

THE INTERFACE OF SHARIA AND INTERNATIONAL HUMAN RIGHTS: The Case of Women's Right to Education

Ahmad Rofii
Fakultas Syariah, UIN Siber Syekh Nurjati Cirebon
Email: arofii@syekhnurjati.ac.id

Abstrak

Banyak negara Muslim yang gagal dalam memenuhi kewajiban internasional mereka untuk mendukung standar kesetaraan dan nondiskriminasi dalam pendidikan. Hal ini menyebabkan sebagian orang berasumsi bahwa tradisi Islam merupakan hambatan bagi penghapusan diskriminasi dalam pendidikan. Makalah ini mengkaji hubungan hak asasi manusia internasional dan hukum Islam, dengan fokus pada masalah diskriminasi terhadap hak perempuan untuk mendapatkan pendidikan. Artikel ini berargumen bahwa prinsip kesetaraan dan nondiskriminasi mengenai hak perempuan untuk mendapatkan pendidikan merupakan norma fundamental tidak hanya dalam instrumen internasional hak asasi manusia tetapi juga dalam tradisi Islam. Untuk memastikan kesesuaian hukum Islam dengan standar internasional, diperlukan pendekatan yang lebih liberal untuk memahami Islam.

Abstract

Many Muslim Countries have failed to fulfil their international obligations to endorse the standard of equality and non-discrimination in education. This has led some to assume that Islamic tradition constitutes an obstacle to the elimination of discrimination in education. This paper examines the relationship of international human rights and Islamic law, focusing on the problem of discrimination against women's right to education. The paper argues that the principle of equality and non-discrimination regarding women's right to education constitutes a fundamental norm not only in international instruments of human rights but also in the Islamic traditions. In order to ensure the compatibility of Islamic law with international standards, a more liberal approach to understanding Islam is required.

Keywords: Right to education, Islamic Shari'a, principle of equality and non-discrimination.

Introduction

Since regaining power in Afghanistan in August 2021, the Taliban has enforced their interpretation of Islam and Sharia to all people in the country. As part of their policies, girls and women have been banned from attending secondary schools and universities. Until recently, there are about 1.4 million women banned from school.¹ Such a policy was undeniably taken by the authorities as a consequence of their understanding of Islam and Sharia.² Inequality in education

¹UNESCO, "Afghanistan: 1.4 million girls still banned from school by de facto authorities", <https://www.unesco.org/en/articles/afghanistan-14-million-girls-still-banned-school-de-facto-authorities?hub=343>, at 2 March 2024.

²The Taliban's recent policy on women's access to education is nothing new. See Katarina Tomasevski, *Education Denied: Costs and Remedies* (London & New York: Zed Books, 2003) 158-67; L Elizabeth Chamblee, 'Rhetoric or Rights?: When Culture and Religion Bar Girls' Right to Education' (2004) 44 *Virginia Journal of International Law* 1073.

remains a prevalent problem in many Islamic countries. Discrimination against women is often the cause of why these countries found it difficult to fulfil their obligation under international law. One factor causing this disparity in education refers to religious institutions, Islamic interpretations. Islam has been understood as perpetuating discrimination,

Education is fundamental for the development of human dignity and accordingly considered as a human right. The Universal Declaration of Human Rights (UDHR) declares that ‘everyone has the right to education’.³ Education is also regarded as ‘a pre-condition for the exercise of human rights’.⁴ The enjoyment of all human rights, civil and political as well as economic, social and cultural rights, depends on the fulfilment of the right to education. It is called an “empowerment right”, in that it is:

the primary vehicle by which economically and socially marginalized adults and children can lift themselves out of poverty and obtain the means to participate fully in their communities. Education has a vital role in empowering women, safeguarding children from exploitative and hazardous labour and sexual exploitation, promoting human rights and democracy, protecting the environment, and controlling population growth.⁵

It is unlikely that the right to education belongs only to the second generation of rights. Instead, it encompasses all three generations. Called a cultural or social right, education as a second generation right requires (more) positive state actions to provide it. Education is also considered as a right of the first generation. Endorsing a liberal concept of education, this category of human rights assumes that education should be liberated from state and Church’s interferences. Unlike the first generation, its main objective is to guarantee equal access to educational institutions and to respect the parents’ right with regard to the education of their children. Education is also closely related to the third generation of human rights, namely solidarity rights. This category of rights requires academic cooperation between developing and industrialized countries.⁶

One of the objectives of international instruments and agreements in education is to create and ensure equal availability, accessibility, acceptability and adaptability of education between women and men. Every international instrument having to do with education is founded on the principle of non-discrimination. To date, most countries have agreed to enforce this very principle. While the elimination of gender disparity is agreed and promoted worldwide, at least on paper, the reality, however, remains unjust to women. In many Muslim countries, discrimination against women in education is still apparent as mentioned earlier.

The failure of Muslim countries to fulfil their international obligations has led some to assume that Islamic tradition constitutes an obstacle to the elimination of discrimination in education.⁷ Their thesis might be supported by the fact that many Muslim countries have put some reservations to many international standards. Is the adherence to Islam would implicate the discrimination against women’s right to education? Are there approaches to Islam which are compatible with the international standards of equality and non-discrimination in education?

³*Universal Declaration of Human Rights* <<https://www.ohchr.org/en/human-rights/universal-declaration/translations/english>> at 18 March 2024.

