

Modernization, Codification and the Judicial Analysis:  
Exploring Predictability in Law in Sharī‘a Courts in Saudi Arabia

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**Abstract**

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The Kingdom of Saudi Arabia is undergoing a process of rapid, profound social transformation and economic development. As a result, some Saudis have argued that the legal system of Saudi Arabia should also undergo a profound transformation to meet the requirements of the rapidly changing society. In particular, some have advocated the idea of “codifying” the version of Islamic law, or Sharī‘a, that is recognized as the law of Saudi Arabia. This argument is justified in part by the ability of codification to enhance predictability in the legal system that the current traditional analysis of Sharī‘a law within Sharī‘a Courts does not offer, as argued by some Saudi progressives. While many other Islamic countries have done just that, the idea of codifying Sharī‘a is much more controversial in Saudi Arabia. This dissertation explores the actual status of predictability within the current judicial analysis of Sharī‘a Courts focusing on the perspective of the Saudi lawyers. The dissertation also explores why the idea of codification is so intensely controversial within Saudi Arabia.

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Haitham  
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Seattle, U.S.A.

## **Translation and Transliteration Guide**

In writing Arabic words and phrases in this dissertation, the method used is the protocol that is fully described in the “Transliteration Schemes for Arabic Scripts” that is approved by the Library of Congress and the American Library Association (ALA-LC) and that is used by scholars and academicians in the field of Arabic and Islamic related studies, i.e. Near and Middle Eastern Languages and Civilizations Studies.<sup>1</sup> If the situation is not covered by the ALA-LC, the rules of the “Protocol of the International Journal for Middle East Studies” (IJMES) are followed.<sup>2</sup> This occurs in the following situations:

### **1. Pluralizing Arabic Words:**

The ALA-LC does not address the issue of pluralizing Arabic words, such as *faqīh*. However, this issue is addressed by the IJMES; consequently, the protocol of the IJMES is followed. The IJMES rule is to Romanize the plural and not to Anglicize it. Accordingly, the plural of *faqīh* should be written as *fuqahā'*, not *faqīhs*. However, exceptions may be made if there is a good reason, such as if the word is found in the “List of the Arabic Words provided by Merriam-Webster’s Collegiate Dictionary” (LAW) created by the IJMES and thus not fully transliterated. For example, according to LAW, the plural of the word “*mufti*” is Anglicized as “*muftis*”, while the plural of “*‘ālim*” is Romanized as “*‘ulamā'*.”<sup>3</sup>

### **2. The *Nisba* (Attribution):**

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<sup>1</sup> Can be found at: <http://www.loc.gov/catdir/cpsd/romanization/arabic.pdf>

<sup>2</sup> Can be found at: <http://web.gc.cuny.edu/ijmes/pages/transliteration.html>

<sup>3</sup> The List of the Arabic Words provided by Merriam-Webster’s Collegiate Dictionary can be found at: <http://web.gc.cuny.edu/ijmes/docs/WordList.pdf>

Another example is the issue of the *nisba* (attribution), which is also not addressed by the ALA-LC. The IJMES's rule in this regard is that "the *nisba* ending is rendered *-iyya* in Arabic (e.g., *mişriyya*)." Therefore, the IJMES's rule is followed.

### **3. The *Tā' Marbūṭa* [ة] Rule:**

The rule of the Arabic *tā' marbūṭa* [ة] is more accurate in the IJMES, as it renders the *tā' marbūṭa* 'a' not 'ah.' Therefore, it is followed.

### **4. The Prefixes:**

The inseparable prefixes are connected with words that follow through a hyphen, such as *bi-*, *wa-*, *li-*, *la-*. For example: *fi al-'irāq wa-miṣr*.

### **5. Common Arabic Name Connectors:**

Connectors in names such as *bin*, *ibn* and *abu* are always lower case, unless they appear in the beginning of the sentence. Examples include '*Abd al-'Aziz bin 'Abd al-Raḥmān*', but: *Bin Abd al- Raḥmān* when these connectors appear in the beginning of the sentence.

## Glossary

TERM	DEFINITION
<i>Fiqh (n.)**</i>	The collection of scholars' legal understandings of the sacred texts.
<i>Ijtihād (n.)</i>	The process of deriving the rule from the sacred text performed by religious scholars.
<i>Madh'hab (n.)</i>	Doctrine or school of legal interpretation based on a certain methodology; <i>madhāhib</i> (p).
<i>Mujtahid (n.)</i>	Religious scholar who performs ijtihād
<i>Qādī</i>	Sharī'a judge; <i>qādīs</i> (p).
<i>Qiyās (n.)</i>	Legal analogy.
<i>Sharī'a (n.)</i>	Islamic jurisprudence. The sources of Sharī'a are the Qur'ān and the Sunnah.
<i>Shaykh (n.):</i>	The knowledgeable person in a religious matter (religious scholar) equivalent to a "mullah" in some Islamic communities.
<i>Shūra (n.):</i>	Consultation (n); <i>shūri</i> (adj.).
<i>Sunna (n.):</i>	The words, actions, and approvals of Prophet Mohammed; <i>Sunan</i> (p).
<i>Ta'zīr (n.):</i>	Disciplinary punishment that is not stated in sacred text.
<i>Taqlīd (n.):</i>	Following someone else's ijtihād. The followed person here is supposed to be more knowledgeable and experienced in <i>fiqh</i> and the methodology of interpreting the sacred text.
<i>'Ulamā' (p.):</i>	Religious scholars; <i>'ālim</i> (s).

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\*\* "n": noun; "s": singular; "p": plural; "adj.": adjective.

## **Introduction**

Saudi Arabia approved Sharīʿa law as the supreme law of the land. For the most part, this is due to an old historical agreement between its political and religious leaders. All of the Saudi policies and regulations revolve around compliance with Sharīʿa teachings as understood by Saudi religious scholars. The legal system is one of the governmental institutions that is fully controlled by the Sharīʿa scholars. Thus, the Sharīʿa Court system adopts a traditional style for its judicial analysis that resembles neither the analysis used in civil law system nor in the common law system. However, the Judicial Board in Saudi Arabia issued an order in 1928, that was later ratified by the King, to enforce a specific methodology that included a certain staged order for Sharīʿa judges to follow in their endeavor to produce rulings that were consistent and grounded in a common responsiveness to principles of decision and use of law.

Although this worked well when Saudi Arabia was a young, emerging state, the situation changed after the discovery of oil, as Saudi Arabia entered a new era of modernization for its institutions. Saudi Arabia is undergoing a rapid transformative process in seeking an overall modernization of its agencies. Under this umbrella, calls are occasionally made by progressives inside and outside Saudi Arabia to reform and modernize the legal system by replacing the current traditional methodology of judicial analysis in the Sharīʿa Court with a code. In their call for codification, these progressives are inspired by the international and regional codification experiences. One of the main purposes for enforcing a code is to ensure predictability in laws and rulings.

In this dissertation, a theoretical and empirical exploration of the current judicial analysis in the Sharīʿa Court in Saudi Arabia has shown that Sharīʿa judicial analysis is to some degree

predictable in theory as well as in practice for those lawyers with adequate amount of Sharī‘a knowledge. It has also shown that lack of adequate Sharī‘a knowledge is what prevents some lawyers from forming positive perspective and, therefore, enhancing the sense that confusion, vagueness and ambiguity characterizes Sharī‘a jurisprudence. This divergence in perceptions causes continues miscommunication and discomfort in dealing with the Sharī‘a court system between the two groups who are supposed to belong to the same legal profession.

## Chapter One: Introduction

### I. Historical Background

The Kingdom of Saudi Arabia, which has a relatively new and modern constitutional system created by the Basic Laws issued in 1992, adopts a much more conservative version of Islam than other Islamic nations for two reasons. First, Saudi Arabia is the guardian of the holy Islamic places or “*bilād al-ḥaramain*” as Muslims like to call it, which literally means “the land of the two shrines.”<sup>4</sup> Consequently, the observance and the application of Islam within the country are highly visible and are scrutinized by the entire Muslim world. Saudi Arabia and its leaders are cognizant of the importance attached to their rulings and hold their responsibility as the arbiters of Islamic law as a sacred trust.<sup>5</sup> Both individuals and governments look to Saudi Arabia through this scope to define the orthodox “Islamic way” of doing things. Reflecting its position, the founder of the current Saudi state, King ‘Abd al-‘Azīz (d.1953), chose Islam as the official religion of the state at its foundation in 1932. The second reason for adopting a conservative form of Islam is the historical partnership that ties Saudi Arabia’s political and religious institutions. This partnership was first formed in 1744 between the founders of the state when the Emir of *al-Der‘iyya*,<sup>6</sup> Mohammad bin Sa‘ud (d.1765),<sup>7</sup> entered into an agreement, which was later known as “*al-Der‘iyya* Agreement,” with Shaykh Mohammad bin ‘Abd al-

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<sup>4</sup> “Al-Haramain” (*plural*) are the locations of the two holiest places in Islam, Mecca and Medina, and the destination for countless pilgrims among more than a billion Muslims to perform Hajj (Islamic pilgrimage.)

<sup>5</sup> For example, see footnote number 9.

<sup>6</sup> The Family of Sa‘ud settled in al-Der‘iyyah as emirs in 1446. See ABD AL-RAHIM ABD AL-RAHIM, *THE FIRST SAUDI STATE*, 233 (1999).

<sup>7</sup> He is the great grandfather of the current Saudi King. See 6 KHAYR AL-DIN AL-ZIREKLEY, *AL- A’LĀM: BIOGRAPICAL DICTIONARY*, 138 (1979).

Wahhāb (d.1792.)<sup>8</sup> The goal of this agreement was for the political leader to protect and support the religious leader, while the religious leader spread the teachings of the “*true Islam*.” In return, the religious leader would have to grant religious legitimacy to his political partner, declaring him the legitimate ruler to be followed and obeyed. This agreement continues to place the political leader in a unique position. He has been always declared to be the guardian of the tenets of the correct and true Islam.

The religious nature of the governing system in the Kingdom is indisputable and has been stated countless times in the speeches, interviews and official documents of the leaders of the country.<sup>9</sup> This nature was passed down through the generations in the form of customary and social practices until it was officially documented in 1992, when King Fahad (d.2005) ratified the Basic System of Governance. Article 1 of this Basic System clearly defines the country as an “Islamic State.”<sup>10</sup> Article 55 establishes Sharī‘a as the set of laws on which the authority of the king is based and which he shall use in governing the country.<sup>11</sup> Although the importance of Islam is recognized in the constitutions of many Muslim countries, Saudi Arabia is different in the degree to which collaboration between the sovereign and the religious authorities legitimates

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<sup>8</sup> He is the founder of the biggest reforming movement in the modern history of the Arabian Peninsula and the author of several books about its key literature, such as “*Kitab al-Tawhid*,” [Book of Monotheism] “*Kashf al-Shubuhāt*,” [Uncovering of Uncertainties] and “*Ussul al-Iman*” [The Principles of Faith]. See 6 AL-ZIREKLEY, *supra* note 7, at 257.

<sup>9</sup> For example, in 1936 King ‘Abd al-‘Azīz told Rome Landau: “Every good and just policy should be based on religion [Islam] otherwise it will not be good and just. You cannot separate politics from ethics. I do not think there is a separation between the two and I do not see it. Islam represents a very important authority in our existence and inside our policy, but Islam has changed. I only seek to return the Islamic values that derived from the Holy Qur’an and the Sunna of our Prophet (PBUH). They are the two sources upon which our issues are based in the Kingdom of Saudi Arabia.” YVES BESSON, IBN SAU‘D MALIK AL-SAHRA’: TA‘SIS AL-MAMLAKAH AL-‘ARABIYYA AL-SAU‘DIYYA [IBN SAU‘D: THE KING OF DESERT: THE FOUNDATION OF THE KINGDOM OF SAUDI ARABIA], 121 (Abdullah al-Dailami and Abdullah al-Arabi trans., King Abdulaziz General Library Press 1999).

<sup>10</sup> Article 1 of the Saudi Basic Law of Governance reads: “The kingdom of Saudi Arabia is a sovereign Arab Islamic state. Its religion is Islam, and its constitution is the holy Qur’an and the Prophet’s (peace be upon him) Sunna (traditions).” See <http://www.mofa.gov.sa/Detail.asp?InNewsItemID=35297>.

<sup>11</sup> Article 55 of the same law reads: “The King shall undertake to rule according to the rulings of Islam and shall supervise the application of Sharī‘a, the regulations, and the State’s general policy as well as the protection and defense of the country.”

the state. Unlike Iran, which is formally a theocracy, the Saudi constitution presumes that the king and the religious authorities will share power and actively collaborate in governing the country.

## II. The Sharī'a Courts (*al-Mahākīm al-Shar'iyya*)

The Law of the Judiciary of 1975 and of 2007 as well as the Basic Law of 1992 formally re-organize the structure of the Sharī'a Courts (*al-Mahākīm al-Shar'iyya*), position them as the official courts of the state, and require that they apply Islamic Sharī'a.<sup>12</sup> In theory, these two laws grant Sharī'a Courts, also known as the General Courts, a jurisdiction over all civil and criminal cases,<sup>13</sup> while, in reality, Sharī'a Courts do not exercise this jurisdiction in full. Sharī'a Courts rule only in personal status, family affairs, civil disputes and most criminal cases.<sup>14</sup> Laws and regulations have exempted several areas of laws to be looked at by other courts and legal tribunals.<sup>15</sup>

The Saudi legal system of Sharī'a Courts approves of several sources in applying Islamic laws. In addition to the essential sources of the Qur'ān and the Sunna, the system considers the

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<sup>12</sup> See The Basic Law of Governance, Royal Order No. A/90, (27/8/1412H, Mar. 1, 1992), O.G. Umm al-Qura No. 3397 (2/9/1412H, Mar. 5, 1992): arts. 46 and 48; see also The Law of the Judiciary, Royal Decree No. M/78, art. 9 (19/9/1428H/October 11, 2007): art. 1.

<sup>13</sup> Article 26 of the Law of Judiciary of 1975 states: "Sharī'a Courts have jurisdiction over all disputes and crimes except those exempted by law." Article 25 of the Law of Judiciary of 2007 states: "The Sharī'a Courts have jurisdiction over all cases with accordance to what is stated in the Code of Civil Procedures and Code of Criminal Procedures."

<sup>14</sup> See FRANK E. VOGEL, ISLAMIC LAW AND LEGAL SYSTEM: STUDIES OF SAUDI ARABIA 9 and 177 (2000); See also al-Jarbou, *supra* note 14, at 217-218; see also Saudi Basic Law: Article 49; see also the Law of Judiciary: Article 26.

<sup>15</sup> Beside the Sharī'a Courts, the structure of the Saudi Courts in Saudi also includes the Board of Grievances (*Dīwān al-Madhālīm*), which is comparable to the administrative court in the French system. This court was formally established in 1954 to rule in all disputes involving government agencies and private contractors. Also, Article 9 of the Law of Judiciary permits the creation of special courts or tribunals supported by a Royal Decree. These tribunals are known as the Administrative Committees. The Administrative Committees possess a judicial power to rule in cases the nature of which is specified through the Royal Decree that established it. Some examples of these Committees include: the Tax Committee, the Committee for Penalizing Traffic Violations, the Mining Disputes Committee, the Fraud, Cheating and Speculation Committee, the Banking Disputes Settlement Committee; and the Copyright Committee.

fiqh (i.e. interpretations of Islamic jurisprudential texts) that was created by the medieval orthodox Muslim scholars and present day scholars. The majority of the Islamic law applied today is derived from fiqh books. Scholars have composed these books cumulatively since the emergence of Islam in the seventh century.<sup>16</sup>

In Saudi Arabia, the Ḥanbali School was specifically chosen to be followed.<sup>17</sup> Therefore, the judges of the Saudi courts have relied upon the Ḥanbali books. All of these sources are the authority that lawyers are expected to cite to a judge in Saudi Arabia and are accepted by all of the Saudi courts and judicial tribunals as the most reliable sources of Sharī‘a law.

