THE ROLE OF SHARIʿA IN INTERNATIONAL COMMERCIAL ARBITRATION

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INTRODUCTION

This article discusses the theological foundations and historical development of Shariʿa in order to explain the application of Shariʿa in contemporary international commercial arbitration (ICA). This article will begin by providing an overview of the theological foundations of Shariʿa, the development of arbitration (*tahkim*) rules under the four schools of Islamic jurisprudence and the eventual codification of

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arbitration rules under the Ottoman Empire. It will then provide an overview of how Shariʿa is implemented in the contemporary world and discuss the possible implications of applying a multidimensional body of law, such as Shariʿa, to contemporary ICA.

I. THEOLOGICAL FOUNDATIONS OF SHARIʿA

Muslims believe that the Prophet Muhammad is the last prophet or messenger of Islam. Historically, according to Sunni Islamic teachings, it was only after the Prophet Muhammad's death that Islamic jurisprudence (*fiqh*) was formulated, under the Abbasid Caliphate in the eighth and ninth centuries.[1] This article generally focuses on the Sunni approach and interpretation of Shariʿa. Sunni Islam is the largest denomination of Islam and the term "Sunni" is derived from the understanding that Muslims are the "people of the community" who follow the *sunna*, which is the normative behaviour of the Prophet Muhammad including his actions and sayings.[2]

Sunni Muslims believe that the first leader (*caliph*) for Muslims after the Prophet Muhammad was the Prophet's father-in-law, Abu Bakr.[3] Sunni Islam can be contrasted with Shiʿa[4] Islam because Muslims from this major religious-political group believe that Ali, the Prophet Muhammad's son-in-law, was the first caliph after the Prophet Muhammad's death and that Ali's direct descendants are the rightful successors.[5] The word "Shiʿa" is derived from *Shiʿat* Ali, meaning "partisans of Ali."[6] There are three main subsects of Shiʿa Muslims. These include Zaydis (who follow Zayd Ibn Ali ibn al-Husayn (deceased 740CE)), the Ismailis (named after Imam Ismaʿil ibn Jafar (deceased 755CE)) and the Ithna Asharias (Twelvers Imam Shiʿas).[7] The Twelvers Imam Shiʿas are the largest group (constituting approximately 80% of

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1 JOSEPH SCHACHT, AN INTRODUCTION TO ISLAMIC LAW 69–71 (1964).

2 ABDULLAH SAEED, THE QURʿAN: AN INTRODUCTION 241 (2008) [hereinafter SAEED, THE QUʿRAN].

3 John L. Esposito, *Sunni Islam*, OXFORD ISLAMIC STUD. ONLINE, http://www.oxfordislamicstudies.com/article/opr/t125/e2280?_hi=2&_pos=2 (last visited May 1, 2018).

4 Also spelt as Shiʿite. Individually referred to as Shiʿi. For consistency, this article will use the spelling Shiʿa, except when a reference adopts an alternative spelling.

5 John L. Esposito, *Shii Islam*, OXFORD ISLAMIC STUD. ONLINE, http://www.oxfordislamicstudies.com/article/opr/t125/e2189?_hi=26&_pos=238# (last visited May 1, 2018); SAEED, THE QUʿRAN, *supra* note 2, at 240.

6 SAEED, THE QUʿRAN, *supra* note 2, at 240.

7 Esposito, *supra* note 5.

the Shiʿa population), and recognize twelve Imams who they believe are divinely guided.[8] They follow the Jaʿfari school of thought.[9]

By the tenth century, certain Islamic scholars[10] had come to an agreement that their religious rulings were complete, and there was no longer a need to exercise independent reasoning (*ijtihad*)[11] to develop the established laws. Therefore, Muslims should follow the views established by the Hanbali, Maliki, Shafiʿi and Hanafi schools of jurisprudence.[12] These four schools of jurisprudence heavily influence the rules governing arbitration under Islamic jurisprudence, which I will refer to in my article as "classical Shariʿa."

On the other hand, as explored below, other scholars believed that Islamic jurisprudence could be further developed through the exercise of independent reasoning. This group included scholars from Shiʿa Islam, who generally follow the Jaʿfari school of thought, as well as Taqi al-Din Ahmad Ibn Taymiyya (deceased 1328 CE) ("Ibn Taymiyya") and Muhammad Ibn Abd al-Wahhab (deceased 1791 CE) ("Ibn Abd al-Wahhab"), who heavily influenced Shariʿa as implemented in Saudi Arabia.[13] As discussed further below, many contemporary Islamic scholars also utilize principles such as "contextual ijtihad" and the concept of public interest (*maslaha*) to argue that Shariʿa has the ability to evolve and adapt to the society and context in which it is implemented. Therefore, classical Shariʿa may also vary if independent

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8 SAEED, THE QUʿRAN, *supra* note 2, at 237–240.

9 *Id.*

10 Wael Hallaq, *Was the Gate of Ijtihad Closed?*, 16 INT'L J. OF MIDDLE EAST STUD., 1984, at 7–10. [hereinafter Hallaq, *Gate*] Hallaq notes that the Islamic scholars who advocated blind imitation (*taqlid*) over independent reasoning (ijtihad) include "traditionalists" who take a literal interpretation of religious texts as opposed to the right of people to interpret texts according to their own independent reasoning. This included scholars such as Dawud al-Zahri.

11 *Id.* The process of ijtihad has also been defined by Hallaq as "the maximum effort expended by the jurist to master and apply the principles and rules of *usul al-fiqh* (legal theory) for the purpose of discovering God's law." Hallaq also argues that the "gates of ijtihad" were never closed and that ijtihad remained an essential part of Sunni Islam. See Hallaq, *Gate*, *supra* note 10, at 3.

12 Instisar A. Robb, *Ijtihad*, OXFORD ISLAMIC STUD. ONLINE, http://www.oxfordislamicstudies.com/article/opr/t236/e0354 (last visited Feb. 15, 2018); SCHACHT, *supra* note 1; Esther van Eijk, *Sharia and National Law in Saudi Arabia*, in SHARIA INCORPORATED, 23 (Jan Michiel Otto ed., 2010); Hamza Yusuf, *Shaykh Murabtal Haaj's Fatwa on Following One of the Four Accepted Madhhabs*, SHAYKH HMAZA YUSUF (Jan. 1, 2000), http://shaykhhamza.com/transcript/Fatwa-on-Following-a-Madhab.

13 SAEED, THE QUʿRAN, *supra* note 2, at 237. *Taqi al-Din Ahmad Ibn Taymiyyah*, OXFORD ISLAMIC STUD. ONLINE, http://www.oxfordislamicstudies.com/article/opr/t125/e959 (last visited Apr. 14, 2018). *Muhammad ibn Abd al Wahhab*, OXFORD ISLAMIC STUD. ONLINE, http://www.oxfordislamicstudies.com/article/opr/t125/e916?_hi=0&_pos=16 (last visited May 17, 2018).

reasoning is utilized by an Islamic scholar who can exercise ijtihad (*mujtahid*).

In contemporary domestic legal systems, Shariʿa is used (to varying extents) as a source of law[14] in conjunction with the civil and/or common law tradition, depending on the jurisdiction. Literally, Shariʿa means "the way" or "the clear path," which Muslims should follow in order to be guided correctly.[15] Many Muslims view Shariʿa as the embodiment of the divine will and God is seen as the supreme legislator, whose laws sanctify human life.[16]

Muslims believe that the primary sources of Shariʿa include the Qurʿan and the hadith. The Qurʿan is the final book which Muslims believe is the word of God as revealed to the Prophet Muhammad, and is the primary source of Shariʿa, as explained below.[17] The hadith are records of the Prophet Muhammad's actions and sayings (*sunna*) that were gathered into written collections in the eighth and ninth centuries.[18] The hadith and sunna provide Muslims with a living example or role model to follow.[19] Although both Sunni and Shiʿa Muslims believe in the Qurʿan as the primary source of Shariʿa, Shiʿa Muslims refer to different collections of hadith, which are not explored in this article, narrated by the *Imams*[20] and their companions in four books.[21] On the other hand, some Muslims, often referred to as Qurʿanists, do not accept Shariʿa as a body of law based on the hadith and the established schools of thought (as discussed further below), because they argue that Shariʿa was

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[14] For example, the implementation of laws and regulations by a government into a legal system is known as *qanun*, whereas Shariʿa is a more complex body of law as further explained in this chapter. *Qanun*, OXFORD ISLAMIC STUD. ONLINE, http://www.oxfordislamicstudies.com/article/opr/t125/e1917 (last visited Feb. 16, 2018). See generally, MOHAMMAD HASHIM KAMALI, SHARIʿAH LAW: AN INTRODUCTION (2008).

[15] MOHAMMAD HASHIM KAMALI, SHARIʿAH LAW: AN INTRODUCTION 14 (2008).

[16] *Id.*

[17] SAEED, THE QUʿRAN, *supra* note 2, at 239.

[18] *See generally* JONATHAN BROWN, MISQUOTING MUHAMMAD: THE CHALLENGE AND CHOICES OF INTERPRETING THE PROPHET'S LEGACY (2015).

[19] JAMILA HUSSAIN, ISLAM: ITS LAW AND SOCIETY 36, (3rd ed. 2011); WAEL HALLAQ, A HISTORY OF ISLAMIC LEGAL THEORIES: AN INTRODUCTION TO SUNNĪ UṢŪL AL-FIQH 10 (1997) [hereinafter HALLAQ, LEGAL THEORIES].

[20] SAEED, THE QUʿRAN, *supra* note 2, at 237. The religious and political leader of the Shiʿa community, but also refers to the leader of a congregational prayer for all Muslims regardless of the sect.

[21] WAEL HALLAQ, SHARĪʿA: THEORY, PRACTICE, TRANSFORMATIONS 116–117 (2009) [hereinafter HALLAQ, SHARIʿA]; SAEED, THE QUʿRAN, *supra* note 2, at 199–200; MOOJEN MOMEN, AN INTRODUCTION TO SHIʿI ISLAM: THE HISTORY AND DOCTRINES OF TWELVER SHIʿISM 174 (1985).

formulated many years after the death of the Prophet Muhammad.[22] Qurʿanists do not constitute a major sect of Islam, but simply embody an interpretation of Islam where the Qurʿan is the only primary source of law.[23]

The concept of Shariʿa is broader than the Western view of law because it is adopted in everyday life, governing matters such as personal hygiene, food, family relations, and dress code.[24] The Arabic term for this perspective is "din-wa-dunya," which means that Islam should act as a permanent guide to all aspects of life.[25] However, Hallaq, an academic on Islamic law, argues that Shariʿa should not be understood through Western linguistics, such as the European concept of law. He argues that:

> the very use of the word law is . . . problematic; to use it is to project, if not to superimpose, on the legal culture of Islamic notions saturated with the conceptual specificity of nation-state law, a punitive law that, when compared to Islam's jural forms, lacks . . . the same determinant moral imperative.[26]

For the purposes of this article, Shariʿa is recognized as a multidimensional and complex body of law that is understood and implemented through fiqh based on the Qurʿan and the hadith, as explained above. Tariq Ramadan further elaborates on the definition of fiqh and its relationship with Shariʿa by explaining that "[f]iqh represents the product of human thought and elaboration on it; more precisely [f]iqh is the state of judicial reflection reached by Muslims scholars at a certain time and in certain context in light of their study of the Sharia, and as such [f]iqh, while remaining faithful to the function and purpose of *Sharia*, has to be dynamic, in constant elaboration since evolution is the defining character of our world."[27] The perspective that Shariʿa is an

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[22] *See* EDIP YUKSEL ET AL., QURAN: A REFORMIST TRANSLATION (2007). JANE SMITH & YVONNE YAZBECK HADDAD, THE OXFORD HANDBOOK OF AMERICAN ISLAM 150–153. (2014). *See* ABDULLAH SAEED, READING THE QURʿAN IN THE TWENTY-FIRST CENTURY: A CONTEXTUALIST APPROACH (2014) [hereinafter SAEED, CONTEXTUALIST APPROACH].

[23] SMITH & HADDAD, *supra* note 22, at 150–53.

[24] *See generally* PERI BEARMAN, THE ASHGATE RESEARCH COMPANION TO ISLAMIC LAW (2014). HUSSAIN, *supra* note 19, at 90.

[25] Mohamed Al Awabdeh, History and Prospect of Islamic Criminal Law with Respect to the Human Rights (2005) (PhD thesis) http://edoc.hu-berlin.de/dissertationen/al-awabdeh-mohamed-2005-07-07/HTML/chapter2.html.

[26] HALLAQ, SHARIʿA, *supra* note 21, at 2–3.

[27] TARIQ RAMADAN, *Ijtihad and Maslaha: The Foundations of Governance* in ISLAMIC DEMOCRATIC DISCOURSE: THEORY, DEBATES, AND PHILOSOPHICAL PERSPECTIVES 3 (M. A. Muqtedar Khan ed., 2006).

adaptable and evolving body of law in light of fiqh will be discussed in further detail below.