⁴Manfred Nowak, ‘The Right to Education’ in Asbjørn Eide, Catarina Krause and Allan Rosas (eds), *Economic, Social and Cultural Rights: A Textbook*, 2nd revised ed. (Dordrecht: Martinus Nijhoff Publishers, 2001) 245. On the empowerment rights, see Jack Donnelly and Rhoda E Howard, ‘Assessing National Human Rights Performance: A Theoretical Framework’ (1988) 10 *Human Rights Quarterly* 214.

⁵Committee on Economic and Social Council, *General Comments No 13 the Right to Education (Article 13 of the Covenant)*, E/C.12/1999/10 8 December 1999, para 1.

⁶Manfred Nowak, ‘The Right to Education’, 252-5.

⁷See, eg, Klause Dieter Beiter, *The Protection of the Right to Education by International Law Including a Systematic Analysis of Article 13 of the International Covenant of Economic, Social and Cultural Rights* (Leiden: Brill, 2006) 34.

This paper examines the relations of international human rights and Islamic law, focusing on the problem of discrimination against women's right to education. It argues that the principle of equality and non-discrimination regarding women's right to education constitutes a fundamental norm not only in international instruments of human rights but also in the Islamic traditions. A more liberal approach to Islamic law, however, is needed to ensure its compatibility with international standards.

International Instruments on Women's Right to Education

International instruments of human rights provide significant protection to women. There are three categories of the content of these instruments: protective, corrective and non-discriminatory.⁸ "Protective" instruments assume that women are a subordinate group in society and in need of protection since they are different from and more vulnerable than men. "Corrective" instruments attempt to improve the treatment of women without making overt comparisons to that of men. They may remove any obstacles against women's activities. "Non-discriminatory" instruments presuppose the equal treatment between men and women. Women are no longer regarded as a distinct, separate group. Physical differences should not be a basis for discriminatory treatment.

The Charter of the United Nations enshrines the non-discriminatory approach for the first time. It believes in 'the equal rights of men and women' and encourages respects for human rights without distinction as to sex.⁹ The principle of non-discrimination particularly against women, then, underlines and constitutes a basic and general principle of international human rights instruments. The Universal Declaration of Human Rights (UDHR) inserted the non-discriminatory provision in Article 2, which states that 'everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status'.¹⁰ Article 26 which provides a guarantee for the right of everyone to education, in this sense, should be read in conjunction with that non-discriminatory provision.

The establishment of the United Nations Educational, Scientific and Cultural Organization (UNESCO) on 16 November 1945 was aimed at contributing world peace and security through education, science and culture by, among others, 'instituting collaboration among the nations to advance the ideal of equality of educational opportunity without regard to race, sex or any distinctions, economic or social'.¹¹ Education constitutes the organization's major concern. With 191 member states as its partners, it bears a mandate to bring education, as a universal human right, to all people.¹² The General Conference of the UNESCO on 14 December 1960 adopted the Convention against Discrimination in Education (CDE).¹³ It is the first international instrument stipulating comprehensive standards on the elimination of discrimination in education. It is stated

⁸See Natalie Kaufman Hevener, 'An Analysis of Gender Based Treaty Law: Contemporary Developments in Historical Perspective' (1986) 8 *Human Rights Quarterly* 70.

⁹*Charter of the United Nations*, Preamble and Article 1(3) < <https://www.un.org/en/about-us/un-charter/full-text> > at 2 April 2024. See Hillary Charlesworth and Christine Chinkin, *The Boundaries of International Law: A Feminist Analysis* (Manchester: Manchester University Press, 2000) 213-4.

¹⁰*Universal Declaration of Human Rights*.

¹¹Article 1 of the *Constitution of the United Nations Educational, Scientific and Cultural Organization*, adopted in London on 16 November 1945 < <https://unesdoc.unesco.org/ark:/48223/pf0000133729.page=7> > at 2 April 2024.

¹²See the organization's website, www.unesco.org. See further Klaus Dieter Beiter, *The Protection of the Right to Education*, 226-241; Fons Coomans, 'UNESCO and Human Rights' in Raija Hanski and Markku Suksi (eds), *An Introduction to the International Protection of Human Rights: A Textbook* (2nd revised ed. (Turku: Institute for Human Rights, Åbo Akademi University, 2002) 219.

¹³*Convention against Discrimination in Education* < <https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-against-discrimination-education> > at 2 April 2024.

in the Preamble that the Convention is based on the principle of non-discrimination and the right to education of every person to education or Articles 2 and 26 of the UDHR. The objective of the CDE is to abolish and prevent discrimination and to achieve equality in education, or, as Ammoun called “active” and “static” discrimination.¹⁴

Article 1 of the CDE defines what “discrimination” and “education” mean. Discrimination, according to Article 1(1) of the Convention, is defined as ‘any distinction, exclusion, limitation of preference which, being based on race, color, sex, language, religion, political or other opinion, national or social origin, economic condition or birth, has the purpose or effect of nullifying or impairing equality of treatment in education’. The rest of the paragraph enumerates particular cases where discrimination occurs. The word “education”, as stated in Article 1(2), refers not only to all types and levels of education, whether provided by states or private sectors, but also to ‘the standard and equality of education, and the conditions under which it is given’. In line with Article 2, there are three situations which do not constitute discrimination, if certain requirements are fulfilled, namely the establishment of separate education systems or institutions for men and women, the establishment of separate education systems of institutions on the basis of religious or linguistic reasons and the establishment of private educational institutions. States’ obligations against any types of discrimination are enshrined in Article 3 and 4. Article 3 is concerned with “active” discrimination, in that states are under the obligation to take steps to abolish and prevent discrimination in education. While Article 4 focuses on “static” discrimination, in that states are under the duty ‘to formulate, develop and apply a national policy’ which will promote equality in education.¹⁵

