ANGLIA RUSKIN UNIVERSITY

FACULTY OF ARTS, LAW AND SOCIAL SCIENCES

‘ A CRITICAL ANALYSIS OF THE CONTINUED RELEVANCE OF SECULARISM TO CONTEMPORARY ISLAMIC STATES’ ATTITUDES TO INTERNATIONAL HUMAN RIGHTS LAW ’

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A Thesis in partial fulfilment of the requirements of Anglia Ruskin University for the degree of Doctor of Philosophy

Submitted: June 2019
AFFIRMATION

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

I would like to express my great gratitude and very great appreciation to my supervisory team, Dr Alexander Murray and Dr Aldo Zammit Borda, for their encouragement, guidance and support throughout the years of my research from the beginning to the last stage. It was a pleasure to work under their supervision. I also wish to express my special appreciation to Professor Robert Home.

Lastly, special gratitude to my great parents, my great wife for her support and for my great brothers whose help, support and encouragement helped me in all the time for writing of this thesis.
ABSTRACT

This research aims to provide a critical and relevant exploration of the relationship between the major assumptions surrounding Islamic law and issues related to the protection of basic human rights vis-à-vis the different situations in secular and non-secular countries. The focus is on comparing the precise ways in which secular Islamic states and non-secular Islamic states tend to adopt basic principles pertaining to human rights.

The main objective of this study is to discover whether secular Islamic states tend to demonstrate higher degree of compliance with international human rights law in comparison with non-secular Islamic countries. This research objective provides the backbone of the entire work, since a comparison between secular and non-secular Islamic countries may yield important practical implications, and can also determine to what extent the level of a Muslim country's implementation of international human rights law may be attributed to specific factors. Similar aspects are determined by the quality parameter of the work, which is regulated through the flexible organisation of codified law.

The context of considering these aspects is comparative by nature, since the legal systems in secular Islamic countries differ from those of non-secular Islamic countries. This study applies both comparative, empirical research and library work. It seeks to provide a theoretical understanding of the specific context of various Islamic states’ attitudes in detail in order to ascertain their level of compliance with international human rights law.

The study has provided that modern secular Islamic state seems to be more closely aligned with the principles of human rights than does the non-secular one. The study also provided that secular modern Islamic states do not use religion to regulate their justice systems and that this model emphasises international human rights instead, as secular Islamic state model is based on religious neutrality and does not use Islamic religious principles in dispensing justice, but rather is subject to a well-established justice system that respects human dignity and the rule of law.
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LIST OF INTERNATIONAL INSTRUMENTS


Convention on the Prevention and Punishment of the Crime of Genocide. Approved and proposed for signature and ratification by General Assembly resolution 260 A (III) of 9 December 1948. Entry into force: 12 January 1951, in accordance with article XIII.


Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Adopted and opened for signature, ratification and accession by General Assembly resolution 39/46 of 10 December 1984. Entry into force 26 June 1987, in accordance with article 27 (1).


LIST OF NATIONAL INSTRUMENTS

Kingdom of Saudi Arabia


Statute of Human Rights Commission Translation of Saudi Laws Council of Ministers Resolution No. 207 Dated 8 Sha'ban 1426H / 12 September 2005


Republic of Tunisia

Personal Status Code promulgated by decree on August 13, 1956 and came into effect on January 1, 1957

Penal Code, Code if Criminal Procedure, approved by Law No.68-23 of July 24, 1968


Child Protection Code, Law number 95-92 of November 9, 1995
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<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Full Form</th>
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<tbody>
<tr>
<td>ACHPR</td>
<td>African Charter on Human and People’s Rights</td>
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<td>ACHR</td>
<td>American Convention on Human Rights</td>
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<tr>
<td>CAT</td>
<td>United Nations Convention Against Torture</td>
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<td>CDHRI</td>
<td>Cairo Declaration on Human Rights in Islam</td>
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<td>CEDAW</td>
<td>Convention on the Elimination of All Forms of Discrimination Against Women</td>
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<td>CERD</td>
<td>Convention on the Elimination of all Forms of Racial Discrimination</td>
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<td>CPC</td>
<td>Child Protection Code (Tunisia)</td>
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<td>CPCG</td>
<td>Convention on the Prevention and Punishment of the Crime of Genocide</td>
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<tr>
<td>CRC</td>
<td>Convention on the Rights of the Child</td>
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<td>CRPD</td>
<td>Convention on the Rights of Persons with Disabilities</td>
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<td>CSR</td>
<td>Convention Relating to the Status of Refugee</td>
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<td>ECHR</td>
<td>European Convention for the protection of Human Rights and Fundamental Freedoms</td>
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<td>GCC</td>
<td>Golf Corporation Council</td>
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<td>HRC</td>
<td>Human Rights Commission</td>
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<td>HRW</td>
<td>Human Rights Watch</td>
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<tr>
<td>IBHR</td>
<td>International Bill of Human Rights</td>
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<td>ICESCR</td>
<td>International Covenant on Economic, Social and Cultural Rights</td>
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<td>Acronym</td>
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<tr>
<td>ICRMW</td>
<td>International Convention on the Protection of the Rights of All Migrant Workers</td>
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<td>IHRL</td>
<td>International Human Rights Law</td>
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<td>NFSP</td>
<td>The National Family Safety Program</td>
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<td>NGOs</td>
<td>Non-Governmental Organisations</td>
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<tr>
<td>NSHR</td>
<td>The National Society for Human Rights</td>
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<tr>
<td>OIC</td>
<td>Organisation of Islamic Cooperation</td>
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<tr>
<td>OMCT</td>
<td>World Organisation Against Torture</td>
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<tr>
<td>UDHR</td>
<td>The Universal Declaration of Human Rights</td>
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<tr>
<td>ARP</td>
<td>The Assembly of Representatives of the People</td>
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<tr>
<td>CPVPV</td>
<td>Committee for the Promotion of Virtue and the Prevention of Vice</td>
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<tr>
<td>NCA</td>
<td>National Constituent Assembly</td>
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**GLOSSARY**

<table>
<thead>
<tr>
<th>Term</th>
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<tr>
<td>Akl</td>
<td>Notion</td>
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<tr>
<td>Allah</td>
<td>God</td>
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<tr>
<td>Fatwa</td>
<td>Verdict</td>
</tr>
<tr>
<td>Fiqh</td>
<td>Human understanding of the sharia and Jurisprudence</td>
</tr>
<tr>
<td>Hadith</td>
<td>Islamic traditions</td>
</tr>
<tr>
<td>Ijma</td>
<td>Consensus or agreement of the Muslim scholars on religious Issues</td>
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<tr>
<td>Ijtihad</td>
<td>Reasoning or decision making effort</td>
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<tr>
<td>Istihisan</td>
<td>Juristic discretion or juristic preference</td>
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<tr>
<td>Madhabs</td>
<td>Schools of Islamic thought</td>
</tr>
<tr>
<td>Qiyas</td>
<td>Analogical reason by compare or contrast</td>
</tr>
<tr>
<td>Quran</td>
<td>Holy book, central religious text of Islam</td>
</tr>
<tr>
<td>Ra’y</td>
<td>Common sense or rational discretion</td>
</tr>
<tr>
<td>Sharia</td>
<td>Islamic Law or divine law forming part of the Islamic tradition</td>
</tr>
<tr>
<td>Shura</td>
<td>Consultation</td>
</tr>
<tr>
<td>Sunna</td>
<td>Normative behaviour, actions, decisions, approvals and disapprovals of the Prophet Mohammed</td>
</tr>
<tr>
<td>Ulama</td>
<td>Denotes scholars of almost all disciplines</td>
</tr>
<tr>
<td>Urf</td>
<td>Custom, what is established and practiced by the people</td>
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Introduction

Introductory Remarks

The concept of international human rights was first formulated in the Universal Declaration of Human Rights (UDHR) on 10 December 1948.¹ This declaration was drafted in order to attain the same standard of achievement for all people and nations.² The UDHR was designed to promote and protect human rights at domestic, regional and international levels. As per these norms states that ratify human rights treaties commit themselves to respecting the rights contained therein by ensuring that their own domestic law is compatible with international legislation.³

In order to improve upon this basic declaration, multiple treaties including the Convention on the Prevention and Punishment of the Crime of Genocide (CPCG) in 1948,

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the Convention Relating to the Status of Refugee (CSR) in 1951, the Convention on the Elimination of all Forms of Racial Discrimination (CERD) in 1963, the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) in 1979, the United Nations Convention Against Torture (CAT) in 1985, the Convention on the Rights of the Child (CRC) in 1989, the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (ICRMW) in 1990, and the Convention on the Rights of Persons with Disabilities (CRPD) in 2006 have been adopted on an international scale. 4

The adoption of the UDHR in 1948 marked the beginning of a new era in international law, which prompted scholars in the legal field to explore the status of human rights law within the legal systems of both secular and non-secular modern Islamic states. The most important assumptions embedded in the UDHR include those pertaining to the universality of human nature, respect for the dignity of the individual, and the need to maintain a democratic social order. 5

Since the establishment of the UDHR, the issue of human rights has become a highly relevant aspect of international political and legal discourse. A general assumption made in this discourse is that the existence of human rights is possible only in secular states

which lack the framework of religion. Thus the prevailing view, such as that of Lerner and Geneviève Souillac, is that the concept of human rights is a secular one. In the case of Islam, it is often assumed that the religion supports values that are found to be incompatible with the values outlined in the UDHR.

The discussion on international human rights is rooted in the notion of secular liberalism, which promotes the rights of citizens and establishes a legal system independent of religion. This secularisation of the public sphere is absent in an Islamic judicial context. The Islamic tradition instead emphasises the extensive role of the community in society as well as the relational aspects of human interaction, and in these respects it differs from the secular tradition, which places supreme importance on individualism and independent moral standards. A common point of criticism among Muslim scholars is that the UDHR is anti-religious in nature. In order to promote the proper application of universal human rights, efforts have been made to engage traditional Muslim scholars in an ongoing discussion on the foundations of basic human rights and their possible application in non-secular Muslim States.

Since the rise of Islamic political consciousness it has become apparent that Muslim authorities had legitimate reasons for failing to comply with some of the assumptions of the UDHR, and they often used the term 'culturally Eurocentric' when explaining why they

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rejected secular principles. The UDHR is commonly perceived to be insensitive to specific Muslim cultural and social values, especially in relation to individual rights and collective values that determine how Muslim societies function.9

When attempting to comprehend the basic assumptions identified in the UDHR it must be kept in mind that every official text or document was written in a specific historical and cultural context that should be adequately explained.10 The UDHR is a good example of this. Those who drafted it were fully aware of the fact that traditional communities maintained their ways of life in the period following the two World Wars. The nations involved in drafting the UDHR indicated that their objective was to seek a universal language which could be applied to protect individuals from extensive violence and oppression.

Throughout the UDHR there is a strong emphasis on the Enlightenment view of humanity, and human equality is portrayed as being necessary simply by virtue of human existence.11 The main problem with relativism in the context of human rights has always been apparent and has persisted throughout its history. The reality of different life experiences in different cultures has sometimes served as the foundation for relativism in a global context when specific standards of justice are being discussed.

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9 Malanczuk (n 6).
11 Ibid.
Regardless of efforts to promote a universal view of morality, it is difficult to achieve consensus on the application of common legal standards at international conventions.\textsuperscript{12} The process of detaching universal morality from individual cultures has led to a tendency to ignore the propositions of the UDHR in non-secular Muslim states. This has been most evident in Muslim countries where the principles of political governance are largely based on cultural relativism, which has been used to justify the lack of particular freedoms within those societies.\textsuperscript{13}

A substantial amount of bias is evident in Islamic encounters with the western notion of international human rights. From this perspective some scholars, such as Emilie Hafner-Burton, argue for the implementation of a pragmatic approach to understanding the complex implications of international human rights.\textsuperscript{14} As such, human rights may be perceived as pragmatic political tools, with a particular focus on their comprehensiveness and applicability in different contexts.\textsuperscript{15}

Moreover, religion is used as a means of initiating or modifying the discourse on human rights in secular versus non-secular Muslim states. However, it may also be argued that a simple belief in human rights does not necessarily imply that such rights exist

\begin{flushright}
\textsuperscript{13} Helaine Silverman, D Fairchild Ruggles, \textit{Cultural Heritage and Human Rights} (1\textsuperscript{st} edn, Springer Science & Business Media 2007) 33.
\textsuperscript{14} Emilie Hafner-Burton, \textit{Making Human Rights a Reality} (1\textsuperscript{st} edn, Princeton University Press 2013) 43.
\end{flushright}
independently of human purpose. It is therefore more useful to promote the idea that human
rights are essential tools for protecting residents of all countries against violence and
oppression. However, it is also true that the existence of only one moral foundation for
the discussion of international human rights (the UDHR) has led to confusing or misleading
claims among traditionalist Muslim societies that it serves colonialist purposes. Due to this
it must be emphasised that international human rights commonly serve a wide range of
purposes, and that these purposes can be expressed in multiple ways across various states
around the world. Thus, as researchers have often found, it has become difficult to justify
the notion of international human rights in traditional and religious states in the Muslim
world.

In order to adequately justify the existence of such rights, it is important to centre
the debate on clarifying why human beings should have similar rights. In Muslim societies,
the emphasis is on one’s responsibilities, but the main problem is that there is no clear
discourse on rights. Additionally, Islamic doctrines support the belief that human beings
are created equal, but in Islamic societies their human dignity is traditionally viewed within
the context of a greater societal framework. From this perspective, it has become
important to discuss human rights as converging with this societal framework to a
significant extent.

A common assumption made in this context is that the prevailing arguments about
human dignity and natural law are inherently abstract, indicating the feasibility of the
philosophical tradition. However, a significant problem with this assumption is that such

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16 Silverman and Ruggles (n 13).
arguments may fail to prove their practical importance for Muslim non-secular states. Abstract claims about the natural dignity of human beings have impeded the discourse on advancing international human rights. Certain abstract propositions may even reflect the weakening of the status of human rights.  

Abdulaziz Sachedina has indicated that some Muslim scholars have interpreted the UDHR as a rather controversial document in terms of its principles of morality and ethics. From an Islamic perspective, it appears that the issue of cultural relativism has been used against the Eurocentric sources of the UDHR. Such a charge of relativism should not be ignored in the context of human rights, but most importantly a flexible dialogue with representatives of other belief systems should be initiated in order to present objective viewpoints in the discourse on human rights. Reaching a high level of consensus on the topic of human agency has been identified as a priority in research literature on the subject. This is due to the fact that the notion of human agency is typically seen as an inseparable part of human dignity.

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1. Defining the Problem, and the Significance of this Research

Human rights are considered to be a universal priority, and a conflict between universalism and cultural relativism has emerged due to the lack of ‘complete agreement about the nature of such rights or their substantive scope.\(^\text{21}\) The debate has become even more complicated in recent years when examining the issue of how the countries that have implemented Islamic law currently operate, especially with regards to their inability to respect basic human rights in a satisfactory manner.

The examples of Iran and Saudi Arabia show Muslim societies in a negative light, and even societies with a tradition of secular governance, such as Turkey or Tunisia, contribute to the complexities of this matter. However, such case studies are always open to debate, as a regime’s respect for human rights is not linked exclusively to its legal system. Instead a variety of factors, including social, economic, ethnic, cultural, and political issues, must be analysed in order to determine the status of human rights in a particular country.

Many member states of the United Nations are Muslim states that enforce Islamic domestically either fully or partially, and this has led to debates about the challenges of protecting basic human rights in non-secular Islamic countries due to complications in

interpreting human rights-related issues.\textsuperscript{22} This can be explained by the fact that Islamic law itself creates specific contradictions, and thus it becomes difficult for non-secular Islamic countries to ensure a more flexible interpretation of law and implement principles related to human rights.\textsuperscript{23} In order to develop the current research properly, particular research objectives must be formulated that correspond with the intention of the researcher to be clear regarding what can be expected from the outcome of the research.

\subsection*{1.1 Islamic States: Secular and Non-secular}

An Islamic state (\textit{Ad-dawlah Al-islamīyah}) is a type of government based, at least to a certain extent, on \textit{Shari’a}-derived principles and norms.\textsuperscript{24} Historically the type of proto-government known as the Caliphate was modelled after the rule of Prophet Mohammad. Modern Islamic states too are rooted in Islamic law but, unlike caliph-led governments, which were ruled by despots or were monarchies (\textit{Malik}), modern Islamic states include political elements such as elections, parliamentary rule, judicial review, and popular sovereignty. In the present day many Muslim countries have incorporated Islamic law, either partially or wholly, into their legal systems. Modern Islamic states can be divided

\begin{itemize}
\item \textsuperscript{22} Mark Ellis and others, \textit{Islamic Law and International Human Rights Law} (1\textsuperscript{st} edn, Oxford University Press 2012) 91.
\item \textsuperscript{23} Ekaterina Krivenko and others, \textit{Women, Islam and International Law: Within the Context of the Convention on the Elimination of All Forms of Discrimination Against Women} (1\textsuperscript{st} edn, BRIL 2009) 221.
\item \textsuperscript{24} Ali Ashgar, \textit{The State in Islam: Nature and the Scope} (1\textsuperscript{st} edn, Pinnacle Technology 2006) 91.
\end{itemize}
into monarchies and Islamic republics. Some Muslim states have declared Islam to be their state religion in their constitutions, but do not apply Islamic law in their courts.

The essence or guiding principles of an Islamic government or Islamic state is the concept of Al-Shura (religious house of parliament). This is understood primarily to involve meetings or consultations that follow the teachings of Islam and the guidelines of the Qur’an and Sunna. The notion of a ‘secular state’ is a modern one and stems from the now widespread concept of secularism. Secularism promotes the idea that a state is officially neutral concerning matters of religion, and equality before the law in all matters is accorded to citizens of a secular state regardless of their religion, thus excluding the possibility of systematic discrimination or preferential treatment through certain policies. Secular states by definition do not have a state religion, but this does not mean that a state is actually fully secular, since in some cases, despite the separate of state and church, religion still is used as a residual part of traditional culture to legitimise the state.

Secularism as a manifestation of modernisation has had varying impacts on the Muslim world, with secular Islamic states embracing and accommodating secular (read Western) influences in contrast with non-secular Islamic states, which have militantly resisted secular influence, including forms of democratic governance. Secularism is rooted the European historical experience, which sought to remove coercive power from ecclesiastical authority and thus safeguard freedom of religion and separation of religion

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and state. This process has often interpreted by Muslims as the removal of religious values from the public sphere, and therefore condemned.

Muslim theologians have long distinguished between matters of *din* (religion) and *dawlah* (state) but insisted that public life must be guided by Islamic values. Historically, Muslims have experienced secularism as an ideology imposed on them by outside by invaders and colonialists, thus as an extension of foreign culture.

### 1.2 The Selection of Secular and Non-Secular States

Given the classical definitions of secular and non-secular modern Islamic states and the concept of secularism, which states should be the focus of this study? As the chief concern is the attitude of these two kinds of states to international human rights law it is seems obvious to choose the Kingdom of Saudi Arabia as a well-known and controversial example of the classical *Shari'a* system. Tunisia, on the other hand, is the prime example of a Muslim-majority nation with a secular system. A brief description of these two countries will now be given, including information about their respective legal systems. Saudi Arabia is an example of a non-secular country which applies Islamic law in full, according to Sunni (*Hanbali*) jurisprudence.²⁸

Noticeably, it was the only Muslim country which did not vote in the UN General Assembly to adopt the UDHR in 1948, for Islamic reasons.²⁹ The leadership of the country

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²⁹ Baderin (n 18).
at the time objected to accepting the provision on equal rights in marriage and the provision on religious liberty in the declaration.\textsuperscript{30} Saudi Arabia employs a culturally relativist approach to international human rights.\textsuperscript{31} Its key constitutional document is the Basic Law of Governance, which excludes key human rights mentioned in the UDHR, including the prohibition of torture, the right to life, freedom of association, freedom of expression, freedom of thought, women’s rights, freedom of conscience and freedom of religion.\textsuperscript{32}

Tunisia on the other hand is a country with a secular government which, since the event of the Arab Spring in 2010, has made significant steps towards complying with international human rights law, becoming the first Islamic state to ‘legally enshrine gender parity in the electoral rolls’. Furthermore, freedom of the press laws have been liberalised – although defamation of religion is still punishable by imprisonment, the freedom to publish academic texts has now been established.\textsuperscript{33}

1.3 International Law and Islamic Law

International law is defined as ‘the set of rules generally regarded and accepted as binding in relations between states and between nations. It serves as a framework for the practice of stable and organized international relations. International law concerns the legal systems

\textsuperscript{30} Hirschl R, \textit{Towards juristocracy: the origins and consequences of the new constitutionalism} (1\textsuperscript{st} edn, Publication Data 2004) 100.
\textsuperscript{31} Ann Elizabeth Mayer, \textit{Islam and Human Rights} (4\textsuperscript{th} edn Westview Press, USA 2013) 8
\textsuperscript{32} Anthony Billingsley, \textit{Political Succession in the Arab World: Constitutions, Family Loyalties and Islam} (1\textsuperscript{st} edn, Routledge 2009) 138.
\textsuperscript{33} Rainer Grote and others, \textit{Constitutionalism, Human Rights, and Islam After the Arab Spring} (1\textsuperscript{st} edn, Oxford University Press 2016) 606.
of states rather than private citizens. This point is important when considering the legal systems of Muslim countries where Shari’a law is applied to the behaviour of individual Muslims. In the case of treaties, supranational tribunals or courts national law becomes international law.

The attitude to human rights in Islamic countries shows no uniformity, and there are great variations between countries. For the purposes of this study it should be noted that the variations, ranging from the downright flouting of international human rights law through to the pursuit of justice that is prescribed by it correlates with the classification of Islamic states given above. The research approach to this variation then will need to study the attitudes of Islamic states with systems of classical, secular and mixed laws to international human rights law and more broadly to international law.

A major question that will be addressed in this study is: What is the relationship between the legal system of an Islamic state being based on Shari’a and its attitude to international human rights law? The hypothesis, informed by the typology of secular and non-secular Islamic states given above, is that the attitude to international human rights law depends on how much and to what extent the legal system of an Islamic state is based on fundamentalist Shari’a law derived from the Qur’an and the Hadith. The response to this hypothesis will likely confirm a range of attitudes, ranging from the relatively negative and resisting ones of classical non-secular Islamic states to the negotiated and partial

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adoption of international human rights law by states with mixed legal systems and the adoption and commensurable accommodation of international human rights law by secular Islamic states.

The first objective of this study is to determine whether secular Islamic states tend to demonstrate a higher degree of compliance with international human rights law by comparison with non-secular Islamic countries. This research objective provides the backbone of the entire research, since a comparison between secular and non-secular Islamic countries may yield important practical implications.

The second objective of this study is to determine to what extent the level of a Muslim country's implementation of international human rights law can be attributed to several specific factors. Similar aspects are determined by the quality parameter of the work, which is regulated through the flexible organisation of codified law. The indicated dimensions represent a substantial focus on the influence of external factors that may play an essential role in determining the readiness of a particular country to comply with strictly defined human rights law in an international context. This research has been carried out within the specific context of selected Islamic states in order to conclude whether or not it is more effective for a universalist doctrine of human rights to be applied in those states or, alternatively, whether a doctrine of human rights issuing from the expression of a cultural relativist paradigm should be implemented.
The significance of this study lies in analysing and understanding the mechanisms of Islamic law in secular Islamic states in critical comparison with non-secular Islamic states.\textsuperscript{36} The comparison between different countries is important since it will highlight a number of facts on the subject of their compliance with principles of international human rights and will offer an informed and impartial study of Islamic law and human rights.

On the basis of this hypothesis the following analysis aims to expand the arguments presented in the conventional literature by bringing new perspectives to bear on the impact of Islamic law on the formulation of the essential principles of human rights. In addition, the research aims to explain the variances in willingness to conform to human rights perspectives of different Islamic countries. In this regard special attention will be given to the way in which Islamic states interpret and apply the principles of international human rights law. The aim of such detailed analysis and interpretation is to determine whether or not the states being examined follow a conservative or liberal line in adhering to human rights law.

This thesis thus aims to fill an important gap in international human rights discourse and allow for a wider range of perspectives regarding certain aspects, which can help individuals acquire an adequate vision on the main research problem investigated in the study. Moreover, this study will hopefully provide other researchers and practitioners in the field of international human rights law with an adequate platform to explore specific issues related to Islamic law. Non-Muslim researchers in particular should benefit from the

\textsuperscript{36} Glenn L. Roberts, \textit{Islamic Human Rights and International Law} (1\textsuperscript{st} edn, Universal-Publishers, USA 2003) 20.
explanations and insights given in order to aid them and expand their knowledge of the principles and rules of Islamic law, which are often misinterpreted.\textsuperscript{37}

The focus of this study is to provide as clear and flexible an interpretation as possible of the identified issues. The final outcome of this research will hopefully be positive, since individuals and organisations can demonstrate a deeper understanding of what constitutes Islamic law, and how it restricts or facilitates the implementation of particular principles of human rights law.\textsuperscript{38} The consideration of different external factors is expected to result in an objective presentation of research findings. The study may eventually contribute to enriching the debate pertaining to universalist human rights doctrine and the cultural relativist paradigm in critical socio-legal studies.

2. The Gap in the Conventional Literature

Common and normative implications exist in most studies in conventional literature on Islamic law and human rights. This suggests that a significant gap exists because certain issues have long been ignored by scholars. There have been debates on the modernisation of Islamic law in order to make it more applicable to the conditions of modern life in contemporary global societies.\textsuperscript{39} It has been observed in the conventional literature that

\begin{itemize}
\item\textsuperscript{37} Sabine Carey and others, \textit{The Politics of Human Rights: The Quest for Dignity} (1\textsuperscript{st} edn, Cambridge University Press 2010) 55.
\item\textsuperscript{38} Baderin (n 18).
\end{itemize}
secular and non-secular Muslim societies tend to differ regarding the normative place religion has in the political realm.\(^{40}\)

Research findings that have been reported in conventional literature have been generally found to be inconclusive on this subject. Conservative and liberal views on these issues have been contrasted in an attempt to find a middle ground, but this has often resulted in futile research efforts. On the one hand, it has been observed that this polarisation of views has led to a failure to recognise the importance of religious beliefs among the populations of Muslim states, while on the other hand the interpretation of particular religious beliefs has been scarce and often inadequate.\(^{41}\)

The most significant gap identified in existing conventional literature is this polarisation of opinions, which has led to extensive confusion and misinterpretation of the ways Islamic law is interpreted by different groups in different Muslim societies. Compromise in these debates seems impossible to attain even after long periods of discussion. As a result, it has often been suggested that any prospects for social reform in non-secular Islamic countries remain highly contested and elusive.\(^{42}\) The popular religious mind-set of people in majority-Muslim countries provides significant challenges for researchers promoting greater flexibility and the assimilation of particular ideas into a culture.


\(^{41}\) Carey and others (n 37).

Another issue that has been overlooked in existing conventional literature is that researchers have failed to adopt a holistic approach in analysing issues of Islamic law and international human rights law. A significant change in attitude is required in order that more comprehensive results can be found. Exploring the possible Islamic basis of human rights may appear quite challenging, especially if researchers follow basic arguments identified in the conventional literature. There is a need in this case to expand and broaden the discussion, allowing for more accurate conclusions on the subject of religion versus secularism and the polarisation of beliefs.

Any discussion of human rights has the potential to become very complicated. Arguably some of the arguments made in conventional research have failed to highlight the importance of compromise between individuals within a society. Another problem often present in the literature available is the tendency to view Islam as the faith of an individual completely isolated from society as a whole. It may be suggested that a common tendency that has been observed in this respect is that researchers analyse a society in terms of basic individual rights.

However when it comes to Muslim societies, Islamic law and the discussion around human rights it is virtually impossible to present an analysis which is not couched in essentially Islamic terms. Even though the situations which are identified in most typical research are true for the respective societies, conventional literature has failed to introduce a more comprehensive view of Islamic law and how it can be modernised or reinterpreted.

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43 Carey and others (n 37).
44 Smith (n 42).
in order to comply with international human rights law. The part of this problem highlighted in this work refers to the extent to which the concept of human rights can be defined in the context of secular Islamic states versus non-secular Islamic states. Impractical means of initiating reform in Muslim societies, for example through secular ideologies such as Marxism, should be avoided.

The existing literature has also failed to create a progressive dialogue on the broader relationship between Islamic law and international human rights law.\textsuperscript{46} By focusing solely on the intense polarisation of society in Muslim-majority countries researchers may prevent efforts to perceive the debate on Islamic law and international human rights from a more constructive perspective. Conventional literature tends to focus almost solely on states’ preoccupation with the idea of finding active support for international human rights within the complex Islamic context.\textsuperscript{47} It is very challenging to adequately present and describe this issue, and thus significant gaps can be found in existing research. Therefore, it may be necessary to focus on fresh interpretations of sacred texts, which would allow researchers in the field to find new ways of exploring the issue of Islamic law and international human rights law.\textsuperscript{48}

The various attempts that have been made to successfully reconcile the principles of \textit{Shari’a} law and human rights law reveal that there is a certain degree of flexibility possible in the interpretation of the \textit{Qur’an} and related Islamic sources, as is the case with

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\footnote{Stephen Hopgood, \textit{The Endtimes of Human Rights} (1\textsuperscript{st} edn, Cornell University Press 2013) 36.}
\footnote{Samuel Moyn, \textit{The Last Utopia: Human Rights in History} (1\textsuperscript{st} edn, Belknap Press 2012) 230.}
\footnote{Akira Iriye and others, \textit{The Human Rights Revolution: An International History} (1\textsuperscript{st} edn, Oxford University Press 2012) 27.}
\end{footnotes}
any religious texts. Certain scholars have attempted to reconcile the principles of Shari’a with modern human rights; Ahmed An Na’im for example argues that there are several verses in the Qu’ran which highlight the importance of humanity and support egalitarianism.

It has been argued that, while the principles of Shari’a could never be erroneous or misleading, they could be misapplied and misinterpreted in ways which would ultimately result in the violation of human rights. This is expanded upon by Ahmed and Ginsburg (2014), who argue that, if properly applied and understood, Shari’a would allow for the freedom to change religion and to exercise beliefs freely, with the implementation of fiqh resulting in the achievement of complete equality between all human beings. Since this is still a minority view, these efforts to install legal pluralism in these spaces and to reconcile secular law and Shari’a law have not been particularly fruitful, despite the best attempts of scholars and policymakers on both sides of the debate. However, with the advent of globalisation, this subject has become more salient than ever.

49 Hisham M Ramadan, Understanding Islamic Law: From Classical to Contemporary (1st edn, Rowman Altamira 2006) 95.
51 Mayer (n 31).
3. Research Methodology

Every research has its own specific methods, which can be described as the tools in the hands of the researcher which are to conduct the research. The researcher should aim to develop and implement reliable and valid procedures; reliable being understood as being consistent with measurements given, and valid meaning that procedures achieve their desired purposes.54

Qualitative research may be defined as exploratory research that is used to gain an understanding of the subject’s underlying reasons and opinions, and to provide insights into a problem or help develop new ideas or hypotheses.55 Qualitative research is a research strategy that usually produces findings or emphasizes words, and is not arrived at by means of statistical producers or other quantifications in the collection and analysis of data.56 Lichtman states:

“Qualitative research is a subjective form of research relying on the analysis of controlled observations of the researcher.”57

57 Marilyn Lichtman, *Qualitative Research for the Social Sciences* (1st edn, SAGE Publications 2013) 11.
Qualitative research produces information about the specific case being studied. In qualitative research, data is obtained from a relatively small group of subjects.\(^{58}\) For the purposes of this study, a qualitative research paradigm will be used. Qualitative research methodologies are more compatible with the purpose of research on human rights in secular and non-secular Islamic States in two ways. Initially, the primary aim is to determine through empirical data how law and legal institutions affect the societies they create, and qualitative research methodology can deepen the researcher's understanding of the issue at hand and allow him to focus on the social facets of the law.\(^{59}\)

The method is therefore appropriate for this research, as it will increase the understanding of human rights in Islamic States. Secondly, the qualitative method produces a significant resource in the form of social feedback to policy framers, legislators and judiciary so that they are better able to enforce, legislate and interpret the law. Qualitative research is adaptable, allows researchers to formulate new ideas, and highlights the gaps between theoretical goals and social reality.

This research is devised using secondary research. Unlike primary research, which involves the gathering of data directly from the source, secondary research involves the analysis of existing bodies of literature in order to process the data and allow the researcher to come to his own conclusions.\(^{60}\) Based on this understanding this study will encompass a large amount of legal source material on Islamic law, as well as any available case studies.

\(^{58}\) David Morgan, *Integrating Qualitative and Quantitative Methods: A Pragmatic Approach* (1st edn, SAGE Publications 2013) 50.

\(^{59}\) Ronald C Martella and others, *Understanding and Interpreting Educational Research* (1st edn, Guilford Press 2013) 324.

of Islamic law contrasted with secular law and human rights in the countries being examined.

There are several ways of collecting data for qualitative research. Fortune, Reid and Miller argue that;

“There are several useful methods for qualitative data collection. Researches should detail the nature of the date collection methods employed to clarify the nature of evidence used in this study.”

There are primary sources and secondary sources. Primary sources provide first-hand, original information. These include interviews, questionnaires, schedules, interview guides and observation. This data can be collected either by asking selected respondents a set of pre-determined questions or by asking more open-ended questions. Secondary sources are materials that discuss, explain, and analyse the law. These include published or unpublished books, law reviews, journals, law reference books, legal articles and reports made by international organizations.

Given the title of this research, ‘Secular and Non-Secular Modern Islamic States Attitudes towards International Human Rights Law’, the two main terms that need to be immediately clarified are: (1) secular and non-secular modern Islamic states, including the concept of secularism; and (2) international human rights law (IHRL) and the concept of ‘attitudes’ as applied to particular states. The first approach to these terms’ rests on their

62 Kumar (n 60).
63 Fortune and others (n 61).
definition, and leads to two related questions: What is an Islamic state and, more specifically, what are secular and non-secular modern Islamic states? The second approach to understanding the nature of and differences between secular and non-secular modern Islamic states is to apply an ‘area studies’ perspective. Area studies can be defined as the study of countries within a regional context.

Before describing the representative examples of secular and non-secular states that this study will give more detailed attention to the area studies approach will briefly be used to further consider the classification of the legal systems in Muslim countries. These may be grouped in two categories: classical Shari’a systems and secular systems. Classical Shari’a systems are those in which Shari’a plays a dominant role and is present in most areas. Secular systems are those in which Shari’a plays no role.

3.1 Comparative Methodology

A comparative approach consists of a comparison of different legal systems, legal traditions, and legal cultures, or fields of law within national legal systems, and the similarities and dissimilarities of those legal systems. Comparative law methodology is used by legal scholars and researchers within the field of national law and international law. The comparative legal methodology is used to develop coherent research about

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64 Joan Church and others, Human Rights from a Comparative and International Law Perspective (1st edn, Unisa Press 2007) 37.
65 Pier Giuseppe Monateri, Methods of Comparative Law (1st edn, Edward Elgar Publishing Ltd 2012) 7.
different legal systems and cultures, sometimes with the goal of finding solutions to problems intrinsic to and across two or more legal systems.

3.1.1 The Comparative Method

Legal scientific research is often based on legal rules and case studies. As legal positivism implies, such research is based on the fact that a legal rule can be found in a recognised source of law, such as legislative rulings, legal cases and judicial decisions. In general, different domains of knowledge require different methodological approaches. While a micro and macro level of comparative research is more common in sociology research, recent discoveries suggest its appropriateness in legal research as well.

The key to a proper comparative method, as Ragin suggests, is to have a high number of relevant observations as an integral part of the research. Ragin argues that with a decreasing number of relevant observations an increase in the level of subjectivity also increases, which leads to a less viable overall result. Ragin argues that the usefulness of the comparative method is due its rigorousness. Nevertheless, he also observes that the comparative method can only be used on a small sample of observations, which, as previously stated, decreases the reliability of the study.

Nevertheless, the relevance of the chosen observations can contribute further to increasing the study’s reliability and reaching a rigorous conclusion. Vallier and Apter have

68 Ibid.
discussed the limitations of the comparative method, claiming that comparative analysis in an organisational context can be subject to bias. They also claim that it is based on a series of assumptions that are mostly used in social research. However, more recent studies suggest that research from the past decades has brought made the comparative method more reliable. Durie and Ross argue that it is widely misunderstood on multiple levels.

The first misunderstanding pertains to its application to various fields of knowledge. There are not many areas of scientific research in which the comparative method can be used, and the academic world seems to have assigned it only to sociological research. Secondly, as Durie and Ross argue, the comparative method in some domains is often confused with the technique of multilateral comparison, even though the two methodologies are fundamentally quite different.

The most convincing argument in favour of the comparative method comes from Pennings, Keman and Kleinnijenhuis, which they describe the art of comparison not only as useful but also as a necessary part of the research process in the political, legal and social fields. In discussing the use of comparative research in the legal and political fields, the same source claims that comparison is the only way of investigating the appropriate relationship between legislation and judicial decisions. They also note that a comparative analysis can be performed either at the micro level or at the macro level of argumentation.

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71 Ibid.
The authors also stress the fact that comparison is necessary in order to control all of the different observations and their variations. 73

In this study Islamic human rights in selected secular states and non-secular states will be compared in the context of the normative system of global human rights. This brief explanation will involve comparing human rights in Islamic states with international legislation. A comparative law approach has been selected as the methodology for this study because it allows for the grouping of legal systems into different ‘legal families’. 74 For the purposes of this study the primary distinction is between secular and non-secular modern Islamic states, with the main topic of interest being the attitudes of those states that fall into these two ‘legal families’ towards international human rights law.

In the context of comparative law, with regards to Islamic law in non-Islamic states, the reception of a law can occur at three main levels: firstly, at the level of constitutional and legislative drafts; secondly at the judiciary level, and thirdly at the level of scholars and experts in law-related subjects. In this vein, Reimann and Zimmermann argue that:

“Comparative conflicts law employs the usual techniques (identifying similarities and differences, and so on) and pursues essentially the usual goals (recognition of alternative solutions, better understanding of one’s own system, inspiration for law reform, and so on).” 75

73 Ibid.
The comparative law method requires not only the theoretically-informed comparison of legal systems, but also consideration of their operating procedures, as these are shaped by and reflect the legal culture they foster. Legal culture is defined by Friedman as:

>“the ideas, values, attitudes and opinions people in some society held, with regard to law and the legal system. . .. Legal culture is the source of law – its norms create the legal norms; and it is what determines the impact of legal norms on society.””

Comparative law methodology therefore can lead to crucial insights into various legal systems and can facilitate solutions to legal problems or even find ways of merging and unifying different legal systems – most notably in the case of regional intergovernmental associations like the European Union. Despite the fact that no global consensus has been reached among scholars as to the best way of applying comparative law methodologies, it is the approach which is most promising for this research study. As William Elliott Butler argues:

>“The comparative method is unhesitatingly accepted as useful without any apprehension of international law itself being called into question, but there remains for fundamental issue; for what purpose is comparison to be undertaken and what relationship, if any, be it shadow or otherwise, might there be between

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76 Lawrence M Friedman, ‘Is there a Modern Legal Culture?’ (1st edn, Ratio Juris 1994) 117.
the generally accepted realm of comparative law and the role of comparison in international law?"78

It can be useful to apply comparative law to cases where the comparison process exceeds the framework of one single legal system, keeping in mind that the comparative process by itself does not create legal norms, but that it may contribute to the creation of legal rules within the framework of one or more legal systems.79

From a procedural standpoint comparative legal methodology involves several steps: Firstly, the substantive problems(s) that are to be addressed must be identified, in order to determine the norms of the legal systems which are to be compared, and the degree to which they are compatible or not. Secondly, the countries in which the legal systems to be compared themselves need to be compared, often using a pilot study in order to determine the similarities or unassailable differences between countries, cultures and legal systems. Thirdly, country reports are constructed, guided by key questions about how the legal systems operate both in theory and in practice.

The fourth step is a comparative cross-section assessment that seeks to find common ground (if there is any) between the legal systems being researched, while failing to ignore the key differences that exist between them.80 The fifth step is to consider

78 William Elliott Butler, International Law in Comparative Perspective (1st edn, Sijthoff & Noordhoff International Publisher 1980) 29.
solutions to the problems encountered while conducting the comparison and then, upon
due reflection, to make recommendations as to which solutions are most viable.

At this stage it should be noted that special care has to be taken so that the
researcher(s) remains impartial and adopts and maintains an objective attitude towards the
legal systems being studied. Moreover, the researcher has to pay close attention to possible
unconscious biases and unwanted approaches in order to avoid making partial judgments
or jumping to conclusions. Due to this the comparative law methodology requires an
appropriate scholarly mind-set. Every effort has been made to comply with scholarly
research ethics for this work.

Given this detailed summary of the procedure used to carry out comparative legal
research, the focus of this research on the different legal systems in secular and non-secular
Islamic states is achieved with the help of two comparative methodological approaches.
The first approach is to review the relevant available literature in order to become
acquainted with the most recent scholarship, after which the second approach is to analyse
examples of legal systems in secular and non-secular Islamic states, tracing the similarities
and differences between them.

3.1.2 Micro and Macro Levels of the Comparative Method

At the macro level the comparative law approach is very broad, and at the micro level it is
a narrow approach, concentrating on some aspect of private law in one legal system.\(^{81}\)

\(^{81}\) Esin Orucu, *The Enigma of Comparative Law: Variations on a Theme for the Twenty-
first Century* (1st edn, Springer 2013) 40.
Micro level observations can provide sufficient justification to enable them to be linked in a comparative manner to macro level observations. In legal scientific research, this can be translated into a relationship between legal rulings in case studies and legislative texts. More specifically, a micro level to macro level link in this case can help the researcher justify the observations made in legal case court rulings with the letter of the law.\textsuperscript{82}

Frank Esser and Thomas Hanitzsch also note the crucial link between micro and macro levels in comparative research. They state that differences at the macro level can explain and even significantly shape communication at the micro level.\textsuperscript{83} This observation can also be applied to legal scientific research. It is common knowledge that legal court rulings are very much based on what the law specifically states. However, in civil law the decision-making process is also based on precedence.

According to Hantrais, finding the appropriate level of analysis significantly impacts the results of the research. Within the framework of social research the macro level centres on groups of individuals, structures, processes, or systems, while the micro level centres more on individual behaviour and activities.\textsuperscript{84}

The available literature also provides a comprehensive separation of the micro and macro levels in legal research. At the micro level comparisons are often made between the

\begin{flushleft}
\textsuperscript{82} Salvatore J Babones, \textit{Methods for quantitative Macro-Comparative research} (2\textsuperscript{nd} edn, SAGE Publications 2014) 7-9.
\textsuperscript{83} Frank Esser and Thomas Hanitzsch, \textit{The handbook of comparative communication research} (1\textsuperscript{st} edn, Routledge 2012) 6-7.
\textsuperscript{84} Linda Hantrais, \textit{International comparative research: Theory, methods and practice} (1\textsuperscript{st} edn, Palgrave Macmillan 2008) 28-29.
\end{flushleft}
individual legal rulings that take place in a legal context, or specific legal institutions. Legal institutions can be separated into two categories: on one hand, legal institutions can refer to those institutions that apply positive law, such as courts, legal persons or administrative organs. On the other hand, other normative legal institutions such as marriage, bankruptcy or the transfer of guardianship can also be considered viable legal institutions at the micro level.

Comparison at the macro comparison level may be focused not on the legal approach to a certain issue, but on moral and doctrinal interpretations. Legislative methods, doctrines and systems of law are considered to be the main concern of macro level comparisons. Theoretical frameworks and ethical concerns are the most significant issues that should be approached at a macro level. Therefore the researcher should not only explore legal arguments and rulings, but also the doctrines and moral arguments behind them.

3.1.3 The Macro Level

The available literature suggests that comparative research often operates at the macro level, as its main purpose is to deal with systems as a whole. There are two main theories behind the idea of the macro level: systems theory and structure theory. In systems theory,

the macro level is supposed to deal with the entire system from multiple points of view (not just from a legal perspective, but also concerning morals and alignment with normative global rulings), while structure theory is concerned with the functionality of the legal structure of the country or system being studied.\textsuperscript{88}

Some researchers argue that the academic world has not reached a consensus on the topic of micro and macro level comparative research. Studies are assumed to have clearly defined boundaries, whether these may be of a structural, political, temporal, territorial or cultural nature.\textsuperscript{89} Therefore, following Peters as well as Esser and Hanitzsch’s description of the macro level, it may be stated that, within the field of legal scientific research, legislative exploration is not only concerned with the body of law itself, but also with the underlying context of the legislative ruling.\textsuperscript{90} Cultural, temporal, ethical and even political reasons may have led to the formulation of a legislative ruling, therefore all of these aspects should be taken under consideration at the macro level.

In a legal context, macro level analysis commonly considers courts to be like any other political institution, similar to parliaments. Therefore, it is important to note that legal institutions and most importantly legal decision making bodies do not follow the same dynamics and rules as a parliament, but rather employ other, more pragmatic approaches in their work. For this reason, it is important to acknowledge the decision-making process

\textsuperscript{88} Joan Church and others, \textit{Human Rights from a Comparative and International Law Perspective} (1st edn, Unisa Press 2007) 38.
\textsuperscript{89} Esser and Hanitzsch (n 83).
\textsuperscript{90} Peters (n 87).
of courts, as well as the legal basis of each case ruling and the manner in which the case was processed, in a macro level analysis.\(^9\)

Furthermore, Johnson argues that the specific details of human agency may emerge in certain contexts during macro level analysis, but that this is more common in micro level analysis.\(^2\) Macro level analysis is mostly concerned with large-scale social and legal systems, usually involving entire societies and countries.\(^3\) David Jaffee explains that it is important to understand that the levels of analysis in comparative analysis focus on different aspects, allowing for correlation of the results later in the study.\(^4\) Thus macro level analysis is focused on larger and therefore more objective institutional factors which consist of the legal structures and bodies in which individuals operate, and not on the manner in which these individuals operate.

### 3.1.4 The Micro Level

In the field of comparative law, micro level analysis refers to a variety of terms that are necessary in order to conduct a viable assessment.\(^5\) Unlike the macro level analysis, a

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\(^9\) Mads Tonnesson and others, *Courts and Comparative Law* (1\(^{st}\) edn, Oxford University Press 2015) 15.


\(^3\) *Ibid.*


\(^5\) Church and others (n 88).
micro level analysis focuses on the smallest units that make up the object of research. Husa states:

In micro-comparison, research can be aimed at legal rules (also individual legal concepts), which regulate broadly the same thing and are compared with each other.  

In the social sciences, for example, the individual is considered to be the smallest possible unit of study. Of course, this definition can be expanded and applied to a variety of other fields. However, this concept may trigger significant debates concerning its scientific value. In the field of politics, for instance, including the concept of microanalysis is less common, especially when studying macro level concepts, such as international policy. Nevertheless, micro analysis becomes relevant when assessing the constituent parts of a larger functional whole.

Berger and others illustrate the macro level to micro level influences that can occur. In their view, the conceptualisation of the macro terms needs to be reflected in the results of the micro analysis. Therefore, the structural and analytical nature of the macro level needs to be reflected in the micro level observations, meaning that in a legal scientific research context the motivations behind and the basic interpretation of the law should be reflected in practical observations.

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96 Husa (n 85).
98 Guido Giarelli, Comparative research methodologies in health and medical sociology (1st edn, Franco Angeli 2010) 47-52.
In a macro comparative analysis, the aim should be to establishing certain dynamics at various levels of knowledge, whereas in the case of the micro analysis the aim should be to test the relationship between various concepts. Using the example of community-level civic engagement, Berger explains that a macro analysis could focus on the hypothesis of why the media affects communities in a certain way while a micro level analysis would be focused on how this effect occurs.\textsuperscript{99}

Micro level analysis is also an important part of multi-level assessments. Eko argues that micro level analysis compares the outcomes of specific questions about the law or controversies and conflicts of laws across jurisdictions. Micro level comparative and international law studies are probably the most common type of comparative studies.\textsuperscript{100}

Generally, when research is conducted focusing on multiple aspects of a single topic, the functionality and effects of all of its constituent parts must be considered.

In order to provide a structured approach, the researcher usually begins at the smallest level and work his way up to a broader context. However, some problems may arise when attempting to collect micro level data. For example, international data may be dispersed and highly fragmented, which may require the researcher to conduct a lengthy process of assembling the data. Some data may also be restricted or protected by privacy laws. In this case, the researcher may require ethical consent for data collection.\textsuperscript{101}

\textsuperscript{99} Charles R Berger and others, \textit{The handbook of communication science} (2\textsuperscript{nd} edn, SAGE 2010) 191.

\textsuperscript{100} Lyombe Eko, \textit{New Media, Old Regimes: Case Studies in Comparative Communication Law and Policy} (1\textsuperscript{st} edn, Lexington Books 2012) 57.

\textsuperscript{101} Giarelli (n 98).
As noted previously, micro analysis is also seen as inefficient by some in the scientific community.\textsuperscript{102} The fundamental question in this case is whether some phenomena can be explained by dividing the whole effect into its constituent parts. This is in some ways similar to the social science approach of questioning whether some social phenomena can be explained by analysing the individuals that caused an event.\textsuperscript{103} Extrapolating these findings to legal scientific research, it may be stated that the macro level focuses on legal systems as a whole, encompassing all of their components, from basic law to social standards, while the micro level consists of individual behaviours and rulings.

For the purposes of this research a comparative legal method will be applied based on a description and assessment of the national legislation in selected countries, as provided by secondary resources. Macro and micro level comparative investigations each have their own drawbacks and benefits.\textsuperscript{104} This study will use a comparative approach, using micro level analysis to compare small, distinct issues within legal systems.

4. The Limitations of the Research

Comparative analysis is often employed as method of research. It is widely used in all areas of the social sciences and humanities as a comparison strategy. As described above,

\textsuperscript{102} Ibid.
\textsuperscript{103} Berger and others (n 99).
comparative legal methodology is used to study different legal systems and cultures, sometimes with the goal of finding solutions to problems intrinsic to and across two or more legal systems.

One of the most significant limitations of comparative methodology is the possible presence of bias. In particular, it is highly unlikely that the individual sources will all have been acquired in accordance with the research objectives. Therefore, findings from secondary sources will be distorted to some extent, and must be altered to fit the aims and objectives of the proposed thesis. Another risk is that the analysis will fail to consider non-doctrinal factors which may affect the implementation of human rights law within the countries, such as social and economic factors which may not be related to religion. For example, it may be the case that the failure to fully implement human rights law can be attributed to factors such as lack of education rather than to adherence to Shari’a doctrine.

This research is derived from secondary sources. Unlike primary research, which involves the gathering of data directly from the source, secondary research involves the analysis of existing bodies of literature in order to process the data and come to independent conclusions. Resources of secondary data resources often prove to be effective research tools. However, the use of secondary data has its own limitations, which were also encountered while undertaking this research. Sometimes secondary data is not presented in a reliable format, or the full document of the research is not available, which means that the researcher does not have access to all of the information. This is sometimes due to restrictions on information imposed by certain Islamic states. Therefore, the researcher may be forced to rely on secondary data that has already been presented and classified.
The limitations of this particular study mainly relate to the numerous objections and viewpoints regarding both human rights in general Islamic law and its compatibility with modern secular law. Given the fact that Muslim societies have devised various approaches to Islamic law, with some of them being more secular than others, it is difficult to draw clear boundaries between the various approaches to religious versus secular law, legal pluralism, human rights issues and other related subjects that are relevant to this research.

5. The Structure of the Research

This study is comprised of nine chapters. The introduction, which provides the reasoning behind the research and make a case for its importance. It addresses conceptual issues, the chosen research methodology and the approach taken when examining these issues for the purposes of the hypothesis. Chapter one explores the concept and context of religious state and Islamic state. Explores and analyses secularism and non-secularism in selected Islamic state. This chapter addresses secularism and non-secular state, the nature and evolution of secularism. For the purposes of this study, the Kingdom of Saudi Arabia has been selected as a non-secular Islamic state, and the Republic Tunisia as a secular Islamic state in order to examine issues related to the protection of basic human rights in relation to the different situations in secular and non-secular countries, and the evolution of secularism in selected states in order to establish a general framework of reference for the research.

Chapter two analyses the formation and evolution of Islamic Law (Shar`ia) and international human rights law. This research aims to provide a critical and relevant
exploration of the relationship between the major assumptions surrounding Islamic law, and therefore it is essential to focus on the emergence of both Islamic law and human rights. This chapter examines and analyses the nature and sources of Islamic law and human rights. It explores the sources and methods of Islamic law, as well as the sources of international human rights law in order to establish the conceptual differences between the two. In relation to the Universal Declaration of Human Rights, and to the Cairo Declaration of Human Rights.

Chapter three analyses the application of International human rights law in selected Islamic states. The Kingdom of Saudi Arabia has been selected as a non-secular Islamic state, and Tunisia as a secular Islamic state in order to examine issues related to the protection of basic human rights and the legal position of the selected Muslim states to the Universal Declaration of Human Rights, and to the Cairo Declaration of Human Rights.

Chapter four is a comparative legal analysis of the Constitution, Constitutional Law and Constitutional Rights in the Kingdom of Saudi Arabia and Tunisia. This chapter will also examine the legal position of each country in relation to the International Covenant on Civil and Political Rights (1976), and in relation to the International Covenant on Economic, Social and Cultural Rights (1976).