However, although the application of Islamic law in the Courts is mainly based on the Ḥanbali School, contradictions and disparities in rulings and procedures occurred, as interpretations among the scholars inside this School itself vary. Sometimes, this led to considerable difficulty in acquiring an authoritative legal opinion. For this reason, the government started in 1927 to implement measures to minimize the discrepancies. One of these solutions was the enforcement of a methodology to be followed when conducting judicial analysis in the Sharī‘a Courts, which will be explained later.

The judicial process in Sharī‘a Courts in Saudi Arabia follows the classical form of Islamic adjudication. It introduces a different form of adjudication as compared to the major judicial processes in the world. In part, it reflects the social and religious practices existing in Saudi Arabia.<sup>18</sup> There is no code for Saudi judges to follow as in the civil law systems. Also,

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<sup>16</sup>There are four major Islamic Sharī‘a schools of jurisprudence within the Sunni Islam: Ḥanafī, Maliki, Shafī‘ī and Ḥanbali. In general, these four schools are the main sources of Islamic law after the Qur’ān and the Sunna. The books of these schools contain mostly opinions and rulings on factual situations made in light of the Qur’ān and the Sunna. The Islamic legal system is, thus, a system based on juristic or scholarly opinion rather than on the precedential authority of court decisions or codes.

<sup>17</sup>The reasons and historical context of this decision will be discussed later in this paper.

<sup>18</sup>See Frank Vogel, *Saudi Arabia: Public, Civil, and Individual Sharī‘a in Law and Politics*, in SHARĪ‘A POLITICS: ISLAMIC LAW AND SOCIETY IN THE MODERN WORLD, ed. ROBERT W. HEFNER (2011), at 56.

these judges are not required to respect or consider any precedents in their rulings like their counterparts in the common law systems.<sup>19</sup> Judicial analysis within Saudi Sharī‘a Courts follows the methods laid down in the Resolution of 1928 that was mentioned earlier.

### III. Resolution Number (3) of 1928

In June 1928, the Saudi Judicial Board (predecessor of the Ministry of Justice) issued a resolution that was confirmed by the King requiring that judicial rulings be in agreement with the established interpretations found in the school of Imām Ahmed ibn Hanbal. The resolution justified this by the ease and clarity of this school’s references and books. Moreover, the resolution mentioned, among others, the consensus of this school’s scholars and the presentation of its proofs.<sup>20</sup> The resolution approved certain Hanbali books to be consulted by the judges following a specific procedure.<sup>21</sup>

However, this does not protect the judicial analysis in Sharī‘a Courts from criticism directed by some Saudi Progressives,<sup>22</sup> who claim, among other things, that, since Saudi Arabia is undergoing rapid economic development, its Sharī‘a Law should be codified to mainly ensure predictability, among other things.

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<sup>19</sup> See Vogel, *supra* note 18, at 58.

<sup>20</sup> See ABD AL-FATTAH M. SAYFI, AL-AHKAM AL-AMMAH LIL-NIZAM AL-JINAI FI AL-SHARIAH AL-ISLAMIYAH WA-AL-QANUN [THE GENERAL PRINCIPLES OF CRIMINAL SYSTEM IN ISLAMIC SHARI‘A AND LAW], 9 (1997).

<sup>21</sup> This Royal Decree, which organizes the legal analysis within the Sharī‘a Courts, will be explained in a single chapter in this research.

<sup>22</sup> In this dissertation, the term “Progressives” will be used to include Saudi individuals who support and strongly believe in the need to modernize the country in general and the legal system in particular to make it closer to the Western contemporary style. One of the main characteristics of these individuals is their strong support for the codification of Sharī‘a law. The term “Progressives” consists for the most part of members of educated elites, technocrats, and legal professionals, such as lawyers and law professors. However, this does not exclude a significant number of individuals, whose training was in Sharī‘a, but who, nevertheless, support some aspects of modernizing the legal system, and whose number is increasing. On the other hand, the term “Conservatives” will be used to mean the opposite individuals, who do not at all believe in the need to modernize either the country in general or the legal system in particular and who consider all of this “heresy” and a way to “Westernize” the country. This includes mostly classical Sharī‘a trained individuals, who are usually represented by the ‘ulamā’ (religious scholars) at Sharī‘a schools, Sharī‘a Court judges, the Board of the Senior ‘Ulamā’, the Higher Council of Justice, and some independent ‘ulamā’, who do not belong to the official government structure.

Although predictability is desired and asked for by these Saudi Progressives, predictability does not occupy the same level of importance or interest among the judges in Sharī'a Courts in Saudi Arabia. This is because the focal point for these Sharī'a judges is the application of God's order as revealed and interpreted in the sacred scriptures, namely the Qur'an and the Sunna. Whether the laws or the rulings resulted from this application are predictable is totally a minor interest for these judges.

Commentary published in Arabic in Saudi Arabia on the question of whether or not Sharī'a should be codified tends to be very polarized. Advocates and opponents of codification do not generally engage in thoughtful debates but tend to reject the other side's opinions out of hand, and neither side uses any empirical evidence to support their positions. The personal experiences of the Saudi lawyers, who are essential players in this matter, are almost never thought of as contributing source in answering this quest. A research that explores predictability through engaging the Saudi lawyers is expected to lay out more information in this regard.

#### **IV. Predictability in Law: Importance and Meanings**

Generally, it should be realized that, in the real world, law and judicial performance can never be absolutely predictable.<sup>23</sup> Nevertheless, lawyers, especially in Western countries, strive for predictability in law and assign high importance to it. Inability to reach perfect predictability never discouraged theorists in the legal field from calling for clear and predictable laws.<sup>24</sup> In fact, it is so obvious and clear that predictability is a crucial component for any modern society that seeks freedom and democracy as opposed to a tyrannical régime that usually flourishes through

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<sup>23</sup> See P. S. Atiyah, *Justice and Predictability in the Common Law*, 15 U.N.S.W.L.J. 448, at 448 (1992); see also Adam M. Samaha, *Judicial Transparency in an Age of Prediction*, 53 Vill. L. Rev. 829, at 842 (2008).

<sup>24</sup> See Atiyah, *supra* note 23, at 449.

the existence of vague and uncertain laws.<sup>25</sup> Moreover, predictability in law was greatly emphasized by theorists and writers with the rise of capitalism in the late 19<sup>th</sup> century up to today.<sup>26</sup> It is, as P. S. Atiyah says, “[t]he more I say about the desirability of predictability in the law, the more it seems I am merely stating the obvious.”<sup>27</sup>

However, the aim in this dissertation is not only to describe predictability through asking directly about whether the interviewed lawyer thinks the current Sharī‘a judicial analysis is predictable or not, but also to dig beyond the quantitative inquiry and to explore in-depth the subjective qualitative sense of predictability among different practitioners in the Saudi legal system, and to relate that sense of predictability with attributes to the lawyers’ legal training.<sup>28</sup> What is meant by predictability in this research is not intended to only describe numerical reality, but also to try to capture the accompanied qualitative impressions by the participants in the system as to the system’s intelligibility and transparency, with consideration to their legal training, and to synthesize based on results.

Following is a description of the research project of this paper that is meant to explore this matter further and answer this quantitative quest.

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<sup>25</sup> See Atiyah, *supra* note 23, at 449.

<sup>26</sup> See Atiyah, *supra* note 23, at 450. Some of the 19<sup>th</sup> century theorists believed that capitalism needs a formal legal system that is rational. Therefore and to be rational, the legal system must also be predictable. For example, Max Weber believes that capitalism grew and was able to operate in the West because of the nature of Western law that worked “like a slot machine into which one just drops the facts . . . in order to have it spew out the decision.” 2 MAX WEBER, *ECONOMY AND SOCIETY*, (GUENTHER ROTH & CLAUS WITTICH, ed., 1968) at 883, 8847 & 886. Weber’s definition of rationality requires “some criteria of decision which is applicable to all like cases.” David M. Trubek, *Max Weber on Law and the Rise of Capitalism*, *Wis. L. Rev.* 720, at 742 (1972). This applicability to other cases makes the system predictable and empowers the players in the market or their representing legal professionals (i.e. lawyers) to predict the outcome of the courts in “all like cases.” It is, as defined by Justice Holmes, the “prophecies of what the courts will do in fact, and nothing more pretentious.” Oliver Wendell Holmes, Jr., *The Path of The Law*, 10 *Harv. L. Rev.* 457, at 460-461 (1897).

<sup>27</sup> Atiyah, *supra* note 23, at 451.

<sup>28</sup> It should be understood that qualitative sense cannot stand by itself to be an objective measure unless that sense or impression of qualitative inquiry can be matched up to some numerical actual predictability based on person experience in the eye of the lawyer who are participant in the system, for example.

## V. Thesis Goals

This research closely explores the predictability of current judicial analysis within the Sharī'a Courts in Saudi Arabia with emphasis on the workability of this predictability for lawyers, how they perceive it and what it means to them. The research investigates the possibility that the current Saudi system already performs function that Progressives attribute to codification – i.e. predictability.

## VI. Research Questions

The most significant question that this research is designed and meant to answer is the following:

**Is the current judicial analysis used in Sharī'a Courts in Saudi Arabia predictable?**

To answer this question requires answering the following two other questions:

*First Question:* Theoretically, is the current judicial analysis applied in Sharī'a Courts predictable? What is the legal framework that supports predictability in the judicial analysis in Sharī'a Courts?

*Second Question:* What do lawyers think about the predictability of the legal analysis in Sharī'a Courts?

## VII. Hypothesis

The method and progress of the current legal analysis within the Sharī'a Courts in Saudi Arabia represent a different and special case that is compatible with Saudi Islamic and Arabic values and identity; it does not resemble analysis followed within either the common law or the civil law system. No code exists for judges to follow nor do any precedents bind them. The hypothesis that is introduced in this dissertation can be summed up in two points:

1. The methodology introduced in Resolution Number (3) issued in 1928 is able to

provide a reasonably clear and predictable outcome for lawyers.<sup>29</sup>

2. If lawyers are trained in classical Sharī‘a schools<sup>30</sup> then they are more likely to think that the Sharī‘a judicial analysis is predictable than lawyers who are trained in civil law schools or law departments.<sup>31</sup> Also, Sharī‘a lawyers are more likely to express comfort and confidence in the Sharī‘a legal system than their law-trained counterparts. This suggests a correlated causal relationship between the nature of the legal education and the lawyers’ perception and understanding of the predictability of Sharī‘a Court outcome.<sup>32</sup>

### VIII. Significance and Contribution to Legal Scholarship

**First**, as the argument between the Conservatives and Progressives continues, it seems that codification is one of the major issues between the two parties that is supported and claimed by the Progressives to be the solution for many judicial problems and flaws. This research suggests that the conflict exists, because there is a difference between the two sides in the way of understanding the judicial analysis in the Sharī‘a Courts and how it works in action.<sup>33</sup> Through interviewing the Saudi lawyers, this research intends to contribute in reconciling the conflict between the two parties through building some understanding of how each side perceives and

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<sup>29</sup> As it was mentioned earlier, predictability has been always looked at as a consequence of the existence of formal rationality in law. The rationality in law is defined as “some criteria of decision which is applicable to all like cases.” Trubek, *supra* note 26, at 742. This applicability to other cases is what makes such legal system predictable and, therefore, empowers the legal professionals (i.e. lawyers) to predict the outcome of the courts in “all like cases.” However, the inaccessibility to the cases in Saudi Arabia dictates considering beside this meaning of predictability other qualitative impressions by the participants in the system as to the system’s intelligibility and transparency, as was described earlier, which can be used in detecting the defined predictability and in digging beyond this to capture a bigger picture of reality in a wider sense of predictability. The discussion of this part of the hypothesis is included in the analysis provided in chapter 4, pages 111-120.

<sup>30</sup> Hereinafter “Sharī‘a lawyers” or “Sharī‘a lawyers.”

<sup>31</sup> Hereinafter “law-trained lawyers” or “law lawyers.”

<sup>32</sup> The discussion of this part of the hypothesis is included in chapter 4, from page 120 to page 150.

<sup>33</sup> Al-Jarbou (one of the progressives) implicitly admitted it in his article when he said that codification is needed, because Islamic Sharī‘a is sometimes “not easily understandable to every one.” Al-Jarbou, *supra* note 14, at 199.

understands the judicial analysis, and what is/are the factor(s), if any, underlying this perception. Utilizing an empirical methodology will unclthe truths and reflect reality more than a methodology that is built only on theoretical approach.

**Second**, notwithstanding Saudi Arabia's strategic importance, academic writings and dissertations concerning it are relatively few. The scarcity and inaccessibility of many documents is a factor as is the conservative nature of the society and the legal and political systems as a whole. One of the contributions of this research is to provide more understanding of the legal and political situation of the country.

**Third**, a distinct element of this study is its structure that combines theory and practice in analyzing the mechanics of judicial analysis within Sharī'a Courts. Although the doctrinal framework is tentatively established first, it is re-visited consistently as findings and results dictate in the practical side through the application of empirical methods.

**Fourth**, studies about Saudi Arabia have largely been conducted either by political scientists or researchers with a foreign legal background. The difference in the present research is in the researcher's substantial background in both Sharī'a and law that will provide an insider's analysis for a regime in which *Sharī'a* forms the core of its operations and values.

**Fifth**, the value of this study is transitive, because many Muslims see Saudi Arabia as the arbiter of orthodox Islamic teachings. Its spiritual position is unique, because it embraces the places where Islam emerged and contains the two holiest Islamic places. The success of this research will prove to be a boon to the Islamic communities and will help contribute to identifying how the Muslim world can keep pace with the non-Muslim world.

## IX. Methodology

To explore the predictability of the current legal analysis in the Sharī‘a Courts in Saudi Arabia and how practicing Saudi lawyers perceive it, the research applies a pragmatic approach.<sup>34</sup> This method is usually used in social science to identify the problem first and then to use pluralistic approaches to build knowledge about the problem.<sup>35</sup> To answer the research questions, data is collected through two approaches: a process of closely reading the existing literature related to codification and judicial analysis; and qualitative open ended interviews with practicing Saudi lawyers between December 2013 and June 2014.

***Close Reading of Available Literature:*** To answer theoretically the question of whether the current legal analysis in Sharī‘a Courts is in some sense predictable, the research uses a close reading process of the written literature as a departure point to obtain data and draw a picture of the problem at hand, i.e. codification and judicial analysis. This will help in gaining understanding of each point of view and to analyze the strategies and the consequences of applying each point of view from different angles. This will include the literature written in Arabic and in English, published in books, academic journals, newspapers, and on the Internet. As it stated earlier, studies about the legal system of Saudi Arabia are generally humble and scarce. To date, there is no any academic literature that was written to specifically discuss any aspect of the judicial analysis within the Sharī‘a Court in Saudi Arabia. This dissertation is expected to be one of the pioneer studies in the subject matter. The intended close reading to the available literature, although little, will focus, first, on explaining and illustrate in some details the text of the methodology followed in the judicial analysis within Sharī‘a Court. Second, this illustration will be followed by examples that are derived from actual cases to examine the

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<sup>34</sup> See JOHN W. CRESWELL, RESEARCH DESIGN: QUALITATIVE, QUANTITATIVE, AND MIXED METHODS APPROACHES, 10-11 (2009).