Drafted upon the suggestions of the UNESCO, the International Covenant of Economic, Social and Cultural Rights (ICESCR),¹⁶ which was adopted on 16 December 1966, is greatly inspired by the CDE. Like the UDHR, the ICESCR provides general ideas on non-discrimination in education. Article 2(2) stipulates that the states parties should ensure the implementation of rights under the Covenant without any discrimination as to, among others, sex. Article 3 provides a clear direction, stating that ‘the state parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth in the present Covenant’. Article 2(2) and 3 are ‘integrally related and mutually reinforcing’. These articles should be read in relation to any rights guaranteed by the Covenant, including the right to education.¹⁷

The recognition of the right of everyone to education in the ICESCR is perceived on the basis of Article 2 (2) and Article 3 above. Article 13 and 14 are devoted to the right to education. Article 13 requires the states parties to “recognise” and “to have respect” to the items contained in the Article. This means that the right to education is fulfilled by the positive, progressive as well as negative actions of the states parties.¹⁸ They should recognise that, *inter alia*, every person has the right to education, primary education should be compulsory and free, secondary education should be generally available and accessible to all, and higher education should be equally

¹⁴See Yves Daudet and Pierre Michel Eisemann, *Right to Education: Commentary on the Convention against Discrimination in Education* (2005) 9 < <https://unesdoc.unesco.org/ark:/48223/pf0000141286> > at 3 April 2024; Klaus Dieter Beiter, *The Protection of the Right to Education*, 245.

¹⁵See Klaus Dieter Beiter, *The Protection of the Right to Education*, 249-56; Yves Daudet and Pierre Michel Eisemann, *Right to Education*, 12-25.

¹⁶*International Covenant of Economic, Social and Cultural Rights*, Adopted 16 December 1966 entry into force 3 January 1976 < <https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-economic-social-and-cultural-rights> > at 2 April 2024.

¹⁷Committee on Economic and Social Council, *General Comment No 16 Article 3 of the ICESCR*, E/C.12/2005/4, para 7.

¹⁸See Fons Coomans, ‘In Search of the Core Content of the Right to Education’ in Audrey Chapman and Sage Russell (eds), *Core Obligations: Building a Framework for Economic, Social and Cultural Rights* (Antwerp: Intersentia, 2002) 217, 221-4.

accessible to all. In addition, they should respect the liberty of parents or legal guardians to choose their children's education in accordance with their own convictions.¹⁹

The General Comments of Article 13(2) provides that the application of the right to receive education should covers four essential features, namely availability, accessibility, acceptability and adaptability (or the 4-A scheme).²⁰ Availability refers to sufficient quantity of educational institution and programs, the implementation of which depends on some factors inherent in the jurisdiction of state parties. Accessibility means that educational institutions and programs are accessible to everyone, involving three dimensions: non-discrimination, accessible within safe physical reach and affordable to everyone. Acceptability means that the form and substance of education should be acceptable to students and parents. It is acceptable in the sense of, for instance, good quality and culturally suitable. Adaptability refers to flexibility to the changing needs of societies and students.

In addition to the obligation to guarantee the non-discrimination as mentioned above, states are obliged to 'take steps, individually and through international assistance and cooperation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures'.²¹ With regard to states' obligations under the ICESCR, like those in the ICCPR, states are obliged to fulfil three types of obligations or duties: the obligations to respect, protect and fulfil. 'Failure to perform any one of these three obligations constitutes a violation of such rights.'²² The obligation to respect refers to states' negative obligations to refrain from acting in ways which could deprive people from the enjoyment of economic, social and cultural rights. The obligation to protect means states' positive obligation to prevent third parties from violation of human rights. Finally, the obligation to fulfil requires states' positive action to ensure the full realization of such rights. The obligation to fulfil includes three kinds of obligations, namely to provide, facilitate and promote.²³

International instruments which are concerned particularly with children's rights including their rights to education were actually proclaimed in 1959 by the UN General Assembly's adoption of the Declaration of the Rights of the Child on 20 November 1959. Thirty years after the promulgation of this "soft law", children-related convention called the Convention on the Rights of the Child (CRC) have been adopted. This treaty-based system, unlike that of the Declaration, protects the rights of children comprehensively. The Committee on the Right of the Child considers four Articles as general principles underlying the Convention, namely non-discrimination obligation (Article 2), the best interest of the child (Article 3(1)), the child's right to life, and states duty for the survival and development of the child (Article 6), and the right to express views and being given due weight (Article 12).²⁴ The children's right to education is enshrined in Article 28

¹⁹For a detail explanation of this Article, see Klaus Dieter Beiter, *The Protection of the Right to Education*, Chapter 10.

²⁰Committee on Economic and Social Council, *General Comment: the Right to Education (Art 13)*, E/C.12/1999/10 8 December 1999 < <https://www.refworld.org/legal/general/cescr/1999/en/37937>> at 8 April 2024. The 4-A scheme (availability, accessibility, acceptability and adaptability) has been developed by Katarina Tomasevski, former Special Rapporteur of the Commission on Human Rights on the Right to Education. See Katarina Tomasevski, *Preliminary Report of the Special Rapporteur on the Right to Education*, E/CN.4/1999/49 13 January 1999; Klaus Dieter Beiter, *The Protection of the Right to Education*, 476-8.