Chapter five is a comparative legal analysis and examination of the notion of equal rights in Islamic law, and women’s rights in Islamic Law (Shar’ia). This chapter demonstrate a comparative legal analysis between the notion of equal rights in the Kingdom of Saudi Arabia and in Tunisia, and women’s Rights in the Kingdom of Saudi Arabia and in Tunisia. It will also examine the Kingdom of Saudi Arabia’s Position on the Convention on the Elimination of All Forms of Discrimination Against Women (1979),

Chapter six is a comparative legal analysis of children’s rights in Islamic law (Shar‘ia), and examines the state of Children’s Rights in the Kingdom of Saudi Arabia, and in Tunisia. This chapter also examines and comparatively analyses the Kingdom of Saudi Arabia’s legal position on the Convention on the Rights of the Child (1989), and Tunisia’s legal position on the Convention on the Rights of the Child (1989).

Chapter seven analysis contributing factors, universalism, cultural relativism and the relationship between religion and human rights within Islamic state. Explores Conceptional differences in Islamic state human rights law and International human rights law. Chapter eight is the concluding chapter of the thesis, in which the findings of the research are presented.
Islamic State and Secularism: Concept and Context

1. Religious state

The religious identity of the state is as a rule enshrined in the state’s constitution. As the country’s constitution can be regarded the legal backbone of the state, which is the foremost legal document underpinning the stat’s fundamental characteristic. A state religion is the creed or religion that the state has endorsed. By declaring itself religious the state reserves a determinative roll for religion within the overall functioning of the state.\textsuperscript{105} Such a state is a non-secular state because the basic law of the land has endorsed a particular religion which the citizens must adhere to.

Most state procedures are carried out in strict adherence to the ideals of the religion to which the state has subscribed. Such a state is not necessarily a theocracy in which the ruling class have a spiritual and secular authority. It only happens that the country has a state-sanctioned religion which dictates what every citizen must do in strict observance of the ideals of the religion.\textsuperscript{106}


In most countries in the Middle East, Islam is stated in the basic law as the state religion. All government processes are carried out with strict adherence to the provisions of the Quran. One good example is the Kingdom of Saudi Arabia whose Basic Law under article states that the Kingdom of Saudi Arabia is a sovereign Arab Islamic State with Islam as the state religion and Arabic as the language.

Article 1 further states that the state’s constitution shall be the Holy Qur'an and the Prophet's Sunnah (traditions). Clearly, therefore, the Basic Law of the Kingdom of Saudi Arabia is an Islamic State in the sense that Islam is the state religion and the state constitution is the Holy Qur'an and the Prophet's Sunnah (traditions). The basic Law does not mention the accommodation of other minority religions, meaning that Islam is the only religion that is allowed in the Kingdom.

One other article of the Basic Law which leads to the conclusion that the Kingdom of Saudi Arabia is an Islamic State is article 6 which states that “citizens shall pledge allegiance to the King on the basis of the Book of God and the Prophet's Sunnah, as well as on the principle of "hearing is obeying" both in prosperity and adversity, in situations pleasant and unpleasant.” Article 7 provides that the ruling regime derives its power from the Holy Qur'an and the Prophet's Sunnah which rule over this and all other State Laws.

The basic law of the land is therefore based on the Holy Qur'an and the Prophet's Sunnah, leading to the conclusion that this is not a democratic state where there is a legislature enacting laws based on the nature of the society within which they exist. The

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108 Ibid.
law governing the Kingdom is predetermined and can only be the Holy Qur'an and the Prophet's Sunnah.

In addition, article 46 states that judicial authority can only be based and derived from Islamic Shari'ah. Although the basic law has provision for rights and duties of the citizens of the Kingdom of Saudi Arabia, there have been concerns that the fact that the state is an Islamic State adhering to Islamic Shari'ah, human rights and freedoms are violated with reckless abandon. The manner in which criminals are punished is one cause for concern. For example, the arm amputation and beheading as done to people convicted of crime of theft has been rebuked as a major violation of human rights.

2. Islamic State

An Islamic state is a type of government primarily based on the application of shari'ah (Islamic law), dispensation of justice, maintenance of law and order. From the early years of Islam, numerous governments have been founded as "Islamic". However, the term "Islamic state" has taken on a more specific connotation since the 20th century. 109 Like the earlier notion of the caliphate, the modern Islamic state is rooted in Islamic law. It is modelled after the rule of Muhammad.

The first Islamic State was the political entity established by Muhammad in Medina in 622 CE, under the Constitution of Medina. It represented the political unity of the Muslim Ummah (nation). It was subsequently transformed into the caliphate by

Muhammad's disciples, who were known as the Rightly Guided (*Rashidun*) Caliphs (632–661 CE). The Islamic State significantly expanded under the Umayyad Caliphate (661–750 CE) and consequently the Abbasid Caliphate (750–1258 CE). However, unlike caliph-led governments which were imperial despotisms or monarchies, a modern Islamic state can incorporate modern political institutions such as elections, parliamentary rule, judicial review, and popular sovereignty.

3. The Modern Islamic State

"The very term, 'Islamic State', was never used in the theory or practice of Muslim political science, before the twentieth century," according to Muslim scholar of Islamic history Qamaruddin Khan. The modern conceptualization of the "Islamic state" is attributed to Abul A'la Maududi (1903–1979), a Muslim theologian who founded the political party Jamaat-e-Islami and inspired other Islamic revolutionaries such as Ayatollah Ruhollah Khomeini. Abul A'la Maududi's early political career was influenced greatly by anti-colonial agitation in India, especially after the tumultuous abolition of the Ottoman Caliphate in 1924 stoked anti-British sentiment.

The Islamic state was perceived as a "third way" between the rival political systems of democracy and socialism. Maududi's seminal writings on Islamic economics argued as

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early as 1941 against free-market capitalism and socialist state intervention in the economy. Maududi envisioned the ideal Islamic state as combining the democratic principles of electoral politics with the socialist principles of concern for the poor.113

Today, many Muslim countries have incorporated Islamic law, wholly or in part, into their legal systems. Certain Muslim states have declared Islam to be their state religion in their constitutions, but do not apply Islamic law in their courts. Islamic states which are not Islamic monarchies are usually referred to as Islamic republics.114

4. Secularism

4.1 The Definition of Secularism

The term “secularism” was first used by British writer George Jacob Holyoake in 1851.115

In legal term secularism refers to separation of religion and government. Which also is known as separation of church and the state. This means to replace the laws of God or (Shari'ah in Islam) with civil laws and there should be no discrimination of religion.116 Secularism seen as made up of three elements, the first element is separation of religious institutions form the institutions of the state and no domination of the political sphere by religious institutions.

113 ibid
114 Shaheen Sardar Ali, Modern Challenges to Islamic Law (1st edn, Cambridge University Press 2016) 64.
The second element is freedom of thoughts, conscience, and religion for all, with everyone free to change their beliefs and manifest their beliefs with the limits of public order and the rights of others. The third element is no state discrimination against anyone on grounds of their religion non-religious world view, with everyone receiving equal treatment on these grounds. The main element of secularism is that the state should steer clear of religion and by so doing allow religious freedom so that each citizen is at liberty to choose their religion.117

Such a state asserts the right of its people to be free from religious rule, remains neutral on matters of religion and abstains from imposing a state religion on its people. In addition, a secular state does not allow public activities and decisions to be influenced by religion. Secularism has therefore been heralded as a fundamental tool in promoting justice, equality and cohesion among citizens.118 Due to the fact that a secular state is more inclined to allowing religious freedom than establishing a state religion, it promotes democratic ideals of equality before the law, public participation and freedom.

Research shows that secularism ensures that all citizens are equal before the law, regardless of their religious affiliation.119 For this reason, citizens are treated equally by the state and religious dogma is not allowed to undermine human rights. By emphasizing on religious freedom, secularism ensures that there are no religious exemptions that undermine the existing equality laws and that disputes are settled by non-partisan courts

rather than by religious courts and tribunals. In addition, secularism allows for every citizen
to freely express their religious beliefs.

These beliefs are also open to criticism, satire, ridicule and discussion by people
who are not associated with them. In other words, religious freedom in secular states
exists in the absence of religious protection so that each religion is free to profess their faith
to its believers. In addition, such a religion is also expected to accommodate other religious
that express faith that is different from what it professes.

Secularism also promotes social cohesion and coexistence among people
professing different faiths. A secular state has room for all religions in the sense that it is a
political framework that ensures that all people of all religions to coexist and avoid
sectarian conflict and disharmony. This social cohesion is a fertile ground for state
development, unity, and obedience to law and order.

For this reason, three principles underpin the whole idea of secularism: separation
of the state from religion and the participation of religion in the public sphere rather than
domination, freedom to practice one’s religion without causing harm to others, equality
before the law such that religion or lack of it does not place anyone at a disadvantage or
advantage. Secular states seek to ensure that there is freedom for all, believers and non-
believers. Whereas those who profess a certain faith are free to do so in a secular state,
there is also freedom from religion for those who do not profess any faith.

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Since secularism champions universal human rights, it is a strong pillar in enhancing democratic ideals of fairness and equality. A state that allows for freedom of worship has a strong inclination towards democratic governance in which the majority have their way while the minority are allowed to have their say in governance. A secular state is a concept of secularism, whereby a state or country purports to be officially neutral in matters of religion, supporting neither religion nor irreligion. A secular state tries to treat all the citizen equally whatever their religion is. It does not discriminate between a religion or atheism over any other religion. A non-secular state is a state in which the government supports a religion and discriminates the support religion from others in a way or the other.¹²³

4.2 The History of Secularism

The history of secularism draws on the interactions between traditional Western communities and the various aspects that accompanied westernisation. Medieval Europe was dominated and by the Catholic Church.¹²⁴ Politics were mainly dictated by the church and every aspect of society, social, political and economic, was guided by religious principles. Modern notions of secularism did not gain any acceptance until later, during the Renaissance period.¹²⁵

¹²⁴ Steve Bruce, God is Dead: Secularization in the West (1st edn, Oxford: Blackwell 2002) 69.
Humanism began taking the church’s place as a mode of thought that promoted the pursuit of wisdom and knowledge without reference to religion. Philosophy, the classical arts and literature consequently allowed for a more humanistic approach to life.\textsuperscript{126} With the advent of modernisation most people’s interest shifted away from the spiritual to, and the emergence of nationalism saw people identify with the state rather than with religion. The religious wars that followed resulted in the search for non-religious solutions for peace. The arrival of the age of scientific discovery further destabilised traditional religion by providing rational reasons for formerly unexplained phenomena.\textsuperscript{127} Norris and Inglehart quoted Charles Mills to describe the secularization process as:

> “Once the world was filled with the sacred – in thought, practice, and institutional form. After the Reformation and the Renaissance, the forces of modernization swept across the globe and secularization, a corollary historical process, loosened the dominance of the sacred. In due course, the sacred shall disappear altogether except, possibly, in the private realm.”\textsuperscript{128}

All of these factors combined encouraged people to agitate for supreme authority to be placed with the state as opposed to with the church, and for religious rituals to be held separate from the state. This led to the first elements of secular states emerging and continuing to thrive, resulting in today’s democracies.\textsuperscript{129} Secularism therefore did not just

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{126} DL Munby, \textit{The Idea of a Secular Society} (1\textsuperscript{st} edn, London, Oxford University Press 1963) 28.
\item \textsuperscript{128} Pippa Norris and Ronald Inglehart, \textit{Sacred and Secular: Religion and Politics Worldwide} (2\textsuperscript{nd} edn, Cambridge University Press 2011) 3.
\item \textsuperscript{129} David Martin, \textit{A General Theory of Secularization} (1\textsuperscript{st} edn, Oxford: Basil Blackwell 1978) 15.
\end{enumerate}
\end{footnotesize}
happen spontaneously. It evolved over time alongside the realisation that people can actually form and participate in their own governments based on their wishes as opposed to the wishes of a supernatural being.

A number of other factors influenced the legal emergence of secularisation, as will be discussed in the following section. The legal aspects of secularism draw on the Peace of Westphalia in 1648, the enactment of the American Constitution, and more broadly on the ideas and occurrences of 20th Century. Secularism has many dimensions, and accordingly researchers take radically different approaches to the concept. Some approach it from a religious perspective while others approach it from a social or political one. As such, secularism has many origins depending on the perspective or even the country being examined.

Western nations have been the pioneers of the secular movement, requiring their governments to pass secular laws, which were often fought for without a clear definition of what they would result in once enacted.\textsuperscript{130} The measure of the legitimacy of the laws of a secular nation can arguably be taken by how devoid they are of any aspects of religion, in other words whether they are neutral laws. In the broadest sense, secularism is defined as the separation of religion and state.\textsuperscript{131}

While this definition may appear sufficient, it falls short of capturing all the aspects of a secular state. Secular in a literal sense means \textit{without religion}. In a secular regime,

\textsuperscript{130} Austin Sarat, Lawrence Douglas, \textit{Law and the Sacred} (1st edn, Stanford University Press 2007) 35.
\textsuperscript{131} Yılmaz Yılmaz and Hüseyin Gündoğdu, 'Secular Law in an Islamic Polity: The Ottoman Case' [2013] 6(2) European Journal of Economic and Political Studies 57-78.
sovereignty is viewed as belonging to the nation as opposed to a divine body.\footnote{Ibid.} Religion in a secular state is separate from the government and thus does not in any way affect the way the government runs its affairs. The laws and regulations of a secular state are thus not governed by religion.\footnote{Martin (n 372).} As such, in a secular state, there is no official or preferred religion and the state does not favour one religion over another.

One result of this is that all individuals become equal before the law regardless of their religious affiliation. A secular government aligns its precepts with rational and humanistic approach to issues, which easily leads to democracy.\footnote{Rodney Stark, 'Secularization' (Association for the Sociology of Religion, 1999) <https://academic.oup.com/socrel/article-abstract/60/3/249/1658084/Secularization-R-I-P?redirectedFrom=fulltext> accessed 30 May 2015.} Secular law or a secular legal system also does not depend on religious beliefs or on faith.\footnote{Sullivan Winnifred and others, After Secular Law (1st edn, Stanford University Press 2011) 33.} The interpretation and implementation of secularism, especially with regards to the place of religion in society, varies among Muslim states just as it does among other non-Muslim states.

While the term secularism is usually used to describe the separation of public life and civil matters from religious aspects or methods, or simply the separation of religion and civil life, secularism in Muslim states is often specifically contrasted with \textit{Shari`a} as a legal system. There are debates among both Western and Muslim scholars on the topic of secularism, including on the roles of civil governance and religious authorities in the
Islamic states and the means and degree of application of Shari’a doctrine within the legal system of the state.¹³⁶

4.3 The Influences of the Secular Movement

In contemporary Western society, people seek to keep their private lives separate from their public ones, including their religion, political opinions or even academic achievements. As such, religion has stopped playing a central role in the life of the individual. In the current societal landscape, religious fervour has largely succumbed to reason and tolerance.¹³⁷

In a democratic society, there is a deliberate effort to tolerate extreme differences among individuals and view them as personal choices that do not require state intervention. This includes extreme differences in religious beliefs and practices which are regarded as personal choices to be tolerated for the sake of national coherence. Religious beliefs have become private affairs separate from the personality of a citizen. This has coincided with movements opposing government involvement in a citizen’s private affairs.

As the value of human dignity is actively promoted, empathy towards individuals with different beliefs has grown and even the most charismatic of religious leaders continually fail to convince people to join their belief systems unless their beliefs are backed by empirical reasoning.¹³⁸

¹³⁶ An-Na‘īm (n 50).
This lack of a shared religious belief in the public sphere has been a major blow to religious authoritarianism in secular states.\textsuperscript{139} In secular societies people are also unable to determine what public religion should entail. In a multicultural setting, there is a diminished community who share traditional beliefs and morals. This kind of tolerance dissuades people from the notion that their religion is superior and that those who follow other religions are insignificant.\textsuperscript{140}

4.3.1 Human Rights Influences

Human rights have now taken centre stage in most democracies. Some of the practices that are generally accepted in some religions have been shunned as violating human rights and entirely unconstitutional.\textsuperscript{141} Human rights activists are still seeking to abolish religious practices that result in unequal human rights such as female genital mutilation and discrimination against women, especially in countries governed by \textit{Shari’a} law.\textsuperscript{142}

Increased globalisation has brought along with it increasing interactions between different cultures, religions and personalities.\textsuperscript{143} Information on different religions has also become more prevalent, resulting in increased tolerance and understanding of the beliefs

\textsuperscript{139} Harvey Cox, \textit{The Secular City: Secularization and Urbanization in Theological Perspective} (1\textsuperscript{st} edn, Princeton University Press) 21.
\textsuperscript{140} Momen Moojan, \textit{The Phenomenon Of Religion: A Thematic Approach} (1\textsuperscript{st} edn, Oneworld Publications, Oxford 1999) 62.
\textsuperscript{141} Nikki Keddie, \textit{Secularism and its Discontents} (1\textsuperscript{st} edn, Daedalus 2003) 132.
\textsuperscript{142} José Casanova, \textit{Public Religions in the Modern World} (1\textsuperscript{st} edn, University of Chicago Press 1994) 211.
\textsuperscript{143} Charles Taylor, \textit{A Secular Age} (1\textsuperscript{st} edn, Harvard University Press 2007) 505.
of others as human rights in general. Radical belief in one particular religion has thus been
diluted, and people in contemporary society tend to revolt against the imposition of
religious beliefs.144

Since secularisation entails the partial or total disengagement of religion from the
public sphere, political life and aesthetic life it must retreat to a private world where it
retains authority only over its followers, ideally meaning that other people who do not
ascribe to that religion in the wider world would be opposed to any impositions of private
beliefs on them. Secularism however does not mean that the country is completely devoid
of religion or that its citizens are less religious. A secular state only makes a distinction
between religion and government – it does not make religious choices for its citizens.
Religion is seen as a personal choice which should incapable of influencing the legal
system and the public affairs of a state. This is seen as prerequisite for democracy, which
is based on the rule of law as opposed to on religious beliefs and practice.

5. Islamic State and Secularism

Secular law or a secular legal system is defined as law that does not depend on a foundation
of religious beliefs or faith.145 The definition and application of secularism, especially vis
à vis the place of religion in society, varies among Muslim states, just as it does in other
non-Muslim states. Secularism is usually used to describe the separation of public life and

144 Daniel Bell, "the Return of the Sacred? The Arguments on the Future of Religion" in
145 Winnifred Sullivan and others, After Secular Law (1st edn, Stanford University Press,
USA 2011) 33.
civil matters from religious rituals, traditions and rules, or simply the separation of religion and civil life. Secularism in Muslim states is often contrasted with Shari’a law.¹⁴⁶ There are debates over secularism among both Western and Muslim scholars on the role of civil governance and religious authorities in Islamic states and the means and degree of applying Shari’a doctrine in the legal system of the state.

The role of the state in Islam was constituted in such a way that the early companions and imams could implement Shari’a, which requires the authority of the state to act in the public interest in order to ensure law and order, justice and more importantly human rights. Shari’a makes a clear distinction between secular law and non-secular or religious law on one hand, and on the other hand suggests the possible enforcement of both types of law to a certain extent.¹⁴⁷

It is important to appreciate the difference between an Islamic state and states in which Islam is the main religion.¹⁴⁸ In an Islamic state all laws must strictly conform to Islamic Shari’a, as is the case in the Kingdom of Saudi Arabia and in the Islamic Republic of Iran, which are non-secular states. However, if a state declares 'Islam as its religion', it means that Islam is preferred to all other religions and that it has more privilege than other religions in the country, as is the case in Republic of Turkey and in the Republic of Tunisia, which are both secular states.¹⁴⁹

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¹⁴⁷ Ibid.
6. Secularism in the Republic of Tunisia

Tunisia can be viewed as the most recent player in the secularism debate. It is not only the latest country to embrace secularism, but arguably also provides a more interesting case study of the interaction between secularism, democracy and Shari’a law than most Islamic countries.\(^{150}\) In this respect it follows in the footsteps of Turkey, but unlike Turkey, Tunisia has not become a secular state directly after being a non-secular one.

After the Islamist party won the national election in 2011 and the parliamentary and presidential elections in 2014 under the Ennahda party, a coalition with the opposing secular party was formed. This was a strategic move, seeing that Ennahda only won 40% of the popular vote. The leader of the party Rached Ghannouchi is quoted as saying:

> “We need democracy and development in Tunisia and we strongly believe in the compatibility between Islam and democracy, between Islam and modernity. So, we do not need secularism in Tunisia.”\(^{151}\)

In this statement, the leader seems to suggest that Islam and democracy are compatible, an idea that has been contradicted by some scholars. It further seems to want to separate the concepts of secularism and democracy by stating that Tunisia needs democracy and not secularism.


6.1 The Religion

Tunisia is an Arab country, and about 98% of its population is made up of Sunni Muslims. Just as in Iran and Saudi Arabia, there is no separation of state and religion.\textsuperscript{152} The government has massive control over mosques and even pays the salaries of Islamic religious leaders. In fact, the Law of Mosques as enacted in 1988 decrees that only government-appointed personnel may lead activities in mosques.\textsuperscript{153} It regulates the times during which the mosques must open and close, and there are even provisions that mosques must be built in accordance with the regulations on urban planning. Upon completion they become government property. Christians and other religious minorities follow the same laws as the rest of the population, but they are not controlled by the government as Muslims are.

The constitution of Tunisia guarantees freedom of religion and the freedom to practise personal religion with the qualification that this practice must not interfere with public order.\textsuperscript{154} However, the constitution allows for a state religion by stating that the

\footnotesize{\textsuperscript{152} USA International Business Publications, \textit{Arab League of Arab States Investment and Business Guide} (1\textsuperscript{st} edn, Int'l Business Publications 2007) 16.  

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country is determined to adhere to the teachings of Islam. Additionally, it categorically describes Islam as the official state religion and requires that the president be a Muslim.  

When determining the success of secularism and democracy in Tunisia, it is important to remember that it is a country whose state religion is Islam and that does not allow for people of other religious affiliations to become president, however democratically they might be elected. We are in essence looking at a state whose laws derive legitimacy from the constitution, which in turn derives legitimacy from Shari’a law.

6.2 The Constitution

After nearly two years of deliberation, Tunisia adopted a new constitution in January 2014. This new Constitution of Tunisia is a very interesting document in that it combines elements of secularism and religion in a seemingly conflict-free manner. This can be seen in the following articles:

“Tunisia is a free, independent and sovereign state. Islam is its religion, Arabic its language and the republic its form of government. The Article cannot be amended” \(^{156}\)

“Tunisia is a civil state based on citizenship, the will of the people and the supremacy of law. This Article cannot be amended.” \(^{157}\)

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\(^{157}\) Ibid.
"The people are sovereign and are the source of all powers, which shall be exercise through their freely elected representatives or by referendum."  

Article 1, which decrees that Islam is the state religion, cannot be amended, and the same goes for Article 2 which talks about the will of the people and the supremacy of the law. How then can the will of the people and the rule of law be supreme while they are controlled by the values of the state religion? Article 3, which talks about the sovereignty of the people, has unfortunately has not been protected from amendments as the two previous articles have.  

The implication here is that Islam has been given the upper hand as opposed to will of the people. This begs the question of whether non-secularism and democracy can really be combined. Is it possible to have a democracy where the rule of law is qualified by appeals to religion? The answer seems to be no.  

Democracy and secularism are intrinsically linked.

Democracy and secularism are intrinsically linked. The constitution can either be a secular one or a non-secular one, and if it is neither it fails international standards of law and brings about confusion in the state.

158 Ibid.
6.3 The Law

Since the legal system in Tunisia is a fairly new one, there is not much that has been done with regards to national legislation. The Assembly of Representatives of the People (ARP) is currently in the process of attempting to comply with the given timelines of the legislative process. According to the constitution, there is a clear separation of powers within the legislative process, which is a tenet of democracy and an aspect of secularism. The legislative process is currently under close observation as to whether it will comply with democratic principles. 162

Though the human rights guaranteed in the constitution are largely limited, Tunisia is expected to review its legal framework in such a manner so as to ensure that its domestic law reflects and respects citizens’ rights both as enshrined in the constitution and by international human rights conventions.163 Even with its legislature not yet fully enshrined, it is possible to speculate whether Tunisia is a secular state or a non-secular one, and whether it can serve as a good example of the compatibility of Islam and democracy.

The constitution, as demonstrated above, is evidently a compromise between the Islamic party and the Secular party. While this compromise has helped move the constitutional process forward, in reality it has led to more challenges than solutions. It

162 Rainer Grote and others, Constitutionalism, Human Rights, and Islam After the Arab Spring (1st edn, Oxford University Press 2016) 71.
creates a situation similar to that in Iran where religious bodies and state bodies tend to usurp each other’s powers due to not knowing which one has precedence in which case.\footnote{Dan E Stigall, 'Law and the Lodestar: Tunisian Civil Law and the Task of Ordering Plurality in the Aftermath of the Jasmine Revolution' (\textit{Digitalcommonslaw}, 29 October 2014) <http://digitalcommons.law.lsu.edu/cgi/viewcontent.cgi?article=1123&context=jcls> accessed 30 May 2015.}

This ambiguity can be seen for example in Article 1 and 2 of the Tunisian Constitution, in which it is not clear whether \textit{Shari'a} law is the ultimate authority or if it is the will of the people and rule of law that matter most. It is still the case then that insofar as the Assembly has the power to legislate, \textit{Shari'a} law still dominates. Tunisia is therefore not a secular nation, even though it is commonly considered to be one. Democracy as defined by international law cannot exist if it is not completely guaranteed.\footnote{Mohammad H Fade, 'Public Reason as a Strategy for Principled Reconciliation: The Case of Islamic Law and International Human Rights Law' [2007] 8(1) Chicago Journal of International Law 19-20.} A state in which the power of the people to legislate is still subject to religious laws must be viewed in every sense as a non-secular state, even if it disguises itself as a secular state.\footnote{Euro-Mediterranean Human Rights Network, 'The Reform of Judiciaries in the Wake of Arab Spring, Proceedings of the Seminar' (\textit{Refworld}, 11 February 2012) <http://www.refworld.org/ pdfid/515009ac2.pdf > accessed 30 May 2015.}
7. Non-Secularism

Non-secularism occurs when the state establishes and supports a particular religion so that the preferred religion gets favours from the state while the less favoured ones are deprived.\footnote{167} A non-secular state therefore has a state religion which it supports. In most cases, the constitution or basic law of the non-secular state mentions the state religion. For example, the Basic Law of the Kingdom of Saudi Arabia provides that Islam shall be the state religion. Likewise, the Church of England is the established state religion of England.\footnote{168}

A non-secular state therefore expects its citizens to abide by the expectations of the state religion. Citizens do not have a right to profess a faith of their choice because the basic law clearly provides for the religion that they are supposed to abide by. Disputes are also settled in strict adherence to the religious dictates and ideals of the religion. Article 7 of the Basic Law of the Kingdom of Saudi Arabia, for example, provides that the governing regime shall derive its power from the Holy Qur'an and the Prophet's Sunnah which rule over this and all other State Laws.

This means that no other law, whether derived from religious belief or otherwise, shall supersede the Holy Qur'an and the Prophet's Sunnah. Article 23, on the other hand,


\footnote{168} Gerard Phillips, Introduction to Secularism (1\textsuperscript{st} edn, Published by the National Secular Society 2011) 10.
provides that the State shall protect the Islamic Creed and shall cater to the application of Shari'ah. Clearly, even human rights shall be respected to the extent that respecting them adheres to the principles of Shari'ah.\(^{169}\)

There have been concerns that non-secular states have little regard for human rights.\(^{170}\) For a start, religious freedom is one of the fundamental freedoms listed in the Universal declaration of Human Rights. Article 18 in particular states that everyone has the right to freedom of thought, conscience and religion. By establishing a state religion, non-secular states violate this basic human right as provided for under the Universal Declaration of Human Rights.

By establishing a state religion, a non-secular state disregards the religious minorities existing within its borders.\(^{171}\) One of the key things to do if it wants to be human rights compliant is that a non-secular state must recognise and allow freedom for religious minorities that are not mentioned in its basic law. Religious minorities have a right to profess their faith and a right not to be forced to profess a religion that they do not believe in. Entrenching religious freedom is the foundation of ensuring that there is national unity, social cohesion and inclusivity, democratic governance, fairness, and equality before the law.

Most non-secular states are monarchies and autocracies. They do not entrench democratic governance where people have great regard for fundamental rights and


freedoms. In most non-secular states like the kingdom of Saudi Arabia, disputes are solved using religious beliefs and ideals. Human rights are disobeyed with reckless abandon and religious freedom is unheard of. Non-secular states must therefore accommodate and recognise minority religions, entrench equality before the law, allow for religious freedom, and demonstrate respect for human rights.  

8. Islamic State and Non-Secularism

Over the last thirty years a number of Muslim countries have adopted constitutional amendments that require state law to be consistent with the norms of Islamic law. Most of these countries have majority-Muslim populations, such as Afghanistan, Egypt, Sudan, Pakistan, Qatar, Iran and Saudi Arabia among others. The constitution of Saudi Arabia, for example, states that Shari’a law is the binding law of the land and any other law that is repugnant to Shari’a law is unenforceable.  

The constitution of Afghanistan states: “No law shall contravene the tenets and provisions of the Holy religion of Islam in Afghanistan.” The same trend can be seen in Iraq’s recently adopted constitution, which states in Article 2 that “Islam is the state’s

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172 Susanna Mancini, Michel Rosenfeld, **Constitutional Secularism in an Age of Religious Revival** (1st edn, OUP Oxford 2014) 176.

173 Grote and other (n 162).


official religion and is the foundational source of legislation.” Sub-Article (a) reads that “it is not permissible to enact a law that contradicts the fixed rulings of Islamic law.” 176

The most likely culprit for this unwillingness to adopt secular principles is the Islamic belief system and ideology as based on the Qur’an and the desire to protect the religion from secular state influences. Probably the explanation lies with the Islamic belief system itself as explained in Al-Qur’an:

"They say, " Allah has taken a son." Exalted is He! Rather, to Him belongs whatever is in the heavens and the earth. All are devoutly obedient to Him, Originator of the heavens and the earth. When He decrees a matter, He only says to it, "Be," and it is". 177

Islamic ideology holds that there is no god but Allah (God), and that every other action must be guided by God’s word as contained in the Qur’an. 178 Islamic law in that respect tends to contradict secularism. In the past there has been an attempt, such as by Abdulaziz Sachedina, to differentiate between a Democratic Republic and an Islamic Democratic Republic. 179

A republic is defined as a representative type of government limited by a written constitution which is created by the people and can only be changed through verified amendments. In a democratic republic, majority rule exists, meaning that the majority make

178 Ibid.
the laws, which are however limited by the constitutional framework. This is in essence a secular republic, which is different from an Islamic republic. An Islamic republic is not a pure democracy but instead a constitutional republic whose constitution is based on the Qur’an. Under this form of government, the ruler is seen as obtaining guidance direct from God.

Based on this assumption, any deviation from the edicts of the Qur’an and the constitution as derived from the Qur’an is illegal. The constitution of an Islamic Republic forms the basis from which all other laws derive legitimacy, meaning that all existing laws have deep religious connotations, and state and religion are completely intertwined.

Bernard Lewis argues that there has been a major deviation from the tenets of secularism even in Islamic states which had previously embraced them, and that a deliberate move back to the Islamic values and all-encompassing principles occurred. There was a reinstatement of Shari’a law, which was now seen as the fundamental framework for all the public and private human behaviour.

Shaykh Yusuf Al-Qaradawi, one of the most esteemed religious scholars, argues that the Islamic tradition remains the central source of authority, and that secularism and Islam are incompatible. Islamic Democratic Republics have been justified on the

\[^{180}\textit{Ibid.}\]
\[^{181}\text{Bernard G Weiss, The Spirit of Islamic Law (1^st edn, University of Georgia Press 1998) 24.}\]
\[^{182}\text{Bernard Lewis, Islam and the West (1^st edn, Oxford University Press 1993) 174.}\]
grounds of them limiting the power of rulers, but they are nonetheless based on a constitution which cannot not be amended because it is derived from Shari’a law, which is seen as unchangeable. Based on this fact alone, it would be safe to say that the concept of democracy is totally no-existent in non-secular states, since democracy is characterised by the ability of the people to make their own rules and be governed by these rules.\textsuperscript{184}

9. Non-Secularism in the Kingdom of Saudi Arabia

The formation of the Kingdom of Saudi Arabia was majorly influenced by religious factors and it is best described as a theocratic state. This can be seen in the legal system of the state from the constitution to the subsequent legislation, which is founded on Shari’a law.

8.1 The Religion

Ever since the formation of Saudi Arabia in the year 1932, there has been a total inability to separate state from religion. This persistence of non-secularism can be traced back to the relationship forged in the year 1744 between a renowned religious scholar by the name of Muhammad ibn Abd and the ruler of the Nejd area in Arabia, Muhammad ibn Saud.\textsuperscript{185} This particular bond is still relevant to the study of the non-secular nature of Saudi Arabia.

\textsuperscript{184} Bruce (n 137).
During Muhammad Ibn Saud’s reign, the Arabian Peninsula was being led politically by the nomadic tribes that lived there. In the view of Al-Wahhab, this region had strayed from the Islamic teachings of Prophet Muhammad and had also deviated from the principles of Islamic politics and leadership that had once governed Saudi Arabia. In particular, the leaders had failed to spread the principle of Tawhid (oneness of God), since the native population were involved in worshipping tombs, sacred earthly symbols and sacred trees.

Looking at this scenario, al-Wahhab concluded that political coercion would be necessary in order to spread Islam. He argued that religion and politics could never be separated and that without the coercive political power of the state, religious principles would be driven to the point of extinction. His belief was that if the revealed law in the form of the Qur’an were to be ignored in governance, then the state was bound to become a tyranny. At that point in history, the House of Saud was trying to gain control over the Arabian Peninsula.

Al-Wahhab promised Muhammad ibn Saud that in exchange for helping to spread tawhid, he would give him religious legitimacy and immense political power based on religious support. Consequently, by the year 1744, the religious teachings of al-Wahhab

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had become strongly intertwined with the conquests made by Al Saud throughout the territories, and came to be known as *Wahhabism*. The House of Saud increased its control over the Arabian Peninsula with religious backing until 1902 when Abd al-Aziz bin Abd al-Rahman al Saud (known as Ibn Saud) began a rival conquest, led by an armed tribal group of *Kwhan*. The war came to an end thirty years later with Ibn Saud’s victorious conquest over the area. In this year the Kingdom of Saudi Arabia was born.

The leadership used religion to legitimise political ventures such as military conquests and territorial expansion. The driving force for the conquests was the religious conviction that all true *Wahhabis* were charged with the responsibility of carrying the message of Islam to all non-Muslims (known as infidels). Owing to the origins of the state, it has become very difficult to separate religious connotations and the desire to convert everyone to Islam with the state even in present day Saudi Arabia.  

8.2 The Constitution

In spite of the fact that most states now have written constitutions, the Kingdom of Saudi Arabia has always been opposed to the adaptation of a secular written constitution based on the argument that the state is already governed by a constitution in the form of the

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Qur’an. The government has however in the recent past issued a Basic Law which is the equivalent of the constitutions found in secular states.  

However, even though the Basic Law addresses some legal issues, it cannot in a strict sense be called a constitution. It would therefore be accurate to say that the Basic Law, which derives its validity from Shari’a law, is not a constitution per se, since the concept of the consent of the governed is taken away. Article 1 of the Basic Law states that the constitution of Saudi Arabia is God’s Holy Book and the traditions of his prophet. Thus, the undisputed role of the clergy as part of the government is left intact under the Basic Law. The leaders are still bestowed with the authority of being final the arbiters in constitutional matters, and the king retains absolute authority according to the constitution.

The constitution declares Islam to be the state religion, thus deliberately moving away from state secularisation. Even the bill of rights states that the rights of the people are to be protected in accordance with Islamic Shari’a law and its rules. The judiciary is also to administer justice in accordance with Shari’a law, the teachings of the Holy Qur’an, the Sunna, and the regulations that have been set in place by the ruler. These regulations must not contradict the Qur’an in order to be validated.

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Article 9 of the Basic Law describes the family as the fundamental unit of Saudi Arabian society, and decrees that all family members be brought up in the Islamic faith.\textsuperscript{193} Under the Basic Law, the king and the appointed council of senior scholars are the only bodies which are legally permitted to interpret the constitution. This aforementioned council of senior scholars is the body through which religious leaders express their authority over the people, and its members are appointed by the king. The doctrine of the separation of powers does not totally exist for the council.

The council as established is meant to restrict itself to religious matters, but the fact that it is appointed by the king means that in practice it tends to share his political affiliations. The council is called upon to give advice on political matters.\textsuperscript{194} It has been asserted that its decisions are purely advisory, but it usually applies Islam interpretations to political moves.

With the king being both the commander of the community and the spiritual leader, the principle is that if a royal decision does not contravene Islamic principles, everyone is bound to obey it. With the king and the council both being recognised under the Basic Law, we could say that the \textit{Qur’an} and Islamic interpretations of the Basic Law are the constitution of Saudi Arabia.\textsuperscript{195} The council in its role as advisor in constitutional interpretation becomes the equivalent of constitutional courts as they exist in states with written constitutions. Constitutional rights are thus not guaranteed in the kingdom as they

\textsuperscript{193} Kingdom of Saudi Arabia Basic Law of Governance (n 191).
\textsuperscript{194} \textit{Ibid.}
are in secular states, since no one can go to court to declare a political move unconstitutional.

The inseparability of state and religion under the constitution is further emphasised in Article 7, which states that God’s Holy Book and his prophet’s traditions are the source of the authority of the government, and that they are the arbiters of this law and every other law. According to Article 83, the king is the only one with the authority to amend the laws. It is obvious that a state which succumbs to constitutional interpretations according to the interpretation of Shari’a law by the clergy cannot be said to be democratic in any way.

8.3 The Law

Ordinarily, a country’s legislation draws on its constitutional provisions. In Saudi Arabia, however, the Qur’an and the Sunna form the constitution according to the Basic Law. Legislative authority is thus derived from it, and the king is entitled to lay down statutory laws and regulations under its guidance. The king’s authority extends to approving international treaties, regulations, making international concessions and ratifying international agreements. Legislation in the form of secular law is not recognized in Saudi Arabia, which ascribes to the Qur’an’s provisions that only God can legislate.

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196 Kingdom of Saudi Arabia Basic Law of Governance (n 191).
The king, the Consultative Council and the council of ministers are the ones charged with all legislative responsibilities. A large amount of discretion in legislating matters of public interest is granted to the king, who is seen as the supreme enforcer of divine law. Matters to do with the country’s development are thus regulated under the public law. The legitimacy of this legislation is measured against compliance with divine law.

Under the Basic Law, the regulatory authority is mandated to lay down laws and regulations that meet the interests of the state and prohibit actions that are not in accordance with Shari’a law. The king is the ultimate authority and an independent ruling body in Saudi Arabia.\textsuperscript{199} His authority extends to enacting laws, repealing legislation and even amending existing legislation through issuing Royal Orders. He can also veto the decisions of the other two legislative bodies. The council of ministers is free to propose laws affecting their individual ministries, which require a majority vote in order to be adopted by the council.\textsuperscript{200} Even when they are adopted through this procedure, they are not considered final until the king approves them.\textsuperscript{201}


The *Shura* Council, which is the Consultative Assembly of Saudi Arabia and is also known as *Majlis as-Shura* or *Shura Council*, is the formal advisory body of Saudi Arabia was created to enhance public participation in the legislative process. The council can comment on state affairs and submits annual reports to ministries and other governmental bodies.\(^{202}\) The *Shura* council by its legislative mandate submits legislative enactments and amendments to the king, which must be approved by at least two thirds of the council members in order to be adopted.

The king is however still the overseer of the resolutions and determines which ones are passed to the Council of Ministers. This required approval of all pieces of legislation by the king does not contravene the fact that every piece of legislation that passes must be weighed against *Shari’a* law in order for it to be considered valid.\(^{203}\) Therefore the Kingdom of Saudi Arabia remains a non-secular state with religion deeply tied to politics.

There is no room to think outside of religion, which is arguably the reason for the rampant abuse of human rights in the country, particularly against women. Since under Islamic law the place of women is an inferior one, and these laws have constitutional backing, there is no way to circumvent this. This remains a concern of international law to the present day. A democracy where human rights are protected solely by religious beliefs and principles cannot exist.

\(^{202}\) Kingdom of Saudi Arabia Basic Law of Governance (n 191).
Chapter 2

The Evolution and Formation of Islamic Human Rights Law and International Human Rights Law

1. The Emergence of Islamic Law

_Shari’a_ is defined as divine law in both the _Qur’an_ and in the account of Prophet Muhammad’s words and acts (the _Sunna_). _Shari’a_ law is thus seen as being related to the _Fiqh_ but also fundamentally different in that the _Fiqh_ is an interpretation of the law from a human point of view.\(^{204}\) Many scholars have viewed _Shari’a_ not as a formal code or as a well-defined set of rules but instead as a discussion of the duties of Muslims, based on the opinions of the Muslim community and a wide variety of literature.\(^{205}\)

_Shari’a_ is thus traditionally viewed as long, diverse and highly complex.\(^{206}\) This perception is probably due to the historical context within which Islamic law emerged. Islamic law originated in an Arab society which was characterised by the belief in magic. In pre-Islamic Arab society, the law was believed to be so magical that even the rules of investigation and evidence were accompanied by sacred procedures such as oaths and

\(^{204}\) Russell Sandberg, _Law and Religion_ (1st edn, Cambridge University Press 2011) 175.


\(^{206}\) Hunt Janin and André Kahlmeyer, _Islamic Law: The Sharia from Muhammad’s Time to the Present_ (1st edn, McFarland 2007) 3.
It also had a penal law consisting of only compensation and payment of the offended party. Over time the positive elements subsided, but a considerable portion of the penal law remained. Other features such as rules about personal status, inheritance and family also remained, but they varied heavily in their interpretation and enforcement. It should be noted here that the law existed in the context of a dominant Arabian tribal system and within a patriarchal family structure.

In such a system an individual would not find legal protection outside of his tribe, and the concept of criminal justice was non-existent. Every act was treated as though it were a tort and punishable by the tribal group. As such, blood feuds emerged, although it is believed that these fell outside of the purview of the ancient Arabic tribal law. There was no organised political authority or judicial system. Disputes regarding property rights, succession and torts were handled mostly by soothsayers, since they were believed to hold supernatural powers.

The arbitrator would make a decision based on customary law, and with time soothsayers came to be considered lawmakers. Their function was to expound on the normative legal custom, the Sunna. The Sunna later became one of the most authoritative agents in the emergence of Islamic law and the Ulama became the lawmakers of Islam.

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210 Holt and others (n 207).
Prophet Muhammad later emerged and began his public activity in Mecca, where he was at first considered to be one of the ordinary soothsayers, which he protested against. Muhammad in his early days continued to act as an arbitrator in the community. Through his revelations and practises, he gave rise to the Qur’an and the Sunna, which became the primary sources of Shari’a law.\textsuperscript{212}

2. The Nature of Islamic Law

Generally, Islamic law is misconceived as being immutable and wholly divine. This view emerges from the failure to distinguish between the sources of Islamic law and their interpretation. A distinction between Fiqh and Shari’a is necessary in order to understand Islamic law. While both of these terms are regularly equated to Islamic law, they are not synonymous. Fiqh means understanding, while Shari’a refers to the right path.\textsuperscript{213} The former refers to methods of implementing Islamic law, while the latter represents the sources of this jurisprudence.

In a strictly legal sense, Shari’a represents the laws revealed in the Qur’an and in the traditions of Prophet Muhammad. It is different from Fiqh because it is immutable.\textsuperscript{214} On the other hand, Fiqh represents the methods of the law or the understanding that is obtained from Shari’a, which might undergo changes based on circumstances and time. Thus, Shari’a largely covers the spiritual, social, legal, and moral

\textsuperscript{212} Kecia Ali, \textit{The Lives of Muhammad} (1\textsuperscript{st} edn, Harvard UP 2014) 48.
\textsuperscript{213} Farrukh B Hakeem and others, \textit{Policing Muslim Communities: Comparative International Context} (1\textsuperscript{st} edn, Springer Science & Business Media 2012) 55.
\textsuperscript{214} Ibid.
aspects of the lives of Muslims, while Fiqh deals with the legal elements of Shari’a that are different from the moral features of Islamic law. Thus, Shari’a regulates the moral, social and religious behaviour of Muslims. Consequently, Islamic law is composed of two constituent parts: the divine and absolute revelation referred to as Shari’a and the Fiqh, the human interpretation of Shari’a. The sources of Islamic law or Shari’a are described in detail in the section below.

Fiqh reflects the underlying epistemological basis of Islamic law, which is fallible. Fiqh scholars have interpreted divine texts, being consciously aware of their potential for human error. Therefore, Muslim scholars have acknowledged that their generalisation of Fiqh rules were only possible articulations of the law of God. While Shari’a represents God’s absolute truth, human attempts at understanding and elaborating such truths are probably flawed and imperfect.

The idea of Ijtihad or legal reasoning was constructed as an approach of Islamic law. From this concept, the legal approaches of Qiyas (legal analogy) and Ijma (juristic preference), and various legal doctrines including Urf (custom), Maslahah (public good), or Istihsan (juristic preference) emerged. These approaches are normally viewed as the secondary sources of Islamic law and were the outcome of human reasoning. While Shari’a was completed with the death of the Prophet Muhammad, these different methods of Islamic law were seen as the means of promoting Shari’a.

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217 Ibid.
In line with this idea various schools of jurisprudence in Islam have emerged, including the Hanbali, Maliki, Hanafi, and Shafii schools.\textsuperscript{218} The common element of these schools is the recognition of the Sunna and the Qu’ran as the main sources of Islamic law. The variation of opinions on specific matters emerge from their varied interpretations of some prophetic traditions and verses in the Qur’an. Thus, Muslims may follow or conform to the rules of one of these different schools of jurisprudence.\textsuperscript{219}

The general purpose and objective of Shari’a, which must be considered in both its application and interpretation, is promoting welfare and preventing harm. This is referred to as Maslahah, a concept that was developed by Imam Malik, a leading figure in the Maliki School of Islamic jurisprudence. It underwent further development by Abu Ishaq Al-Shatibi, who considered it to be a means of extending and rationalising Islamic law in light of changing circumstances, and as a basic principle for certainty and universality of Islamic law.\textsuperscript{220} Maslahah is a pragmatic doctrine that highlights the viability of Shari’a as a living force within society. Therefore, it is an authentic Islamic legal principle that supports the attainment of international human rights within Islamic law.\textsuperscript{221}

The nature of Islamic law is normally explored in relation to other legal systems in the western world and to international law. As far as this discussion is


\textsuperscript{220} Muhammad Masud, \textit{Shatibi’s Philosophy of Islamic Law} (1st edn, Islamabad: The Islamic Research Institute, 1995) viii.

concerned, scholars are mostly interested in the notion of the compatibility and incompatibility of Islamic law by comparison with the legal notions and values that are embedded in modern legal systems. Questions like, “is democracy possible in Islam?” “Does Islam justify acts of violence differently?” “Are human rights achievable in Islam?” are often posed.

All of these questions in some way explore the nature of Islamic law during the comparison process but do not explore it as wholly as they should. Perhaps the best starting point when investigating the nature of Islamic law is by asking the fundamental question of whether Islamic law can be considered a legal system at all. In considering how Islamic law compares to other legal systems, it is important to question where it exists and how it operates. This can then provide the answer to the larger question of its nature.

Though called ‘law’, Shari’a differs from western notions of secular law in two fundamental ways. The first major difference is the scope. Shari’a law is extremely broad in its application. While modern secular law regulates the relationship between individuals and between individuals and the state, Shari’a also regulates the relationship between the individual and God, as well as the relationship between individuals and their own conscience. Shari’a is not only concerned with legal rules but also with ethical behaviour that is not legally enforced, which is not a concern in secular law.

This means that Shari’a law is not only concerned with what one is legally bound to do or refrain from doing, but also with what ones’ conscience should allow him to do or refrain from doing. Accordingly, some actions are considered praiseworthy and worthy of incurring divine favour, or disfavour if they are omitted, even though there is no legal validity attached to them. As such, Shari’a law is not a mere set of laws but a comprehensive code of conduct within which an individual is expected to live.

The other major difference between Islamic law and modern secular law is the concept of law as an expression of divine will. It is believed that when Prophet Muhammad died, there ceased to be a communication of divine will to human beings and thereafter divine revelation became fixed and immutable. A process of expansion and interpretation of divine material began, until a collection of medieval legal manuals was formed. This was then termed Shari’a law, which originated as static and rigid.

Shari’a law is thus very different from secular legal systems which are formed organically in societies and which change in accordance to the changing nature of the society. The nature of law according to western jurisprudence is that the source of law lies with the political leadership and evolves as society does. In an Islamic society, the society does not shape the law, but the law shapes the society. There is only one definition of law that is offered in Islam and that is that the law is God’s will.

225 Ibid.
3. Sources of Islamic Law

In discussing sources of Shari’a law, many think only of the Qur’an, the Holy Book of Islam. However, the Qur’an is only one of the many sources of law in Islam. These sources can be divided into primary and secondary sources. The primary sources generally have gained wide acceptability and binding force while the secondary sources are accepted to varying degrees among Muslims.

3.1 The Qur’an

The Qur’an is one of the primary sources of Islamic law. It is comprised of 114 chapters and 6,616 verses. It is derived mostly from the revelations of the Prophet Muhammad, most of which had a situational context. Most non-Muslim authors claim that the prophet wrote the Qur’an himself, but they do not deny that the text as it is unaltered and still exists in the same form as the prophet dictated to his scribes. Muir for instance concludes that every verse in the Qur’an is a genuine one and still stands just as Prophet Muhammad composed it. Muslims however on the other hand believe that the Qur’an represents a verbatim version of revelations sent by God.

232 Ibid.
The Qur’an as a source of Shari’a law is not in itself a legal treaty but instead it provides guidelines and general principles which should be followed in order to achieve an ideal civilised world. This is aided further by the Sunna, which is the precedent set by the prophet. Of the verses in the Qur’an, 350 address legal issues which are believed to have been encountered by the people.\textsuperscript{233} Scholars are in agreement that the Qur’an is the primary source of Shari’a law, even though this assertion does not appear in the early writings of Islamic Jurists.\textsuperscript{234} For Muslims, there is no need to differentiate between revelations and human reasoning, since human reasoning is considered so fallible that there can never be any perceived contradiction between human reasoning and revelation. For Islamic scholars, the value of human lies in its use in correcting faulty interpretations of the revelations.\textsuperscript{235}

### 3.2 The Sunna

The Sunna is the other primary source of Shari’a law. Sunna is a term used in reference to the behaviour, actions, decisions and likes and dislikes of the prophet.\textsuperscript{236} Owing to its nature, the Sunna is believed to have been heard, memorised, recorded and transmitted through generations via an oral tradition, as is evidenced by the Arabs. These oral transmissions were collected over the years from the third century onwards in what became

\textsuperscript{235} Faruqi and Faruqi (n 180).
\textsuperscript{236} SM Darsh, Islamic Essays (1st edn, London: Islamic Cultural Centre 1979) 79.
known as the Hadith.\textsuperscript{237} While many of these collections exist, only six of them have been officially named: al Bukhar, Muslim, Abu Daoud, al Tirmidhi, al Nasa‘I, and Ibn Majah. The first two of these have generally been the most respected.\textsuperscript{238} These collections have been deemed authentic by means of comparison with historical sources and examining the witnesses used by the collectors. The science of the Hadith played a vital role in elaborating on the principles that had been laid down by the Qur’an in the early years of Islam.

4. Human Rights in Islamic Law

The Universal Declaration of Human Rights (UDHR) has not been very well-received in non-western countries. Among the criticisms made of it is its failure to take into account the context in which Islamic countries operate. Universal human rights as declared in the UDHR have been considered by Islamic scholars and politicians to be an imposition of non-Muslim culture on Muslim people, as well as disrespectful of the culture and customary practises of Islam.\textsuperscript{239}

Due to this non-compatibility the Organization of Islamic Cooperation responded to UDHR by adopting the Cairo Declaration of Human Rights in Islam in 1990.\textsuperscript{240}


\textsuperscript{238} Kamali (n 233).


However, even after the Cairo Declaration, the Islamic world did not truly accept the concept of human rights. The Cairo Declaration for instance lacks provisions for allowing democratic principles, freedom of association, religious freedom, freedom of press, equal protection under the law and the equal rights of persons.

Notably, Article 24 of the Cairo Declaration states that all the rights and freedoms guaranteed therein are subject to Islamic law. Similar restriction is made such as the counter-terrorist legislative regimes in western states which impinge significantly upon human rights. The implementation of strict security measures limiting human rights in times of national emergency when there is a threat to the existence of a state or its citizens and therefore to the fundamental rights of those citizens.

In response to this controversy, it has been argued that Shari’a law is based on the idea of mutual obligations, to which individual human rights are potentially disruptive. The idea of the collective and of collective religious duties are thus given priority in Islam over individual rights, justifying inequality among Muslims and discrimination against non-Muslims. Bassam Tibi for instance has argued that human rights law and Shari’a law are totally incompatible.

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A divergent view is held by Carney, who argues that Shari‘a law is misunderstood by those who fail to divorce it from its context and distinguish it from politics. While Carney attempts to distinguish between Shari‘a and politics, a study of Shari‘a law suggests that state and religion are inseparable in Islam and thus this distinction cannot be achieved in reality. This suggests that Shari‘a law and human rights laws are based on fundamentally different ideologies which cannot be combined.