The Qurʿan and hadith are not legal manuals and instead provide indications (*dalalat* or *amarat*) directing an Islamic scholar to the causes (*ilal*) of the rulings (*ahkam*).[28] Therefore, a *mujtahid* ascertains Shariʿa rules by using certain legal principles,[29] such as analogy, *qiyas* (precedent), and, if no precedent is found, *ijma* (consensus). Ijma refers to a consensus on a legal matter among scholars of Shariʿa.[30] This concept of consensus, as a source of Shariʿa, is based on the hadith of the Prophet Muhammad, which states, "my community shall never agree on error."[31]

Other sources of Shariʿa include the writings of jurists and schools of law (*madhabs*, plural *madhahib*).[32] A legal school in Shariʿa refers to a body of doctrine that was taught by a leader, or imam, who must be a leading mujtahid (one who is capable of exercising independent reasoning).[33] According to various Islamic scholars, a mujtahid must be qualified to perform ijtihad (independent reasoning as opposed to following a precedent) and therefore, requires additional qualifications. Traditionally, a mujtahid was qualified so long as they knew at least 500 verses of the Qurʿan that related to the field of law; understood the hadith and were able to differentiate and ascertain its authenticity; and knew the legal commentary on the hadith.[34] The mujtahid must also have a deep knowledge of the Arabic language in order to understand metaphorical and other linguistic nuances in the classical Arabic used in the Qurʿan. [35] Furthermore, the mujtahid must comprehend the context of Qurʿanic revelations (including abrogated verses), and *usul-ul fiqh* and legal opinions, which have been established

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[28] Hallaq, *Gate*, *supra* note 10, at 4–5.

[29] *Id.*

[30] SEYYED HOSSEIN NASR, THE HEART OF ISLAM 121 (2004). HALLAQ, SHARI'A, *supra* note 21, at 98.

[31] NASR, *supra* note 30; HALLAQ, SHARI'A, *supra* note 21, at 101.

[32] HUSSAIN, *supra* note 19, at 39; *See* WAEL HALLAQ, AN INTRODUCTION TO ISLAMIC LAW 60–63 (2009) [hereinafter HALLAQ, ISLAMIC LAW] (A more complex definition and discussion of *madhabs*).

[33] KAMALI, *supra* note 15, at 68.

[34] HALLAQ, ISLAMIC LAW, *supra* note 32, at 110–111.

[35] NADIRSYAH HOSEN, RESEARCH HANDBOOK ON ISLAMIC LAW AND SOCIETY 295 (2018). Hallaq, *Gate*, *supra* note 10, at 5. These qualifications were articulated by classical Islamic scholar, Al-Ghazali (d. 1111CE); however, Hallaq argues that these preconditions are flexible.

by ijmaʿ.[36] A *mufti* or "jurisconsult," who issues *fatwas* (a legal expert opinion) must have the same qualifications as a mujtahid, with the additional requirement that the community must consider a mufti a devout Muslim of "just character."[37]

Although many schools of thought developed after the eighth century, the four most influential Sunni schools of thought discussed in this article are known as the Hanbali, Maliki, Shafiʿi, and Hanafi schools. These schools of thought are named after and influenced by Ahmad ibn Hanbal (deceased 855 CE), Malik ibn Anas al-Asbahi (deceased 795 CE), Muhammad ibn Idris al-Shafiʿi (deceased 820CE), and Abu Hanifah Nuʿman ibn Thabit (deceased 767 CE). Other schools of thought include the Jaʿfari, Zaydi, Ibadi, and Ismaʿili schools.[38] The Jaʿfari, Zaydi and Ismaʿili schools of thought are followed by certain Shiʿa Muslims. The Ibadi school of Islam is practiced in Oman and Zanzibar and stems from an eighth century separatist movement that arose during the rule of the Abbasids.[39] There are also various Sunni schools of theology and creed such as the Ashʿari, Muʿtazilite, and Zahirite schools, which still influence the main schools even though they are largely extinct.[40] It is also important to note that within one school of thought, scholars may hold different views; however, this article will refer to the view that is generally practiced by the school (often referred to in classical Shariʿa as the "*mashhur*" or "widespread" opinion).[41] Any alternative perspectives held by certain scholars are expressly noted as a minority view.

Depending on the school of thought, other sources (or roots) of jurisprudence (*usul ul-fiqh*) include the following: equity or juristic preference (*istihsan*),[42] custom (*urf*), and public interest (*maslaha*)[43] when

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[36] NADIRSYAH HOSEN, RESEARCH HANDBOOK ON ISLAMIC LAW AND SOCIETY 295 (2018). HALLAQ, LEGAL THEORIES, *supra* note 19, at 118.

[37] HALLAQ, LEGAL THEORIES, *supra* note 19, at 118.

[38] *See* ALBERT HOURANI, A HISTORY OF THE ARAB PEOPLES 39–40 (2005). *See also* JANE I. SMITH & YVONNE Y. HADDAD, THE OXFORD HANDBOOK OF AMERICAN ISLAM 137, 139–54 (2015) (for a detailed discussion of these movements).

[39] HOURANI, *supra* note 38, at 39–40. *See* VALERIE HOFFMAN, THE ESSENTIALS OF IBADI ISLAM (2012).

[40] Amongst others. *See* HALLAQ, LEGAL THEORIES, *supra* note 19, at 135–143.

[41] *Id.* at 163.

[42] *See* HALLAQ, SHARIʿA, *supra* note 21, at 107 (2009). Hallaq defines *istihsan* as "reasoning that presumably departs from a revealed text but leads to a conclusion that differs from one reached by means of qiyas." *Id. See also* SAEED, THE QURʿAN, *supra* note 2, at 238 (defined under "maslaha").

[43] *See* SAEED, THE QUʿRAN, *supra* note 2, at 238. Saeed defines *maslaha* as "a principle of Islamic jurisprudence that allowed jurists to exercise discretion or juristic preference (*istihsan*) in matters

making Shariʿa rulings.[44] The extent to which Islamic scholars should rely on ijtihad and maslaha or follow doctrine (*taqlid*) when deducing Shariʿa is also subject to differences of opinion. The next section discusses arbitration under classical Shariʿa by focusing on the four main Sunni schools.

II. ARBITRATION UNDER CLASSICAL SHARIʿA

Arbitration has long established religious and cultural roots in the Middle East, pre-dating the advent of Islam.[45] Arbitration under Shariʿa is known as tahkim, derived from the verbal noun of the Arabic word *hakkama*. *Hakkama* means "the turning of a man back from wrongdoing."[46] An arbitrator is known as a *hakam* or *muhakkam*.[47] Tahkim existed in pre-Islamic Arabia as a method of resolving disputes over property, succession, or torts.[48] The appointed arbitrator (*hakam*) was required to be a reputable man, known to a community and considered an expert in settling disputes.[49] When the *hakam* agreed to arbitrate, the parties involved provided security in order to ensure compliance. This was because the decision of the *hakam* was final, but not enforceable.[50] An Arab historian from the tenth century, Al-Yaqʿoubi, observed that

> [a]s a result of not having religions or laws to govern their lives, pagan Arabs used to have arbitrators to settle their disputes. So when they [had] a conflict regarding blood, water, grazing or inheritance they used to appoint an arbitrator who carried the characters of honour, honesty, old age and wisdom.[51]

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that were not clearly covered by a textual source." For Definition of 'maslaha', see HALLAQ, SHARIʿA, *supra* note 21, at 107.

44 SEYYED HOUSSEIN NASR, THE HEART OF ISLAM 121 (2004).

45 Faisal Kutty, *The Shariʿa Factor in International Arbitration*, 28 LOY. L.A. INT'L & COMP. L. REV. 565, 589 (2006).

46 Mahdi Zahraa & Nora A. Hak, *Tahkim (Arbitration) in Islamic Law Within the Context of Family Law Disputes*, 20 ARAB L. Q. 2, 3 (2006).

47 *Id.*

48 Arthur Gemmell, *Commercial Arbitration in the Middle East,* 5 SANTA CLARA J. INT'L L. 159, 173 (2006).

49 *Id.*

50 *Id.*

51 ABDULRAHMAN YAHYA BAAMIR, SHARI'A LAW IN COMMERCIAL AND BANKING ARBITRATION: LAW AND PRACTICE IN SAUDI ARABIA 45 (2010).

Many Islamic concepts of arbitration were derived from pre-Islamic practices, such as the concept of placing the burden of proof on the plaintiff.[52] During this time, dispute resolution occurred in a holistic way and focused on creating a form of compromise between the parties rather than making a binding, enforceable decision.[53] Therefore, the traditional role of judges was to create harmony between parties and resolve differences and conflicts in order to enable the parties to continue with their normal course of business.[54]

Under Shariʿa, matters may be resolved through tahkim or *sulh* (amicable settlement or conciliation). However, arbitration and conciliation differ under Shariʿa due to three factors. First, sulh can be attained by parties with or without the involvement of others, while tahkim requires a third party.[55] Second, the agreement under sulh is not binding unless it is taken before the court, whereas tahkim is generally considered binding without court intervention (according to most Islamic jurists).[56] Finally, parties can only resort to sulh if the dispute has already occurred, whereas tahkim can address both existing and prospective disputes.[57] However, as explained further in this essay, some Islamic opinions differ on whether an agreement under tahkim is binding and whether tahkim can apply to prospective disputes. During the Prophet Muhammad's time, this commitment to the arbitral process continued and was actually emphasized. The Prophet played a prominent role in acting as an arbitrator and promoted the application of arbitration, particularly for resolving disputes involving goods and chattels.[58] Arbitration was explicitly revealed for family disputes in the following verse:

> If you [believers] fear that a couple may break up, appoint one arbiter from his family and one from hers. Then if the couple want to put things right, God will bring about a reconciliation between them . . .[59]

This verse was interpreted by Hanbali scholar, Muwaffaq al-Din Ibn Qudama (deceased1223 CE) to require arbitrators to act as judicial

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[52] *Id.* at 47.

[53] Nudrat Majeed, *Good Faith and Due Process: Lessons from the Shariʿah*, 20 ARB. INT'L 97, 106 (2014) [hereinafter Majeed, *Good Faith*].

[54] *Id.* at 106.

[55] Zahraa & Hak, *supra* note 46, at 9.

[56] *Id.*

[57] *Id.*

[58] Kutty, *supra* note 45, at 598.

[59] OXFORD WORLD'S CLASSICS, THE QURʿAN 54 (M.A.S. Abdel Haleem trans., 2004).

officers, in addition to their roles as agents of the parties.[60] Arbitration is also supported by the actions of the Prophet Muhammad because he acted both as an arbitrator and as a party accepting the decision of an arbitrator. It is also reported that the Prophet Muhammad always preferred conciliation and arbitration over litigation,[61] and "for a Muslim, arbitration carried with it no better imprimatur than that given to it by the Prophet himself."[62] The Prophet's continuous participation in and commitment to the arbitral process has led many scholars to refer to him as the "exemplary standard for the independence of arbitrators."[63] For example, the first treaty to ever be signed during the Prophet's time was the Treaty of Medina, which was signed in 622 CE between Muslims, non-Muslims, Arabs, and Jews, called for all disputes to be resolved through arbitration.[64] Furthermore, the Prophet Muhammad was chosen to act as an arbitrator in conflicts between Arab and Jewish tribes.[65]

Another important arbitration that took place in early Islamic history was between Ali bin Abi Talib (the fourth caliph or head of the Islamic state between 656 to 661 CE) and Muʿawiyah ibn Abi Sufyaan (the governor of Syria and founder of the Ummayad dynasty). After the death of the third caliph in 656 CE, there was a dispute as to whether Ali or Muʿawiyah should be the successor.[66] The two men were prepared to resolve the dispute through battle, when Muʿawiyah proposed an arbitration: "I wish to choose a man amongst my men and you choose a man amongst yours so that both of them settle the dispute between us and make their award in compliance with the provisions of the Holy Book."[67]

Ali consented to the arbitration, which took place in front of 400 witnesses.[68] It was the first formal Islamic arbitration agreement, and

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[60] BAAMIR, *supra* note 51, at 49. *See generally Ibn Qudama, Muwaffaq al-Din*, OXFORD ISLAMIC STUD. ONLINE, http://www.oxfordislamicstudies.com/article/opr/t125/e953 (last visited Apr. 19, 2018).

[61] BAAMIR, *supra* note 51, at 51.

[62] Gemmel, *supra* note 48, at 173.

[63] Nudrat Majeed, *Investor-State Disputes and International Law: From the Far Side*, 98 AM. SOC'Y INT'L L. PROCEEDINGS 30, 32 (2004).

[64] Aseel Al-Ramahi, *Sulh: A Crucial Part of Islamic Arbitration* 14 (L., Soc'y, & Econ., Working Paper No. 08-45, 2008).

[65] Mohammed Abu-Nimer, *A Framework for Nonviolence and Peacebuilding in Islam*, 15 J. OF L. & RELIGION 217, 244–247 (2000–2001).

