vision 2030’ <http://vision2030.gov.sa/sites/default/files/NTP_En.pdf> accessed 19 October 2017.

⁵ Supreme Order No 33322 (2017); SPA, ‘20 Justice Decisions Promote Saudi Women’s Rights in Judicial Facilities Saudi Press Agency’ (2018) <<https://www.spa.gov.sa/1753625>> accessed 18 April 2018.

⁶ Abdullah F Ansary, *A Brief Overview of the Saudi Arabian Legal System* (New York University School of Law 2015).

⁷ Committee on the Elimination of Discrimination against Women (n 3).

generation of international human rights, both of which tend to impose 'duties' on individuals as well as conferring rights.⁸

Chapter 4 examined the background behind gender equality in Saudi Arabia by providing a greater understanding of the concept of guardianship. Although formulated within the legal-Islamic tradition, these institutions are grounded in Saudi cultural norms which are based on the complementary role in Islamic *Shariah* of men and women taking into account the characteristics of each gender.⁹ Although the concepts of *qiwamahh* and *wilayah* have been established in Saudi Arabia based on the principles of Islamic *Shariah*, a contemporary understanding of these has been at the centre of recent scholarship's attempts to redefine the role of women in Islamic tradition and to accommodate a more egalitarian understanding of the relationship between men and women.¹⁰ Contemporary scholars have also questioned why the principles of gender equality that are part of the Islamic tradition (ie 'there is no preference of one over the other except in relation to obedience [to God]') have been excluded from discussion of male authority over women.¹¹ An egalitarian view of gender relations in Saudi Arabia could be interpreted solely within the confines of the Islamic legal tradition.

Chapter 5 highlighted the right to education for women in Saudi Arabia. This chapter considered the potential effects of the recent reforms on the right of women to education and the importance of the role of education in achieving sustainable development and the realization of human rights. Many efforts have been made to provide education and fight illiteracy on the basis of gender equality. The right to education in Saudi Arabia is also considered in relation to the recognition of the right to education in international human rights law.¹²

Chapter 6 builds on the previous chapter by considering women's place in the workforce. There is much evidence to suggest that the right to work is a right granted to both males and females under the Kingdom's laws. For example, the Labour Law does not distinguish between women and men in terms of rights and duties. The recent reform to empower women to obtain work without guardian consent has been viewed as evidence to protect and facilitate the right of women to work in Saudi Arabia.¹³

⁸ Mashood A Baderin, *International Human Rights and Islamic Shariah* (Oxford University Press 2003).

⁹ Committee on the Elimination of Discrimination against Women (n 1).

¹⁰ For example, see Amina Wadud, *Quran and Woman: Rereading the Sacred Text from a Woman's Perspective* (Oxford University Press 1999).

¹¹ *ibid.*

¹² HRC, How is Equality Between Men and Women Made Under the Kingdom's Laws?

<<http://www.hrc.gov.sa/ar-sa/HumanRightsInSaudi/Pages/equalityrights.aspx>> accessed 19 April 2018.

¹³ See Saudi Labor Law, Royal Decree No. M/51, September 2005, Part VI Working conditions (wages, working hours, rest periods, leaves).

Chapter 7 considered women's freedom of movement in relation to guardian-consent. It also analysed the issue of women's travel with a *mahram* in order to protect her from non-related males. The chapter further assessed the right to freedom of movement of women in Saudi Arabia, following the empowerment of Saudi women after the removal of the guardian-consent requirement. The chapter explored the origin of guardianship and its legal basis, thereby examining the boundary between law and custom in the evolution, and justification, of guardianship related norms and practices.¹⁴

8.3 Recommendations

This thesis has demonstrated that women enjoy a legal personality as well as full legal capacities that are equal to men, especially in financial transactions. Therefore, one can say that women enjoy full economic capacity as well as an independent financial identity. This simply means that women acquire rights and bear responsibilities just like men, and their finances are independent of their guardians regardless of whether he is the father, son, husband or brother. Given that women enjoy financial independence, they are accordingly entitled to perform all actions in that regard and acquire rights and bear responsibilities without sharing such rights with anyone. Moreover, women are allowed to inherit and bequeath as provided in Islamic *Shariah*.

The scope of man's guardianship over a woman is one of the matters that need to be specified and clarified because it might entail women being restricted in practicing their rights, thereby reducing their competency in performing actions that are permitted by Islamic *Shariah* and the domestic law.¹⁵ If such restrictions over the competency of women in performing some actions or looking after their affairs based on *Shariah* are intended to maintain the dignity of humans and protect women, then they must be interpreted in line with the rights that women enjoy based on their independent legal capacity. Therefore, women's rights could be asserted by specific legal texts that guarantee their rights and help them exercise them while abiding by the requirements of the provisions of Islamic *Shariah* and in line with the spirit and nature of this day and age.

This thesis notes the efforts of recent reforms by the Saudi government that have instructed all government entities to refrain from requiring a woman to obtain a male guardian's permission in order to have access to services and procedures, except where justified by law or *Shariah* law principles.

¹⁴ Bandar Alaiban, 'Women Driving the Car Leading to the Strengthening of its Right to Travel' (*Okaz*, 2018) <<https://goo.gl/jUm1oH>> accessed 16 June 2018.

¹⁵ Aiob Al-Jarboa and Khalid Al-Mohisan, *Women Legal Status in the Kingdom of Saudi Arabia* (King Fahd National Library 2010).

This thesis argues that government bodies may undertake awareness-raising campaigns to develop awareness of women's rights. Raising women's awareness of all their rights would encourage them to exercise all the rights granted to them by the country and *Shariah* law. Also, women should know how to prevent any violations that can occur to them by always resorting to the Saudi judiciary. Furthermore, consciousness should be spread among men in general that the concept of guardianship includes certain matters defined by the Islamic religion, which does not mean preventing women from accessing them and enjoying their fundamental rights. Awareness of women's rights should be disseminated in all public places, whether in schools, universities, mosques or markets, as well as on television and social media. The implementation of the above suggestions would correct erroneous practices stemming from an incorrect understanding by individuals of *Shariah* provisions on the rights and duties of men and women and the mandate of men over women.

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