4.1 Human Rights, Universalism and Islamic Law

Islam is a religion based on Shari‘a law. Whether it is as a religion fundamentally linked to law is debatable. The tendency in recent times has been to demonstrate a closer relationship between Islam and the law than between Islam and the devotional and moral principles inherent in the religion. Shari‘a law has been present in the lives of Muslims since the creation of the Qur’an, and it is derived from it as well as from the traditions and teachings of the prophet Mohammad. At first, however, it had little to do with the law and more to do with the discovery of the religion. To this end, Shari‘a speaks a great deal about devotion, which includes, inter alia, appreciation of the importance of justice and ensuring that justice will be done for everyone.

Shari‘a provides the doctrinal means for a Muslim to live a good, morally fulfilling life in the five spheres considered to be most important – the so-called five essentials values

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(Al-daruriyat Al- khamsah) – those of property, family, life, religion and intellect. Additionally, there are two terms, Shari‘ah and Fiqh, which while often seen as interchangeable, refer to two distinct parts of Islam. Shari‘a derives from the Qur‘an and the divine revelations of the Hadith (Wahy). Fiqh, on the other hand, is related to the corpus juris developed by Islamic legal schools (Madhhabs), by prominent legal scholars through legal reasoning (Ijtihad) and through the issuing of legal verdicts (Fatwa).

The issue of universalism has been widely discussed in the discourse on human rights. This complements the modern take on what should constitute a nation-state, which has come to be seen in increasingly secular rather than non-secular terms. With respect to the universality of human rights, the act of naming the first United Nations (UN) human rights instrument as the Universal Declaration of Human Rights suggests that universalism was considered vital to the purposes of international human rights law. The issue of universality however is complex, and it involves reflection on the exact meaning of the universality of human rights as well as on the way in which such universality might be achieved. The dispute over universality has been informed by an understanding that a great variety of societies with many differing ways of life currently exist.

It could be argued that the futility of such an endeavour is reflected by the fact that the debate on whether human rights are or should be seen as universal or as culturally

248 An-Na‘im (n 50).
249 UN General Assembly, *Universal Declaration of Human*, (General Assembly resolution 217 A (III)) art. 2 (UN Documents ) http://www.un-documents.net/a3r217a.htm> 22 November 2014.
specific continues almost seven decades after these questions were first posed.\textsuperscript{250} In the context of Islamic law, the issue of the universalism of human rights has been a notably controversial one. Even the staunchest supporters of universalism have admitted that there could be no ‘prospect of the universal application of such rights unless there is, at least, substantial agreement on their concept, scope and content’. Ever since the UDHR was first adopted in 1948 human rights have been considered a universal priority in the face of a harsh conflict between cultural relativism and universalism, which has emerged due to the lack of ‘complete agreement about the nature of such rights or their substantive scope’.\textsuperscript{251}

The extent to which Islam can be considered compatible with international human rights law is debateable. The majority of scholars, who are ‘rejectionists’, argue that Shari’a is intrinsically incompatible with human rights law. This is reflected in the outcome of the case of \textit{Refah Partisi vs. Turkey}, in which it was argued that Shari’a is ‘stable and invariable’ and is ‘difficult to reconcile with the fundamental principles of democracy’.\textsuperscript{252} This view has been supported by other Islamic scholars, who seek to engage in \textit{Jihad} against the \textit{Kufr}, and who call for the subservience of religious minorities and Muslim women within the Islamic constitutional framework.\textsuperscript{253}

\begin{footnotesize}
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\item \textsuperscript{251} Rehman (n 227).
\item \textsuperscript{252} Ahmed and Ginsburg (n 52).
\item \textsuperscript{253} Baderin (n 18).
\end{itemize}
\end{footnotesize}
5. An Overview of Human Rights in Islamic Law

5.1 Constitutional Rights in Islam Law

The status of Islamic law in comparison with manmade law is a central issue of constitutional design in Muslim countries. Shari’a law is regarded as a higher law which limits temporal authority, a function that is performed by the constitution in the secular world.\textsuperscript{254} Shari’a is so important in the Islamic world that in the political realm it was considered to be the only means of ensuring that laws were legitimate.\textsuperscript{255} This meant that governments had the power to apply and enforce laws only insofar as these did not in any way violate Shari’a law or become contrary to the public interest.\textsuperscript{256}

Some scholars of Islam argue that Shari’a has some featured that make it more constitutional than a positive manmade constitution.\textsuperscript{257} In view of these issues, this research posits that the main problem is the place of human rights in Islam if these rights are only guaranteed by a constitution, and more specifically, what happens to constitutional rights that are contrary to Shari’a law? Freedom of speech is one example of this. Freedom of

\textsuperscript{254} Anwar Emon, \textit{Islamic Natural Law Theories} (\textit{1st} edn, Oxford University Press 2010) 71-92.
\textsuperscript{257} \textit{Ibid.}
speech as guaranteed in most modern constitutions cannot be attained in the Islamic world because of the existence of the offence of blasphemy.

Blasphemy in Islam is defined as any form of cursing, questioning or annoying God, Muhammad or anything that is considered sacred in Islam.\textsuperscript{258} Various Islamic schools prescribe various punishments for blasphemy, ranging from fines, hanging and imprisonment to amputation and beheading.\textsuperscript{259} Non-Muslims who are found to have blasphemed are in some instances allowed to evade death if they convert to Islam.\textsuperscript{260} Blasphemy, when viewed under human rights law, is a controversial topic.

Most constitutions also guarantee every person’s right to freedom of thought, conscience and religion, as set out under the United Nations’ Universal Declaration of Human Rights.\textsuperscript{261} This right has however not been fully recognized in Islam.\textsuperscript{262} This can be seen in the religious rules for conversion under Shari’a law. It is understood in Islamic law that if a person is born and raised a Muslim or converts to Islam during his lifetime, he has the rights of a full citizen in Islamic states.

Leaving Islam is considered a religious crime or even a sin and once any man or woman is classified as Muslim either by birth or conversion, then he will be subjected to

\textsuperscript{259} Ibid.
the death penalty if he abandons the Islamic faith for another religion or becomes an atheist or agnostic. In Islamic Shari’a law, the view among the majority of medieval jurists was that a male apostate must be put to death unless he suffers from a mental disorder or converted under duress, for example, due to an imminent danger of being killed. A female apostate must be either executed, according to Shafi’i, Maliki, and Hanbali schools of Sunni Islamic jurisprudence fiqh, or imprisoned until she reverts to Islam as advocated by the Sunni Hanafi school and by Shi’a scholars.263

Under Shari’a law, the offender should be offered another chance to reconsider his decision and return to Islam.264 Furthermore, if a person has never been a Muslim, he is allowed to live in an Islamic state if he accepts the status of dhimmi. In this case the individual’s rights are limited in some ways and he will not enjoy legal equality with Muslims.

Under Shari’a law, non-believers are to be offered a chance to convert to Islam and if they reject the offer, they may become a dhimmi. A non-Muslim who fails to pay taxes will be enslaved, killed or ransomed.265 As can be seen from this overview, it would be rather difficult to expect the rights to freedom of thought, conscience and religion to be recognised in Islam.

Since the UDHR was inaugurated in 1948, the Islamic world has continually wrestled with the relationship between the primacy of religious norms and the questionable ethical

265 Ibid.
universalism of the core legal systems of modern constitutionalism. The twentieth century witnessed a marked development of religion in law and government, and from the 1960s onwards a new trend in the implementation of Islamic law was observed. While a number of constitutions historically contained a state religion clause, constitutions in Muslim-majority countries considered and implemented religion more strictly.

Muslim countries, including Iran, Saudi Arabia, Egypt, Kuwait, Bahrain, Iraq, Syria, Yemen and the United Arab Emirates, adopted constitutions that entrenched Islam or Shari’a as “a source,” “a primary source” or “the primary source” for their legislation.266 Meanwhile, reformers and conservatives alike struggled to integrate religious modes of governance into a modern format. Beginning with Turkey in 1921 and three decades later Tunisia in 1959, some Islamic states in the Muslim world adopted modern republican constitutions.267 Yet these states also sought to render political authority accountable to Islamic law and thereby develop an Islamic constitutionalist system.

This goal of amalgamating constitutionalism and Islamic law led to the implementation in Islamic terms of legal structure in line with international human rights. Since then, the status of Islamic law, and more specifically its relationship with the law as established by political institutions and constitutions, remains a contested issue in Muslim states. The fundamental issue in this case was that governments in Muslim countries had the power to make and apply laws as long as these laws did not violate Shari’a and were seen as being in the interest of the public.268 Scholars and researchers of Islamic law and

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266 Islahi and Hashm (n 148).
267 Rainer Grote Tilmann Rode, Constitutionalism in Islamic Countries: Between Upheaval and Continuity (1st edn, Oxford University Press, Inc, USA 2012) 252.
268 Ibid.
governance explicitly stressed the relationship between *Shari’a* and natural law; some even argued that *Shari’a* had certain features that might make it more constitutionalist than a positive constitutional order.  

5.2 Equal Rights in Islamic Law

The Quran is considered the primary source of authority by Muslims. The *Qur’an* states that all humans being descendants of Adam are brothers to one another. Justice and equality is emphasized throughout the *Qur’an*, in which is written:

> “O you who believe! be maintainers of Justice, bearers of witness of Allah's sake, Though it may be against your own selves or (your) parents or near relatives; if he be rich or poor, Allah is nearer to them both in compassion; therefore do not follow (your) low desires, lest you deviate; and if swerve or turn aside, then surely Allah is aware of what you do.”

However, there is a contradiction in this case in that gender equality is not guaranteed in Islam. This can for instance be seen when A’ishah asked the messenger of Allah who has the greatest right over a woman, and the messenger replied that it is the husband. When asked who has the greatest authority over the husband, the messenger replied that it is his mother. This is essence means that women are subordinated in terms of rights in Islam.

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It has been argued that in Islam women are not equal to men owing to the fact that they possess a different nature than men, but that the rights of men and women are equally balanced. This explanation may be acceptable in Islam, but in human rights law it is obvious discrimination on the basis of gender.\textsuperscript{272}

International human rights bodies prohibit the discrimination of women based on gender. Specifically, the International Covenant on Economic, Social and Cultural Rights (ICESCR), and the International Covenant on Civil and Political Rights (ICCPR) utilise similar wording in prohibiting discrimination based on sex (article 2) and ensuring that women and men enjoy equal rights (article 3).\textsuperscript{273}

Furthermore, the Declaration on the Elimination of Discrimination against Women adopted in 1967 by member states of the United Nations considers discrimination against women to be an offense against the dignity of women.\textsuperscript{274} Consequently, it requires states to abolish any practises, regulations, customs, and laws that discriminate against women and to create sufficient legal protection necessary for equality between women and men. Similarly, the Convention on the Elimination of All Forms of Discrimination against Women, adopted in 1979, explains the meaning and nature of discrimination based on sex


and establishes state obligations towards the elimination of discrimination and the realisation of substantive equality.

The convention requires not only that states repeal any discriminatory laws, but also that private bodies eradicate customs and practises that discriminate against women. In this convention, the particular state obligations for the elimination of discrimination against women in the cultural, economic, social, and political spheres can be found in 16 articles.

Such discrimination includes unintentionally or intentionally disadvantaging women, preventing society from recognising the rights of women in public and private spheres, and preventing women from exercising the basic freedoms and human rights to which they are entitled. Therefore, subordination of the rights of women in Islamic law is gender-based discrimination as articulated in international human rights instruments.

One example of this can be seen when discussing property rights in Islam: women’s rights to property have not been addressed adequately in Shari’a law. According to the Qur’an, a woman is granted the right to inherit property from other family members. While this is a positive guarantee, the limitation is contained in Qur’an 4:12 where a woman’s inheritance is proven to be unequal to a man’s inheritance and is also dependent upon other factors. The section reads:

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275 Ibid.
"Allah enjoins you about [the share of inheritance of] your children: A male's share shall equal that of two females -- in case there are only daughters, more than two shall have two-thirds of what has been left behind. And if there be only one daughter, her share shall be half -- and if the deceased has children, the parents shall inherit a sixth each, and if he has no children and the parents are his heirs then his mother shall receive a third, and if he has brothers and sisters then the mother's share is the same one-sixth. [These shares shall be distributed] after carrying out any will made by the deceased or payment of any debt owed by him (the deceased). You know not who among your children and your parents are nearest to you in benefit. This is the law of Allah. Indeed, Allah is wise, all knowing."

Positively, however, Shari’a law grants Muslim women the right to own property, which was a right enjoyed by them before women in the western world. While this is the case, non-Muslim women are not granted the same rights. Inequality between free and slave women, master and slave women, believers and non-believers is also recognised under Shari’a law and thus inequality even amongst women is propagated. In the case of slavery Islam allows for a master to have sexual relations with his female servant, even without her consent.

Gender justice has arguably been one of the goals of the Muslim world. Characteristically, the ‘paradox of equality’ means that substantial equality is achieved if like cases are treated alike and conversely, cases which are not similar are treated dissimilarly: ‘Differentiation, in this fashion, is distinct from discrimination’. Gender equality is traditionally

282 Anver M Emon, 'The Paradox of Equality and the Politics of Difference: Gender Equality, Islamic Law, and the Modern Muslim State' (Social Science Research Network
approached by Muslim theorists from a point of view which proposes that Muslim societies are essentially patriarchal.

It has been argued that such an approach is due either to long-standing tradition or has simply been introduced to Islam as a reflection of cultures external to the Muslim world. Subsequently, this view of Islam as patriarchal has been seen as belonging to the past. Another school of thought, which opposes seeking any reference to gender equality in the holy Qur’an, takes refuge in asserting that such equality is a manifestation of justice and not of kindness or mercy, the latter approach supposedly giving rise to oppression of the weaker gender (women) by the stronger gender (men).

Equality may be expressed through the vocabulary of rights that are mutual in their political, social, and sexual dimensions. Such a view of equality, which is essentially rights-orientated, originates from the historical lack of colonial subjugation of many Muslim States. According to this narrative, rights are never ‘given’ to someone, in this case to women; rights rather belong to the respective right-holder. Instead of being fought for, rights, in this discourse, become an expression of one’s humanity. In this vein it has been claimed that the Qur’an’s egalitarianism and the lack of any real assertion of patriarchal values means that Islam does not treat the genders differently. However, this should not be approached simplistically, since ‘to be anti-patriarchal does not mean that factual

285 Ibid.
difference must be obscured, or that legal differentiation must be avoided at all times and places.

5.3 The Rights of Women in Islamic Law

Women’s rights cannot be overlooked when discussing human rights issues. Women’s rights first gained recognition in 1979 when the Convention for Elimination of all forms of Discrimination Against Women (CEDAW) was drafted and consequently also adopted by many of the member states of the UN. Under CEDAW, member countries are to adopt measures that protect women against discrimination and also to report periodically to the UN on the same.

Originally, CEDAW focused mainly on political, economic and other issues of the public sphere. However, feminist critics pointed out that human rights provisions should also deal with abuse in the private sphere, thereby encompassing domestic violence, sexual abuse and rape. The convention was thus seen as an inadequate piece of legislation. It was generally recognised that women’s issues are universal human concerns, only focused on a distinct category of people.

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From 1990 onwards however, violence against women became a global human rights agenda and in 1992 the UN Committee on Elimination of Discrimination against Women actively recognised violence against women as a human rights issue. During the UN’s 11th session, General Recommendation 19 was submitted, positing that gender-based violence directed against a woman due to her gender constituted a form of gender discrimination and thereby amounted to a breach of CEDAW.290

A series of other meetings followed this recommendation and in 1993 the United Nations General Assembly drafted the Declaration on Violence against Women. From then on violence and discrimination against women has taken centre stage in human rights debates and it is generally agreed upon that any form of discrimination and violence against women is a gross violation of human rights. Given this attention to women’s issues it is important to examine how Islam interacts with women in order to further investigate how Islam relates to human rights.

Many scholars have claimed that Shari’a law encourages domestic violence against women.291 Domestic violence is specifically encouraged if a husband suspects his wife of disloyalty, disobedience, ill conduct or even rebellion.292 However, differing opinions have also been raised where it has been argued that wife battering does not go hand in hand with

292 John Raines and Daniel Maguire, (Ed), Farid Esack, What Men Owe to Women: Men's Voices from World Religions (1st edn, State University of New York 2001) 201-203.
modern perspectives on the Qur’an. While views differ among Muslim scholars, the true perspective can only be found in the Qur’an, since it is the source of Shari’a law.

A critical examination of some of verses in the Qur’an seems to suggest strongly that domestic violence is encouraged in Islam. Look for instance at Surah 4:34, which has been translated as follows:

“Men shall take full care of women with the bounties which God has bestowed more abundantly on the former than on the latter, and with what they may spend out of their possessions. And the righteous women are the truly devout ones, who guard the intimacy which God has [ordained to be] guarded. and as for those women whose ill-will you have reason to fear, admonish them [first]; then leave them alone in bed; then beat them; and if thereupon they pay you heed, do not seek to harm them. Behold, God is indeed most high, great!”

In accordance with Surah 4:34, many countries that institute Shari’a law have so far been reluctant to prosecute and punish acts of domestic violence. Shari’a law has therefore can be considered against protecting women rights in this matter. Shari’a law also discriminates against women when it comes to self-determination in matters of marriage, divorce and child custody. A report by UNICEF compiled in 2011 concluded that even in legal proceedings, a testimony by a woman is considered half as credible as that of a man.

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Child marriages are only allowed in Iran, Lebanon and Bahrain. However, in other Islamic countries where child marriages are not allowed, the Islamic courts are at liberty to override civil law and thus in some instances they have been allowed, which constitutes an abuse of children’s rights.

When considering human rights under any legal regime, it is always instructive to look at the provision for women’s rights, as women have been one of the most systematically oppressed population groups in the history of human civilisation. It is therefore necessary to consider the rights of married women in Islam, both in general terms and compared to their Christian counterparts.

For instance, in Christian or formerly Christian countries it is common practise for a woman to change her last name upon getting married and adopt her husband’s family name. This figuratively erases the wife as an individual person. By contrast such a name change considered to be *haram* (forbidden) in Islam. This is because in the *Qu’ran* it is stated that ‘*Allah* (God) has cursed the one who claims to belong to someone other than his father’. In general, the *Qu’ran* places a heavy emphasis on belonging to one’s father. Surat Al-Ahzab 33:5 states:

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“Call them by [the names of] their fathers; it is more just in the sight of Allah. But if you do not know their fathers – then they are [still] your brothers in religion and those entrusted to you. And there is no blame upon you for that in which you have erred but [only for] what your hearts intended. And ever is Allah Forgiving and Merciful.”

It seems from this verse that not attributing someone to their father in name is a serious oversight in *Shari’a*, serious enough to necessitate a caveat that one will not fall foul of the law if one’s intentions were good in this regard. However within the context of women’s rights *qua* human rights specifically it is somewhat questionable whether the situation is much better, since the only reason why the name change is deemed *haram* is because the woman already ‘belongs’ to her father.

It is clear from the verse cited above that both men and women belong to their fathers equally; while there is something unequal in the primacy afforded to the father, at least Islamic law is not unequal with respect to children of different genders.

In addition to the more obvious name change issue, there is the contentious and important issue of the wife’s property. It may be observed here that up until approximately the beginning of the 20th century the Islamic rules for women and their property were much

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303 Mir-Hosseini (n 298).
more progressive than their Judeo-Christian counterparts in the USA and Europe. When comparing the theological background of Islam with the Judeo-Christian tradition for example the distinctly more ‘liberal’ flavour of Shari’a becomes noticeable.

Commentators such as Sherif Abdel Azim note that this is an expression of the general approach of each religion to family life; while all three religions place a heavy emphasis on family life and accord primacy to the husband, the Judeo-Christian tradition is accused (unlike Islam) of reducing the wife to the status of chattel. Muslim women have been given property rights since the 7th century C.E. (thus arguably being a burden on her family); a Muslim woman’s dignity is such that it is the husband who must present her with a gift; moreover, she has an inalienable right to that gift even if she is later divorced.

Furthermore, a Muslim husband has no right over his wife’s property whatsoever unless she freely consents to him having such a right. The Qu’ran is explicit on this: ‘And give the women (on marriage) their dower as a free gift; but if they, of their own good pleasure, remit any part of it to you, take it and enjoy it with right good cheer’. A Muslim wife remains in full control of her own property and also of any income she possesses (inherited or earned). Moreover, these assets are for her personal use, since her husband has a duty to maintain her and their children without any financial input from her.

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307 The Holy Qu’ran, 'Surat Al-Ahzab ' (n 301).
5.4 The Rights of Children in Islamic Law

Unlike women, whose rights are arguably violated in Islam, children enjoy great protection under *Shari’a* law. A child in Islamic Law has a right to a healthy start in life, as well as the right to health care and proper nutrition, which is alluded to by the duty of both parents to ensure that the child does not suffer harm and to take all measures to ensure that the child will have an increased chance of enjoying good health. Muslims believe that parents will be judged according to this duty on the day of judgement.

In Islam, a child is arguably also protected from hereditary diseases by means of the duty placed on parents to do their best to refrain from marrying a close relative or someone a partner who suffers from a hereditary disease. In terms of gender equity between children, Islam frowns against discrimination of children based on their gender. This can be seen in the *Qur’an* when it chastises Arabs who would celebrate the birth of a baby boy but be saddened if the baby was a girl.

The *Qur’an* states; ‘when if one of them receives tidings of the birth of a female, his face remains darkened, and he is wroth inwardly. He hides himself from the folk because of the evil that whereof he has had tidings. Shall he keep it in contempt of bury

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beneath the sand. Verily evil is their judgement.’\(^{312}\) Even given this amount of protection of children in *Shari’a* law, in reality the situation can be quite different. Islamic countries lag behind in protecting the rights of children, with the Covenant of the Rights of the Child in Islam (2005) being the only binding document enacted to protect children. Article 16 and 17 of this covenant focuses on child protection and child labour, but they are arguably too brief to offer any adequate protection.\(^{313}\)

All Islamic countries except Somalia have ratified this convention, but most have done so with some reservations.\(^{314}\) For instance, the Islamic Republic of Iran has made a reservation that if the text of the convention is, or becomes incompatible with, the domestic laws and Islamic standards at any time, then the government shall not abide by it.\(^{315}\) The covenant further does not define who exactly can be considered a child. In most Islamic countries, children are some of the primary victims of terror attacks and land mines, but this is not addressed in the convention.\(^{316}\) Most countries who are signatories to the convention have yet to pass the legislation required for actively adopting its provisions.

The above discussion on human rights in Islam has been recorded in order to explore the status of human rights under *Shari’a* law. What has clearly emerged from this

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discussion is the rigidity of Shari’a law in approaching human rights issues. As pointed out earlier, Shari’a law is static in nature and fails to take recent societal developments into account. It contains many aspects and apparent biases which have been viewed as violating human rights. It has been proven that it would be difficult to modernise Shari’a law, since it is seen as immutable by many. Those who defend the existence and use of Shari’a law maintain that its purpose is to protect the common good, and that individual rights are an insignificant part of Islam. This argument further contributes to the notion that full human rights are incompatible with Islam.

Children’s rights under Islamic law have recently been the subject of controversy both within the Islamic world and outside of it. Islamic states exercise their sovereign rights by applying Islamic law, or Shari’a, within their jurisdictions, which applies to all aspects of the legal system. The approaches to family law vary, even between Shari’a jurisdictions, and this calls for a more detailed inquiry into the issue of compatibility between Shari’a and human rights.  

It has been argued that inter-cultural mediation can lead to good results in the area of children’s issues. In addition to procedural competence, which can be adjusted to working in a multicultural environment, community resources can also be employed. Parental cooperation, when available, can be used to secure more favourable conditions for the child and this may be more desirable than more legally-sound theoretical decisions that

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might harm children in the eventuality of a divorce, for instance.\textsuperscript{318}

However, many Islamic scholars, such as Nisrine Abiad, and Farkhanda Zia Mansoor, argue that Islamic law does include all of the necessary provisions for the rights of children and for their protection.\textsuperscript{319} Referring to the numerous legal frameworks and international treaties that aim to protect the rights of children (e.g. the UDHR, the ICESCR) and to the various treaties that exist at regional levels pertaining to this issue (e.g. the ACRWC), scholars seek to emphasise the fact that Islamic law holds the same fundamental views on the issue as most secular laws and can therefore be regarded as compatible with secular law.\textsuperscript{320}

In other words, scholars argue that \textit{Shari`a} can work well alongside secular laws, especially when taking into account the differences in attitudes that may exist within \textit{Shari`a} itself; family and child-related issues can therefore be discussed in light of the compatibility of Islamic legal theory with the spirit of international human rights. Many Islamic scholars have expressed great interest in human rights since the 1970s and have sought to reconcile traditional Islamic law with the UDHR as much as possible. In light of these events, it can be argued that Islamic law can, at least theoretically, be considered

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\textsuperscript{319} Nisrine Abiad, Farkhanda Zia Mansoor, \textit{Criminal Law and the Rights of the Child in Muslim States: A Comparative and Analytical Perspective} (1\textsuperscript{st} edn, BIICL 2010) 25.
\textsuperscript{320} Olowu (n 318).
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compatible with human rights and with children’s rights. However, whether this compatibility can lead to real-life solutions is another issue.\footnote[321]{JB Simonsen, ‘Redefining rights: Islamic perspectives and the Cairo Declaration’, in Kirsten Hastrup (ed) \textit{Legal cultures and human rights: the challenge of diversity} (1\textsuperscript{st} edn, The Hague: Kluwer Law International 2001)117-119.}

\section*{6. The Cairo Declaration of Human Rights (1990)}

The UDHR was signed in 1948, including by many Muslim-majority countries, but countries such as Saudi Arabia, where the king is expected to comply with \textit{Shari’a}, refused to sign the declaration, since it was seen as violating Islamic law and failing to take into account the cultural and religious contexts of the Islamic world.\footnote[322]{Jacques Waardenburg, \textit{Islam: Historical, Social, and Political Perspectives} (1\textsuperscript{st} edn, Walter de Gruyter 2008) 167.} On the 5\textsuperscript{th} of August 1990 the 54 member states of the Organization of the Islamic Conference adopted the Cairo Declaration of Human Rights in Islam (the Cairo Declaration).\footnote[323]{Cairo Declaration on Human Rights in Islam (\textit{Human Rights Library University of Minnesota, 5 August 1990}) http://hrlibrary.umn.edu/instree/cairodeclaration.html> accessed10 May 2015.}

This declaration claimed to be a general guide and a complement to the UDHR, but in reality it contained provisions that undermined many of the human rights guaranteed under the UDHR. The Cairo Declaration has been viewed as undermining the universal nature of the UDHR and thus marginalising the 45 states that have their own set of human rights principles that are based on \textit{Shari’a} law. Therefore, it can in no way be said to be truly complementary to the UDHR. In its preamble, the Cairo Declaration embraces the role of Islam and of the vicegerents of \textit{Allah} (God) on earth.
The importance of issuing a human rights document in the context of Islam which will serve to guide member states in all aspects of life is also recognised. In the declaration the historic role of the Islamic *Ummah* (community) and the belief that it was created by God to be the ideal form of government are highlighted. Accordingly, the *Ummah* is declared to have been given the role of guiding humanity in this confused world of competing ideologies and of providing solutions to chronic problems in materialistic civilisations.\(^\text{324}\)

The Cairo Declaration acknowledges the fact that humankind has reached an advanced stage of scientific achievement, but nevertheless offers religion as a solution by purporting to safeguard human rights in accordance with *Shari’a*. The preamble makes reference to fundamental rights, but it should be noted that these are not the fundamental rights acknowledged by international human rights bodies, but the fundamental rights as described in Islam.\(^\text{325}\) So where the Declaration states that no one has a right to suspend rights or limit them, what is being referred to here are rights according to Islam, which limits rights in its own way. These limits as revealed by the Books of God and sent through the prophets are not deemed to be abuses of human rights by the Cairo Declaration, since they justified by *Shari’a* law.\(^\text{326}\)

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\(^{324}\) *Ibid.*


Historically, the UDHR originated as a direct result of the experiences of World War II, mainly in order to guarantee freedom of speech, religion, and freedom from fear and want. Its foundation is built on these ideas, and it is made up 40 Articles. Freedom of religion under the UDHR guarantees freedom of religion in teaching, practise, worship and observance.\(^{327}\) By contrast, Article 10 of the Cairo Declaration has been viewed as aiming to convert people to Islam.\(^{328}\) It also prohibits atheism, which clearly contradicts Article 18 of the UDHR.\(^{329}\)

The main result of this is that the open door is left open for faith-based prosecutions. In particular, the article states that “Islam is the religion of unspoiled nature. It is prohibited to exercise any form of compulsion on man or to exploit his poverty or ignorance in order to convert him to another religion or to atheism.” With respect to the right to fair trial, the Cairo Declaration guarantees the right to protection from arbitrary arrest, torture, maltreatment or indignity. It guarantees the right to be presumed innocent and states that guilt will only be proven through a trial in which a defendant is to be given the right of defence. Article 19 further stipulates that there are no other crimes or punishments other than those which have been prescribed by Shari’a, which ideally include corporal punishment, capital punishment and decapitation.\(^{330}\)

The declaration cannot withstand critical examination in the context of Shari’a, since the human rights concerns that existed in Islam before the creation of the UDHR are

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\(^{328}\) Cairo Declaration on Human Rights in Islam (n 322)


\(^{330}\) Cairo Declaration on Human Rights in Islam (n 323).
still not addressed. Instead what has been done here is to emphasise that there is an Islamic justification to commit atrocities. Muslims continue to be put to death under the Cairo Declaration for blasphemy as they are under Shari’a. Even though the Declaration provides the right to a fair trial, it must be noted that the process of fair trial for the various crimes contained in the Qur’an is also dictated therein.\footnote{Darara Timotewos Gubo, \textit{Blasphemy and Defamation of Religions in a Polarized World: How Religious Fundamentalism Is Challenging Fundamental Human Rights} (1\textsuperscript{st} edn, Lexington Books 2014) 60.} Therefore if the declaration is subject to Shari’a law, then fair trial would be what Shari’a prescribes and not what secular law prescribes.

7. The Historical Emergence of International Human Rights

International human rights law is an area of international law that is concerned with the protection of human rights. Luis defines human rights as those liberties, immunities and benefits which all human beings should be able to enjoy by way of accepted shared values in the society in which they live.\footnote{Henkin Luis, Human Rights. in Rudolf Bernhardt (ed), \textit{Encyclopaedia of Public International Law} (1\textsuperscript{st} edn, North-Holland 1985) 273.} In accordance with the Peace of Westphalia, international law is drafted by state governing bodies in order to regulate the relations between them based on the principle of a plurality of independent states that are equal to each other without any superior authority prevailing above them.\footnote{David Onnekink, \textit{War and Religion After Westphalia, 1648–1713} (1st edn, Routledge 2016) 215.} Following these definitions, it appears that a state may violate the fundamental rights of its citizens but will...
be bound by the same words to respect the rights of foreign citizens in its jurisdiction who belong to another state. \(^{334}\)

The concept of international protection of human rights has evolved both in form and content since the end of the World War II, leading to the founding of the UN in the year 1945 and the subsequent adoption of the UDHR by the UN General Assembly in December 1948. \(^ {335}\) The concept of human rights is often linked to the concept of natural rights, which is evident in the language of previously adopted legal documents that were aimed protecting human rights through the rule of law. \(^ {336}\) The real journey towards achieving the international protection of human rights by means of universal law however did not begin until the adoption of the UDHR. \(^ {337}\) The following section will examine the historical evolution of human rights.

It is important to note that a prior attempt to create human rights laws had been made with the Covenant of the League of Nations after World War I, but this proved to be unsuccessful. However, the covenant did outline substantive labour rights in Article 23. \(^ {338}\) Despite the failure of the covenant to guarantee international human rights, separate

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minority protection treaties and declarations which guaranteed rights for minorities emerged, with the League of Nations performing a supervisory role.

The League also played a vital role in enforcing the obligations of the treaties where they were considered to be of international concern. Both within the League and outside of it, private and public bodies worked to ensure the attainment of international human rights. In 1929 for example a private body made up of recognised scholars of international law from Europe, America and Asia adopted the Declaration of the Rights of Man. This declaration proclaimed that it was the duty of every state to recognise the equal rights of every individual to life, liberty and property.

Additionally, every state would owe its citizens full protection of these rights within its jurisdiction, and the rights were to be enjoyed without any distinction whatsoever on the basis of nationality, sex, race, language or religion. The disadvantage of this document was that it was not a legally binding one, even though it still contributed to the popular idea of international human rights in the legal realm in the years that followed. Marshall for instance, commenting on this declaration, stated:

‘this declaration ... states in bold and unequivocal terms the rights of human beings, ‘without distinction of nationality, sex, race, language and religion,’ to the equal right to life, liberty and property, together with all the subsidiary rights essential to the enjoyment of these fundamental rights. It aims not merely to assure to individuals their international rights, but it aims also to impose on all nations a standard of conduct towards all men, including their own nationals. It thus repudiates the classic doctrine that states alone are subjects of international law. Such a revolutionary document, while open to criticism in terminology and to the objection that it has not juridical value, cannot fail, however, to exert an influence on the evolution of international law. It marks a new era which is more concerned with the

interests and rights of sovereign individuals than with the rights of sovereign states.'

The other most remarkable development in the origin of human rights law occurred after WWII in response to the atrocities committed during the war, which were seen to be evidently inhumane. A worldwide concern for humanity arose, along with an urgent call to create a formal international tool that would guarantee the legal protection of human rights and ensure peace and security in the world. Even before the war was concluded, the allies were in agreement that an international commitment to protect human rights should be a major part of post-war reconstruction.

This commitment can be seen in the preamble to the UN Charter that emerged after the war, in which the member states reinforce their determination to save later generations from the horrors and sorrows of war. They likewise reaffirmed;

‘their faith in the fundamental human rights, in the dignity of the human person and in the equal rights of men and woman of all nations large or small.’

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Article 1(3) of the UN Charter states that one of the purposes of the UN is to aid in achieving international cooperation and promoting respect for human rights and the fundamental freedoms of all human beings regardless of race, sex, language or religion.\textsuperscript{346} Article 55 of the Charter declares that the United Nations should promote universal respect for human rights and fundamental freedoms. This stems from the idea that creating conditions of stability is necessary in order to maintain peaceful and friendly relations among nations, based on the principles of equal rights and self-determination. Article 55 also mandates that all states pledge to take joint and separate actions in cooperation with the UN for the purposes achieving the goals outlined in Article 55.\textsuperscript{347}

This charter however did not refer to any human rights in particular or even list the fundamental freedoms it described. In spite of its shortcomings however it remains a significant development in international human rights law and is thought to have marked the beginning of the legal reign of human rights in the international arena.\textsuperscript{348} The charter opened the door for the Economic and Social Council (ECOSOC), whose function it was to recommend how respect for and observance of human rights and fundamental freedoms could be achieved. The Council also had the power to draft commissions, which were used to perform its functions.\textsuperscript{349} In some ways the UN Charter provided a basis for the development of the UDHR in 1948.

\textsuperscript{346} Ibid.
\textsuperscript{349} Ibid.
As noted before, the charter did not explicitly define human rights. It is for that reason that non-governmental organisations (NGOs) met at the San Francisco Conference to push for the inclusion of a bill of rights in the Charter, but they failed in this mission as the move was largely opposed.\textsuperscript{350} After the adoption of the charter, the Commission established therein established a Commission of Human Rights in the year 1946, which was formed with the purpose of developing a framework for an international bill of rights and clearly set out what these rights were. A drafting committee was appointed, which in turn drafted the UDHR, which contains the International Bill of Human Rights as we know it today.\textsuperscript{351}

8. The Nature of International Human Rights Law

Human Rights can be defined as a set of universal moral rights that are intended to protect fundamental and general human interests against the intervention and non-intervention of regional, international and national public institutions.\textsuperscript{352} Primarily, human rights exist as moral rights where there are sufficient grounds to hold other actors under an obligation to respect the interests of the right holders.\textsuperscript{353}

\textsuperscript{353} Ibid.}
Human rights refer to the rights of all individuals completely equally. Individuals are entitled to these rights because they are human beings. They are derived from the innate dignity of people and are enjoyed by all people regardless of their sex, colour or race, and other individuals or governments cannot deny or withdraw these rights. Human rights have various inherent characteristics. Firstly, they are innate and universal, since all human beings possess them and they are applicable to human beings. Secondly, they are legal claims to which human beings are entitled and thus they must be shared equally by all people. Thirdly, because all human beings possess human rights, certain rights possessed by individual people on the basis of their status are eliminated because they are not within the scope of human rights.

Fourthly, as human rights are possessed equally by all people and universal, they are inalienable and based on rational constraints that must be guaranteed or prescribed by law. Fifth, any group or individual can assert or claim human rights against the entire world. For instance, an individual may require human rights when national practices and laws fail to effectively guarantee these rights. Consequently, human rights empower victims and the dispossessed. Human rights legislation normally seeks to change established political or legal practices. The process of claiming human rights focuses on changing economic and political practises and structures so that it becomes unnecessary

for individuals to make claims about their human rights, as the specific practices that result in human rights violations will have been eliminated following adequate observation by the individuals or institutions that previously violated them.

Sixth, human rights confer moral standards of international and national political legitimacy on government, and those who have adopted them can be viewed as being legitimate by the world and its citizens since they are seen as complying with and respecting the decisions, rights, and views of their citizens.\(^{358}\) Finally, human rights laws prohibit distinctions based on characteristics such as religion, sex, and race. Instead they call for equal consideration of all individuals irrespective of whether they meet any anticipated obligations.\(^{359}\)

All of this indicates that any cultural or geographic origins of the notion of human rights do not affect their validity, universality or legitimacy. From this discourse it can be seen that human rights are also obligatory and legally binding, even though they have a moral basis. However, in order for human rights laws to be upheld they must be weighed against any competing social interests and found more important.\(^{360}\) Human rights laws are of particular importance because the interests that they seek to protect are regarded as fundamental and of a general human interest by mere virtue of the existence of humanity. This fundamental nature is not seen as being determined for all time, but with reference to the context at the time of enforcement.\(^{361}\)

\(^{358}\) Ibid.
\(^{360}\) Ibid.
Legally, the rights of the individual are regarded as fundamental and give rise to a duty to protect them through a focus on the normative status of members of the community in view of their political equality. Equality is thus a major testing factor of human rights law.\textsuperscript{362} It is the process through which individuals become active political agents.\textsuperscript{363} Human right laws are therefore power mediators in that they guarantee political equality.

Due to these reasons they are a prerequisite of democracy. Democracy comes about when the ruling political bodies respect human rights law, allowing the people to exercise their political will freely. International human rights law is based on the doctrines of universalism and universality. Universality refers to the global acceptance or universal quality of the idea of human rights. The adoption of the Universal Declaration of Human rights in 1948 signalled this realisation of the universality of human rights. According to the doctrine of universality, any cultural differences ought not to be allowed to rationalise and restrict the scope of human rights as embodied in the UDHR. Therefore, human rights should not be viewed as valid only in specific settings but instead should be viewed as valid for all people.

The broad acceptance of this doctrine is evidenced by the fact no contemporary state will explicitly admit that it violates human rights. In the present day all societies generally recognise the idea of human rights, which establishes their universality.\textsuperscript{364} Universalism, a related concept, is associated with the application and interpretation of the

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\textsuperscript{362} Rainer Forst, \textit{The Basic Right to Justification: Towards a Constructivist Conception of Human Rights} (1\textsuperscript{st} edn, Constellations number 6, 1999) 48.
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idea of human rights. Universalism contends that human rights are similar or ought to be similar everywhere in terms of both application and substance.\(^{365}\)

Proponents of universalism support the exclusive universality of international human rights. Advocates of universalism search for support for their contention in the language used in the legal documents of international human rights. This language usually states that all persons are entitled to human rights. Therefore, the concept of universalism within the context of international human rights law relies on the identification or evolution of a universal agreement in interpreting principles of human rights.

These two terms highlight a cross-cultural approach to interpreting and applying international human rights principles and enhancing their efficacy, seeking the achievement of an inclusive perspective of universalism. Thus, universality does not imply a disregard for the existence of various religions and cultures in various societies.\(^{366}\) Rather, it supports the perspective that human rights are dynamic and thus relate to all situations and people regardless of their cultural, political, social, and economical backgrounds, as well as their sex, colour, and race. Therefore, the universalism doctrine in international human rights law recognises the diversity of cultural practises and values.

Universalism is however also a reflection of the universal search for human equality and dignity that goes beyond cultural values. This can be seen in the preambles of the ICESCR (International Covenant on Economic, Social and Cultural Rights), the ICCPR (International Covenant on Civil and Political Rights), the UDHR (Universal Declaration

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of Human Rights), and the United Nations Charter, which all state that recognising the
innate nature of human rights and human dignity is the foundation of international human
rights law. Some would be inclined to argue that both sets of laws should enjoy the same
Shari’a seem to be based in morality, and it is worth noting that the moral status of Shari’a
is radically different from the moral status of human rights law.

The moral status of Shari’a is qualified as divine law which science has rejected as
impossible to provide for. On the other hand, the morality of human rights law is derived
from the idea of human rights, which must be protected on a legal level. This morality
does not originate in religion but rather in humanity itself. In fact, notions of religion are
totally rejected in human rights law, which recognises that there should be no official state
religion and that no one should be discriminated based on their religion. Furthermore,
human rights law guarantees the freedom of worship while Shari’a law by its nature
restricts this freedom.

The concepts of discussion and consultation are promoted in human rights law,
meaning that laws are made by those whom they will affect. Shari’a law embraces the
concept of top-down, authoritarian laws in that every law has to derive from the Qur’an
and the other sources of Shari’a. In fact, the concept of deliberation in making a law and
existence of human law is not acceptable in Shari’a at all.

367 United Nation (n 352).
368 Reem A Meshal, Sharia and the Making of the Modern Egyptian: Islamic Law and
Custom in the Courts of Ottoman Cairo (1st edn, Oxford University Press 2014) 45.
369 Ibid.
370 Hisham M Ramadan, Understanding Islamic Law: From Classical to Contemporary
(1st edn, Rowman Altamira 2006) 150.
Additionally, human rights law introduces the notion of political equality before the law, whereas equality as known in human rights law is not achievable in Shari’a. The Qur’an has already established a rigid hierarchy where women are naturally and by law subordinate to men and they enjoy different rights by divine decree. This cannot be changed, since questioning the law constitutes apostasy, which is punishable by death.

Finally, human rights law promotes the concept of democracy, which is an important one in debates around Islamic law. Democracy stems from the idea of equality before the law and the right to participate in the political realm together with other individuals of an equal status. Again, this is not achievable in Islam, as this requires that a leader be Muslim. Under Shari’a law, non-Muslims do not enjoy an equal right to seek leadership positions. 371

9. Sources of International Human Rights Law

9.1 Binding Treaties

When discussing treaties as sources of international human rights law, it is important to mention soft law, which goes hand in hand with treaties. The founding of the United Nations after WWII saw the formation of multi-lateral treaties aimed at protecting human rights. In the preceding years, different governments had drafted and approved numerous human rights documents, but not all of them were legally binding upon states.

Article 55 and 56 of the UN Charter state that the UN shall promote universal respect and observance of human rights and that all members must pledge to take sole and joint efforts to achieve this goal. Some scholars have considered these provisions not to be binding upon member states but instead mere guiding principles that have no meaning in a legal context and are in fact redundant. The UN General Assembly has since then adopted statements of common positions and guidelines. These can aid in negotiating treaties but are not in themselves binding. They are referred to as soft law.

An example of soft law is the Declaration of Human Rights. It is a resolution which is not binding, but has formed the basis for a number of treaties, including the International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights, the Convention on the Elimination of all forms of Discrimination Against Women, and the Convention on the Rights of the Child. Soft law is therefore to some extent a source of international human rights law. A treaty sometimes also referred to as an international convention, a protocol, a covenant, a pact or exchange of notes, is an agreement between two or more states.

Treaties are binding upon the states which are party to them. International agreements are based on international customs and the Vienna Convention on the Law of the Treaties, which was adopted in 1980 and functions in codifying international customary

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372 United Nation (n 352).
norms.\textsuperscript{376} Generally, reservations are permitted in treaties, but the European Court of Human Rights and the UN Human Rights Committee have stated their objections to states’ reservations to human rights treaties and argued that if such are made, the agreement must be considered null and void and those parts to be held incompatible with the objects of the treaty.\textsuperscript{377}

\textbf{9.2 Regional Human Rights Treaties}

In addition to international treaties, the UN charter also encourages the adoption of regional instruments that establish human rights obligations. These treaties have played a crucial role in the development of international human rights law. The European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) for example was adopted by the Council of Europe in 1950 and became binding in 1953.\textsuperscript{378} This treaty supplemented the European Social Charter of 1961.\textsuperscript{379}

In America, the American Convention on Human Rights (ACHR) was adopted in 1969 and has since been supplemented by the 1988 protocol of San Salvador on Economic,

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\textsuperscript{376} Ibid.
\textsuperscript{379} Ibid.
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Social and Cultural Rights and the 1990 Protocol to abolish the death penalty.\textsuperscript{380} In Africa, the Organization of African Unity adopted the African Charter on Human and People’s Rights was adopted in 1981, to which an additional protocol on the establishment of the African court of Human and People’s Rights was added in 1998. The Protocol on the Rights of Women in Africa (2003) as well as the Protocol on the Statute of the African Court of Justice and Human Rights (2008) have also been adopted.\textsuperscript{381}

Regional treaties carry the same binding force as international treaties, except that they are only binding upon the member states within the region in which they were drafted. Sometimes international courts allow for the regional treaties to be invoked as authorities when deciding cases of international human rights law.

\textbf{9.3 Customary Law}

Customary law as a source of international human rights law appears in many contexts but its meaning cannot be fully understood.\textsuperscript{382} It is defined as a general practice that has been

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accepted as law.\textsuperscript{383} Custom in the traditional sense of the word includes two elements: the practice itself and the notion that states should follow the practice out of legal obligation. Unlike treaties, customs are normally binding upon all the members of the world community, and also upon the states which have not explicitly consented to their terms.\textsuperscript{384}

Due to this the Human Rights Committee in General Comment No.24 has expressed the conviction that the provisions of the ICCPR, which represent customary law, should not be subject to reservation.\textsuperscript{385} Most constitutions around the world also incorporate customary international law and see it as superior to domestic statutes. This further affirms the position that international human rights are part of international custom and that they are binding upon all states and rank highly in most constitutions. Some commentators hold the viewpoint that the UDHR is now part of international customary law.\textsuperscript{386}

It has been posited that the term general practice points not only to a state’s behaviour, but also to the practice of all of the participants in the international legal court. While it might be argued that custom is only a source of law for the International Court of Justice, the nature of customs support their being applied to international human rights laws. In the \textit{Barcelona Traction} case for example, the ICJ differentiated between state obligations to the international community and obligations under the scope of diplomatic

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Specifically, state obligations are an issue for all states, implying that all states have legal obligations to ensure human rights. These obligations are derived from contemporary international law such as the prohibition of genocide and protection from racial discrimination and slavery. Therefore, obligations related to human rights are a critical aspect of customary law.

Although the ICJ has explicitly addressed physical hardship, arbitrary detention, slavery, and genocide, it has not restricted the scope of customary law to these aspects. Thus customary law is applicable to international human rights law. It is a widely accepted principle that any international agreement that violates a pre-emptory norm becomes void. Further, Article 64 of the Vienna Convention also states that if a new norm emerges, it will render void any existing treaty that is contrary to that custom. Therefore customary law is binding upon all states. If human rights law is customary law, then international human rights law is binding upon all world states.

When examining the sources of international human rights law vis à vis the sources of Shari’a law, it can be seen that human rights law has emerged as a result of discussion between member states. Shari’a law on the other hand is believed to have been passed down by God, constituting the Qur’an and the experiences of Prophet Muhammad as well as other expositions that have been formulated since then, and therefore did not involve any discussion between states.

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387 Baylis (n 385).
389 Janin and Kahlmeyer (n 206).
Shari’a suffers not only from a lack of the free and mutual exchange of ideas, but also from a lack of flexibility. Sharia is of divine origin, both its content and theoretic structure was mostly developed by scholars. In doing so they developed a vast corpus of legal literature, which was to be read in addition to the Word of God (the Qur’an) and the words of the prophet Muhammad (the Sunna). All this literature together comprised the Shari’a. Shari’a in its physical form, therefore, is not a single book, therefore suffers lack of flexibility.\(^{390}\) Islam has not meddled with the outward pattern and form of life, which is wholly dependent upon the standard of human knowledge. Islam by keeping the aims under its own authority, and by setting permanent laws not variable laws according varying requirement civilization.\(^{391}\)

Since its inception, Shari’a law was meant to be legally binding upon Muslims while international human rights law was meant to legally binding upon member states.\(^{392}\) However, as is discussed above, human rights law as expressed in international customary law is binding upon all states in the world whether they are signatories to human rights documents or not.\(^{393}\) This is probably the issue that leads to the most debate about human rights in Islam. This is because according customary law, Islamic nations are bound to protect the human rights of their citizens in accordance with human rights documents, but

\(^{390}\) Muhammad Abid al-Djabri, Din, dawla wa tatbiq al-Shari’a (‘Religion, nation, and the application of the Shari’a’), (1\(^{st}\) edn, Markaz Darasat al-Wahda al-‘Arabiyya, Beirut, 1996).

\(^{391}\) Ibid.

\(^{392}\) Shaheen Sardar Ali, Modern Challenges to Islamic Law (1\(^{st}\) edn, Cambridge University Press 2016) 71.

\(^{393}\) Cassese (n 384).
according to the Qur’an, which is essentially the only binding document for Muslims, these rights are not guaranteed.

*Shari’a* is guiding Muslim believers in all aspects of their lives, including the law. The main difference is that in some Muslim constitutions, the people are represented via religion and/or Muslim customary law. It is undeniable that the presence of both Islamic law in and customary law in a constitution raises issues, especially with regard to the respect and enforcement of universal human rights. One can view the Universal Declaration of Human Rights, together with some other important resolutions of the UN General Assembly, as a contribution to the formation of *opinio juris*, as an indispensable contributing element to the creation of customary law. The references to the Universal Declaration continued to support the claims that at least some rights had attained the quality of customary rules in other forms. One of them was the invocation of the Declaration in the United Nations and other international fora and the references to the Declaration in constitutions, internal legislation of states and decisions of the national courts. The Universal Declaration was even quoted as containing rules of *jus cogens*.394

10. The Internationalisation of Human Rights

The recognition of individual human rights is quite different from the universalisation of human rights.395 The recognition of human rights domestically is not sufficient. From its

395 Donnelly (n 366).
inception, the concept of international hum rights law incorporated the concept of universality. This has been the main challenge facing the various mechanisms that have been introduced so that human rights can be internationalised.\textsuperscript{396} It is important to note that when talking about universalisation, both national and international efforts to ensure human rights are given a global attention are being referred to. National efforts however do not stand alone, as they mostly involve the ratification of treaties through both constitutional and legislative reforms, as will be discussed in the following section.

\textbf{10.1 International Treaties}

The internationalisation of human rights began shortly after WWII when the Allies sought to establish international human rights law capable of protecting citizens from atrocities like those that had been witnessed during the war.\textsuperscript{397} Probably the biggest challenge in achieving that standard of internal human rights was the conflict between domestic and international law.

These two sets of laws exist in such a way that domestic law will in most cases win out, since in the case of international law there is no sovereign who is able to force the other states to comply with international human rights principles. The proliferation of human rights treaties highlights the relationship between domestic and international law.\textsuperscript{398}

\textsuperscript{396}Gudmundur Alfredsson and others, \textit{International Human Rights Monitoring Mechanisms} (1\textsuperscript{st} edn, Martinus Nijhoff Publishers 2009) 12.
\textsuperscript{398} \textit{Ibid.}
In the field of human rights, this issue is especially pertinent, as human rights treaties do not focus on the interests of states but are instead concerned with protecting individuals. Constitutions regulate the relationship between internal norms and treaties. Usually, constitutional systems in states adopt either dualist or monist systems.

The dualist system incorporates international and domestic legal systems that are autonomous and different from each other – therefore no conflict or association exists between them. Under this system, treaty obligations and rights must be incorporated by municipal law before having any domestic impact.\textsuperscript{399} Conversely, a monist system is based on a single legal entity that includes both domestic and international laws. Under this system it becomes unnecessary to convert international treaties to domestic laws to allow for incorporation into municipal laws. This allows for international treaties to be automatically executed.\textsuperscript{400}

There are two main ways in which states can internationalise human rights by means of international treaties. The first is through legislative and administrative reforms.\textsuperscript{401} Setting the standards of human rights at a national level depends greatly on how well treaties are able to converge international law and domestic law. One of the most successful examples of this was the formulation of labour policies in accordance with the International Labour Organisation (ILO), which was established as an agency of

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\item[\textsuperscript{399}] Susan Breau, \textit{Q & A Revision Guide International Law 2013 and 2014} (1\textsuperscript{st} edn, OUP Oxford 2013) 53.
\item[\textsuperscript{400}] Svitlana Chernykh, Tom Ginsburg, and Zachary Elkins, ‘Commitment and Diffusion: How and Why National Constitutions Incorporate International Law’, (1\textsuperscript{st} edn, \textit{University of Chicago Law Review} 2008) 204.
\item[\textsuperscript{401}] David Harris, \textit{International Human Rights Law} (1\textsuperscript{st} edn, OUP Oxford 2010) 124.
\end{itemize}
the League of Nations following World War I in 1919. Most countries have since then changed their domestic law to for example, prohibit child labour or slavery. It is therefore vital for national legislative reforms to be in line with treaties. The second and more effective way of internationalising human rights is through constitutional reform.

