Saudi Arabia and the International Covenant on Civil and Political Rights 1966: A Stalemate Situation

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ABSTRACT  The article addresses the issue that given that Islamic Shari’ah is the supreme law of Saudi Arabia, whether or not it is attainable for Saudi Arabia to ratify the International Covenant on Civil and Political Rights 1966 (ICCPR) without violating the Shari’ah. If not, is it attainable to reconcile the ICCPR with the Islamic Shari’ah without making reservations incompatible with the object and purpose of the ICCPR? The paper starts by highlighting the status of the Shari’ah within the framework of the Saudi constitution, which states unequivocally that the Islamic Shari’ah is the supreme law of the land. Since the Shari’ah contains rules that are considered to be incompatible with the ICCPR, two approaches are considered in order to resolve the conflict between the two and thereby facilitate the joining of Saudi Arabia to the ICCPR. Firstly, the methods employed by the Muslim modernist movement to ‘adapt’ the Shari’ah to fit modern requirements are examined in terms of their consistency with the Islamic legal theory and their likely effect on eliminating the conflict between the Shari’ah and the ICCPR. Secondly, the permissibility of making reservations on particular Articles of the ICCPR in order to reconcile it with the Shari’ah is also examined.

Introduction

Saudi Arabia is one of a number of countries acknowledged as holding a non-compliant and controversial position towards internationally accepted human rights. Their position was initially demonstrated when Saudi Arabia abstained from voting on the Universal Declaration of Human Rights (UDHR) in 1948.1 The Government’s objection, voiced through Al-Barudi, the Saudi Ambassador to the United Nations at the time, was that the UDHR reflected aspects of Western culture that were unable to sit comfortably with the cultural values of Eastern States.2 Saudi Arabia’s particular objection was against Article 18 of the UDHR. This Article gives individuals the right to change their religious faith, which, as stated by the Saudi Ambassador, is incompatible with the teachings of the Islamic Shari’ah, as it specifically forbids Muslims from ever changing their religion.3 Saudi Arabia persisted with the incompatibility argument throughout the
debates for the International Covenant on Civil and Political Rights (hereafter ICCPR or Covenant) held in 1954 and 1960. The proffered objection to joining this Covenant was based similarly on that of Article 18 of the Declaration mentioned above, as this Covenant repeatedly guaranteed freedom of religion including the freedom to change one’s faith.

In refusing to acknowledge the universality of these documents, Saudi Arabia attempted to develop its own human rights declaration and duly formed a coalition comprised of several Muslim states in order to produce a human rights document compatible with the precepts of the Islamic Shari’ah. Over the years these attempts have resulted in the production of a number of ‘Islamic’ human rights documents. The most recent of these was the Cairo Declaration on Human Rights in Islam 1990, which was presented by the Saudi Foreign Minister to the 1993 World Human Rights Conference, held in Vienna. This Cairo Declaration went on to be advocated by a number of Muslim states as a more feasible Islamic alternative to the UDHR during the 1997 Organisation of the Islamic Conference, held in Tehran. However, the Declaration did not manage to achieve the recognition or support of the international community, as ascertained by the UN Secretary-General, Kofi Annan, who in 1998 rejected this view by reasserting that the rights recognised in the UDHR were universally applicable.

Against this background, Saudi Arabia seems to have retreated from directly opposing the main international human rights documents on the basis of cultural differences. Instead, in 1998, the Saudi Government established a committee to consider the ratification of the ICCPR and International Covenant on Economic, Social, and Cultural Rights 1966. However, to date and despite repeated promises to ratify those Covenants, Saudi Arabia remains a non-member state to both.

This paper, then, will consider some of the past and present difficulties facing the Saudi Government which, albeit their expressed desire to sign up to the international human rights documents, have prevented them from doing so. The discussion, however, is limited to the possibility of Saudi Arabia joining the ICCPR, as it is this document that guarantees what have become known as first generation rights, and because of the mechanism that this Covenant provides for enforcing the protected rights. The discussion will ultimately revolve around the principal issue, which is, given that Islamic Shari’ah is the supreme law of Saudi Arabia, whether or not it is attainable to ratify the ICCPR without violating the Shari’ah. If not, is it attainable to reconcile the ICCPR with the Islamic Shari’ah without making reservations incompatible with the object and purpose of the ICCPR?

**Islamic Shari’ah and the Saudi Basic Law of Government**

The Basic Law of Government, introduced as late as 1992, is the nearest form of constitution that Saudi Arabia has ever had. Given that it is, in a sense, the constitution, one might think that it should override any other legislation. However, in scrutinising the Basic Law, different facts will appear. For instance, Article 1 states ‘The Kingdom of Saudi Arabia is a sovereign Arab Islamic state with Islam as its religion; God’s Book and the Sunnah of His Prophet, God’s prayers and peace be upon him, are its constitution’. In the same respect, Article 7 of the Basic Law reads ‘The regime derives its power from the Holy Qur’an and the Prophet’s Sunnah which rule over this and all other State Laws’. Furthermore, Article 23 states that ‘The State protects Islam; it implements its Shari’ah’.
The Basic Law, without a precedent, was the first codified law in Saudi legal history to recognise the concept of ‘human rights’. However, that concept comes with a pretty heavy caveat as Article 26 of the Basic Law states that ‘The State protects human rights in accordance with the Islamic Shari’ah’. It follows from this Article that human rights in Saudi Arabia are not the same as those recognised under international human rights instruments, but, alternatively, only those recognised under the Islamic Shari’ah.