<sup>35</sup> See CRESWELL, *supra* note 34, at 10.

ability of solving the questions in these examples following the methodology laid out in the judicial analysis text. This step is intended to answer the first question of the research –the question of predictability and of perceived predictability– and includes laying out the theoretical framework within the Sharī‘a system that produces a particular form of predictability within the current judicial analysis in Sharī‘a Court.

***Semi-structured, Open-ended Question Interviews:*** To build a better understanding of how lawyers receive and understand the current legal analysis in Sharī‘a Courts, the research applied an empirical methodology utilizing qualitative open-ended interviews<sup>36</sup> These interviews consisted of semi-structured (directive)<sup>37</sup> open-ended questions<sup>38</sup> that were not always asked in the same order.

These interviews were conducted to acquire illustrative data to answer the research questions and to complement any gaps in knowledge gained from the limited abovementioned literature. The purposive sampling frame utilized included Saudi lawyers, who have been practicing and dealing with Sharī‘a Courts for at least 2-3 years. The sample included two sub-groups, as will be explained later.

This type of interviewing methodology was chosen for several reasons. **First**, generally, social scientists consider interviews one of the strong measurements in research for sophisticated

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<sup>36</sup> The qualitative research interview is an interview, the purpose of which is to “gather descriptions of the life-world of the interviewee with respect to interpretation of the meaning of the described phenomena.” Steinar Kvale, *The Qualitative Research Interview: A Phenomenological and a Hermeneutical Mode of Understanding*, in 14 JOURNAL OF PHENOMENOLOGICAL PSYCHOLOGY, 171-196, 174 (1983).

<sup>37</sup> The interviewer maintains the lead regarding the track of the interview or discussion. However, the interviewees are encouraged freely to narrate their knowledge and experience and to reveal their feelings and opinions as they perceive fit, with as little direction as possible from the interviewer. See Robert K. Yin, *Case Study Research: Design and Method*, p. 89-90 (2002); see also TIMO VOIPIO, ISSA SOCIAL SECURITY RESEARCH AND POLICY MANUAL, (MODULE 6: QUALITATIVE RESEARCH), 9 (2010).

<sup>38</sup> Open-ended questions invite the respondent to provide his or her own answers and provide qualitative data. They are useful and used for scheduled interviews. See ALLEN RUBIN & EARL BABBIE, RESEARCH METHODES FOR SOCIAL WORKS, 201-202 (2008).

populations, such as members of a profession, as is the case here.<sup>39</sup> Responding to the open-ended interviewing of lawyers about how they do their job has the advantage of being a relatively uncomplicated method of investigation that, nevertheless, offers promise of insights into the tracing of judicial analysis in action.

**Second**, interviews are a fundamental source for information in “case study strategy” similar to the case study that this research applied to the situation in Saudi Arabia.<sup>40</sup> Since case studies are about human affairs, collected data should be reported by participants who are themselves partners in these affairs.<sup>41</sup> Interviews can be a short path to gain a background and to uncover more sources of information about the case study subject.<sup>42</sup> Human subjects are likely to provide facts and insiders’ perspectives that otherwise would not be revealed by a sole reliance on printed documents. To generate as much knowledge about the problem as possible, the pragmatic research approach suggests investigating daily human practice of related people facilitating the institution in addition to investigating the other dimensions of the problem.<sup>43</sup>

**Third**, interviews carry a special importance when conducting legal research in a country like Saudi Arabia. This type of study is more useful in cases that have restricted access and limited information<sup>44</sup> (i.e., limited academic commentary and limited government data). This is the current situation for court work in Saudi Arabia, because the government or civil society organizations publish very few public sources of information, there are no legal academic

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<sup>39</sup> See ROBERT ROSENTHAL & RALPH L. ROSNOW, *ESSENTIALS OF BEHAVIORAL RESEARCH: METHODS AND DATA ANALYSIS*, 128 (1991) (self-reporting works where “persons have the language and experience to describe their own behavior...”).

<sup>40</sup> YIN, *supra* note 37, at 89.

<sup>41</sup> YIN, *supra* note 37, at 92.

<sup>42</sup> *Id.*

<sup>43</sup> See Jörg Friedrichsa and Friedrich Kratochwil, *On Acting and Knowing: How Pragmatism Can Advance International Relations Research and Methodology*, in 63 *INTERNATIONAL ORGANIZATION* No. 4, 701–31 (Fall 2009).

<sup>44</sup> Creswell suggests that the qualitative methodology is essentially an investigative method that is best utilized in situations where little studies have been previously made. See CRESWELL, *supar* note 34, at 11-12.

journals at all, and there are very few social science journals. There are no published cases, no specialized trade publications, and little coverage of legal issues in the mass media.

In contrast to structured interviews, semi-structured interviews are flexible by permitting new questions to be carried on during the interview in response to what the interviewee says.<sup>45</sup> The questions in the in-depth, open-ended, semi-structured interviews permit the participants to elaborate on their responses, to show emotion, to reveal motivations, and to act naturally.<sup>46</sup>

However, research that utilizes this type of interview must be aware of the limitations that come with it. For example, qualitative interviews are not about generalizability; rather, they are about particularity. In other words, the significance of qualitative research rests in the individual description and ideas advanced in the setting of a particular time and place. This somehow limits the applicability of the results to other cases and confines it only to the participants.<sup>47</sup> Practically, the way that the research conclusion is framed should avoid the use of phrases that include generalizing words, such as “all,” and “everyone in the profession.” More limiting words and phrases, such as “some” and “within the interviewed sample,” should be utilized to reflect the truth.

### **1. General Approach:**

**Conducting Legal Research in Saudi Arabia:** It is important here to describe some of the difficulties encountered when conducting legal research in Saudi Arabia in comparison to conducting the same kind of research in the United States, for example. Generally, access to the sources of information to conduct legal research in Saudi Arabia is very restricted. It might be hard for American researchers, who are accustomed to a higher level of freedom of information

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<sup>45</sup> ALLEN RUBIN & EARL BABBIE, RESEARCH METHODES FOR SOCIAL WORKS, 445-446 (2008).

<sup>46</sup> ROBERT ROSENTHAL & RALPH ROSNOW, ESSENTIALS OF BEHAIORAL RESEARCH MTHODS AND DATA ANALYSIS, 179 (1991).

<sup>47</sup> See CRESWELL, *supar* note 34, at 190-193.

and research, to understand these limitations.

To conduct legal research in the United States, all primary sources of state and federal law are considered “public information” and are accessible not only to researchers but to the American public in general. This easy accessibility is due in part to the application of the Freedom of Information Act (FOIA) of 1966 and in part to the importance that case law (precedents) represents to the common law system such as the one in the United States. This includes statutes, judicial opinions, regulations, administrative decisions and guidance, court filings, proposed and enacted legislation, and proposed and adopted regulations. Secondary resources, while not public information, are also numerous.<sup>48</sup>

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<sup>48</sup> Some examples of sources of legal information in the United States include:

**1. The Public Access to Court Electronic Records (PACER):**

This system provides American citizens with access to the pleadings filed in litigation in the federal court system. It provides access to the names of all parties involved in a lawsuit, their attorneys, and the judges; and it provides a chronological record of how the litigation proceeded with supporting documents. (See <http://www.pacer.gov/>).

**2. The Administrative Office of the United States Courts (AO):**

This agency of the federal judiciary collects and analyzes statistics about activity in the federal courts. It publishes reports on federal judicial caseload statistics, federal court management statistics, bankruptcy statistics, and wiretap reports. AO reports are used when Congress makes decisions about the budget of the federal judiciary. (See <http://www.uscourts.gov/FederalCourts/UnderstandingtheFederalCourts/AdministrativeOffice.aspx>).

**3. The Transactional Records Access Clearinghouse (TRAC):**

Although the main goal of TRAC is to “provide the American people with comprehensive information about staffing, spending, and enforcement activities of the federal government,” legal researchers can use it as a very helpful resource of legal information. It offers a large variety of information and services, such as a public website, information about the federal enforcement activities – criminal, civil, and administrative. It also provides very timely month-by-month reports and data tracking changes in the government’s criminal enforcement activities. (See <http://trac.syr.edu/aboutTRACgeneral.html>).

**4. National Center for State Courts (NCSC):**

This is an “organization courts turn to for authoritative knowledge and information. One of the NCSC goals is to ‘Disseminate knowledge and information about judicial administration.’” This includes providing such services as searching its database by topics, searching its database by category, searching its database by state, Court Statistics Project (CSP) (offers numbers for almost everything: civil, criminal, domestic relations, juvenile, traffic, and appellate), budget resource center, and comparing state courts. (See <http://www.ncsc.org/>).

**5. Federal Judicial Center (FJC):**

This organization offers files of books and official materials produced by the federal courts. Unlike the AO, the FJC’s goal is directed more toward education and training. One of its significant publications is the Federal Judicial Center Annual Report, which includes such information as education and training, research, federal judicial history, and programs for foreign judicial officials. The reports are all available for online downloading in a pdf format. (See [http://www.fjc.gov/public/home.nsf/autoframe?openform&url\\_r=pages/102](http://www.fjc.gov/public/home.nsf/autoframe?openform&url_r=pages/102)).

In comparison, sourcing similar legal information in Saudi Arabia is very limited and humble. Although the availability of information contrasts with the United States, it is in line with its neighboring countries, such as Kuwait and the United Arab Emirates, which seem to suffer from a similar scarcity of accessibility to data.<sup>49</sup> Although the body of laws, regulations, and some very few legal books are somehow available, the judicial rulings are not published, and there is no procedure to obtain cases officially even for academic research purposes. Although cases are organized and archived, access to these cases is restricted to judges and court staff. Moreover, there are no law journals or magazines. While statistical information is available, updated, and open to the public in the United States, they are not available, updated or open to the public in Saudi Arabia. Few statistical and up-to-date surveys and reliable numbers can be used when conducting academic research.

Daryl Champion is an example of a researcher who wrote about Saudi Arabia and has expressed his struggle and frustration in this regard. He says:

Saudi Arabia has always presented difficulties for researchers. Information is a tightly controlled asset in the Arab world, and a robust concept of privacy makes it doubly so in Saudi Arabia. Where documents, statistics and other data exist, they are notoriously difficult to access and are frequently full of gaps and lacking in detail, reliability often ranging from the doubtful to the extremely

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#### **6. American Bar Association (ABA):**

This is a great source for lawyers that offers statistics about lawyers, a demographics table, national lawyers population by state, total national lawyers counts, and American bar foundation lawyer statistical report (periodical report that provides detailed demographic information on the numbers of lawyers and law firms nationally and on a state-by-state basis. It also presents distributions of lawyers across practice settings, among law firms of various sizes, and practice settings by age and gender.) (See <http://www.americanbar.org>).

#### **7. Lawyers Directories:**

This is a very helpful tool to “find a broad range of results, so you can find the lawyer you’re looking for even when you’re unsure about the spelling of his/her name.” It offers a variety of searching tools and alternative possible entries to reach out to lawyers.

(See <http://www.mywsba.org/default.aspx?tabid=177>).

In addition to all of these examples of governmental and quasi-governmental sources, there are commercial sources, such as WestLaw and LexisNexis, both of which offer a large variety of legal information available for their users for a fee. Moreover, most courts have websites on which they publish information regarding their performance and other topics. Google Scholar is another free source for legal information that is available for users.

<sup>49</sup> See NADEYA SAYED ALI MOHAMMED, POPULATION AND DEVELOPMENT OF THE ARAB GULF STATES: THE CASE OF BAHRAIN, XV (2003).

dubious... Aside from North Korea, Saudi Arabia is one of the most closed countries in the world. Information is difficult to obtain... Reliable economic data tends to be out of date (by at least 18 months)... Essentially, Saudi Arabia remains wrapped in a shroud, in part much maligned, in part inaccessible, and especially incomprehensible, to western – even Arab – observers and analysts... Saudi Arabia is one of the most secretive societies in the world...<sup>50</sup>

The writer then explains how other writers and researchers usually relate words, like “taboo,” “*terra incognita*,” and “inscrutable, elusive,” when studying and writing about Saudi Arabia.<sup>51</sup> To illustrate this matter more, Champion continues emphasizing his point by invoking other writers’ experiences in writing about Saudi Arabia. For example, he mentions Fred Halliday, who believes that it “remains virtually inaccessible to independent or in-depth research,” and that “all who study Saudi Arabia have to rely on a combination of fragments, muffled sounds, and intuitions.”<sup>52</sup>

Champion adds that

Even Saudi academics, who might be expected to enjoy a relatively privileged position regarding research on their own country, complain that “reliable information was sometimes scarce, inaccessible or unavailable.”<sup>53</sup>

He continues in emphasizing his idea by mentioning how the staffs of the International Monetary Fund (IMF) and the World Bank gain access to the information of all member states except Saudi Arabia.<sup>54</sup>

Champion concludes his discussion by saying:

Overall, a difficult research topic – and the enigma that is Saudi Arabia fits this description – can either be consigned to the “too hard” basket and avoided or taken as a challenge and an opportunity to shine a light on something that receives all too little illumination.<sup>55</sup>

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<sup>50</sup> DARYL CHAMPION, *THE PARADOXICAL KINGDOM: SAUDI ARABIA AND THE MOMENTUM OF REFORM*, 317 (2003).

<sup>51</sup> See CHAMPION, *supra* note 50, at 318.

<sup>52</sup> Fred Halliday, *Saudi Arabia: Government, Society and the Gulf Crisis*, 30:3 *Mid. E. Stud.* 691, at 692 (1994) (book review).

<sup>53</sup> CHAMPION, *supra* note 50, at 318.

<sup>54</sup> CHAMPION, *supra* note 50, at 319.

<sup>55</sup> CHAMPION, *supra* note 50, at 321.

This dissertation is the result of the second choice.

**Surveys v. Interviews:** In addition to other factors, the preceded inaccessibility to information exists in Saudi Arabia contributed heavily in choosing between the utilization of surveys versus the utilization of interviews for the sake of this research. Surveys are not feasible tool in the Saudi society as it is impossible for lawyers who were chosen randomly in large number to participate in such study. It is rare for people to be asked to express their opinions regarding almost any issue in Saudi, which makes such practice suspicious and surrounded with doubts. For example, only 21 lawyers agreed to be interviewed in this research while more than 30 lawyers rejected to do, based on fear, doubts and unfamiliarity with such techniques and projects.

Also, choosing subjects for a project run with surveys depends on the availability of a mean to access the sample of that project, which is unavailable in the case of the lawyers in Saudi Arabia. Advertisement for lawyers is illegal in Saudi Arabia. There is no special professional directory for lawyers. Based on this, lawyers in Saudi are considered “hidden population.”<sup>56</sup>

Moreover, the surveys technique is useful for projects that are directed more towards generalization, while the direction of this research is more towards the depth of the interviewees’ personal experiences. This depth can only be acquired through the utilization of the interview method. The interviews are expected to provide the research with information-rich experiences that cannot be provided if surveys are utilized.

## **2. Description of the Population**

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<sup>56</sup> This also justifies the utilization of the snowball sampling technique, which will be explained later in this introduction.

**Legal Education in Saudi Arabia:** Legal education in Saudi Arabia is divided into two types: Sharī‘a schools and modern law schools or departments (hereinafter law schools). The duality of the legal education is reflected on different curricula taught to students who seek a legal education in Sharī‘a schools versus modern law (called “*andhima*” [regulations] in Saudi) departments and, therefore, in their employment opportunities after graduation.