The constitution is the most basic and important set of laws in any country and is therefore the best tool to ensure that the obligations of a state under a treaty are actualised. Most modern constitutions in Europe for instance now include a bill of rights in their texts. In Islamic countries with the worst kinds of human rights abuses, no such bill of rights is included. Internationalisation has also been achieved by means of international declarations on human rights which are not necessarily binding but have nevertheless been ratified by a number of countries. For instance, the International Convention on the Elimination of All Forms of Racial Discrimination has been ratified by 177 countries.

The International Covenant on Civil and Political Rights has been ratified by 168 countries, while only 164 countries have ratified the International Covenant on Economic, Social, and Cultural Rights, and 189 countries have ratified the Convention on the Elimination of All Forms of Discrimination against Women. The Convention against

404 Murray Hunt, Using Human Rights Law in English Courts (1st edn, Bloomsbury Publishing 1997) xii.
Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, the Convention on the Rights of the Child, International Convention on the Protection of the Rights of all Migrant Workers and Members of their Families, the International Convention for the Protection of all Persons from Enforced Disappearance, and the Convention on the Rights of Persons with Disabilities have been ratified by 158, 196, 48, 51, and 160 states, respectively.406

10.2 The Charter of the United Nations

As noted earlier, the Charter of the United Nations was the earliest document intended to achieve human rights globally. The pursuit of international human rights was its aim, and it has arguably lived up to its mandate.407 Currently, there are over 192 countries in the world that are signatories of the charter. By being signatories, the members are mandated to promote universal respect for and observance of human rights.

In particular, Chapter 1 of the charter elaborates on the purpose of UN, which is to preserve security and peace worldwide. Chapter 2 outlines the procedure for gaining membership of the UN while Chapters 3 through 15 explain the various organs of the UN and their respective powers. Chapter 13 is concerned with internationalisation, and mandates that the National Assembly initiate studies and also makes recommendations for the purposes of promoting international cooperation in the political field and encouraging

406 Ibid.
the progressive development of international law and its codification.\textsuperscript{408} The Assembly is also mandated in the same Article to assist in the realisation of human rights and in achieving fundamental freedoms for all people. This charter can therefore be seen as a major factor in the global development of human rights.

10.3 The Universal Declaration of Human Rights (1948)

The Universal Declaration of Human Rights is arguably the most internationally recognised human rights document. Viewed solely as a text in its own right, the declaration can be seen as a proclamation of international rights and a culmination of the debate between secularism and religion in human rights. The UDHR is in and of itself not a binding international resolution, but it is considered to have acquired the force of international customary law, which means that it may be invoked to solve disputes in international tribunals.\textsuperscript{409}

The UDHR obliges its member states to aid in the promotion of human, economic, civil and social rights and asserts that these rights are an important part of promoting peace, justice and freedom in the world. It was the first international legal instrument that acted to limit the behaviour of states and to also to bestow obligations on them with regards to their citizens.\textsuperscript{410} The human rights commission that drafted the international Bill of Rights

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\textsuperscript{408} Universal Declaration of Human Rights (n 1)
\textsuperscript{409} Ezio Biglieri, G Prati, Encyclopedia of Public International Law (8\textsuperscript{th} edn, Elsevier Science Publisher B.V 1985) 307.
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in 1947 did not immediately agree on the form it should take and thus proceeded to create the UDHR alongside other treaties, but the UDHR inevitably became the priority.\footnote{Universal Declaration of Human Rights (n 1).}

The UDHR includes the basic principles known to all of humanity on dignity, liberty, equality and brotherhood in its first two articles, and also details the rights of individuals in relation to each other and to groups, as well as spiritual rights, public and political rights, economic, social and political rights. The final three articles of the document limit the rights to the context which they are to be realised. The third clause of its preamble clearly shows the intention of its drafters for the document to have some kind of binding force. It states that:

\begin{quote}
‘Whereas it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law.’\footnote{Ibid.}
\end{quote}

The internationalisation of human rights can therefore be contrasted with methods of implementing Islamic law. While both of them are concerned with how the law may be applied, human rights law (as discussed above) depends on the willingness of the states to be signatories, after which they become legally obligated to acknowledge and allow for the human rights of all persons within their jurisdiction. On the other hand, \textit{Shari’a} is forceful in how it is applied. It does not require any consent from Muslims in order for them to be bound by the obligations therein. It is arbitrarily applied to all Muslims and sometimes also
to non-Muslims. Also, *Shari’a* law is not concerned with universality, since it was conceived to govern Muslims specifically.
Chapter 3

The Application of International Human Rights Law in Islamic States

1. Human Rights in Islamic Law (Shari’a)

In Islamic countries, Shari’a represents the main body of law, and this is very significant in Middle Eastern countries. Shari’a is derived from the main religious precepts of the Islamic faith, the Qur’an and the Hadiths or Sunna, and its name is derived from the Arabic Shari’a, which can be translated as a body of religious and moral rules that stem from religious prophecy and which people should abide by.  

Still, Shari’a is not only comprised of moral guidelines, but also contains a multitude of laws which cover crime, marriage contracts, politics, economics, trade regulations and personal matters.

Questions as to the compatibility of Shari’a and human rights legislation have often been subject to academic debate, especially in light of Islamic countries’ refusal to sign the Universal Declaration of Human Rights (UDHR) in 1948. This has led those Islamic countries to assemble their own set of rights compatible with Shari’a law in the form of

the Cairo Declaration of Human Rights in Islam in 1990. Many criticise Shari’a and even argue that its concepts and rulings are ‘alien’ to true human rights, with numerous NGOs and media outlets pointing out the high number of human rights violations in Islamic countries.

Some scholars argued that Shari’a law as practised in a large number of Muslim countries in 1948 is incompatible with the UDHR, and that it is additionally a source of injustice, which some consider to be shameful to the Islamic religion and traditional Muslims who adhere to a more peaceful interpretation of the Qur’an and the Sunna. Ezzat however argues that not only is Shari’a compatible with human rights, but that the legal provisions of Shari’a can be considered quite effective in protecting and enforcing human rights in Islam.

However, there are some contradicting verses in the Qur’an, some of which promote tolerance and others which do not. This fact is reflected in the significant legal dualism showing differences in the ways in which holy texts are translated into Shari’a law. The Qur’an also forbids suicide, yet many people nowadays believe that the act is promoted in the Islamic religion. It should also be noted that some violent punishments,

416 Abdulkadir Mubarak, 'Shari’a and Human Rights, the Challenges Ahead' [2013] II (1) KOM 17–43.
such as the death penalty for abandoning one’s faith or stoning, are not found in the Qur’an but are instead part of the Hadiths, a set of reports about the prophet’s life that were written a century after his death.

Therefore, it can be said that opinions on the compatibility between the UDHR and Shari’a law vary, and it seems to be a matter of cultural difference. One study discusses whether or not a certain level of compatibility can be reached between the Shari’a law and the UDHR.\textsuperscript{419} The Rehman argues that the European Court of Human Rights believes that the democratic ideals of the UDHR cannot be achieved by applying Shari’a law, yet there are Islamic countries that have successfully embraced democracy under Shari’a law (such as Tunisia or Indonesia).\textsuperscript{420}

A 2015 report on human rights in Africa and the Middle East argues that even though there have been complaints that Shari’a law does not comply with the UDHR, a similar complaint could be made about the UDHR based on the fact that it is not culturally sensitive. In other words, human rights as they are outlined in the UDHR are not sensitive to various cultures, and simply because the human rights in Shari’a are not formulated in a similar manner does not automatically imply that Shari’a is incompatible with human rights or that it fails to respect human rights.\textsuperscript{421}

A number of attempts at reconciliation have been made in response to the theory that Shari’a is incompatible with human rights, and common ground was found in multiple

\textsuperscript{419} Rehman (n 227)
\textsuperscript{420} Robert W Hefner, \textit{Shari’a Law and Modern Muslim Ethics} (1\textsuperscript{st} edn, Indiana University Press 2016) 107.
areas. Some jurists have primarily searched for compatibility at the judicial and political level, recognising the fact that a number of Islamic states have managed to progress quite far towards democracy over the past decade (countries such as Tunisia or Indonesia have already adopted democracies).\textsuperscript{422}

The primary source of law for \textit{Shari’a} is the \textit{Qur’an}, which promotes the equality of all humans before of God: “The only One who is above all humans is their Creator and Lord and there is nothing that could be compared with Him” (\textit{Qur’an} 112:4).\textsuperscript{423} Equality in Islam is also discussed in other sources, which state that men and women were created equal before \textit{Allah} and neither of them has any privilege over His other creations. Therefore, discrimination based on race, lineage, sex, religion, class, language or colour can be considered to be prohibited under \textit{Shari’a} law.\textsuperscript{424}

Furthermore, the \textit{Qur’an} says that all mankind stems from one single original source, therefore claiming superiority or privilege over others based on any criteria is considered wrong in the eyes of \textit{Allah}. \textit{Shari’a} speaks about the preservation of the five essential necessities of life: religion, the self, the mind, honour and family, and wealth.\textsuperscript{425} Article 18 of the International Bill of Human Rights claims that everyone has the right “to freedom of thought, conscience and religion”, which is consistent and compatible with the

\begin{footnotesize}
\textsuperscript{422} Rehman (n 227)
\textsuperscript{425} Ibid.
\end{footnotesize}
manner in which Shari’a protects the essential necessities of life in the areas of religion, the self (conscience) and the mind (freedom of thought).  

Article 16 (3) of the IBHR argues that the family is the “natural and fundamental group unit of society” and is therefore entitled to protection, which is similar to what Shari’a argues about the family as an essential necessity of life and the duty the law has to protect it. In addition, Article 17 speaks about the right to property in a way that can be considered similar to the manner in which Shari’a treats the right to protect one’s own wealth.

However, while there are a number of similarities between human rights as depicted in the UDHR and Shari’a law, the sources of Shari’a law are also the Hadiths, and the writings of the Hadiths and the Qur’an are subject to interpretation. This is the reason there is such a contrast between how the Kingdom of Saudi Arabia and Tunisia apply Shari’a law in their legal systems.

2. Kingdom of Saudi Arabia’s Legal System and Sources of Law

The legal system of the Kingdom of Saudi Arabia, as is the case in many Islamic states, is based on Shari’a. The political system in this state is the monarchy, with the king being the supreme ruler of the country. The Basic Law of Governance stipulates that Saudi Arabia

427 Ibid.
428 Al-Shena (n 424).
is a fully sovereign state, with its religion being Islam and its constitution being the Qur’an and the Sunna (Article 1).\footnote{Kingdom of Saudi Arabia Basic Law of Governance (n 191)}

The Basic Law of Governance also stipulates that the throne will remain in the possession of the royal family, which consists of the sons and descendants of the founder of the kingdom, King Abdul Aziz bin Abdul Rahman Al Saud. Furthermore, the kingdom is divided into 13 provinces, each of them governed by a prince.\footnote{Ibid.} While it is believed that the KSA does not have a formal written constitution, it is stipulated in the Basic Law of Governance that the constitution of KSA is the Book of God and the Traditions (Sunna). To that extent, other scholars consider the Basic Law of Governance to be the constitution of Saudi Arabia.\footnote{John R Bowen, 'Shari’a As Discourse: Legal Traditions and the Encounter with Europe' [2011] 34(1) Political and Legal Anthropology Review 182-185.}

Many researchers have argued that Shari’a as applied in the Kingdom of Saudi Arabia has led to a legislative system that has enforced strict rules with regards to criminal law and the conduct of women. With little codified legislation available in Kingdom of Saudi Arabia, the letters of the Qur’an and the Sunna are open to interpretation. The legislative power belongs to the Ulama, who are entrusted with the interpretation of the canonic texts and who often trust the work of their predecessors in their decision-making processes.\footnote{Ibid.}

In 2005, the Ulama provoked a global debate by issuing a fatwa (law) prohibiting women from driving a car. This was not the first time this ban had been instated, but it was
the first time a *fatwa* was issued in order to further enforce the ban. Women had previously been prohibited from driving for 15 years, but without an official law. The Saudi legal system, established by the Basic Law of Governance, calls for a convergence of Saudi jurisprudence and interpretation of divine law.

While the task of interpreting the law, as previously stated, belongs to the *Ulama* (and their interpretations can be found in books they and their predecessors have written), the king can ultimately take any action, in accordance with his interpretation of the divine law, in order to ensure the public good. The fifth part of the Basic Law of Governance outlines the rights and duties of the state. To that end, Article 23 argues that it is the duty of the state to protect the Islamic Creed and ensure that *Shari’a* is properly applied by enforcing and encouraging good and forbidding evil. The formulation here seems ambiguous and allows for the application of *Shari’a* law based on interpretation.

The most significant article in the context of this work is the 26th article of the Basic Law of Governance, which says that it is the state’s duty is to protect human rights in accordance with Islamic *Shari’a*. Nevertheless, the UN was urged to suspend Saudi Arabia’s membership of the Human Rights council after repeated reports of human rights violations, violence and abuses from the Religious Police were reported. The issue here

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434 Ibid.
is the manner in which the law is formulated. Thus, the Basic Law of governance holds the state accountable for the protection of human rights, but only within the boundaries of Shari’a law. This gives Saudi Arabia the legal backing to reject accusations of human rights violations on the grounds of religious and cultural motivations.

The Kingdom of Saudi Arabia executes a large number of criminals each year, claiming that the legal basis for its actions can be found in Shari’a law, when many have argued that they are in fact they are taking extreme measures under the protection of a legal system that is based on a skewed interpretation of real Shari’a law. After the end of WWI and the defeat of the Ottoman Empire, however, the Islamic countries did not have any experience with the modern form of government they should have adhered to. In other words, the fall of the Ottoman Empire left the Islamic countries unprepared to deal with modern democracy.

An “unnatural fusion” between modern government and the Islamic religion may have eventually led to a lack of balance in the manner in which Shari’a law was applied in various Islamic countries. Saudi Arabia is one of the countries that seem to have an extreme interpretation of Shari’a. Still, even though Shari’a is open to interpretation, it also contains processes and procedures that are quite clear.

A Human Rights Watch report shows that in 2014 Saudi Arabia continued to send to trial, convict and imprison human rights activists on account of their activities, which

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were described by the Human Rights Watch as peaceful. The same report also detailed discrimination against women and those of a different religion, and showed that Saudi Arabia continued to fail to protect the rights and liberties of foreign workers (an estimated 9 million people).

Furthermore, it has been claimed that the Kingdom of Saudi Arabia continues to subject people to unfair trials and detention and that the new regulations for terrorism prevention enforced by the Specialized Criminal Court are used to criminalise any form of criticism of the government, thus viewing even peaceful criticism as acts of terrorism. For example, on 15 April 2014, the Specialized Criminal Court ordered the detention of a prominent lawyer and human rights advocate, Waleed Abu Al-Khair, sentencing him to 15 years of imprisonment for his activism.

In addition to that, Waleed Abu al-Khair was also sentenced to pay a fine of (100,000 Saudi Riyals) and was prohibited from traveling for 15 years. Following his resistance to being moved to another prison on August 11, Waleed Abu al-Khair was beaten by prison authorities and dragged away in chains, which resulted in severe injuries to his ankles. While it has been claimed that these actions are based on Shari’a law, the KSA seems to have chosen a different interpretation of divine law. Saudi Arabia nevertheless remains one of the most prominent Arab countries, and is considered the Cradle of Islam,

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seeing as it is home to Mecca and Medina.⁴⁴¹ Legislative history shows that the regime has continuously increased its strictness over time and recent reforms have not improved the way in which the law in Saudi Arabia is enforced. However, the first female member of the Consultative Council was recently appointed by the King, in a gesture that was perceived as showing a willingness to reform. ⁴⁴²

3. Republic of Tunisia's Legal System and Sources of Law

The Constitution of Tunisia is based on the French model, while also incorporating some aspects of Shari’a law. However, the Tunisian legal system is more influenced by Western law due to the application of the French model, even though some basic dictates of Shari’a still remain in family law. Issues arose when president Bourguiba was deposed by his prime minister, who believed in a more strict interpretation of Shari’a as per the Saudi model.

Bourguiba was re-elected until he reached his limit of four terms as per the constitution (two times he ran without opposition); following this proposed a referendum in 2002 to change the constitution, allowing him to run for an unlimited number of times.⁴⁴³ However, sources claim that his presidency soon transformed into a dictatorship, with the

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Republic of Tunisia moving towards a state system similar to other Arab countries such as Saudi Arabia. By 2010 the country was faced with poverty, repression and injustice, when a fruit vendor set himself on fire in the street to protest the abusive police force and extreme poverty.

This led to massive public demonstrations throughout Tunisia, especially in the capital, a chain of actions which later became known as the Jasmine Revolution. This was the start of the Arab Spring, perhaps the most significant event of democratisation in modern times. The Jasmine Revolution led to the free election of the National Constituent Assembly (NCA), whose role it was to draft and publish a new constitution, one that would be fair to the people. The progress Tunisia achieved with this revolution is reflected in their new constitution, drafted in 2014. The preamble of the constitution recognises the sacrifices of the martyrs of the revolution in 2010-2011 and sets out to honour their sacrifice by proposing a legal system that protects the rights of the people of Tunisia. The aim is to build a republican and democratic system without ignoring Shari’a law, Muslim culture and the Islamic religion.

Moreover, numerous legal reforms have diminished the gap between Tunisian law and international human rights, furthering a process that aims to align state laws and

444 D Touchent, 'A guide to the Tunisian legal system' (September 2013) <http://www.nyulawglobal.org/globalex/Tunisia1.html> accessed 1 August 2015.
446 Tunisia’s Constitution (n 156).
universal laws. Two main differences between the Saudi Constitution and the Tunisian Constitution can be seen immediately. The first is that the Tunisian Constitution requires government institutions and heads of state to abide by the written law (Article 11). Also, the constitution issues provisions and mandates regarding democratic elections (a mandate is 5 years long, with elections organised in the last sixty days before the end of a term – Article 56). Furthermore, Articles 65-67 of the constitution describe the numerous law codes of the country, another difference to the constitution of the Kingdom of Saudi Arabia.

The second major difference consists of the fact that, in the preambles of the two constitutions, their purposes are described in different ways. The Tunisian Constitution claims it is drafted “in the name of the Tunisian people, with the help of God”, while the Saudi Constitution states that citizens “shall pledge allegiance to the King on the basis of the Book of God and the Prophet's Sunna, and emphasises the principle of "hearing is obeying" both in prosperity and adversity, in situations pleasant and unpleasant” (Article 6). The article is reproduced in full here as its formulation stresses the difference in the manner in which each of the two constitutions define the role of the citizen: while the Saudi Constitution describes the citizen as an allegiant of the king, the Tunisian Constitution puts the government at the service of the people.

Also, as the existing literature shows, Tunisian law condemns violence, which is defined as coercion “without the authority of the law” in order to force a person to perform

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448 Ibid.
an act that they did not consent to.\textsuperscript{449} According to this definition, Tunisian law categorises rape as violence and punishes it accordingly. At the other end of the spectrum, Saudi Arabia Court recently sentenced a rape victim to six months of imprisonment and 200 lashes (in public) for speaking to the press about what happened to her, which was considered an act of indecency and an attack on public morals.\textsuperscript{450}

Nevertheless, despite these significant differences, and despite the fact that Human Rights Watch argues that Tunisia has come a long way from a quasi-dictatorship to a democracy, the Tunisian Constitution is still criticised.\textsuperscript{451} It has been argued that a number of the articles of the constitution fail to achieve their purpose, with the first example being that of Article 6, which aims to protect religion and ensure freedom of religion in Tunisia. Criticism of this article consists of pointing out a contradiction: the article seems to suggest that the state is the protector of the sacred while at the same time allowing for freedom of religion.

Taking the example of a more strict Islamic state, such as Saudi Arabia, the contrast becomes obvious, but in the context of the UDHR, this article seems to bring Tunisia closer in line with international human rights. The concern with this contradiction from this point

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\footnote{Amna Guellali, 'The problem with Tunisia’s new constitution' (3 February 2014) <https://www.hrw.org/news/2014/02/03/problem-tunisias-new-constitution> accessed 2 September 2015.}
\end{footnotes}
of view centres on the future application and interpretation of the article. The legal system in Tunisia is well-described in existing research. Although it is based on a civil law judicial model, the codification of Tunisian law is neither cohesive nor dual, but it is based on a thematic structure.\textsuperscript{452} Thus, Tunisia has a Property Law, a Personal Status Code and many others that separately regulate what is otherwise regulated in other systems of law through a single, unifying Civil Code. Also, unlike in Saudi Arabia, which lacks a clearly-defined constitution, in Tunisia the constitution prevails over any national legislation, and international conventions prevail over national laws.\textsuperscript{453}

This last fact was also reflected by the decision to lift reservations in relation to CEDAW in 2011. For this reason, the incidence of severe discrimination against women and religious minorities in this country is lower than in Saudi Arabia, as the Personal Status Code protects the family and even regulates and permits divorce. The family as an entity is also protected under the Constitution in Article 7.\textsuperscript{454} In fact, an entire section of the constitution of Tunisia is dedicated to the protection of human rights. Still, it is important to note that the lack of sufficient precedents can make the application of the new law difficult.

As the new constitution seems to focus more on the involvement of civil society in the life of the state, this has been explored in new research, especially in relation to the events of the Arab Spring and the approach to legal matters that other states, such as the

\textsuperscript{452} Stigall (n 449).
\textsuperscript{453} Maaike Voorhoeve, \textit{Family law in Islam: Divorce, marriage and women in the Muslim world} (1\textsuperscript{st} edn, I. B. Tauris & Company 2012) 171.
\textsuperscript{454} Tunisia’s Constitution (n 156).
Kingdom of Saudi Arabia, are taking.\textsuperscript{455} It has been argued that even though Tunisia’s uprising against its president, dictator Ben Ali, has become a symbol of the people’s power and role in guiding a regime towards democracy, there is still some scepticism as to the success of the Arab Spring in other Islamic states, since Tunisia, small as it is, also has a history of protecting civil rights and was always more inclined towards religious homogeneity rather than religious extremism.\textsuperscript{456}

This may be one of the reasons why there continues to be some criticism towards the judicial system in Tunisia. Tunisia has managed to create a body of law that oversees the functioning of the judicial system, and there are not sufficient controls put in place to ensure the independence of this body.\textsuperscript{457} The most significant problem with the system is that only a small number of judges are elected to the body, called the Supreme Judicial Council, by their peers, the majority of them whom are appointed by the executive.

Republic of Tunisia, in order to further improve itself, increase the number of elected judges on the Supreme Judicial Council, remove the membership of the general prosecutor of military justice, since military courts should operate separately from civil courts, place the council under the supervision of the General Inspections Service and strengthen assurances against arbitrary transfers.\textsuperscript{458}


\textsuperscript{456} Ibid.


\textsuperscript{458} Ibid.
4. Human Rights in the Kingdom Saudi Arabia

As previously discussed, the strict regime of the Kingdom of Saudi Arabia has caused much debate with regards to its practices, as they are often considered to be against human rights. It is important to note that Saudi Arabia has refused in the past and continues to refuse to sign the UDHR, as they consider Shari’a law sufficient to protect the rights of the people. It is written in the Basic Law of Governance that the state “shall protect human rights” following the provisions of Shari’a (Article 26).\(^{459}\)

The Law of Protection from Abuse aims to protect citizens from all forms of abuse and provide assistance to the abused, while also punishing the abuser. The Law also says that it is the duty of the Ministry to evaluate cases of alleged abuse and to take immediate measures to provide health care to the victims, ensure the abuse stops, provide counselling and, if the case requires, contact the competent authorities (Article 7-10).\(^ {460}\) The passing of this law came after an increased amount of criticism of the Kingdom of Saudi Arabia for the lack of laws in the country. There is a strong cultural component in the construction of the legal system in Saudi Arabia, which is reflected in the judicial decisions in relation to human rights violation cases.

Despite this, more recent evidence suggests the law has failed to reach its objectives, with over 1000 cases of domestic abuse being reported in 2013.\(^ {461}\) Thus,

\(^{459}\) Kingdom of Saudi Arabia Basic Law of Governance (n 191)
\(^{460}\) Ibid.
criticism of the law due to its inability to protect basic human rights and of the Kingdom of Saudi Arabia itself for being unable or unwilling to enact its own legislation, increased. Amnesty International accuses Saudi Arabia of not fulfilling its promises on human rights.

It has been argued that even though the Shura Council and the body of Ministers can enact laws, they still have no real power, as the Council members are appointed by the king and the real power lies with him at all times.\textsuperscript{462} Even though the Kingdom of Saudi Arabia has begun to pass laws aimed at protecting human rights, these seem to be only a formality at the moment, as the criminal justice system is considered fundamentally flawed, and the procedures regarding arrests, trials and detention, as well as prisoner rights are far from aligned with international standards.\textsuperscript{463}

A report by Cairo Institute for Human Rights Studies on Saudi Arabia also details the struggle citizens have gone through in the last decade due to the harsh theocracy. When new King came to power in 2005 there were high hopes for modernisation and reform in the areas of women’s rights, religious tolerance, a fair judicial system and freedom of expression.\textsuperscript{464} The king’s public statements raised people’s hopes, and some change may have been enacted, yet conservative factions within the royal family and the religious establishment have resisted change, creating tensions in the political arena. The Committee

\textsuperscript{463} Ibid.
for the Promotion of Virtue and the Prevention of Vice, also known as the religious police, which is are responsible for enacting Shari’ā law, is also responsible for numerous acts of violence and suppression of liberties and human rights over the past years.

Additionally, there is growing economic inequality in the country, as the underprivileged live in poor conditions while the wealthy live in luxury. Nevertheless, the only evidence to support Saudi Arabia’s violation of human rights come from international reports as the Saudi judicial system is closed to outsiders, and legal proceedings are not made available to the general public, as is the case in continental law. These extreme measures have been justified by the global fight against terrorism. Since 2009 Saudi Arabia seems to have responded to this threat by imprisoning thousands of suspects and offering them the chance to participate in religious programmes in order to rehabilitate them. Some argue that these rehabilitation programmes are themselves creating terrorists, but no concrete evidence has been found so far to fully support that claim.465

A Human Rights Watch report shows that, of the thousands of prisoners detained since 2003, less than 9000 were sent to trial by 2008.466 Therefore they spent five years being detained without trial, which indicates that the KSA has willingly violated their right to freedom. The judicial proceedings in this case remain unclear, as the legal cases tried in Saudi courts are not made public.

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Thus, Human Rights Watch made recommended to Saudi Arabia in 2009 that it release all detainees who have not benefited from a trial or to conduct trials in order to charge them with criminal offenses.\textsuperscript{467} Furthermore, information has been found that some prisoners challenged their detention at the Board of Grievances and were successful, yet have not yet been released. The Human Rights Watch recommends their immediate release as well. Another recommendation was made to ensure that the prisoners receive fair trials. Saudi officials did not grant Human Rights Watch permission to visit the prisoners or to sit in on their trials.

Concerns about human rights issues have also been directly expressed by the USA, a country which recognises the importance of Saudi Arabia at an international level and which provided it with assistance in its fight against terrorism, claiming close security ties with the state.\textsuperscript{468} The suppression of peaceful activists and NGOs that work for reforms for the protection of human rights continues to the present day. This is a direct violation of the freedom of expression, one of the essential rights guaranteed by the International Bill of Human Rights in Article 19 subsection 2, given that the activists’ actions did not threaten national security or public order, nor did they disrespect the rights of others.\textsuperscript{469}

Despite the fact that peaceful human rights activists risk being imprisoned and sentenced for their actions, researchers have observed that they are becoming more and

\textsuperscript{467} Ibid.
\textsuperscript{469} The International Bill of Human Rights (n 426).
more organised, transforming themselves into a true force for change.\textsuperscript{470} Activists that disapprove of the extreme traditionalism of the Saudi regime have formed the Adala Centre for Human Rights, although the government has so far refused to register it.\textsuperscript{471} The leaders of this organisation have continuously published allegations of the torture that protesters and activists go through during their time in detention. The centre has also reported that not only does the Kingdom not respect basic human rights as established by the UDHR, but that they were also found to be in violation of their own human rights laws, engaging in long periods of detention without trial.

As the country has no written penal code, capital punishment can be applied in an arbitrary manner, even for nonviolent offenses such as adultery, and even in the case of crimes committed by minors.\textsuperscript{472} Instances of torture and confessions obtained through torture are also reportedly common in the Kingdom of Saudi Arabia, even though Shari’\textquotesingle a law forbids judges to accept a confession obtained under duress. While people who have been detained in the Kingdom of Saudi Arabia allege torture and violence, no deaths during detention were reported by human rights organisations.\textsuperscript{473}

Depending on the severity of the offense, the judicial system also allows for house arrests, travel bans or religious counselling as alternatives to incarceration. Nevertheless,

\textsuperscript{471} \textit{Ibid.}  
\textsuperscript{473} \textit{Ibid.}
as previously mentioned, independent monitoring is not permitted, since the authorities prohibit human rights organisations from visiting their prisoners and sitting in on trials, especially after allegations of human rights violations have been made.

5. Human Rights in the Republic of Tunisia

Ever since the events of the Arab Spring, the human rights situation in the Republic of Tunisia seems to have improved. The fact that the Republic of Tunisia is a constitutional republic with a parliament and a president whose power is limited by the constitution may have contributed to the rapid change after the Jasmine Revolution.474

The Republic of Tunisia does not implement capital punishment and does not conduct public executions, unlike Saudi Arabia. Furthermore, Tunisia has also tried and charged those guilty with manslaughter, but the trials were considered to be subject to judicial fallacy by international human rights bodies.475 As per a report of the US State Department, the police have been repeatedly accused of instituting harsh treatments in detention centres, even though the law specifically prohibits the use of torture in the law

Local lawyers and human rights activists have criticised Tunisian law enforcement for its reluctance to investigate these allegations.

An Amnesty International report has also found several other problems that need to be brought to the attention of legislative bodies in Tunisia in order to improve the justice system with regards to the protection of human rights. The first problem is a lack of transparency. According to Amnesty International, establishing the fact that violations of human rights did actually occur can assist the judicial bodies in correctly identifying and punishing abuse.

The second problem is a lack of justice, and in order to correct this a just and lawful investigation of past violations and prosecution of the suspects according to the evidence and the law is required. The third problem identified by Amnesty International is lack of reparation, which can be remedied by the provision of reparations in any form (rehabilitation, compensation, public apologies etc.) to the victims of human rights violations and their families. Lastly, the government needs to guarantee that the violations and abuses will not occur again by making changes and amendments to laws and legal practices.

Some of these changes seem to have already been achieved by means of the newly formulated constitution. Before its publication, numerous organisations made recommendations to the Tunisian constitutional decision-making body as to what the new constitution should contain. It was argued that a significant portion of the constitution

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476 Bureau of Democracy, Human Rights and Labor (n 474).
478 Ibid.
should be dedicated to instituting a bill of human rights, a practise that has become quite common since the adoption of the British Magna Carta, the American Declaration of Independence and the French *Déclaration des droits de l'homme et du citoyen* (Declaration of the Rights of Man and the Citizen).

It was argued that the implementation of a bill of human rights in the Tunisian Constitution was crucial for a number of reasons. The first reason was the significant contribution this would make to the culture of liberty in Tunisia. According to experts, a distinct and clearly defined bill of human rights within the constitution of a country is the first step towards nurturing a culture of liberty in the community. Secondly, a written bill of human rights would enable the Tunisian authorities to prepare a judicial response in cases of human rights abuse, a response that would otherwise be unsupported by current legislation. Thirdly, the constitutional protection of human rights would also help the people understand the meaning and purpose of human rights.

The newly-adopted Constitution of Tunisia demonstrates that the country is committed to the protection of human rights. Title Two of the constitution, consisting of Articles 21-49, demonstrates that not only does Tunisia desire to protect human rights according to *Shari’a* law, but that it is also attempting to adhere to the UDHR.

The change in the status of human rights brought on by the Arab Spring seems to be the most significant in Tunisia, the origin of the protests. The Republic of Tunisia, like

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480 Rainer Grote Tilmann J Roder, *Constitutionalism, Human Rights, and Islam After the Arab Spring* (1st edn, Oxford University Press 2016) 82.

481 Tunisia’s Constitution (n 156)
the Kingdom of Saudi Arabia, has had numerous reports of police brutality and killings, especially during the protests in 2011, but evidence suggests the numbers are continuously dropping.¹⁴⁸² Unlike Saudi Arabia, Tunisia is demonstrating an effort to improve prison conditions and ban law enforcement abuse. Furthermore, Tunisia was the first country to remove the reservations they had on the CEDAW (Convention of Elimination of All Forms of Discrimination Against Women).¹⁴⁸³

Still, as has been shown in other sources, the transition period of 2011 to 2013 was not easy, neither for the authorities nor for the people. Evidence points towards the lack of understanding of the meaning and purpose of transitional justice, and the Tunisian struggle has been compared a tug of war. Antagonistic policy formulations and forceful debates were common in the period between 2011 and 2013.¹⁴⁸⁴

International bodies came to the assistance of authorities in the country, who at times seemed not to know which direction to lead in. After much deliberation, the decision-making bodies appear to have found common ground between the UDHR and Shari’a law in terms of protecting human rights. Nevertheless, there are still reports of human rights violations, especially in rural areas of Tunisia which are inhabited by people with a more

traditional approach to Islamic law. This shows how cultural and religious factors impact the law.

According to Human Rights Watch, Tunisia had an oppressive system of laws before the Arab Spring, especially in their Penal Code. For instance, peaceful expression was criminalised under the pre-Arab Spring law, which led to restrictions on freedom of speech. Since then, a committee has revised and amended the penal code, reducing the number of types of protests and expressions that are criminalised. Furthermore, the prison penalty for all forms of protests was removed.

In this regard, Tunisia takes a different approach to Saudi Arabia, obtaining in this manner a higher level of freedom of speech than the aforementioned state. Also, defamation was changed from a criminal matter to a civil one, although issues surrounding this continue to arise as per the HRW report. Online freedom was also increased, another way in which Tunisia’s approach to human rights differs of that of Saudi Arabia.

Despite all of these changes, some have still expressed concerns that Tunisia will return to an oppressive form of government in the future. The process of change has been challenging and it is not yet complete, with numerous violations still being observed by international and local human rights organisations. Furthermore, significant concerns

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486 Ibid.
have been expressed in relation to the third article of the draft version of the Tunisian Constitution, which criminalised religious offenses (which could include any form of public display of religious symbolism that could be considered offensive to Islam).  

The removal and replacement of this particular article brings Tunisia closer in line with the UDHR, and it now only states that the state is the protector of religion and that it guarantees freedom of belief and free exercise of religious practices. Furthermore, the Tunisian Constitution promotes tolerance and ensures the protection of the sacred, calling for mosque neutrality on all matters of the state, which limits the involvement of religion in judicial proceedings.


When examining the position of the Kingdom of Saudi Arabia on the Universal Declaration of Human Rights, it is important to mention that the Kingdom of Saudi Arabia did not sign the Declaration in 1948 at its inception and refuses to this day to sign and adhere to it, since it believes that some of its provisions are in direct conflict with the Islamic religion. Furthermore, Saudi Arabia claims that Shari’a law provides sufficient insight into the needs of the people, and that the current law is applied in a fair manner.

489 Tunisia’s Constitution (n 156).
490 Ibid.
Saudi Arabia is not the only Islamic state that has refused to sign the UDHR, but its position can be considered unique and unusual.\textsuperscript{491} In 1970 Saudi Arabia published a memorandum on the issue of human rights, explaining its refusal to sign the UDHR. The memorandum argues that unlike in the Declaration of Human Rights, the human rights as depicted in \textit{Shari’a} law are not connected to moral formulas but are depicted as precise prescriptions of law that need to be applied in accordance to the legislation (which in Saudi Arabia is an interpretation of \textit{Shari’a} based on revelation).\textsuperscript{492} Failure to comply with these commands leads to sanctions. Such commands include prohibiting marriage between a Muslim woman and a non-Muslim man, as well as prohibiting a Muslim man to marry a woman of another religion, motivated by the desire to preserve the traditional family. Issues of women’s rights, the absence of a constitution and corporal punishment, and the position of the Saudi jurists (\textit{Ulama}) indicated a poor grasp and a refusal to consider change.

Motivated by security concerns, Saudi Arabia has in the past and continues to severely violate human rights. Critics of the regime argue that the supposed security of citizens in Saudi Arabia is a mere illusion used by the regime to justify their crimes against their own people.\textsuperscript{493} Furthermore, the ban on political parties and associations of any kind has led to a significant amount of criticism of the Saudi regime, but this has not led to change. Further reports of corporal punishments and violence have been received in the past two decades, and the actions of the government were deemed immoral.\textsuperscript{494}

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\textsuperscript{491} Waardenburg (n 322).
\textsuperscript{492} \textit{Ibid.}
\textsuperscript{493} JE Peterson, \textit{Saudi Arabia and the Illusion of Security} (1\textsuperscript{st} edn, Oxford University Press 2002) 15.
\end{flushright}
Despite Kingdom of Saudi Arabia’s refusal to adhere to the UDHR, the same attitude is not perceived in the citizens themselves. In a country with an absolute monarchy where political parties are banned and protests are not only prohibited but also met with extreme punishments, the media is forbidden from showing the concerns and dissatisfactions of the people, however they use the internet and social media to express their feelings and emotions, call for action or critique the government’s inability to protect its own people from natural disaster.\footnote{Stephane Lacroix, 'Between Islamists and Liberals: Saudi Arabia’s New ‘Islamo Liberal’ Reformists' [2004] 58(3) Middle East Journal 345–365.}

The lawyer and human rights defender Waleed Abu Al Khair for example argued that he would sue the municipality for the Jeddah flood on behalf of the families who lost their loved ones in the disaster. He is now serving 15 years of imprisonment in Saudi Arabia for his actions to defend human rights. The detention of Waleed Abu Al-Khair is not the only instance of unlawful detention that has been condemned in Saudi Arabia.\footnote{Amnesty International, 'Waleed Abu Al-Khair, imprisoned for defending human rights' (2014) https://www.amnesty.org.uk/saudi-arabia-free-human-rights-lawyer-waleed-abulkhair-abu-al-khair/>accessed 12 April 2016.}

In 2015 Amnesty International condemned once again the actions of Saudi Arabia as the authorities detained nine peaceful activists for their role in human rights defence actions.\footnote{Amnesty International, 'Saudi Arabia: UN expert working group highlights appalling record on unlawful detention of peaceful activists' (23 November 2015) <https://www.amnesty.org/en/latest/news/2015/11/saudi-arabia-un-expert-working-group-highlights-appalling-record-on-unlawful-detention-of-peaceful-activists/> accessed 12 April 2016.} Despite the fact that they did not sign the UDHR, Saudi Arabia continues to be a member of the UN Human Rights Council, a fact which is often brought up in discussion.
of its treatment of human rights activists. International defenders of human rights suggest to Saudi authorities that instead of trying to silence human rights activists and arresting lawyers (a direct reference to the scandal of Waleed Abu Al Khair’s arrest, prosecution and detention) they should seek to address the fact that, as a member of the UN Human Rights Council, they have a duty to respect and adhere to universal human rights, despite the fact that they did not sign the declaration and continue to disapprove of some of the articles.498

Other critics not only condemn Saudi authoritarianism but also the support the country continues to receive from the USA, the UK and France, despite its repressive actions.499 The fact that seems to baffle critics most is that members of oppressive governments are not always religious extremists and traditionalists, but instead have benefited from a Western education and were integrated into the Western media. Yet to some extent they continue to engage in the same politics and take the same actions even when the whole world condemns their behaviour and brutal laws.500 Justified by the war on terror that Saudi Arabia declared almost two decades ago, the political regime continues to punish men, women and children who raise criticism of the government by accusing them of terrorism.

While it is important to note that human rights are perceived differently depending on culture, it is also important to note that many Muslim critics of the Saudi regime argue

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498 Amnesty International, 'Waleed Abu Al-Khair' (n 496).
500 Ibid.
that the Qur’an promotes peace and harmony rather than violence and killing.\textsuperscript{501} The Qur’an also admits that there is no difference between people of different cultures, races and religions. This admission is further underlined by the prophet arguing that no human is superior to another based on wealth, religion, race or gender.

Since Shari’a law is based on the Qur’an and the prophet’s own interpretations of the Qur’an as described in the Hadiths, there should be no reason to allow discrimination based on gender or religious beliefs, yet Saudi Arabia has, in practice, differentiated between Muslims and non-Muslims. It can therefore be argued that the opposition to the UDHR that Saudi Arabia has repeatedly expressed may have no basis in Shari’a law.\textsuperscript{502}

7. Republic of Tunisia’s Position on the Universal Declaration of Human Rights (1948)

Like the Kingdom of Saudi Arabia, Republic of Tunisia is among the signatories of the UDHR. However, as previously discussed, their approach to human rights seems to adhere much more closely to the UDHR than is the case with the Kingdom of Saudi Arabia. Also, Republic of Tunisia, in their post-Arab Spring attempt to draft a new constitution, paid attention to outside criticism and requirements and, while still respecting Shari’a law, made political and legal decisions that would lead to a consensus between Islamic law and the UDHR.

\textsuperscript{501} Chris Seiple and others, The Routledge Handbook of Religion and Security (1\textsuperscript{st} edn, Routledge 2013) 70.
\textsuperscript{502} Ibid.
For example, before the publication of their new constitution, Tunisia received a manifesto from Amnesty International concerning human rights. This manifesto contained ten points in pursuit of the protection of human rights that would ensure a better future for the republic and its citizens. Amnesty International also urged Republic of Tunisia’s political parties to adopt the ten points of the manifesto into the bodies of their own constitutions, which led to a significant amount of debate among the political parties in the Republic of Tunisia. Still, as the constitution shows, the points were taken into account to some extent, but they were also evaluated in relation to Shari’a law, and the final formulation was in accordance with Islamic law.

The first point of the manifesto was to end discrimination against women. All political parties were requested to take a pledge to end violence and discrimination against women by altering or eliminating any laws that were discriminatory in any way. The first point also demanded the elimination of the articles in the Penal Code that allowed men to escape prosecution for rape by marrying the victim. The second point required the state to fight torture and cruelty by establishing an authoritative body committed to doing so. The main issue raised by this point is that of the mistreatment of detainees by law enforcement personnel.

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504 Ibid.
authorities. The third point focuses on the same subject, requiring decision-making parties to make security forces accountable for their actions.

The fourth point requires the end of government immunity and the immediate investigation of all accusations of human rights violations. This was demanded in light of the fact that Tunisian judicial officials have proven reluctant to investigate cases of violence and crime committed by law enforcement agents in the past. The fifth point requires a guarantee of the independence of the judicial system, while the sixth mandates upholding the right to freedom of expression. The seventh point argues that the new constitution should uphold the right of freedom of association. The sixth and seventh points are particularly important, as Islamic countries are known for having a tendency towards limiting those particular rights.

The example of Saudi Arabia clearly shows an extreme approach to limiting the freedoms of expression and association. However Tunisia, in its new constitution, specifically grants these rights. These last three points have created some controversy and disagreement among politicians in Tunisia. While some agreed with the other seven points, they disapproved of the final three.

These mandate the protection of refugees and asylum seekers, the realisation of the economic and socio-cultural rights of the people and the abolition of the death penalty. The new constitution of Tunisia does not abolish capital punishment, but the judicial system and penal code has made death penalty punishments rarer, even commuting 122 death

\[506\] Ibid.

\[507\] Parker (n 503).
penalty sentences to prison terms. A conference was held in order to discuss the manifesto and the ten requirements, which led to more signatories coming forward.

This manifesto was not the only instance in which Amnesty International became involved with the human rights approach of the Tunisian Constitution. A 2016 report argues that, although it is not as prevalent as in the time of President Ben Ali, Tunisian prisoners still fall victim to torture and ill-treatment in detention. While the cases are less severe than those found in Saudi Arabia, they are serious enough to raise some criticism and to demand action from Amnesty International.

Testimonies collected by Amnesty International between 2011 and 2016 claim that the torture often occurs during the first days of detention, before the accused is brought before a judge, and often with the purpose of forcing a confession. Nevertheless, the appearance of the accused before a judge occurs relatively quickly, unlike in Saudi Arabia, where there have been instances of years of detention before any trial was conducted. Another human rights-related intervention was made by Amnesty International in 2014, when the organisation stressed the fact that it is Tunisia’s duty to ensure, after the publication of its constitution, that the human rights detailed in the document were adhered

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511 Ibid.
to and respected by all citizens and institutions, and that no instances of human rights violations should occur.\textsuperscript{512}

It is important to note the position that Tunisia has held over time in relation to these interventions, in comparison to the position of Saudi Arabia. While Saudi officials have denied international human rights organisations any involvement in their internal legislation and affairs and showed no reaction to the extensive amount of criticism that their human rights violations brought upon them, Tunisia demonstrated more openness and a greater desire to adhere to some of the Universal Declaration of Human Rights provisions.

The new constitution of Tunisia is also praised for guaranteeing equal rights for all citizens.\textsuperscript{513} While this right is part of many western constitutions, and therefore may not seem like such a significant achievement, critics argue that this is an important step for Tunisia as an Islamic country.\textsuperscript{514} As a result, 63 women won seats in the National Constitution Assembly (NCA) and continue to fight for the improvement of the treatment of women in Tunisia and the Arab world.\textsuperscript{515}

Also, there is evidence that the NCA worked with civil society in drafting the constitution, and the civil society is autonomous, a fact that, at the moment, cannot be said

\textsuperscript{514} \textit{Ibid.}
about Saudi Arabia. Tunisia’s position towards the Universal Declaration of Human Rights is therefore quite unique in the Islamic arena, and while some of the UDHR’s human rights are still being debated, as they are considered incompatible with Shari’a law, Tunisia has made significant progress towards a more international approach in their legislative system, unlike Saudi Arabia, which continues to reject any kind of reform.  


Since most of the Islamic states did not adhere to the Universal Declaration of Human Rights on the grounds that some of its provisions were against Shari’a law, an alternative was created in 1990 in the form of the Cairo Declaration of Human Rights in Islam. Naturally, the Cairo Declaration of Human Rights in Islam was met with criticism, among them being that it failed to protect women’s rights and therefore did not achieve equality, affirmed the superiority of men over women, significantly constrained freedom of religion, prohibited women from marrying outside of the Islamic religion, enforced punishments according to Shari’a law, forbid any criticism of religion, the law or the Prophet (limiting freedom of speech) and introduced discrimination against non-Muslims.

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516 Ibid.
517 Cairo Declaration on Human Rights in Islam (n 323).
The Cairo Declaration of Human Rights in Islam claims that it agrees with the provisions of the UDHR as long as its provisions do not contradict Shari’a and the Muslim people’s understanding of human rights as defined by Shari’a. Despite the fact that the CDHRI was formulated in accordance with Shari’a law and the main reason that Saudi Arabia did not sign the UDHR was because it contradicted Shari’a law, evidence shows that the Kingdom of Saudi Arabia also did not sign the CDHRI in 1990, but did do so in 2005.\(^{519}\)

In order to explain the position Saudi Arabia has taken in relation to the CDHRI, it is necessary to explain the provisions of this declaration in comparison to the UDHR. The first article of the Cairo Declaration proclaims that all human beings are subject to Allah and part of a single family under Allah.\(^{520}\) This article, although it appears to proclaim the equality of human beings, can also be interpreted as a restrictive religious confession, as people are described as being part of one family only under Allah. The religious component here is significant and has been subject to criticism by UDHR supporters.

The second article proclaims the right to life, arguing that life is a gift given by Allah and that it is the right of every human being. The article also condemns genocide and it is very important to note that safety from physical harm is guaranteed unless Shari’a law provisions state otherwise.\(^{521}\) This final mention allows for physical harm and even the existence of the capital punishment if it is deemed appropriate by Shari’a law. Article 10

\(^{520}\) Cairo Declaration on Human Rights in Islam (n 323).
\(^{521}\) Ibid.
is also important, as it depicts Islam as the religion of “true and unspoiled nature”. This can also be considered an article that infringes on religious freedoms.

Moreover, Article 12 states that every man has a right to freedom of movement and selection of a desired place of residence, unless otherwise determined by Shari’a law. This means that the Cairo Declaration allows for detention or the prohibition of free movement if the law decrees it. Furthermore, Article 22 states that all citizens have the right to express their own opinions as long as they are not contrary to the principles of Shari’a.522

As discussed, the provisions of Shari’ a are subject to interpretation, especially in Saudi Arabia. A comparative analysis of the CDHRI and the UDHR shows that Islamic human rights documents, including the Cairo Declaration, have failed to adhere to the decrees of the UDHR by omitting some of the most significant rights. Furthermore, it has argued that the Shari’ a laws that are invoked in justifying the position of these documents do not represent the position of all Muslims.523 Many Islamic scholars have supported the reformation of Shari’ a law, but so far, they have been faced with resistance by bodies of law that support a more traditionalist position.

The main dilemma many Islamic scholars are faced with when discussing the reformation of Shari’ a law is the fact that it is not a codified law and it has been subjected to centuries of interpretation, based on numerous cultural changes. In the 21st century many argue that the Shari’ a law has often been badly interpreted and is an inadequate source of rules and punishments. The ambiguity of Shari’ a law has led to many centuries of extremist

522 Ibid.
interpretations, and examples of harsh applications of the law by traditionalist Muslims have been given throughout this research.\textsuperscript{524} It has been suggested that Muslims should find new meaning in \textit{Shari’}a law and perhaps open their minds in analysing the UDHR in relation to the writings of the \textit{Qur’an}.

A similar argument is made by Saedén, who observes that the religious component in Islamic alternatives to human rights is not unique, since Catholic and Protestant bodies have likewise expressed their concerns about the fact that nowhere in the UDHR is it mentioned that human rights come from God.\textsuperscript{525} However she argues that such a mention would not only cause even more resistance to the UDHR from Muslim countries, but would also contradict the right to religious freedom as depicted in the UDHR.\textsuperscript{526} Consequently it has been argued that religion should not dictate human rights, as this would lead to even more conflict.

The contradictions in the Cairo Declaration have also been observed by other sources, especially in relation to the freedom of religion.\textsuperscript{527} Some adherents of \textit{Shari’}a law consider apostasy for example to be punishable by death, and Islamic jurisprudence in Saudi Arabia claims that an apostate can be killed without prosecution.\textsuperscript{528} Under the provisions of the Cairo Declaration however, the right to life is considered sacred and it is

\begin{footnotesize}
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\item \textsuperscript{524} \textit{Ibid.}
\item \textsuperscript{526} \textit{Ibid.}
\item \textsuperscript{528} \textit{Ibid.}
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said that no person can take the life of another without punishment, unless otherwise decreed by Shari’a law. Since some Shari’a law interpreters and jurisprudence retain the right to take the life of an apostate, it can be said that the Cairo Declaration does not offer the same protection of life as the UDHR.

It has also been argued that the main reason why Saudi Arabia has not adhered to the Cairo Declaration of Human Rights is because its traditionalist Ministry sees Shari’a law as the only law Saudis should abide by.\textsuperscript{529} Therefore the questions that may be raised here are whether or not Saudi Arabia can ratify its laws and adjust its jurisprudence system to adhere to the CDHRI without being in direct violation of the manner in which they apply Shari’a law, and if they are able to do so, if this would incur a significant change with regards to international human rights.

It has been observed that Saudi Arabia is presently at an impasse, as there is pressure to stop the violation of human rights in order to maintain and improve international relations, yet this would violate Shari’a law as it is practised at the moment in Saudi Arabia, as well as many Saudis’ way of life. This resistance to reform has religious roots and motivations, and therefore obtaining change in Saudi Arabia with regards to human rights can prove to be difficult.\textsuperscript{530}


\textsuperscript{530} Ibid.

Unlike Kingdom of Saudi Arabia, Republic of Tunisia is among the signatories of the Cairo Declaration of Human Rights. Nevertheless, the numerous criticisms the country has received from international human rights defence organisations as well as the events that led up to the revolution that ignited the Arab Spring indicate that citizens’ rights were insufficiently protected during the dictatorship of Ben Ali.

After the uprising, the newly founded democracy has instituted less harsh measures and to a constitution which more closely aligns with both the CDHRI and the UDHR. Still, the adherence of Tunisia to the CDHRI has led to the same set of criticisms that the declaration itself has attracted. Critics argue that the CDHRI is subject to relativism and is meant to represent the political interests of authoritarian states, being more an instrument of further oppression that temporarily stops the criticism raised due to the non-adherence of Islamic countries to the UDHR. It has been viewed more as a document aimed at defending religious principles and cultural identities rather than actual human rights.

As previously discussed, the religious component of the CDHRI is noticeable, making the declaration a highly conservative document that is more protective of Shari’a law than of human rights. It is important to mention that despite the provisions of the CDHRI, the status of minorities in Arab countries still remains contested, as the protection

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531 CONCIT 'Human Rights and Islam' (n 518).
533 Ibid.
of minority rights does not seem to be a priority for the Middle East. The issue of minorities and their safety is not mentioned in the Cairo Declaration, but it is stipulated that everyone has the right to live in secure conditions (Article 18).

Nevertheless, there exists a common policy of reaching uniformity under the banner of one culture in Middle Eastern countries, alongside attempts to extinguish all differences in favour of building a collective identity. In democratic countries such as Tunisia, this tendency is diminished by moderate Islamic parties which have a more permissive approach to minorities. Still, the actions of a small number of countries cannot change the manner in which Islam perceives minorities. It is also noticeable that the Cairo Declaration protects national identities, therefore Tunisia’s permissive approach can be perceived as unusual.