It is therefore clear from the above quoted Articles that despite the introduction of the Basic Law, it is the Islamic Shari’ah that remains the supreme law of Saudi Arabia. It follows that if Saudi Arabia is to ratify any international treaty, or introduce any law for that matter, it can only do so if it is consistent with the Shari’ah. If this is not the case then the law will have no force or effect, and consequently will not be applied by the judiciary in cases brought before them. This fact is made explicit by the Basic Law, as Article 48 states that ‘The courts will apply the rules of the Islamic Shari’ah in the cases that are brought before them, in accordance with what is indicated in the Book and the Sunnah, and statutes decreed by the Ruler which do not contradict the Book or the Sunnah’.

As we have concluded that international human rights can be recognised under Saudi Arabian law only if they are deemed compatible with the Shari’ah rules, it is relevant here to highlight the areas of conflict between the Shari’ah and the ICCPR.

**Human Rights under the Shari’ah**

The purpose of this part of the paper is not to give an extensive account of how human rights fare under the rules of classical Shari’ah but to focus attention on the areas where the Shari’ah rules are considered to be incompatible with international human rights norms as set out in the ICCPR. In my view, these areas of conflict can be classified into the two following categories:

Firstly, it is relevant to repeat the restrictions the Shari’ah rules impose upon the freedom of religion as understood under the ICCPR. As mentioned previously the Islamic Shari’ah prohibits Muslims from converting to any other religion. This prohibition of apostasy is based on what is stated in the Qur’an ‘if anyone desires a religion other than Islam, never will it be accepted of him; and in the hereafter he will be among the losers’. In fact, apostasy under the rules of the Shari’ah is punishable by the death penalty. This is without doubt contrary to the freedom of religion guaranteed by Article 18 of the ICCPR.

Secondly, the Shari’ah contains explicit rules legalising discrimination on the basis of sex and religion. With regard to the discrimination on the basis of sex, the Shari’ah provides Muslim males with rights exceeding those enjoyed by Muslim females. These include the obligation of Muslim wives to obey their husbands as long as they are not asked to do something prohibited by the Shari’ah, and, in a case of non-obedience, as a last resort, the husband is entitled, by law, to use physical violence against his wife. The weight given to evidence provided by a woman is less than that given to the evidence provided by a man, and the evidence of two women commonly equals the testimony of one man. With regard to the right to inheritance, a woman receives only half of what a man inherits even if they have an equal degree of relationship with the deceased person, such as a son and a daughter to a deceased father. In addition, where the female is a victim of homicide or bodily harm offences, she is only entitled, generally speaking, to
half of what a male would receive as financial compensation (diyyah) in the same case. A man is entitled to be married to up to four wives at the same time, whereas a woman is only allowed to be married to one man at a time. Finally, a woman cannot freely marry without the permission of her guardian or a judge, who is always a man.17

Regarding discrimination on the basis of religion, I only highlight the Shari’ah rules which discriminate against non-Muslims as aliens, as the Saudi population is considered to be 100 per cent Muslim. Non-Muslims living in an Islamic state are obliged to pay jizya (tax), to guarantee their security and to enjoy their freedom of religion, albeit within strict limits.18 Non-Muslim men are not permitted to marry Muslim women, and Muslim males are prohibited from marrying a non-believer, that is those who are not Muslim, Christian, or Jewish.19 Finally, the financial compensation (diyyah) which non-Muslims are entitled to for homicide or bodily harm is half of that payable to the Muslim population.20

These types of discrimination embedded in the Shari’ah law are in direct conflict with Article 2 (1) and Article 3 of the ICCPR, which explicitly prohibit all types of discrimination, especially the discrimination on the basis of sex or religion with regard to the enjoyment of the rights recognised under the Covenant. In particular the Shari’ah discriminates on the basis of either sex or religion or both with regard to the right to marry which is enshrined in Article 23 (2), and the right to equality without discrimination on the basis of sex or religion which is enshrined in Article 26.

The Nature of Islamic Shari’ah

One cannot appreciate the difficult, if not impossible task of adapting the Shari’ah rules without understanding the Islamic legal theory from which these rules have stemmed and acquired their authority. In addition, a thorough understanding of the development of the Shari’ah rules as a body of law is imperative in determining whether or not it is feasible to adapt the Shari’ah to meet the requirements of the ICCPR.