[66] ABDEL HAMID EL AHDAB & JALAL EL AHDAB, ARBITRATION WITH THE ARAB COUNTRIES 8–9 (3rd ed. 2011).

[67] *Id*. at 9.

[68] Majeed, *Good Faith*, *supra* note 53, at 106.

through *qiyas*, it extended the Qurʿan's directive of arbitration in family disputes to the political arena.[69] According to the arbitrator's decision, Ali and Muʿawiyah both surrendered their power, and the Muslim community was given the discretion to decide their leader.[70] Following the award, Muʿawiyah was proclaimed the caliph of Jerusalem.[71] This seemingly peaceful arbitration, however, paved the way for the ensuing Sunni-Shiʿa division in Islam.[72]

Despite the significant historical role of arbitration during the time of the Prophet Muhammad, a smooth transition to the modern arbitration framework did not occur. One reason may be the different approaches to arbitration within Islam based on schools of thought within the Sunni branch of Islam, as well as the approaches arising out of the Sunni-Shiʿa division within Islam.[73] The next sections discuss the concept of arbitration under the four Sunni schools of jurisprudence and the *Medjella*, which is the codification of the Hanafi school of thought during the Ottoman Empire.

A. HANAFI SCHOOL

Abu Hanifa Nuʿman ibn Thabit (deceased 767 CE) ("Abu Hanifa") founded the Hanafi school. The Hanafi school of thought had a huge influence during the Ottoman Empire and in 1869, the Ottoman Turks began to codify Hanafi ideologies in a body of law known as the Medjella.[74] Abu Hanifa emphasized personal opinion (*raʿy*) and reasoning by analogy (*qiyas*).[75] He also recommended the use of equity and ijmaʿ; however, the Qurʿan and the hadith were given priority over *usul ul-fiqh*.[76] *Urf* (custom) was only referred to as a residual source after the use of the above-mentioned sources of Shariʿa.[77] A merchant by occupation, Abu Hanifa contributed to the development of law regarding

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[69] ABDEL HAMID EL AHDAB & JALAL EL AHDAB, ARBITRATION WITH THE ARAB COUNTRIES 10 (3d ed. 2011).

[70] Majeed, *Good Faith*, *supra* note 53, at 106.

[71] *Id.*

[72] Kutty, *supra* note 45, at 599.

[73] *See id.* at 597–98.

[74] *Id.* at 598. *See also* SAMIR SALEH, COMMERCIAL ARBITRATION IN THE ARAB MIDDLE EAST: SHARI'A, SYRIA, LEBANON, AND EGYPT 8 (2006).

[75] KAMALI, *supra* note 15, at 70; SALEH, *supra* note 74, at 8.

[76] *Id.*

[77] *Id.*

commercial transactions (*muʿamalat*).[78] This school of thought arose in Iraq and spread to Syria and Central Asia.[79] Hanafis stressed the close connection between arbitration and conciliation.[80] Therefore, for Hanafis, an arbitral award is similar to conciliation and has less force than a court judgment.[81] In the Hanafi school, the arbitration contract is valid (*sahih*), but not binding (*ghayr lazim*).[82] In the other three schools, contracts are *jaʿiz* (permissible), meaning either party may revoke the contracts.

The Hanafi school and the *Medjella* take the view that arbitral tribunals may be subject to a statute of limitations, depending on what parties stipulate in the contract.[83] In the case of *Saudi Basic Industries Corporation (SABIC) v. Mobile Yanbu Petrochemical Company* ("Saudi Basic III"), SABIC claimed that Exxon and Mobil's claim was time-barred.[84] However, in the pre-trial bench ruling, the trial judge held that the claim could not be time-barred under Shariʿa because the property rights were eternal and could not be barred by the passage of time.[85] Nonetheless, a review of publicly available arbitral decisions shows that this issue does not often arise, presumably because most jurisdictions, including Saudi Arabia, recognize the statute of limitations.[86] Akaddaf observes that:

> Islamic legal systems are theoretically divided as to the application of a time limit within which a legal action must be brought. Some Muslim authorities claim that it is the interest of society to bar claims from being tried after a certain period of time has passed, others adopt the traditional Islamic view under which no right shall be lost by lapse of time. Such views remain only theoretical, however, and have no impact on the existing codified laws of each country.[87]

One exception is Iranian law, where following the Islamic Revolution of 1979, the existing legal system was replaced with Shariʿa.

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[78] KAMALI, *supra* note 15, at 70.

[79] FRANK E. VOGEL, ISLAMIC LAW AND LEGAL SYSTEM: STUDIES OF SAUDI ARABIA at xi, 9 (Ruud Peters & Bernard Weiss eds., 2000).

[80] Kutty, *supra* note 45, at 597; EL AHDAB & EL AHDAB, *supra* note 66, at 14.

[81] Gemmell, *supra* note 48, at 176.

[82] NATHALIE NAJJAR, ARBITRATION AND INTERNATIONAL TRADE IN THE ARAB COUNTRIES 46 (2017).

[83] SAYED HASSAN AMIN, ISLAMIC LAW IN THE CONTEMPORARY WORLD 86 (1985).

[84] Saudi Basic Indus. Corp. v. Mobil Yanbu Petrochemical Co., 866 A.2d 1, 14–15 (Del. 2005).

[85] *Id.*

[86] Fatima Akaddaf, *Application of the United Nations Convention on Contracts for the International Sale of Goods (CISG) to Arab Islamic Countries: Is the CISG Compatible with Islamic Law Principles?*, PACE INT'L L. REV. 1, 43 (2001).

[87] *Id.* at 45.

Reference to the statute of limitations was abolished as per the Iranian Civil Procedure Code of 1983.[88] In fact, the arbitral tribunal in the case of *Aryeh v. Iran* rejected the argument that several claims brought before an arbitral tribunal were not time-barred due to Iranian law.[89]

Since the statute of limitations issue rarely arises, this article will not examine the issue in further detail. Nonetheless, it may be interesting to further research the consequences if classical Shariʿa or Iranian law is the governing law, or if arbitral awards are enforced in Iran. In particular, whether parties would need to stipulate if statute of limitations apply in their contract or whether they may agree to waive the application of statute of limitations.[90]

B. MALIKI SCHOOL

The Maliki school was founded by Malik ibn Anas al-Asbahi (deceased 795 CE), who lived most of his life in Medina and consequently relied on the consensus of the scholars living there.[91] The book *al Muwatta*, is a compilation of the ijmaʿ of the scholars and is based mostly on the Qurʿan, hadith, and *qiyas*.[92] The Maliki school is predominant in Morocco, Algeria, Tunisia, upper Egypt, the Sudan, Bahrain, and Kuwait.[93] In Algeria, a French draft code was prepared in 1916 based on the Maliki teachings.[94] The Maliki jurisprudence is known as the most dynamic and comprehensive school of thought because of its emphasis on legal principles such as independent reasoning (ijtihad) and public interest (*istislah*).[95] In the area of arbitration, Malikis believe that the decision of an arbitrator is binding unless there is a "flagrant injustice."[96] Furthermore, unlike the other three schools, this school

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88 *Id*.

89 Aryeh v. Iran, in 33 IRAN–UNITED STATES CLAIMS TRIBUNAL REPORTS 272, 310–11 (Edward Helgeson ed., 1997).

90 *See generally* Nima Nasrollahi Shahri & Amirhossein Tanhaei, *An Introduction to Alternative Dispute Settlement in the Iranian Legal System: Reconciliation of Shariʿa Law with Arbitration as a Modern Institution*, 2 TRANSNAT'L DISP. MGMT. _ (2015). Interestingly, Iranian law implements *Shariʿa* based on Shiʿa jurisprudence, which this article does not examine.

91 KAMALI, *supra* note 15, at 73; SALEH, *supra* note 74, at 8.

92 SALEH, *supra* note 74, at 8.

93 *Id.* John L. Esposito, *Maliki School of Law*, OXFORD ISLAMIC STUD. ONLINE, http://www.oxfordislamicstudies.com/article/opr/t125/e1413# (last visited October 13, 2018).

94 *Id.*

95 KAMALI, *supra* note 15, at 73.

96 EL AHDAB & EL AHDAB, *supra* note 66, at 14; Kutty, *supra* note 45, at 597.

asserts that the arbitrator cannot be removed once arbitration has commenced.[97] The Maliki school emphasizes the neutrality of the arbitration and the award's effect is seen as limited so that it does not affect third parties' rights.[98]

C. SHAFIʿI SCHOOL

The Shafiʿi school was named after its founder, Muhammad ibn Idris al-Shafiʿi (deceased 820), who was a student of Malik ibn Anas al-Asbahi and was also influenced by Hanafi jurists.[99] This school of thought arose in Egypt and spread to Iraq, Persia, East Africa, as well as certain regions of Saudi Arabia and Central Asia.[100] It became the predominant school of thought in Southeast Asia.[101] The Shafiʿi theory states that Islamic law is based on four principles, which include: the word of God in the Qurʿan, the sunna of the Prophet Muhammad, consensus of opinion, and reasoning by analogy. Unlike Maliki, Shafiʿi believed that authentic hadith should always be accepted and could not be invalidated on the grounds that it conflicted with the Qurʿan because he believed that the hadith and Qurʿan never contradicted each other.[102] In arbitration, the position of arbitrators was seen as inferior to judges and the parties could remove the arbitrator until the award was issued.[103] Shafiʿi also believed that arbitration was closer to conciliation and therefore had a less binding effect.[104] The Shafiʿi school considers arbitration particularly useful during times of corruption amongst judges.[105]

D. HANBALI SCHOOL

The Hanbali school of law was founded by Ahmad ibn Muhammad ibn Hanbal (deceased 855 CE), a student of Idris al-Shafiʿi,

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[97] Gemmell, *supra* note 48, at 175.
[98] SALEH, *supra* note 74, at 17.
[99] *Id.* at 8.
[100] VOGEL, *supra* note 79, at 9–10.
[101] *Id.* at 10.
[102] KAMALI, *supra* note 15, at 75.
[103] Gemmell, *supra* note 48, at 176.
[104] Kutty, *supra* note 45, at 597.
[105] EL AHDAB & EL AHDAB, *supra* note 66, at 14.

who was an orthodox opponent of the Rationalist school.[106] This school is the most conservative of the four schools and its teachings are based on a textual, as opposed to contextual, interpretation of the Qurʿan, hadith, and sunna.[107] This school of law was formulated and influential in Baghdad, Damascus, and the Arabian Peninsula.[108] It uncritically accepts the authenticity of the sunna and makes few concessions to personal reasoning (*raʿy*) or equity. [109] In the eighteenth century, Wahhabism, which is a puritanical movement in the Arabian Peninsula, derived its doctrine and inspiration from the Hanbalis.[110] The Hanbali school is currently predominant in Oman, Qatar, Bahrain, and Kuwait.[111] In terms of arbitration, this school of thought believes that the decision of an arbitrator has the same binding nature as a court's judgment.[112] Therefore, the arbitrator must also have the same qualifications as a judge and the decision carries a *res judicata* affect.[113] Samir Saleh, an academic on commercial arbitration in the Middle East, notes that "[t]he Hanbalis are known to be strict in religious ritual but tolerant in commercial transactions."[114] This becomes relevant when discussing the implementation of Shariʿa in Saudi Arabia due to the fact that the Shariʿa courts in Saudi Arabia follow the Hanbali school of law.

E. THE MEDJELLA

The *Medjella* of Legal Provisions, which was based on the Hanafi school, was the first codification of the *Shariʿa*.[115] An entire section in the *Medjella* is devoted to arbitration, and, in accordance with the Hanafi school, it is more in line with conciliation.[116] Under the *Medjella*'s rules of arbitration, there was no *res judicata* effect based on the award by itself, rather, the contractual nature of the arbitration was

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[106] SALEH, *supra* note 74, at 9. KAMALI, *supra* note 15, at 83. IBN AL-JAWZI, VIRTUES OF IMAM AHMAD HANBAL: VOLUME TWO 536 (2015)

[107] Gemmell, *supra* note 48, at 176.

[108] VOGEL, *supra* note 79, at 10.

[109] *Id.*

[110] *Id.*

[111] KAMALI, *supra* note 15, at 84.

[112] Kutty, *supra* note 45, at 597–98; SALEH, *supra* note 74, at 17.

[113] *Id.*

[114] *Id.* at 9.

[115] Gemmell, *supra* note 48, at 176. *See also* EL AHDAB & EL AHDAB, *supra* note 66, at 14; ASEEL AL-RAMAHI, SULH: A CRUCIAL PART OF ISLAMIC ARBITRATION 16 (2008).