**Brief History:** Until 1970, there was no modern legal education in Saudi Arabia. By contrast, the teaching of Sharī‘a has been continuously practiced both officially and unofficially in Saudi Arabia since the founding of Islam in the 8<sup>th</sup> century. The Mosques, especially the two grand ones in Mecca and Medina, have always been a place where Sharī‘a is taught. During the era of the Ottoman Empire, the practice of Sharī‘a law was more advanced and relatively sophisticated in Hijaz (the western region of the Arabic Peninsula) with a more developed judicial system in that region, in comparison with the other ones.<sup>57</sup>

The first school for Sharī‘a in a modern sense of higher education was established in 1949 in Mecca and was called the Sharī‘a College at Umm al-Qura University. All other Sharī‘a schools in operation today were established after this. This includes:

1. Sharī‘a College at Imam Mohammed ibn Sa‘ud University in Riyadh (1953)
2. The Sharī‘a College at Islamic University in Medina (1961)
3. The Sharī‘a College at al-Qaseem University (1976)
4. The Sharī‘a College at Imam Mohammed ibn Sa‘ud University in Abha (1976)
5. The Sharī‘a College at Imam Mohammed ibn Sa‘ud in Ahsa (1981)

There are also Islamic Studies departments at several universities, which were established in the 1980’s. They offer a similar education to that offered in Sharī‘a schools. These departments include:

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<sup>57</sup> See VOGEL, *supra* note 14, at 754-757.

1. The Islamic Studies Department at King ‘Abd al-‘Azīz University in Jeddah
2. The Islamic Studies Department at King Fahad University in Dhahran
3. The Islamic Studies Department at Taiba University in Medina
4. The Islamic Studies Department at al-Jouf University in Skaka
5. The Islamic Studies Department at King Faisal University in Dammam

The curricula at all of these schools and departments are very similar. The focus is usually on four types of Islamic subjects: Islamic jurisprudence (*fiqh*), Qur’ānic interpretation (*tafsir*), prophetic tradition (*hadith*), and classes in Arabic linguistics. The most important subject among these is the *fiqh* that depends entirely on the books written by Muslim religious scholars (*‘ulamā’*) from the Hanbali School, because the Hanbali School dominates in Saudi Arabia.

There has been a generally negative attitude among Sharī‘a scholars and religious leaders toward teaching law in a modern way.<sup>58</sup> because teaching secular, modern law in isolation is perceived to be elevating man-made law above Allah’s law. This ambivalence toward modern, secular law is pervasive throughout the Saudi legal system. It even permeates through very fine and delicate details, such as names used and terminology. For instance, the word “*nidham*” (which means system or regulation in Arabic) is used in Saudi to describe modern laws in substitution for the word “*qanun*”, which literally means law and which is used in all other Muslim countries. For this reason, modern, secular law in Saudi Arabia is often referred to as “*andhima*,” which literally means “regulations” in English, to distinguish it from Sharī‘a law.

In this dissertation, I will use “Sharī‘a” or “Islamic Law” to refer to traditional, religious law, and I will use “Law” to refer to modern/secular law.

This ambivalence toward regulations also explains why the first faculties of law focused on modern, secular law were not established until much later than the first Sharī‘a law schools

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<sup>58</sup> See al-Jarbou, *supra* note 14, at 214.

even though the modern Saudi state was established in 1932. The history of the establishment of this type of departments can be traced as follows:

1. In 1970, the first department for teaching regulations in the modern sense was established as part of the Institute of Public Administration under the justification of training government employees to carry out some of their duties related to legal issues. This department was not established under any of the existing universities at that time, which indicates how sensitive and challenging this step was.
2. In 1979, the first university-level regulations department was established at the School of Administration Sciences at King Sa‘ud University in Riyadh. This was the first academic program to offer a four-year-bachelor degree in regulations. The Arabic name of the department was “*Qism al-Andhima*” (the Department of Regulations) rather than “*Qism al-Qanun*” (the department of law) in deference to the above-mentioned sensitivity. The curriculum of this department is similar to the curriculum of any law school in a modern, Western civil law country. Students in this department study some very few Sharī‘a courses to learn the law that applies in those areas that are not regulated by the government. These courses include Family Law, Principles of Islamic Jurisprudence (*Usul al-Fiqh*), Law of Inheritance, and Islamic Jurisprudence History.<sup>59</sup>
3. In 1986, another department with the same curriculum and name was established at King ‘Abd al-‘Azīz University in Jeddah at the School of Administration Sciences.
4. In 2007, King Faisal University established a similar department but added the word “*qanun*” (law) to its name for the first time to become “*Qism al-Qanun*” (the Department of Law) instead of “*Qism al-Andhima*” (Department of Regulations), as it used to be.

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<sup>59</sup> In 2006, this department was converted to “*Kuliyat al-Qanun*” (Law School) to become the first school to hold this name in Saudi Arabia.

**Female Legal Education:** Although females' formal education faced strong opposition from the religious leaders in Saudi Arabia when the government started it in the early 1960's, these religious leaders in general never opposed the teaching of Sharī'a to females.<sup>60</sup> In fact, the teaching of Sharī'a for females was practiced informally for a long time before the first formal girls' college was established in 1970 in Riyadh, and female students were admitted for the first time to study Sharī'a in addition to other majors. In contrast, the teaching of regulations was one of the fields forbidden to females because of the negative attitude described above and also because the regulations field was thought to be one of the fields improper for females to learn and practice.<sup>61</sup>

In 2005, the Prince Sultan Private University established a department with a regulations curriculum for girls. This step encouraged King 'Abd al-'Azīz University (public school) to start accepting female students that same year to its Regulations Department followed by King Sa'ud University in Riyadh. Yet, the female graduates from these departments were unable to practice law as lawyers. Although the government has promised to allow females to assist female clients in courts, this is still not happening widely.<sup>62</sup> So far, only one female graduate was licensed in October 2013 as the first licensed Saudi female lawyer ever.

**First Hybrid Education:** Although law departments with curricula covering regulations always required their students to take some courses on Sharī'a, Sharī'a law schools did not require their students to take any courses in regulation/laws. However, this did not stop Umm al-Qura University in Mecca from establishing the first school that combines the two majors under the name of the College of Judiciary Studies and Systems (*Kuliyat al-Dirasat al-Qadha'iyya wa*

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<sup>60</sup> See ROBERT LACEY, *INSIDE THE KINGDOM: KINGS, CLERICS, MODERNISTS, TERRORISTS, AND OTHER STRUGGLE FOR SAUDI ARABIA*, 237 (2009);

<sup>61</sup> See Amani Hamdan, *Women and education in Saudi Arabia: Challenges and achievements*, 6:1 Int'l Ed. J. 42, 53 (2005).

<sup>62</sup> From a newspaper article by Qabul al-Hajri at:  
<http://www.alriyadh.com/2009/04/29/article425555.html>.

*al-Andhima*) in 2010. This school is the first one of its type in the Arabic and Muslim World. It was the fruit of a study submitted by Shykh Sa‘ud al-Shuraim, a Sharī‘a Court judge and an Imam at the Grand Mosque in Mecca.<sup>63</sup> The new school offers a four-year-bachelor degree with a curriculum that covers both Sharī‘a and regulation subjects. The school “qualifies its graduates to work in juridical sectors, education sectors, security sectors, human rights organizations, embassies, lawyering, and governmental and private legal consultation.”<sup>64</sup> The first class of this newly founded school is expected to graduate in 2014.

**Employment Opportunities:** The duality in the legal system affects the employment opportunities of graduates of the different programs. For example:

1. The appointment to judgeship positions is reserved exclusively for Sharī‘a graduates. Graduates from regulation departments/schools do not qualify for such positions according to both the Law of Judiciary and the Law of the Board of Grievances.
2. Graduates from Sharī‘a Schools can be appointed as “*mustashār shar‘ī*” (Sharī‘a consultant) and “*mustashār nidhamī*” (law consultant), while graduates from regulations departments/schools qualify only for the latter, (*mustashār nidhamī*).<sup>65</sup>

A total of 18,000 graduates specialized in Islamic studies in 2012/2013 (from all schools and all majors), of whom 7,000 were male and 11,000 were female.<sup>66</sup> Approximately half of these numbers (3,500 males, 5,500 females) graduated from Sharī‘a School, while the other half

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<sup>63</sup> See the web site of the School of Judiciary Studies and Systems as accessed in June 26, 2012: <http://uqu.edu.sa/page/ar/203752>

<sup>64</sup> *Id.*

<sup>65</sup> It is not necessary for the Sharī‘a or regulations consultant to be a “licensed lawyer,” although he or she might qualify to apply and obtain the license. In fact, most people who work as “Sharī‘a or regulations consultants” in Saudi are not licensed lawyers for regulatory reasons. For instance, the Saudi policies do not allow a Sharī‘a or regulations professor to practice law as a licensed lawyer in addition to his teaching occupation. However, they allow them to give “*istishārāt*” (consultations). Therefore, a Sharī‘a or regulation professor can work as a “Sharī‘a or regulations consultant” without violating the law.

<sup>66</sup> Source: Center of Statistics at Saudi Ministry for Higher Education. <http://www.mohe.gov.sa/ar/Ministry/Deputy-Ministry-for-Planning-and-Information-affairs/HESC/Pages/default.aspx>

graduated from “*Kuliyat al-Da’wa wa Usul al-Din*” (School of Preaching and Religion Principles), which is similar to divinity schools in the Western academic systems. Generally, most Sharī’a-related studies’ graduates from both genders join the public schools to teach Islamic subjects to elementary, secondary, and high school pupils.

During the same year of 2012/2013, a total of 1,150 graduates specialized in regulation, of whom 700 were male and 450 were female.<sup>67</sup> As noted earlier, most of the male regulation graduates are interested in practicing law, while the female graduates who wish to do the same still face some challenges.

**Legal Profession:** It is clear from this brief overview of legal education in Saudi Arabia that fewer lawyers are trained in law than in Sharī’a in the legal profession today. The negative attitude toward modern law is also directed toward the legal profession, as Conservatives look at it as another face of modernization that is incompatible with conservative Islamic teachings. The small number of lawyers trained in regulation is another manifestation of the general negative attitude in Saudi society toward modern, secular law, the continued expansion of which is seen as incompatible with Islamic traditions.

The modern legal profession is relatively new to Saudi Arabian government and society as well. It was organized only in the last decade after the issuance of the first Code of Law Practice in 2001. The Code includes the definition of the lawyering profession, lawyers’ qualifications, lawyers’ rights and duties, lawyers’ discipline, and general and transformable rules.<sup>68</sup>

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<sup>67</sup> *Id.*

<sup>68</sup> Article I of the Saudi Code of Law Practice of 2001 states that “lawyer” is the title that is given to any person who is licensed to practice law before Courts, Board of Grievances, or the legal committees – formed in accordance with decrees, orders, or decisions – to try cases that fall under the jurisdiction of these legal entities and to give Sharī’a and legal consultations.

It is also worth noting that although there is a minority of Saudi Shi'a Muslims (between 10 and 15% of the population),<sup>69</sup> there is no piece of law that discriminates against them in either joining the legal profession or adjudicating before the Sharī'a Courts. As for all other Saudi citizens, the Saudi Basic Law approves Sharī'a Court as the official court for all Saudi citizens, including the Shi'a citizens, and they enjoy an equal access to it.<sup>70</sup>

### 3. Sampling

Generally, the number of lawyers in Saudi Arabia is very little compared to its population.

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Article II mentions the duty of the Ministry of Justice to prepare a list of practicing and non-practicing lawyers based on the date of registry.

Article III of the same Code mentions the qualifications for individuals to be considered for practicing law as lawyers. These are: (1) Saudi citizenship; (2) Holding a Sharī'a degree or bachelor in systems from either a Sharī'a school or law department from one of the approved schools in the Kingdom; (3) Experience of at least 3 years; (4) Maintaining a good standing of behavior and manner; (5) Never been convicted with a had (major crime) or misdemeanor; (6) Residency in Saudi Arabia.

Article V of this Code concerns the procedure to obtain a license, which is an application filled out by the person who wants to become a licensed lawyer and submitted to the "Committee of Registering and Admitting Lawyers."

Article VII mentions the way to grant the license, which is a decision by the Minister of Justice. The expiration time for the license is 5 years from the date of issuance. The fees are SR 2000 for initial licensing and SR 1000 for the renewal. No bar exam is required to obtain a license, nor are there any kind of exams or tests to pass.

Article XI requires lawyers to conduct their business according to legitimate principles and observed regulations and to abstain from any misconduct.

Article XXIX states that a lawyer's name shall be deleted from the Ministry list for practicing lawyers if he is convicted with a punishment for a crime breaching honor or honesty.

Article XXXV states that the punished lawyer's name is to be transferred from the practicing lawyers' list to the non-practicing lawyers' list. This lawyer cannot open his firm during the time of the punishment, and, if he does, he shall be punished by deleting his name from the lawyers' list and revoking his practicing license.

Article XXXVI states that, after 3 years, the punished lawyer can ask that his name be re-listed in the practicing lawyers' list.

See the Code of Law Practice of 2001, Articles I, II, III, V, VII, XI, XXIX, XXXV, and XXXVI.

<sup>69</sup> CHAMPION, *supra* note 50, at 96; see also <https://www.cia.gov/library/publications/the-world-factbook/geos/sa.html>.

<sup>70</sup> See The Basic Law of Governance, Royal Order No. A/90, (27/8/1412H, Mar. 1, 1992), O.G. Umm al-Qura No. 3397 (2/9/1412H, Mar. 5, 1992): arts. 46 and 48; see also The Law of the Judiciary, Royal Decree No. M/78, art. 9 (19/9/1428H/October 11, 2007): art. 1.

There are so few attorneys in total: 2,115 licensed lawyers<sup>71</sup> for a total population of approximately 30 million as of 2013.<sup>72</sup> Moreover, not all lawyers selected on the basis of a random sample would probably consent to be interview subjects for this study. In addition, the focus was on practicing lawyers who were educated in Shari'a or law schools, and, since there is no system for tracking lawyers with this exact criteria in Saudi Arabia, it is impossible to determine how many of the 2,115 total attorneys currently meet this criteria to enable a random sample to be drawn from that subgroup to all interviewees. However, this did not prevent utilizing "simple random sampling" technique to choose the first few interviewees (2-3). The identification of the rest of the interviewees was then made through the application of a "snowball sampling." Snowball sampling is based on reaching a participant by means of referrals.

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<sup>71</sup> According to news report published in al-Arabiya Web Site at:

<http://www.alarabiya.net/articles/2012/09/20/239083.html>

Moreover, most of these relatively few lawyers exist in Riyadh (946) and Jeddah (541). Some of the 23 Saudi regions have only one lawyer for the whole region. The small number of lawyers in Saudi Arabia in comparison with its population is due in the first place to the novelty of the profession as a whole. The existence of a huge number of Shari'a graduates versus the small number of lawyers is due to factors such as:

1. Shari'a students do not go to Shari'a schools to graduate and become lawyers. Most of these thousands of graduates prefer to get jobs in the public sector. Specifically, they become teachers in public schools within its three stages: elementary, secondary, and high schools. This is really what most Shari'a graduates do. Students in public education study 6 to 7 Islamic subjects out of the 15 subjects they are taught. Teaching jobs in the public sector in Saudi are more rewarding and secure for Shari'a graduates than practicing law.
2. A good number of these graduates from Shari'a work as judges.
3. A good number of them join the Bureau of Investigation and Public Prosecution as prosecutors.
4. The law profession in particular did not start officially and gain some (not all) respect until very recently (around 10 years ago after the issuance of the Law of Lawyering in 2001).
5. Based on my personal observation, Shari'a graduates who practice law do this only after retiring from professions like judgeships and similar positions. They do not go directly after graduation to become lawyers.
6. Rules and policies in Saudi Arabia do not allow working in both sectors. If one is working in the government as a teacher, for instance, he cannot work as a lawyer by establishing his own practice.
7. The traditional image of the lawyer being the "advocate of the devil" and all the accompanying negative attitudes still exist in Saudi society especially among religious (Shari'a) graduates and conservative Saudi citizens.