Islamic Legal Theory

Shari’ah is considered by those of the Islamic faith to be the expression of God’s will. Man in Islam does not possess the authority to create the law. This privilege under the Shari’ah belongs exclusively to God Almighty.21 His law, furthermore, is, according to Islamic legal theory, immutable and valid for all time and for all human beings. It is stated in the Qur’an: ‘Then We put thee on the [right] way of religion: so follow thou that [way], and follow not the desires of those who have no knowledge.’22 Thus, the role of Muslims is strictly confined to the application of Shari’ah. As an inherent and binding part of the application of the law, Muslims are allowed, in fact are required, to apprehend and discover God’s law.23 However, such an important role can only be undertaken by a qualified Muslim jurist, or what is known under the Shari’ah, as a mujtahid (plural mujtiheen).24 Ijtihad translates from Arabic as ‘endeavour’ and in legal usage means ‘the endeavour of a jurist to formulate a rule of law on the basis of evidence (dalil) found in the sources’.25

In exercising the faculty of ijtihad, a Muslim jurist is not left to his own reasoning in apprehending and discovering the law of God, but his exercise is governed by usul al-fiqh (the roots of jurisprudence) to ensure that the law is properly inferred from the textual sources. Usul al-fiqh, thus, could be defined as the science that is ‘concerned
with laying down procedural rules and principles in accordance with which the deduction of detailed substantive Islamic law would be regularised, standardised and freed from possible fallibilities.\textsuperscript{26}

According to \textit{usul al-fiqh}, the \textit{Shari’ah} is mainly derived from four sources. Namely, the \textit{Qur’an} (the Holy Book), which is believed by Muslims to be the very words of God himself, as revealed upon the Prophet Muhammad (peace and blessings be upon him), over his lifetime; then there is \textit{Sunnah}, the tradition of the Prophet Muhammad, which details the actions and sayings of the Prophet during his lifetime; thirdly there is \textit{ijma}, or consensus of opinion, which could be defined as the agreement of Muslim jurists in any particular age on a legal ruling; and lastly there is \textit{Qiyas}, which translates from Arabic as analogy. In legal usage this means the method by which the jurist extends the application of a certain law of one case to another because they share a common nature.\textsuperscript{27}

It is apparent from the foregoing that the \textit{Shari’ah} is not formulated or altered by secular institutions to meet the desires and aspirations of a given society, but it is comprehended and formulated by a qualified Muslim jurist, in accordance with what is likely to constitute God’s will.\textsuperscript{28} This leads us to the fundamental difference between the Islamic \textit{Shari’ah} and Western laws. In Western legal systems, from which international human rights originated,\textsuperscript{29} the sovereignty resides with the people, or what is known as ‘popular sovereignty’. Therefore, the nation is entitled, through its representatives, to change an existing law or create a new one, to respond to social changes in a given society and in a given time. Under Islamic \textit{Shari’ah}, God and God alone is the sovereign, and, therefore, Muslims must regulate their actions to comply with His law, i.e. the \textit{Shari’ah} at all times.\textsuperscript{30} The implication of this conclusion for human rights under the \textit{Shari’ah} rules is that human beings are only entitled to those rights granted them by the \textit{Shari’ah}, not by virtue of being human beings or individuals, but merely by virtue of the divine will. Thus, unless international human rights are recognised by the \textit{Shari’ah}, the expression of God’s will, they cannot enjoy the status of rights in a Muslim state, and therefore they are not worthy of the protection of the law.

\textit{The Development of Shari’ah and the Authority of Juristic Rulings}

By the end of the third century of Hijra (900 AD) four orthodox \textit{Sunni} schools of jurisprudence were established.\textsuperscript{31} These were Maliki, Hanifi, Shafii and Hanbali. Each of these schools was named after the founding jurist who laid down the principles and doctrines applicable to legal matters, and the methodological rules by which \textit{ijtihad} is governed (\textit{usul al-fiqh}).\textsuperscript{32} The legal methodology used by these four schools was the same, in particular with regard to their classification of the sources of law.\textsuperscript{33} However, due to geographical, social and economic conditions in which these schools were formed and developed, differences in the details of legal matters were soon forthcoming. These differences were mainly related to matters of selecting a certain tradition, or to showing a preference to one particular tradition over another, etc.\textsuperscript{34}

The students of these four distinguished masters of jurisprudence collected and documented the principles and doctrines stated by each of them, and by the turn of the fifth century of Islam (1000 AD) the doctrine of \textit{ijtihad} was replaced by a new doctrine called \textit{taqlid} (imitation), on the basis of alleged \textit{ijma}. The application of this new doctrine meant that every qualified Muslim jurist lost the right to direct recourse to the original textual sources, and became obligated instead to imitate one of the four \textit{Sunni} schools
in applying the rules of the Shari`ah. The adoption of taqlid was based largely upon the fact that the four orthodox Sunni schools had established sufficient legal rules, as set out in their authoritative orthodox treatises, capable of dealing with any future developments. In addition, the jurists of the first three generations of Islam, from the beginning of the Prophet’s mission in 610 AD, until the mid-ninth century, are considered by subsequent Muslim jurists to be more skilled and knowledgeable about the Shari`ah than those jurists who emerged later, and consequently the opinions of those early jurists are considered to be more authoritative and weighty. In effect this has resulted in a closing of the door of ijtihad and recourse, in practice, only to what is included in the four orthodox treatises.