[116] Gemmell, *supra* note 48 at 176.

stressed.[117] Also, the court could determine an arbitrator's award as void if the award was found to be contrary to a previously rendered court judgment.[118] An arbitrator's scope of power was less broad than that of a court and was therefore limited to the matters that were before the arbitrator and directly related to the dispute.[119] Furthermore, according to section 1853 of the *Medjella*, "if a third party settles a dispute without having been entrusted with this mission by the parties, and if the latter accept his settlement, the award shall be enforced . . . according to which 'ratification equivalent to agency.'"[120] Consequently, a judge could annul an arbitral award if he saw fit, unlike a judgment.[121]

Also, the *Medjella* did not recognize statutes of limitations. An academic on Islamic law, Joseph Schacht characterizes the *Medjella* as "an experiment . . . [that] . . . was undertaken under the influence of European ideas, and it is, strictly speaking, not an Islamic but a secular code . . . not intended for the tribunals of the [q]adis, and was in fact not used [by] them . . . it contains certain modifications of the strict doctrine of Islamic law . . . ."[122] The codification, which governed civil matters, also applied after the fall of the Ottoman Empire in the early twentieth century, until countries under its rule formulated their own legal systems.[123] Due to the fact that this civil code is no longer implemented in contemporary legal systems, this article does not examine the *Medjella* in detail.

III. THE IMPLEMENTATION OF SHARIʿA IN THE CONTEMPORARY WORLD

Hallaq argues that various historical and political factors, such as the collapse of the Ottoman Empire and the rise of colonialism, contributed to the "structural demise of Shariʿa"[124] in the contemporary world.[125] This is due to the historical collapse of Islamic financial foundations; the introduction of modern legal processes due to

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[117] *Id.*
[118] *Id.*
[119] *Id.*
[120] AL-RAMAHI, *supra* note 115, at 16.
[121] *Id.*
[122] SCHACHT, *supra* note 1, at 92–93.
[123] EL AHDAB & EL AHDAB, *supra* note 66, at 16.
[124] HALLAQ, SHARIʿA, *supra* note 21, at 500.
[125] *See* HOURANI, *supra* note 38. *See generally* HALLAQ, SHARIʿA, *supra* note 21.

colonialism; and the influence of commercial, civil, and criminal laws on the legal system of nation states.[126] For this reason, it is important to understand the form or interpretation of Shariʿa that is being referred to in legal systems or arbitration.

Shariʿa is still referred to in the constitutions of Egypt, Kuwait,[127] UAE,[128] and Saudi Arabia.[129] Interestingly, in Egypt, the Egyptian Constitution of 2012 was enforced under the regime of the former Islamist president, Mohammed Morsi and was replaced by the current constitution of 2014.[130] One of the most controversial questions when the new constitution of 2014 was being drafted related to the role of Shariʿa.[131] Despite ongoing political tensions in Egypt, including a military coup that stripped the constitution of religious language, Article 2 of the Egyptian Constitution remained.[132] According to Article 2, "Islam is the religion of the State and Arabic is its official language. The principles of Islamic Shariʿa are the main source of legislation."[133] Therefore, due to the political climate of nation-states, the incorporation of Shariʿa and the extent to which it should be adopted is often subject to controversy.

Shariʿa is also mentioned in the civil and commercial codes of Jordan, Oman, and Iraq. Article 2 of the Jordanian Civil Code 1976 states that in the absence of applicable law, the court should apply the principles of Shariʿa,[134] Article 5 of the Commercial Code of 1990 (Oman) states that custom applies in the absence of the relevant provisions while Shariʿa applies in the absence of customary law.[135]

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[126] HALLAQ, SHARI'A, *supra* note 21, at 500.

[127] CONSTITUTION OF KUWAIT 1962, art. 2 (reinstated 1992) ("The religion of the state is Islam and the Islamic *Shari'a* shall be a main source of legislation.").

[128] CONSTITUTION OF THE UNITED ARAB EMIRATES 1971, art. 7 (amended 1997) (The Fed. Nat'l Council Standing Orders trans.) (referring to *Shari'a* as a source of legislation). *See also* Sam Luttrell, *Choosing Dubai: A Comparative Study of Arbitration under the UAE Federal Code of Civil Procedure and the Arbitration Law of the DIFC*, 9 BUS. L. INT'L 254 (2008).

[129] KINGDOM OF SAUDI ARABIA BASIC LAW OF GOVERNANCE Mar. 1, 1992 (stating that Quʿran and sunna are the sole sources of law, and all regulations, laws, etc., must conform to *Shariʿa*).

[130] *Egypt referendum*: *'98% back new constitution,'* BBC NEWS (Jan. 19, 2014), http://www.bbc.com/news/world-middle-east-25796110.

[131] BROWN, *supra* note 18, at 5.

[132] *Id.*

[133] CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, 18 Jan. 2014, art. 2 ("Islam is the religion of the State and Arabic is its official language. The principles of Islamic Sharia are the main source of legislation.").

[134] JORDANIAN CIVIL CODE art. 2.

[135] OMAN COMMERCIAL LAW art. 5.

Likewise, Article 1 of the Civil Codes of Egypt and Iraq stipulate that in the absence of the relevant provisions, custom applies and in the absence of customary law, Shariʿa applies.[136] In the absence of applicable customary law and Shariʿa, general principles of justice apply.[137] Furthermore, Article 1 of the Syrian and Libyan Civil Codes states

> [i]n the absence of applicable legal provisions, the Judge shall pass judgment in accordance with the principles of Islamic law. In the absence of Islamic legal precedent, he shall pass judgment according to prevailing custom, and in the absence of precedents in customary procedure, he shall pass judgment according to the principles of natural law and the rules of equity.[138]

In the contemporary world, Islamic countries may be separated into the following groups in terms of geographic location, as well as the influence of Shariʿa and secular law.[139] However, these categories are not mutually exclusive.

1. Middle Eastern countries influenced by the civil law tradition (e.g., Lebanon, Syria, Egypt, Algeria, Bahrain, Kuwait, Morocco, and Tunisia) or the common law tradition (Sudan);
2. Middle Eastern countries heavily influenced by the Shariʿa, (e.g., Saudi Arabia, Qatar, Oman, and Yemen);
3. Middle Eastern countries that are influenced by the Shariʿa but have secular commercial laws (these include Iraq, Jordan, Libya, and the UAE);
4. Other countries in Western Asia, South Asia, and South-East Asia, such as Iran[140] and Pakistan,[141] where Shariʿa is referred to in the constitution and Shariʿa courts exist independently of secular courts. The constitutions of Indonesia and Malaysia do not refer to Shariʿa, but independent Shariʿa courts exist in both countries.[142]

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[136] Civil Code, art. 1 (Egypt); The Civil Code Law No. 40 of 1951, art. 1 (Iraq).

[137] *Supra* note 136.

[138] THE LIBYAN CIVIL CODE, § 1, art. 1; SYRIAN CIVIL CODE 1949, art. 1. *See also* Florentine Sonia Sneij & Ulrich Andreas Zanconato, *The Role of Shari'a Law and Modern Arbitration Statutes in an Environment of Growing Multilateral Trade*, 12 TRANSNATIONAL DISPUTE MGMT. 11 (2015).

[139] Kutty, *supra* note 45, at 594–95.

[140] *See* QANUNI ASSASSI JUMHURII ISLAMAI IRAN [THE CONSTITUTION OF THE ISLAMIC REPUBLIC OF IRAN] [1980].

[141] *See* PAKISTAN CONST.

[142] *See generally* VOICES OF ISLAM IN SOUTHEAST ASIA: A CONTEMPORARY SOURCEBOOK (Greg Fealy & Virginia Hooker eds., 2006).

It is difficult to categorize countries in terms of the influence of Shariʿa over the legal system because it depends on the context. For example, in various jurisdictions, Shariʿa may strictly forbid interest, but simple interest is still applied in the context of arbitral awards.[143] On the other hand, Shariʿa is rarely applied to refuse enforcement of foreign arbitral awards in the context of contemporary ICA.[144]

IV. SHARIʿA ARBITRAL RULES AND STANDARDS

Some case studies examined in this article include the Saudi arbitration laws, the Asian International Arbitration Centre (AIAC) i-Arbitration Rules, and the Accounting and Auditing Organization for Islamic Financial Institutions (AAOIFI) Standards. Conversely, other jurisdictions such as various Middle Eastern countries and Iran can also be used comparatively as case studies when discussing arbitrability, interest, and enforcement of arbitral awards. However, this is beyond the scope of this article. The following sections discuss the i-Arbitration Rules, the IICRA Rules, the AAOIFI Standards, the application of Shariʿa in Saudi, and the Saudi Arbitration Law 2012.

A. AIAC I-ARBITRATION RULES

The AIAC introduced *i-Arbitration Rules* (the prefix "i" indicates compliance with Shariʿa) in 2012 at the Global Financial Forum.[145] The *i-Arbitration Rules* are largely based on the UNCITRAL Rules 2010 and aim to cater for Shariʿa-based disputes in international commercial arbitration by providing a procedure through which arbitral tribunals can refer matters to Shariʿa advisory councils.[146] According to the Director of AIAC, Sundra Rajoo:

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[143] *See, e.g.,* Case No. 7373 of 2004 (ICC Int'l Ct. Arb.); Case No. 5082/1980 of 2004 (ICC Int'l Ct. Arb.) (applying Iranian law, the arbitral tribunal found that whilst *ribā* was prohibited, compensation was allowed in the form of simple interest).

[144] *See, e.g.,* INT'L BAR ASS'N SUBCOMM. ON RECOGNITION AND ARBITRAL AWARDS, REPORT ON THE PUBLIC POLICY EXCEPTION IN THE NEW YORK CONVENTION (2015). *See also* Ismail Selim, *Public Policy Exception as Applied by the Courts of the MENA Region*, *in* UNITED NATIONS COMM'N ON INT'L TRADE L., SECOND CONFERENCE FOR A EURO-MEDITERRANEAN CMTY. OF INT'L ARBITRATION (2015).

[145] KUALA LUMPUR REGIONAL CENTRE FOR ARBITRATION, KLRCA ARBITRATION RULES (2013).

[146] *KLRCA to Unveil Islamic Arbitration Rules*, GLOBAL ARBITRATION REVIEW, Sept. 17, 2009, http://globalarbitrationreview.com/article/1031606/klrca-to-unveil-islamic-arbitration-rules.

> With the advent of globalisation and increasing cross-border transactions, the centre decided to come up with a set of rules that provide for international commercial arbitration that is suitable for commercial transactions premised on Islamic principles, and that would be recognised and enforceable internationally. Many Asian arbitration centres have their niche—for example, Hong Kong is an obvious venue for China-related disputes, and as a plural society with a majority of Muslim citizens and a regional hub for Islamic finance, Malaysia could be an appealing neutral arbitration forum for parties who have issues with Shariʿa contracts.[147]

Rajoo emphasizes that it is significant for contemporary ICA to be compatible with Shariʿa so that arbitral awards are enforceable internationally.[148] For this reason, in 2013, the KLRCA revised the *i-Arbitration Rules*. The revisions allow arbitrators to award interest and refer Shariʿa matters to any Shariʿa advisory council.[149] The i-Arbitration Rules 2018, which came into effect on March 8, 2018, were also recently revised and have been reformed to include new sections on the joinder of parties and consolidation of arbitral proceedings.[150] The current *i-Arbitration Rules* are not entirely consistent with Shariʿa; this is evident by the power that arbitrators are given to award interest under Rule 12(8) of the revised Arbitration Rules, which has also been adopted by the Arbitration Rules further revised in 2018 under Rule 6(g).[151] Furthermore, the *i-Arbitration Rules* also differ from contemporary ICA rules in relation to evidentiary procedures.

B. IICRA RULES

IICRA was established in the United Arab Emirates (UAE) in 2005 and began operating in 2007, following the efforts of the UAE government, Islamic Development Bank, and the General Council of

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147 *Id*.

148 *Id*.

149 The previous *i-Arbitration Rules* limited the referral to the Malaysian Shariʿa Advisory Council. *See KLRCA publishes new rules*, THOMSON REUTERS PRACTICAL LAW ARBITRATION (Oct. 30, 2013), http://us.practicallaw.com/2-547-2965?q=&qp=&qo=&qe=.

150 This article does not delve into a discussion on these new updates. For more information, *see generally Kuala Lumpur Regional Centre for Arbitration Rebrands as Asian International Arbitration Centre*, JONES DAY (Feb. 2018), http://www.jonesday.com/Kuala-Lumpur-Regional-Centre-for-Arbitration-Rebrands-as-Asian-International-Arbitration-Centre-02-14-2018/?RSS=true.