In sum, the opportunities for Shari'a graduates to have jobs in the public sector cannot be compared to the opportunities that Regulations' graduates have. The Shari'a graduates have more chances, jobs, and better trust and prestige in society's eyes as well as government itself. In contrast, a student who graduates from Regulations has very limited chances in the public sector and is already programmed mentally to accept this.

<sup>72</sup> See the Saudi Central Department Of Statistics and Information at:

<http://www.cdsi.gov.sa/english/index.php>.

Snowball sampling can be defined as “A technique for finding research subjects. One subject gives the researcher the name of another subject, who in turn provides the name of a third, and so on.”<sup>73</sup>

First, randomly chosen experienced lawyers were interviewed. Second, each of these lawyers was asked in turn to identify other lawyers, who were also asked to participate in the interviews and to identify other lawyers who met the study criteria. This technique helped to reach more participants, since such a technique “offers real benefits for studies which seek to access difficult to reach or hidden populations,”<sup>74</sup> like the Saudi lawyers population that is targeted in this dissertation.

As noted earlier, accurate statistics are hard to obtain from reliable, official sources in Saudi Arabia. However, the best possible efforts were made to obtain the closest, possible numbers to use in creating a “sampling frame” for the interviews to be as representative as possible and to reflect the different segments based on different characteristics that exist within the Saudi legal profession.<sup>75</sup> This required establishing quotas that were kept in mind during the application of the snowball sampling strategy.<sup>76</sup>

#### **4. Participants’ Criteria**

Based on the previous description of the lawyer population in Saudi Arabia, the major difference between lawyers was in their education and specifically whether they had Sharī‘a law training or civil law training.<sup>77</sup> The number of licensed lawyers today (2,115) anecdotally

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<sup>73</sup> JOHN BREWER, *THE A-Z OF SOCIAL RESEARCH: A DICTIONARY OF KEY SOCIAL RESEARCH CONCEPTS*, 275 (2003); THOMAS LINDLOF & BRYAN TAYLOR, *QUALITATIVE COMMUNICATION RESEARCH METHODS*, 124 (2002).

<sup>74</sup> BREWER, *supra* note 73, at 275; LINDLOF & TAYLOR, *supra* note 73, at 124.

<sup>75</sup> EARL BABBIE, *THE BASICS OF SOCIAL RESEARCH*, 195 (2005).

<sup>76</sup> BABBIE, *supra* note 75, at 191.

<sup>77</sup> In the early drafts of this research, the “number of years of practice” was considered as a factor. Then during the interviews and through discussions with several lawyers, there was semi-agreement on that the “number of years of practice” has no significant impact on the main focus of the study. The participant

reported to be approximately divided equally between these two types of lawyers.<sup>78</sup> Therefore, a sampling goal was that about half of the interviewees (50%) should be conducted with lawyers with a Sharī‘a background and about half (50%) with lawyers with a regulations background for the sampling to be as representative as possible.

These previous percentages can be translated into the following:

For the sampling to be as representative as possible, then:

- Roughly 50% of the interviews should be conducted with law-trained lawyers (9 - 10 interviews)
- Roughly 50% of the interviews should be conducted with Sharī‘a-trained lawyers (9 - 10 interviews)

Before starting the fieldwork, it was hard to determine a specific number of interviews that should be conducted.<sup>79</sup> In general, there is no fixed number viewed as optimal for qualitative studies.<sup>80</sup> However, some estimation of a useful and meaningful sample size could be developed based on factors such as “what you want to know, the purpose of the inquiry, what’s at stake, what will be useful, what will have credibility, and what can be done with available time and resources.”<sup>81</sup>

On the one hand, since the purpose of the empirical work here is to gain deep understanding of how lawyers understand and perceive the predictability of the judicial analysis

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either knows and understands the judicial analysis and is familiar with it based on his education or not, regardless the time that he spent in the practice. However, a minimum of 2-3 years of practicing was kept in mind to give a chance for the graduate to obtain his licensing and to stand before the court and deal with the judicial analysis in a practical manner. Thus, even those who graduated from law schools and expressed positive impressions toward the Sharī‘a analysis were familiar with the judicial analysis by studying Sharī‘a courses independently, which resulted in positive impressions. Their actual legal experience, therefore, was not the key factor in forming their positive attitude, as it will be illustrated later in this research.

<sup>78</sup> This is based on the best, closest, possible estimation that I was able to obtain from lawyers.

<sup>79</sup> See LINDLOF & TAYLOR, *supra* note 73, at 129.

<sup>80</sup> See MICHAEL QUINN PATTON, *QUALITATIVE EVALUATION AND RESEARCH METHODS*, 184 (1990).

<sup>81</sup> PATTON, *supra* note 80, at 184; *see also* LINDLOF & TAYLOR, *supra* note 73, at 129.

in the courts, the advantage of relatively small number of interviews is to provide information-rich data. It provides the researcher with more time to spend with each interviewee during the interview and any possible follow-ups. This is likely to give the chance for each interviewee to speak up and provide more data and explanation, and to overcome any time or financial constraints from the side of the researcher.<sup>82</sup>

On the other hand, the trade-off between breadth and depth should be born in mind especially in considering the validity of particular conclusion that might be viewed as soundly based on the data. In particular, the depth in information provided through small sample in qualitative inquiry comes at the expense of limitation on generalizing from the sample to the population of which is a part, as generalization usually requires large, representative sample.<sup>83</sup>

For these reasons, the hope was to interview between 10 and 20 Saudi lawyers from each two sub-groups. At the end, a total of twenty-one (21) interviews were conducted in several Saudi cities:<sup>84</sup> 13 interviews (62%) were conducted with lawyers with a law background, while 8 interviews (38%) were conducted with lawyers with a Sharī‘a background.<sup>85</sup>

Two points justify the limited number of the interviews conducted in this research:

First, the restraints imposed by the time and financial resources provided through the sponsor of this research.

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<sup>82</sup> The small number of cases is valuable especially when the study concerns a hidden or hard to access populations such as lawyers in Saudi. In this case, a few people are expected to provide the researcher with valuable data. See Patricia A. Adler & Peter Adler, *The Epistemology of Numbers, in How Many Qualitative Interviews Is Enough*, 8-11, 8. Can be accessed at: [http://eprints.ncrm.ac.uk/2273/4/how\\_many\\_interviews.pdf](http://eprints.ncrm.ac.uk/2273/4/how_many_interviews.pdf).

<sup>83</sup> PATTON, *supra* note 80, at 184.

<sup>84</sup> This includes Jeddah, Mecca, Medina, Taif, Riyadh, and Dammam.

<sup>85</sup> Mark Mason surveyed 560 samples of PhD studies that used qualitative approaches and qualitative interviews as the method of data collection to figure out what is the average number used in these studies. As a guideline, Mason found that 15 is the smallest number acceptable in such studies, with 20-30 as an average. See Mark Mason, *Sample Size and Saturation in PhD Studies Using Qualitative Interviews*, in 11 Forum: Qualitative Social Research, (No. 3, Art. 8) (2010).

Second, the expected hesitation and refusal expressed by many selected subjects to participate in the study. As mentioned earlier, it is in fact rare for people in Saudi to be asked to express their opinions regarding almost any issue in Saudi, which usually makes such practice suspicious and surrounded with doubts. Therefore, the participants' willingness to be interviewed was very limited.

As stated earlier, only 21 lawyers agreed to be interviewed in this research while more than 30 lawyers rejected to do, based on fear, doubts and unfamiliarity with such techniques and study projects.

The following figure shows the distribution of the different interviewees based on these two segments:

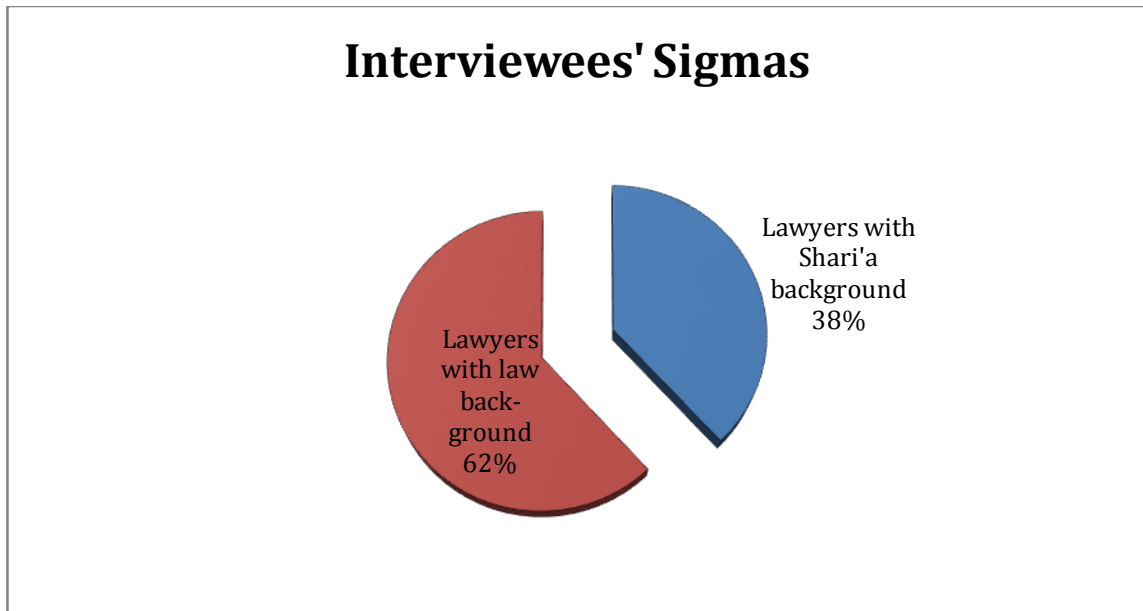


Figure 1: Allocation of Interviewed Sample

Notably, the interviewed sample did not include any female lawyers, as the lawyering profession was not open to Saudi females until very recently, as noted earlier.

## 5. Recruitment

Most of the interviews with practicing Saudi lawyers were conducted between December

2013 and June 2014. While most of these interviews were conducted face-to-face within the mentioned period, some very few (2-3 interviews) were conducted by phone at a later time. Moreover, some answers from the face-to-face interviews were received after the interview took place. The subjects were contacted through a variety of channels, mostly through personal recommendations from colleagues, friends and family members. Telephone directories were used sometimes too. Advertisements were not used, as they are prohibited for lawyers in Saudi Arabia. When a lawyer was contacted by telephone, a general explanation of the purpose of the research was usually given, which was usually followed with a request for an in-person interview of 45–60 minutes duration. Toward the end, each interviewee was asked to suggest one or more other lawyers who could be interviewed. Each named lawyer was then contacted in the same manner, and the same steps were taken. Some interviewees were visited more than once to gain their trust and to make them more comfortable in participating in the study. Some answers were received from interviewees later through e-mail. Some lawyers refused to answer all of the questions. Some lawyers refused to be interviewed at all.

## **X. Thesis Organization**

This thesis consists of 5 chapters. Because this thesis concerns the compatibility of the current judicial analysis within Sharī‘a Courts and modernization, chapter 2 focus on drawing a close picture of the modernization experience in Saudi Arabia. It starts by discussing the meaning of the term “modernization.” It then discusses the major aspects of modernization and the history of the origins of this term. The discussion ends with a critical notion that paves the way toward building on the thesis for the whole research; modernization does not have an agreed on template that is expected to produce the same specific results with all expected accompanied

details everywhere that it may be applied.<sup>86</sup> Rather, diversity in the social and cultural settings of the societies where modernization took or will take place dictates crucial consideration, and respect should be given to these settings when modernization in these societies is the subject of analysis and focus.

Chapter 2 then turns to focus on the modernization experience in Saudi Arabia through surveying different perspectives in this regard. Depending upon the point of view of the observer, the Saudi experience with modernization is either interpreted as a paradox or as an expected outcome when the course of modernization is purposefully shaped and directed. For outsiders, the Saudi case represents a paradox and an inexplicable challenge to the principles of modernization theory. However, it might impose the establishment of a new paradigm of modernism shaped to achieve national agendas.

Some Progressives in and out of Saudi Arabia appear to adopt a narrow, reductionist interpretation of the classical framework of modernization in their argument, thinking that, for Saudi Arabia to achieve modernity, it must follow the Western model. This includes developing a modern legal system to replace the current Sharī‘a system. Accordingly, they suggest the abandonment of the classical legal analysis in Sharī‘a Courts to adopt a more predictable analysis. In their view, this is embodied only in codification.

Like the previous chapters, chapter 3 is designed to explore the codification argument in Saudi Arabia. It aims to present the debate surrounding the issue of codification of Sharī‘a law in Saudi Arabia among all different groups that represent different ideological approaches to the issue at hand. While some of these groups, whose members were trained in the Islamic classical way, are religious, others, who were either trained in the modern law departments inside Saudi

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<sup>86</sup> See SIMON DIXON, *THE MODERNIZATION OF RUSSIA 1676-1825*, 4-5 (1999).

Arabia or in the law schools in such Western countries as France, England, and the United States, are not religious. Some of both groups are Conservatives or Progressives who support codification, while others are Conservatives or Progressives who oppose it.

Seeking to clarify and explore this issue better, this chapter starts by visiting the recorded historical developments that led to the current status, followed by identifying the meaning of the conceivable, possible codification that can be imagined in Saudi Arabia considering all specific features and circumstances of the Saudi case. Some written examples are presented from the arguments raised by codifiers who are either Conservatives or Progressives. However, more attention is paid to the more important and meaningful argument between the opponents and proponents of codification among the religious scholars (‘ulamā’) in this regard.

The chapter then responds to one of the major concerns raised by both sides, which is the real effect, if any, of codification on the role of judges based on some academic inputs and recorded actual experiences. The point addressed here is whether codification really reduces the role of judges or, instead, re-directs it, as will be seen.

The theoretical argument of codification in Saudi is followed then by some of the empirical results related to the codification argument in Saudi. These results are part of the data collected during the fieldwork for this research.

Finally, the chapter ends with a concluding analysis drawn from the preceding. Also, the chapter is not meant to support any side against the other or to assess who is right or who is wrong. Rather, it is meant to give a general view and to explore the issue within an appropriate, tailored scope to pave the way to the following chapter about the legal analysis in Sharī‘a Courts, which represents the focus point of the research and which has never been studied or tested closely as this research seeks to do.

Chapter 4 is dedicated to presenting and explaining fully the current methodology of legal analysis that has been followed within the Sharī‘a Courts in Saudi Arabia since 1928. The debate about codification is dividing the Saudi intellectual community. Some of the proponents blindly advocate codification, because they claim that it will be able to provide an overall solution to many problems or vices of the current legal system. Their arguments in favor of their position are based partly on religion. Whether the opponents from the conservative side interact with this argument or not, neither of the two sides has studied or explained the current legal methodology used in the legal analysis within the Sharī‘a Courts. This research is meant to bridge the gap between the two camps by engaging in the argument from a different perspective. This research explains the current methodology theoretically and empirically; the theoretical search will be followed with an empirical search and with an exploration of the effect of this methodology on the legal practice and specifically on the practicing lawyers who represent the active parties in society. The chapter begins with an introduction to the historical circumstances that led to the birth of the legal analysis in the Sharī‘a Court system in Saudi Arabia.

Chapter 5 summarizes the findings and concludes the discussion.