One human rights document in the Middle East however does protect the rights of minorities: the Arab Charter on Human Rights. The Charter has a provision that protects minorities from being deprived of enjoying their religion and culture. Interestingly, Saudi Arabia, unlike Tunisia, has adhered to the Arab Charter on Human Rights, which has been viewed as more universal in comparison to the Cairo Declaration’s relativism.

534 Will Kymlicka (ed), *Multiculturalism and minority rights in the Arab world* (1st edn, Oxford University Press 2014) II.
535 Cairo Declaration on Human Rights in Islam (n 323).
536 Kymlicka (n 534).
537 Ibid.
The Arab Charter on Human Rights can in fact be deemed a significant improvement on the Cairo Declaration on Human Rights in Islam, since its provisions are more in line with the universal human rights as depicted in the Universal Declaration of Human Rights. A high number of Arab states have adhered to the Charter, including Saudi Arabia, yet Tunisia has not signed the document. As the document was drafted in 2004, it is believed that one of the reasons for Tunisia not being one of the signatory states was the dictatorship regime at the time.\textsuperscript{540} To this day it remains unclear whether Tunisia will adhere to the charter or not, but the human rights granted by the 2014 constitution demonstrate an openness towards the universalisation of the human rights in Tunisia. Abiad argues that \textit{Shari’a} law still has a significant impact on the domestic practice in relation to human rights in Tunisia.\textsuperscript{541}

A question raised by the UN Human Rights Committee to a Tunisian delegation with respect to the invocation of religious matters in Tunisian courts received the response that for the Tunisian jurisprudence the adherence of the people to the provisions of \textit{Shari’a} is as important as its implementation in everyday life.\textsuperscript{542} Nevertheless it has been argued that even though religion and \textit{Shari’a} law play an important role in Tunisian jurisprudence,

\begin{footnotes}
\item[540] \textit{Ibid.}
\item[541] Nisrine Abiad, \textit{Sharia, Muslim states and international human rights treaty obligations: A Comparative Study} (1\textsuperscript{st} edn, BIICL British Institute of International and Comparative Law 2008) 51.
\end{footnotes}
on a number of occasions court cases were held in favour of plaintiffs by citing international human rights or the Cairo Declaration of Human Rights.  

The Convention of the Rights of the Child has also been applied in several cases, for example in a case involving the establishment of the paternity of a child, where it was ruled that filiation was the child’s right according to the Convention of the Rights of the Child, which made paternity testing legal and mandatory. This created a unique precedent that was not otherwise stipulated under Shari’a law, and it also demonstrates the openness of the Tunisian jurisprudence to adhere to universal human rights for a fairer sense of justice.  

It has been argued that Tunisia’s open and active adherence to universal human rights in judicial cases is possible due to its new constitution. The first article of the constitution argues that Tunisia is a free state, under the Islamic religion, its form of government being a republic and its official language being Arabic. In none of the subsequent articles does the Tunisian constitution establish Shari’a law as the main body of law, as for example the Saudi Arabian Basic Law of Governance does.  

This is a key element that brings Tunisia closer to the UDHR and further away from the Cairo Declaration of Human Rights, which directly establishes Shari’a law as a significant and principal body of legislation, superior to the provisions of the Cairo

543 Zahia Smail Salhi, Gender and Diversity in the Middle East and North Africa (1st edn, Routledge 2013) 59.
544 Ibid.
545 Rainer Grote and Tilmann J Roder, Constitutionalism, human rights, and Islam after the Arab spring (1st edn, Oxford University Press 2016) 71.
546 Tunisia’s Constitution (n 156).
547 Kingdom of Saudi Arabia Basic Law of Governance (n 191).
Declaration. Tunisia’s constitution can therefore be considered a modern body of law for an Islamic state and may be a prime example of an Islamic nation adopting a more open stance on human rights.\textsuperscript{548}

Blau also argues that the current Tunisian Constitution and its approach to the judicial system is closer to the UDHR than it is to the Cairo Declaration.\textsuperscript{549} It has been argued that this adherence can be attributed not only to the democratic regime that was active in Tunisia long before a dictatorship was instated, but also to the willingness of the people to rebel and demand that their rights be respected, as was demonstrated by the success of the Jasmine Revolution and the Arab Spring uprising. However, the rebellion of the people cannot be attributed to the UDHR, but to the continuous and significant violations of their rights and feelings of powerlessness under the oppressive regime of Ben Ali.

While Tunisia still has its issues with regards to human rights violations, it has also received a large amount of praise in relation to its constitution. Therefore, Tunisia can be considered a paradox in the Arab world, divided as it is between adhering to Shari’a law and applying a more universal approach in human rights cases. Still, recent evidence seems to suggest that Tunisia is much closer to decreasing the influence of religion and traditionalism in its judicial system.\textsuperscript{550}

\textsuperscript{548} Ibid.
\textsuperscript{550} Ibid.
Chapter 4

Constitutional Rights In Islamic States

1. Constitutional Rights in Islamic Law

Constitutional rights in Islamic Law strongly depend upon the legislative principles of the particular state which applies *Shari’a* as a means of public legislation. In this regard, the concept of theocratic constitutionalism, which can be defined as the notion of a state wherein religion holds political and legislative power, may be founded on either religious or liberal values. These states will generally provide fundamental rights, grant public sovereignty and protect national identity. They will therefore institute constitutional Islamisation in which *Shari’a* becomes the main source of legislation. Under the government of these states, certain rights such as religious freedom or equality remain under the discretion of court jurisprudence.\(^{551}\)

Given that Islamic law has been subjected to extensive interpretation in light of religious norms, it is possible for states to link human rights with *Shari’a* in order to secure human welfare. This may occur in states that are obliged to adhere to Islamic law but are founded on liberal values. By contrast, in states founded strictly on religious values, constitutional Islamisation laws may act to the detriment of the notion of constitutionalism.

\(^{551}\) Michel Rosenfeld and Andras Sajo (eds), *The Oxford handbook of comparative constitutional law* (1st edn, Oxford University Press 2012) 140.
by allowing secular judges to add personal concepts of religious law to the equation of justice, which are then transposed as constitutional interpretations. This leaves individual rights to be nugatory, thus facilitating unequal treatment with respect to religious beliefs, gender or other minorities.\textsuperscript{552}

In the context of more liberal states governed by Islamic law, a new form of government has arisen. Democracy is in these cases has been combined with \textit{Shari’a} to form a so-called Theo-democracy.\textsuperscript{553} Nevertheless, in states governed by this mechanism, questions still remain as to the interpretation of \textit{Shari’a}, and most importantly whose interpretation is valid. Thus, it is possible for some Muslim states to grant equal rights to citizens and allow the right to vote and the electoral participation of both men and women, while on the other hand, other states that identify themselves as Muslim may deny these rights based on a different \textit{Shari’a} interpretation.\textsuperscript{554}

When considering the constitutional rights of citizens, the interpretation of \textit{Shari’a} and thus its juxtaposition with Islamic and/or liberal law is the fine line which accounts for the difference between granting and limiting rights. This interpretation as well as how it is used to serve the interest of certain groups of people explains why some Muslim states governed by Islamic law grant constitutional rights to some extent, while others do not.\textsuperscript{555}

\begin{thebibliography}{99}
\bibitem{footnote}\textit{Ibid.}
\bibitem{footnote}MA Muqtedar Khan, \textit{Islamic Democratic Discourse: Theory, Debates, and Philosophical Perspectives} (1\textsuperscript{st} edn, Lexington Books 2006) 237.
\bibitem{footnote}Shaheen Sardar Ali, \textit{Modern challenges to Islamic law} (1\textsuperscript{st} edn, Cambridge University Press 2016) 67.
\bibitem{footnote}John Witte and M Christian Green, \textit{Religion and Human Rights: An Introduction} (1st edn, Oxford University Press 2011) 76.
\end{thebibliography}
In Saudi Arabia for example the Islamic law does not allow the formation of political parties, thus making it impossible for Shari’a to be interpreted to the political advantage of one party. Nevertheless, it has been argued that in absolute monarchies such as the Kingdom of Saudi Arabia, the interpretations of Shari’a that come into effect are interpretations that favour the views of the current ruling elites. This may limit rights and liberties as long as these rights and liberties are not in line with the elite’s interest.\textsuperscript{556}

Regardless of interpretation, Islamic law is based upon five goals, referred to collectively as Maqasid. These goals focus on various aspects of life and include religion, way of life, lineage, intellect and property. In a sense, these aspects can be viewed as the basics of human rights granted by Islamic law under Shari’a. Academics have connected these goals of Islamic law with basic human rights such as dignity, independence and freedom and some have even expanded these principles to encompass 24 categories rather than five. These are then divided in four major groups that describe community, humanity, family and the individual. Nevertheless, as previously discussed, the interpretation of Shari’a and subsequently the interpretation and application of Islamic law rests with the jurists (Ulama), whose perceptions of the law and rights granted are influenced by the social, economic and environmental contexts in which they live.\textsuperscript{557}

Property rights under Islamic law are perhaps some of the most complex rights granted by Shari’a, as these encompass the concept of individuality but also of community.

\textsuperscript{556} Peri Bearman, \textit{The Ashgate research companion to Islamic law} (1\textsuperscript{st} edn, Routledge 2016) 315.

\textsuperscript{557} Karim Ginena and Azhar Hamid, \textit{Foundations of Shari’ah governance of Islamic banks: The role of Sharia supervisory boards, internal audit and advisory firms} (1\textsuperscript{st} edn, John Wiley & Sons 2015) 35.
Thus individuals and corporations are entitled to property based on Shari’a. The law also encourages economic development and the creation of financial wealth for the benefit of the community. At the same time, Islamic law dictates that the enjoyment of his property should be held as less important than the needs of the community, further stipulating that one should not disregard people of a community who will act as stakeholders.558

Thus it can be seen that Shari’a and Islamic law do not prohibit ownership, but keep the community and the individual connected in that the community will benefit from corporations. In a sense this can be seen as a social right to welfare. Additionally, according to Shari’a and the Qur’an, people are only temporary property owners, as Allah is the true owner. These texts also require that people who possess property give to charity, thus emphasising societal good over individual interests.559

Another significant right given by Islamic law in accordance with Shari’a is the right of labour. As noted by the Basic Law, and also by its constituent parts, the Shari’a and the Qur’an, people are granted the right to work and earn their living, and by doing so to aid the development of their society. In Saudi Arabia these rights are not specifically mentioned, however Article 17 of the Basic Law emphasises the right to ownership, labour and capital. Additional articles, such as Article 26 and Article 1 from the Law of the Provinces, argue that rights and liberties shall be granted according to Shari’a.560

It is important to point out based on the information given in this section that constitutional rights in Islamic law derive from Shari’a. The right to property, ownership,
labour and capital are not only present in Shari’a but also in the Basic Law. Nevertheless, turning back to the issue of interpretation, these rights may be granted or taken away according to the Ulama’s interpretation of Shari’a. Considering this aspect, it is important to point out that while international human rights are inviolable and immovable, constitutional rights as granted by Shari’a are subject to interpretation and thus to constant possible modification. Hence constitutional rights under Islamic law grant freedoms and liberties in line with the interpretations of the Ulama of Shari’a and thus may substantially differ among Muslim countries governed by Islamic law.

2. Kingdom of Saudi Arabia’s Constitution and Constitutional Law

The Kingdom of Saudi Arabia has no formal codified constitution, however the purposes of constitutional law are fulfilled by the Basic Law of Governance of Saudi Arabia, implemented in 1992.\footnote{Joseph Kechichian, \textit{Succession In Saudi Arabia} (1st edn, Springer 2001) 205.} This function as a substitute for constitutional law and is derived from Shari’a and the Qur’an. Although the Kingdom of Saudi Arabia functions as an absolute monarchy, the king must comply with Shari’a (Sunna) and the Qur’an. In this regard, the Basic Law outlines the duties and rights of the government, declares Islam as the county’s official religion and stipulates that the Sunna and the Qur’an represent the state’s functioning constitution.\footnote{Vernon Valentine Palmer and others, \textit{Mixed legal systems, east and west} (1st edn, Ashgate Publishing 2014) 268.}
The Basic Law details the rights and duties of the government and stipulates the rights and responsibilities of the citizens. This form of constitutional law is generally predominant in theocratic systems, and it is characterised by a combination of the Sunna and the Qur’an that acts as a constitution and as functions of constitutional law. The most frequently encountered form of theocratic constitutionalism is Islamic constitutionalism, which is characterised by the aforementioned merger of Islamic principles into a constitutional operating framework, which imposes some limitations, both on the absolute monarch and on the population, as dictated by religious law.

This law is then applied based on jurists’, scholars’ or teachers’ (the Ulama) interpretation, whose responsibility it is to interpret the divine law. Alongside with the king, the Sunna and the Qur’an, the Ulama can be regarded as the fourth branch of government. This form of constitutional law has attracted various criticisms, with some academics arguing that religion cannot function as a framework for constitutional law, especially when religious texts are open to interpretation by political authority.

Hirschl argues that this paradigm is particularly dangerous from a social perspective, as power is divided among the few and governmental authority is subject to religiously-interpreted law. On the other hand, it has been argued that public decisions, including judicial and legislative decisions in liberal governments, are made in a similar fashion to this model, by which the law is still subjected to interpretation by people. One

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564 Rosenfeld and Sajo (n 551).
566 Rosenfeld and Sajó (n 551).
example of this is the United Kingdom, which has no codified constitution, and thus rulings are left open to debate by the executive branch of the government. Some have also argued that religion is a rational discipline used to understand morality and subject it to human interpretation, hence a government that functions by excluding religion is a government that produces moral self-impoverishment and burdens citizens that are religious.\textsuperscript{567}

In the Kingdom of Saudi Arabia, constitutional law serves the purpose of ensuring that all Saudis adhere to Islamic law and follow the Islamic tradition. In Article 5(a) of the Basic Law it is stipulated that all people in the country are subjects of the king, followed by Article 5(b) and Article 6, which provide clear restrictions on the power of the king, who must comply with Shari’a and the Qur’an. Thus, the king cannot interfere in those areas of the law that are administered by the Qur’an.\textsuperscript{568} The scope of this law is to ensure that the king does not possess absolute power, and that his rulings follow Shari’a.

Article 1 of the Basic Law immediately provides a dogmatic interpretation of constitutional law. The article states:

\begin{quote}
“\text{The Kingdom of Saudi Arabia is a fully sovereign Arab Islamic State. Its religion shall be Islam and its constitution shall be the Book of God and the Sunnah (Traditions) of His Messenger, may God’s blessing and peace be upon him (PBUH). […]}”\textsuperscript{569}
\end{quote}

This implies the constitutional law is derived from a natural source of authority, without the use of legal precedents or legislation, but with the application of Ijthad (understanding, judgement) by the legal religious scholars referred to as the Ulama (Ulema). Hence, any

\begin{itemize}
\item \text{Hirschl (n 565).}
\item \text{Abiad (n 541).}
\item \text{Kingdom of Saudi Arabia Basic Law of Governance (n 191).}
\end{itemize}
Fiqh (Islamic jurisprudence) that is derived from the Qur’an and Sunna is regarded as Saudi law due to its compliance with Shari’a. As a result, nizams (king’s decree) will only be followed as long as these demands comply with fiqh.570

In utilising religious law as governing law, Saudi Arabia can relocate power to individuals who act as religious interpretive bodies by entrenching both the procedural and the substantive law in the constitution. Consequently Article 7 of the Basic Law reinforces this idea by arguing that the government of Saudi Arabia draws its power from the Qur’an and the Prophet’s tradition. Thus the effects of both Article 1 and Article 7 denote that the Basic Law functions as an explanation and interpretation of that what is assumed to be prior knowledge.571 This leads to the conclusion that Saudi Constitution is not defined by a system of governance which reflects Islamic principles, but is rather the embodiment and interpretation of Islam itself.

The interpretation of the Qur’an and Sunna as well as the interpretation of Shari’a by the Ulama has led to a number of criticisms of the current system in Saudi Arabia. Some authors argue that based on Shari’a principles, all lives are sacred, and innocents should not be killed. However, the view of what constitutes an innocent person is subject to the norms of the society in which that person resides, making the term “innocent” subject to societal interpretation.572 Others have argued that the interpretations of the Ulama stem directly from the character of the person making the interpretation. Just like all people

570 Abiad (n 541).
571 Kingdom of Saudi Arabia Basic Law of Governance (n 191).
living in societies, Islamic scholars may be biased by tribal beliefs which are deeply rooted in Islamic countries. In relation to constitutional law interpretation and application,

Esmaeili argues that the Kingdom of Saudi Arabia is an amalgamation of tribal customs, *Shari`a* and modern legal principles.\(^{573}\) This view may explain the inconsistencies between the existing constitutional law and *Shari`a* principles. Other criticisms have been made due to the nature of the religious text. It has been argued, considering that the *Qur’an* has many texts with reference to moral teachings, that these are less applicable to legislative orders. At the opposite end of the spectrum, arguments have been made that the text itself contains the necessary moral law to rule a society.\(^{574}\)

Some remarks have also been made with regards to the independence of judges and *Ulama* in relation to constitutional law and its enforcement. As stipulated in the Basic Law in Article 44, three forms of power will be the governing forces: judicial authority, executive authority and regulatory authority, yet all three are subject to the king’s authority.\(^{575}\) In practical terms, this implies that the decisions made by the constitutionally created authorities can be declined through the king’s intervention.

Unlike in states whose governments that are based on constitutional law, the Kingdom of Saudi Arabia’s constitution does not allow the formation of political parties.\(^{576}\) However in recent years significant progress has been made in terms of the democratic process of elections. In 2015, women in Saudi Arabia participated for the first time in

\(^{573}\) *Ibid.*


\(^{575}\) Kingdom of Saudi Arabia Basic Law of Governance (n 191).

municipal elections, even though the voting process occurred without the existence of political parties and under strict campaigning rules.\textsuperscript{577}

2.1 Constitutional Rights in the Kingdom of Saudi Arabia

As a natural result of the constitutional makeup of the Kingdom of Saudi Arabia, constitutional rights exist according to the Qur’an and Shari’a law. Article 26 of the Kingdom of Saudi Arabia Basic Law argues that the state shall protect human rights as long as these rights are in concordance with Shari’a.\textsuperscript{578} In general terms, any rights granted to citizens of Saudi Arabia by the functioning constitution are expected to fulfil a social purpose. In this regard, the rights to property, labour and capital are granted under Article 17. Further to this, Article 18 and Article 19 place a strong emphasis on private property, to which citizens have inviolable rights. Confiscation of private property is thus prohibited under Article 19 and it is only possible with a judicial verdict.\textsuperscript{579}

Article 37, 38 and 40 present additional rights of Saudi citizens, such as the right to maintain the privacy of one’s home, the right to privacy in correspondence and the right not to be punished before committing an act that violates the law. Punishments are also restricted to the perpetrator of criminal acts. Article 43 gives the right to citizens to communicate their concerns or complaints to the king. Because of this, disputes or requests


\textsuperscript{578} Kingdom of Saudi Arabia Basic Law of Governance (n 191).

\textsuperscript{579} Ibid.
are formally addressed to the king or to the *majlis*.\textsuperscript{580} As it can be seen from the articles cited above, the Basic Law which functions as the Saudi Arabia’s constitution does not contain specific information in relation to human rights, women’s rights or child rights. The only references that are made declare that the state shall protect human rights as long as these are in line with *Shari’a*. Property rights can also be taken away if decided by a judicial verdict, according to Article 18.\textsuperscript{581}

The constitutional rights granted by the Kingdom of Saudi Arabia are therefore the exact rights granted by *Shari’a*. As discussed in the previous section, the application of Islamic law in relation to rights and liberties are dictated by *Shari’a*, to which the Basic Law adheres. It is therefore safe to assume that the same principles of Islamic law in relation to human rights apply in this case. With regards to the rights of ownership, capital and labour as stipulated by the Kingdom of Saudi Arabia constitution, it is worth mentioning that property and the possession of capital as dictated by *Shari’a* should be not only a matter of individual interest but also of community interest.\textsuperscript{582}

Nevertheless, a more complex form of *Shari’a*-given rights can be seen in the right to labour. According to Islamic law and *Shari’a*, an employer must provide a fair wage for the employee that would suffice for him and his family to lead a humane life. People who are employed by the state are granted housing if they otherwise have none. The employer must also provide his employee education as needed to perform his job, have a regard for his health and well-being and that of his family as well as provide transportation when

\textsuperscript{580} *Ibid.*

\textsuperscript{581} Kingdom of Saudi Arabia Basic Law of Governance (n 191)

\textsuperscript{582} Al-Tusi (n 35)
necessary. An important aspect to be mentioned in this case is that Islamic law does not focus on the right to minimum wage, yet it stipulates that the employee shall have a wage that is sufficient for him and his family to lead a dignified life. The fluctuation of labour markets and salaries are irrelevant in this respect, as the employer must ensure that his employee receives the amount of money necessary to lead a normal life.583

Article 27 of the Basic Law stipulates that “The State shall guarantee the right of the citizen and his family in emergencies, sickness, disability, and old age, and shall support the social security system and encourage institutions and individuals to participate in charitable work.”584 Considering this article of the Basic Law, it can be argued that Saudi citizens benefit from a system of social security which is supposed to aid them in matters of health care, old age or disability. The article does not place this right in the category of Shari’a law, yet it derives from the principles of individuality and community mentioned above. The Basic Law of Governance makes no mention of the rights of women, but also does not make any reference to the rights of men. Gender may only be intuited from Article 28, which stipulates that: “The State shall facilitate the provision of job opportunities to every able person and shall enact laws that protect the workman and the employer.”585

The rest of the acts make reference to “citizens”, “people” and “humans”. Nevertheless, some restrictions may be noted from the state by the phrase “workman” which implies that the state will enact laws that protect the workman and the employer,

584 Kingdom of Saudi Arabia Basic Law of Governance (n 191).
585 Ibid.
disregarding female workers. This tendency is also visible in social life, where a woman’s right to education or employment is subject to a man who is appointed as her legal guardian. In this respect, women’s earnings can be diverted to their guardians.  

Although no mentions are made of the right to vote, for either men or women, women were not allowed to vote until 2015. By royal decree issued in 2011 by King Abdullah, women were able to participate in municipal elections and vote. After the election, 17 women were elected to public office. When looking at the right of women to vote, it must be taken under consideration that the Basic Law of Governance makes no reference to gender, hence the royal decree which allowed women to vote was the result of consultation. This liberty of interpretation and careful consideration of Shari’a and the Qur’an in the drafting of the Basic Law allowed King Abdullah to increase the social participation of women by granting them the right to be elected to public office and the right to vote.

Considering that the basic function of a constitution is to outline the duties and rights of governments and people, it is important to also focus on the right to freedom of expression and how the Kingdom of Saudi Arabia manages this right. Article 29 of the Basic Law of Governance states that: “Mass and publishing media and all means of expression shall use decent language and adhere to State laws. They shall contribute towards educating the nation and supporting its unity. Whatever leads to sedition and division or undermines the security of the State or its public relations or is injurious to the

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586 Ibid.
honour and rights of man, shall be prohibited. Laws shall set forth provisions to achieve this.\textsuperscript{588}

The implications of this article are that the press cannot criticise the government openly. Saudi Arabia is among the few GCC countries that do not guarantee freedom of speech, not only for its people but also for the press. The freedom to bring matters of importance to public attention is particularly important in the Kingdom of Saudi Arabia, mostly because the country lacks an official penal code. Thus, as in the case with other granted rights, criminal charges, including those related to media or free speech, are open to interpretation.\textsuperscript{589}

In essence, the constitutional rights granted in Saudi Arabia match the principles of Islamic law and \textit{Shari’a}. The existing rights make reference to the welfare of the citizen, including social and health protection in times of emergency as well as the right to a fair wage. The state must grant the rights specified in \textit{Shari’a}, which for the Kingdom of Saudi Arabia implies that taking for granted that rights should be in line with \textit{Ulama} interpretations. Additionally, the country does not provide protection for free speech nor does it endorse a free media.

\textsuperscript{588} Kingdom of Saudi Arabia Basic Law of Governance (n 191).

3. Republic of Tunisia’s Constitution and Constitutional Law

The Constitution of the Republic of Tunisia is the supreme law of the Tunisian Republic. The constitution forms the framework for the Tunisian government and for the relationship of the government, citizens and all people within Tunisia. On 23 October 2011, Tunisian Constituent Assembly was elected to draft the text of a new constitution. On 16 December 2011 they issued a constitutive law, Law on the Provisional Organization of Public Authorities, which superseded the Legislative Decree of 23 March 2011 and the 1959 constitution. This law provided for three branches of government and guaranteed human rights during the time it takes for the new constitution to be written and ratified.\(^\text{590}\)

The Republic of Tunisian Constitution was adopted in 2014 and guarantees a civil state and a parliamentary system in which the president can hold only certain prerogatives.\(^\text{591}\) Since the constitution declares Tunisia to be a civil state, legislative power is exercised by citizens through elections of representatives. The branch of executive power is divided between the president and the head of government. Judicial power according to the constitution is responsible for the administration of justice, the enforcement of the constitution and the protection of freedoms and rights. The legislative system is thus based on civil law that functions as a system of regulations which is largely codified. The rules

\(^{591}\) Tunisia’s Constitution (n 156).
and regulations are interpreted and applied by judges, with the legal system being based on a singular national legislation.\footnote{592}

The Republic of Tunisian constitution also stipulates the means by which the constitution can be changed. This involves a law having to be adopted by two thirds of the majority formed by people elected representatives from the Representative Assembly before it can be incorporated and thus modified to align with pre-existing constitutional laws. International conventions may be applied; however these regulations are lower hierarchically in comparison to the adopted constitution.\footnote{593}

As established by the constitution, Tunisia functions as a hybrid model of government in which the president of the republic and the prime minister, who is the head of government, share executive power. The president of the republic is elected based on constitutional law Article 75, once every five years, and has the right to two mandates.\footnote{594} Domestic policies are made by the prime minister, while the president is also in charge of foreign policy, security and national defence. Nevertheless, ministers who act under the prime minister are only instated with presidential approval. The president is not obliged to participate in all meetings of the Council of Ministers, however he must participate if the topics being topics are his direct responsibility, such as foreign policy or national security.

\footnote{593} \textit{Ibid}.  
\footnote{594} Tunisia’s Constitution (n 156).
Whenever the president participates in meetings of the Council of Ministers, he chairs the meetings as dictated by the constitutional attributes of presidency.\(^{595}\)

The newly adopted constitution of the Republic of Tunisia has some similarities to the old system. The constitution issued in 2014 declared Islam to be Tunisia’s official religion, yet, unlike the old version, it stated that the first article, which stipulates this fact, cannot be changed or amended. A significant development can however be noted with regards to human rights and liberties. The new constitution puts a strong emphasis on the protection of the individual’s right to education, health, a clean environment and freedom of expression as well as freedom from torture.

At the same time, although the constitution declares Islam as the country’s religion, no references are made to Islamic Shari’a.\(^ {596}\) The new constitution also guarantees the freedom of the press and free expression in Article 31 and Article 32.\(^ {597}\) However, some concerns have been raised in relation to the possibility of the press to be independent, particularly due to the fact that current legislative conditions make it difficult for the press to achieve financial independence.\(^ {598}\)


\(^{597}\) Tunisia’s Constitution (n 156).

Article 74 further discusses the Islamic religion. The article decrees that in order to participate in elections for presidency the candidate, man or woman, must hold as an official religion Islam. As the article stipulates: “Every male and female voter who holds Tunisian nationality since birth, whose religion is Islam shall have the right to stand for election to the position of President of the Republic.”

3.1 Constitutional Rights in the Republic of Tunisia

The Constituents National Assembly adopted and implemented the new constitution of the Republic of Tunisia on January 2014 provided a distinct legislative example for other Islamic countries, as it is the best representation of the previously discussed concept of Theo-democracy. The constitution upholds many key civil, political, social, economic, and cultural rights. These include the rights to citizenship, to create political parties, to bodily integrity, and freedom of movement, opinion, expression, assembly, and association.

The constitution managed to blend the Islamic religion with the human rights and freedoms granted by democratic constitutions while still preserving its cultural heritage. Under the new constitution, citizens have been granted freedom of speech, equality, freedom of worship and protection against discrimination based on gender. The

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599 Tunisia’s Constitution (n 156).
600 Khan (n 553).
601 Shelly Culbertson, The fires of spring: A Post-Arab spring journey through the turbulent new middle east - turkey, Iraq, Qatar, Jordan, Egypt, and Tunisia (1st edn, St. Martin’s Press 2016) 52.
constitution includes stronger protection for women’s rights, including article 45, which provides that, “The state commits to protect women’s established rights and works to strengthen and develop those rights,” and guarantees “equality of opportunities between women and men. Rights are granted in the Tunisian Constitution under Title Two, in Article 21-49. In this section are discussed the general guarantee of equality, equality regardless of gender, the right to a reasonable standard of living, the right to human dignity, the prohibition of torture and the right to life. These aspects are addressed in Articles 21, 22 and 23.\textsuperscript{602}

Additionally, Article 40 of the Tunisian constitution grants equal rights to work and pay to both men and women. A note to be made in this case is that these rights are granted by the state, and not subject to \textit{Shari’a} interpretation as in the case of the labour rights provided by the Kingdom of Saudi Arabia constitution. For workers of both genders, this implies that wages must be paid in according to the government’s and the employers’ financial capacity. This is due to the fact that the Tunisian Constitution does not include \textit{Shari’a}, with the only mention towards Islam being its institution as the official country religion.

As discussed, labour rights according to \textit{Shari’a} demand that the employer provide wages to employees that are sufficient to ensure a dignified life for the employee and his family, regardless of financial circumstances.\textsuperscript{603} With the elimination of \textit{Shari’a} as a source of legislation, this no longer applies in the Tunisian Constitution, hence salaries are granted

\textsuperscript{602} Tunisia’s Constitution (n 156).
\textsuperscript{603} Ghazali (n 598).
based on the democratic system, in which, as stipulated in the aforementioned article, the state must provide the conditions for a dignified existence.

The Human Right to life constitutes a contested theme in Tunisia, the Tunisian constitution, under Article 22, states that the right to life is sacred but also that it can only be prejudiced under circumstances imposed by the law. This allows for the state to still apply the death penalty, with concerns being raised by Amnesty International and Human Rights Watch, which have requested for this article to be amended so that it stipulates a clear prohibition of death penalty.\textsuperscript{604} In terms of religious rights, the constitution of Tunisia grants the freedom of belief, , the Tunisian state distances itself from religion by arguing in Article 6 that the state is the protector of religion. The same article forbids acts of religious violence and instigations to hate, followed by a prohibition of violation of the sacred, referred to as blasphemy.\textsuperscript{605} Moreover, in articles concerning the rights of children and families, the constitution does not stipulate that children should be raised in line with \textit{Shari’a} principles, the Tunisian Constitution contains a provision on the rights of children and women, which include the right to health and education from the state and parents without discrimination of any kind.\textsuperscript{606}

However, the mention in the constitution of the concept of “blasphemy” has been interpreted by some academics as a possible way of prohibiting free speech and religious freedom. While the prohibition of blasphemy can be seen through the spectrum of societal

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{604} Roger G Hood and Carolyn Hoyle, \textit{The death penalty: A worldwide perspective} (5\textsuperscript{th} edn, Oxford University Press 2015) 76.
\item \textsuperscript{605} Lorenz Langer, \textit{Religious offence and human rights: The implications of defamation of religions} (1\textsuperscript{st} edn, Cambridge University Press 2014) 354.
\item \textsuperscript{606} Tunisia’s Constitution (n 156).
\end{itemize}
\end{footnotesize}
values, it can also be seen as a means by which people of different religions, or people sharing different opinions, may be silenced, especially since a clear definition of what constitutes blasphemy is not given.\footnote{Evelyn Mary Aswad, 'The role of religion in constitutions emerging from Arab spring revolutions' (2016) 16(1) Georgetown Journal of International Affairs; Winter/Spring <http://connection.ebscohost.com/c/essays/109994855/role-religion-constitutionsemerging-from-arab-spring-revolutions>accessed 27 October 2016.}

Some concerns about the extent of freedom of religion, information and free speech have been raised in relation to the new Tunisian constitution, particularly concerning ambiguities that remained unaddressed with regards to the death penalty, freedom of religion, freedom of speech and freedom of the press.\footnote{Anthony T Chase, Routledge Handbook on Human Rights and the Middle East and North Africa (1\textsuperscript{st} edn, Taylor & Francis 2016) 263.} However Article 127 calls for the institution of a pluralistic and free press, which according to some may be impossible to achieve, while Article 31 and Article 42 clearly lay out the right to freedom of opinion as well as freedom of culture and the importance of support and tolerance among different cultures.\footnote{Tunisia’s Constitution (n 156).}

These concerns, alongside issues to with the financing of a free media, as well as the Tunisian’s state ability to argue that civil rights may be dropped as a priority in face of national threats, make the existence of the Islamic-democratic constitution problematic.\footnote{Riddhi Dasgupta and George Bangham, The new constitution of Tunisia: Choices and decisions (1\textsuperscript{st} edn, Booktango 2012) 216.} Conclusively, it can be argued that Tunisia’s new constitution provides substantial grounds for the democratic development of human rights and liberties, but that these rights and liberties may still be subject to interpretation due to the lack of clear definitions of certain
terms (i.e. blasphemy) as well as in the context of high unemployment, radical Islamism and civil unrest.  

4. Constitutional Differences between Kingdom of Saudi Arabia and Republic of Tunisia

Several differences in constitutional construction and constitutional law between Tunisia and Saudi Arabia may be observed. As previously discussed, The Kingdom of Saudi Arabia has no formal codified constitution, however the purposes of constitutional law are fulfilled by the Basic Law of Governance. The Kingdom of Saudi Arabia’s Basic Law of Governance relies strongly on Shari’a law, the Qur’an and Sunna. These are the constituent parts of the Saudi constitution, alongside interpretations provided by the Ulama. The king can veto all other state powers, yet even he cannot circumvent Shari’a law.

By contrast, the Republic of Tunisian constitution is constructed based on legislative frameworks, particularly in relation to human rights prerogatives. Islam does not hold legislative power, yet it is still declared the official religion of the country, as in the case of Saudi Arabia. Similarly to the Kingdom of Saudi Arabia, rules and regulations from the legislative system are intended to be interpreted by judges; however, interpretation by an external body is present only in this area. In the Kingdom of Saudi Arabia, all laws


\[^{611}\] Ibid.
\[^{612}\] Kechichian (n 561).
\[^{613}\] Ibid.
and regulations are derived from Shari’\textquotesingle a and are therefore subject to interpretation by the Ulama.\textsuperscript{614}

The first distinction that can be drawn between constitutional rights in Tunisia and in the Kingdom of Saudi Arabia has to do with their approach to gender. The Saudi Basic Law of Governance makes no reference to this issue and refers to people as citizens without implying that there is any difference in treatment based on gender (with the exception of the protection of the “workingman”).\textsuperscript{615} Tunisia’s constitution on the other hand approaches this matter straightforwardly. The section on rights and liberties is prefaced thus by Article 21, which states: “All citizens, male and female, have equal rights and duties, and are equal before the law without any discrimination. The state guarantees freedoms and individual and collective rights to all citizens and provides all citizens the conditions for a dignified life.”\textsuperscript{616}

Additional rights found in the Republic of Tunisian constitution but lacking in the Basic Law of Governance of Saudi Arabia refer to political rights. These include the right to form political parties, the right to peaceful protest and the right to political opinions. Kingdom of Saudi Arabia Basic Law of Governance of argues that any public presentation of information which brings harm to the state, religion or its people is forbidden. Article 29 states: “Whatever leads to sedition and division or undermines the security of the State or its public relations or is injurious to the honour and rights of man, shall be prohibited.”\textsuperscript{617}

\textsuperscript{614} Kingdom of Saudi Arabia Basic Law of Governance (n 191).
\textsuperscript{615} Ibid.
\textsuperscript{616} Tunisia’s Constitution (n 156).
\textsuperscript{617} Kingdom of Saudi Arabia Basic Law of Governance (n 191).
Both countries’ constitutions mandate some kind of division of power. While in Saudi Arabia the power is divided among the king and regional religious powers, in Tunisia power is divided between the presidents, the prime minister as well as the people. Some attempts at elections have been conducted in Saudi Arabia, but with the prohibition of political parties still intact.\textsuperscript{618} In Tunisia, the existence of political parties is guaranteed by the constitution, thus providing more power to the people. Another significant difference can be noted in the attitudes towards liberties and freedoms depicted in both constitutions. While the Tunisian constitution provides freedom of the press and human rights irrespectively of \textit{Shari’a}, the Kingdom of Saudi Arabia’s Basic Law of Governance grants rights only as dictated by Islamic law.\textsuperscript{619}

Another difference can be seen in the amount of power granted to the king by the Basic Law and the amount of power granted to the president by the Tunisian Constitution. The king of Kingdom of Saudi Arabia has authority over the three branches of the state (executive authority, judicial authority and regulatory authority), even if these are granted a degree of freedom, particularly in relation to judicial authority.\textsuperscript{620} In Tunisia, however, the constitution allows for the formation of a Constitutional Court, which has been granted independence. This court is not under the authority of the president or the prime minister, and the decisions it concerning law drafts passed by the president need to be taken unanimously between all members of the court.\textsuperscript{621}

\textsuperscript{618} McDowall (n 577).
\textsuperscript{620} \textit{Ibid.}
\textsuperscript{621} Tunisia’s Constitution (n 156).
Nevertheless some similarities between the two can also be found. When considering the division of power instituted by the constitutions of both countries, it can be noted that the principle of functionality relies on the separation of power between several political bodies. In Tunisia, veto power is held by the president of the republic, the prime minister and the people since the emergence of the civil state. On a similar note, in the Kingdom of Saudi Arabia the power is divided between the king and religious leaders who must act in line with Shari’a.

Thus, a strong similarity can be seen in that power is not granted to a single person, such as the king or the president, but it is divided among the state leader and other sub-powers. The power held by the people by means of free elections can be seen as somewhat similar to the power held by religious leaders when applying this concept on the regional power division. While the Basic Law of the Kingdom of Saudi Arabia allows power to be divided between the Ulama, whose interpretations of the law are applied in regional courts, elections in Tunisia grant regional power to citizens, who vote for the representatives of a particular region. In this spectrum, the chosen representatives all act as sources of regional power.

International agreements and international partnerships have been addressed by both constitutions. The Basic Law argues that the application of this law cannot bring any prejudice to international agreements or treaties that Kingdom of Saudi Arabia has with organisations. On a similar note, the Tunisian Constitution imposes in Article 20 that:
Thus, in Tunisia, the constitutional law is above international agreements, while in Saudi Arabia international agreements are held above constitutional law as long as constitutional laws bring any prejudice to agreements and treaties pre-established by the Kingdom of Saudi Arabia and international bodies. Nevertheless, domestic law cannot be used as a means of breaking the international law to which a country has previously adhered. It is however worth mentioning that a country may refuse to adhere to international law by arguing that an agreement with this law would directly conflict with its domestic law.


The International Covenant on Civil and Political Rights (ICCPR) was adopted by the United Nations General Assembly in 1966 and became binding in 1976. The document exists so as to ensure that signatory countries provide certain rights to their citizens. These include the right to political freedom, electoral rights and the right to a free and fair trial.

622 Ibid.
623 Kingdom of Saudi Arabia Basic Law of Governance (n 191)
The countries who signed this treaty must also grant their citizens certain freedoms, including freedom of religion, freedom of assembly and freedom of speech.\textsuperscript{625}

The ICCPR was developed as a part of the International Bill of Human Rights, and alongside the Universal Declaration of Human Rights and the International Covenant on Economic, Social and Cultural Rights it forms part of an international approach to human rights and liberties. The ICCPR undergoes yearly assessment by the Human Rights Committee, which functions on an ongoing basis, with members elected from all states that have signed the document.\textsuperscript{626} Although the members are elected from each participant state, the members do not represent that state within the committee. The assessment of ICCPR implementation within the participants states is conducted based on periodic reports that are submitted by the state.\textsuperscript{627}

The Kingdom of Saudi Arabia has adopted a position of non-compliance with regards to the ICCPR. The first argument held by Kingdom of Saudi-Arabia against the ICCPR and the Declaration of Human Rights relates to Article 18 of the Declaration and the ICCPR, which grants the individual the right to choose his own faith. This article directly conflicts with Islamic law and \textit{Shari’a}, which demand that the religion of all citizens be Islam. Additional conflicts between the ICCPR and \textit{Shari’a} are found in Article


\textsuperscript{626} Yvonne Donders and Vladimir Volodin, \textit{Human Rights in Education, Science, and Culture : Legal Developments and Challenges} (1\textsuperscript{st} edn, UNESCO 2007) 45.

\textsuperscript{627} O P Dhiman, \textit{Understanding human rights} (1\textsuperscript{st} edn, Gyan Publishing House 2011) 117.
2 (1) and Article 3, which prohibit any type of discrimination based on gender or religion. According to *Shari’a*, women are regarded as “half” of a man and are therefore inferior.\(^628\)

The law dictates that women receive half of the inheritance that would be given to a man, and women are also obliged to be obedient to their husbands, as long as their requests are not against *Shari’a*. Thus, according to Islamic law and teachings (*Sunna*) there is a clear distinction between men and women in terms of social roles, with women being given an inferior role.\(^629\) Considering these aspects, gender discrimination is deeply rooted within Saudi Arabia’s legislative and social system in such a way that makes it impossible for the country to comply with the ICCPR.

In the Kingdom of Saudi Arabia, religious minorities are required to pay a state tax in order to be able to remain in the country and practise their religion, which is to be done only within their own homes and with some restrictions. Additionally, a Muslim woman or man is prohibited from marrying a person of a different religion. Considering these decrees, the ICCPR comes in direct conflict with the laws of Kingdom of Saudi-Arabia.\(^630\) According to the ratification status of Saudi Arabia presented by the UNHR in 2016 the country does not adhere to the ICCPR treaty. Nevertheless, based on a 2013 report of the General Assembly, the Kingdom of Saudi-Arabia had adhered to some of its regulations

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\(^629\) Al-Hargan (n 529)

\(^630\) *Ibid.*
and had applied them to the national legislative framework. These included the Code of Criminal Procedure, the Legal Profession Law and Combating Human Trafficking.\textsuperscript{631}

In 2005 the statute of the Saudi Arabia Human Rights Commission was issued. This legislation stipulated in 19 articles the purposes of the Commission as well as its obligations. The role of the Commission is thus listed in Article 1 as being one of enhancing and protecting human rights in all aspects and according to international human rights standards but only as guided by \textit{Shari’}a law. The article states:

\begin{quote}
“It [the Human Rights Commission] aims to protect and enhance human rights according to international standards for human rights in all aspects, promote public awareness thereof and participate in ensuring implementation of the same in light of the provisions of Sharia.”\textsuperscript{632}
\end{quote}

The commission is also responsible for providing opinions on new law drafts to verify their compliance with international human rights laws as well as for verifying if the appropriate governmental agencies have properly human rights protections.

Other responsibilities of the Commission include the approval of annual reports on human rights issued by Kingdom of Saudi Arabia as well as the verification of complaints with regards to human rights. Since the Commission functions in its own authority, thus

\begin{thebibliography}{99}
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being independent from any external body, it can arrange visits to detention centres without any pre-notification of local authorities, as stipulated in Article 5(6).\footnote{Ibid.}

While the Kingdom of Saudi Arabia has its own reasons for complying with international human rights, the ICCPR functions as an optional protocol for implementation. In practical terms, countries that have signed and ratified this treaty make commitments to ensure the protection of human rights in line with international human rights policies. The status of the Kingdom of Saudi Arabia with regards to the ICCPR has changed somewhat in recent years, with the country declaring during the last UN Human Rights Council that it will consider some changes imposed by the ICCPR to its own legislation on human rights protection.

Nevertheless, during the same conference, the Kingdom of Saudi Arabia rejected other proposals that would have allowed it to ratify the treaty. The application of the existing laws providing limited rights to women, migrant workers and children have been widely criticised by Human Rights Watch and other organisations monitoring the implementation of human rights internationally.\footnote{Amnesty International, 'Saudi Arabia must back concessions on human rights with action' (19 March 2014) <https://www.amnesty.org/en/latest/news/2014/03/saudi-arabia-must-back-concessions-human-rights-action/> accessed 30 April 2016.}

A report issued by Human Rights Watch argues that even with the introduction of new laws, the practical application of these laws and their efficiency in protecting human rights is not ideal. One example of this is the Labour Law, which was adopted in 2005 and
amended in 2012. The law regulates the conditions under which women can work and also deals with migrant workers.

Although the law granted permission for women to work without the approval of a male guardian in certain domains, it still imposes gender segregation in the workplace and continues to ban women from entering certain professions without the permission of a guardian. At the same time, the law is grossly ineffective in managing the issues of migrant workers. The system upon which this particular part of the law functions is referred to as the kafala or sponsorship system. The practice allows employers to control migrant workers, since an employer’s signature is needed not only for the migrant worker to change employment but also for him to leave the country. The practice also allows the employer to withhold the worker’s salary and force employees to work against their will.

Since 2012, the kafala system has been prohibited by the government, yet this change has not yet taken effect in practice. The system as it is violates both the ICCPR and Shari’a law, which, as previously discussed, obligates employers to provide the employee and his family with a humane living condition by granting him a wage that is sufficient to fulfil these conditions. Nevertheless, recent events seem to indicate that Saudi Arabia may be shifting towards implementation of the ICCPR. The recent participation of women in municipal elections as well as the formation of the Saudi Arabia Human Rights Commission may be regarded as events that show small steps in a possible new direction.

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636 Ibid.
637 Amnesty International (n 634).
In summarising the stance of Saudi Arabia on ICCPR, some conclusions can be drawn. The initial position of the Kingdom of Saudi Arabia on the ICCPR was one of non-compliance and non-adherence to the treaty. In the past decade, however, as shown by changing legislation within the Kingdom of Saudi Arabia, the position of Saudi Arabia with regards to the ICCPR seems to have shifted towards a consideration of the recommendations. Additional actions, such as the enforcement of the Labour law and the creation of a Human Rights Commission, seem to support such a shift.


The regime change of 2011 in the Republic of Tunisia has been described as a transitional stage in the journey towards democracy. The previous constitution rejected international human rights, making Tunisia non-compliant with the ICCPR. However, the new constitution, which is now at the heart of the legal system, has incorporated principles of international human rights, including the ICCPR treaty. Hence Tunisia is arguably indirectly among the countries that have ratified and signed the ICCPR. Consequently, Tunisia is compliant with the ICCPR and therefore is obliged by international law to respect human rights and freedoms.

The power of the ICCPR also in some respects surpasses the national laws of the countries that have agreed to this treaty. The treaty declares that governments will be run

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638 Nadjma Yassari (ed), Changing god’s law: The dynamics of middle eastern family law (1st edn, Ashgate Publishing 2016) 69.
in line with international human law. Thus public and private entities, including the states that have signed the treaty, will be held responsible and accountable for implementing these laws. As a result, all legal decisions taken in Tunisian courts must adhere to the international human rights that the country has agreed to.\textsuperscript{639}

At this point, three differences between Tunisia’s position on the ICCPR and Kingdom of Saudi-Arabia’s position on the same treaty become obvious. While the Republic of Tunisia has ratified and signed this agreement, which now constitutes an integrative part of its constitution in the form of articles concerning human rights, the Kingdom of Saudi Arabia merely hints that it will take this treaty into consideration, even though it has not implemented any of the recommendations made by the UN Council on Human Rights.\textsuperscript{640}

Another distinction can be seen in the area of state law, with Saudi Arabia applying international human rights only as long as these rights in line with \textit{Shari’a} law, while Tunisia has already implemented ICCPR within its constitution, which is now the base of the state law.\textsuperscript{641} At the same time, while the Republic of Tunisia used the ICCPR in drafting its 2014 constitution, the Kingdom of Saudi Arabia has forged its own Human Rights Commission, which will apply international human rights only as long as these rights are not in conflict with the principles of \textit{Shari’a}.\textsuperscript{642} It is worth mentioning that the extraterritorial nature of the ICCPR allows international bodies assessing the application

\textsuperscript{639} Ibid.
\textsuperscript{640} Amnesty International (n 634).
\textsuperscript{641} Yassari (n 638).
\textsuperscript{642} Kingdom of Saudi Arabia, Statute of Human Rights Commission (n 632).
of human rights legislation to hold states that do not respect human rights or that take actions which violate human rights accountable.\textsuperscript{643}

In the event of a breach in Tunisia, the International Human Rights Commission can impose sanctions on the country, yet it cannot take any form of legal action against the Kingdom of Saudi Arabia due to the fact that the country is not part of the ICCPR treaty. A UK law suit in 2006 accusing Saudi Arabia of torture resulted in no action being taken based on the international law principle of state sovereignty, according to which a state is not able to exercise its judicial power over another state.\textsuperscript{644} Considering the ICCPR’s extraterritorial application, such a legal case would have a different outcome under the new Tunisian law. Although a clear differentiation can be seen between the stances of Tunisia and the Kingdom of Saudi Arabia in relation to the ICCPR, some criticisms of the Tunisian Constitution have been made in relation to the fact that, although a part of the ICCPR treaty, the country still limits freedom of expression and leaves room for interpretation on the subject of freedom of religious choice.

It has been argued that by using the notion of “blasphemy” within the constitution without providing a proper definition of the word, the state may limit freedom of expression as well as freedom of religion.\textsuperscript{645} Other concerns have been raised about the constitution’s

\textsuperscript{643} De Charles Sampford and others, \textit{Rethinking international law and justice} (1\textsuperscript{st} edn, Routledge 2015) 65.
\textsuperscript{645} Aswad (n 607).
failure to comply with the ICCPR in granting freedom of speech, because the constitution does not provide specific protections for people who act as whistle-blowers. Some documents that are of public interest have also not been made available. Without detailed articles guaranteeing these rights, most researchers’ attentions are thus focused on the ICCPR and Tunisia’s participation, which make these rights granted within the country as an ICCPR state.\(^{646}\)

Article 31 and Article 49 of the Tunisian Constitution strongly resemble Article 19 of the ICCPR, with several reservations. In the Tunisian case, freedom of expression is granted alongside responsibilities and duties, which may act as limitations within the margin of the law. Some restrictions may be imposed for national protection, public health protection, public order protection and the protection of moral conduct. In essence, the Tunisian state grants freedom of expression as long as this freedom does not become a danger to the public. In terms of torture and inhumane behaviour, a prohibition on torture has been imposed in line with ICCPR Article 7. Criminal proceedings are in place for victims who have suffered abuse under the previous regime.\(^{647}\)

Suggestions have been made that the Criminal Code should be amended to reflect Article 2 and Article 15(1) of the ICCPR so as to hold perpetrators of criminal acts...
accountable at the time of their occurrence. Nevertheless, as stipulated in Article 32 of the constitution, the constitution legally prevails before any other national legislation. Taking into account the extraterritorial nature of the ICCPR, which holds states that violate human rights accountable, even in the absence of proper legal instruments for the implementation of these rights, these rights are still granted in light of both the ICCPR and the constitution.

Steps towards the attainment of human rights and freedoms have been taken since the implementation of the 2014 Tunisian constitution in many areas of the government. In 2015, UNESCO in partnership with the Tunisian Ministry and other nations, developed a training manual for local authorities explaining the rights of the press and freedom of speech within the ICCPR framework. Further elaborations have been made in the area of criminal law in order to grant humane treatment to prisoners and people suspected of terrorism, as per the ICCPR. Prisoners are granted rights, including the right to repatriation

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The one remaining problem of the implementation of the ICCPR within Tunisia’s legal framework remains the right to free speech. Before the official adoption of the constitution, the initial draft sought to grant freedom of speech without any legislative impediments. As was argued at the time by representatives of the new government, the freedom of speech act should be in line with Article 19 of the ICCPR, as this right is an earned one in the aftermath of the revolution.

However, the representatives of the instated Commission on Rights and Freedoms had significantly different opinions on the enactment of Article 19. On one hand it was argued that free speech without repercussions and in the absence of responsibility may threaten public order, while on the other hand representatives of the Ettakatol party argued that granting free speech within a legal limit is not freedom of speech at all. Even so, the final draft of the constitution reproduced Article 19, with some references to the limits and responsibilities of free speech.\footnote{Rory McCarthy, "Protecting the sacred: Tunisia’s Islamist movement Ennahdha and the challenge of free speech" [2015] 42(4) British Journal of Middle Eastern Studies 447–464.}

As it can be seen from the information above, Tunisia’s position on the ICCPR reflects the country’s current transitional state on the road to democracy. While the constitution of Tunisia has been drafted in line with the ICCPR when it comes to protecting
freedom of political choice and granting civil rights, its legal system still requires some amendments in order to match international standards in protecting human rights.