151 *Id.*

Islamic Banks and Financial Institutions.[152] The center was established to facilitate the resolution of financial or commercial disputes for parties that chose Shariʿa to govern their proceedings. IICRA Rules govern both conciliation and arbitration methods of dispute resolution.[153] The IICRA website notes that it is "an international, independent, non-profit organization, and one [of the] major infrastructure institutions of the Islamic finance industry."[154] Cases resolved by IICRA are not published, so there is limited research available in relation to the effectiveness of and demand for the *IICRA Rules*.[155]

C. AAOFI STANDARDS

AAOIFI is an organization based in Bahrain that was established in order to provide "accounting, auditing, governance, ethics and Shariʿa standards for Islamic financial institutions and the industry."[156] These standards aim to provide an international and harmonized approach to accounting, auditing, governance, and Shariʿa-related issues in Islamic finance, and may be adopted by various international Islamic financial institutions including banks and regulatory firms, as well as international legal and accounting firms.[157] The standards are subject to review by internal AAOIFI committee or working groups.[158]

The relevant standards are the Shariʿa standards,[159] which address the pre-requisites required to ensure that arbitration and various Islamic finance products comply with Shariʿa. At a conference organized by the AAOIFI, it was noted that arbitration was the preferred dispute

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[152] *Establishment*, INT'L ISLAMIC CTR. FOR RECONCILIATION AND ARBITRATION, http://www.iicra.com/iicra/en/page/details/page_id/ee37cbdbcdad1a37ec1e4247382903ff (last visited Sep. 15, 2018) [hereinafter IICRA]. KABIR HASSAN & MERVYN LEWIS, HANDBOOK OF ISLAMIC BANKING 380 (2007).

[153] KABIR HASSAN & MERVYN LEWIS, HANDBOOK OF ISLAMIC BANKING, 381 (2007).

[154] *Who we are*, IICRA, http://www.iicra.com/iicra/en/page/details/page_id/76070bbb02830110772a8fd81756a777 (last visited Sep. 18, 2018).

[155] The author tried to interview senior executives of IICRA, but they were unable to provide detailed information about the centre.

[156] *What We Do*, ACCOUNTING AND AUDITING ORG. FOR ISLAMIC FIN. INST., http://aaoifi.com/?lang=en (last visited Sep. 18, 2018) [hereinafter AAOIFI].

[157] Dar Al Maiman, *Foreword* to AAOIFI, SHARIʿAH STANDARDS 6 (2015).

[158] *Id.* at 6–7.

[159] *Id*.

resolution process to resolve disputes arising from the Islamic financial contracts because of the emphasis on arbitration in the Qurʿan.[160]

The chairman of the Shariʿa board of AAOIFI, Muhammad Taqi Usmani, noted that "AAOIFI decided to issue Shariʿah standards in the same way it had issued its accounting standards, in order to provide a reference for Islamic banks financial institutions to comply with Shariʿah in their transactions and products and to harmonize various [f]atwas issued by different Shariʿah Supervisory Boards (SSBs)."[161] However, the standards stipulated by the AAOIFI are not agreed upon by all Islamic organizations and scholars.

V. THE APPLICATION OF SHARIʿA IN SAUDI ARABIA AND THE *SAUDI ARBITRATION LAW 2012*

The *Saudi Arbitration Law 2012* was issued by a Royal Decree No. M/34 on April 16, 2012.[162] This Saudi Arbitration Law 2012 was published in the Official Gazette on June 8, 2012 and went into effect thirty days later.[163] Abdulrahman Baamir, who is an academic on arbitration in Saudi Arabia, notes that the Saudi Arbitration Law 1983 reflected the views of the Hanbali school of thought, and that it was not comprehensive on various issues relating to the arbitration proceedings, such as the relationship between the arbitral tribunal and parties, the seat of the arbitral tribunal and the deliverance of arbitral awards.[164] Furthermore, under the Saudi Arbitration Law 1983, the Saudi courts would intervene at various stages of the arbitration proceedings, including the initiation of proceedings and enforcement of the arbitral award, in order to ensure Shariʿa-compliance, which resulted in a review of the entire arbitral award.[165] In contrast, the Saudi Arbitration Law 2012 provides significant reforms to both procedural and substantive elements of Saudi arbitration, which aim to be more consistent with the

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[160] Jasim Salim Al Shamsi, *Restricting Restoring to [Civil] Laws in Contract [Disputes] and Accepting the Arbitration of Shariʾah Boards Instead,* Bahrain: The 5th Seventh Annual Shariʿah Supervisory Boards Conference for Islamic Financial Institutions, 19–20, (Nov. 2005).

[161] Dar Al Maiman, *supra* note 157, at 10.

[162] Faris Nesheiwat & Ali Al-Khasawneh, *The 2012 Saudi Arbitration Law: A Comparative Examination of the Law and Its Effect on Arbitration in Saudi Arabia*, 13 SANTA CLARA J. INT'L L. 443, (2015).

[163] Nesheiwat & Al-Khasawneh, *supra* note 162, at 444.

[164] Abdulrahman Yahya Baamir, *Saudi Arabia*, *in* ARBITRATION IN MENA 19 (Gordon Blanke & Habib Al Mulla eds., 2016)

[165] Nesheiwat & Al-Khasawneh, *supra* note 162, at 446.

UNCITRAL Model Law.[166] Interestingly, the Saudi Arbitration Law 2012 also replicates the Egyptian Arbitration Law No. 27 of 1994.[167]

In addition, arbitration reforms introduced by the new Saudi Enforcement Law 2013[168] replaced the provisions of the 1989 Rules of Civil Procedure before the Board of Grievances.[169] The role of the Board of Grievances prior to the introduction of the Saudi Enforcement Law 2013 was to hear enforcement requests and deal with important commercial issues before Saudi courts.[170] Parties were required to make applications to seek the enforcement of foreign judgments and arbitration awards before the Board of Grievances.[171] The Saudi Enforcement Law 2013 abandons this system by creating a specialized forum within which judgments and awards are enforced.[172] The purpose behind the reform is to harmonize the enforcement process with international standards.[173]

Article 2 of the *Saudi Arbitration Law 2012* states "[w]ithout prejudice to the provisions of Islamic law and the provisions of international conventions in which the Kingdom is party, the provisions of this regulation are applied to every arbitration."[174] In light of this provision, it is clear that Saudi Arabia is attempting to adhere to Shariʿa while, as noted above, also trying to align itself with the UNCITRAL Model Law. Nesheiwat and Al-Khasawneh are both legal practitioners and academics who have researched on Saudi arbitration law. They observe that

> [t]he drafters of the New [Saudi] Law made a conscious decision to base it on the UNCITRAL Model Law in order to create a legal framework for arbitration that is more in tune with international

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[166] Jean-Pierre N. Harb et al., *The New Saudi Arbitration Law*, JONES DAY (Sep. 2012), http://www.jonesday.com/new_saudi_arbitration_law/ (last visited Sep. 18, 2018).

[167] Baamir, *supra* note 164, at 21.

[168] Yusuf Giansiracua et al., *The New Enforcement of Saudi Aravia: An Additional Step Toward a Harmonized Arbitraion Regime*, JONES DAY (Sep. 2013), http://www.jonesday.com/the-new-enforcement-law-of-saudi-arabia-an-additional-step-toward-a-harmonized-arbitration-regime-09-04-2013 (last visited Sep. 18, 2018).

[169] Jean-Benoît Zegers, *National Report for Saudi Arabia (2013)*, *in* ICCA INT'L HANDBOOK ON COMMERCIAL ARBITRATION (Jan Paulsson & Lise Bosman eds., Supp. 51 2013). Giansiracua, *supra* note 168.

[170] Giansiracua, *supra* note 168.

[171] *Id.*

[172] *Id.*

[173] *Id.* David Long, *The Board of Grievance in Saudi Arabia*, 27 MIDDLE EAST J. 1, 71 (1973). Leon Boshoff, *Saudi Arabia: Arbitration vs. Litigation*, 1 ARAB L. Q. 299 (1985).

[174] World Intellectual Property Organization, Kingdom of Saudi Arabia Law of Arbitration (promulgated by the Royal Decree No. M/34 (2012) http://www.wipo.int/edocs/lexdocs/laws/en/sa/sa057en.pdf.

> standards. At the same time, the drafters sought to maintain the essential principles of Shariʿa and local practice, thus creating a hybrid set of rules that simultaneously deviate from and converge with the UNCITRAL Model Law.[175]

On the other hand, Tarin argues that the *Saudi Arbitration Law 2012* is more compliant with Shariʿa than the previous law whilst also being consistent with the UNCITRAL Model Law.[176] However, Tarin does not comprehensively address which interpretation of Shariʿa the Saudi Arbitration Law 2012 is more consistent with.

Shariʿa is one of the major sources of law in the Kingdom of Saudi Arabia, which is an absolute monarchy.[177] As noted above, Saudi Arabia does not have a constitution (other than the Qurʿan and *sunna*) and instead introduced the Basic Law of Governance in 1992, which describes the roles and responsibilities of institutions in the country, as well as stipulating the supremacy of Shariʿa.[178] While Article 44 of the Basic Law of Governance seems to stipulate a separation of powers between the executive, judiciary, and regulatory authorities, it also states that the King will have the final authority.[179] Specialist on Middle Eastern law, Chibli Mallat, notes that despite the introduction of the Basic Law of Governance, it is clear that "[d]elegation operates vertically, through the Council of Ministers, the various ministries, and the bureaucracy. Delegation also operates horizontally, with the King appointing a number of representatives from amongst the ruling family to head the various administrative regions in the vast Kingdom."[180] Furthermore, the supremacy of Shariʿa is stipulated in Article 1 of the Basic Law of Governance, which provides that:

> [t]he Kingdom of Saudi Arabia is a fully sovereign Arab Islamic State. Its religion shall be Islam and its constitution shall be the Book

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[175] Nesheiwat & Al-Khasawneh, *supra* note 162, at 444–445.

[176] Shaheer Tarin, *An Analysis of Influence of Islamic Law on Saud Arabia's Arbitration and Dispute Resolution Practices* 26 AM. REV. INT'L ARB. 131 (2015).

[177] Ester van Eijk, *Sharia and National Law in Saudi Arabia*, *in* SHARIA INCORPORATED 139 (Michiel Otto ed., 2010).

[178] *Id.* at 156; CHIBLI MALLAT, INTRODUCTION TO MIDDLE EASTERN LAW 160–62 (2007).

[179] *The Basic Laws of Governance*, ROYAL EMBASSY OF SAUDI ARABIA (1992), https://www.saudiembassy.net/about/country-information/laws/The_Basic_Law_Of_Governance.aspx.

[180] MALLAT, *supra* note 178, at 160.

> of God and the *Sunna* (traditions) of His messenger, may God's blessings and peace be upon him.[181]

Article 7 further stipulates that the "[g]overnance in the Kingdom of Saudi Arabia derives its authority from the Book of God Most High and the *Sunna* of his Messenger, both of which govern this Law and all the laws of the State" and Article 48 states "[t]he courts shall apply to cases before them the provisions of Islamic Shariʿah, as indicated by the Qurʿan and the *Sunna*, and whatever laws not in conflict with the Qurʿan and the *Sunna* which the authorities may promulgate."[182]

Consequently, Shariʿa is a primary source of law in Saudi Arabia in conjunction with Saudi law. Vogel notes that Shariʿa is Saudi law and "any fiqh opinion authoritatively rooted in the Qurʿan and sunna is Saudi law, because it is a valid statement of Shariʿa and Saudi law is nothing but Shariʿa."[183] The sources upon which courts rely when determining Shariʿa include the Hanafi, Maliki, Shafii, and Hanbali schools of law, as well as books of fiqh written by Islamic scholars over fourteen centuries.[184] Although judges in Saudi Arabia may apply any four schools of Sunni thought, they largely look to the Hanbali school.[185] Saudi courts also heavily rely on scholars who follow the Hanbali school and their texts such as the classic text *al-Mughni*[186] which was written by the Hanbali scholar Ibn Qudama; the views of Ibn Taymiyya (as noted above); Ibn Qayyim al-Jawziyya (deceased 1350 CE) and Mansur bin Yuni al-Bahuti (deceased 1641 CE).[187] The views of some of these Hanbali scholars will be explained further in this chapter. Ansary notes:

> To learn the law of Saudi Arabia, one turns first to the "fiqh", Islamic Law. In other words, one turns not to State legislation or court precedents but to the opinions, the "ijtihad," of religious-legal scholars from both the past and the present who, by their piety and learning, have become qualified to interpret the scriptural sources and to derive laws therefrom. Most of the Islamic law applied today,

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[181] *Basic Law of Governance (promulgated by Royal Decree No. A/90* (1992), WORLD INTELLECTUAL PROPERTY ORGANIZATION, http://www.wipo.int/edocs/lexdocs/laws/en/sa/sa016en.pdf; *The Basic Law of Governance*, *supra* note 179.

[182] *Id*.

[183] VOGEL, *supra* note 79.

[184] *Id.* at 9.

[185] Dr. Abdullah F. Ansary, *UPDATE: A Brief Overview of the Saudi Arabian Legal System*, GLOBALEX (August 2015), http://www.nyulawglobal.org/globalex/Saudi_Arabia1.html.

[186] See the following case discussed in Chapter 8**:** *Parties not indicated,* Board of Grievances of Saudi Arabia, undated 2012, *International Journal of Arab Arbitration* 6, no 2, (2014): 29.