## **Chapter Two: Perspectives on Modernization Experience in Saudi Arabia**

### **I. Introduction**

The Conservatives and Progressives in Saudi Arabia have long argued about the modernization of the country's legal system. In particular, part of this argument focuses on the judicial analysis in Sharī'a Courts. Progressives claim that the judicial analysis in the Sharī'a Courts in Saudi is incompatible with requirements of modernization as they view it following Western theorists. They think that it lacks enough predictability required for such a transformation.

This chapter discusses, first, the meaning of the term "modernization" as defined in the writings of its Western theorists, who are the primary source for this term. Next, the chapter briefly discusses the major aspects of modernization and the history of the origins of this term, focusing on the political incidents that accompanied its birth, adoption, and formulation in a theory to carry a specific meaning in the mid-20<sup>th</sup> century. It then sheds light on the modernization experience in Saudi Arabia through surveying the different perspectives in this regard.

### **II. What Is Modernization?**

Etymologically, the word "modernization" is derived from the word "modern" which has been in use since the 15<sup>th</sup> century to mean several things depending on the form of the use. Some of these meanings include "[b]eing in existence at this time" and "current, present."<sup>87</sup> It can also be used as to mean "[o]f or relating to the present and recent times, as opposed to the remote

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<sup>87</sup> See "modern, adj. and n." entry in OXFORD ENGLISH DICTIONARY, at: <http://www.oed.com.offcampus.lib.washington.edu/view/Entry/120618?redirectedFrom=modern#contentWrapper>

past.”<sup>88</sup> Another meaning includes “[c]haracteristic of the present time, or the time of writing” opposite to “not old-fashioned, antiquated, or obsolete” through “employing the most up-to-date ideas, techniques, or equipment.”<sup>89</sup> When the word is used to describe a person it means “up to date in behaviour, outlook, opinions, etc.” who is “embracing innovation and new ideas” and who is “liberal-minded.”<sup>90</sup>

However, like most historical models and theories, the term “modernization” has no single, orthodox definition. The efforts to define the term are relative, and there is confusion concerning the meaning of the word “modernization.” This confusion is due to the different goals, approaches, and knowledge among those who use the term depending on their ideologies and fields of interest. This diversity in directions led to vagueness and ambiguity in defining the borders of the contemporary usage of the term “modernization.”<sup>91</sup> Different definitions were introduced to show these different directions and interests.<sup>92</sup>

For instance, although sociologists define modernization a bit differently among themselves, their definitions are still within the realm of sociology. This includes consideration of social concepts that all revolve around social changes and transitions from traditional to

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<sup>88</sup> See “modern, adj. and n.” entry in OXFORD ENGLISH DICTIONARY, at: <http://www.oed.com.offcampus.lib.washington.edu/view/Entry/120618?redirectedFrom=modern#contentWrapper>

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> See Samuel Huntington, *The Change to Change: Modernization, Development, and Politics*, in ANALYZING THE THIRD WORLD: ESSAYS FROM COMPARATIVE POLITICS 30, 40-41 (NORMAN PROVIZER ed., 1978); see also DIXON, *supra* note 86, at 4-5; see also RICHARD D. BROWN, MODERNIZATION: THE TRANSFORMATION OF AMERICAN LIFE 1600-1865, 3-4 (1976); see also DAVID HARRISON, THE SOCIOLOGY OF MODERNIZATION AND DEVELOPMENT, 1 (1988).

<sup>92</sup> See ALVIN SO, SOCIAL CHANGE AND DEVELOPMENT: MODERNIZATION, DEPENDANCY, AND WORLD-SYSTEM THEORIES, 23 (1990); see also CYRIL BLACK ET AL., THE MODERNIZATION OF JAPAN AND RUSSIA: A COMPARATIVE STUDY, 4-5 (1975); see also M. FRANCIS ABRAHAM, PERSPECTIVES ON MODERNIZATION: TOWARD A GENERAL THEORY OF THIRD WORLD DEVELOPMENT, 4-5 (1980).

modern. Among these sociologists who have written about modernization, Everett Rogers who defines modernization as:

“the process by which individuals change from a traditional way of life to a more complex, technologically advanced, and rapidly changing style of life.”<sup>93</sup>

Other sociologists define modernization in relation to “man’s increased knowledge and mastery of his environment.” Among these is Cyril Black who defines modernization as:

“the process by which historically evolved institutions are adapted to the rapidly changing functions that reflect the unprecedented increase in man’s knowledge, permitting control over his environment that accompanied the scientific revolution.”<sup>94</sup>

Shmuel Eisenstadt defines modernization by focusing on its most important feature in his view, “social mobilization.” Following Karl Deutsch, he characterizes it as:

“the process in which major clusters of old social, economic, and psychological commitments are eroded and broken, and people become available for new patterns of socialization and behavior.”<sup>95</sup>

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<sup>93</sup> EVERETT M. ROGERS, *MODERNIZATION AMONG PEASANTS: THE IMPACT OF COMMUNICATION* 14 (1969); *see also* BROWN, *supra* note 91, at 6-7. Daniel Lerner interprets modernization as: “A secular trend, unilateral in direction from traditional to participant life-ways.” DANIEL LERNER, *THE PASSING OF TRADITIONAL SOCIETY: MODERNIZING THE MIDDLE EAST*, 89 (1958).

<sup>94</sup> CYRIL BLACK, *THE DYNAMICS OF MODERNIZATION: A STUDY IN COMPARTIVE HISTORY*, 7&9-13 (1966); *see also* Huntington, *supra* note 91, at 33. Robert Bellah equates modernization with progress and therefore describes it as: “an increasing ability to learn to learn.” He defines progress/modernization as: “an increase in the capacity of a social system to receive and process information from within and without the system and to respond appropriately to it.” ROBERT N. BELLAH, *RELIGION AND PROGRESS IN MODERN ASIA*, 169-170 (1965).

<sup>95</sup> SHMUEL EISENSTADT, *MODERNIZATION: PROTEST AND CHANGE*, 2 (1966).

It is obvious that the emphasis in this definition is on the readiness of people in a certain society to abandon their traditional ways and absorb new, modern ones.

From a different angle, economists define modernization in relation to economic concepts, such as economic growth structures that encompass per capita income, standard of living, and so on. In this direction, Wilbert Moore defines modernization in relation to “economic growth,” which he sees embodied specifically in “industrialization.” In Moore’s view industrialization, therefore, represents the modernization process, which he defines as

“the extensive use of inanimate sources of power for economic production and all that that entails by way of organization, communication, and so on.”<sup>96</sup>

In contrast to these views that focus on social and economic aspects is the view that can be found in the literature of some political scientists. This view defines modernization with emphasis on the policies initiated by the leaders or elites of developing countries to support modernization.<sup>97</sup> Modernization, therefore, is a set of plans and policies set by these “modernizing” leaders to direct change in a direction thought of by those leaders as more advanced and modern. According to this view, the policies enforced by Meiji leaders of Japan in

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<sup>96</sup> WILBERT E. MOORE, *SOCIAL CHANGE*, 91-92 (1963). Walt Whitman Rostow’s version of modernization reflects a special consideration to economic change as well. He argues that all human communities go through five phases of development starting with traditional society and ending with the high mass-consumption society. See Walt Whitman Rostow, *The Takeoff Into Self-Sustained Growth*, in *SOCIAL CHANGE: SOURCES, PATTERNS, AND CONSEQUENCES*, 275, 275-290 (AMITAI ETZIONI & EVA ETZIONI eds., 1964).

<sup>97</sup> See Ronald Philip Dore, *On the Possibility and Desirability of a Theory of Modernization*, in 38 *COMMUNICATIONS SERIES OF UNIVERSITY OF SUSSEX*, 1, 4 (1969).

the 1870's or Kemal Ataturk in Turkey in the 1920's, for example, were part of a process of modernizing these countries, and those leaders were, according to this view, modernizers.<sup>98</sup>

In a different direction, psychologists have their own definition of modernization that considers concepts derived from their field, such as the impact of modernization on the individual's personality, the pressure between an individual's security and his or her independence in the newly-moved-to societies, and so on.<sup>99</sup>

Another direction represents a contrasting view that defines modernization in general, broad terms, although the similar specific meaning can still be understood from the context. For example, in Monte Palmer's view, modernization

“refers to the process of moving toward that idealized set of relationships posited as modern by various social theorists.”<sup>100</sup>

He adds that:

“the term “modern” will be used to refer to an idealized pattern of social, economic, and political arrangements that is yet to be achieved but is approximated by the world's more economically developed states.”<sup>101</sup>

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<sup>98</sup> *Id.*; see also NILS GILMAN, MANDARINS OF THE FUTURE: MODERNIZATION THEORY IN COLD WAR AMERICA, 31 (2003).

<sup>99</sup> Among these psychologists is Alex Inklese, who defines modernization by establishing a set of traits of what he believes are required to form “modern personality.” In his view, the modern personality needs to be open to new experiences, ready for social change, have a disposition to form opinions, and be independent, energetic, interested in public policies and cultural matters, rational and able to plan for the future. See ALEX INKELES AND DAVID HORTON SMITH, BECOMING MODERN: INDIVIDUAL CHANGE IN SIX DEVELOPING COUNTRIES, 19-25 (1974).

<sup>100</sup> MONTE PALMER, THE DILEMMAS OF POLITICAL DEVELOPMENT: AN INTRODUCTION OF THE POLITICS OF THE DEVELOPING AREAS, 24-25 (1980).

<sup>101</sup> *Id.* (emphasis added)

It is not surprising to see all of these different ideas and points of view in terms of defining and explaining the meaning of modernization, as modernization is a phenomenon that is involved in almost every field of the social sciences.

What can be concluded from this brief review is that modernization has been hotly debated. The dichotomy used to define it, contrasting what is traditional, past, and old and what is modern, present, and future, is also noteworthy.

Finally, it is clear that modernization is a multi-dimensional-practice: political, economic, social, and cultural, in a way that, inevitably, leaves a deep impact on individuals' lives in the society to move them from the past toward a future that is made by their ability and readiness to absorb and to change.

### **III. The Major Aspects of Modernization**

Although there is no controlling consensus among theorists on a single definition of modernization, as stated above, a list can be created of some of the leading characteristics and phenomena, which almost all of these theorists agree on that they are characteristic of modernization when it occurs in a given developing country. In particular, some leading writers about modernization, including Daniel Lerner,<sup>102</sup> Hadley Cantril,<sup>103</sup> Shmuel Eisenstadt,<sup>104</sup> Henry Bernstein,<sup>105</sup> Cyril Black,<sup>106</sup> Samuel Huntington,<sup>107</sup> and M. Francis Abraham,<sup>108</sup> implicitly or explicitly attribute the following aspects to modernization:<sup>109</sup>

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<sup>102</sup> See LERNER, *supra* note 93, at 34-75, especially the 2<sup>nd</sup> chapter as Lerner devotes it to explain the aspects of modernization.

<sup>103</sup> See HAIDLEY CANTRIL, *THE PATTERN OF HUMAN CONCERNS*, (1966).

<sup>104</sup> See EISENSTADT, *supra* note 95; *see also* SHMUEL EISENSTADT, *THE PROTESTANT ETHICS AND MODERNIZATION: A COMPARATIVE VIEW* (1968).

<sup>105</sup> See Henry Bernstein, *Modernization Theory and the Sociological Study of Development*, 7:2 *JOURNAL OF DEVELOPING STUDIES*, 141-160 (1971).

<sup>106</sup> See BLACK, *supra* note 94.

<sup>107</sup> See Huntington, *supra* note 91.

1. Modernization is an inevitable practice and has turned into a widespread phenomenon.<sup>110</sup>
2. Modernization increases social mobility.<sup>111</sup>
3. Modernization results when many individuals move from villages and the countryside to the urban areas causing an urban population explosion.<sup>112</sup>
4. Industrialization is a major aspect of modernization. Industrialization is accompanied by an increase in manufacturing, mass production, a skilled labor force, professional bureaucracy, market rationality, and international commerce.<sup>113</sup>
5. Secularization is also a major aspect of modernization. It is a transformation of the traditional system of values and beliefs into a system controlled by logic, rationale, and constructive science.<sup>114</sup>

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<sup>108</sup> See ABRAHAM, *supra* note 92.

<sup>109</sup> Other examples of the modernization aspects include: (1) inhabitants who relocate from rural areas to big cities in urbanized structured homes; (2) professions that become more skillful and narrowly specialized; (3) the creation of better health conditions that are based on healthy diets and medical care programs; (4) product selection and variety become diverse and enormously wide; (5) traveling between cities becomes less time consuming because of the use of mechanical transportation; (6) conventional farming techniques become obsolete and are replaced by machines and updated watering technology; (7) the use of money becomes popular superseding traditional barter or gift exchange of goods; public services are founded based on logic and collectivity; (8) efforts are made by planning departments and organizations to gain deliberated control over policies that shape the economy; and (9) the news from every place reaches the entire world at the same time through the Internet and satellite facilities. See BLACK, *supra* note 94, at 20-24; *see also* Huntington, *supra* note 91, at 34; *see also* GILMAN, *supra* note 98, at 24-25.

<sup>110</sup> See SO, *supra* note 92, at 34.

<sup>111</sup> See BLACK, *supra* note 94, at 20-21 & 24; *see also* LERNER, *supra* note 93, at 47-48; *see also* EISENSTADT, *supra* note 95, at 2.

<sup>112</sup> See LERNER, LERNER, *supra* note 93, at 46 & 60; *see also* EISENSTADT, *supra* note 95, at 2; *see also* Neil Smelser, *Mechanisms of Change and Adjustment to Change*, in *INDUSTRIALIZATION AND SOCIETY* 32, 33 (BERT HOSELITZ & WILBERT MOORE eds., 1963); *see also* Wilbert Moore, *Industrialization and Social Change*, in *INDUSTRIALIZATION AND SOCIETY* 299, 326-336, (BERT HOSELITZ & WILBERT MOORE eds., 1963).

<sup>113</sup> See LERNER, LERNER, *supra* note 93, at 60; *see also* EISENSTADT, *supra* note 95, at 2; *see also* Smelser, *supra* note 112, at 32-54; *see also* Moore, *supra* note 112, at 317-322; *see also* ABRAHAM, *supra* note 92, at 14; *see also* MOORE, *supra* note 96, at 91-92 & 108-110.

<sup>114</sup> See Moore, *supra* note 112, at 351-353; *see also* ABRAHAM, *supra* note 92, at 7; *see also* MOORE, *supra* note 96, at 104.

6. Social status in modernized societies is based more on personal success and achievement rather than on status relations and familial kinships.<sup>115</sup>
7. The level of the use of inanimate energy, the common transmission of goods, and the expansion of service facilities in the modernized society, is higher than its counterpart in traditional or less modernized society in comparison.<sup>116</sup>
8. Literacy and secular, scientific-based values are other major aspects of modernization that control the relationships between individuals and their environments.<sup>117</sup>
9. Higher media exposure, the revolution of rising expectations, and the appearance of a considerable middle class are all major aspects of modernization.<sup>118</sup>

It is also clear that modernization cannot be connected to only one or two phenomena; rather, it is an overwhelming complex and diverse phenomenon that involves sweeping changes to many aspects and directions in society, polity, and culture.<sup>119</sup>

Hence, it would be incorrect to limit modernization to a certain fixed template that should and is expected to produce the same specific results with all expected accompanied details everywhere once it is applied.<sup>120</sup> In fact, the diversity in the social and cultural settings of the societies where modernization took or will take place dictates crucial consideration, and respect should be given to these settings when modernization in these societies is the subject of analysis and focus.

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<sup>115</sup> See EISENSTADT, *supra* note 95, at 2-3; *see also* Moore, *supra* note 112, at 106-105.

<sup>116</sup> See Huntington, *supra* note 91, at 33; *see also* MOORE, *supra* note 96, at 91-92.