²¹Article 2(1) ICESCR.

²²*The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights* (1998) 20 *Human Rights Quarterly* 691, 693-4. These types of state parties' obligations were introduced by Henry Shue, *Basic Rights: Subsistence, Affluence and US Foreign Policy* (Princeton: Princeton University Press, 1980) 35-40, 51-64.

²³The obligation to promote incorporated in the obligation to fulfill is introduced in *General Comment No 16 Article 3 of the ICESCR*, E/C.12/2005/4, para 17.

²⁴Committee on the Rights of the Child, *General Comment No 5 (2003) General Measures of Implementation of the Convention on the Rights of the Child (Arts 4, 42 and 44, para 6)*, CRC/GC/2003/5, para 12.

and 29 of the CRC. Article 28 provides states parties recognition of the right to education on the basis of equal opportunity. It addresses some points similar to those in Article 3(2) of the ICESCR, such as primary education should be compulsory and free to all. It seems obvious from the terms used that the CRC employs weaker statements regarding the children's right to education than those of the ICESCR.²⁵ Article 29 is concerned with the aims of education, many of which have been provided in the ICESCR.

In addition to the above-mentioned instruments regarding women in general, there are specific instruments which are concerned only with the protection of women's rights. On 7 November 1967 the General Assembly proclaimed the Declaration on the Elimination of Discrimination against Women (DEDAW).²⁶ Although not legally binding, the Declaration is the first comprehensive international attempt to resolve the widely practiced discrimination against women. It promulgates that the discrimination 'is incompatible with human dignity and with the welfare of the family and of society, prevents their participation, on equal terms with men, in the political, social, economic and cultural life of their countries and is an obstacle to the full development of the potentialities of women in the service of their countries and of humanity'. Article 9 provides the state parties' obligations regarding the right to education.

The General Assembly, then, adopted the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) on 18 December 1979.²⁷ The term "discrimination" in the Covenant is defined in Article 1 as 'any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or other field'.

Article 2 articulates state parties' obligations under the Convention. They should eliminate all forms of discriminations against women and to take positive actions. According to Article 2, states are under the duty to respect, protect, promote and fulfil international standards of equality between women and men. Their duty, in line with Article 2(f), includes the elimination of customary laws which constitute discriminatory treatment. In this sense, religious and customary laws which operate outside the state authority are also subject to states' initiatives of change if these laws discriminate against women. To abolish discriminatory religious and customary laws, as Abdullahi Ahmed An-Nai'im contends, states should transform popular beliefs and attitudes through 'a comprehensive and intensive program of formal and informal education, supported by social services and other administrative measures, in order to changes people's attitudes' on a particular practice.²⁸

Regarding the right to education, Article 9 of the DEDAW is reinstated by Article 10 of the CEDAW. It lays down the state parties' obligation in relation to the right to education, providing that "States Parties shall take all appropriate measures to eliminate discrimination

²⁵See Douglas Hodgson, 'The International Human Right to Education and Education Concerning Human Rights' (1996) 4 *The International Journal of Children's Rights* 237, 244-5; Klaus Dieter Beiter, *The Protection of the Right to Education*, 116-7.

²⁶*Declaration on the Elimination of Discrimination against Women*, proclaimed by General Assembly resolution 2263(XXII) of 7 November 1967 <<https://www.refworld.org/legal/resolution/unga/1967/en/38169>> at 8 April 2024.

²⁷*Convention on the Elimination of All Forms of Discrimination against Women*, adopted and opened for signature, ratification and accession by General Assembly resolution 34/180 of 18 December 1979, entry into force 3 September 1981 <<https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-elimination-all-forms-discrimination-against-women>> at 8 April 2024.

²⁸Abdullahi Ahmed An-Na'im, 'State Responsibility under International Human Rights Law to Change Religious and Customary Laws' in Rebecca J Cook (ed), *Human Rights of Women: National and International Perspectives* (1994) 167.

against women in order to ensure to them equal rights with men in the field of education and in particular to ensure, on a basis of equality of men and women.”

The implementation of international norms under the CEDAW, however, depends on states' acceptance. In fact, the Convention has been subject to many reservations by states with respect to customary and religious norms. For Muslim countries, for instance, the implementation of the Convention would be determined by its compatibility with Islamic *shari'a*.²⁹ As a norm, according to Article 28(2), such reservations should be compatible with 'the object and purpose' of the Convention. It remains a critical issue of the Convention, however, to determine what is compatible with the goals of the Convention and what is not. For Rebecca Cook, a reservation would be compatible if it 'contemplate[s] the provision of means towards the pursuit of this goal', but it becomes incompatible if it 'contemplates enduring inconsistency between state law or practice and the obligations of the Women's Convention'.³⁰ The Committee on the Elimination of Discrimination against Women regards Article 2 and 16 as central to the goals, and accordingly reservations to the provisions in this Article were considered impermissible.³¹ Nevertheless, even if some reservations are considered as a violation to its goals, there is no treaty mechanism as to annulling such reservations.³²

The CEDAW and other treaty-based human rights schemes put a great emphasis on the principle of equality, particularly that of substantive equality. The creation of the ICESCR, for instance, was substantially informed by the substantive equalization approach. This approach is also understood from the words used in the Covenant, 'the enjoyment of all economic, social and cultural rights.'³³ This was also emphasised in the General Comment No 16 (2005). According to the Committee, substantive equality refers to 'the effects of laws, policies and practices and [to] ensuring that they do not maintain, but rather alleviate, the inherent disadvantage that particular groups experience'.³⁴