It is noteworthy that some Muslim scholars doubt the validity or wisdom of closing the door of ijtihad, as will be shown below. However, there does seem to be a general consensus amongst traditional Muslim jurists who claim the right to ijtihad that although a Muslim jurist could reject the opinions expressed in the four treatises, and exercise his own ijtihad, he is still obliged to adhere to the legal methodology formulated by the four Sunni schools in formulating his opinion.

It is worth emphasising, finally, that opinions expressed by the founding masters or their students, or by any Muslim jurist, for that matter, are not definitive statements of God’s will, but are only, in essence, the jurist’s opinion of what is likely to constitute the law of God. Hence, difference in opinion among the Muslim scholars is tolerated, and each opinion is considered equally authoritative as long as it is established by a qualified jurist, and he adheres to the proper methods of jurisprudence (usul al-fiqh).

The Possibility of Adapting the Shari`ah to Meet the Requirements of the ICCPR

It is important, first, to mention the importance of the Shari`ah as seen in the eyes of Muslims around the globe. As stated earlier the Shari`ah is believed by Muslims to be the expression of God’s will. Therefore, they feel in order to please God in this life, and to win His mercy and His promised heaven in the hereafter, it is essential for them to adhere to His law. The importance of this factor with regard to international human rights was highlighted by An-Na’im in the following terms:

As a Muslim, I appreciate the extralegal power that Shari’a has on the minds and hearts of Muslims. Given this power, it is difficult to see how Muslim governments can honor their obligations to promote and protect human rights, even if they wish to do so, where those obligations are perceived to be contrary to Shari’a.

This explains why the modernist movement in the Muslim world, which started in the nineteenth century with its declared aim to ‘adapt’ and ‘reform’ the Shari`ah to fit modern requirements, has felt that it was imperative to consider and justify any reforms in a strictly Islamic nature in order to win the popular support of the Muslim nations. Bearing in mind that, as yet, the modernist movement has not had any significant influence in Saudi Arabia, I will consider two of their most influential methods and their likely success in providing a platform for reforming the Shari`ah in Saudi Arabia. A necessary move if Saudi Arabia is to be able to comply with the international norms set out in the ICCPR, but will the modernists’ methods ever be accepted as legitimate, i.e. will they conform with the Shari`ah precepts?
Taqnin (Codification) and Talfiq (Selection)

As noted above there are divergences in opinion between the various Islamic schools of law, but this goes further; divergence also exists within the same school. The logical implication of this divergence for ordinary Muslims is that as long as they follow any of the expressed opinions contained within the four authoritative jurisprudential treatises, their application is considered to be Islamic. It should be noted, though, that some Muslim jurists assert that a Muslim, in following the Shari‘ah, should select only one school to observe, and unless his actions conform with the rules of the school which he belongs to, his action would be considered as non-Islamic even if it conforms with the rules of one of the other schools. The former practice is called talfiq fi al-taqlid (selection in imitation), while the latter is called taqlid (imitation). Here I will concern myself not with the practices of individuals, but rather with the question of whether or not it is permissible under the Shari‘ah for a Muslim state, Saudi Arabia in this context, to create a comprehensive code based on eclectic selection from among various views expressed in the treatises of the four Sunni schools. This could be done, as explained earlier, by adopting the doctrine of talfiq, but we must look first at the consistency of codifying the Shari‘ah with Islamic legal theory, and then examine its likely effect on adapting the Shari‘ah to meet the requirements of the ICCPR.

Saudi legal scholars do not dispute the right of individuals or qadis (judges, singular qadi) to practise talfiq, as the four schools historically derive from the same sources. However, when it comes to the matter of codifying the Shari‘ah, there is great disagreement among Saudi scholars with regard to its lawfulness, which explains why the Shari‘ah, to date, has been left uncodified in Saudi Arabia. That is to say if one concludes that it is lawful to codify the Shari‘ah, the same conclusion would be reached with regard to the permissibility of talfiq, however if one concludes otherwise with regard to the permissibility of the codification of the Shari‘ah, then the issue of talfiq becomes obviously irrelevant.

The main opposition argument levelled against the codification of the Shari‘ah, as invoked by the majority of the Council of Senior Islamic Scholars (the highest religious authority in Saudi Arabia), in ‘Fatwa’ No. 8 (legal opinion) is that the Ruler does not have the authority to bind qadis to follow a specific school of law or point of view. Their core argument is based upon two premises. Firstly, that the door of ijtihad has never been closed, and therefore qadis must be allowed to practice ijtihad in determining the applicable Shari‘ah rule to the individual case before them. The second premise, which is highly relevant to the first, is that Saudi qadis are qualified mujtihdeen, and they do practise ijtihad, so that the codification of the Shari‘ah would interfere with the authority assigned to them, by God, to comprehend His law.