[187] VOGEL, *supra* note 79, at 12–13.

> according to the recognized Islamic schools of law, can be found in books of "fiqh" that were written by Muslim scholars (*ulama*)[188] over a period of nearly fourteen centuries. Judges in Saudi Arabia consult these books (especially those considered to be the primary sources in each Islamic school of law) in order to formulate their rulings.[189]

For the purposes of this article, it is important to understand that court precedents and State legislation are secondary to Shariʿa in Saudi Arabia. Therefore, Saudi law does not have a system of judicial precedent, and judges have the power to apply their own interpretations to Shariʿa.[190] In areas such as the appointment of women or non-Muslims as arbitrators, the prohibition against interest and uncertainty in Shariʿa, and the extent to which public policy applies in arbitration, the Saudi legal system is unclear on the extent to which Shariʿa applies. This is especially true in matters of international and domestic commercial law, and this lack of clarity often impacts on the Saudi economy.[191]

Eijk observes that "[f]or foreign investors, uncertainties surrounding the content of Saudi commercial law, especially as to its fundamental [S]hariʿa component, causes various problems and insecurities. The situation is, of course, highly disadvantageous for the Saudi economy."[192] This is due to the ongoing uncertainty that the lack of judicial precedent causes in the area of contemporary ICA. The lack of certainty and predictability surrounding Saudi laws is also due to the fact that the Saudi Arabia is an absolute monarchy. Article 67 of the *Basic Law of Governance* stipulates that the King and his relevant authorities can issue regulations if it is in the public interest and does not contradict Shariʿa:

> [t]he regulatory authority shall have the jurisdiction of formulating laws and rules conducive to the realization of the well-being or warding off harm to State affairs in accordance with the principles of the Islamic *S*hariʿah. It shall exercise its jurisdiction in accordance with this Law, and Laws of the Council of Ministers and the Shura Council.[193]

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[188] *Ulama* or Muslim scholars are also transmitters of religious knowledge for Sunni Muslims. *See* SAEED, THE QUʿRAN, *supra* note 2.

[189] Ansary, *supra* note 185.

[190] Eijk, *supra* note 12, at 161–62.

[191] *Id*. at 167.

[192] *Id.* (emphasis added).

[193] Basic Law of Governance, Royal Decree No. A/90, March 1, 1992, art. 67, *in* Official Gazette of Saudi Arabia, March 5, 1992, No. 3397, p. 11 (World Intellectual Property Organisation trans.),

However, the Saudi legal system also consists of several different judicial bodies that have been recently been subject to reform.[194] For example, the Royal Order replaced the previous judicial system in Saudi Arabia with a new court system as follows:

1. High Court
2. Court of Appeal; and
3. First Degree Courts consisting of:
    a. General Courts;
    b. Criminal Courts;
    c. Personal Status Courts;
    d. Commercial Courts;
    e. Labor Courts; and
    f. Enforcement Courts.[195]

In addition, the Saudi Arabian legal system comprises of judicial bodies that exist parallel to the court system and report directly to the King, such as the Board of Grievances or *Diwan al-Mazalim* ("*Diwan*" or "Board of Grievances"). The Board of Grievances is independent of the Ministry of Justice, which is a body that administers the abovementioned courts, and was created to deal with the heavy caseload of Saudi courts.[196] It is an administrative and judicial body, which initially heard disputes to which the government, or a government entity, was a party. Currently, the Board of Grievances has jurisdiction to hear administrative disputes and arbitration matters. The Board is also authorized to enforce foreign judgments and arbitral awards.[197] Another independent judicial body is the Committee for the Settlement of Banking Disputes of the Saudi Arabian Monetary Agency, which was created to settle disputes in which banks are parties.[198] However, this Committee often does not adhere to strict Shariʿa principles. Baamir notes that the contradiction between Shariʿa and Saudi law "has caused a great deal of uncertainty in relation to arbitration and litigation, as the teachings of Shariʿa prohibits all forms of banking interest, conventional

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http://www.wipo.int/edocs/lexdocs/laws/en/sa/sa016en.pdf. Saudi Arabia Basic Laws of Governance, No: A/90, art. 67 (Mar. 1, 1992).

194 Ansary, *supra* note 185.

195 *Id.*

196 BAAMIR, *supra* note 51, at 22–24. Ansary, *supra* note 185.

197 Ansary, *supra* note 185.

198 *Id.*

insurance, sales of tobacco products, and the Saudi law does not enforce this prohibition in daily life."[199]

Interestingly, in 2014, a Royal Order issued by King Abdullah established a committee, that consisted of Islamic experts, researchers, and judicial officers, which was given the task of codifying Shariʿa rules to aid judicial officers.[200] Ansary notes that "[t]he committee is required to adhere to the rules of the Islamic Shariah and follow a scientific approach in weighting the opinions of the Islamic schools of law. All the codified material must be supported by evidence from Shariah texts and the 'ijtihad' of religious-legal scholars."[201] The reason this Royal Order is interesting is because, through the process of ijtihad, Islamic scholars in Saudi Arabia often make rulings that are not based on the Qurʿan, hadith or Islamic schools of law. According to Vogel, "Saudi judges ordinarily adhere to Hanbali legal positions, but . . . they are free to adopt views from others schools, or even from outside the four schools altogether, as long as they base their view, following proper interpretive procedures, on the Qurʿan and sunna."[202]

These interpretative procedures are criticized by commentators such as El Fadl who argues that the Saudi government justifies its legal positions on the basis of "blocking the means to evil" and that "the idea of preventive or precautionary measures (*al-ihtiyat*), could be exploited to expand the power of the state under the guise of protecting the Shariʿah."[203] This may be evident by the *fatwas* delivered by Islamic scholars through two public agencies established by the government in 1971. These two agencies are: (1) the Board of Senior Ulama (Islamic scholars); and (2) the Permanent Committee for Scientific Research and Legal Opinions.[204] These two institutions consist of Islamic scholars who interpret Shariʿa, and their *fatwas* which are available on the Saudi government's online portal called, "Portal of the General Presidency of Scholarly Research and *Ifta*." *Ifta* refers to the declaration of a *fatwa*, which the Saudi government enforces through the Committee for

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[199] Baamir, *supra* note 164, at SA-9.

[200] Dr. Abdullah F. Ansary, *A Brief Overview of the Saudi Arabian Legal System*, GLOBALEX (2015), http://www.nyulawglobal.org/globalex/Saudi_Arabia1.html.

[201] *Id*.

[202] VOGEL, *supra* note 79, at 10

[203] Khaled Abou El Fadl, *Islam and the Challenge of Democracy*, BOSTON REV., Apr.–May 2003, http://bostonreview.net/archives/BR28.2/abou.html.

[204] MUHAMMAD AL-ATAWNEH, WAHHĀBĪ ISLAM FACING THE CHALLENGES OF MODERNITY at xiv (Bernard Weiss ed., Vol. 32, 2010).

Commanding Right and Forbidding Wrong or the *mutawwiʿa* (religious police).[205] People who do not abide by the religious rulings in Saudi Arabia are punished by the State.[206] For example, one *fatwa* published online states that women should not drive cars, because it could lead to adultery, which is viewed as a sinful act that is forbidden in the Qurʿan and hadith.[207] This *fatwa* has been implemented in Saudi law despite the fact that it is not a view shared by the majority of Muslim scholars internationally.[208]

In fact, according to Al-Atawneh, Saudi *fatwas* are often inconsistent because "[w]hen dealing with modern innovations and political issues, Saudi Arabian muftīs are relatively open and liberal, whereas, in the realms of social norms (e.g., ritual, the status of women), they maintain a 'Puritanical' Wahhabi approach."[209] El Fadl also notes that the

> claim of precautionary measures (blocking the means) is used today in Saudi Arabia to justify a wide range of restrictive laws against women, including the prohibition against driving cars. This is a relatively novel invention in Islamic state practices and in many instances amounts to the use of Shariʿah to undermine Shariʿah.[210]

El Fadl's critique that the Saudi interpretation of Shariʿa undermines the objectives of Shariʿa (maqasid Al-Shariʿa) will be discussed in more detail below.

In order to understand the Saudi interpretation of Shariʿa, it is important to recognize the influence of two eminent Hanbali scholars in Saudi Arabia—Ibn Taymiyya and Ibn Abd al-Wahhab.[211] In 1745 CE, Ibn Abd al-Wahhab, who founded the Wahhabism[212] movement, asked the Saudi prince, Ibn Saud (deceased 1765 CE) to actively reform Islamic thought in accordance with his teachings.[213] With Ibn Saud as the political leader and Ibn Abd al-Wahhab as the spiritual leader, the reform

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[205] *Id.* at 2.

[206] *Id.*

[207] Abdul-ʿAziz ibn ʿAbdullah ibn Baz, *Fatwas of Ibn Baz*, *Vol. 3*, KINGDOM OF SAUDI ARABIA http://www.alifta.com/Fatawa/FatawaChapters.aspx?languagename=en&View=Tree&NodeID=135&PageNo=1&BookID=14 (last visited Nov. 26, 2018).

[208] *See generally* El Fadl *supra* note 203.

[209] AL-ATAWNEH, *supra* note 204.

[210] El Fadl, *supra* note 203.

[211] VOGEL, *supra* note 79, at xv.

[212] Vogel notes that the term 'wahabbism' is in fact rejected by the movement itself and is a modern terminology. *See* VOGEL, *supra* note 79, at xvi n.12.

[213] *Id.* at xv; Eijk, *supra* note 12 at 141–43.

was initially successful and spread over most of the Arabian Peninsula until it was overthrown by the Ottoman Empire in 1819 CE.[214] However, the Wahhabi movement was revived in 1902 CE when another Saudi prince, Abd al-Aziz (deceased 1953 CE) took over the Arabian Peninsula and founded the Kingdom of Saudi Arabia in 1932 CE.[215]

The newly founded modern nation of Saudi Arabia was heavily influenced by the ideas of Wahabbism. The ideology of Wahabbism is a puritanical and legalistic approach to Islam because it believes in a return to the practices of the salafs, the original followers of Islam, and stems from the ideology of *Salafism*. Many Sunni Islamic scholars argue that the original followers of Islam, the salafs, consisted of "rightly-guided successors" of the Prophet Muhammad, being the first four Sunni caliphs: Abu Bakr al-Siddiq (deceased 634 CE), Umar al-Khattab (deceased 644 CE), Uthman Affan (deceased 656 CE), and Ali Abi Talib (deceased 661 CE).[216] This concept is based on the following hadith,[217] in which the Prophet Muhammad said the following:

> [t]he best people are those living in my generation, and then those who will follow them, and then those who will follow the latter[218] . . . you must keep to my [s]unnah and to the [s]unnah of the Khulafa ar-Rashideen (the rightly guided caliphs), those who guide to the right way. Cling to it stubbornly (literally: with your molar teeth). Beware of newly invented matters (in the religion), for verily every bidah (innovation) is misguidance.[219]

Other Islamic scholars argue that "rightly-guided" successors is a broad concept, and refers to all the Islamic scholars succeeding the Prophet Muhammad, or the companions of the Prophet Muhammad.[220] Hassim observes that "[t]he best opinion is all of the above. 'Rightly-guided successors' refers to the Four Caliphs first and foremost, then the remainder of the Companions, followed by the successors and scholars who observed their way in religion."[221]

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[214] VOGEL, *supra* note 79, at xv.

[215] *Id.* at xvi.

[216] This view is taken by classical Islamic scholars: al-Tahawi (deceased 935 CE), al-Nawawi (1278 CE), al-Mubarakafuri (1353 CE), Ibn Abi al-Izz (1390CE), Ibn Rajab (1393 CE). *See* EEQBAL HASSIM, ORIGINS OF SALAFISM IN INDONESIA: A PRELIMINARY INSIGHT 11 (2010).

[217] Plural of *hadith*.

[218] SAHIH BUKHARI, Vol. 5, Book 57, No. 3, http://www.sahih-bukhari.com/Pages/Bukhari_5_57.php.

[219] HADITH NAWAWI, Vol. 40, Hadith 28, http://sunnah.com/nawawi40/28. (emphasis added).

[220] HASSIM, *supra* note 216.