On 8 September 2000 the General Assembly adopted a resolution of the United Nations Millennium Declaration. Of the main objectives of the resolution is to ensure that every person, men and women, will have equal access to all levels of education. It formulates the so-called the UN Millennium Development Goals (MDGs). Goal 3 out of 8 goals is to promote gender equality and empower women, by way of eliminating gender disparity in primary and secondary education preferably by 2005 and at all levels by 2015.³⁵

At the same time, the World Education Forum of UNESCO in April 2000 adopted the Dakar Framework for Action Education for All: Meeting our Collective Commitments. Goal 5 out of 6 goals of the Framework is to eliminate gender disparity in primary and secondary education by 2005 and achieve gender equality by 2015, focusing on ensuring girls' full and equal access to and achievement of basic education of good quality. It differentiates between equality and parity.

²⁹See, eg, Michele Brandt and Jeffrey A Kaplan, 'The Tension between Women's Rights and Religious Rights: Reservations to CEDAW by Egypt, Bangladesh and Tunisia' (1995-1996) 12 *Journal of Law & Religion* 105;

³⁰Rebecca J Cook, 'Reservations to the Convention on the Elimination of all Forms of Discrimination against Women' (1990) 30 *Virginia Journal of International Law* 643, 648. See also Belinda Clark, 'The Vienna Convention Reservations Regime and the Convention on Discrimination against Women' (1991) 85 *The American Journal of International Law* 281; Henry J Steiner and Philip Alston, *International Human Rights in Context, Law, Politics and Morals: Text and Materials*, 3rd ed (Oxford: Oxford University Press, 2008) 439-44.

³¹Divisions for the Advancement of Women, *Reservations to CEDAW*, <<https://www.un.org/womenwatch/daw/cedaw/reservations.htm>> at 10 April 2024.

³²Linda M Keller, 'The Convention on the Elimination of Discrimination against Women: Evolution and (Non)implementation Worldwide' (2004) 27 *Thomas Jefferson Law Review* 25, 39-40.

³³Dianne Otto, 'Disconcerting 'Masculinities': Reinventing the Gendered Subject(s) of International Human Rights Law' in Doris Buss and Ambreena Manji (eds), *International Law: Modern Feminist Approaches* (Oxford: Hart, 2005) 105, 115.

³⁴Committee on Economic and Social Council, above n 19.

³⁵See *Millennium Development Goals* <<https://www.un.org/millenniumgoals/>>

Gender parity is concern about “formal equality”, or the same participation of boys and girls in all levels of education based on their proportion in the relevant age groups. On the other hand, gender equality refers to equal conditions or “substantive equality” of boys and girls for the realization of their full human rights, which is beyond the question of numerical proportion. To achieve gender equality, there should be equality of opportunities, equality in learning process, of outcomes and external results. Substantive equality assumes the difference between women and men. It requires the recognition of the fact that inequality stems from different treatment of the question of what constitutes men and women and what their contributions are.³⁶

In order to achieve the gender equality in education, therefore, three-fold characterization of the rights in education may provide such objective, namely rights to, within and through education. The rights “to” education refer to equal proportion between boys and girls in terms of access to education, survival, attendance, retention and transition between levels of education. It conforms to gender parity or formal equality as mentioned above. The rights “within” education, on the other hand, while acknowledging the parity as a starting point, requires further achievements of non-discrimination in various aspects of education, such as learning content and outcomes, teaching method and process, subject choice and assessment modes. The rights “through” education extend the scope of the rights within education by ensuring gender equality outside the areas of education. This category of rights regards gender equality within education as shaped and also shaping gender equality in other areas of life.³⁷

Islamic Law and Women’s Right to Education

This section is concerned with how Islam deals with women’s right to education, some perspectives in defining the boundaries of women’s right within Islamic traditions *vis a vis* international standards of the right to education. It might be assumed that because Islam is a system of obligations and duties consisting of God’s commands to human beings, Islam has not recognised the concept of human rights. This assumption, however, fails or even misunderstands the Islamic legal regime. The fact that religious texts contain numerous duties or obligations does not mean that they deny the existence of rights entitled by humans. The term “duty” is employed in the context of interrelation with the concept of right. The term “right” (*haqq*) is everywhere to be found in Islamic sources. The fact that there are legal remedies demonstrates the existence of one’s right. The classical literatures of Islamic law have also dealt with the issue of right. Ibn Nujaim (1563 AD), for instance, contended that right is ‘competence’ or capacity’ granted to an individual or group. An individual, accordingly, is a subject of right.³⁸

From the perspective of Islamic legal theory, rights are classified into the rights of God (*huqûq Allâh*) and those of human beings (*huqûq al-‘ibâd*).³⁹ The rights of God mean that there are several rights entitled only by God and that human beings are under the duty to fulfil them. The consequences of these rights are that every person is ‘liberated from the worship of fellow beings and everyone equally dignified’. In addition, they require certain fundamental rights such as the

³⁶*Gender and Education for All: The Leap to Equality*, EFA Global Monitoring Report 2003/4, Ch 2, 24 <<https://unesdoc.unesco.org/ark:/48223/pf0000132513>> at 20 April 2024; Ramya Subrahmanian, ‘Gender Equality in Education: Definitions and Measurements’ (2005) 25 *International Journal of Educational Development* 395.