The International Covenant on Economic, Social and Cultural Rights (ICESCR) is an international treaty which grants people cultural, social and economic rights. These include the right to welfare, labour rights, the right to education and the right to health. At the present time, the Kingdom of Saudi Arabia is not a part of this treaty and declined to withdraw reservations on the ICESCR at the latest UN Council Meeting.\(^{653}\) The grounds on which Kingdom of Saudi Arabia maintains its position on the ICESCR can easily be seen when analysing this international legislation in light of Shari’a law. The first point of contention is Article 1 of the ICESCR, which states that:

\[\text{“All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.”}^{654}\]

This article directly conflicts with the Kingdom of Saudi Arabia’s Basic Law of Governance and with Islamic Law. According to Shari’a and Saudi Arabian legislation, all


\(^{654}\) Ibid.
Saudi people must be raised in Muslim culture and follow the Islamic religion. The Basic Law also offers no grounds for political parties to be formed, indicating that the formation of political parties and subsequently political beliefs is strictly forbidden. Therefore, Article 1 of International Covenant on Economic, Social and Cultural Rights would eliminate the state’s means of imposing Islam as the only acceptable religion in the Kingdom of Saudi Arabia.\textsuperscript{655}

Additionally, Article 2(2) Article 3 and Article 6 of the International Covenant on Economic, Social and Cultural Rights mandate that states ratifying this treaty must eliminate all forms of discrimination based on sex, religion or nationality and grant equal economic rights to men and women. This article contradicts \textit{Shari’a} on multiple levels.\textsuperscript{656} The elimination of all gender discrimination is not compatible with the \textit{Shari’a} law that governs Kingdom of Saudi Arabia, especially in an economic sense. Women are only allowed to work in some jobs without the permission of their guardian and are also entitled to half of the inheritance which a man would be entitled to.\textsuperscript{657} Also, people of a different religion are only permitted to practise this religion in their own homes. They are also subjected to strict regulations, including fees and taxes.\textsuperscript{658}

However, some of the provisions of the International Covenant on Economic, Social and Cultural Rights in relation to labour rights are in line with \textit{Shari’a} Law. These are listed in Article 7(i) (b)(d) and include the right to a wage that is sufficient to allow a

\begin{thebibliography}{9}
\bibitem{655} Kingdom of Saudi Arabia Basic Law of Governance (n 191).
\bibitem{657} Al-Hargan (n 529).
\bibitem{658} \textit{Ibid.}
\end{thebibliography}
decent standard of living for the worker and his family, the right to a safe working environment and the right to leisure. Although some accounts note that these rights are not respected for migrant workers in Saudi Arabia, the Basic Law does state that labour rights shall be grated in line with *Shari’a*, which resembles the aforementioned acts.\(^{659}\)

A more complex legal issue is illustrated by the social security rights granted by the ICESCR and by *Shari’a* law. *Shari’a* law asks Muslim people to act charitably and to donate part of their earnings to people in need. The act of social aid by means of providing money or other benefits to members of the same community is a tribal tradition reflected in Islamic Law. Since this is the advice of the *Qur’an* and the teachings of the Prophet, Islamic people are obliged to perform them as part of their religion. However, in a legal context, not giving to charity is not punishable by any legislation within Saudi Arabia. Considering this fact, the ICESCR introduces a legal obligation to contribute to taxation, which is then distributed towards different areas of the state, including social security.\(^{660}\)

Nevertheless, other countries which function on legislation derived from *Shari’a* law have ratified the International Covenant on Economic, Social and Cultural Rights agreement. Egypt for example has argued that ICESCR does conflict with *Shari’a* law.\(^{661}\) However it must be considered that what *Shari’a* law dictates in one country, through the interpretation of *Ulama*, may not be the same in another country in which *Shari’a* is interpreted by different Islamic scholars and jurists. Some have argued that the ratification

\(^{659}\) Kingdom of Saudi Arabia Basic Law of Governance (n 191).  
\(^{660}\) Ben Saul, David Kinley, and Jacqueline Mowbray, *The international covenant on economic, social and cultural rights* (Oxford University Press 2014) 610.  
of the ICESCR in states in which Shari’a is the main source of law is a very difficult due to the multiple conflicts that exist between these two pieces of legislation.\textsuperscript{662}

Moreover, considering that rights are given according to Shari’a by the Basic Law, the approach taken by Kingdom of Saudi Arabia in applying this law is one that does not reflect the Articles of the International Covenant on Economic, Social and Cultural Rights. Substantial differences which seem to occur on the basis of interpretation exist in the areas women’s rights and labour rights that concern women but also other liberties, such as the right to strike or to form a political opinion.

The Basic Law of Governance does not make any references to protest or strike rights, yet it does stipulate that each citizen is entitled to communicate his concerns to the king and his representatives.\textsuperscript{663} At the other end of the spectrum, the International Covenant on Economic, Social and Cultural Rights grants the right to strike, as long as this form of protest abides by the laws of the specific country which is part of the ICESCR.\textsuperscript{664} The Saudi Labour Law does not contain any provisions regarding the right to strike either, as opposed to the International Covenant on Economic, Social and Cultural Rights, which takes a clear stance on the matter.

Another difference between the Kingdom of Saudi Arabia’s Basic Law of Governance and the International Covenant on Economic, Social and Cultural Rights concerns the right to education. While the Basic Law of Governance, in Article 30, stipulates

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\textsuperscript{662} Eva Brems, \textit{Human Rights: Universality and Diversity} (1\textsuperscript{st} edn, Martinus Nijhoff Publishers 2001) 271.
\textsuperscript{663} Kingdom of Saudi Arabia Basic Law of Governance (n 191).
}
merely that the State is responsible to provide public education and needs to “commit itself
to the eradication of illiteracy”, the International Covenant on Economic, Social and Cultural
Rights takes a clearer position on education, with an elaborate article covering the matter.
Thus, Article 13 of the ICESCR states that not only should primary education be available
for all, it is also compulsory.

Moreover, Article 13 states that secondary education needs to be made available to
all through the progressive introduction of free education and can also be provided in the
form of vocational and technical education.665 The Basic Law of Governance does not
contain any provisions that would explain the manner in which the state plans to eradicate
illiteracy. Also, the International Covenant on Economic, Social and Cultural Rights claims
that it is the right of the parents or legal guardians to choose the children’s schools and to
ensure the religious and moral education of their children.

This freedom to choose the moral and religious education of children goes against
Shari’a law, which recognises a single religion, Islam. In fact, it is clearly stated in Article
13 of the Basic Law of Governance that education “aims at the inculcation of the Islamic
creed in the young generation and the development of their knowledge and skills so that
they may become useful members of society who love their homeland and take pride in its
history”.666 Moreover, experts have noticed that even though the Saudi State has made a
commitment through the Basic Law of Governance to end illiteracy, Saudi women’s access

665 Ibid.
666 Kingdom of Saudi Arabia Basic Law of Governance (n 191).
to education continues to remain restricted, with Saudi females having fewer educational opportunities and later on fewer employment opportunities than their male counterparts. 667


As Abiad has explained, even though Saudi Arabia refuses to adhere to the ICESCR on the grounds that the provisions of the Covenant were not in line with Shari’a Law and in some situations were completely counter to Shari’a law, there are a number of other Muslim countries that chose to sign the International Covenant on Economic, Social and Cultural Rights despite these conflicts. Tunisia’s application of Shari’a law is significantly different from the manner in which Kingdom of Saudi Arabia interprets and applies it, which can clearly be seen in the differences between the constitutional legislation in each of the respective countries. 668

Thus, in order to determine Tunisia’s actions in relation to the ICESCR, it is necessary to compare the country’s legislation with selected articles of the Covenant. Drawing on the argument made in the previous paragraphs regarding the incompatibility of the first paragraph of Article 1 of the Covenant with Shari’a, the Article states:

668 Abiad (n 541).
“All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development”. 669

The Constitution of Tunisia demonstrates a similar point of view. The second article of the Constitution states that:

“This is a civil state based on citizenship, the will of the people, and the supremacy of law”. 670

This indicates that the people have a considerable amount of power in matters of the state. Article 3 continues to call the people “sovereign” and the main source of authority, as authority is exercised by the people through their representatives, who are obliged to abide by Tunisian law. Also, Article 8 of the Tunisian Constitution speaks of the inclusion of the youth in the community, recognizing their right to participate in “social, economic, cultural and political development.” This seems to align with the provisions of the ICESCR in a number of ways, but several significant differences remain, such as the recognition of Islam as the unique religion of Tunisia, which can be seen as limiting the right of the people of Tunisia to cultural development as outlined in the ICESCR.

Furthermore, Article 2 (2) states that the rights detailed in the legal document shall be valid for all people, regardless of gender, race, social status or religion. However, the Tunisian Constitution allows for religious discrimination through Article 6, which explains that the state:

670 Ibid.
“undertakes to disseminate the values of moderation and tolerance and the protection of the sacred, and the prohibition of all violations thereof”\textsuperscript{671} and that the state is the “guardian of religion”.\textsuperscript{672}

A clearer statement of religious discrimination in the Tunisian Constitution also can be seen in Article 74, which states that the right to become a candidate and be elected as President of the Republic of Tunisia belongs to Tunisian citizens, male or female, “whose religion is Islam”.\textsuperscript{673}

As far as labour legislation is concerned, the ICESCR guarantees, in Article 8 paragraph (a), the right to join trade unions in order to protect one’s own economic and social interests.\textsuperscript{674} Furthermore, trade unions have the right to function freely and be subject to no limitations, except those imposed by the country’s law. In Tunisia the Labour Code is the main source of law that regulates labour, the labour market and therefore all workers in the country.\textsuperscript{675}

Tunisian workers, unlike those in Saudi Arabia, have the right to organise in unions (Article 31) and to negotiate labour contracts in order to obtain better remuneration conditions, better working conditions or other common benefits. Furthermore, the Tunisian Labour Code protects against unfair dismissal (Article 37) and establishes other norms,

\textsuperscript{671} Tunisia’s Constitution (n 156).
\textsuperscript{672} Ibid.
\textsuperscript{673} Ibid.
such as the length of the trial period, the minimum age for labour or even compensations after unfair dismissal.\textsuperscript{676} Furthermore, the Labour Code has specific provisions that prohibit gender discrimination, as Article 5 (2) argues that no discrimination between men and women will occur in applying the provisions of the Code. The constitution says that:

\begin{quote}
“work is a right for every citizen, male and female. The state shall take the necessary measures to guarantee work on the basis of competence and fairness. All citizens, male and female, shall have the right to decent working conditions and a fair wage.” \textsuperscript{677}
\end{quote}

Article 40 indicates a commitment to ensure that gender discrimination does not take place.\textsuperscript{678} Thus, as per the new Constitution established in 2014, in Tunisia male and female citizens have equal rights to work. This interpretation of this law is different than in Saudi Arabia, where women are allowed to work in specific domains (such as education) only with the consent of their male guardian.

As far as the Tunisian education system is concerned, evidence suggests that the legislation adheres more closely to the ICESCR than does Saudi Arabia. Specifically, the Tunisian education system has initiated a number of reforms since Tunisia gained its independence from France. The main goal after independence was to build a qualified workforce with the purpose of gaining the competitive advantage that a developing country needed at that time. Thus, the first wave of reform was focused on developing and

\begin{flushright}
\textsuperscript{677} Tunisia’s Constitution (n 156).
\textsuperscript{678} Ibid.
\end{flushright}
encouraging vocational training among the youth of Tunisia, with the purpose of addressing the economic and social needs of the country.

Furthermore, through the constitution, education was made compulsory up to the age of sixteen for all Tunisian citizens (Article 39). Education until the age of sixteen is also free by decree of the constitution (Article 39), the state being obliged to ensure “provisions of the necessary resources to achieve a high quality of education, teaching, and training” (Article 39). The manner in which Tunisia interprets and applies Shari’a law therefore adheres much more closely to the provisions of the International Covenant on Economic, Social and Cultural Rights from 1966 in comparison to the manner in which Saudi Arabia applies the Shari’a law. As previously stated, Shari’a law is highly subject to interpretation by the Ulama. Therefore, it can be said that compliance with international human rights legislations and the creation of laws that can lead to this compliance is a matter of interpretation and maybe of conscious choice.

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679 Tunisia’s Constitution (n 156).
Chapter 5

Equality and Women’s Rights In Islamic States

1. Equal Rights in Islamic Law (Shari’a)

The continuing debate on the topic of human rights and human rights violations in Islamic countries also covers issues of equality, with a particular focus on gender equality issues. At an international level, there are numerous laws that promote non-discrimination and equality, laws that a high number of Muslim countries do not adhere to, as they contradict Shari’a law. These laws include, in addition to the Universal Declaration of Human Rights, numerous international covenants (such as the International Covenant on Civil and Political Rights), regional human rights conventions (such as the Cairo Declaration of Human Rights) and treaties in specific fields (e.g. the Convention on the Elimination of All Forms of Discrimination Against Women and the Convention on the Rights of the Child).

Non-discrimination should ensure equality before the law and the equal protection under the law of all human beings, with no distinctions in regard to race, gender, religion

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or language.\textsuperscript{682} However, \textit{Shari’a} law contains some provisions that encourage clearly discriminatory behaviour, especially when it comes to gender and religion. As previously mentioned, \textit{Shari’a} law is highly reliant on the interpretation of religious texts and traditions, and therefore does not rely on legal precedent and legislation, but on the judgement of the \textit{Ulama}, and on the \textit{fiqh}, the Islamic jurisprudence that is derived from the \textit{Qur’an} and the \textit{Sunna}.

There are certain discriminatory provisions in \textit{Shari’a} law, especially concerning religion. Thus, non-Muslims are known as \textit{kafirs}, and \textit{Shari’a} law indicates that a holy war (\textit{Jihad}) must be led against the \textit{kafirs} in order to establish Islam. The \textit{Qur’an} states:

\begin{quote}
“Fighting has been enjoined upon you while it is hateful to you. But perhaps you hate a thing and it is good for you; and perhaps you love a thing and it is bad for you. And Allah Knows, while you know not.” \textsuperscript{683}
\end{quote}

Also, Muslims are given permission to mock the \textit{kafirs}, plot against them or even kill them, and the \textit{Qur’an} states:

\begin{quote}
So when you meet those who disbelieve [...] , strike [their] necks until, when you have inflicted slaughter upon them, then secure their bonds, and either [confer] favor afterwards or ransom [them] until the war lays down its burdens.” \textsuperscript{684}
\end{quote}

\textsuperscript{682} Weiwei (n 680).
This is a direct violation of international human rights and equality laws. By contrast those of the same religion (Muslims) are considered, as per Shari’a law, as equals. An interesting phenomenon can be observed in terms of legal provisions given in Shari’a law. There is a legal dualism involved in the manner in which Islamic countries apply Shari’a. As previously argued in the second chapter, there is a notable difference between Saudi Arabia’s approach to Shari’a law and the application of law in Tunisia. The same dualism can also be observed in the Qur’an and the Hadiths themselves. On the one hand, some verses promote a tolerant attitude, as when the Qur’an states;

“And be patient over what they say and avoid them with gracious avoidance.” 685

As can be seen from verse 47:4 quoted above, encourage an intolerant and violent attitude. Nevertheless, regardless of the attitude that is suggested by the holy texts (tolerant or intolerant), the fact remains that non-Muslims are not considered equal to Muslims, but rather inferior due to their religious beliefs. It is even permitted, under Shari’a law, to enslave a non-believer, yet it is considered illegal to enslave a Muslim. This is in direct contradiction with Article 7 of the Universal Declaration of Human Rights, which states that:

“All are equal before the law and are entitled without any discrimination to equal protection of the law.” 686

686 Universal Declaration of Human Rights (n 1).
Inequality is also reflected in the approach *Shari’a* law takes to the idea of family. According to the law, the husband, who is also the guardian of the family, has a number of rights over his wife and female-born children.\(^{687}\) Thus, the husband can prohibit his wife from leaving the house. Also, marriage to a minor is permitted according to *Shari’a* law and the guardian has the right to sell a female child into marriage, but not for an amount less that what others are selling daughters of the same condition (age, statute etc.).\(^{688}\) These family laws demonstrate that, under *Shari’a* law, women are not equal to men and men have certain rights over the females that are under their guardianship. This does not imply that unmarried women are equal to men under the law, as the law decrees that it is mandatory for a woman to have a guardian.\(^{689}\)

The issues of inequality in the provisions of *Shari’a* law pertaining to the family have been subjected to a great amount of criticism and debate, especially when people seek to live by Islamic laws in countries where the dominant religion is not Islam. However, there are critics who argue that the differences between *Shari’a* law and international law on the topic of equality have been exaggerated.\(^{690}\)

It has been argued that the media presents Muslim laws in an oppressive and condemnatory light, which has led to further stigma against them and a greater tendency

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\(^{687}\) Bill Warner (ed), *Sharia Law for The Non-Muslim* (1st edn, Center For the Study Of Political Islam 2014) 15.


\(^{690}\) Ralph Grillo, *Muslim families, politics and the law: A legal industry in Multicultural Britain* (1st edn, Ashgate Publishing 2015) 125.
towards isolating themselves from universally accepted bills of law, refusing to adhere to rules that go against their cultural traditions. Other critics speak about the fact that Shari’a law is controversial because of its religious nature.\textsuperscript{691} This explains why judicial proceedings in Islamic countries are not made public and may be one of the reasons why the world perceives Shari’a law as unfair. Furthermore, the contentious issues tried under Shari’a law have been faced with a high level of publicity, often arguably motivated by a fear of religious difference.

The contradictory nature of Shari’a law is much discussed in existing literature.\textsuperscript{692} Even Muslim jurists who analyse the law say that Shari’a law promotes equality, wisdom, and the welfare of all human beings, only to later argue that the wife can be considered her husband’s prisoner or slave, because the Hadiths describe the duties the man has towards his wife identically with the duties he has towards a slave. Ergo, the interpretation some legal bodies have issued in relation to this Hadith was that the wife may be considered a slave to the husband. If explanatory arguments of a legal and cultural nature can be made in relation to the position Shari’a law has on equality as long as the discussion remains focused solely Islamic states, evidence suggests that other countries do not tolerate the provisions of Shari’a law that go against national law.\textsuperscript{693}

\textsuperscript{691} H Akh Minhaji, \textit{Islamic Law and Local Tradition: A Socio-Historical Approach} (1\textsuperscript{st} edn, Kurnia Kalam Semesta 2008) 137.
\textsuperscript{692} Lena Larsen, Ziba Mir-Hosseini, and Christian Moe (eds), \textit{Gender and equality in Muslim family law: Justice and ethics in the Islamic legal tradition} (1\textsuperscript{st} edn, Palgrave Macmillan 2013) 26.
\textsuperscript{693} Scientific Council for Government Policy, \textit{Dynamism in Islamic Activism: Reference Points for Democratization and Human Rights} (1\textsuperscript{st} edn, Amsterdam University Press 2006) 139.
The reality is that inequality is common in Islamic countries that are governed by Shari’a law, but, as previously discussed, the level of inequality present depends on how Shari’a law is interpreted, and which perspective is chosen by the Ulama. For example, not all Islamic countries apply the same harsh punishments as Saudi Arabia. In Tunisia, even though it has not abolished the death penalty by law, the last execution took place in 1991, while Saudi Arabia still practise capital punishment. This is because punishments in Saudi Arabia are established according to the Shari’a interpretations of the Ulama.⁶⁹⁴

1.1 Equality Rights in the Kingdom Saudi Arabia

In Saudi Arabia, the Basic Law of Governance guarantees the right to equality, and states:

“The system of government in the Kingdom of Saudi Arabia is established on the foundation of justice, "Shoura" and equality in compliance with the Islamic Shari'a (the revealed law of Islam).”⁶⁹⁵

Equality is thus guaranteed by Shari’a law. However, as previously discussed, under Shari’a law women are not considered to be equal to men, therefore it can be said that the Basic Law of Governance from Saudi Arabia does not guarantee equality. Furthermore, there are a number of areas where inequality can be observed when analysing Saudi Arabian law, such as religious inequality and labour inequality and discrimination.

⁶⁹⁵ Kingdom of Saudi Arabia Basic Law of Governance (n 191).
It is written both in the Basic Law and in *Shari’a* law that each citizen has the right to labour in order to earn his living. According to the *Qur’an*, there are numerous indications on how labour must be conducted and what the rights of workers are. Thus, all workers are granted the right to a safe working environment and are protected from being overworked by employers.\(^696\) It is mentioned in the Basic Law in Article 17 that labour, ownership and capital are fundamental for the Kingdom’s development and they constitute private rights that are granted in accordance with *Shari’a* law.

The Saudi Arabian Labour Law states in Article 3 that all citizens are equal in their right to work and that the employer and the worker must adhere to the provisions of *Shari’a* law when applying the Labour Law.\(^697\) However, Article 7 section 5 states that non-Saudi workers may come to the Kingdom for work and that if the period in which they conduct their work does not exceed two months it is exempt from the Labour Law. This means that foreign workers who work in Saudi Arabia for less than two months are not granted equal rights, according to the Labour Law, to Saudi citizens are.

Furthermore, the Labour Law obliges employers to hire disabled people that are deemed professionally capable, and the disabled workforce should represent at least 4% of the total work force of the employer. This provision is in accordance with *Shari’a* law, which deems that Muslims have the right to earn their living. Also, if a worker suffers an injury at work which results in him remaining disabled and not being capable of performing

\(^{696}\) Ghazali (n 598).

his usual work, the employer is obliged to offer the worker another position within the firm, according to his labour capacity.

The part of the Saudi labour law poses problems for equality is the one relating to the employment of non-Saudis. Articles 32 to 41 of the Labour Law impose strict rules pertaining to foreign workers and foreign recruitment is concerned. First of all, according to the law, an employer who wants to recruit workers from abroad can only do so with the permission of the Ministry of Labour (Article 32). Also, it is illegal for a foreigner to work in Saudi Arabia without having a work permit. This work permit is obtained from the Ministry of Labour.

Work contracts for non-Saudi workers are for a limited time only, according to Article 37 of the Labour Law. The Saudi Labour Law also rules that certain jobs and positions are prohibited to foreign workers, the list of forbidden jobs being provided by the Ministry of Labour, and including jobs in human resources, receptionist positions, cashier or typist. Furthermore, employing a non-citizen in Saudi Arabia for a job that is different from the one enlisted on the work permit is not allowed (Article 38), and the employer cannot allow his employee to work for other employers, nor is the employee allowed to work as a freelancer. All procedures are issued by the Ministry of Labour and may be changed to protect the country’s economic welfare and the welfare of its people. While this part of the Labour Law protects the right to work of Saudi nationals, it is very restrictive and discriminatory towards non-citizens.

699 Kingdom of Saudi Arabia Labor law (n 697).
700 Ibid.
It can also be argued that there is no religious freedom or equality of religion in Saudi Arabia.\footnote{701} Even in the first article of the Basic Law, the official religion is declared to be Islam and no other religion is permitted. Religious minorities are allowed to conduct their religious practices in private, but public displays of any religion other than Islam are strictly forbidden.\footnote{702} Since there is no separation between the state and religion, and the law itself is based on religious teachings, it can be said that religious practice is an essential part of Muslim culture. For this reason, even though people of other religions have the right to practice their religion in private, this right is often violated, with people of other religions either being punished, harassed or discriminated against for their beliefs by the religious police (officially known as the CPVPV - Committee for the Promotion of Virtue and the Prevention of Vice) or deported if they are not citizens of Saudi Arabia.

Apostasy (the conversion from Islam to another religion) is punishable by death according to the Basic Law. Furthermore, given that the majority of the population is Sunni, there is widespread prejudice against Shia Muslims. Evidence suggests that Shia Muslims are discriminated against in schools, in employment, in political representation and in the justice system, mainly due to historical animosities between Sunnites and Shiites and because the Sunnites believe that the religious practices of the Shia Muslims promote polities and encourage people to commit apostasy.\footnote{703}

\footnote{701} Heiner Bielefeldt and others, *Freedom of Religion Or Belief: An International Law Commentary* (1\textsuperscript{st} edn, Oxford University Press 2016) 344.  
1.2 Equality Rights in the Republic of Tunisia

The Constitution of Tunisia prescribes equality clearly and concisely in Article 21:

“All citizens, male and female, have equal rights and duties, and are equal before the law without any discrimination. The state guarantees freedoms and individual and collective rights to all citizens and provides all citizens the conditions for a dignified life.”

However, there are still some issues in Tunisia concerning equality in a number of areas, mostly concerning labour, religion and sexual orientation. Even though the constitution clearly states in Article 21 that all citizens “male and female” are equal before the law and have equal rights, there is still evidence of gender inequality. Furthermore, other instances of inequality occur in various areas of law, such as labour and freedom of religion, however these are not as severe as in the case of Saudi Arabia.

As discussed, Tunisia applies a version of Shari’a law that is less strict than that of Saudi Arabia. However, issues related to work inequality have existed in the country even before the reform of the constitution, being one of the main causes of the events of the Arab Spring. In order to explain how Tunisian labour law does not protect the people from inequality, some of the key legal provisions must be documented here. The country’s labour code was last amended in 1996, and since then a number of provisions have been

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704 Tunisia’s Constitution (n 156).
enforced. However, the labour code does not apply to all of the work force, with public servants, domestic workers and sea workers being exempt from the provisions of this law, each category having separate provisions.

More importantly, domestic workers are not protected by the provisions of the labour code, but their contracts with the employers are subject to civil contract law. However, the Tunisian labour code does not hold any law regarding collective dismissal.\textsuperscript{706} Unlike the Saudi Arabian labour law, the Tunisian code does not hold any specific provisions that prohibit foreign workers from taking jobs in Tunisia, nor does it impose severe restrictions on them doing so, however a work permit is required in order to work in Tunisia as a foreigner. Furthermore, the law also protects pregnant women from unlawful dismissal (Article 20, paragraph 2), and maternity leave is well-regulated.\textsuperscript{707}

From this brief analysis of the main elements of the Tunisian labour code, it appears that its provisions are much more in line with international legislation. However, issues of poverty and inequality are still present in the Tunisian economy. Even though the Tunisian Constitution aims at creating a more equitable distribution of work opportunities decreasing the social welfare gap in the country, decentralised politics and structural constraints have slowed the progress of reform.\textsuperscript{708}

Despite the progress the country had made by 2015, progress for which Tunisia was awarded a Nobel Peace Prize in 2015, there are still regions of the country mired in poverty,

\textsuperscript{706} OECD, 'Tunisia' (n 676).
and Tunisia remains, from an economic point of view, a country in transition.\textsuperscript{709} Comparing the situation in Tunisia with that of Saudi Arabia in terms of labour legislation, it can be observed that the Tunisian labour law is more in line with international labour legislation and offers more protection to working citizens. However, despite the existence of the law, the lack of improvement in terms of economic inequality demonstrates that Tunisia has not successfully enforced it.

As far as freedom of religion is concerned, Tunisia also states in the constitution that the official religion of the country is Islam, however the provisions of Article 6 of the constitution oblige the state to offer freedom of conscience and worship and protect the Islamic religion without diminishing the values of tolerance and the protection of the sacred.\textsuperscript{710} Moreover, the same article provides that incitements to violence and hatred are not acceptable, and that the state is obliged to fight such practises and ensure freedom of religion.

The constitution declares in Article 6 that the state will not become involved in religion and vice versa and that mosques and places of worship will not be used for the purposes of political propaganda.\textsuperscript{711} For this reason many of the country’s civil laws do not have a religious substrate, being based on the Napoleonic Code, except for inheritance and family laws which in some instances draw on \textit{Shari’a law}.\textsuperscript{712} As a consequence, the number of attacks against members of non-Islamic religious minorities fell considerably in 2014 in

\textsuperscript{709} \textit{Ibid.}
\textsuperscript{710} Tunisia’s Constitution (n 156).
\textsuperscript{711} \textit{Ibid.}
comparison to 2013, with violent groups that advocated radical doctrines being arrested. By 2014 religions such as Judaism and Christianity were more widely accepted by the Muslim population in Tunisia.

Nevertheless, there are still a number of restrictions on religious propaganda that stem from the penal code, in the form of provisions that criminalise religious hate speech that disrupts the public order and morals and offends the public sense of decency.\textsuperscript{713} Compared to Saudi Arabia’s approach to religious freedom, however, Tunisia demonstrates a more tolerant approach. Some issues of religious inequality still exist in practice, as there is a cultural barrier between Muslim traditionalists and the law.\textsuperscript{714}

Political and legal reforms in Tunisia do not seem to have taken into account the cultural factor, which could be capable of slowing down the development towards religious freedom. Nevertheless, unlike Saudi Arabia, which prohibits the presence of spiritual leaders of other religions in the country and imposes private worship, Tunisia has allowed non-Muslims in the community to practise their religion freely.

\textsuperscript{713} \textit{Ibid.}

2. Women’s Rights in Islamic Law (Shari’a)

There is a significant amount of debate at the moment around women’s rights in the context of Shari’a law, as the decrees of Shari’a law do not protect women’s rights, and Islamic countries show no desire to join the international movement for women’s rights. There are a number of legal provisions stemming from Shari’a that clearly render women inferior to men.

It is argued in Shari’a law that a woman’s testimony as a witness is equal to half of that of a man, because the woman’s mind is deficient as the prophet states;

“The Prophet said, "Isn't the witness of a woman equal to half of that of a man?" The women said, "Yes." He said, "This is because of the deficiency of a woman's mind."\(^{715}\)

From this provision, it is evident that women are considered less intelligent than men, a belief which seems to be reflected in current legal practice in countries that apply a strict version of Shari’a law. Nevertheless, some critics that argue the interpretation of the holy texts with regards to women’s testimonies are taken out of context.\(^{716}\)

Furthermore, it has been argued that other verses of the Qur’an (verse 2:282 for example) do not distinguish between male and female testimonies, although other jurists argue that

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\(^{716}\) Saleem Marsoof, ‘Witness Testimony – Some Perspectives From Sharia’a Law’ (1st edn, University of Colombo, Faculty of law 2016) 10.
these are only exceptions to the general rule that female testimonies are not equal to those of men.\textsuperscript{717}

Contradictions can also be observed when analysing the rights given to women in marriage under \textit{Shari’a} law. In some legal texts it is said that the legal male guardian of a female can give her into marriage to whomever he decides, regardless of the age of the female or of her consent to marriage.\textsuperscript{718} Thus, the marriage contract is not between the husband and the wife, but between the husband and the bride’s legal guardian. In other words, a marriage under \textit{Shari’a} law can often be regarded as a transfer of guardianship from the bride’s father (or another close male relative) to the groom. Even under \textit{Shari’a} law there is typically some controversy on the subject of child marriage.

While it is generally illegal in many countries, it is common practice in rural areas of Muslim countries to marry female children that are of age (i.e. had their first menstrual cycle), and the law seems to protect this behaviour, as the legal guardians have the right to make any decision concerning the female. Some Islamic jurists criticise this interpretation of the holy texts, as they claim there is no verse of the \textit{Qur’an} or \textit{Hadith} that specifically states that child marriage is legal, especially in the absence of consent.\textsuperscript{719} They claim that the Prophet himself invalidated marriages that were not consensual.

Furthermore, even if it has been claimed by some \textit{Ulamas} that child marriage is legal under \textit{Shari’a} law, because the Prophet himself married Aisha when she was only

\textsuperscript{718} Raj Bhala, \textit{Understanding Islamic law: Sharia} (1\textsuperscript{st} edn, LexisNexis 2011) 82.
\textsuperscript{719} Ayesha M. Imam, Mufuliat Fijabi, and Hurera Akilu - Atta, \textit{Women’s Rights in Muslim Law} (1\textsuperscript{st} edn, BAOBAB for Women ‘s Human Rights 2005) 33.
nine years old, other critics argue that some texts specify Aisha was much older upon her marriage to the prophet.\textsuperscript{720} The right of a woman to choose her own spouse has also been challenged in several cases. For instance, in \textit{Ghaled v United Arab Emirates} a Christian man married a Muslim woman of United Arab Emirates nationality in Lebanon.\textsuperscript{721} It was required that the husband convert to Islam as per \textit{Shari’}a law, yet the man did not comply. Because it is prohibited under \textit{Shari’}a law for a Muslim woman to marry a non-Muslim man, the husband was sentenced under the UAE \textit{Shari’}a court to 99 lashes and one year of imprisonment.

International bodies of law considered that, because both spouses entered the marriage of their own free will and there were no issues related to consent, the punishment and criminalisation of the husband for marrying a woman of another religion violated the international rights to equality, the right to privacy and the right to choose one’s spouse. Thus the man’s detention was considered arbitrary. As a result of this case, the UAE was requested to amend their laws to comply with international human rights legislation in order to remedy the situation of Mr. Ghaled and to become part of the International Covenant on Civil and Political Rights, however this did not occur.\textsuperscript{722}

A similar case occurred with \textit{Humaira Mehmood v SHO PS North Cantt}. Humaira married Mehmood in secret, against the will of her parents. Humaira had already been promised in marriage to a cousin from childhood, but she did not consent to that


\textsuperscript{721} Robyn Emerton and others, \textit{International Women's Rights Cases} (2\textsuperscript{nd} edn, Routledge 2016) 585.

\textsuperscript{722} \textit{Ibid.}
arrangement. On the other hand, her marriage to Mehmood was consensual. As her parents did not consent to the marriage, they detained and tortured Humaira for a month, after which she was forced to marry her cousin. To invalidate her marriage to Mehmood, the marriage to her cousin was backdated in the marriage registry in order to appear as if it took place a month before she married Mehmood. As women under Shari’a law do not have the right to polygamy, her marriage to Mehmood was invalidated.723

Moreover, she was accused of committing adultery and sentenced in accordance to Shari’a law. The case escalated when the spouses fled to another region, fearing for their lives, and Humaira’s cousin pursued them. Mehmood was also accused of abducting Humaira. The case was resolved when Humaira brought a petition before the High Court and it was ruled that under Pakistani Shari’a law, in accordance with the Cairo Declaration on Human Rights in Islam, Articles 5 and 6, and under the provisions of CEDAW Article 16, Humaira’s marriage to Mehmood was legitimate because she entered into it of her own free will and with full consent, and the marriage to her cousin was invalidated because it occurred under coercion and constituted a violation of Humaira’s basic human rights.724

The differences between the two cases once again show the dualism present in the interpretation of Shari’a law. While the first case was judged under Shari’a law as applied in the United Arab Emirates, a strict and more traditional country, and the defendant was prosecuted to the full extent of the law, despite petitions from international human rights bodies, the second case, in Pakistan, had a completely different outcome, since the ruling was made not only in accordance with Shari’a law and constitutional rights, but also

723 Ibid.
724 Ibid.
according to international human rights legislation, including the Cairo Declaration on Human Rights in Islam and Convention on the Elimination of All Forms of Discrimination Against Women.

Not all Islamic countries place the same restrictions on women’s rights.\textsuperscript{725} For example, in Bahrain women were given the right to vote and become candidates in national elections in 2002.\textsuperscript{726} After the reform was passed, women ran for seats in parliament, but none of them won at the time. Nevertheless, 2002 was the first year women could vote in Bahrain, this country becoming the only one in the Gulf where women have been granted this right.\textsuperscript{727} Other Islamic countries continue to enforce a stricter version of Shari’a law, one that strips women of many of their basic rights.

\subsection*{2.1 Women’s Rights in the Kingdom of Saudi Arabia}

Saudi Arabia has become widely known for the fact that it has demonstrated a strong resistance to feminist reforms over the years.\textsuperscript{728} Nevertheless, change did occur when King Abdullah granted women the right to vote in 2011, which was widely considered a step forward as far as women’s rights in Saudi Arabia are concerned. This change came about

\begin{itemize}
  \item \textsuperscript{725} Florence Denmark and others, \textit{Engendering Psychology: Women and Gender Revisited} (2\textsuperscript{nd} edn, Psychology Press 2016) 71.
  \item \textsuperscript{726} The report, \textit{Emerging Bahrain 2007} (1\textsuperscript{st} edn, Oxford Business Group 2007) 12.
  \item \textsuperscript{727} Amal Al-Malki and others, \textit{Arab Women in Arab News: Old Stereotypes and New Media} (1\textsuperscript{st} edn, A&C Black2012) 93.
  \item \textsuperscript{728} James P Levine and Chitra Raghavan (eds), \textit{Self-determination and women’s rights in Muslim societies} (1\textsuperscript{st} edn, University Press of New England 2012) 304.
\end{itemize}
as a consequence of the Arab Spring, and brought hope to the women of Saudi Arabia, but this small victory did not alter the fact that a high number of laws that violate women’s rights still exist.

Moreover, considering the fact that Shari’a is the law in the country, women seem to have had difficulties gaining more social recognition. Labour laws, the fact that women are banned from driving and the obligation of women to have a male guardian are all provisions of Shari’a law that are applied in Saudi Arabia and severely limit women’s rights. The Kingdom of Saudi Arabia’s Basic Law of Governance does not have any provisions that promote gender equality. As Saudi Arabian Shari’a law is extremely traditionalist, there are numerous instances where women have been abused, oppressed, had their freedoms taken away, or even lost their lives due to strict laws.\textsuperscript{729}

A promising change however has been the opening of the first female law firm in Saudi Arabia, which focuses on protecting women’s rights in the country after four women were granted the licence to practise law in 2014.\textsuperscript{730} However, women represent only a small part of the total Saudi Arabian workforce, and their right to work is still restricted by male guardianship. Gender segregation is enforced by means of the Basic Law, with women not being allowed to work in mixed-gender environments. Article 8 of the Basic Law states that the system of governance is based on equality according to Shari’a law, which grants

\textsuperscript{729} Ibid.
the government and the religious police the authority to enforce rules (which are usually traditional and unwritten) that often violate women’s rights.\textsuperscript{731}

A similar gender disparity can be seen in education. Article 13 of the Saudi Arabia Basic Law states that the purpose of the education system in Saudi Arabia is to teach the young the Islamic faith, while also offering them the skills and knowledge necessary for them to become useful members of society. Despite that, and despite the progress the country has made in the past decades in women’s literacy, there is still a clear gender segregation in education.\textsuperscript{732}

The reason for this may be the fact that the patriarchal viewpoint on gender roles is passed on to younger generations from an early age through religious education, and children are taught that women are of lower status than men.\textsuperscript{733} Women in Saudi Arabia historically became so marginalised that they were once close to being faced with compete expulsion from the workforce.\textsuperscript{734} The guardianship legislation did not improve this situation, as male guardians often did not grant women the right to work, arguing that their role in the family is to care for the home, the children and the husband.

Since that time, women have slowly become more involved in the workforce, but the jobs they could do were regulated by the government. Thus women could only be employed in health care, education or other social industries. This contradicts Article 28 of the Basic Law of Governance, which states that the government should provide job

\begin{footnotesize}
\textsuperscript{731} Kingdom of Saudi Arabia Basic Law of Governance (n 191).

\textsuperscript{732} Ibid.

\textsuperscript{733} Sherifa Zuhur, \textit{Saudi Arabia} (1\textsuperscript{st} edn, ABC-CLIO, 2011) 208.

\textsuperscript{734} The Report: \textit{Emerging Saudi Arabia} (1\textsuperscript{st} edn, Oxford Business Group, 2007) 36.
\end{footnotesize}
opportunities to all those able to work and should ensure, through proper laws, the protection of both the employee and the employer.\textsuperscript{735}

As previously discussed, the Labour Law enacts some provisions to protect workers, yet women are still not given equal work opportunities to men. However, recent evidence suggests that women are beginning to notice a change in their status due to variations in the economic needs of the Kingdom of Saudi Arabia.\textsuperscript{736} Historically, women’s empowerment can be connected to major events, such as the Iranian Revolution or the Arab Spring. In January 1979 the Iranian Revolution consolidated the religious leadership of the Kingdom of Saudi Arabia, which led to a loss of women’s rights in the country.\textsuperscript{737} After this event, the first Gulf War took place, between Iran and Iraq, followed by the second Gulf War. Each of these events had a destabilising impact on Saudi society, strengthening radical traditionalism and religious power and slowly reducing women’s rights in the country. Women’s desire for change became stronger after the American presence in Saudi Arabia increased during the 1970s and the Mecca uprising in 1979.\textsuperscript{738}

After this event, the country became even more determined to preserve the religious rules and traditions embedded in their culture, while continuing on the road towards economic development. Girls’ education was segregated from the education of boys, and was placed under the jurisdiction of the Department of Religious Guidance, whose purpose

\begin{thebibliography}{9}
\bibitem{735} Kingdom of Saudi Arabia Basic Law of Governance (n 191).
\bibitem{736} Julinda Abu Nasr, Henry T. Azzam, and Nabil F. Khoury (eds), \textit{Women, employment, and development in the Arab world} (1\textsuperscript{st} edn, Mouton Publishers 2012) 38.
\bibitem{737} Ayman Al-Yassini, \textit{Religion and state in the kingdom of Saudi Arabia} (1\textsuperscript{st} edn, Westview Press Inc 1985) 39.
\bibitem{738} Daryl Champion, \textit{The Paradoxical Kingdom: Saudi Arabia and the Momentum of Reform} (1\textsuperscript{st} edn, C Hurst & Co Publishers 2003) 130.
\end{thebibliography}
was to ensure that women were educated in a manner that did not deviate from tradition, preparing women to become good mothers and wives and training them for jobs that were deemed suitable for them (in domains such as nursing or education).

These notions still persist today, and women are not permitted to work in jobs that are deemed unsuitable for them. Therefore the fact that four women were granted the license to practice law in Saudi Arabia and have opened their own law firm is a significant indicator of progress. Another indication of progress was the laws the king passed between 2011 and 2013 with regard to women’s rights. Women not only gained the right to vote in 2011, but in 2012 the king issued a decree that allowed women to become part of the Consultative Council.

This can be considered an important step forward as far as women’s rights are concerned, as the role of the Consultative Council is to propose laws to the king and the cabinet. While it has no power to enforce laws, the Council can influence legislative progress through its propositions. The presence of women on the Council can therefore lead to more laws being passed to protect women’s rights, especially when the king has already passed several laws granting women their rightful place as members of society, such as issuing national identity cards for women and increasing the list of jobs they are allowed to have.

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As previously discussed, traditionalist lawmakers have criticised the king’s reforms on women’s rights, arguing that they are not entirely in accordance with Shari’a law.\textsuperscript{741} From 2013 onwards women have joined the Consultative Council, and since then a number of laws improving the status of women have been passed. Domestic abuse against women was criminalised in 2014, incorporating shelter, counselling and medical aid to victims of domestic abuse while also instating a punishment of one year of prison for the abuser, plus a substantial fine.

Also, the female members of the Council issued a petition for granting women the right to drive, which was accepted for discussion in the council, having been previously rejected more than once. As of the present, however, the efforts of the female council members to lift the driving ban for Saudi women have not been successful due to cultural factors. An uneducated official also that women driving is dangerous for them, as they risk damaging their ovaries and giving birth to unhealthy offspring.\textsuperscript{742}

Another significant indication of progress was on September 26, 2017 the King of Saudi Arabia issued a royal decree adding new provisions to Royal Decree M/85 on Traffic. This new decree gives women the right to be issued a driving license and institutes

\textsuperscript{741} Al-Jarboa and Al-Mohisan (n 739).
a governmental body to execute its provisions within 30 days from the issuance date, but it is not clear if these provisions have been executed.⁷⁴³

The reality however is that in Saudi Arabia women are still forbidden to leave the house without a male chaperon, and their rights and liberties remain constrained, despite the progress achieved by the king’s reforms. Moreover, Saudi women are often in danger of being subjected to harsh punishments for not respecting the traditional provisions of Shari’a law. As of the present, women can still be stoned to death or subjected to public whip lashes for crimes such as adultery or even for not wearing their veil or leaving the house without male companionship. The benefits of women’s political participation are visible, yet substantial change is far from being achieved in the Kingdom of Saudi Arabia.⁷⁴⁴

2.2 Women’s Rights in the Republic of Tunisia

In practice women in Tunisia still struggle to exercise basic rights. Nevertheless, the Tunisian government has made a considerable effort to enforce gender equality, which can be seen in the provisions of the constitution. Article 21 of the constitution clearly states:

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“All citizens, male and female, have equal rights and duties, and are equal before the law without any discrimination.”\textsuperscript{745}

Moreover, the same article states:

“The state guarantees freedoms and individual and collective rights to all citizens, and provides all citizens the conditions for a dignified life.”\textsuperscript{746}

This means that, in accordance with the constitution, women are granted equal rights to men and the state is responsible for providing them with the proper conditions to lead a dignified life, including granting them the right to work. This is fundamentally different from the Kingdom of Saudi Arabia’s Basic Law of Governance. Despite this, women in Tunisia still struggle to gain full access to their basic rights.\textsuperscript{747}

Women’s participation in the Arab Spring protests was notable, as they marched together with men in the streets demanding the establishment of democracy and the granting of their freedom and dignity. Nevertheless, even after the fall of the old regime, women are still fighting to actually exercise their basic rights and freedoms.\textsuperscript{748} However, there is legal evidence supporting the view that Tunisia has taken significant steps towards granting women their rights even before the events of the Arab Spring. The Code of Personal Status, which can be considered the first legal text in Tunisia that aimed to protect

\textsuperscript{745} Tunisia’s Constitution (n 156).
\textsuperscript{746} Ibid.
\textsuperscript{748} Majid Khadduri, The Islamic Conception of Justice (1st edn, JHU Press 2001) 233.
gender equality, issued a number of provisions that led to women’s empowerment.\textsuperscript{749} It abolished polygamy, which was a matter of great significance, as polygamy is permitted under \textit{Shari’a} law.

Moreover, it introduced a ruling that the minimum age for marriage in the case of girls would be 17 years, and also that the marriage would only take place if the girl consented to it. Subsequent amendments to the Code of Personal Status set the minimum age for marriage for girls at 18 years.\textsuperscript{750} This abolishes child marriage and limits the right of the male parent to force his daughter into a marriage she does not desire. Furthermore, the Code of Personal Status decrees that both spouses have the right to request a divorce, thus diminishing the power husbands held over their wives under \textit{Shari’a} law. Furthermore, it diminishes the value of male guardianship, as it gives the mother the right to become the legal guardian of her children in the case of the father’s death. Until the passing of the Code of Personal Status, women were either obliged to remarry after their husband’s death, or another male from the family would become the legal guardian of the children.

A very important sign of progress introduced by the Code of Personal Status was the policy of birth control.\textsuperscript{751} Not only were women allowed to use birth control, which was also subsidised by the government, but they were also given the right to have an abortion without the medical personnel at the hospital asking about their age, marital status

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\textsuperscript{749} Roslind Varghese Brown and Michael Spilling, \textit{Tunisia} (\textit{1\textsuperscript{st} edn, Marshall Cavendish 2008}) 47.
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or demanding an authorisation from the husband or parents. This provision is very significant in relation to women’s right to their own bodies and their right to privacy, a legal ruling that does not exist in Saudi Arabia.

Moreover, the marriage of a girl who is still a minor must also be authorised by the mother under the Code of Personal Status, not only by the father, thus increasing equality between husband and wife.\footnote{United Nations Division for the Advancement of Women, \textit{Bringing International Human Rights Law Home: Judicial Colloquium on the Domestic Application of the Convention on the Elimination of All Forms of Discrimination Against Women and the Convention on the Rights of the Child} (1\textsuperscript{st} edn, United Nations Publications 2000) 41.} As mentioned previously, under \textit{Shari’a} law the wife must obey her husband, a provision which is still applied in Saudi Arabian family law. In Tunisia however both spouses are obliged to treat each other with kindness, assist each other as far as household management is concerned and make decisions together about the children under the Code of Personal Status.\footnote{Khedher (n 750).}

This automatically changes the status of women, giving them more power in the decision making process of the family. Further amendments of the law allow women to keep their residences in the case of divorce if they have children of a young age and to have a separate facility to allow them to care for their young children if they are imprisoned.\footnote{Mounira M Charrad, 'Family Law Reforms in the Arab World: Tunisia and Morocco' (\textit{United Nations}, 15 May 2012) <http://www.un.org/esa/socdev/family/docs/egm12/PAPER-CHARRAD.Pdf> accessed 25 June 2016.} The effects of this law are visible in the progress Tunisia has made concerning women’s empowerment, as a high proportion of Tunisian girls are enrolled into school, the rate of
female illiteracy has dropped significantly and the rate of medically-assisted births has increased since the passing of the Code of Personal Status.

The rise of educated women in Tunisia has also led to numerous organisations that fight for gender equality, a stronger presence of women in politics and an increased presence of women in the workforce.\textsuperscript{755} Tunisian legislation has succeeded in eliminating the gender gap in school enrolment in primary education, thereby drastically reducing female illiteracy.\textsuperscript{756} Moreover, the school enrolment in secondary education for Tunisian girls has doubled over a 40-year period.

The gender distribution in secondary education, however, demonstrates that female students are more present in some fields than in others. For example, a greater prevalence of female students has been observed in arts and humanities studies, experimental science studies and economics and management. Nevertheless, the prevalence of female students in computer sciences fields continues to increase. Still, as far as vocational training is concerned, a strong female presence cannot be observed in Tunisia.\textsuperscript{757}

The presence of women in politics has also significantly increased. Tunisian women consolidated their position in society as active member and enforcers of change during the events of the Jasmine Revolution in 2011, and after these events, they continued to be more involved in the political life of the country, initiating reform and having a

\textsuperscript{755} Ibid.
\textsuperscript{757} Ibid.
significant impact on the country’s new Constitution. Crucial to the introduction of women into politics was the adoption of vertical parity after the revolution.\footnote{Nedra Cherif, ’Tunisian women in politics: From constitution makers to electoral contenders’ (FRIDE, NOVEMBER 2014) <http://fride.org/download/PB_189_Tunisian_women_in_politics.pdf> accessed 15 December 2016.}

This provision mandates alternating male and female representation among the candidates in order for a party list to become valid. Political parties were also requested to promote women in party leadership positions, however women faced challenges in their political involvement and during the drafting of the constitution. Nevertheless, evidence suggests that the formulations in the current constitution evolved significantly due to the involvement of female politicians and lobbyists, culminating in a set of law that permits women to enforce their rights in present day Tunisia.

The new legislative assembly in Tunisia has a large number of female elected officials who actively participate in the political decision making process.\footnote{Ibid.} Tunisian women have managed to actively change the Constitution, enforce laws and play a significant role in the political decision making process of their country.\footnote{Rangita De-Alwis, ’Women and the Making of the Tunisian Constitution' [2017] 35(1) Berkeley Journal of International Law 95-102.} Moreover, Tunisian women have better access to education in comparison to Saudi women and are more active participants in the workforce, without being hindered by legislative restrictions that prevent them from taking on certain jobs.

The Convention on the Elimination of All Forms of Discrimination Against Women is the main international treaty that addresses issues of discrimination against women. It was adopted by the UN General Assembly and has currently been ratified by 189 countries, Tunisia among them. Saudi Arabia has also ratified the CEDAW, with a reservation that argues they will not abide by the provisions of the CEDAW if it is deemed that they go against Islamic Shari’a law. While the CEDAW was formulated to be respectful of cultural and religious beliefs and traditions, it seems that Saudi Arabia is using this as a justification to maintain the lower status of women as a group that requires male guardianship and approval for education, work or even going out on the street.

In fact, the CEDAW has been met with a number of restrictions and reservations, which indicates that not all countries are prepared to adhere to international human rights legislation. The law was adopted in 1979 and became binding in 1981, when the 20th state ratified it with full acceptance of its provisions. The convention is often described as the international bill of women’s rights, and it has been used as a basic tool in identifying and combatting numerous forms of discrimination against women worldwide. The first article clearly defines discrimination against women as:

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“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.” 763

This covers discrimination both in the public life and in the private lives of women. The ratification of the CEDAW also required the formation of the Committee on the Elimination of Discrimination against Women in accordance with Article 17 and consisting of 23 independent members that represent various cultures and geographical regions. 764 All countries that have ratified the CEDAW must automatically accept the role of the Committee in ensuring that they implement national legislation in accordance with CEDAW and that the aims of the convention are respected. 765

The Committee is responsible for monitoring the progress of member states with respect to women’s rights. One year after ratifying the convention, the member states are obliged to submit a report discussing the measures they took in their legislation in order to ensure that they respected the provisions of the CEDAW. The Committee can also issue recommendations for the member states, and they are then obliged to submit annual reports with evidence to support the fact that they followed the recommendations, or give a justification for not complying. 766

763 CEDAW (n 761).
764 Ibid.
Reservations to the treaty are however allowed under the provisions of the CEDAW. Article 28 and Article 29 allow for the existence of reservations under certain circumstances. For example, it is stated in Article 28 that member states are allowed to express their reservations and the Committee will accept them, as long as the reservations are not deemed incompatible with the purpose of the Convention. Furthermore, according to Article 28, a member state cannot express reservations in relation to the Convention itself, but only in relation to certain articles that are incompatible with the laws of the country or its cultural beliefs.\textsuperscript{767}

As far as the situation of women in Saudi Arabia is concerned, there are a number of practices and legal provisions that are in direct violation of the CEDAW. In the Kingdom, women are underprivileged and prevented from participating significantly in public life. According to a 2010 report of the World Economic Forum, the gender gap in Saudi Arabia is severe.\textsuperscript{768} Gender segregation laws are so rigid that they allow the religious police to inflict severe punishments if unlawful mixing of the genders is identified. Women are not allowed to work in the same spaces as men and they are not even allowed to work in the same domains. This action of Saudi \textit{Shari‘a} law is in direct violation of the CEDAW’s provisions, however the country has justified its non-compliance by arguing that it is a matter of cultural values.

The most significant violation of CEDAW in Saudi Arabia is the requirement of male guardianship. As previously discussed, every woman in Saudi Arabia must have a

\textsuperscript{767} CEDAW (n 761).
male guardian, called a *mahram*. The *mahram* has the right to control a woman’s daily life, and the system is applied to all women, regardless of their economic or social status. Even more gravely, there are no clear written provisions in Saudi law to justify these violations of international women’s rights, but the principles are strongly embedded in Saudi culture and tradition, and they are taught to children in schools from a young age through religious education.\(^769\)

The Kingdom of Saudi Arabia ratified the CEDAW in 2000 but formulated a specific reservation. It claimed that it would not be bound by the provisions of CEDAW if these contradict Islamic *Shari’a* law.\(^770\) Furthermore, the country claimed it would not be bound by the first paragraph of Article 29, which requires arbitration from the Committee in disputes regarding women’s rights violations, and those of Article 9 paragraph 2 of the convention, which decrees that the state;

> “shall grant women equal rights with men with respect to the nationality of their children.”\(^771\)

This has led to a barrage of criticism from the Committee, especially concerning the numerous differences that exist between the provisions of the Convention and Islamic *Shari’a* law. The Committee argues that the reservations expressed in the document put forward allow Saudi Arabia, under the justification of religious and cultural differences, to be among the signatories of the Convention without actually adhering to its provisions, thus continuing their discriminatory policies and oppressive practices towards women.