[221] *Id.*

Wahabbism emphasizes the primacy of the Qurʿan and sunna when deducing Shariʿa rules, and rejecting certain mystical practices (i.e., rituals followed by certain branches of Sufism, such as shrine worshipping), which are considered *bidah* (innovation).[222] For example, Vogel notes that Ibn Abd al-Wahhab claimed that if the literal meaning of a hadith was valid according to Islamic scholars, then the statement in the hadith must be followed even if the four schools of thought have a different interpretation of the hadith.[223] Therefore, Wahabbis accept the Hanbali school of law only to the extent that Hanbali scholars are strictly following the Qurʿan, sunna or hadith, legal opinion of the companions of the Prophet (and if there is a difference of opinion, whichever view is most consistent with the Qurʿan and sunna), and if necessary, *qiyas*.[224] One of the sons of Ibn Abd Al-Wahhab states that although the Hanbali school of thought should be followed, it is unnecessary to follow a school of thought, if there is a clear text in the Qurʿan or sunna.[225] The Qurʿan and sunna are considered more valid than the view of a certain school.[226]

VI. INDEPENDENT REASONING (*IJTIHAD*) OR IMITATION (*TAQLID*)?

As noted above, Ibn Abd al-Wahhab was heavily influenced by the prominent Hanbali scholar, Ibn Taymiyya, who believed in ijtihad or "independent reasoning" as a tool for interpreting the Shariʿa, as opposed to strict adherence to doctrine (taqlid).[227] Ijtihad stems from the root word "jahada" which means "striving, or self-exertion in any activity which entails a measure of hardship."[228] Kamali further defines ijtihad as "the total expenditure of effort made by a jurist in order to infer, with a degree of probability, the rules of Shariʿah from their detailed evidence in the sources."[229] However, the process through which ijtihad is used as a tool to determine rules of Shariʿa depends on whether scholars approach ijtihad in a manner that is literalist or contextual.

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[222] VOGEL, *supra* note 79, at xvi.
[223] *Id.* at 72.
[224] *Id.* at 73.
[225] *Id.* at 74.
[226] *Id.*
[227] SCHACHT, *supra* note 1, at 72; VOGEL, *supra* note 79, at xv.
[228] MOHAMMAD HASHIM KAMALI, PRINCIPLES OF ISLAMIC JURISPRUDENCE 367 (1991).
[229] *Id.*

Ibn Abd al-Wahhab and Ibn Taymiyya took a literalist interpretation of the Qurʿan and hadith regarding theological matters. An example of Ibn Taymiyya's literalist approach is noted in his book *Majmu al-Fatawa al-Kubra* ("The Great Compilation of Religious Rulings") in which he states:

> The way of the Salaf is to interpret literally the Qurʿanic verses and hadith that relate to the Divine attributes (*ijraʿ ayat al-sifat wa ahadith al-sifat ʿala zahiriha*), and without indicating modality and without attributing to Him anthropomorphic qualities (*maʿ nafy al-kayfiyya wa-l-tashbih*). So that one is not to state that the meaning of "hand" is power or that of "hearing" is knowledge.[230]

This literalist approach was taken by many followers of the Salafiyya movement (also referred to as the "reformers"), which arose in the late nineteenth century, and which also advocated a return to the way of the original followers of Islam by utilizing ijtihad and rejecting adherence to doctrine or imitation.[231] Interestingly, classical Hanafi scholars often debated matters such as whether God's attributes, as mentioned in the Qurʿan, should be interpreted metaphorically or literally. One Hanbali scholar, Abd al-Rahman Ibn al-Jawzi (deceased 1201 CE), argued against other Hanbali scholars by stating that God's attributes should be interpreted metaphorically.[232] Therefore, even within one movement or school of thought, Islamic scholars may take a different approach to matters of Islamic theology (*kalam*) and creed (*aqidah*).[233]

Although they overlap in many matters, one difference between the Salafi and Wahabbi movements is that the latter generally follows the Hanbali school of thought and advocates ijtihad. On the other hand, there is a division between the Salafis as to whether a school of law (*maddhab*) should be followed. For example, some Salafis follow the companions of the Prophet Muhammad, their successors, and the founders of the four schools of thought.[234] Other Salafis believe that Ibn Taymiyya advocated

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[230] TAQI AL-DIN IBN TAYMIYYA, MAJMU AL-FATAWA AL-KUBRA 152 (1966). For a more detailed analysis of Ibn Taymiyya's views, see ABD AL-RAHMAN IBN AL-JAWZI, THE ATTRIBUTES OF GOD (Abdullah Bin Hamid Ali trans., 2016). *See also* JOHN HOOVER, IBN TAYMIYYA'S THEODICY OF PERPETUAL OPTIMISM (2007).

[231] SCHACHT, *supra* note 1, at 73.

[232] *See generally* IBN AL-JAWZI, *supra* note 230.

[233] *See* HALLAQ, LEGAL THEORIES, *supra* note 19, at 135–43.

[234] HASSIM, *supra* note 216, at 14.

the way of the original followers of Islam (*salaf*) over imitation (*taqlid*) of the four schools of thought.[235]

The argument regarding imitation (taqlid) or independent thinking (ijtihad) is important because it defines and formulates Shariʿa rulings on matters, especially the extent to which the four schools of thought should be followed. This argument arose between the tenth and thirteenth centuries when Abu Hanafi, Malik, Hanbal, and Shafii decided that the religious rulings were comprehensive enough and there was no longer a need to practice independent reasoning (ijtihad).[236] Many contemporary commentators, including Schacht, view this era as the "closing of the door of ijtihad."[237] Therefore, while a mufti (Muslim legal expert) may issue a *fatwa*, the mufti must refer to the four schools of thought when issuing an opinion as opposed to a mujtahid who works with the Qurʿan and hadith.[238]

On the other hand, other scholars such as Hallaq argue that ijtihad remained an integral part of Sunni Islam, and it was only groups such as the "people of the hadith" and "traditionalists" who believed in strict adherence to imitation (*taqlid*).[239] Similarly, Rabb states:

> The settling of the major areas of Islamic law gave rise to the perception, prevalent among many modern Western scholars and Sunni lay Muslims, that jurists had come to a consensus that the so-called "gate of ijtihad" was closed at the beginning of the tenth century. As a result, ijtihad had come to be thought of as the opposite of *taqlid*, rather than the two working in tandem as before . . . However, any perception of an *absence* of or *bar* to ijtihad has been shown by recent scholarship to be without foundation. There exists no evidence of such a closure or even the possibility of such a closure given the diffuse nature of juristic authority. There certainly was no consensus to that effect. To the contrary, evidence shows that the practice of ijtihad continued throughout the centuries, as expressed through *fatwa*s, commentaries, and glosses on settled legal texts.[240]

Ibn Taymiyya's argument that the "gates of independent thinking (ijtihad)" should remain open was also followed by Islamic scholars of the nineteenth century, Jamal al-Din al-Afghani (deceased 1897 CE) and

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[235] Bernard Haykel, *On the Nature of Salafi Thought and Action*, *in* GLOBAL SALAFISM: ISLAM'S NEW RELIGIOUS MOVEMENT 33, 45–46 (Roel Meijer ed., 2009).

[236] HUSSAIN, *supra* note 19, at 46; SCHACHT, *supra* note 1, at 69–71.

[237] SCHACHT, *supra* note 1, at 71.

[238] BERNARD G. WEISS, THE SPIRIT OF ISLAMIC LAW 135 (3d ed. 1998).

[239] Hallaq, *Gate*, *supra* note 10, at 7–9.

[240] Intisar A. Rabb, *Ijtihad*, *in* 2 THE OXFORD ENCYCLOPEDIA OF THE ISLAMIC WORLD 522, 524–25 (John L. Esposito ed., 2009).

Muhammad ʿAbduh (deceased 1905 CE) from Egypt, and twentieth century scholar, Muhammad Iqbal (deceased 1938 CE), as well as, Sayyid Ahmad Khan (deceased 1898 CE) from the Indian subcontinent.[241] Although these scholars agreed with the idea of ijtihad, they were not literalists when it came to theological matters. They were more concerned with the "renaissance of Muslim society" and in a Muslim "enlightenment."[242] Saeed argues that "[f]or these scholars, the modern context demanded a reappraisal of the intellectual heritage of Muslims that required giving up the practice of blind imitation (*taqlid*), which they argued was common among Muslims of their time."[243] Over the 20th and early 21st centuries, a number of Muslim thinkers have also applied the contextual approach, or contextual ijtihad, to interpreting the Qurʿan.[244] Such scholars include Fazlur Rahman (deceased 1988 CE), Muhammad Asad (deceased 1992 CE), and Abdullahi An-Naim[245] and believe the Qurʿan should be interpreted contextually due to the importance of the sociological and historical context of the Qurʿan and hadith.[246]

Therefore, Saeed categorizes ijtihad into the following methods: text-based ijtihad*,* which is the classical approach to ijtihad; eclectic ijtihad; and context-based ijtihad, which is referred to in the modern world but stems from the early Islamic period.[247] Text-based ijtihad or the "textualist approach,"[248] addresses new legal issues by heavily relying on principles of jurisprudence under Shariʿa as well as the Qurʿan, hadith, or the view of a school of thought.[249] On the other hand, "eclectic ijtihad" does not strictly adhere to textual sources of Shariʿa or principles of jurisprudence and therefore, can result in conclusions that are often *ad*

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[241] HUSSAIN, *supra* note 19, at 48–49; Haykel, *supra* note 235, at 46–47. SAEED, CONTEXTUALIST APPROACH, *supra* note 22, at 21 (the extent to which ijtihad was practiced by these scholars is not discussed in this thesis).

[242] Haykel, *supra* note 235, at 46–47.

[243] SAEED, CONTEXTUALIST APPROACH, *supra* note 22, at 21.

[244] *Id.* at 23.

[245] *See generally* ABDULLAHI AN-NA'IM, *Civil Rights in the Islamic Constitutional Tradition: Shared Ideals and Divergent* in ISLAM AND HUMAN RIGHTS: SELECTED ESSAYS OF ABDULLAHI AN-NA'IM (Mashood A. Baderin ed., 2010); FAZLUR RAHMAN, ISLAM & MODERNITY: TRANSFORMATION OF AN INTELLECTUAL TRADITION (1982).

[246] *See generally* SAEED, CONTEXTUALIST APPROACH, *supra* note 22.

[247] Abdullah Saeed, *Ijtihad and Innovation in Neo-Modernist Islamic Thought*, 8 ISLAM & CHRISTIAN-MUSLIM REL. 279, 282–83 (1997) [hereinafter Saeed, *Ijtihad*].

[248] SAEED, THE QUʿRAN, *supra* note 2, at 220.

[249] Saeed, *Ijtihad*, *supra* note 247, at 283.

hoc.[250] Context-based ijtihad or the "contextualist approach,"[251] heavily relies on the historical context of a problem, and scholars are directed by public interest (maslaha).[252] Although a scholar may apply all three methodologies, Saeed gives an example of the neo-Modernist[253] trend in Indonesia where scholars use context-based ijtihad to address modern problems.[254] The "context-based ijtihad" approach is also evident by the views of scholars such as Abd Al-Razzaq Ahmad Al-Sanhuri (1895–1971 CE), who heavily influenced the civil codes of Egypt, Syria, Iraq, Libya, and Kuwait.[255] Arguably, Sanhuri was using a form of contextual ijtihad when he reasoned that the prohibition under Shariʿa was against compound interest as opposed to simple interest.[256] Another form of ijtihad is known as 'collective ijtihad' or *ijtihad jamaʿi*, which is when a collective body of mujtahids create a religious ruling based on the Islamic concept of consultation (*shura*).[257] Although it is beyond the scope of this article to analyze the different forms of ijtihad and how they are implemented, it is important to understand that Shariʿa is a body of law subject to a variety of interpretations and has the ability to adapt to the evolutionary nature of society, which will be discussed in the next section.

VII. IJTIHAD, MASLAHA AND MAQASID AL-SHARIʿA

Ijtihad is a tool of Shariʿa through which the changing conditions of society can be addressed and contextual ijtihad considers the public interest or maslaha (also referred to as *istislah*) in order to ascertain

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[250] *Id.* at 283.

[251] SAEED, THE QUʿRAN, *supra* note 2, at 220.

[252] Saeed, *Ijtihad*, *supra* note 247, at 284.

[253] *See id.* at 284–90. "Neo-Modernist" is a term used by Saeed to identify contemporary intellectuals who advocate ijtihad, as opposed to dogmatism, believe that classical Islamic knowledge can exist in harmony with Western thought and believe in independent reasoning (ijtihad) and therefore, Islamic law should cater for modernity.

[254] *See id.* at 286. Examples provided is the view polygamy should no longer be permissible under *Shariʿa* despite the consensus among the four schools of thought that it is allowed and punishments under *Shariʿa* for criminal acts.

[255] Emad H. Khalil & Abdulkader Thomas, *The Modern Debate over Riba in Egypt*, *in* INTEREST IN ISLAMIC ECONOMICS: UNDERSTANDING RIBA 69, 73 (Abdulkader Thomas ed., 2006).