However, the proponents of the codification of the Shari‘ah present a compelling rebuttal to this argument. They argue that Saudi qadis who graduate from the judicial institutions are not qualified to practise ijtihad, but are mere muqaldeen (imitators, singular muqalid). Secondly, they argue that in practice there is widespread adherence to the Hanbali school, and even where qadis depart from this school, their departure is not based on their assessment of the proof that the ruling is based upon, but merely upon maslaha (public interest) as interpreted by the qadi. If this is the case, why should individual qadis make such selections when the Ruler or ulama (the religious establishment), who are better informed about the dictates of public interest from religious and secular point of
views, could do the same in a uniform and coherent manner? That is to say that the argument that the codification of the Shari’ah will affect the right of a qadi to ijtihad, at the very best, is a weak one when one considers that such a right only exists in a hypothetical fashion, bearing in mind the advantages that codification could bring to the judicial system as a whole.50

The proponents of codification are not short of further arguments to support their position. Here I shall present just two more arguments, as they are the most substantiated, from the Shari’ah point of view. Firstly, the proponents argue that the Ruler has the right under the concept of siyasa shar’iyya (the rules of governance) to enact regulations in the legal sphere, on the condition that those regulations are guided by public interest and do not constitute a departure from the Shari’ah. Since the codification of the Shari’ah will be enacted by selecting appropriate views from the four orthodox treatises based upon maslaha (public interest), it cannot be argued that such codification constitutes a departure or a contradiction to the Shari’ah.

Secondly, the proponents invoke maslaha mursala (public interest), which has been recognised by the Maliki school to be the fifth source of the Shari’ah, as a legitimate basis for codifying the Shari’ah. The application of the doctrine of maslaha mursala is conditional on it not contradicting the textual sources as it will remain subordinate to them, and therefore cannot override them. In addition, such maslaha mursala must be beneficial to the public as a whole, not just to a few individuals. The proponents advance several advantages of codification that meet the criteria of maslaha mursala. These advantages include the uniformity of judgments, the Shari’ah being accessible to lay citizens who lack the skill and knowledge to consult the Shari’ah in its classical form, in order to know the applicable law to their cases, and finally the preservation of the integrity of the judiciary by eliminating suspicion or doubt that qadis apply the Shari’ah in an arbitrary or unfair manner.51

The position of ulama opponents to codification is largely driven by their concern as to the effect that codification of the Shari’ah may have on their current status as the guardians of God’s law. They fear that codification might lead to the adoption of weak opinions just to meet the desired end. There is also the fear that by allowing the Ruler unfettered discretion to determine the final statement of the Shari’ah, as opposed to their current position where they enjoy full authority in determining what the Shari’ah dictates, the codification may lead the Shari’ah to be fully secularised. These concerns, according to the opponents, are reinforced when one looks at the results of codification of the Shari’ah in other countries, where the Shari’ah has become fully secularised.52

In my view, Shari’ah is better served, respected and enforced if it is codified. Ulama opponents to codification view their position largely in comparison with the Ruler power, while in fact the Ruler only represents the people he governs. I believe that the opponents should reconsider their position, not by what codification could render their power to, but by considering all the potential advantages and disadvantages that codification of the Shari’ah could bring to both the Shari’ah and the nation that it governs. One has also to consider that codification does not constitute a departure from the Shari’ah, at least in the view of the minority of the Council of Senior Islamic Scholars.53 It seems to me that the only solution that could reduce the opponents concerns and fulfil the aims of codification is that the codification of Shari’ah should be undertaken by ulama, drawing from the four Sunni schools, as they all derive from the same sources, and it would seem logical that it is codified on the basis of selecting the opinion which is seen best to serve maslaha. If
there is disagreement among ulama, the Ruler should choose the most advantageous view in his assessment, as guided by maslaha. Once the code is completed, a royal decree should be issued to bind qadis to follow the proposed code, on the basis of the doctrine of siyasa shar’iyya.\(^{54}\)

However, the main question, which remains still to be answered, is that although Saudi Arabia’s reservations to the ICCPR through codification of the Shari’ah would become specific and transparent,\(^{55}\) what is the likely effect that codification on the basis of drawing from the four Sunni schools could have in minimising the conflict between the Shari’ah and the ICCPR in any of the areas of conflict identified earlier.\(^{56}\)

An example of how this method could minimise the conflict between the Shari’ah and the ICCPR should suffice. As mentioned before, the financial compensation for bodily harm or homicide given to non-Muslims is half of what a Muslim receives in the same case. This rule is based upon the opinion expressed in the Hanbali, Maliki and Shafii schools. On the other hand, according to the Hanafi school there is no difference between Muslims and non-Muslims in terms of financial compensation, each therefore should receive the same.\(^{57}\) Thus, if the codification is based upon the doctrine of talfiq then the conflict between the Shari’ah and the ICCPR with regard to this case and cases similar to it, is resolved.