³⁷See Ramya Subrahmanian, ‘Gender Equality in Education’, 399-405; Duncan Wilson, *Human Rights: Promoting Gender Equality in and through Education*, Background Paper for Global Monitoring Report 2003/4 <<https://unesdoc.unesco.org/ark:/48223/pf0000146974>> at 20 April 2024.

³⁸See, eg, Muhammad Hashim Kamali, ‘Fundamental Rights of the Individual: an Analysis of Haqq (Rights) in Islamic Law’ (1993) 10 *American Journal of Islamic Social Sciences* 340; Mashood A Baderin, ‘Establishing Areas of Common Ground between Islamic Law and International Human Rights’ (2001) 5 *The International Journal of Human Rights* 72, 83-5; Ebrahim Moosa, ‘The Dilemma of Islamic Rights Schemes’ (2001) 15 *Journal of Law & Religion* 185, 191.

³⁹See note no. 38 above.

maintenance of justice are protected in human interactions. The rights of people, on the other hand, are characterized as ‘secular and civil’ in that they concern the worldly human behaviours. They regard the interests of individual as well as society. These rights could be general like the right to have children and education, or specific like one’s to his/her own property. The significance of this scheme of rights, as Ebrahim Moosa argues, lies in the fact that ‘civil and devotional obligations are accorded the same moral status’.⁴⁰

All Islamic normative provisions are aimed at protecting *maqâshid al-syarî‘ah* (the purposes and objectives of religion).⁴¹ These objectives consist of five essential values: faith, life, intellect, property, and to lineage. Subsequently, ‘irdl or honour was added as the sixth fundamental value. These basic values constitute ‘a distinctly Islamic view of human rights’.⁴² The right to learning and education in this rights scheme is included in one’s right to preserve his/her intellect (‘*aql*’).

One of the vocal issues on the discourse of Islam and human rights is that regarding women’s rights. Are women’s rights equal with those of men? This issue constitutes a constant challenge to the idea of Islamic human rights scheme. Until recently, a number of approaches from Islamic points of view has been proposed and adopted, but unfortunately, as an author argues, ‘there is an absence of any willingness to recognise women as full, equal human beings who deserve the same rights and freedom as men. Instead, discrimination against women is treated as something entirely natural’.⁴³ In what follows, this paper will discuss how women’s right particularly in the area of education are dealt in the Muslim scholarships.

Knowledge and seeking knowledge (education) constitutes the main value in Islam. In addition to the terms such as *hikmah* and *ma‘rifah*, the Islamic tradition widely uses the word ‘*ilm*’ to refer the meaning of knowledge. The importance of learning and education in Islam is evident in that the first revelation to the Prophet is concerned with learning and teaching (al-Qalam: 1-5). Al-Qur’an also mentions several times the significance of knowledge. Numerous verses deal with how God asks everyone to exercise his/her intellect.⁴⁴ Knowledge itself is one of God’s characteristics from whom all knowledge comes (an-Nur: 35); those who have knowledge have a superior place in God’s eyes, as stated in al-Mujâdilah: 11, ‘Allah will raise up, to (suitable) ranks (and degrees), those of you who believe and who have been granted Knowledge’; it is not only a virtue but also God’s command to pursue knowledge (Thâhâ: 114).

In addition to al-Qur’an, the Prophetic tradition (*Sunnah* and *Hadîts*) contains a remarkable respect to knowledge and seeking knowledge. The Prophetic reports suggest Muslims to ‘seek knowledge even [as far as] China’; ‘seek knowledge from the cradle to the grave’. In a popular report, the Prophet stated that ‘seeking knowledge is an obligatory for Muslim’. Here the Prophet referred to Muslim men as well as women. To this point, seeking knowledge and learning become a lifelong matter which is equally obligatory for men and women in Islam.⁴⁵

As the concepts of obligation and right are unseparated, the obligation to seek knowledge would mean that men and women have rights to education. In an explicit way, Muhammad Asad

⁴⁰Ebrahim Moosa, ‘The Dilemma of Islamic Rights Schemes’, 192.

⁴¹See further Yûsuf Hâmid ‘Âlim, *al-Maqashid al-‘âmmah li al-Syarî‘ah al-Islâmiyyah* (Riyadh: IIIT, 1991).

⁴²Khaled Abou El Fadl, ‘A Distinctly Islamic View of Human Rights: Does it Exist and is it Compatible with the Universal Declaration of Human Rights?’ in Shireen T Hunter and Huma Malik (eds), *Islam and Human Rights: Advancing a US-Muslim Dialogue* (Washington: CSIS Press, 2005) 27.

⁴³Ann Elizabeth Mayer, *Islam and Human Rights: Traditions and Politics*, 2nd ed (Colorado: Westview, 1995) 117.

⁴⁴The word ‘ilm and its derivatives are mentioned about 704 times in al-Qur’an. This indicates the important position Islam place to knowledge. See, eg, Sayyid Wahid Akhtar, ‘Islamic Concept of Knowledge’ (nd) 12 *Al-Tawhid*, <<http://www.al-islam.org/al-tawhid/islam-know-conc.htm>> at 21 May 2024; Paul E Walker, ‘Knowledge and Learning’ in *Encyclopaedia of the Qur’an* (Leiden: Brill, 2006) vol 3, 100-4.