[256] *Id.*

[257] *See generally* Aznan Hasan, *An Introduction to Collective* Ijtihad (Ijtihad Jama'i): *Concept and Applications*, 20:2 THE AMERICAN JOURNAL OF ISLAMIC SOCIAL SCIENCES 26 (2003).

whether a legal decision is in the interests of contemporary society.[258] Imam Malik, the founder of the Maliki school of thought, referred to maslaha when he had to rule on an issue which was not addressed in the Qurʿan or hadith.[259] The companions of the Prophet Muhammad also referred to maslaha when they decided to establish taxation regimes, prison systems, and a financial currency in conquered territories because it was in the public interest, despite the fact that there were no provisions in the Qurʿan and/or hadith stipulating such systems.[260] Similarly, many *ahadith*[261] are cited to support the claim that legal decisions can be made in the public interest as long as they are not contrary to provisions of the Qurʿan and hadith.[262]

Two eminent classical Islamic scholars who elaborate on *maqasid al-Shariʿa* and maslaha include Al-Ghazali (deceased.1111 CE) and the Andalusian scholar, Shatibi (deceased.1388 CE). Al-Ghazali wrote at length about the concept of maslaha in his works, *Shifa al-Ghalil* and *al-Mustasfa*.[263] Al-Ghazali defines maslaha as a tool through which the objectives (maqasid) of Shariʿa are achieved. According to Al-Ghazali, the five objectives of Shariʿa include preservation of religion, life, intellect, lineage and property.[264] Therefore, the concept of public interest (maslaha) under Shariʿa public policy consists of higher objectives that are religious rather than secular and thus, not recognized under secular legal systems.[265]

Al-Ghazali categorizes maslaha as follows:

1. The "imperative" or "necessities" (*al daruriyyat*) which includes the preservation of the five objectives or maqasid of

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[258] TARIQ RAMADAN, IJTIHAD AND MASLAHA: THE FOUNDATIONS OF GOVERNANCE 5 (M. A. Muqtedar Khan ed., 2006).

[259] HALLAQ, SHARIʿA, *supra* note 21, at 109–110.

[260] KAMALI, *supra* note 228, at 271.

[261] Plural of *hadith*.

[262] For example, the following hadith: Aisha (wife of the Prophet) reports, "[w]henever Allah's Apostle was given the choice of one of two matters, he would choose the easier of the two, as long as it was not sinful to do so, but if it was sinful to do so, he would not approach it. . ." Sahih Bukhari, *Volume 4, Book 56, Number 760*, https://www.sahih-bukhari.com/Pages/Bukhari_4_56.php; The Prophet said "[t]here should be neither harming nor reciprocating harm," Hadith Nawawi, *Hadith 31*, http://sunnah.com/nawawi40; "Muslims will be held to their conditions, except the conditions that make the lawful unlawful, or the unlawful lawful." Jamiʿ at-Tirmidhi, *Vol. 3, Book 13, Hadith 1352*, http://sunnah.com/tirmidhi/15; KAMALI, *supra* note 228, at 269.

[263] KAMALI, *supra* note 15, at 124.

[264] TARIQ, *supra* note 27, at 5; *See also* KAMALI, *supra* note 15, at 124; *See also* Yasir Ibrahim, *Rashid Rida and Maqasid al-Sharia*, 102/103 STUDIA ISLAMICA, 157 (2006).

[265] Kutty, *supra* note 45, at 602.

Shariʿa.[266] For example, Shariʿa rules in relation to daily rituals such as prayer aim to achieve the overall objective of preserving religion, and rules regarding food and shelter aim to preserve life and intellect. Similarly, laws may be introduced if the necessities are threatened. [267]

2. Laws may also be reformed to address the needs (*al-hajiyyat*) of society in order to alleviate difficulties in the community.[268] One example is if ritual obligations under Shariʿa are causing illness or hardship such as fasting, then an individual does not have to abide by the law.[269] Hallaq notes that "[t]hese mitigated laws are *needed* in order to make the life and legal practice of Muslims tolerable."[270]
3. The notion of "improvements" or "perfecting" (*al-tahsiniyyat* and *al-kamaliyyat*) focuses on those parts of the law that perfect the customs and practices of people.[271] For example, laws in relation to charity are viewed as perfecting or improving the Shariʿa.

Shatibi further explains maslaha according to how consistent it is with the foundational texts of the Qurʿan and hadith. [272] If maslaha is consistent with foundational texts, it is known as accredited (*maslaha mutabara*) and if it contradicts the Qurʿan or hadith, then it cannot be taken into account and is referred to as discredited (*maslahah mulgha*).[273] On the other hand, if the Qurʿan or hadith are not clear on an issue then maslaha is classified as undetermined (*mursala*).[274] Ramadan observes that *maslaha mursala* means that scholars are able to "use their own analysis and personal reasoning in order to formulate a legal decision in the light of the historical and geographical context, using their best efforts to remain faithful to the commandments and to the 'spirit' of the Islamic legal corpus where no text, no 'letter' of the Law, is declared."[275]

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[266] KAMALI, *supra* note 228, at 269; *see also* TARIQ, *supra* note 27, at 6; HALLAQ, LEGAL THEORIES, *supra* note 19, at 168.
[267] HALLAQ, LEGAL THEORIES, *supra* note 19, at 168.
[268] *Id.* at 168; KAMALI, *supra* note 228, at 272. TARIQ, *supra* note 27, at 6.
[269] HALLAQ, LEGAL THEORIES, *supra* note 19, at 168; KAMALI, *supra* note 228, at 272.
[270] HALLAQ, LEGAL THEORIES, *supra* note 19, at 168.
[271] KAMALI, *supra* note 228, at 272.
[272] *Id.*
[273] *Id.*
[274] TARIQ, *supra* note 27, at 6.
[275] *Id.*

Shatibi also elaborates on the definition of maqasid al-Shariʿa in his seminal text, *Al Muwafaqat fi Usul al-Shariʿa* (the Reconciliation of the Fundamentals of Islamic Law),[276] in which he notes that the concept of maqasid al-Shariʿa can be further divided into dual objectives, depending on whether the concept of maqasid is explained through the perspective of God (maqasid al-shari), which include objectives such as worship.[277] Alternatively, maqasid may be viewed through the perspective of human beings (*maqasid al-mukallaf*), which include objectives relevant to life on earth such as employment and marriage. However, the objectives of God and human beings are not mutually exclusive because "the formulation of the laws is for securing interests of the servants (human beings) in both the here[278] and the Hereafter."[279] These objectives are further elaborated upon by Islamic scholars to include "deeper meanings" and "inner wisdom"[280] of the Shariʿa, and "the ultimate goals, aims, consequences, and meanings which the Shariʿah has upheld and established through its laws and consistently seeks to realize and materialize and achieve them at all times and places."[281] More contemporary Islamic scholars, such as Rashid Rida (deceased 1935 CE)[282] and Yusuf al-Qaradawi refer to maqasid al Shariʿa in the contemporary context to address issues of reform and the protection of human rights, such as the rights of women, in the context of women as arbitrators and witnesses.[283] Hallaq argues that Shatibi's theories on maqasid al-Shariʿa were later used by legal reformists because "[t]he uniqueness of Shatibi's theory, some scholars have argued, stems from the fact that Shatibi, realizing the failure of law in

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[276] *See generally* AL MUWAFAQAT FI USUL AL-SHARIʿA (1884) *translated in* IBRAHIM IBN MUSA ABU ISHAQ AL-SHATIBI, THE RECONCILIATION OF THE FUNDAMENTALS OF ISLAMIC LAW VOLUME II (Imran Ahsan Khan Nyazee trans., 2015).

[277] *Id.* at 3–4.

[278] *Id*.

[279] *Id.* at 3–4, 9–241 (elaborates on objectives and purposes related to god), 255–310 (discusses objectives of human beings).

[280] Mohammad Hashim Kamali, Maqasid al-Shari'ah *and* Ijtihad *as Instruments of Civilisational Renewal: A Methodological Perspective*, 2:2 ISLAM AND CIVILISATIONAL RENEWAL 245, 249 (2011).

[281] *Id.*

[282] Ibrahim, *supra* note 264, at 157. *Contra* HALLAQ, LEGAL THEORIES, *supra* note 19, at 254 (Hallaq argues that Rashid Rida's methodology places more emphasis on concepts of public interest (*masalaha*), necessity (*darura*) as opposed to relying on primary Islamic texts such as the Qurʿan and hadith).

[283] JASSER AUDA, MAQASID AL-SHARI'AH AS PHILOSOPHY OF ISLAMIC LAW: A SYSTEMS APPROACH 5 (2007).

meeting the challenges of socio-economic change in eighth-/fourteenth-century Andalusia, tried in his theory to answer the particular needs of his time by showing how it was possible to adapt law to the new social conditions."[284]

Therefore, contextual ijtihad, maslaha, and maqasid al-Shariʿa are potential reformative tools which are able to address contemporary issues which the Qurʿan or hadith are unclear or silent about. However, there has been much discussion among Islamic scholars in relation to who can interpret Shariʿa, and how rules of Shariʿa should be interpreted.[285] Abou El Fadl accurately notes:

> Value-based assumptions are founded on normative values that the legal system considers necessary or basic . . . Muslim jurists often asserted that the basic necessities are five essential values . . . religion, life, intellect, lineage and property . . . [t]hese were basic values or objects that the Shariʿah is supposed to satisfy or guard. However, this field remained underdeveloped, and the asserted values were not necessarily those actually served or protected by the juristic culture. Muslim jurists argued that the five basic values were derived solely through textual analysis, and this might explain the largely mechanical way that they asserted or defended them.[286]

For example, as noted above, Al-Ghazali argues that only a mujtahid with certain qualifications can exercise ijtihad. Furthermore, even when a mujtahid with the relevant expertise exercises ijtihad to come to a certain conclusion, they may approach the Qurʿan and hadith literally or contextually, depending on which interpretive approach they prefer, or they may have a different concept of what constitutes "public interest." This is evident in the literalist way Shariʿa is interpreted and implemented by the Saudi government and the Wahabbi movement. For this reason, contemporary scholars such as El Fadl argue that such interpretations have stagnated the classical approach to Shariʿa, which was creative and evolutionary in nature.[287]

Hallaq also argues that the implementation of Shariʿa is not possible in the postmodern world and that the true essence of Shariʿa can only be understood during the period in which it was the paradigm model of law, which includes the twelve centuries until the colonialist period

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[284] HALLAQ, LEGAL THEORIES, *supra* note 19, at 162–163.

[285] *See generally* KHALED ABOU EL FADL, SPEAKING IN GOD'S NAME: ISLAMIC LAW, AUTHORITY AND WOMEN (2001).

[286] *Id.* at 154–155.

[287] *Id.* at 264.

beginning in the nineteenth century.[288] He uses the example of modern day Iran, where Shariʿa is based on a Shiʿi interpretation of Islam, to argue that the contemporary Islamic state has

> disfigured Shar[i]ʿa's norms of governance, leading to the failure of both Islamic governance and modern state as political projects. Nor have the other Muslim countries fared any better, because the political organization they adopted from—and after—colonialism has been and remains authoritarian and oppressive and because their integration of Shar[i]ʿa as a mode of governance has hardly paid anything more than lip service to the original.[289]

Consequently, there is widespread disillusionment with the authoritarian implementation of Shariʿa in Muslim nation states, such as Saudi Arabia and Iran. For this reason, it is also important to understand that the form of Shariʿa implemented by Saudi Arabia is different to that adopted by Iran. Similarly, the *i-Arbitration Rules* developed by the KLRCA may have a different understanding of Shariʿa than the AAOIFI Standards. Islamic scholars may also come to different conclusions about Shariʿa rules based on their different views on the Shariʿa-compliant nature of certain Islamic finance products.

Shariʿa is subject to varying interpretation and implementation and depends greatly on the country, the legislation, the Islamic legal scholar, the arbitrator, and the disputing parties. Contemporary scholar Jonathan Brown examines how debates over the interpretation of Shariʿa have existed throughout the history of Islamic civilization, and still exist in the contemporary world are often influenced by political considerations.[290] Therefore, when analysing Shariʿa's application to contemporary ICA, this article argues that Shariʿa is not stagnant, but rather subject to a variety of different interpretations, and is likely to evolve and reform through its own sources of law and legal theories such as ijtihad, maslaha, and maqasid al-Shariʿa.

VIII. CONCLUSION

Shariʿa as a conceptual framework for divine law is applied and understood in various ways. This article refers to the term "classical Shariʿa" as a body of Islamic jurisprudence based on the four schools of

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[288] WAEL HALLAQ, THE IMPOSSIBLE STATE 2 (2013).

[289] *Id.* (emphasis added).

[290] *See generally* BROWN, *supra* note 18.

thought. Nevertheless, there is a strong argument that mujtahids may also use independent reasoning (ijtihad) to address contemporary issues. Since Shariʿa is not codified and is subject to multiple interpretations, this can often cause confusion and inconsistency as to which form of Shariʿa is applicable to contemporary ICA. Islamic scholars should revive and employ principles of jurisprudence such as contextual ijtihad, maslaha and maqasid al-Shariʿa to further develop Shariʿa rules on international commercial arbitration, which have the ability to be consistent with contemporary ICA principles. Due to the concept of party autonomy, parties agreeing with the approach used by Islamic scholars could choose to apply these rules if they wish to conduct their arbitration in a Shariʿa-compliant way. However, issues may arise in relation to whether Shariʿa is a body of law, which will be recognized and accommodated by contemporary ICA and this is a matter that needs to be explored further by academics and practitioners.