However, the effect of the application of the doctrine of talfiq must not be overstated. This is because the effect of the application of talfiq is dependent upon the existence of different views within the four schools, from which the selection can be the one that is compatible with international human rights standards on the basis that it is in the public interest to do so. However, this cannot work in all circumstances as in some cases the approach taken by the Shari’ah, which is inconsistent with the ICCPR standards, is adopted by all four schools. This could be illustrated by the Shari’ah’s position, as previously mentioned, with regard to the financial compensation payable to the heirs of a murdered woman. In this case all four Sunni schools adopt the view that a woman should receive half of what a man would receive in the same case.\(^{58}\) Therefore, without reinterpretation of the original sources, the Qur’an and the Sunnah, the conflict between the Shari’ah and the ICCPR will remain unresolved. This is not to say, however, that Saudi Arabia should not codify the Shari’ah in accordance with the doctrine of talfiq, but that although this method bears certain advantages its effect as far as international human rights are concerned is limited.

*Modern ‘Ijtihad’*

As previously mentioned, by the turn of the fifth century of Islam (1000 AD) the door of ijtihad was considered to be closed. However, the modernist movement has fought to unlock this closed door in order to achieve full ‘reformation’ of the Shari’ah. The problem was not so much as to whether or not the door of ijtihad was closed or still open, as we have seen the Saudi scholars unanimously reject the conception of the closure of the door of ijtihad,\(^{59}\) but the problem was concerning the methods that have been applied by the modernists in exercising ‘ijtihad’. The modern ‘ijtihad’ way, according to the suggested methodology of An Na’im, for instance, which is claimed to resolve the conflict between the Shari’ah and international human rights, is based upon selecting particular texts from the Qur’an and the Sunnah that do meet, in this case, the international
human rights standards, while ignoring others, merely because they are inconsistent with those standards. An-Na‘im describes his methodology in the following terms:

[T]he only effective approach to achieve sufficient reforms of Shari‘a in relation to universal human rights is to cite sources in the Qur’an and Sunna which are inconsistent with universal human rights and explain them in historical context, while citing those sources which are supportive of human rights as the basis of the legally applicable principles and rules of Islamic law today. ⁶⁰

I have no doubt that this selective methodology is capable of ‘reconciling’ the Shari‘ah with international human rights in general; what is questionable, though, is the validity of such methodology. An-Na‘im’s methodology is driven by his desire to ‘adapt’ the Shari‘ah to meet the needs of contemporary Muslims, in the form of securing the protection of international human rights law with its full substance in Muslim sates. A strong argument against this is, as already mentioned, that the Shari‘ah is designed to regulate and govern Muslims’ behaviour, but not vice versa. An-Na‘im’s methodology, or the so-called modern ‘ijtihad’ in general, is clearly designed to subordinate the Shari‘ah to the Muslims’ will and needs, which is completely incompatible with the precepts of Islam, and the principles set out in usul al-figh, which governs the exercise of ijtihad and guarantees its infallibility and orthodoxy.

The deficiency of modern ‘ijtihad’ has been observed by Muslim scholars, as well as foreign observers. ⁶¹ Coulson, for example, comments on the methodology of modern ‘ijtihad’ in the following terms:

If the outright recognition of the needs of society which jurisprudence has thus endorsed in many respects is to be regarded as modern ijtihad, it is obviously a very different concept of ijtihad … where reforms were based on particular interpretations of specific Qur’anic injunctions. In sum, it appears that modern jurisprudence has not yet evolved any systematic approach to the problem of adapting the traditional law to the circumstances of contemporary society. Lacking any consistency of principle or methodology, it has tackled the process of reform as a whole in a spirit of juristic opportunism. ⁶²

From the foregoing it is clear that the Saudi Arabian law, as long as it proclaims the Islamic Shari‘ah to be the supreme law of the land, could not be adapted to meet the requirements of the ICCPR. It could not be done either by codifying the Shari‘ah and adopting the doctrine of talfiq because of its obvious limitations, or by the exercising of ‘ijtihad’, in the form suggested by the modernist movement, because it amounts to distortion and secularisation of the Shari‘ah. Thus, the question to be addressed in the following paragraphs is whether or not the ICCPR could be adapted, through making reservations on particular Articles, to meet the Saudi Arabian law.

Permissible Reservations under the ICCPR

To reiterate, the Shari‘ah is in conflict with the ICCPR in two main areas, those being freedom of religion and equality without discrimination on the basis of sex or religion. Therefore, the question that arises here is whether or not it is permissible for a state to
make a reservation concerning these two rights. The ICCPR does not include a provision to deal with the validity and effect of reservations to its Articles. Therefore, the test of any reservation made to the ICCPR must be assessed upon the basis of the test set out in the Vienna Convention on the Law of Treaties, 1969. According to Article 19 (c) of the Vienna Convention, a reservation is deemed valid if it is compatible with the object and purpose of the treaty concerned. The Human Rights Committee established by the ICCPR provides an authoritative interpretation of the ICCPR Articles. In its General Comment 24, the Committee has specified some Articles a reservation to which would be deemed incompatible with the object and purpose of the ICCPR and is, therefore, without legal effect. According to the Committee, a reservation restricting the right against discrimination on the basis of sex or religion with regard to the enjoyment of the ICCPR rights or a reservation restricting the freedom of religion are among those reservations which are considered to be impermissible as they are incompatible with the object and purpose of the ICCPR.