⁴⁵See further the writing of al-Ghazali (1058-1111AD), *Ihyâ’ ‘Ulûm al-Dîn, Kitâb al-‘Ilm* (the Book of Knowledge), available at <<http://www.ghazali.org/works/bk1-sec-1.htm>> at 21 May 2024; Muḥammad Rashîd Ridlâ, *Huqûq al-Nisâ’ fî al-Islâm: Nidâ’ ilâ al-Jins al-Lathîf* (nd) 17-9.

argued that in Islam, 'it is the citizens' right and the government's duty to have a system of education which would make knowledge freely accessible (and compulsory) to every man and women in the state'.⁴⁶ It is reported that some women complained to the Prophet about the fact that they received less religious teachings than their male partner. Having accepted their interests, the Prophet then allocate a special time for teaching them.⁴⁷

From the aforementioned reading, it is without doubt that Islam recognises women's right to education. Therefore, the banning of women from their right to education in Afghanistan during the era of Taliban could not be regarded as a consequence of the implementation of Islam in the country.⁴⁸ Such banning is contrary to the very basic principle regarding the divine mandate for women to seek knowledge as developed above.

Is the acknowledgment of women's right to education also a proclamation of the equality of this right? Is women's right to education equal to that of men? Many "traditionalist" Muslims have argued that in Islam women could not enjoy the same right to education as men do. Women have barriers to achieve all access to education. This includes their nature as a weak creature in need of protection and their gender role in family as a wife and a mother and an educator of kids. Women going out of their house to pursue education without male-*mahram* escort might be regarded as un-Islamic. Women are not allowed to go accompanied by men who are not their relatives (*khalwat*).⁴⁹ It was on the basis of this argument that the Council of Guardian of Iran, the supreme body composed of conservative Muslim jurists, invalidated a bill that would dismantle the prohibition of women studying abroad without permission from a male guardian.⁵⁰

The traditionalist *cum* conservative approach would regard girls' role in society mostly as candidates of men's wife and mothers of their children. Home, as an author argues, is:

women's "great sphere of dominion." She is its mistress, its organiser and its controlling force. Since she is the man's wife, his life partner, the one who eases his loneliness, and the mother of his children. Hence, Islam looks upon the women's work as manager of the home – in which capacity she looks after her husband's affairs and gives their children a good upbringing – as a form of worship; hence it resist any school of thought or system which would seek to hinder her from fulfilling this task in the best possible manner.⁵¹

As a wife, a woman should always obey her husband. To go out of the house to study, for instance, is allowed as long as her husband grants her permission. Woman's life and rights very much depend on the husband's discretion. To obey her husband, an author argues, resembles to the observance to God. To act upon her husband commands is regarded as an essential factor for the establishment of family. A woman has no right to go out her husband's house except with his permission. Without his permission, she is considered to commits a sin.⁵²

As a candidate of mother and educator of children, a woman should be well informed with the related knowledge how to educate their children in accordance with Islamic values. In this

⁴⁶Muhammad Asad, *The Principles of State and Government in Islam* (1980), quoted in Mashood A Baderin, *International Human Rights and Islamic Law* (Oxford: Oxford University Press, 2003) 213.

⁴⁷Shahîh al-Bukhârî, *Kitâb al-'Ilm*, Hadîts No 99 <<http://hadith.al-islam.com/Display/Display.asp?Doc=0&Rec=181>> at 22 May 2024.

⁴⁸See Marjon E Ghasemi, 'Islam, International Human Rights & Women's Equality: Afghan Women under Taliban Rule' (1999) 8 *Review of Law and Women's Studies* 445, 452-3.

⁴⁹Khâlid 'Abd al-Rahmân 'Ak, *Tarbiyat al-Abnâ' wa al-Banât fî Dlaw'i al-Qurân wa al-Sunnah* (Beirut: Dâr al-Ma'rifah, 2005) 261.

⁵⁰Human Rights Watch, *Iran Blocks Overseas Education for Women* (2001) <<http://www.hrw.org/english/docs/2001/01/26/iran206.htm>> at 22 May 2024.

⁵¹Suleiman bin Abdul Rahman al-Hageel, *Human Rights in Islam and their Applications in the Kingdom of Saudi Arabia*, trans by Omer F Atari (Riyadh: Mu'assasah al-Mumtâz, 2001) 217.

⁵²Zainab Hasan Syarqâwî, *Ahkâm al-Mu'âsyarah al-Zauwjîyyah* (Jedah: Dâr al-Andalus al-Khadlrâ', 1998) 145-7, 163.

sense, she could only study in any field relevant to this function. A Muslim scholar contends, ‘the specificities of woman require that that her study and learning would help her in exercising her function as prescribed by God. If she studies completely as equal as man does in all levels and types of education, it would be an effort which is not on the right place [incompatible with her function]’.⁵³ The gender role of women in family ascribed by this view would inevitably hinder women from pursuing their study and discriminate their right to education. They are excluded from the opportunity to study in any field they like except in the course of educating their children.