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\(^770\) Goodhart (n 762).

\(^771\) CEDAW (n 761).
To this end, the Committee has formulated a list of recommendations that would bring Saudi Arabia closer to the provisions of the CEDAW.\(^ {772}\) Thus, the Committee urged Kingdom of Saudi Arabia to withdraw their reservations to the CEDAW in light of the evidence that the convention and *Shari’a* law are not inherently contradictory. Furthermore, the country has been urged to amend its legislation in order to give international laws priority over domestic laws, since international law is more favourable to its citizens. At the same time, the Committee accepts that according to the Basic Law of Governance any legislation adopted by royal decree (the CEDAW included) is considered to be a law of the country.\(^ {773}\)

Furthermore, the Committee requests that Saudi Arabia implement the convention as an integrated part of legal education in the country and apply it in family court cases in order to prevent legal rulings that are discriminatory towards women. Also, the country has been urged to fully and clearly incorporate the concept of equality between men and women in their legislation in accordance with Article 28 of the convention (an article towards which Saudi Arabia did not express a reservation), which would lead to abolishing of the concept of male guardianship.

In the same document, the Committee requests that Saudi Arabia develop a national action plan to implement the provisions of the Convention and to create an organisation responsible for doing so. These actions would then be described in the following years’


\(^{773}\) Kingdom of Saudi Arabia Basic Law of Governance (n 191).
reports. Also, the enforcement of a minimum age of marriage for both girls and boys of 18 years is considered by the Committee to be mandatory, the general recommendation of the Committee being the age of 21 years.\footnote{Committee on the Elimination of Discrimination Against Women, 'Concluding comments of the Committee on the Elimination of Discrimination against Women, Saudi Arabia' \textit{(United Nations}, 14 January-1 February 2008) http://www2.ohchr.org/english/bodies/cedaw/docs/CEDAW.C.SAU.CO.2_en.pdf>accessed 30 June 2016.} Regardless, the slow development of women’s rights in Saudi Arabia demonstrates that the recommendations of the Committee have not been taken into account. The actions of the king as head of government and reforms in recent years have demonstrated a certain level of willingness to comply with the CEDAW, yet these too have been met with criticism from the more traditional judicial bodies.\footnote{List of Issues and Questions In Relation To The Combined Third And Fourth Periodic Reports Of Saudi Arabia. Committee on the Elimination of Discrimination Against Women \textit{(United Nations}, 9 November 2017) <http://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/SAU/CEDW_C_SAU_Q_3-4_Add-1_28443_A.pdf> accessed 30 November 2017.}

Nevertheless, the presence of women in the political life of Saudi Arabia, low as it may be, along with the ratification of the CEDAW, demonstrates a willingness to adhere to international human rights laws. Cultural factors are a clear impediment to the development of women’s rights legislation in Saudi Arabia, and the general consensus is that the government needs time in order to change the mentality of the Saudi population.

Tunisia is among the countries that have ratified the CEDAW, with some reservations to the treaty at the time. However, compared to Saudi Arabia, the reservations expressed by Tunisia did not seem so severe, demonstrating the fact that the country has the desire to protect the rights of all its citizens, regardless of their gender.\textsuperscript{776} This can be mainly attributed to the fact that Tunisian laws are mostly based on the French code, with the Shari’a courts being abolished in 1956 following the country’s independence. However, there are still cultural and even legal elements stemming from Islamic law that are reflected in the country’s legislation.\textsuperscript{777}

Upon ratification of CEDAW in 1985, the Republic of Tunisia expressed reservations in relation to a number of articles of the convention. Similarly to Saudi Arabia, Tunisia expressed reservation in relation to Article 9 section 2 and Article 29 section 1.\textsuperscript{778} In addition, reservation was expressed in relation to Article 16 sections c, d, f, g and h, which mandate that the states is obliged to take the necessary measures to eliminate discrimination against women and grant them the same rights during marriage and the right to request a dissolution of the marriage, the same rights and responsibilities in parenthood,

\textsuperscript{778} CEDAW (n 761) Article 9 & 29.
the same right to make decisions related to the children, and related to guardianship, equality in marriage between husband and wife, and the same rights of both spouses to ownership.

As the laws changed in Tunisia and the Code of Personal Status was modified in order to account for the recommendations made by the Committee, the reservations Tunisia expressed in relation to the Convention were gradually abolished.779 From August 2011 onwards, all reservations made by Tunisia were withdrawn, and the change became effective immediately after the United Nations Secretary was notified.780

In fact, not only was Tunisia among the first Islamic countries to ratify the CEDAW, it was also the first to renounce all reservations it had previously expressed upon ratification. In addition, women achieved gender parity in political parties in 2011 and their contribution to the Tunisian Constitution is reflected in the clarity with which gender equality is expressly granted. This occurred as a result of the numerous recommendations that the Committee made to Tunisia in order to encourage greater compliance with the Convention, but also as a consequence of the active involvement of women during the events of the Arab Spring (the Jasmine Revolution).781

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The 2010 Committee report on the Republic of Tunisia contained a number of recommendations that were deemed to align the country’s legislation more closely with international law. Aside from these, several positive developments were observed. One of the most significant was the equalisation of the minimum age of marriage of both girls and boys to 18, as previously requested by the Committee. The change of the legislation in custody rights, granting the mother guardianship of the children in the case of the death of the husband or in the case of divorce, along with granting the woman compensation in the form of alimony in the case of divorce were also noted by the Committee.\textsuperscript{782}

Also, it was deemed that the state made additional efforts to ensure gender equality, calling Tunisia a positive example to other Arab countries that are governed by Muslim legislation. Other positive developments included the ratification of the Convention on the Rights of Persons with Disabilities in 2008, the protocols set in place to criminalise and punish human trafficking, including protocols against the smuggling of migrants alongside international laws against international organised crime, and the ratification of laws favouring human rights.\textsuperscript{783}

The Committee also expressed concern about the role played by the parliament in protecting the wellbeing of its citizens. It was deemed that the dictatorship regime that


existed at that time had begun to disregard its obligations and its responsibilities towards the people, not being fully accountability to the implementation of the provisions of the Convention. The Committee deemed it was their duty to remind the state of its obligation to implement all of the provisions of the Convention, being only partially exempted from those provisions that the state had expressed clear reservations towards.

Also, Tunisia was asked to lift all reservations and take action in order to align national law with international provisions of the bill against the discrimination of women.\textsuperscript{784} The motivation behind the request to lift reservations was, as expressed by the Committee, due to the fact that recent legislative reforms in Tunisia invalidated the justification initially offered for the reservations. In addition, there was no conflict of substance found by the Committee between the provisions of the CEDAW and the provisions of Islamic \textit{Shari’a} law.\textsuperscript{785}

Furthermore, the Committee urged Tunisia to include a clear definition of discrimination against women in their constitution, following the model provided by the convention in its introductory article, and to extend the state’s responsibility for eliminating gender based discrimination both in public and private contexts, in accordance with Article 2 section (e) of the CEDAW.\textsuperscript{786}

The Committee also identified the existence of some discriminatory laws, urging the state to take immediate action towards implementing legislative reform aimed at eliminating these laws and replacing them with others that would protect women’s rights

\textsuperscript{784} Committee on the Elimination of Discrimination Against Women (n 782).
\textsuperscript{785} Ana Vrdoljak, \textit{The Cultural Dimension of Human Rights} (1st edn, OUP Oxford 2013) 147.
\textsuperscript{786} CEDAW (n 761) Article 2.
and basic human rights. In light of the cultural and religious disputes such legislative reforms might generate, the Committee also encouraged the State of Tunisia to cooperate with religious leaders and community leaders for a more successful transition of the law.\textsuperscript{787}

Taking into account the events that took place shortly after the Committee’s recommendations were issued, events that led to the Arab Spring and the Jasmine Revolution which overthrew the Tunisian regime at that time, it can be said that Tunisia applied a great deal of change, which began with the will of the people for freedom. The subsequent elimination of all reservations in relation to CEDAW differentiates Tunisia’s position on the Convention from that displayed by Saudi Arabia.

Furthermore, the Committee urged the State to take action towards the elimination of stereotypes and other harmful practices that were widening the gender gap. It recognised that there were some Islamic traditions that directly limited the liberties and rights of women in Tunisia, and that these were enforced especially in rural regions with a strong sense of Islamic tradition and culture, regardless of any legislative reforms that were implemented. Finally, the Committee demanded the State of Tunisia take measures to ensure a higher level of participation of women in the public life.\textsuperscript{788} After the Jasmine Revolution, the Tunisian legislation implemented a practise that ensured political parity and guaranteed a much higher level of participation of women in the country’s political scene.

\textsuperscript{787} Committee on the Elimination of Discrimination Against Women (n 782).
\textsuperscript{788} \textit{Ibid.}
Since 2011, significant improvement in multiple areas has been observed concerning women’s rights in Tunisia. The effects of lifting all reservations to CEDAW were reflected in national statistics regarding education and women’s economic participation. The total literacy rate for young women increased from 92.2% to 95.8%, shrinking the gap between female literacy and male literacy. Moreover, other laws have been enforced with the purpose of protecting women, such as the right to an abortion, the right to contraception and the criminalisation of female genital mutilation. However, some international organisations have expressed concerns about to the State’s desire to protect public morals and public order, viewing this desire as limiting of freedom of expression and freedom of speech. These concerns are rooted in the fact that the law could impose a stricter dress code on women, similar to Saudi Arabia, where women are not allowed to go out in public unless their bodies, including their faces, are completely covered.

Nevertheless, the differences between Tunisia’s position on the CEDAW and Saudi Arabia’s position on the CEDAW are significant. The fact that an Islamic country, guided by similar religious, cultural and traditional mores as other Islamic countries, has managed not only to align its legislation with the provisions of CEDAW, but has done so by lifting

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all reservations, can constitute evidence that the reasons Saudi Arabia is invoking in order to maintain their reservations in relation to the CEDAW may be considered unfounded.
Chapter 6

Children's Rights In Islamic States

1. Children’s Rights in Islamic Law (Shari’a)

Under Shari’a law, the principles of children’s rights are derived from the Qur’an and the teachings of Prophet Muhammad. These principles provide guidelines for the treatment of children, but also their obligations towards their parents as well as the treatment of orphans. In Islamic cultures that follow Shari’a law, securing the rights of children is one of the religious duties of adults, as Islamic jurisprudence rights and duties are intertwined. Protecting children’s rights as dictated by Shari’a law is thus mandatory. 792

The rights granted to children under Shari’a can be divided into two categories: protective rights and liberty rights. 793 Liberty rights include the rights to free speech and the right to family, insofar as these are in line with Shari’a, while protective rights encompass the right to an education, the right to health and the right to physical security.

Most of the children’s rights imposed by Islamic law are a direct extension of parental responsibilities, and are thus inseparable from that concept.\textsuperscript{794}

The Qur’an states that children are given by Allah as an act of goodwill towards people and as a blessing. In order for people to preserve this goodwill, they are obligated to protect the vulnerable, which in this case are children, including orphans. In this regard, \textit{Al-Qur’an: 66: 6} dictates “You Who Believe! Protect yourselves and Your Families from that fire, whose fuel will be humans and stones”.

The interpretation of this line by Imams has mostly been connected to teaching children the word of Allah by teaching them the Qur’an. This is the main fundamental right that children under Islam have. To illustrate this, an anecdote of Umar ibn al-Khattab, a powerful caliph, tells the story of a man who came to complain about his disobedient son. The caliph quickly turned the blame on his father for not teaching his son the Qur’an.\textsuperscript{795} The anecdote is also the basis for other children’s rights, such as the right to a respectable name and the right to a good mother.\textsuperscript{796}

The Covenant on The Rights of Children in Islam states under Article (6) that:

\textquote{The child shall have the right to life from when he is a fetus in his/her mother’s womb or in the case of his/her mother’s death; abortions should be prohibited except under the necessity warranted by the interests of the mother,}

\textsuperscript{794} Don Cipriani, \textit{Children’s rights and the minimum age of criminal responsibility: A global perspective} (1\textsuperscript{st} edn, Ashgate Publishing 2009) 78.
\textsuperscript{795} Arfat, (n 792).
\textsuperscript{796} Etheshamuddin Ahmed Mirza, \textit{The rights of children} (1\textsuperscript{st} edn, Al-Ather Islamic Center 2011) 8.
the fetus, or both of them. The child shall have the right to descent, ownership, inheritance and child support."

As can be deduced from this passage, children have rights under Shari‘a even before they are born. The right to a good mother is thus guaranteed under this law, and the father is therefore obliged to choose the future mother of his children based on this criterion. In contrast to other governing principles in regards to the rights of children that impose these rights only immediately after birth, under Shari‘a law children have rights before birth. These rights derive from the responsibility of the father to choose a good mother for his future children. This choice is made based on the woman’s good character and religion, while the guardians of young unmarried women also have the responsibility of allowing marriage only with a respectable man.

In 2005, UNICEF and Al-Azhar University created an updated version of children’s rights under Shari‘a, which lists the basic rights of children under Islamic law. As noted by the document, these rights include the right to a healthy start in life, the right of name, property, inheritance, family and kindred, the right to be healthy and have proper nutrition, the right to be educated and acquire skills as well as the right to lead a dignified and secure life.

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An additional right is also included here, which is the right to belong to a society and the responsibility of the state to support and protect all children’s rights. 799 The right to a healthy start in life focuses more on the responsibilities the mother has while pregnant. The pregnant mother is thus forbidden to engage in any behaviour that could potentially harm the baby, including fasting. Pregnant women are thus excused from Ramadan fasting and may attend this later in the year when they are able to. If women are not able to fast due to being pregnant, then they are required to feed a poor person for every day of fasting that was missed.

Such implementation of Shari’a law guarantees that the foetus is protected from malnourishment during the intrauterine period. To comply with the right of the unborn child to a healthy life, the mother of the child is also responsible for seeking proper medical attention during her pregnancy and to nourish herself sufficiently so that the child may be healthy. This responsibility also lies with the father, who must ensure that his pregnant wife has all the nutrients she needs in order to have a healthy child. 800

Considering the approach that Shari’a has to the rights of children, it can be concluded that children have two fundamental rights even before birth, one that must be fulfilled by their father and the mother’s guardian before marriage, and one that must be fulfilled by the mother once pregnant. The first right guarantees that the child will have parents which are able to raise him well, while the second right guarantees his safety during pregnancy.


800 Ibid.
After birth, children under Shari’a law have the right to a lineage. This implies that every child has the right to know who his parents are and where he comes from. Orphans have the right to fair treatment, but they are not to be regarded as offspring of those who adopt them but rather as brothers in faith who deserve equal protection as vulnerable members of society.\footnote{Abdur Rahman Assheha, 'Hadith collections compiled by Tirmidhi and Baihaqi’ in Suhaib Alam Siddiqui (ed), In Islamic Concept of Human Rights (1st edn, First Publisher 2004) 11–12.} Shari’a law does not favour the dilution of family blood through adoption. Instead it proposes a system of sponsorship for orphans without children being denied their true roots.\footnote{UNICEF and Al-Azhar University (n 799).}

Under Shari’a law, the right to Tarbiah (Islamic cultural upbringing) denotes the right of children to know Allah and adhere to the Islamic faith. This concept differs from children’s rights in other cultures, which give children the right to choose their own beliefs.\footnote{Ursula Kilkelley, ‘Religion and Education: A Children’s Rights Perspective, A paper delivered at the TCD/IHRC Conference on Religion and Education, Trinity College Dublin, 20 November 2010’ (Irish Human Rights and Equality Commission, 20 November 2010) <https://www.ihrec.ie/download/pdf/kilkelley_religion_and_education_a_childrens_rights_perspective.pdf> accessed 5 July 2016.} One example of this can be seen in the Committee on the Rights of the Child, under Article 14, paragraph 1, The Article states:

“States Parties shall respect the right of the child to freedom of thought, conscience and religion.”\footnote{United Nations, 'The right of the child to be heard’ (UN Committee on the Rights of the Child, 1 July 2009) <http://www2.ohchr.org/english/bodies/crc/docs/AdvanceVersions/CRC-C-GC-12.pdf> accessed 5 July 2016.}
By contrast, the *Tarbiah* imposes that children born of Islamic parents shall be raised in the Islamic faith. Nevertheless, the same CRC document (in Article 14, paragraph 3) suggests that parents should provide for education, including religious education.\(^{805}\) In this sense, children’s rights under *Shari’a* are somewhat similar to those imposed by international children’s rights acts.

Another important aspect in Islam is the religious influence of parents. In the eventuality that the mother is of a different faith, the child must follow the father’s religion, which is Islam. Moreover, since *Shari’a* prohibits the marriage of a non-Muslim man to a Muslim woman, but not vice versa, the child shall always follow “the best religion”, which is in this case of course Islam.\(^{806}\) It can thus be argued that under *Shari’a* law, the child’s right to religion is not the right to choose a religion, but the right to be taught the Islamic faith. This is also referred to as the “right to socialisation”, as the child needs to become a member of the Islamic community and cannot do so without having been taught the Islamic faith by other members of the community.\(^{807}\)

Another right given to children under *Shari’a* is the right of the child to maintenance. This right guarantees the child’s sustenance, including food, clothing, housing and education. As dictated by *Shari’a* law, fulfilling this right is the responsibility of the father, who must provide for daughters until they are married and to sons until they reach puberty. The same principle applies to children that are no longer in their father’s custody. If the child does not have parents, the right of sustenance is provided by close

\(^{805}\) *Ibid.*


\(^{807}\) *Ibid.*

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relatives. Children, irrespective of gender, have the right to education under Shari’a. This right is also the responsibility of parents, who must secure the necessary means for the child’s education. This is not dictated only by Shari’a but also by the Qur’an. This implies that children must receive an education suited to their developmental needs, with a strong emphasis on Islam as the main source of learning.\textsuperscript{808}

The attitude in Shari’a law towards child marriage is the subject of much controversy. As pointed out in the report issued by Unicef and Al-Azhar University, there are no clear mentions in the law of a child’s suitable age for marriage, with the only reference being made referring to mental maturity. In practice the guidance given by the Qur’an has been strongly distorted by societal mores and by other traditions deriving from Shari’a, such as the practice of presenting the family of the bride with gifts. As pointed out by Human Rights Watch, girls are in some cases seen as financial burdens for families, who marry them off in order to escape the economic responsibilities of raising a daughter.

Moreover, as it is custom for the family of the groom to provide gifts and money to the family of the bride, marriage is seen as a profitable affair.\textsuperscript{809} However, this practice is not encouraged nor imposed by Shari’a. Other scholars analysing Shari’a law and the rights of children argue that the books of Hadith and Sunna, detailing a story wherein Prophet Muhammad was married to a nine year old girl, do not have a real basis in Shari’a, as the account of the marriage goes against the principles of Islamic law and children’s

\textsuperscript{808} Ibid.

rights. Moreover, a series of examples show that under Shari’a, it is strictly forbidden to “sell” one’s daughters into marriage for financial gain. As is stated in the Qur’an:

“You shall not force your girls to commit prostitution, seeking the materials of this world, if they wish to be chaste. If anyone forces them, then God, seeing that they are forced, is Forgiver, Merciful.”\(^{810}\)

Another area of concern discussed by scholars in relation to Shari’a and the rights of children is the rights of children under criminal law. According to country and interpretation of Shari’a, children may or may not be held accountable for criminal offences if they are underage. Technically, Shari’a law does not allow for the conviction of a child for a criminal act, unless the action taken against them is of disciplinary manner. Corporal punishment is permitted. Nevertheless, although the treatment of juveniles is clearly distinguished from the treatment of adult criminals by Islamic jurisprudence, these conventions are not always adhered to, even in modern Islamic states.\(^{811}\)

One issue in this debate debates is that the person who holds the authority to give the child a punishment for an offense is also able to choose, without any clear restrictions, what type of punishment may be applied. Nevertheless, even in this case, the punishment applied must be in the best interest of the child. In other words, the punishment must help to the correct the child’s behaviour and help him to acquire better behaviours. Such

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\(^{811}\) Nisrine Abiad and others, Criminal law and the rights of the child in Muslim states: A comparative and analytical perspective (1st edn, British Institute of International and Comparative Law 2010) 80.
punishments include “light beating” or delivery to the guardian, who himself will apply the punishment that he sees fit. Another action that may be taken in such a case is the removal of the child from the environment he was in while committing the wrongdoing, in order to eliminate future negative influences.\footnote{Ibid.}

As discussed, child offenders under Shari’a law may be given punishments according to the guardian’s or another authority figure’s decisions. However, the notion of Akl, which signifies the mental capacity for reasoning, plays a large role here. It is expected that children under the age of seven do not possess this capacity and are therefore protected from any punishment as a result of a criminal act. Between the ages of seven and the onset of puberty the child is considered to have some degree of Akl, although this is not yet complete. From the age of puberty onwards, children are considered to have acquired Akl and are therefore responsible and liable for criminal acts, unless they do not possess the mental capacity to acknowledge their acts.\footnote{Don Cipriani, \textit{Children’s rights and the minimum age of criminal responsibility: A global perspective} (1\textsuperscript{st} edn, Ashgate Publishing 2009) 2.}

It can be therefore be argued that Shari’a law establishes children’s rights in direct connection with the parental responsibilities which are imposed by the Qur’an. The rights of children are largely framed as protective actions which parents must take in order to ensure the safety, education and development of their children.
2. Children’s Rights in the Kingdom of Saudi Arabia

Children’s rights in the Kingdom of Saudi Arabia have been the subject of substantial international debates with regards to their violation. The main areas of debate are around the rights of children to lead a healthy and dignified life, the right to health and the right to speak their beliefs and convictions. Violations of these rights include child abuse, child criminal punishments, child marriages and forceful imposition of Islamic law. These will be discussed in the following section. In 1996, by royal decree, Kingdom of Saudi Arabia ratified the Convention on the Rights of the Child (UNCRC), issued in 1989. The decree states:

“The Kingdom of Saudi Arabia agreed, under the terms of Royal Decree No. M/7 of 11 September 1995, to accede to the Convention on the Rights of the Child, adopted by the General Assembly of the United Nations on 20 November 1989, with reservations concerning all articles conflicting with the provisions of Islamic law.”

Until 1990, the notion of child abuse and the violation of children’s rights were not acknowledged in the Kingdom of Saudi Arabia. It was in this year that the first case of child abuse was brought before the local authorities in Riyadh, in King Saud University.

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816 Nawaf Bin Abdullah Mohammed Al Faryan, 'Exploration of Child Protection In Kingdom of Saudi Arabia (Policy, Practice, And Knowledge)' (1st edn, La Trobe University 2014) 37.
Hospital. From this incident onwards, awareness of children rights steadily grew within Saudi Arabia, and eventually the ratification of the Convention on the Rights of the Child occurred.  

Since the beginning of 2002 the subject has also been debated in the Kingdom of Saudi Arabia as a result of concerns brought by the World Health Organisation pertaining to cases of child abuse based on cultural and societal norms. This brought, in 2004, an array of media attention to cases of child abuse and neglect in the conservative society of Saudi Arabia. As a result of these actions, several institutions with the purpose of protecting children’s rights were created. These include the General Directorate for Social Protection under the Ministry of Social Affair and the Human Rights Commission (HRC) and the National Society for Human Rights (NSHR). A year later, in 2005, the National Family Safety Program (NFSP) was created by royal decree. The main goal of this programme is to protect children from abuse, neglect and domestic violence. Following these proceedings drafts for the first Child Rights and Protection Act were reviewed by the Saudi Shura Council, which functions as a legislative parliament.

As discussed in previous sections, under Shari’a law children have the right to a healthy life and physical security. Therefore the act of child abuse is a direct violation of this right, not only under Islamic law, but also under the international convention signed by the Kingdom of Saudi Arabia with respect to protecting children’s rights. These matters

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819 Ibid.
820 Munir (n 793).
have been widely discussed by the international community, including international regulatory bodies such as the UN, but also by NGOs and scholars.

In a recent qualitative study conducted at the University of Hail in Saudi Arabia in partnership with the University of Dundee in the UK, researchers pointed out that protecting the rights of children, and especially protecting them from abuse, is a very difficult task in the Kingdom of Saudi Arabia. They argue that there is a staggeringly small quantity of information, reports or statistics on cases of child abuse or human rights violations. Moreover, it was also pointed out that even though medical professionals should be reporting these cases, it is very unlikely that they would do so, since in the culture of the Kingdom of Saudi Arabia corporal punishment is an acceptable practice.

Internationally, the Kingdom of Saudi Arabia has ratified a number of documents which ensure children’s rights and their protection. These include the UNCRC, which they ratified in 1996, The Covenant on the Rights of Children in Islam, which was ratified in 2008, and the Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography, which was signed in 2010. As pointed out in the UNCRC Article 24(3):

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822 Ibid.
“States Parties shall take all effective and appropriate measures with a view to abolishing traditional practices prejudicial to the health of children.”

This article can thus be used to discourage the cultural notion that corporal punishment is acceptable for children. Article 37 (a) states that:

“No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age.”

Nevertheless, this is not always the case in Saudi Arabia. Although the UNCRC has been ratified by Saudi Arabia, when the law conflicts with that of Islam, the law of Islam is always preferred. However, there are no indications in this law that children should be disciplined by violence, but only that they should be disciplined. The cultural beliefs of KSA dictate that child discipline encompasses beating as a punishment for wrongdoing. Hence, while the law may not stipulate that parents have the right to punish their children by means of physical violence, this is implied by the local custom.

Moreover, legal provision established by the country as well as legal provisions accepted by the country under international agreements, do not interpret the prohibition of violence as a prohibition of corporal punishment. A piece of legislative research issued by UNICEF argues that as of the present date, no legislative piece has been identified in the Kingdom of Saudi Arabia that would prohibit corporal punishment for children in

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826 Ibid.
schools or in day care centres, although these institutions are advised by the Ministry of Education not to use this type of approach. Moreover, corporal punishment is lawful and acceptable within the child’s home.

The same situation is encountered in penal institutions, where punishments can be applied to children. The Detention and Imprisonment Regulations of 1977 strictly forbid degrading or inhumane behaviour but do allow flogging, while The Ministry of Labour and Social Affairs Decree 1354 of the Islamic year 1395 H (1975) detail how corporal punishment should be applied.\textsuperscript{828} With regards to other forms of child abuse, some reports of child trafficking have been made, especially in regards to children of migrants.\textsuperscript{829}

These reports are in direct contradiction to Shari’a law, which stipulates that children should be cared for either by their families or by their close relatives and provide for sponsorship agreements with adults in the case of orphans.\textsuperscript{830} It must be noted that the practice of exploiting children, and of depriving them of education and family, is specifically forbidden by Shari’a law, which dictates that children are a gift, and that adults are responsible for their upbringing.\textsuperscript{831} Another issue pertaining to children rights is the matter of child convictions and legal punishments. If exploitation, maltreatment and abuse are somewhat forbidden by Shari’a, since the law still allows corporal punishment but imposes some children’s rights, in terms of legal punishments for children the Shari’a interpretation of the Kingdom of Saudi Arabia is more severe.

\textsuperscript{828} Human Rights Watch, \textit{Adults Before Their Time: Children in Saudi Arabia's Criminal Justice System} (Volume 20, Human Rights Watch 2008) 47.
\textsuperscript{829} \textit{Ibid.}
\textsuperscript{830} Kilkelly (n 803)
\textsuperscript{831} UNICEF and Al-Azhar University (n 799).
Islamic countries have different perspectives on the age at which a child is considered legally responsible for his actions. In 2004 the Saudi Shura introduced a measure to raise the age of legal responsibility to 18, and in 2010 this was again debated by the council in the context of draft law, however the current position of the Saudi government on the issue is still unclear.\footnote{Peter Hodgkinson, \textit{Capital Punishment: New Perspectives} (1\textsuperscript{st} edn, Routledge 2016)67.} In 2016, a document issued by Amnesty International called for legal petitions to aid a prisoner (Abdulkareem al-Hawaj) who had received a death sentence, who at the time of conviction was 16 years old. The same document pointed out that over 118 people have been sentenced to death in 2015 in the Kingdom of Saudi Arabia, some of whom were children under 18 years old. This places the Kingdom of Saudi Arabia in direct violation of the ratified UNCRC.\footnote{Amnesty International, 'Urgent Action Death Sentence for Juvenile Offender' (Amnesty International 2016) <http://MDE2348012016ENGLISH.pdf> accessed 11 July 2016.}

In this respect, the Kingdom of Saudi Arabia’s country report on UNCRC by Human Rights Watch states that even though it recognises that people under 18 years of age are children, this does not imply that children cannot be subjected to the same punishments as adults.\footnote{Human Rights Watch, 'Human rights watch submission to the committee on the rights of the child regarding Saudi Arabia' (www.hrw.org, 2 September 2016) <https://www.hrw.org/news/2016/09/02/human-rights-watch-submission-committee-rights-child-regarding-saudi-arabia> accessed 11 July 2016.} In this regard, the Kingdom of Saudi Arabia does not comply with articles 1, 4 and 51 of the UNCRC. Article 1 of the UNCRC states that a child is considered to be any person under the age of 18, while Article 4 states that:

\begin{quote}
"States Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the present Convention. With regard to economic, social and cultural rights, States Parties shall undertake such measures to the maximum\end{quote}
extent of their available resources and, where needed, within the framework of international co-operation.\textsuperscript{835}

This can be regarded as a typical case of collision between an international treaty which has been ratified by the Kingdom of Saudi Arabia and Shari’a law as interpreted by the country. Additionally, reservations for the UNCRC, which are stipulated by Article 51, note that any state’s reservations should not contravene the scope of the agreement, however the application of Shari’a contravenes the scope of the document, since it allows for situations wherein the mental and physical health of children is endangered.

Moreover, due to the use of punishments such as torture and ill-treatment, the Kingdom of Saudi Arabia also does not comply with Articles 6, 37 and 40 of the UNCRC. As indicated, it applies Shari’a law in convicting criminals, including children, and this law is preferred over international agreements. This also implies the non-existence of a penal code, which is thus replaced by Islamic law with regards to punishments.\textsuperscript{836}

According to other interpretations of Shari’a law, adult punishments are clearly distinguished from child punishments.\textsuperscript{837} However, according to the interpretation of the Islamic law in the Kingdom of Saudi Arabia children can receive the same punishments as adults, even if this is prohibited under the UNCRC, since in cases of legislative conflict

\footnotesize{\textsuperscript{835} United Nations, ‘Convention on the Rights of the Child’ (n 814).
\textsuperscript{837} Nisrine Abiad and others, Criminal law and the rights of the child in Muslim states: A comparative and analytical perspective (1\textsuperscript{st} edn, British Institute of International and Comparative Law 2010) 80.}
Shari’a law takes precedence over any other regulations. As a result punishments such as life imprisonment, corporal punishment and death sentences are lawful. Under the Shari’a interpretation of the Kingdom of Saudi Arabia, provisions have been made to raise the age of criminal responsibility from 7 to 12, yet the reports of these actions are still inconsistent, especially when considering that local judges have the freedom to decide upon punishment in the absence of a penal code.

Moreover, although the Kingdom of Saudi Arabia has juvenile courts, minors (people under 18 years old) are not necessarily tried in these courts, as it is permitted for children to be tried in adult courts. Other reports describe children’s rights abuses in relation to respecting the child’s beliefs and practices. The Kingdom of Saudi Arabia is not tolerant of religions other than Islam, and in some cases adults are permitted to enforce their religion on children. This may affect the child’s personal development, in some circumstances such decisions may be fatal. In 2002 an incident in Saudi Arabia ended with the death of 15 girls when a school caught fire. The girls were forbidden from exiting the burning building by the Mutaween (religious police), who also prohibited fireman from entering the building to help the girls because they were not wearing the veil, and thus it was considered a sin for the men to approach them.

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Considering this incident, it can be stated that even though Shari’a law does not impose Islam on children and states that children should come willingly to the belief with the aid of their parents, in Saudi society the situation is not the like this in practise. Even though they were minors, and thus supposedly still in the process of choosing their beliefs, the girls were not only the daughters of Muslims, but they were considered to be themselves Muslims and thus could not leave a building without their veils even though the building was burning.\(^{841}\)

The Kingdom of Saudi Arabia has no minimum age of marriage and merely stipulates that mental maturity is required for marriage. Although this may be regarded as a case of child abuse, it is highly important to consider the nature of a society when judging a violation of the child’s rights to a decent life as stipulated by Shari’a. In the Kingdom of Saudi Arabia, sexual relations before marriage are strictly prohibited and can even lead to the death penalty. This implies that the only means of engaging in sexual intercourse when the child has reached puberty and is in his adolescent years is marriage.

Moreover, it has been also argued that delaying marriage and refusing positive prospects which may lead to a bright future for the children being married is a violation of their rights and of the duty of the parents to choose an appropriate spouse for them as stipulated by Shari’a.\(^{842}\) Nevertheless, children have the right to benefit from a moral education as well as from a positive upbringing, and these rights may be violated,

\(^{841}\) Ibid.
especially in marriages involving very young children, or marriages made for financial purposes, which are also prohibited by Shari’a.

3. Children’s Rights in the Republic of Tunisia

Children rights in Tunisia include the right to Tunisian nationality and the right to free and compulsory education until the age of 16. Also, the safety of children is guaranteed by law, and abuse of children (such as sexual or economic abuse) is subject to a severe penalty according to the Tunisian law, yet it is rarely applied. In 1995, Tunisia issued the Child Protection Code, also known as Law numbers 95-92, and the law became binding in January 2006. This piece of legislation guarantees the right to life of children, as well as the right to development and protection.

The code also describes the situations in which a child is considered to be in danger, as in the case of parental loss, being exposed to vagrancy and neglect, lacking protection and education and being sexually exploited. Additional situations in which the child is considered in danger are when the child is exploited by organised crime, has been subjected to ill-treatment or is economically exploited. The code also provides the framework for

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institutions that guarantee child protection and institutes child protection officers. The Child Protection Code (CPC) thus covers an array of children rights which prohibit violence towards children and guarantee their right to an education.

Moreover, the Act on the Education System, issued in 1991, deals specifically with children and education, while additional legislation has been created to regulate child labour, the status of juvenile offenders under the Penal Code and personal status. Other acts also deal with education, schooling and personal status, such as numbers 2002-80 of 23rd July 2002, the Act No. 2007-32, which sets the minimum age for marriage at 20 for both men and women as well as Act No. 2005-32, which sets the minimum age of child employment at 16 in domestic labour and at 18 for labour that is considered more demanding. Although marriage between children younger than 20 can still occur in Tunisia, this is conducted only with the legal approval of the guardians of the future spouses and with judicial permission upon case analysis by a court judge. Furthermore, polygamy is prohibited in the country. The minimum age of marriage before the institution of the Tunisian Personal Code was 18 years.

846 Ibid.
There are substantial differences between the ways that children’s rights are managed in Tunisia and in the Kingdom of Saudi Arabia. Firstly, the Kingdom of Saudi Arabia Child Rights and Protection Act relies strongly on the principles of Shari’a, which allows for corporal punishment of children at home and even in schools. On the other hand, Tunisia’s CPC has specific provisions that prohibit the use of violence against children.

Other substantial differences can be noted in the areas education and juvenile offenders. It must be noted that Tunisia has specific provisions and acts which guarantee the right to education of children and regulations that lay out specific ways in which education should be made available. One example of this is the existence of specialised centres that manage children in foster care and ensure that they receive an adequate education up until the age of 18.

If the child is still studying after this age, he will still being cared for until he are able to procure resources for himself by means of employment. Children under the age of 13 cannot be held criminally responsible for their actions, as stated in the CPC Article 68. Article 71 stipulates that children between the ages of 13 and 18 who have been accused of criminal offences cannot be tried in common courts, as these are unfit for trials of minors. These trials should instead be held in special juvenile courts. Moreover, judges

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must impose sentencing according to the age of the offender at the time the crime was committed, according to article 72 of the CPC.\textsuperscript{851}

Additional differences can be observed in the education system. In Tunisia several aforementioned legal provisions dictate the educational path of children, including orphans. By contrast, in Saudi Arabia, the responsibility of education mostly lies with the parents and is based primarily on the teachings of Islam. At the same time, while children may be placed in foster homes, they may also be adopted legally by Tunisian parents or even by international parents. By contrast, the KSA does not allow any form of adoption, only sponsorship.\textsuperscript{852}

Although like Saudi Arabia, Tunisia ratified the UNCRC in 1991 and has made substantial efforts in improving children’s rights, including through the CPC and additional legislative acts, issues with children rights still exist in the country. Most of these occur around child labour and exploration and are related to high levels of poverty and cultural beliefs which makes the implementation of rights such as the right to proper nutrition and health virtually impossible.

As previously mentioned, violence against children is specifically prohibited by Tunisian law. This applies to the child’s household but also to schools and other care institutions. Nevertheless, as with the Kingdom of Saudi Arabia, corporal punishment of


children is a widely accepted practice in Tunisian society.\textsuperscript{853} According to Law numbers 2010-40, dated 26 July 2010, and amending the provisions of article 319 of the criminal code, even violence that does not have serious consequences or that does not lead to injury to the victim is a punishable offence.\textsuperscript{854} This article was changed in 2010, as it had initially stipulated that there is no punishment for people committed violence against people under their authority. When Law numbers 2010-40 came into effect this clause was removed and thus even light violence towards children is strictly forbidden, at least from a legal point of view.\textsuperscript{855} When the law became binding in 2010 it was also published in the Official Gazette of the Republic of Tunisia and was accompanied by a note written by the Constitutional Council, which argued that the law is constitutional and it should be applied to eliminate corporal punishment of children, regardless of its intentions or severity. In Article 47, the new constitution guarantees the right of children to receive an education and humane behaviour from their parents while the state must ensure that all children are protected without discrimination.\textsuperscript{856}

As discussed above, children who are criminal offenders are to receive punishments according to their age and be tried in juvenile courts as stipulated by the Tunisian CPC.

\textsuperscript{856} Ibid.
Moreover, children under the age of 13 are not legally responsible for their actions under the same code. When children are incarcerated, the Penal Code does not indicate that corporal punishment is lawful. Since no mentions are made of this type of punishment and the code specifically prohibits the use of violence against children, corporal punishments of juveniles is prohibited. Furthermore, under the Tunisian Obligations and Contracts Code, Article 9, children over 13 years old are able to claim damages for ill-treatment, even if their parents or legal guardians do not approve.857

The issue of child poverty significantly affects the ability of the country to comply with several points of the CPC. These include the right to an education, and the rights to nutrition, health and personal development. In this context, child poverty levels are not accounted for, although some estimates can be made from other available data. It has been stipulated that poverty rates are higher in rural areas than in urban areas, and that poverty forces girls to seek employment by the age of 14, accounting for approximately 30% of the child female population of Tunisia.

To this end, the Government of Tunisia in partnership with UNICEF has created several poverty reduction programmes that are aimed at the poorest regions in the country (i.e. central-west region) and focus on attending to mothers and their children in order to provide adequate health care, education and nutrition.858 Such programmes have been implemented since 2000, and positive effects have been observed as a result, especially in

858 Ibid.
relation to the Millennium Development goal. Although child poverty is still an issue in Tunisia, the problem is still present in many developing democratic countries.\textsuperscript{859} However, Tunisia managed to transform itself from a low-income country to a middle-income country over the period of 1990-2010, and it has been rated as the 7\textsuperscript{th} fastest-growing region on the Human Development Index scale.\textsuperscript{860}

Some of the most pressing issues faced by Tunisia in relation to children’s rights are related to child labour, school abandonment and sex tourism. These problems are in direct violation not only of the Tunisian’s Penal code, but also of the CPC and the ratified UNCRC. According to the World Organisation Against Torture (OMCT) report a series of international treaties have managed to diminish child exploitation and torture, including forced labour. These include the International Labour Organisation Convention, and especially Article 138, which sets the minimum age for employment and prohibits the exploitation of children for economic purposes, as well as the Convention 182 on the Worst Forms of Child Labour, which was ratified by Tunisia in 2000.\textsuperscript{861}

These acts, in conjunction with the Penal Code that prohibits the ill-treatment of children alongside with the Tunisian CPC, are the fundamental laws which should work to prevent child labour and child economic exploitation. Although in legal terms, child labour


and financial exploitation of children is specifically prohibited, with the minimum age for employment being 16 years old, a report from the United States Department of Labour on international labour statistic shows that children leaving school at a young age in favour of paid employment is still occurring.\textsuperscript{862}

Moreover, although the country has a school enrolment rate of over 98\% for both boys and girls, many drop out after the first year, and no statistics are in place for children between the ages of 5 to 14 years old on school attendance, labour or being employed and attending school.\textsuperscript{863} Approximate child labour percentages are given as 2\% to 3\% of the child population between 5 to 14 years of age.\textsuperscript{864}

Additionally, the International Labour organisation has requested that the government provide more details about statistics concerning child labour. According to the report provided by the government, a total of 1.6\% of child labour cases have ended with the child being removed from the dangerous environment as stipulated by the CPC.

\textsuperscript{862} Child Rights International Network, 'Minimum ages of criminal responsibility in Africa' (n 850).
Nevertheless these cases refer to labour in generalised terms, with no distinction being made for the worst forms of labour.  

Other forms of child abuse and exploitation refer to child trafficking and sexual exploitation. According to investigations by US Department of State, Tunisia is a destination, a source and a possible transit country for men, women and children who are forced into labour and sex trafficking. An investigation carried out in 2013 points out that the young people of Tunisia are subjected to several types of trafficking, which include labour trafficking and sexual trafficking. The most vulnerable group is young females in the northwest region, who work in domestic labour for rich Tunisian families and are oftentimes subjected to sexual abuse. The same group is also sexually exploited and lured with the promise of labour in other countries. Often girls who are minors end up in sexual slavery in countries such as the United Arab Emirates.

Under the Penal Code of Tunisia human trafficking is prohibited by law and punishable with 10 years of imprisonment for forced labour, five years imprisonment for forced prostitution of women and children and two years for forced begging by using a child. However, this punishment is less substantial than the punishment imposed for rape under the Tunisian law. Other shortcomings of the practical applications of the Penal Code


as well as applications of the CPC are derived from the lack of proper investigations and prosecutions as well as a substantial lack of convictions in cases of trafficking.

Additionally, there are no indications that the Tunisian government provides training to law enforcement officers on the subject of anti-trafficking procedures. Nevertheless, no reports or investigations have been issued with regards to the complicity of official members of state in human trafficking.867


The UN Convention on the Rights of the Child (CRC) became binding in Saudi Arabia on 25 February 1996.868 Upon accession, the government of the Kingdom of Saudi Arabia expressed a general reservation with respect to all articles that conflict with the provisions of Islamic law.869 As discussed in the previous section under children’s rights in Saudi Arabia, the kingdom ratified the UNCRC in 1996, yet it rejects the imposition of some articles which conflict with Shari’a law. Kingdom of Saudi Arabia has also ratified The


When analysing these two treaties in light of Shari’a law it is obvious that they are enforceable in the Kingdom of Saudi Arabia. According to Shari’a law, the exploitation of children is prohibited, and adults are responsible for their moral upbringing. However, because Shari’a does not stipulate the legal age for marriage, children can be married before the age of 18. This is a subject of much controversy as well as one of the Kingdom of Saudi Arabia’s reservations on the UNCRC.  

According to the Convention Kingdom of Saudi Arabia should be obliged to comply with Article 19, which states that:

“States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.”

According to this article, the state should not allow child marriages, as these are seen by the international community as child abuse and a severe affront to children’s moral and mental development. The Kingdom of Saudi Arabia has made general reservations to this Article, including to Article 18. These articles come in direct conflict with Shari’a law’s provisions that reinforce the guardianship model for females, which allows male guardians

870 Almuneef and Al-Eissa (n 818).
to prohibit education for females in their custody (although Islamic law does not specifically forbid female children from studying) and also allows for underage marriages.

Because the *Shari’a* interpretation of the Kingdom of Saudi Arabia only requires mental maturity for marriage, and due to the male guardianship system, the Kingdom of Saudi Arabia does not recognise these articles, even though the document was ratified. 873 Additional reservations have been made to Articles 1, 2, 4 and 9. These include the Kingdom of Saudi Arabia’s view on children as being people under the age of 18 and the absence of proper legislative bodies for enforcing child protection. 874

At the present time, the Kingdom of Saudi Arabia has implemented the NFSP, which can be regarded as a system of child protection, yet at this point it does not have officers or special institutions that oversee child protection. 875 By contrast, Tunisia has a penal code in place that prohibits the use of violence against children, and a number of laws that guarantee mandatory education until the age of 16 as well as institutions that manage child education for foster care. 876

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874 Ibid.


876 Child Rights International Network, 'Minimum ages of criminal responsibility in Africa' (n 850).
Other reservations have been made by the Kingdom of Saudi Arabia to the UNCRC in relation to Article 9 (1) (2) (3) (4), which stipulate the right of children to be with their parents. Under paragraph 4 the article notes that:

“Where such separation results from any action initiated by a State Party, such as the detention, imprisonment, exile, deportation or death (including death arising from any cause while the person is in the custody of the State) of one or both parents or of the child, that State Party shall, upon request, provide the parents, the child or, if appropriate, another member of the family with the essential information concerning the whereabouts of the absent member(s) of the family unless the provision of the information would be detrimental to the well-being of the child. States Parties shall further ensure that the submission of such a request shall of itself entail no adverse consequences for the person(s) concerned.”

For the Kingdom of Saudi Arabia, this article is relevant in the case of children of refugees and migrants. Reports have been issued by Human Rights Watch stating over 160,000 children have been deported without regard for their circumstances of arrival. Other than accounts of familial separation, children have also been detained in inhumane conditions without receiving proper care and have faced significant abuses, including begging and forced labour.

In the Republic of Tunisia, where many children and their parents have fled the country in the wake of the 2011 revolution, these situations are handled very differently. In this case, children’s rights violations have been registered by the host countries which received the immigrant Tunisian children. Child refuges in the Republic of Tunisia face a

somewhat better situation than those in the Kingdom of Saudi Arabia, since the country, in partnership with international institutions such as UNICEF, has created special camps that ensure some humanitarian aid.

Nevertheless, cases of violence and abuse have also been reported there.879 Additional articles from the Convention on the Rights of the Child in relation to the rights of child refugees to which Kingdom of Saudi Arabia has reservations are Article 11, 22, 32 and 37.880 Article 22 stipulates that:

“States Parties shall take appropriate measures to ensure that a child who is seeking refugee status or who is considered a refugee in accordance with applicable international or domestic law and procedures shall, whether unaccompanied or accompanied by his or her parents or by any other person, receive appropriate protection and humanitarian assistance in the enjoyment of applicable rights set forth in the present Convention and in other international human rights or humanitarian instruments to which the said States are Parties.”881

Considering the staggering number of children being deported back to their countries of origin, with the knowledge that they will face significant abuses upon reaching them, it can be argued that such actions represent a direct violation of the Convention on the Rights of the Child. This, along with the inhumane conditions reported by Human Rights Watch, imply that the Kingdom of Saudi Arabia does not have the sufficient infrastructure to respect the rights of these children, nor does it take action to improve these conditions since

879 Humanim, 'Children of Tunisia' (n 853).
it holds reservations to the aforementioned Convention on the Rights of the Child articles on the rights of child refuges.

The Kingdom of Saudi Arabia also has specific reservations to the UNCRC Articles 2, 24, 29 and 31. These articles focus on equal rights for boys and girls. Article 2 in particular notes that children’s rights should be respected regardless of race, gender or religion. In general terms, Kingdom of Saudi Arabia rejects this article based on a number of reasons. The first is the *Shari’a* view of women as inferior to men and also based on the fact that *Shari’a* is not tolerant of other religions. However, when looking at children’s rights in *Shari’a* law it is notable that the only distinction that is made between girls and boys is the right to inheritance, where the girl usually receives half of what the boy receives. No suggestions are made towards discriminating against girls in education, as the law dictates that parents are responsible for the upbringing of the children, their sustenance and education, regardless of gender. It has even been suggested by research that a more accurate application of Islamic law could lead to a decrease in the gap in school enrolment between boys and girls.

In relation to education and personal beliefs, *Shari’a* may impose the teachings of Islam, but it does not impose the religion of Islam onto children. Doing so is a social

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882 Human Rights Watch, 'Detained, beaten, deported' (n 878).
construct rooted in the Kingdom of Saudi Arabia society, yet it is not dictated by *Shari’a*, as Islamic law notes that parents should allow children to hold their own beliefs, but to raise them in the Islamic faith.\(^{886}\) Considering these facts, the Kingdom of Saudi Arabia and its interpretation of *Shari’a* should allow for equal education of boys and girls and thus be in line with the Convention on the Rights of the Child, at least in terms of Articles 29 and 31.

Other reports have been made on this issue by the ADHRB (Americans for Democracy & Human Rights in Bahrain), which note that girls are banned from attending physical education classes and are often times subjected to abuse by their male guardians without any possibility for self-defence.\(^ {887}\) These are violations of Article 29 of the Convention to which Kingdom of Saudi Arabia has reservations as the article is noted to be in contradiction with *Shari’a*. As previously discussed, under the Islamic law, all children are seen as gifts from God, and their presence is *Allah’s* test to adults, which He will reward greatly upon completion.

Moreover, *Shari’a* places the care of children directly in the hands of their parents, while for children who have no parents *Shari’a* demands that these be taken care of through sponsorship or by close relative if these exist. There are no examples of *Shari’a* law

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encouraging the ill-treatment of children based on gender, religion or race.\textsuperscript{888} This indicates that the Kingdom of Saudi Arabia not only violates children’s rights under international law but also under Islamic Law.

Saudi Arabia ratified the Convention on the Rights of the Child with additional reservations to Articles 6, 37 and 40. For the Kingdom of Saudi Arabia these articles would prohibit the ill-treatment of children who are in detention. As stipulated by Article 6 (1):

“States Parties recognize that every child has the inherent right to life. (2) States Parties shall ensure to the maximum extent possible the survival and development of the child.”\textsuperscript{889}

In 2015, Saudi Arabia sentenced 118 people to death, some of whom were under the age of 18.\textsuperscript{890} In 2012, Ali Al-Nimr, who was 17 year old at the time of his alleged crime, was sentenced to death after coercively signing a confession. The same year, Dawood Hussein Al-Marhoon, another 17 year old boy, was convicted and sentenced to death for protesting against the government. Abdullah Hasan al-Zaher, who at the time of his conviction was 15 years old, was also sentenced to death in 2012 for peaceful protest against the Saudi government.\textsuperscript{891}

To this day it is not known whether these executions have been carried out, as no information has been made public by the Saudi government. According to reports by NGOs


\textsuperscript{889} United Nations, 'Convention on the Rights of the Child' (n 814).

\textsuperscript{890} Amnesty International, 'Urgent Action Death Sentence for Juvenile Offender' (n 833).

none of the children received a fair trial, nor have they been properly represented by an
atorney, and were forced to sign confessions under threats and violent beatings.\textsuperscript{892}

In the words of the Qur'an and thus Shari'a:

\begin{quote}
"Say: "Come, I will rehearse what Allah hath (really) prohibited you from": Join not anything as equal with Him; be good to your parents; kill not your children on a plea of want; - We provide sustenance for you and for them; - come not nigh to shameful deeds. Whether open or secret; take not life, which Allah hath made sacred, except by way of justice and law: thus doth He command you, that ye may learn wisdom."\textsuperscript{893}
\end{quote}

While this paragraph may show that death sentences are admissible, it also calls for the
"way of justice" which can be interpreted as the notion of a fair trial. Furthermore, the holy
writ also mandates that children shall not be killed for a "plea of want". Seeing as some
these children were protesting against the regime, it can be argued that their presence was
inconvenient and thus disruptive of the existing power structure, and therefore they were
expressing a plea of want.


The United Nations Convention on the Rights of the Child (CRC) was signed by Tunisia
on 26 February 1990 and became binding on 29 February 1992. Tunisia also acceded to
the Optional Protocol of the CRC on the involvement of children in armed conflict by

\textsuperscript{892} Amnesty International, 'Urgent Action Death Sentence for Juvenile Offender' (n 833).
Articles Numbers 2002-42 on 7 May 2002. Upon ratification of the CRC, Tunisia made reservations and declarations to articles 2, 6, 7 and 40.

On 1 March 2002, the government of Tunisia informed the UN Secretary General that it had decided to withdraw its reservation to Article 40, paragraph (b) (v) and its interpretative declaration. Tunisia has made significant progress in instating children’s rights and liberties. Unlike the Kingdom of Saudi Arabia, Tunisia has a fairly stable legal framework on which to build laws for children’s rights, and has its own CPC document and constitution which align with the UNCRC and other treaties that ensure the protection of children’s rights.