<sup>117</sup> See BLACK, *supra* note 94, at 21; *see also* LERNER, T LERNER, *supra* note 93, at 46 & 60; *see also* EISENSTADT, *supra* note 95, at 2; *see also* ABRAHAM, *supra* note 92, at 4; *see also* Huntington, *supra* note 91, at 34; *see also* MOORE, *supra* note 96, at 89 & 103.

<sup>118</sup> See BLACK, *supra* note 94, at 22; *see also* LERNER, LERNER, *supra* note 93, at 46 & 52-54; *see also* EISENSTADT, *supra* note 95, at 2; *see also* ABRAHAM, *supra* note 92, at 4; *see also* MOORE, *supra* note 96, at 103.

<sup>119</sup> See SO, *supra* note 92, at 35; *see also* BLACK, *supra* note 94, at 9-26; *see also* Huntington, *supra* note 91, at 35; *see also* ROGERS, *supra* note 93, at 15.

<sup>120</sup> See DIXON, *supra* note 86, at 4-5.

#### IV. The Saudi Arabian Modernization Experience

The Saudi experience with modernization is quite different to the experiences in other traditional Islamic countries, such as Iran and Pakistan, for example. In Iran, the Islamic Revolution of 1979 was a product of a backlash against modernization efforts by the previous monarch, Shah Mohammad Pahlavi, who was overthrown for the installation of Ayatollah Ruhullah Khomeini as the “Imam” for the Iranian Islamic state.<sup>121</sup> Similarly, in Pakistan, General Mohammad Zia ul-Haq, President of the state, embraced a radical Islamic position following the overthrow of former President Zulfaqar Ali Bhutto, whose efforts to modernize the Pakistani state disregarded the deep Islamic tradition of the society.<sup>122</sup>

In contrast to these two examples, the Saudi state claims to succeed –to some extent– in embracing what it views as a balanced plan in order to harmonize its deep Islamic, Arabic roots with the economic and industrial requirements of modernization. Although advocates of the Saudi modernization philosophy believe that the modernization experience of their country is “unique” in combining some of the requirements of modernization with the teachings of Islam,<sup>123</sup> a more neutral view suggests a different analysis. It might be that much of what is thought to be uniqueness of Saudi modernization experience may due to the fact that Saudi was never fully

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<sup>121</sup> See Marguerite Del Giudice, *Persia: Ancient Soul of Iran: A glorious past inspires a conflicted nation*, NATIONAL GEOGRAPHY MAGAZINE, August, 2008, (Magazine); see also JOHN A. SHAW AND DAVID E. LONG, SAUDI ARABIAN MODERNIZATION: THE IMPACT OF CHANGE ON STABILITY, x (1982); see also TOBY CRAIG JONES, DESERT KINGDOM: HOW OIL AND WATER FORGED MODERN SAUDI ARABIA, 185 (2010).

<sup>122</sup> See HUSSAIN HAQQANI, PAKISTAN: BETWEEN MOSQUE AND MILITARY: FROM ISLAMIC REPUBLIC TO ISLAMIC STATE, 395 (2005).

<sup>123</sup> See Fatina Amin Shaker, *Modernization of the Developing Nations: the Case of Saudi Arabia* 37 (1972) (unpublished Ph.D. dissertation, Purdue University) (in file with the researcher); see also FOUAD AL-FARSI, MODERNITY AND TRADITION: THE SAUDI EQUATION, xxi-xxiii (1990); see also Khalid Abdallah Ben-Bakr, *Modernization as if People Mattered: Towards a New, Indigenous, and Non-Ethnocentric Theory of Modernization*, 56 (1987) (unpublished Ph.D. dissertation, University of Southern California) (in file with the researcher); see also ABDULAZIZ I. AL-SWEEL, SAUDI ARABIA: A KINGDOM IN TRANSITION, 65 (1993).

colonized by one of the Great Powers before the 20th Century, which in turn might be due to the geographical remoteness and limited economic value of the territory prior to the discovery of oil.

In fact, two factors have helped Saudi Arabia to apply its agenda towards the modernization process without jeopardizing its own traditional social, religious and political values:

First, the Kingdom of Saudi Arabia has never been subjected to any type of foreign colonization, as have most of its neighboring states in the Middle East.<sup>124</sup> The modern Saudi state was built at the outset on a base of Arab and Muslim values to form a modern Arab and Muslim state. Neither Western laws nor culture had a direct effect on Saudi Arabia, as they had on most of the previously colonized countries.<sup>125</sup>

Second, Saudi modernization has been supplied and funded entirely with pure Saudi capital, which is provided by Saudi natural resources, mainly its oil.<sup>126</sup> The fact that this modernization was not dependent, even partially, on any foreign (Western or otherwise) fund strongly helped the Saudi Government to impose its own perspective and philosophy of modernization without any external dictations, which was not the case in many other developing countries.<sup>127</sup>

Although not unique to Saudi Arabia,<sup>128</sup> the modernization experience in Saudi exists side-by-side with traditional social and religious values in a way that is contrary to the classical theory of modernization that supposes a transformation towards modern social and political

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<sup>124</sup> See AL-SWEEL, *supra* note 123, at 65; see also PASCAL MÉNORET, *THE SAUDI ENIGMA: A HISTORY*, 75-76 (2005).

<sup>125</sup> See ANN T. JORDAN, *THE MAKING OF A MODERN KINGDOM: GLOBALIZATION AND CHANGE IN SAUDI ARABIA*, 81 (2011).

<sup>126</sup> See CHAMPION, *supra* note 50, at 81; see also Killian Clarke, *A Modernization Paradox: Saudi Arabia's Divided Society*, 29 *Harvard Int'l Rev. (ISSUE 3)* 31-33 (2007).

<sup>127</sup> See AL-SWEEL, *supra* note 123, at 65; see also JORDAN, *supra* note 125, at 81.

<sup>128</sup> Similar to Ireland and the Catholic Church, or Thailand and Buddhism, for instance.

institutions and secularism.<sup>129</sup> As discussed, the classical modernization theory draws a sharp line between what is “traditional” and what is “modern.” It assumes them to be used as “polar opposites in contemporary analysis of social and political changes”<sup>130</sup> applied by modernization and to exist independently, yet correlated. However, some cases, like Saudi, have proven a possible pattern of interaction and coexistence between these two concepts in a given society, thereby creating a gray area that some writers, like Joseph Kahl, for example, call it “in-between,” and some, like Daniel Lerner, call it “transitional stage.” As Kahl puts it, “although the components of modernism are interrelated in the minds of men, it is possible for some men to be modern on a few values and traditional on others.”<sup>131</sup>

In the view of some proponents, the Saudi experience with modernization may suggest a re-examination of the conventional notion of modernization theory set by Western modernization theorists. As it was discussed earlier, the manner in which modernization conceived and practiced in the West requires a separation between scientific, rational principles and social, religious, and spiritual norms. Therefore, religions and traditions have been looked at as obstacles in the way of modernization and development.<sup>132</sup> This Western understanding of modernization might be more insisting when the benefits of modernization must come from cross-border trade and the modernizing country is weaker than the advanced market economies it trades with. This is not the case in Saudi, which has succeeded –to a reasonable extent and as its advocates claim –in combining its domestic norms in politics and society by adhering to religion and traditions while implementing its economic modernization process that is supported by its

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<sup>129</sup> See DAVID E. LONG, *CULTURE AND CUSTOMS OF SAUDI ARABIA*, 28-33 (2005).

<sup>130</sup> JOSEPH KAHL, *THE MEASUREMENT OF MODERNISM: A STUDY OF VALUES IN BRAZIL AND MEXICO*, 22 (1968); see also LERNER, LERNER, *supra* note 93, at 71; see also Shaker, *supra* note 123, at 37-42.

<sup>131</sup> *Id.*

<sup>132</sup> See Ben-Bakr, *supra* note 123, at 59.

own natural wealth. As John Shaw puts it, “Saudi Society does not operate by Western logic.” Shaw is also impressed by the ability of Saudi to keep its traditional political and social structure almost untouched or without major revolutionary change, as is the practice in Third World countries.<sup>133</sup> Mamoun Fandy also said: “In Saudi Arabia, different times and different places exist at once. Saudi Arabia is both a pre-modern and a post-modern society.”<sup>134</sup> In the same vein, William Rugh wrote: “Saudis with a secular education have broken less new ground in the social sphere than they have in the economics. Traditional factors such as kinship and religion still are very important in Saudi social behavior...”<sup>135</sup> The difference of the Saudi experience might not lie in its desire to remain theocratic; rather, it is in the Saudi’s ability to control its trade with advanced market economies.<sup>136</sup>

This might help explain many social phenomena in Saudi society that seem bizarre and even paradoxical to outside-observers, especially Westerners.<sup>137</sup> Although Saudi has its own

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<sup>133</sup> See SHAW AND LONG, *supra* note 121, at 106 and 109-110.

<sup>134</sup> See MAMOUN FANDY, SAUDI ARABIA AND THE POLITICS OF DISSENT, 6 (1999).

<sup>135</sup> William Rugh, *Emergence of a New Middle Class in Saudi Arabia*, 27 *The Middle East Journal*, 7, 17 Issue 1 (1973); see also AL-FARSI, *supra* note 123, at xxii-xxiii; see also CHAMPION, *supra* note 50, at 76-140; see also DAVID E. LONG, CULTURE AND CUSTOMS OF SAUDI ARABIA, 18 (2005), see also ABDULHADI H. TAHER, PETROLEUM, GAS AND DEVELOPMENT STRATEGIES OF SAUDI ARABIA, 97 (2011).

<sup>136</sup> One might wonder here if this process of modernization occurs naturally or organically. The answer lies in understanding that this process run by the government reflects the will of most of Saudi citizens, who strongly support the control of Islamic teachings and values. Some historical incidents have shown that when the government sometimes pushes towards some cultural and social liberation from some traditional values, the majority of the Saudi society, led by religious figures, does not agree and causes some unrest.

<sup>137</sup> See Clarke, *supra* note 126, at 30; see also SHAW AND LONG, *supra* note 121, at 84; see also CHAMPION, *supra* note 50, at 111-112; see also MÉNORET, *supra* note 124, at 41, 71-72, 153-156, and 208; see also JONES, *supra* note 121, at 19; see also MUHAMMAD AL ATAWNEH, WAHHABI ISLAM FACING THE CHALLENGES OF MODERNITY: DAR AL-IFTA IN THE MODERN SAUDI ARABIA, xvi-xvii (2010). Phenomena such as: (1) women wearing ‘abayas –black gowns that cover from head to toe– while shopping at modern and fancy shopping malls designed in the most modern way similar to those that exist in any Western country; (2) women are not allowed to drive cars in Saudi, where the most modern and fancy cars can be found; (3) women are not allowed to travel without their male guardians, although Saudi possesses a fleet of the most modern airplanes and airports; (4) the whole social life is built on a full segregation between men and women in all different social sets, such as education, restaurants, hospitals, sports, etc. (5) no freedom of religion, because only Islam is allowed in Saudi; (6) there is no ‘night life,’ such as bars and clubs; (7) there are no movie theaters; (8) Saudi has never had political elections; (9) all stores shut their doors during prayers times; and (10) restaurants close their

justifications and explanations based on social and religious views for all of these phenomena, modernization in Saudi represents a counter-example for strong advocates of the Modernization Theory as structured and formulated in the West. Western theorists of the classical Modernization Theory, such as Rostow, link economic prosperity with the socio-political change towards democracy and western style social changes, pluralism, and liberalism.<sup>138</sup> The Western formula of modernization promises that, if the economy develops, then more social and political gains will develop towards modernization in the Western style. Killian Clarke wrote:

“The Western view holds that with the development of a thriving middle class comes internal pressure to reform, and, when this pressure becomes strong enough, incumbent regimes have no choice but to bow to the wishes of their people and liberalize their socio-political structures.”<sup>139</sup>

The Saudi experience with modernization represents a challenge to the Modernization Theory, and it “has established a new paradigm” in the view of some writers.<sup>140</sup> It clearly conflicts with the classical view of some Western theorists that economic prosperity will eventually lead to socio-political changes towards Western style democracy, pluralism, and liberalism. The Saudi modernization, rather, supports the findings and the claim made by some critics, such as Mancur Olson and Killian Clarke, that this is not necessarily the case and that this

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doors in the daytime during Ramadan. See AL-SWEEL, *supra* note 123, at 72. All of these examples and others are based on social and religious practices adopted by traditional and religious Saudis, who possess a high status both formally and informally. See Clarke, *supra* note 126, at 30.

<sup>138</sup> See Rostow, *supra* note 96, at 275-290; see also GILMAN, *supra* note 98, at 219; see also Clarke, *supra* note 126, at 30-31.

<sup>139</sup> See Clarke, *supra* note 126, at 31.

<sup>140</sup> *Id.*

perspective that creates such a consequential relationship between these two types of changes is not always constant and accurate.<sup>141</sup>

The Saudi philosophy towards modernization as seen by Saudis is expressed in the words and speeches of the leaders of the country, who have repeatedly stated that they want to see a modern Saudi Arabia, not a mirror image of a Western country.<sup>142</sup> Modernization in Saudi Arabia does not mean Westernization. In a few words, it means a “modern traditional society.”<sup>143</sup>

## V. The Saudi Arabian Modernization in Action

The base of the Saudi economy is a combination of financial resources, petrochemical industries, and physical reserves of oil, which comprises 25% of the world’s proven petroleum resources and which makes Saudi the largest producer of crude oil.<sup>144</sup> It also makes Saudi oil reserves the largest in the world.<sup>145</sup>

Applying the concepts of modernization discussed earlier, Saudi Arabia has experienced a significant modernization transition in its economy since its foundation in 1932. The pace of development and modernization in Saudi is so rapid that it is not always appreciated.<sup>146</sup> Although the modernization process can be traced back to the early days of the foundation of the Saudi

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<sup>141</sup> Mancur Olson collected much data to prove his point of view. See GILMAN, *supra* note 98, at 219; see also Clarke, *supra* note 126, at 31-32.

<sup>142</sup> For example, in a speech during a state visit to Malaysia, King Faisal stated that he felt “sorry for those who think that Islam...impedes progress or stands as an obstacle in the way of advanced development. Those who think so must not understand [the] essential principles of Islam. The opposite is the truth. The most important requirements Islam calls for are to maintain progress, to carry out justice, to create equality, and to breed in people good behavior and in nations moral conduct.” See AL-FARSI, *supra* note 123, at xxi; see also Shaker, *supra* note 123, at 37.

<sup>143</sup> See Shaker, *supra* note 123, at 37; see also SARAH YIZRAELI, POLITICA AND SOCIETY IN SAUDI ARABIA: THE CRUCIAL YEARS OF DEVELOPMENT, 1960-1982, 10 (2012).

<sup>144</sup> See The Annual Statistical Bulletin of the Organization of the Petroleum Exporting Countries (OPEC), 22 (2012); see also JONES, *supra* note 121, at 3; see also ALI D. JOHANY, MICHEL BERNE AND WILSON MIXON, JR., THE SAUDI ARABIAN ECONOMY, 30 and 45 (1986); see also SHAW AND LONG, *supra* note 121, at 4; see also CHAMPION, *supra* note 50, at 1; see also MÉNORET, *supra* note 124, at 133.

<sup>145</sup> See The Annual Statistical Bulletin of the Organization of the Petroleum Exporting Countries (OPEC), 22 (2012); see also JOHANY, *supra* note 144, at 30 and 45; see also SHAW AND LONG, *supra* note 121, at 8.