The reservations made by Kuwait when it joined the ICCPR in 1996 are illustrative that compromises with regard to such rights are impossible. Kuwait, which is a neighbouring country of Saudi Arabia, adopts the Shari’ah as a main source of legislation, as stated in its Constitution. On signing up to the ICCPR Kuwait made two ‘interpretative declarations’ and one reservation. The two interpretative declarations, in fact, according to the General Comment 24, constituted reservations as they were designed to exclude and modify Kuwait’s obligations under the ICCPR. These three statements were designed to exempt the discrimination authorised under the Kuwaiti law against women and non-Muslims with regard to the enjoyment of the ICCPR rights. The Committee, in commenting on Kuwait’s reservations, stated the following:

5. The Committee, referring to its General Comment No. 24 on reservations, notes that the ‘interpretative declarations’ of the State party regarding article 2, paragraph 1, article 3 [the right against discrimination], and article 23 [the right to marry], as well as the ‘reservations’ concerning article 25 (b) of the Covenant [the right to vote] raise the serious issue of their compatibility with the object and purpose of the Covenant. In particular, the Committee notes that articles 2 and 3 of the Covenant constitute core rights and overarching principles of international law that cannot be subject to ‘limits set by Kuwaiti law’. Such broad and general limitations would undermine the object and purpose of the entire Covenant.

6. The Committee finds that the interpretative declaration regarding articles 2 and 3 contravenes the State party’s essential obligations under the Covenant and is therefore without legal effect and does not affect the powers of the Committee. The State party is urged to withdraw formally both the interpretative declarations and the reservations.

While the Committee refrained from stating that the reservations on the right of women to vote and the right to freely marry are without legal effect in accordance with its General Comment 24, which constituted the same basis for declaring the ‘interpretative declaration’ to be without legal effect, it could be persuasively argued that the reservations to women’s right to vote and the right to freely marry are equally incompatible with the object and purpose of the ICCPR and thus without legal effect.
It follows from that any expected reservations to be made by Saudi Arabia on the ICCPR, and in particular on the right against discrimination, are incompatible with the object and purpose of the Covenant, as explained by the Human Rights Committee General Comment 24, and illustrated by the Committee’s Concluding Observations concerning the reservations made by Kuwait.

Conclusion

It seems to me that the Government of Saudi Arabia is placed in an impossible situation, by which it cannot ratify and honour the ICCPR without violating the Shari’ah, which is still to date central to both the Saudi Arabian constitution and the Saudis’ way of life, or to modify its obligations under the ICCPR without violating the object and the purpose of the Covenant, i.e. a stalemate situation. In facing this inescapable reality, Saudi Arabia will either have to go back to its original stance based upon the argument of the relativity of the values protected by the ICCPR, and international human rights law in general, or make radical modifications to its constitutional and legal systems in order to comply with the spirit and standards of the ICCPR. Only time will tell how Saudi Arabia is going to respond to this dilemma.

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Notes

5. Arzt (note 3) p.217. It should be added here that Saudi Arabia also objected to the International Covenant on Economic, Social and Cultural Rights 1966 (ICESCR), on the basis that Article 9, which guarantees social security including social insurance, is a Western concept, and that the Shari’ah, adopts better methods for improving the conditions of the needy. However, since this paper is only concerned with civil and political rights, Saudi Arabia’s position on the ICESCR falls outside of the scope of this paper, and therefore it is not included in the discussion. For a discussion of the Saudi Arabian position on the ICESCR, see ibid. at p.218.
6. See Saud Al-Faisal, Foreign Minister of the Kingdom of Saudi Arabia, address at World Conference on Human Rights, Vienna, Austria (15 June 1993); see also Saud Al-Faisal, Foreign Minister of the Kingdom of Saudi Arabia, statement delivered by H.E. Gaafar M. Allagany, Saudi Ambassador to the United Nations at the 48th Session of United Nations General Assembly (13 October 1993).


11. This mechanism is represented in the monitoring power of the Human Rights Committee under Article 40 of the ICCPR and the jurisdiction of the Human Rights Committee to receive individual complaints under the Optional Protocol to the ICCPR. For a discussion of these mechanisms, see T. Buergenthal, *International Human Rights In A Nutshell*, 2nd edn (St. Paul, MN: West Publishing Co 1995), pp.43–50.


15. This right of a Muslim husband is based upon what is stated in the *Qur’an*, verse 4: 34–5, ‘Men are the guardians over women, because Allah has made some of them excel other, and because they support them from their means. Therefore the righteous women are devoutly obedient, and guard the secrets of their husbands with Allah’s protection. As those women on whose part ye fear disloyalty and ill conduct admonish them [first], [next], refuse to share their beds. [and last] beat them [lightly]; but if they return to obedience, seek not against them means [of annoyance]: for Allah is most High, Great [above all].’ For a further discussion of this right, see Awdah (note 14) Vol.2, pp.513–18.

16. E.g., it is stated in the Holy *Qur’an*, verse 4:11, that ‘Allah (thus) directs you as regard your children’s (inheritance): to the male, a portion equals to that of two females’.