Prior to the full ratification process the UNCRC, the Republic of Tunisia expressed reservations to Article 2 of the convention on the grounds that it would contravene national legislation on marriage and inheritance rights. Further reservations were expressed to Article 40, specifically to paragraph 2(b) (v). The article states that any child accused of a

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896 Child Rights International Network, 'Minimum ages of criminal responsibility in Africa' (n 850).
crime shall be treated with dignity. To this end, and failing to ignore the relevant provisions of international legislation, states parties shall, in particular, ensure that:

(v)If considered to have infringed the penal law, to have this decision and any measures imposed in consequence thereof reviewed by a higher competent, independent and impartial authority or judicial body according to law

The concerns raised to this article referred to cases where the national law could induce an exception by cantonal courts wanting prejudice of recourse from the Cassation Court, which is responsible for the enforcement of the law. Finally, reservations were made by Tunisia to Article 7 of the UNCRC, which stipulates that all children should have a nationality at birth and the right to know their parents. According to the reservation, this article prevented the implementation of national policy on the loss of nationality. However, in 2008, the reservations to Article 7 were withdrawn along with reservations to Article 2. Previously, in 2002, reservations to Article 40 had also been withdrawn.

In relation to child marriages, the CPC and the Personal Status code as well as the Penal Code prohibit such practices by raising the age of marriage to 20, and by enforcing punishment by imprisonment for child abuse and securing the removal of children from dangerous environments. Tunisia also complies with all of the articles of the UNCRC, including articles which are under reservation by the Kingdom of Saudi Arabia, such as

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899 MANAR (n 897).
Article 1 and 2 which mandate equal rights between children regardless of age, race and gender. Moreover, Tunisia recognises all people under the age of 18 years as children. Unlike in the Kingdom of Saudi Arabia, minors are tried in special courts, and age-specific punishments have also been instated. Moreover, the age of criminal responsibility in Tunisia is 13.\textsuperscript{900} The Kingdom of Saudi Arabia has recently raised this age from 7 to 12.\textsuperscript{901}

While some issues may exist in relation to the rights of child refugees, the necessary tools to secure care for these children are in place due to the existing legal system. Due to the existence of national laws that prohibit violence against children and the Tunisian constitution and the UNCRC, no child death penalties have been issued. Moreover, even though the parliament has discussed reinstituting the death penalty for terrorists, given recent attacks in the country’s populated regions, no executions have been carried out in the country since 1991.\textsuperscript{902}

In order to reflect the equal of rights of boys and girls to education and inheritance, Article 156 of the CPC, which stipulated that a girl should receive half of what a boy would inherit, was modified. This occurred with the implementation of the new constitution in 2014 and additional legislative changes towards the elimination of all forms of discrimination against women. In this particular case the UNCRC has standing in all Tunisian legal courts, but it is not above the constitution, which provides a strong framework for gender equality.

\textsuperscript{900} Child Rights International Network, 'Tunisia: National laws' (n 845).
\textsuperscript{901} Child Rights International Network, 'Inhuman sentencing of children in Saudi Arabia' (n 839).
It can thus be argued that Tunisia’s constitution and subsequent amendments to the CPC to eliminate gender discrimination place the country in alignment with the UNCRC. Additionally, as Article 67 of the Tunisian Constitution states, all international treaties come into effect upon ratification, thus the country automatically incorporates the UNCRC into its own legislation. Given that the UNCRC is valid in Tunisian legal courts several examples of its application can be found in Tunisian trials involving children. In legal case No. 53/16,189 from 2003, the court decided to grant filiation to a child, based on a DNA paternity test. The court invoked Article 68 from the Code of Personal Status in conjunction with the UNCRC Article 2 paragraph 2 which stipulates that the right to filiation is a fundamental right of a child regardless of his parent’s legal status.

Additionally, the Constitutional Council of Tunisia argued in 2006 under Opinion Numbers 02-2006 that grandparents have a right to access their grandchildren, as inferred by the UNCRC in relation to the child’s rights to maintain family ties. In relation to juveniles, Tunisia has fully ratified Articles 6, 37 and 40, to which Saudi Arabia has made reservations. Based on Article 37 (d):

“Every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty

904 Abiad (n 541).
before a court or other competent, independent and impartial authority, and to a
prompt decision on any such action.”

In conjunction with the Penal Code, this article, along with Articles 6 and 40, specifically
prohibit the use of violence against children, or the use of violence as punishment for
children. As previously discussed, even though corporal punishment is under forbidden
Tunisia, it is still implemented in households and possibly in schools due to cultural beliefs
about educating children. Nevertheless, in juvenile institutions such punishments are
strictly prohibited.

In line with the UNCRC, Tunisia’s CPC holds juvenile trials in in special courts
designed particularly for handling underage offenders. The right to fair and legal
representation is guaranteed by Article 6 of the UNCRC. Unlike the Kingdom of Saudi
Arabia, which tries children in the same way as adults, Tunisia has attained significant
progress in the juvenile criminal system. Nevertheless, some current elements of Tunisian
society may affect the way that children’s rights, particularly justice rights, may develop
in coming years.

Although in 2011 Tunisia was congratulated for the progress made in the area of
children’s rights, in 2015, as a result of terrorist attacks, the government invoked a decree
from 1978 enabling local authorities to issue a state of emergency and ban all public
demonstrations, whether peaceful or not, which could stir conflict and promote public

906 Convention on the Rights of the Child (n 814).
907 Global Initiative to End All Corporal Punishment of Children, 'Corporal punishment of
children in Tunisia' (n 855).
908 Humanium, 'Children of Tunisia' (n 853)
disorder. Moreover, during the same year the government arrested several journalists and members of the general public under the charges of terrorism. One journalist was arrested because he had published a picture of the perpetrator of the terrorist attack in which he was exiting a vehicle and carrying a gun. Additional arrests have made of people who publicly insulted the government or for opinions expressed in regard to state’s officials’ complicity with the attack.

Other violations of the UNCRC can be seen in a provision form the Personal Status Code that stipulates that divorced mothers do not have the right to keep their children if they remarry. The same is not applicable for men, who may keep their children if they remarry. This is not only a violation of the constitution with regards to gender equality, but also a violation of the children’s right to be with their family. In the case that it would be in the child’s best interest to be with his mother, under the Personal Status Code this would not be possible if she remarries.

Nevertheless, when comparing the events of 2015 in Tunisia of the public ban on protests and the suppression of free speech with the report issued by CRC on Saudi Arabia in relation to the UNCRC on 7th of October 2016, a strong contrast can be seen between the applications of the UNCRC applications in the two countries. While in Tunisia some violations of children’s rights do exist (yet this is also the case in developed nations if

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911 Ibid.
accounting for children living in poverty) as well as some restrictions on free speech, at the opposite end of the spectrum Saudi Arabia still has the death penalty for children, who can be sentenced to death for apostasy (insulting God and/or the Prophet or corrupting the earth). At the same time, torture and ill-treatment of minors is still taking place, and children are attending public executions and amputations, while life imprisonment is still imposed on minors.\footnote{Alkarama, 'Saudi Arabia: Committee on the rights of the child issues its conclusions after the country’s review' (7 October 2016) <https://www.alkarama.org/en/articles/saudi-arabia-committee-rights-child-issues-its-conclusions-after-country’s-review> accessed 30 September 2016.} The concluding observations of the Commission state:

“The Committee remains concerned about the State party’s general reservation to the Convention which provides for the precedence of Sharia law over international treaties and undermines the effective implementation of the Convention.”\footnote{Committee on Children Rights, ‘Concluding observations on the combined third and fourth periodic report of Saudi Arabia’* (CRC 2016) <http://tbinternet.ohchr.org/Treaties/CRC/Shared%20Documents ⁄ SAU/CRC_C_SAU_CO_3-4_25461_E.pdf> accessed 30 September 2016.}

Notably, in Tunisia the progress made up to the present day can be attributed to the fact that the law was not favoured over international treaties nor above the country’s own constitution and legislative systems. The law can be interpreted not only as discriminatory and oppressive, but also in a more positive light as enabling education for both girls and boys and prohibiting the murder of children while guaranteeing them the right to a free trial.

It is also worth mentioning that in the Republic of Tunisia, through the elimination of Shari’a law, all possible ways of interpreting this law have been eliminated, allowing
for the possibility of legislative development and integration of the UNCRC with national policy. According to the general view of Shari’a law, these interpretations are not entirely accurate, as shown by Qur’an verses. These beliefs and practises also violate the multiple articles of the UNCRC to which Kingdom of Saudi Arabia had reservations upon ratification.

In contrast to the Kingdom of Saudi Arabia, the Republic of Tunisia not only integrated the UNCRC into its legislative frameworks, but has also applied this treaty in its legal courts. From a legislative perspective it can be argued that a strong framework has been set in place in the Republic of Tunisia to protect children’s rights, which surpasses the ones existing in the Kingdom of Saudi Arabia. This is particularly due to the existence of a penal code, the distinction of penalties for adults and children as well as the existence of juvenile courts and the prohibition of marriage before the age of 20.

These also include the Tunisian CPC, the ratified UNCRC as well as the Personal Status document and additional schooling and non-violence legislation. Some shortcomings have been identified with regards to the application of the UNCRC in Tunisia, yet it can be concluded that the implementation of this treaty is much more visible in practical terms when compared to Kingdom of Saudi Arabia. Nevertheless, it must be acknowledged that Tunisia is currently a country in transition from an authoritarian regime to a democracy.

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914 Committee on Children Rights (n 913).
With the demise of the regime in 2011, only seven years have passed since the country became a democracy.\textsuperscript{915} Although the seeds of this transition have existed since the 1990s with the creation of the CPC and the ratification of the UNCRC, only a short period of time has passed since the uprising. Future developments in terms of changing cultural perspectives over corporal punishment of children and freedom of expression are arguably yet to come while the indisputable progress made in children’s rights proves that significant advancements have been made in child protection and children’s rights legislation.

While the Kingdom of Saudi Arabia still commits various human rights violations, the secular state of Tunisia attempts to adhere to international principles of human and children’s rights. On various occasions, the Kingdom of Saudi Arabia has been seen to trespass not only international legislation in regard to children’s rights but also its own Shari’a law. Nevertheless as shown in previous chapters, because Islamic law is subjected to interpretation, it is difficult to conclude that Kingdom of the Saudi Arabia breaks this law when giving children the death penalty.

At the other end of the spectrum, Tunisia has also been observed to have had cases of children’s rights violations, albeit not in the same areas as the Kingdom of Saudi Arabia. Child trafficking seems to exist in both states, yet child death sentences are only recorded in the Kingdom of Saudi Arabia. This leads to the obvious conclusion that secular states, in which religion is separated from politics and civil affairs, are more compatible with

\textsuperscript{915} Clement Henry and Ji-Hyang Jang, The Arab Spring: Will It Lead to Democratic Transitions? (1st edn, Springer2013) 38.
international legislation. By contrast, non-secular states such as the Kingdom of Saudi Arabia seem to strongly diverge from international legislation.
Chapter 7

Secularism and Contemporary Islamic States attitudes to International Human Rights Law: Separate or Interactive Factors

1. Contemporary Islamic State and Secularity

Secularization was assumed to be the inevitable destiny of the modern world. The widely held belief that the world would eventually abandon belief in religion was based on somewhat simplistic assumption of actual relationship between modernization and secularization. Secularism as it is known today is identified as a product of Western culture. Secularisation in Islamic States is commonly perceived as an anti-religious project because there is no accurate translation of the term “Secularism” in the Muslim world.

As a normative ideal, European model of secularism have typically been hostile to Islamic States. For much of the Islamic States, secularism is perceived as an imported ideology peculiar to authoritarian regimes in Islamic States. The definition and application of secularism, especially the place of religion in society, varies among Islamic countries as it does among western countries. Secularism in Islamic countries is often contrasted with Islamism, and secularists tend to seek to promote secular political and social values as opposed to Islamic ones.

As the concept of secularism varies among secularists in Islamic States, reactions of Muslim intellectuals to the pressure of secularization also varies. On the one hand, secularism is condemned by some Muslim intellectuals who do not feel that religious influence should be removed from the public sphere. On the other hand, secularism is claimed by others to be compatible with Islam.\textsuperscript{918}

Secularism has inspired some Muslim scholars to argue that secular government is the best way to observe shari‘ah, as "enforcing [shari‘ah] through coercive power of the state negates its religious nature". While they did not adhere to the modern concept of a nation with no official religion or religion-based laws, a number of Muslim-majority states in the Middle Ages demonstrated some level of separation between religious and political authority.

In recent years, however, stronger acknowledgement of the plural forms of secularism has emerged. Scholars in the field, while approving the separations of religious institutions from the state, refuted the removal of religion from public life.\textsuperscript{919} Other scholars stress an important positive feature of secularism, Abou Elafadel argues that: “secularism is necessary to avoid hegemony and abuse of those who pretend to speak for God”.\textsuperscript{920} Scholar Abdullahi An-Na‘im has recently advocated that an inclusive secular

\textsuperscript{918} Ibid.
\textsuperscript{920} Khaled Abou El Fadl, Speaking in God's Name: Islamic Law, Authority and Women (1st edn, Oneworld Publications 2014) ch 5.
democratic state is compatible with Islam as it safeguards the separation of religion from the state.921

2. The Relationship between Religion and Human Rights

Theorists and practitioners commonly assume that the concept of human Rights is secular and that it normally takes priority over other values. These assumptions are controversial for those who approach human rights from prospective of religious beliefs. Muslim scholar, Abdullahi An-Na’im, once opined that the debate on the relationship between human rights and religion should be shifted from ‘from textual interpretations of prescriptions and proscriptions to the actual understanding and practice of belief.’922

In this regard, the Preamble to the United Nations Charter states that the people of the United Nations reaffirm their faith in respect for fundamental rights and freedoms. Although this provision has been replicated in legal instruments of individual states, a dearth of literature on human rights has opined that entrenching respect for human rights in state and international legal instruments is not enough and that more needs to be done.923

Connection with religion may have an inclination towards respect for economic, social, and cultural rights because all world religions have a provision for personal

922 Ibid.
responsibility to satisfy the needs of other persons. Religion carries with it ‘institutionalised connections with transcendental bases for morally justified behaviour.’ While there is no permanent contradiction or compatibility between human rights and religion, considerations of the relationship between the two are too strong to be ignored by advocates and scholars of human rights systems because of the influence that religion has in human beliefs.

Human rights, as defined in the Universal Declaration of Human Rights, are universal and due to the entire human race without discrimination based on gender, national origin, language, religion, and race. Whereas the Universal Declaration of Human Rights is not a binding instrument under international law, it acts as the enabling instrument on human rights. Enforcement and application of these rights is then left to state governments. Since religions are also meant to be universal and due to all persons without discrimination based on gender, religion, national origin, language, and race, it can be proposed that religion has a relationship with human rights based on the universality concept.

Central to any discussion on human rights is equality and human dignity. A state cannot respect human rights if it does no value the dignity of its citizens and, by extension, the dignity of the human race. In addition, a state cannot guarantee the freedom of religion to its citizens if it does not value their equality and dignity.

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Religion and liberalism have a long history of connectedness. Bouwman argued that religious tolerance was the best way to achieve peace in a society that comprises diverse religious traditions. He made this observation based on the conflicts that existed in continental Europe and England between Catholic and Protestant faiths. Scholars in the era of Enlightenment, including the Founding fathers of the United States, borrowed this thinking when they freedom of religion and the separation of the state and the church in the First Amendment.

Liberal theorists are proponents of the doctrine of separation between the state and religion, so that every citizen has a right to their religion of choice, they argue that religion has tendency to topple a democracy because when people of diverse religious traditions are given freedom to exercise their religious freedom in a democracy there is no unity of religious world view which may cause instability. For this reason, state’s relationship with human rights is one of the determining factors in its attitude towards human rights. The next section will discuss how relationship with religion in Tunisia and the Kingdom of Saudi Arabia has been a determining factor in the states’ attitude towards human rights.

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3. Human Rights within Islamic State and the protection of Human Rights

Traditionally, several difficulties confront the discourse of international human rights from an Islamic legal perspective. On one hand is the domineering influence of the Western perspective of human rights, which creates a tendency of always using Western values as a yardstick in every human rights discourse. It is often argued that human rights principles are "principles that were developed in Western culture", thus Western norms should always be the universal normative model for the content of international human rights.929

While it is true that the impetus for the formulation of international human rights standards originated from the West, the same cannot be said of the whole concept of human rights, which is perceivable within different human civilisation. Related to that is the negative image of Islam in the West. Often, some of the punishments prescribed in Islamic law and the political human rights situation in many parts of the Muslim world today are, inter alia, cited by Western analysts as evidence of Islamic brutality and lack of provision or respect for human rights in Islamic law. This has created what has been termed "Islamophobia" in the West, which adversely affects the view about human rights in Islam generally.930

Islamic law or Shari‘ah are both sometimes vaguely advanced by some Muslim countries as excuse for their poor human rights records without any elaboration on

929 Mayer (n 326).
the precise position of Islamic law on the matter. Due to the above difficulties, the concept of human rights under Islamic law has often been discussed from either a reproachful or a defensive angle, depending on the leanings of the discussant.

Piscatori has frowned at the defensive approach of most Muslim writers in the international human rights discourse. We need to determine however, whether the defensiveness is merely an apology in the face of genuine challenges posed by international human rights to Islamic law or are genuine defences against criticisms of Islamic law for human rights situations in Muslim countries not necessarily justifiable even under the Shari’ah.

On one hand, it is undeniable that Western initiatives and modern challenges, which include the international human rights regime, have forced contemporary Muslim thinkers and intellectuals to strongly propose a review of some traditional Islamic jurisprudential views, especially in the area of international law and relations. On the other hand, there have also been general erroneous reproaches against Islamic law for the sometimes appalling attitudes or actions of some governments in Muslim countries that are not justifiable under the Shari’ah. The International Commission of Jurists and the Union of Arab Lawyers, concluded that:

"It is unfair to judge Islamic law (Shari'a) by the political systems which prevailed in various periods of Islamic history. It ought to be judged by the

general principles which are derived from its sources... Regrettably enough, contemporary Islamic practices cannot be said to conform in many aspects with the true principles of Islam. Further, it is wrong to abuse Islam by seeking to justify certain political systems in the face of obvious contradiction between those systems and Islamic law.

While the theoretic arguments concerning the conceptual foundations of human rights may be difficult to settle, the indisputable fact is that international human rights are today not a prerogative of a single nation. It is a universal affair that concerns the dignity and well-being of every human being. However, there is yet to emerge what we may call a "universal universalism" in international human rights. What exists now has been described as "provincialism masquerading as universalism".

While the flagrant abuse of human rights in Muslim States under the pretext of cultural differences is unacceptable, the role and influence of the Muslim world in achieving a peaceful coexistence within the international community does permit Muslim States to question a universalism "within which Islamic law (generally) has no normative value and enjoys little prestige".

An exception to the general non-consideration of Islamic law principles and values in the development of international human rights law is found only in

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935 Ibid.
the Convention on the Rights of the Child (CRC) adopted in 1989. Article 20(3) of the CRC makes a specific reference to the principle of "kafalah of Islamic law".\textsuperscript{936} Since human rights are best achieved through the domestic law of States, recognition of relevant Islamic law principles in that regard will enhance the realisation of international human rights objectives in Muslim States that apply Islamic law fully or partly as state law.

4. The Paradox of Universalism and Cultural Relativism

The theory of universalism is that human rights are the same (or must be the same) everywhere both in substance and application. Advocates of strict universalism assert that international human rights are exclusively universal. This theory is mostly advocated by western nations and scholars who present universalism in human rights through a strict western perspective. They reject any claims of cultural relativism and consider it as an unacceptable theory advocated to rationalise human rights violations. Western scholars who argue that human rights were developed from western culture also argue that western norms should always be the universal non-native model for international human rights law.\textsuperscript{937}

\textsuperscript{936} United Nations, Convention on the Rights of the Child (n 814).
\textsuperscript{937} Ann Elizabeth Mayer, "Current Muslim Thinking on Human Rights" in Abdullahi An-Na'\textquoteleft im, and F. M Deng, (eds.) Human Rights in Africa, Cultural Perspectives (1\textsuperscript{st} edn, University of Pennsylvania Press1990) 1990) 131.
Advocates of this exclusive concept of universalism usually seek support for their argument in the language of international human rights instruments, which normally states that "every human being", "everyone" or "all persons" are entitled to human rights. While it is trite that the language of international human rights instruments generally supports the theory of universalism, present state practice hardly supports any suggestion that in adopting or ratifying international human rights instruments, non-western State Parties were indicating an acceptance of a strict and exclusive western perspective or interpretation of international human rights norms.\textsuperscript{938}

One may observe in this regard that Art. 31(2) of the ICCPR, for instance, provided that in electing members of the Human Rights Committee "consideration shall be given to equitable geographical distribution of membership and to the representation of the different forms of civilization and of the principal legal systems" of the State Parties. It is arguable that this recognises the need for an inclusive and multi civilisational approach in the interpretation of the Covenant.

The theory of cultural relativism is thus advocated mostly by non-western nations and scholars who contend that human rights are not exclusively rooted in western culture but are inherent in human nature and based on morality. Thus, human rights, they claim, cannot be interpreted without regard to the cultural differences of peoples. Advocates of cultural relativism assert that "rights and rules about morality are encoded in and thus depend on cultural contexts."\textsuperscript{939}

\textsuperscript{938} \textit{Ibid.}
\textsuperscript{939} Henry Steiner, Philip Alston, \textit{International Human Rights in Context, Law Political Morals} (2\textsuperscript{nd} edn, Oxford University Press 2000) 366.
The theory emanates from the philosophy of the need to recognise the values set up by every society to guide its own life, the dignity inherent in every culture, and the need for tolerance of conventions though they may differ from one's own. Cultural relativism is thus conditioned by a combination of historical, political, economic, social, cultural and religious factors and not restricted only to indigenous cultural or traditional differences of people.

A critical evaluation of both theories reveals that, on the one hand, the theory of cultural relativism is prone to abuse and may be used to rationalise human rights violations by different regimes. It admits of pluralistic inputs, which, if not properly managed, can debase the efficacy of human rights. On the other hand, the current values projected for the interpretation of international human rights law by advocates of strict universalism have been criticised as purely western and not really universal.940

The present theory of universalism is itself thus criticised as being culturally relative to western values. That is the paradox, whereby the controversy between universalism and cultural relativism actually portrays a situation of cultural relativisms. To most of the former colonies, western values are essentially being used as the universal repugnancy test for the interpretation of international human rights law in the same way Western laws and customs were used in colonial periods to eliminate local laws. The question has thus often been raised as to whether the theory of strict

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universalism in human rights is not another "form of neocolonialism serving to strengthen the dominance of the West."

The ideals of universalism in international human rights law need therefore to be advanced in a manner that escapes charges of cultural imperialism within non-western societies. Universalism international human rights law demands the evolution or identification of a universal consensus in the interpretation of human rights principles. This calls for a multicultural or cross-cultural approach to the interpretation and application of the international human rights principles in a manner that will not reduce its efficacy but lead to the realisation of an inclusive theory of universalism. An-Na'im has also reiterated that: "Any concept of human rights that is to be universally accepted and globally enforced demands equal respect and mutual comprehension between rival cultures".⁹⁴¹

That argument continues to be advanced today mostly by non-western nations. There is thus a need for an objective evaluation of what every civilisation can contribute to universalism in international human rights law. Presumptions of cultural inferiority must be avoided and justifications on cultural differences must be examined and critically evaluated within the parameters of human dignity with a view of evolving an inclusive universalism in international human rights law.

⁹⁴¹ Abdullahi An-Na'im, "What Do We Mean by Universal" (1st edn, Censorship 1994) 120.
5. The Right to Freedom of Thought, Conscience and Religion

Despite the diverse ideological and religious leanings of the international community there is an acceptance in modern society of the basic notion of the right to freedom of thought, conscience and religion as contained in the first sentence of Article 18(1). It is one of the foundations of a pluralistic and democratic society. The attempt to define the content of Article 18 of the ICCPR in terms of Article 18 of the UDHR to include the clause that "this right includes freedom to change (ones) religion or belief met with opposition principally from Muslim countries such as Kingdom of Saudi Arabia who pressed for its deletion.\textsuperscript{942}

Instead of a complete deletion of a compromise was achieved in the change of the language to this right shall include freedom to have or to adopt a religion or belief of one’s choice. The HRC has however indicated that the freedom "to have or to adopt" include the freedom "to replace one's current religion or belief with another or to adopt atheistic views, as well as the right to retain one's religion or belief.\textsuperscript{943}

The interpretation of the right to freedom of thought, conscience and religion to include freedom to change one's religion or even to adopt atheistic views has

\textsuperscript{942} K.J Partsch, "Freedom of Conscience and Expression, and Political Freedoms", (1\textsuperscript{st} edn, SUPRA 1991) 207.

not been without controversy among Islamic scholars with respect to the crime of apostasy under Islamic Law. The different views will be analysed below.

However, the trend among contemporary Islamic scholars on the issue of religious freedom under Islamic law has mostly been towards emphasising the Qur'anic provision which states that:

"There is no compulsion in religion: truth stands out clear from error; whoever rejects evil and believes in God has grasped the most trustworthy handhold that will never break, and God hears and knows all things."  

Elaborating on the principle of non-compulsion to adopt Islam, Ismail al-Faruqi had emphasised that by the wordings of the Qur'an every human is endowed with the capacity to know God if the intellect is exercised with candidness and integrity. He illustrated the human capacity to understand with reference to a story invented by the early Islamic thinkers about a mythical being called "Hayy Ibn Yaqzln" who grew up on a deserted island devoid of humans and hence tradition, and who gradually led himself by sheer intellectual effort from ignorance, to naive realism, to scientific truth and finally, to natural reason and the discovery of transcendent God.  

There is however also the human capacity to misunderstand, especially when influenced or sometimes misled by the surrounding circumstances of non-isolated existence. Thus, the Muslim is obliged by his faith, which he believes...
as the only true one, to present its claims to humanity not dogmatically nor by coercion but rationally through intellectual persuasion, wise argument and fair preaching. The Qur'an points out that whoever accepts it does so for his own good and whoever rejects it does so at his own toss and none may be compelled.

To advocate thought or religion by coercion is, in the words of al-Faruqi, to tamper with the process of intellection and constitutes a threat to man's integrity and authenticity" and is null and void from the standpoint of the Shari'ah.\textsuperscript{946} Uthman has also observed that although the Islamic State has a duty to promote the religion of Islam, it is not allowed to force anyone to embrace Islam, but rather a duty to monitor and prevent those who seek to deny people their freedom of belief.

The rule under Islamic law that a Muslim male who marries a non-Muslim wife cannot compel her into Islam and also the recognition of the status of non-Muslims within the Islamic State indicates that Islamic law does not advocate forced conversions. According to the 12\textsuperscript{th} Century Hanbali jurist, Ibn Qudamah:

\begin{quote}
"It is not permissible to force a non-believer into embracing Islam. For instance, if a non-Muslim citizen (Dhimmi) or a protected alien (Musta 'min) is forced to embrace Islam, he will not be considered as a Muslim except his embrace of Islam is of his own choice... The authority for this prohibition of coercion is the words of God Most High that says: "There is no compulsion in religion".\textsuperscript{947}
\end{quote}

Today, most Muslim scholars who address the human rights question of freedom of thought, conscience and religion, follow the moderate view and hold that Islamic law prohibits the compulsion of anyone in matters of faith. The rule of religious

\textsuperscript{946} Ibid.
\textsuperscript{947} Ibn Qudamah, \textit{Al-Mugni}, (1\textsuperscript{st} edn, Arabic Source Vol.8) 144.
dissemination under Islamic Law is "Invite (all) to the Way of thy Lord with wisdom, and beautiful preaching and argue with them in ways that are best and most gracious ..." which does not also support or imply any notion of forced conversion.\textsuperscript{948}

Thus Art. 10 of the OIC Cairo Declaration states that: "...It is prohibited to exercise any form of compulsion on man or to exploit his poverty or ignorance in order to convert him to another religion or to atheism". Wrongfully without knowledge. Thus, we have made fair-seeming to each people its own doings; then to their Lord is their return and he shall then inform them of all that they used to do".\textsuperscript{949}

This brings us to the question of apostasy under Islamic law vis-a-vis the right to freedom of thought, conscience and religion. Apostasy from Islam is a topical issue under the concept of freedom of thought, conscience and religion because of its classification as a crime punishable with death under traditional Islamic law. This apparently contradicts the basic principle of non-compulsion advanced above. It also conflicts with the international human rights understanding of freedom of thought, conscience and religion. In paragraph 5 of its General Comment 22, the HRC observed, \textit{inter alia}, that:

"Article 18.2 bars coercion that would impair the right to have or adopt a religion or belief, including the use of threat of physical force or penal sanctions to compel believers or non-believers to adhere to their religious beliefs and congregations, to recant their religion or belief or to convert."\textsuperscript{950}

\textsuperscript{948} M.M Ahsan, Human Rights in Islam: Personal Dimensions (1\textsuperscript{st} edn, Arabic Source, Egypt Press 1990) 13.
\textsuperscript{949} Cairo Declaration of Human Rights (n 323).
\textsuperscript{950} Office of the High Commissioner for Human Rights (n 943).
There had been differences amongst Muslim jurists and scholars about the definition and punishment of apostasy under traditional Islamic law since the early times of Islam. Some of the jurists held the view that a Muslim apostate must never be sentenced to death but should be invited back to Islam. Their views conform with the Qur'anic rule of propagation that says: "Invite (all) to the way of thy Lord with wisdom and beautiful preaching; and argue with them in ways that are best and most gracious."

Both El-Awa and Kamali show through references to the Qur'an, the Sunnah, the practice of the rightly guided Caliphs, and views of some of the classical as well as contemporary Islamic jurists and scholars to establish that simple apostasy neither constitutes a Hadd-type offence nor attracted the death penalty. They both cited the twelfth century Maliki jurist, Abu al-Walid al-Bajt as stating that apostasy is "a sin for which there is no Hadd punishment." Although Hamidullah included the crime of apostasy in his Muslim Conduct of State, he went on to indicate that: "The basis of Muslim polity being religious and not ethnological or linguistic, it is not difficult to appreciate the reason for penalizing this act of apostasy.

954 Ibid.
Contemporary Muslim jurists and scholars thus differ as to whether apostasy simpliciter in the form of a person denouncing the Islamic faith is a Hadd-type offence at all, and also as to whether it attracted the death penalty. Many of the scholars and jurists define apostasy in terms of rebellion against the State, where a Muslim-subject of the Islamic State after denouncing Islam joins with those who take arms against the Islamic State and thus commits a political offence against the State.⁹⁵⁵

The contention is that simple apostasy, in the sense of an individual denouncing Islam without more, wherever mentioned in the Qur'an does not stipulate any worldly punishment but is only described as attracting severe punishments in the hereafter. The death punishment for apostasy was based on a reported Tradition of the Prophet that said: "Anyone who changes his religion, kill him".⁹⁵⁶

6. Conceptional Differences in Islamic State Human Rights Law and International Human Rights Law

The conceptual differences on human rights in Islamic law and international human rights law may not be beyond harmonisation, It is clear that the theocentric concept of Islamic law cannot be ignored in its relationship with international human rights law

⁹⁵⁶ Al-Bukhari and Ibn Hajar, Bulugh Al-Maram (1st edn, Hadith, Arabic Source 1032) 428.
because it influences every aspect of the Islamic polity. The theocentric concept cannot however be used as camouflage for oppression or abuse of human rights.

There must be an appreciation of the theocentric perspective of Islamic law within the international human rights regime which will accommodate a justificatory approach rather than a strictly secular and exclusionist approach in the interpretation of international human rights principles. Professor Rene David has rightly observed the impossibility of rejecting the Islamic legal tradition without rejecting the entire Islamic civilisation.957

Since such rejection is not the goal of the international human rights regime, the accommodation of the Islamic legal tradition is of utmost importance for realising the ideal of international human rights in the Muslim world. It is in that perspective that the ICCPR and the ICESCR, representing the International Bill of Rights. Under Article 18(3) of the ICCPR, the right to freedom of religion and beliefs is not absolute. There is a restriction by the provision that:

"Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others".958

That would perhaps be in consonance with the argument of contemporary Islamic scholars and that of some Islamic States that it is not the

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958 ICCPR (n 625).
changing of one's religion simpliciter that is prohibited under Islamic law but its manifestation in a manner that threatens public safety, morals, freedom of others or even the existence of the Islamic State itself.\textsuperscript{959}

The economic, social and cultural rights recognised under the International Human Rights Law are generally compatible with the \textit{Shari'ah} and realisable within the principles of Islamic law. Thus, Islamic law could potentially serve as a vehicle for the promotion and realisation of economic, social and cultural rights in Muslim States. The problem areas concern mainly the issues of separation of religious institutions from the state.

The myth that the \textit{Shari'ah} is an antithesis to civil and political rights has been sustained for so long mainly due to the confrontational approach often adopted in comparisons between Islamic law and international human rights law, which opens the door for a better understanding of the socio-legal problems and how to handle them in a manner that promotes the noble objective of enhancing human dignity and fostering an ideal human community, which are common objectives of both the \textit{Shari'ah} and international human rights law.

\textit{Shari'ah} does not oppose or prohibit the guarantee of civil and political rights, liberal and democratic principles or the liberty and freedom of individuals in relation to the State. The areas of conflict identified, particularly concerning the scope of equality of rights between men and women, prohibition of inhuman and

degrading punishments, freedom of religion and some death penalty cases are also shown to be not insurmountable where addressed open-mindedly and in a well-informed manner.

With a better understanding of the socio-legal problems, Islamic law, being the domestic law of many Muslim States, could serve as a vehicle for the full realisation of the civil and political rights guaranteed under the International Human Rights Law with the result that Muslim States would not only consider themselves under international legal duty but also under a religious obligation to respect and ensure the civil and political rights guaranteed under the Covenant. Muslim States that apply Islamic law also have a duty to demonstrate the highest humanitarian and political will in respect of their obligations under the Covenant through a constructive interpretation and implementation of the Shari'ah.

However, Islamic States that have ratified the ICESCR, have an obligation under Islamic law as they do have under international law to respect and ensure the economic, social and cultural rights recognised under the Covenant. For those Muslim States that have not yet ratified the ICESCR, the foregoing exposition shows that their non-ratification does not absolve them from ensuring those rights under Islamic law.\textsuperscript{960}

Theoretically, the ideals and humane spirit of the Shari'ah as creates an expectation that human rights should best be respected in the Muslim world. This is regrettaently not so, and human rights are violated in Islamic States.

\textsuperscript{960} ICESCR (n 625).
International human rights law is seen to be violated both where there is a hard-line traditional application of Islamic law or the enforcement of hard-line secularist agendas against Islamic norms and rights. There is therefore a need to find a balance between these two positions in the relationship between Islamic law and international human rights law in Islamic States.

It is obvious that there is a common phenomenon of consciousness in Islamic States of the appealing nature of international human rights ideals, especially on the part of those exposed to the modern concepts of freedom, liberty and equality. Islamic States can thus not feign indifference but are rather advancing cautiously and with different degrees of moderation in bridging the gap that exists between their interpretation of the Shari'ah and the realisation of their international human rights obligations.

While the State practice of Islamic States concedes generally to the universality of human rights, they have persistently advanced the cultural relativist argument to sustain Islamic morals and values within their human rights practice. However, State practice, also confirms that, no matter how moderate Muslim States are in their application of Islamic law, there will still remain some areas of cultural differences vis-a-vis current international human rights practice.

Those areas of differences that can be reasonably justified on grounds of public order and morality are those for which this thesis proposes the adoption of the margin of appreciation doctrine by the UN treaty bodies in emulation of the European human rights regime. This will allow for an international evaluation and control of the justifications advanced for the cultural differences and promote
an inclusive universalism that will enrich international human rights practice universally.

The legitimising effect of the *Shari’ah* and its ultimate objective of ensuring both the temporal and spiritual wellbeing of individuals make it a very important vehicle for realising the ideals of international human rights law in Islamic States. Adopting the margin of appreciation doctrine will provide leeway for the healthy interaction between Islamic law and international human rights law in Islamic States. It must be noted however that there is yet to emerge a unified interpretation or application of Islamic law that facilitates a common Islamic human rights evaluation among Islamic States.

Thus with the Islamic resurgence in the Muslim world and the adoption of Islamic law in one form or another by modem Muslim States, an important challenge that also faces them is the establishment of a common Islamic human rights standard and an enforcement mechanism as a reference point towards bridging the gap that presently exists between the application of Islamic law and the enforcement of international human rights law in the Islamic States.
Chapter 8

Conclusion

This research has compared secular and non-secular modern Islamic states’ attitudes towards international human rights law by examining the origin, the sources, the methods and also the concept of human rights in selected Islamic states. It has emerged that Shari’a law is religious law while human rights law is secular law. Shari’a law does not recognise individual rights while human rights law is concerned with individual rights. These two sets of laws therefore differ substantially in nature and in application.

Overall, it has been seen that the two sets of law are incompatible as far as human rights are concerned since they rest on radically different foundations. Shari’a law is concerned with the general well-being of Islamic society while human rights law focuses on the well-being of the individual. Although there are differences between human rights law and Islamic law on the issue of human rights, these differences are not completely irreconcilable. The vital overlapping aspects between the two legal systems are appreciating human dignity and abandoning prejudice.

The potential to combine Islamic law with international human rights norms does exist. The arguments between international human rights law and Islamic law stem primarily from interpretation and can therefore be reconciled. Contemporary Muslim states recognise the importance of human rights. Furthermore, they recognise the universality of human rights and do not deny their obligations under international human rights treaties that they have ratified or question that these treaties are binding in nature. Their argument is largely to do with how international human rights norms are interpreted. Thus their concerns are about universalism
rather than universality. Muslim states affirm human rights together with different levels of inclusion of Islamic legal perspectives in their interpretation of human rights law. This is an indication of the strong association between Islamic law and the civilisation of Islam.

As the objective of international human rights is not to reject Islamic civilisation, the accommodation of Islamic law is of significance in the achievement of the principles of international human rights and for the realisation of universalism in Islamic countries. Therefore, accommodation will ensure that the legitimacy of the Islamic law governing Islamic countries is positively used for enforcing international human rights law in these societies. 

Shari’a law is one of the main sources of law in Islamic countries, being derived from the religious precepts of the Islamic faith. It contains a number of rules and moral guidelines that stem from the teachings of the Qur’an. However, Shari’a in its current form is more than a series of moral guidelines, with the Hadiths (Islamic tradition) containing rules for economic trade and even criminal justice and personal matters. However, there is a continuous conflict between Islamic law and universal human rights, as many Islamic countries do not adhere to the UDHR.  

This study was conducted on two Islamic countries, the Kingdom of Saudi Arabia as a non-secular state and Republic of Tunisia as a secular state, and demonstrated that the differences between Shari’a law and international human rights provisions are not based on Shari’a law itself, but on the manner in which it is applied. Shari’a law is subject to interpretation, which is conducted by the main legislators in Islamic countries, the Ulama.  

The role of the Ulama is to provide an interpretation to the Islamic texts, the Qur’an and the Hadiths in order to determine juridical arguments that enforce certain fatwas (laws). 

\[961\] Saedén (n 525).  
\[962\] Bowen (n 431).
However, interpretations differ between Islamic countries, depending greatly on cultural aspects and on the exposure the country is giving to international legislation. This difference in interpretation is evident from the analysis of the two selected countries. On one hand there is the Kingdom of Saudi Arabia, a country which has chosen to apply a more traditional and strict variant of the Shari‘a law and who repeatedly refuses any external influence, making it a non-secular state.963

On the other hand, the Republic of Tunisia, a secular state, due to exposure to other cultural and political regimes over time, has demonstrated more openness to the adherence to international legislation, choosing a less strict interpretation of Shari‘a.964 Specifically the analysis on the two countries was focused on four main areas: the countries’ position on the UDHR and the CDHRI, their constitutional rights, the countries’ position and approach towards women’s rights and their approach towards children’s rights. Significant differences were observed throughout the analysis, demonstrating that an Islamic secular state can apply Shari‘a law without violating universal human rights.

Unlike the Kingdom of Saudi Arabia, which does not adhere either to the UDHR or to the Cairo Declaration of Human Rights in Islam (CDHRI), Republic of Tunisia is among the signatories of the CDHRI.965 There are significant differences between the CDHRI and the UDHR, with the CDHRI reflecting the Islamic approach to human rights. The first article of the Cairo Declaration proclaims that all human beings are part of a single family under Allah. Therefore Allah is recognised here as the only accepted deity and Islam is the only religion

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964 Touchent (n 444).
965 CONCIT, 'Human Rights and Islam' (n 518).
recognised. Furthermore, the CDHRI, through its articles, gives a number of freedoms and rights to Muslims, unless otherwise provisioned by Shari’a law.

The second article of the CDHRI for example decrees that all people have the right to remain safe from physical harm, unless otherwise provisioned by Shari’a law.966 This formulation imposes the precedence of Shari’a law over the provisions of the CDHRI. This fact, together with the recognition of Islam as the only religion (thus restricting freedom of religion) has been met with criticism from UDHR supporters. However, even though the CDHRI essentially protects the Islamic religion and Shari’a law, the Kingdom of Saudi Arabia did not adhere to it, on the grounds that it is not in line with traditional Islam.

Some of the criticisms made of the CDHRI in relation to its inability to protect basic human rights has come from Muslim critics, which reflects the fact that not all Muslims agree as to the traditional interpretation of Shari’a, with some recognising the need for reform. The result of this need may be reflected into the Arab Charter on Human Rights, which has managed to increase the level of protection of religious and cultural minorities in Islamic countries.

The main differences between the Kingdom of Saudi Arabia’s approach to human rights and Republic of Tunisia’s approach are further reflected by the two countries’ respective abilities to define and protect constitutional rights. Unlike the Republic of Tunisia, which has issued a legal bill clearly defined as a Constitution, the Kingdom of Saudi Arabia does not have a clearly defined constitution, but instead a declaration of applicable legislation, referred to as the Basic Law of Governance. In the Kingdom of Saudi Arabia, the Basic Law of Governance recognises the status of the country as a kingdom, ruled by the royal family under Shari’a law, with Islam as its only religion. Therefore, the Kingdom of Saudi Arabia does not exhibit a

966 Cairo Declaration on Human Rights in Islam (n 323).
neutral religious attitude, but mandates that the Islamic religion is strongly involved in legal matters and guides social conduct, making the country a non-secular state.

In addition to this lack of constitution, the Kingdom of Saudi Arabia also does not have a clearly defined penal code. Instead, legal decisions are made in accordance with the interpretations of the *Ulama*. This has led to significant criticism of the legal system of the Kingdom of Saudi Arabia, with some authors arguing that the country’s approach to *Shari’a* is strict, harsh and violates international human rights, and that it stems less from religious texts and more from social norms.\(^{967}\)

For example, according to the *Qur’an*, all lives are sacred and taking the lives of innocents is forbidden and sinful. Still, the definition of who is innocent and who is not comes from the *Hadiths* and the interpretations of the *Ulama*. Thus the definition of innocence is subject to social norms and interpretation, making the death penalty a common occurrence in Saudi Arabia, often in the form of public decapitations.

At the other end of the spectrum the Republic of Tunisia, even though it allows for the death penalty in its new constitution, has not performed any recent executions. In fact, the Tunisia penal code provisions that the death penalty is to be applicable as a punishment only for terrorism and crimes against the state and its people. The new constitution of the Republic of Tunisia also reflects significant developments with regards to human rights and liberties. After the events of the Arab Spring, the newly developed constitution specifically provides the rights of individuals to education, health, a clean environment and freedom of expression, as well as freedom from torture. The involvement of religion is significantly reduced in the case of the Republic of Tunisia, which is why it is considered a secular state.

It is important to note here the importance given to international law by each of the two countries, both in the Kingdom of Saudi Arabia’s Basic Law of Governance and the Republic of Tunisia’s Constitution. While the Kingdom of Saudi Arabia argues that constitutional law should bring no prejudice to their international relations and to the pre-established agreements and treaties ratified by the country, the Tunisian Constitution specifically provisions in Article 20 that while international laws to which the countries adhered and which were ratified in Tunisia are above the country’s laws, they are not held above the provisions of the constitution. Furthermore, the research on the relationship between constitutional rights and Islamic Shari’a revealed that the precedence of constitutional law over Shari’a interpretation and court jurisprudence depends on the level of traditionalism the country exhibits in its application of Shari’a law.968

Likewise, the division of power as defined by the constitution is different in the two countries. While in the Kingdom of Saudi Arabia the power is divided between the king and regional religious leaders, in the Republic of Tunisia the power is divided among presidents, the prime minister and the people, with free elections being permitted. From this it can be concluded that in the Republic of Tunisia the level of power given to the people is higher than in the Kingdom of Saudi Arabia, due to the differences between their respective forms of government (monarchy in Kingdom of Saudi Arabia versus democracy in Tunisia).

Other significant differences between the legal systems of the two countries and their approaches to human rights were discussed with respect to equality and women’s rights. The role of Shari’a law was significant here as well, along with the sources of law and their interpretations. As discussed in the Chapter 4 of this research project, Islamic countries have faced with significant amount of criticism in relation to the issues they have with equal rights.

Most notably, international human rights bodies repeatedly accuse Islamic countries of violating women’s rights, with a strong emphasis on the fact that under traditional Islamic law, women have fewer rights than men. *Shari’a* law demonstrates a high level of dualism due to the fact that it has multiple sources of law and it is highly subject to interpretation. This dualism is reflected in the approach *Shari’a* law brings to equality and women’s rights.

Inequality is also reflected in the concept of family in Islam, specifically regarding women’s position within the family. As shown by academic evidence discussed in the fourth chapter, under a more traditional and strict approach to *Shari’a* law, women can essentially be considered the property of their husbands, as husbands may be entitled to prohibit their wives from leaving the house alone. In the Kingdom of Saudi Arabia, women are not allowed to leave the house without their legal guardian (be it a husband, a father or another male relative with legal guardianship over the woman) and without covering herself with the *hijab*.

This approach to equality and women’s rights has been brought to the attention of international legislative bodies in a number of cases involving Muslim women that were exposed in the Chapter 4. In each of the cases the international courts intervened in order to prevent the severe violation of human rights. However, as also revealed by legal case proceedings, not all Islamic countries exhibit the same level of intolerant behaviour and gender inequality, and the existing literature emphasises the strength of the cultural component in defining the law in Islamic countries. In other words, the more traditional a country’s approach is to *Shari’a* law, the less rights women have and the larger the gender gap becomes. It is the same in the case of the rights of religious minorities and in the case of freedom of expression.

As with other aspects, important similarities, but mostly differences, between equality and women’s rights legislation in the Kingdom of Saudi Arabia and in the Republic of Tunisia were observed. In The Kingdom of Saudi Arabia, even though the Basic Law of Governance guarantees equality under Islamic Shura and *Shari’a* law, it in practise it allows discrimination
against religious minorities. Also, the analysis conducted on the Saudi Labour Code, as previously discussed, revealed a significant labour inequality, reflected in gender segregation at work and in the fact that women are only allowed to perform gender specific labours (such as in education, social work, nursing etc.). The Labour Code also limits the freedom of employment for non-Saudi workers through the obligation of having a work permit and being employed only in the field and by the employer specified on the permit.

At the other end of the spectrum, the analysis on Tunisian legislation on equality and women’s rights reveals greater compliance with international law and a smaller gender gap than in the case of the Kingdom of Saudi Arabia. Nevertheless, there is still some evidence of inequality in Tunisia, along with instances which have been severely sanctioned by international organisations such as Amnesty International, especially concerning freedom of religion. As far as women’s rights are concerned, the Republic of Tunisia provides evidence of a less strict interpretation of Shari’a law, as women not only have the right to vote, but can also occupy public positions in the government and had an important participation in the drafting of the new constitution.

These different approaches to Shari’a law are also reflected in the area of children’s rights in the two countries. Under Shari’a law, children have the right to be protected by their parents, but the law also issues certain provisions on how children should treat their parents. It is significant to mention here that under Islamic Shari’a law, securing the rights of children and providing them with protection is considered a sacred duty of the parents, as children are the gift of Allah to their parents and are considered a blessing. Once again, as seen in the previous chapters, Islamic jurisprudence often intertwines rights and duties, the right of children to protection being related to the duty of their parents to provide this protection.

Under Shari’a law, the child is considered to have the right of life even before he is born, as abortions are prohibited. Other significant rights include the right to a healthy start in
life, the right of name, property, inheritance, family and kindred, the right to be healthy and have proper nutrition, the right to be educated and acquire skills as well as the right to have a dignified and secure life and to be part of a society. It appears that under Shari’a law, children have a number of rights and privileges that are in agreement with a significant part of the international legislation regarding children’s rights.

Nevertheless, child marriages are the subject of a great deal of controversy in contemporary Islamic states. The fact that children either become married or are promised in marriage at a young age, often without their consent and for economic reasons, has been investigated by international human rights protection organisations both in relation to children’s rights and in relation to women’s rights. However, underage marriage is more prevalent in some Islamic countries than in others, as discussed in the Chapter 5. Notably, the Kingdom of Saudi Arabia ratified the Convention on the Rights of the Child (UNCRC) in 1996, especially considering their reservations to the UDHR or CEDAW. Starting from 2002, the notion of child abuse became more and more acknowledged and the country began to prosecute and punish those responsible for child abuse and neglect.

The Republic of Tunisia, in addition to ratifying the UNCRC, has also issued the Child Protection Code, which seems to be substantially different from the Saudi Child Rights and Protection Act. The Republic of Tunisia guarantees the right to education even in the foster care system, while the Kingdom of Saudi Arabia legislation has no specific provisions regarding this issue. Furthermore, under Saudi law, corporal punishment is allowed in the case of children and children can be held accountable for criminal offences, whereas in the Republic of Tunisia children are not to be held accountable for criminal offences up to the age of 13, and any form of violence against children (including corporal punishment) is forbidden.

969 Alsheaimi (n 821).
This study has shown that empirical research can create, confirm and refine how the modern non-secular Islamic state model is understood as a social and political phenomenon, thereby increasing the knowledge available on the topic and allowing for efforts to improve upon it. The following research recommendations are based on the findings of the study;

The secular states have managed to diminish the role of religion in matters of the state and of society. Being based largely on religious texts and subject to interpretation, Islamic law has proven to be difficult to adapt to international legislation. In a modern society, the state should not commit itself to a certain religion or to a non-secular model. That would suggest that religion being legitimizes government authority.

The efforts secular state has gone to in aligning itself with international legislation demonstrates that Islamic countries can adopt a secular model of government in order to achieve a higher level of compliance with international law, therefor secular Islamic states are more compatible with international human rights and that their efforts towards a higher level of compatibility with them is visible in their legislation.

The fact that secular modern Islamic states do not use religion to regulate their justice systems means that this model emphasises international human rights instead. The secular state model is based on religious neutrality and does not use Islamic religious principles in dispensing justice, but rather is subject to a well-established justice system that respects human dignity and the rule of law. This is opposed to the non-secular model, in which justice is based on unconventional methods of dispensation. In this regard the modern secular Islamic model seems to complement the basic provisions of international human rights law on the rule of law and the criminal justice system.

Non-secular Islamic states that primarily base their governments on the application of Shari’ a law should therefore consider amending their current national legislations, allow for
more transparency of the judiciary and a fair trial, end all forms of discrimination, and initiate a democratic process with the goal of respecting the fundamental human rights of their citizens.

Secularism is based on the separation of religion from the state, and it functions by means of laws and regulations other than religious ones. Secularism rejects religious laws and rules entirely, including Shari’a. The modern secular Islamic state model has been described as religiously neutral. Modern secular Islamic states are not governed by the various religious principles found in the Qur’an. Religion is therefore not used to regulate the judicial, political and economic fabric of society. As a result, most of the laws effecting daily life in the countries governed by secular systems differ from those in non-secular Islamic states to some extent. This means that the secular Islamic state model does not allow for any form of discrimination in society. This is opposed to the provisions of the non-secular Islamic state model, in which Islam is the foundation of the social, political and economic discourse, thus allowing for some forms of discrimination.

International human rights law is concerned with the idea of equality as the foundation of society. According to the provisions of international human rights law, everyone, regardless of gender or religion, is equal. The modern secular Islamic state has embraced equality between men and women, a development that does not conflict with international human rights law. In order to fully embrace equality, non-secular Islamic states would therefore need to formulate their reservations to international human rights treaties in more specific terms and not hesitate in their obligation to abide by them.

It is evident that the modern secular Islamic model seems to be more closely aligned with the principles of human rights than does the non-secular one. Freedom of speech for example is a key component of international human rights law, and is likewise deeply entrenched as a fundamental right in the constitutional provisions of the majority of the countries that subscribe to the modern secular Islamic model. In the non-secular Islamic model
however limitations on transparency and accountability have limited freedom of speech. All types of Islamic law are based on moral interpretations of Islamic teachings and traditions, but should be adjusted in the context of Islamic states in order to be compatible with democracy, human rights, freedom, and pluralism, as well as to be responsive to international human rights law.

The principles of participation, inclusion and transparency are key tenets of international human rights law and cannot be neglected. All citizens must have the right to participate in the decision-making process, especially concerning issues that directly affect their lives. The principle of transparency found in international human rights law seems to be embodied in the secular modern Islamic state model. In non-secular Islamic societies, on the other hand, the decision-making process is reserved for a select few. Government transparency and human rights are linked, and both are suppressed in the non-secular Islamic model.

Modern secular Islamic states have anchored their governments in progressive politics and emphasised democracy. These countries allow their citizens to hold the government accountable, an issue that is important in human rights law. Islam does not have the provisions to form a modern state as we understand it now, and therefore any kind of non-secular Islamic state will not comply with international human rights treaties. Religious governance is arguably an unrealistic notion in the contemporary world, and if a government is formed based on Islamic Shari‘a law it will inevitably serve the interests of a small group of radicals or conservatives, not of the entire society. Thus if Muslims are to form governments, they must be secular Islamic states.


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