This conservative approach is likely to be reflected in the so-called “contemporary Islamic human rights scheme”. The Universal Islamic Declaration of Human Rights (UIDHR) adopted on 19 December 1981 enshrines women’s right to education.⁵⁴ In Article 21, the Declaration states: ‘(a) Every person is entitled to receive education in accordance with his natural capabilities; (b) Every person is entitled to a free choice of profession and career and to the opportunity for the full development of his natural endowments’. The question arises when this article is confronted, for instance, with Article 19(a) which stipulates ‘[e]very spouse is entitled to such rights and privileges and carries such obligations as are stipulated by the [*Shari’a*] Law’. This is about the rights and obligations of married women under Islamic law. If the conservative approach is applied to interpret this provision, as many Islamic countries do, it would discriminate against women’s right to education since they should obey their husband under the traditional *shari’a*.⁵⁵

The traditionalist view on women’s rights is very much regarded as contradictory to the fundamental principle of equality in education as stated above. Al-Qur’an and the Prophetic traditions have already underscored the value of equality in learning. Moreover, the fact that like their male partners women are subject to *maqashid al-syari’ah* shows how equality and non-discrimination constitute the basis of how Islam deals with the right to education.

Until recently, there have been many scholarly efforts being proposed to challenge the traditionalist, puritan and textual approach to the rights of women in Islam. A reformulation of Islamic scheme of women’s rights becomes a new keyword to understanding the recent position of Islam regarding women. Unlike the secular but radical approach which denies the significance of Islamic traditions, Islamic-reform approach remains operating within these traditions. It is a responsible and scholarly way to re-think the relation of Islam and international human rights standards. There is no, however, single proposal for reform. Aimed at liberating women from any discrimination, this approach takes several perspectives and methodologies.⁵⁶

For Abdullahi Ahmed An-Na’im, for instance, a ‘drastic reform’ to the understanding of *shari’a* is needed. Based on the concept of abrogation of revelation (*naskh*) as elaborated by his mentor, Maḥmūd Muḥammad Thâhâ, he suggests that in order to eliminate this discriminative view, Islamic doctrines which were revealed during the Madinah period should be abrogated.⁵⁷ This is because this later period demonstrated a discriminatory treatment and relevant only to that era. Amongst the doctrines revealed in Madinah is about male guardianship (*qawâmah*) which certainly discriminate women. This doctrine should be denied as embodying “the true Islam”. Instead, the Mecca revelations which ‘emphasised the fundamental values of justice and the

⁵³Khâlid ‘Abd al-Raḥmân ‘Ak, *Tarbiyat al-Abnâ’ wa al-Banât*, 246-7.

⁵⁴*Universal Islamic Declaration of Human Rights*, adopted on 19 December 1981 <<http://www.alhewar.com/ISLAMDECL.html>> at 20 June 2024.

⁵⁵See Ann Elizabeth Mayer, *Islam and Human Rights*, 102-9.

⁵⁶See, eg, Niaz A Shah, ‘Women’s Human Rights in the Koran: An Interpretive Approach’ (2006) 28 *Human Rights Quarterly* 868; Syafiq Hasyim, *Understanding Women in Islam: An Indonesian Perspective* (Jakarta: ICIP, 2006) 176-90.

⁵⁷See his *Toward an Islamic Reformation: Civil Liberties, Human Rights and International Law* (New York: Syracuse University Press, 1990) chapter 3.

equality and inherent dignity of all human beings' should guide, take preference and even invalidate the Madinah revelations.⁵⁸

Another scholar, Khaled Abou El Fadl, a Muslim jurist and law professor, proposes what he calls a "moderate" approach. The core of Islam, he contends, is compassion, mercy, love and beauty; Islam is a humanistic religion in nature. He suggests a re-reading of Islamic authoritative sources and traditions. His approach spans from the reinterpretation of al-Qur'an, Sunnah and the past authoritative practices to the critical assessment of Islamic legal scholarship. Regarding the position of women, he argues that equality is the ideal of the God's law. The revelation of al-Qur'an was basically to '[seek] to protect women from exploitative situations and from situation in which they are treated inequitably'.⁵⁹ Islamic law, contained in the *fiqh* literatures, should not be static and fixed. It should be reformed in order to 'achieve the moral objectives expressed in the Qur'an'.⁶⁰

These perspectives challenge the traditionalist position and suggest a substantive and egalitarian approach to Islam. As a consequence of these reinterpretations in terms of the topic at hand, there are no valid grounds in Islam which may lend the basis for discriminating women's right to education. Islam as understood properly would not tolerate such discrimination. Moreover, the elimination of discrimination against women suggested by that reform is not only limited to women's right to education. Equality, it is said, should be the basis of all Islamic provisions regarding the position of women in society in terms of social, economic, political or cultural arena. This inclusiveness exhibits the character of equality which Islam endorses, that is substantive equality.

Conclusion

The discussion in the previous sections leads to the conclusion that Islam, if it is interpreted substantively and moderately, is compatible with international human rights to education. They together prohibit discrimination against women in education.

International instruments on human rights underscore the significance of the principle of equality and non-discrimination including in education. The UDHR, ICESCR, CDE, CRC and CEDAW elaborated in the previous sections require the states parties to respect, protect and fulfil this right. The 4A scheme, availability, accessibility, acceptability and adaptability, which constitute the states parties' core obligation in education, is to be implemented on the basis of equality and non-discriminatory treatment against women's right.

The authoritative sources of Islam also emphasise the significance of equality of men and women in learning and seeking knowledge. For the puritan and traditionalist Muslims, this principle is limited to the extent that women are subject to some restrictions such as the concept of male guardianship. However, since this perspective is much regarded to be inconsistent with the fundamental of Islamic doctrines of education, many Muslim jurists challenge and suggest Islamic reform in order to systematize legal doctrines in accordance with the principle of equality. This brings this paper to the thesis of compatibility of Islamic law and international human rights norms.

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