20. This point is expanded upon below p.449.


24. i.e., a jurist who is qualified to practice *ijtihad*.

31. The discussion here is confined to these four *Sunni* schools, as Saudi Arabia is a follower of the *Sunni* tradition.
33. It should be noted though that according to the *Hanafi* and *Maliki* schools, the *Shari’ah* has supplementary sources. While the *Hanafi* school adopts *Istihsan* (preference), as the fifth source of law, the *Maliki* school considers the fifth source to be *maslaha al-mursala* (public interest). See ibid. at 81–5.
36. Vogel (note 27) p.57.
37. In fact there are some Muslim Jurists who prohibit blind *taqlid* on anyone including lay Muslims, by asserting that everyone has the right, in fact, is obliged, to practice *ijtihad*, and examine the proofs of given opinions and follow the one which his/her conscience favours. This is the dominant opinion in the *Hanbali* school, which explains why Saudi scholars, as discussed below, reject unanimously the proposition that the door of *ijtihad* was closed. See Vogel (note 27) pp.67–81.
38. Ibid.
39. Ibid. p.8; see also Zahraa (note 26) pp.185–6.
40. A.A. An-Na’im, ‘Human Rights in the Muslim World: Socio-Political Conditions and Scriptural Imperatives’, *Harv. Hum. Rts. J.*, Vol.3 (1990) 13, p.21. This is to say that even if the Saudi Government wishes to ratify the ICCPR by violating the *Shari’ah*, such an exercise is highly unlikely to be accepted by the Saudi people, let alone be accepted by *ulama* (the religious establishment), who control the judiciary, as it would be considered to be contrary to their religious law as well as to the constitution, and therefore the requirements of the ICCPR which conflict with the *Shari’ah* rules would be unenforceable in practice.
41. There are other methods adopted in ‘adapting’ the *Shari’ah* but because of their apparent flaws, and limited effect in reconciling the *Shari’ah* with the ICCPR they are not included in the discussion. For a detailed discussion of these methods, see J.N.D. Anderson, ‘Modern Trends in Islam: Legal Reform and Modernisation in the Middle East’, *Int’l & Comp. L.Q.*, Vol.20 (1971), (1); A. Layish, ‘The Contribution of the Modernists to the Secularization of Islamic Law’, *Middle Eastern Studies*, Vol.14 (1978), (263).
43. For the sake of simplicity this method is referred to throughout the paper as *talfiq*. It is worth mentioning that this method is referred to in Islamic English literature as *takhayyur*. However, since books on jurisprudence refer to this method as *talfiq*, in this paper this term is used.
45. Historically this method was first adopted by the Ottoman Law of Family Rights 1917, to improve the miserable conditions endured by Muslim women that resulted from strict adherence to the *Hanafi* school. See Coulson, *A History of Islamic Law* (note 35) pp.182–6.
46. The discussion of the lawfulness of codification in Saudi Arabia draws on Vogel (note 27) chapter 8. Also relevant is Miman (note 42).
47. Ibid. p.338.
52. See ibid. p.338.
54. King Abdulaziz, the founder of modern Saudi Arabia, initially proposed the essence of this suggestion in 1926. However, the proposal of the King received a negative response from ulama apparently for the same reasons that the opponents currently invoke. See ibid. p.287. For similar proposals put forward by the proponents of codification, see ibid. pp.350–54.
55. This is a pre-condition for a valid reservation to the ICCPR. See Human Rights Committee, General Comment 24 (52), General comment on issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under article 41 of the Covenant, UN Human Rights Committee, adopted at the 1382nd meeting on 2 November, 52nd Sess, UN Doc. CCPR/C/21/Rev.1/Add.6 (1994), para. 19 [hereinafter General Comment].
57. Awdah (note 14) Vol.2, pp.182–3. The opinion of the Hanafi school has been adopted by the Union Supreme Court of United Arab Emirates (UAE) as a binding rule to be applied in all cases in which non-Muslims are entitled to financial compensation for homicide or bodily harm. See Appeal No. 107, Union Supreme Court, UAE (18 October 1997). It is noteworthy that the UAE is a neighbouring country of Saudi Arabia, and, according to Article 7 of the Constitution of the Union 1971, Islam is the official religion of the state, and the Shari’ah is a principal source of legislation.
64. The Committee, in fact, assigned to itself the task and authority of determining the compatibility of a given reservation to the object and purpose of ICCPR, by virtue of its function under the Covenant and the Optional Protocol, besides the nature of the Covenant which renders the State parties incompetent in fulfilling this task. See General Comment (note 55) paras.16–18.
65. Ibid. paras.7–10.
66. Ibid. paras.8–9.
67. Article 2 of the Kuwait Constitution 1962 reads ‘The religion of the State is Islam, and the Islamic Shari’ah shall be a main source of legislation’.
68. For an accurate and extensive account of the disparity between the rights recognised under Kuwaiti law and those recognised by the ICCPR, see Human Rights Watch/Middle East, Kuwait: Promises Betrayed: Denial of Rights of Bidun, Women, and Freedom of Expression, Vol.12, No.2(E) (October 2000).