<sup>146</sup> See JORDAN, *supra* note 125, at 75.

state, it was not until the reign of King Faisal ibn ‘Abd al-‘Azīz in the late 1960s that serious steps of modernization were taken in a more planned and deliberated way, influenced by the economic boom that resulted from huge oil revenues.<sup>147</sup> The delay in the benefit of the oil revenue was due to the international circumstances affected by the Second World War.<sup>148</sup> Since 1970, Saudi Arabia has organized its modernization endeavors by designing and applying a sequence of five-year-development plans.<sup>149</sup> In total, there have been nine such development plans. The goals, ambitions, and achievements of these plans have gradually grown over time from one plan to the next one encouraging the leaders of the country to dream more and to achieve a better future for the Saudi people.

The general economic and social objectives of these plans were to maintain Saudi’s religious and moral values, to raise the living standards and welfare of the Saudi citizens, to provide for their national security, and to maintain economic and social stability.<sup>150</sup> The modernization sought by the Saudi government, which is embodied in these plans, is not an unattainable fantasy. Rather, it is a result of strategic moves and carefully studied tactics that are, for the most part, already in process. The modernization aimed at by these plans has transformed and affected almost every aspect by which Saudi citizens conduct their lives.<sup>151</sup> Enormous

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<sup>147</sup> See RICHARD F. NYROP, SAUDI ARABIA: A COUNTRY STUDY 135 (1984); see also MÉNORET, *supra* note 124, at 153; see also JONES, *supra* note 121, at 61 and 83-89; see also TAHER, *supra* note 135, at 143; see also YIZRAELI, *supra* note 143, at 98-99.

<sup>148</sup> See NYROP, *supra* note 147, at 136-137; see also Shaker, *supra* note 123, at 30; see also TAHER, *supra* note 135, at 143; see also YIZRAELI, *supra* note 143, at 19.

<sup>149</sup> See SHAW AND LONG, *supra* note 121, at 11; see also AL-SWEEL, *supra* note 123, at 105-112; see also WILLIAM FACEY, BACK TO EARTH: ADOBE BUILDING IN SAUDI ARABIA, 14 (1997); see also YIZRAELI, *supra* note 143, at 142. Expanded description of these plans is provided in the appendix section.

<sup>150</sup> See Saudi Arabian First Development Plan, 23 (1970).

<sup>151</sup> See SHAW AND LONG, *supra* note 121, at 109.

physical infrastructure projects succeeded in establishing modern cities, connecting them via the most modern communications.<sup>152</sup>

As these plans show, most of the physical (economic, industrial, agricultural, etc.) aspects of modernization that were discussed earlier in the work of the Western theorists of modernization have been considered in Saudi Arabia. These aspects of modernization are all targeted and included in the objectives and goals of these plans. The application of these plans resulted in a huge transformation towards modernity in several fields.

## **VI. Perspectives on Modernization Experience in Saudi Arabia**

Although modernization has found its way to almost every physical aspect in Saudi Arabia, modernization has become controversial and debated when it has impacted some sensitive issues related to social, religious, and political norms and traditions, especially those derived from or based on religious considerations. Although the government is aware of the difficulty posed by social change in Saudi society, it has always endeavored to achieve such change in a balanced way through its development plans as mentioned earlier.

For example, in its Third Development Plan's documents under the title "Problems of Reconciling Traditional Values and Rapid Economic Changes," the Saudi Government wrote:

"During the Second Plan, there was widespread concern in Government and among citizens over the dangers of traditional culture and values being undermined by the alien values and a spirit of materialism. This problem is difficult to deal with, first, because it is unquantifiable, and, second, because it has numerous causes, which may be attributed not only to cultural and educational factors and the abundance of wealth, but also to economic, physical, and managerial factors. Hence, these problems require very careful diagnosis

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<sup>152</sup> *Id.*

and a well-planned combination of cultural, economic, social, legislative, and managerial solutions. The main concern in the future will be to try to ensure that the new conditions in which people are living will not force other, perhaps unwanted, social changes.”<sup>153</sup>

Although, in the view of some writers, “modernization has failed to permeate Saudi society beyond the economic sphere,”<sup>154</sup> this does not mean that some social changes are not happening in Saudi society influenced by international and, mainly, Western and European based values of rationality and science. Part of these changes is directed to the legal institutions; particularly, to the form of Sharī‘a law that is used in the Saudi Courts. Calls by Saudi Progressives to reform and modernize the legal system by codifying Sharī‘a laws have been made.

For example, Abdulrahman al-Jari,<sup>155</sup> Ayoub M. al-Jarbou,<sup>156</sup> Yahya al-Khalailah,<sup>157</sup> and others have written books and articles supporting the codification of Islamic laws in Saudi. Additionally, many newspaper writers and columnists have excessively discussed this issue in their articles excessively, locally as well as internationally, in support of codification.<sup>158</sup> Indeed,

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<sup>153</sup> The Third Saudi Development Plan, 58 (1980).

<sup>154</sup> Clarke, *supra* note 126, at 30.

<sup>155</sup> See ABDULRAHMAN AL-JAR’I, TAQNIN AL-AHKAM AL SHARI’YYAH BYN-AL-MANI’IN WA-L-MUJIZIN [THE CODIFICATION OF ISLAMIC SHARĪ’A BETWEEN PREVENTERS AND PERMITTERS], can be accessed at: <http://islamtoday.net/nawafeth/artshow-86-5987.htm>

<sup>156</sup> See al-Jarbou, *supra* note 14, at 217-218.

<sup>157</sup> See YAHYA AL-KHALAILAH, TAQNIN AHKAM AL-SHARĪ’A AL-ISLAMIYYA BAYN-AL-NAZARIYYA W-L-TATBIQ [THE CODIFICATION OF ISLAMIC SAHRI’A BETWEEN THEORY AND APPLICATION], can be accessed at: <http://eprints.hec.gov.pk/73/>.

<sup>158</sup> The following are some examples of articles written by local writers:

1. Shaykh Abdulmuhsin al-Obaikan, a former judge, a Saudi religious scholar, and a current Judicial Consular in the Saudi Ministry of Justice in his article: “*Codification of Sharī’a: Praised and Original Efforts*,” al-Sharq al-Awsat newspaper, issue 10026, May 2006, available at: <http://www.aawsat.com/leader.asp?section=3&article=362634&issueno=10026>;
2. Ahmed Dhaif in his article: “*Majallatu-l-Ahkam The First Try to Codify Sharī’a in the History of the Kingdom*,” in Okaz Newspaper, issue 1817, June 2006, available at: <http://www.okaz.com.sa/okaz/osf/20060608/Con2006060823750.htm>;
3. Mahmoud Sabbagh in his article: “*the Reform of Judiciary and the Codification of Legal Rules*” in al-Watan Newspaper, issue 2937, October 2008, available at:

it is rare for any international writer to write about Saudi Arabia without mentioning the issue of “un-codified Sharī‘a laws” supporting that notion that Saudi should codify its Sharī‘a laws.<sup>159</sup>

In spite of all these calls and efforts, Saudi Conservatives strongly stand against taking this step of codifying the laws followed in the Sharī‘a courts. The following chapter is devoted to exploring the circumstances, reasons, and potentialities for codification of Islamic laws in Saudi Arabia by shedding light on the existing controversy between the parties.

## VII. Conclusion

The classical approach to modernization is challenged by some examples where modernization exists in some fields, but does not lead to the results expected by some Western classical modernization theorists. One of these cases is modernization in Saudi Arabia. Supported by its oil wealth and committed to ongoing and active state intervention, Saudi Arabia has developed and adopted its own model of modernization tailored to its own circumstances. The modernization of its economy, health, infrastructure, education, and other physical aspects is impressive and comparable to other developed countries. However, this does not match the

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<http://www.alwatan.com.sa/news/writerdetail.asp?issueno=2937&id=7782&Rname=62>;

The following are some examples of articles written by international writers:

1. Nathan Brown in his article “*Why Won’t Saudi Arabia Write Down its Laws?*” in *Foreign Policy*, in March 2012, available at: [http://mideast.foreignpolicy.com/posts/2012/01/23/why\\_wont\\_saudi\\_arabia\\_write\\_down\\_its\\_laws](http://mideast.foreignpolicy.com/posts/2012/01/23/why_wont_saudi_arabia_write_down_its_laws)
2. Christopher Wilcke in his article “*Saudi Arabia Needs a More Transparent Justice System*” in *The Guardian*, in October 2011, available at: <http://www.guardian.co.uk/commentisfree/libertycentral/2011/oct/26/saudi-arabia-justice-system-reform;and>
3. Caryle Murphy in her article “*Saudi to Codify Sharī‘a for Clarity*” in *The National*, on July 2010, available at: <http://www.thenational.ae/news/world/middle-east/saudi-to-codify-sharia-for-clarity>.

<sup>159</sup> See as examples:

1. Esther van Eijk, *Sharī‘a and National Law in Saudi Arabia*, in *SHARIA INCORPORATED*, p. 139-230 (2010).
2. Frank Vogel, *Saudi Arabia: Public, Civil, and Individual Sharī‘a in Law and Politics*, in *SHARĪ‘A POLITICS*, 55-93 (2011).
3. NOAH FELDMAN, *THE FALL AND RISE OF THE ISLAMIC STATE*, 92-102 (2008).
4. ROBERT LACEY, *INSIDE THE KINGDOM: KINGS, CLERICS, MODERNISTS, TERRORISTS, AND THE STRUGGLE FOR SAUDI ARABIA* (2009).

development in the social and political fields. This situation represents a challenge to some Western modernists, who have established a causal, consequential relationship between these two aspects of modernization. Depending upon the point of view of the observer, this is either interpreted as a paradox or as an expected outcome when the course of modernization is purposefully shaped and directed.

For outsiders, especially some Westerners, who adhere to the literature of the Classic Theory of Modernization, the Saudi case represents a paradox and an inexplicable challenge to the principles of modernization theory. However, it might impose the establishment of a new paradigm of modernism shaped to achieve national agendas and this project may involve uniquely local accommodations and integrations of modernists and traditionalists' values.

For some insiders, Saudi Arabia has succeeded in adopting a balanced form of modernization that suits its social and religious values. Its philosophy has been to create a "modern traditional society" and not to be a mirror image of any Western country.

However the Saudi experience with modernization is interpreted and understood, both sides agree that the Saudi experience, as well as other similar experiences, calls for a re-examination and re-definition of the modernization to account for the role of consciousness state.

However, some Progressives in and out of Saudi Arabia appear to adopt a narrow, reductionist interpretation of the classical framework of modernization in their argument, thinking that, for Saudi Arabia to achieve modernity, it must follow the Western model. This includes developing a modern legal system to replace the current Sharī'a system. Accordingly, they suggest the abandonment of the classical legal analysis in Sharī'a Court to adopt more predictable analysis. In their view, this is embodied only in codification.

### **Chapter Three: Codification Controversy in Saudi Arabia**

This chapter aims to present the debate and ideological perspectives surrounding the issue of codification of Sharī‘a law in Saudi Arabia among all different groups. Some of these groups, who were trained in the Islamic, classical way, are religious. Others, who were either trained in the modern law departments inside Saudi Arabia or in the law schools in such Western countries as France, England, and the US, are non-religious. Some of both groups are either Conservatives or Progressives, who support codification, while others are Conservatives or Progressives and oppose it.

Seeking to clarify and explore this issue better, this chapter starts by visiting the recorded historical developments that led to the current state of affairs as a departure point. It follows by identifying the meaning of the possible forms of codification that can be imagined in Saudi Arabia considering all specific features and circumstances of the Saudi case in order to identify the characteristic that provokes all the debate. Some written examples are also presented from the arguments raised by codifiers, who belong to either Conservatives or Progressives. More attention is paid to the more important and meaningful argument between the opponents and proponents of codification among the religious scholars (‘ulamā’), where the real argument lays.

The chapter engages one of the major concerns raised by both sides, the real effect, if any, of codification on the role of judges. That discussion is based on academic inputs and recorded actual experiences, i.e. the French experience. The point addressed here is whether codification really reduces the role of judges and, therefore, increases predictability, or, instead, re-directs it, as will be seen. The chapter then presents the data gathered during the empirical study that concern codification and that reflect how Saudi lawyers, from different backgrounds, perceive

codification of Sharī‘a law in their country.

Finally, the chapter ends with a concluding analysis drawn from the preceding presentation.

The chapter is not meant to support any side against the other or to assess who is right and who is wrong. Rather, it is meant to give a general view and to explore the issue within an appropriate, tailored scope to pave the road to the following chapter about the legal analysis in Sharī‘a Courts, which represents the focus point of the research and which has never been studied or explored closely as this research seeks to do.

## I. Historical Background

Consideration of the codification of Islamic laws in Saudi Arabia and efforts to bring codification about started even before the year 1932, which marks the year of the foundation of the Saudi state. However, it has always been a controversial issue between Progressives, who generally support codification, and Conservatives, who generally stand on the opposite side of the question. In the early days of the state, a single effort to codify some Islamic laws in a manner similar to the Ottoman Majalla was made by the Chief Justice of the Sharī‘a Court in Mecca, Ahmed Abdullāh al-Qārī.<sup>160</sup> Moreover, in 1927, King ‘Abd al-‘Azīz, the founder of the current Saudi state and its first King, in his efforts to modernize the legal system of the country, wanted to organize the adjudication process by establishing a more systematic mechanism. He sought to require that qāḍīs (judges) in Sharī‘a Courts rule according to a pre-set book of rules

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<sup>160</sup> See AHMED BIN ABDULLAH AL-QARI, MAJALATU AL-AHKAM AL-SHAR’YYAH [THE DIGEST OF THE JURISPRUDENTIAL RULES], 28 (Abdulwahab Abu-Sulaiman and Mohammed Ibrahim Ali eds., 1981); see also MOHAMMED BIN ABDULAZIZ AL-FAYEZ, TAQNIN AL-AHKAM AL-QADA’YYIA [THE CODIFICATION OF JUDICIAL RULINGS], 47-48 (2009); see also Abdulmuhsin al-Obaikan, Taqin Ahkam al-Fiqh, [The Codification of Fiqh Rules], can be accessed at: [http://al-obeikan.com/article/86-فقہ%20الاحکام%20الشرعیة.html](http://al-obeikan.com/article/86-فقہ%20الاحکام%20الشرعیة).

similar to the Ottoman Code.<sup>161</sup> The King ordered the Judicial Board (al-Hay'a al-Qaḍā'iyya)<sup>162</sup> to start working toward accomplishing this goal. However, traditional 'ulamā' challenged these modernizing plans within a few months, and the plans were replaced with a Royal Decree Number (3) in 1928. Instead of imposing a code or starting a project of this nature, Royal Decree Number (3) established a methodology for judicial analysis within Sharī'a Courts, which will be explained in the following chapter of this paper.<sup>163</sup>

If the meaning of codification were limited to 'writing down an official legal binding document,' then Saudi Arabia has already done this. The King has ratified most of its laws, regulations, and policies in legal documents in different fields, in the form of legal articles and provisions similar to those seen in codes and restatements.<sup>164</sup> Most important in this regard was the establishment of the Bureau of Experts at the Council of Ministers in 1954. Among others, this Bureau's duties are to "[p]repare drafted laws and their required studies, in cooperation with the [governmental] agency related to each law" and to "[r]eview and propose amendments to current laws."<sup>165</sup> All Saudi written laws and regulations are at the web site of the Bureau of Experts, including those in the following list:

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<sup>161</sup> See O. G. Umm al-Qura No. 3397 (Safar 28, 1346H, August 26, 1927); see also al-Obaikan, *supra* note 160.

<sup>162</sup> Al-Hay'a al-Qaḍā'iyya (the Judicial Board) was established by King Abdulaziz in Mecca and consisted of one chief judge and three members selected by the King. Its full name was *Hay'at al-Muraqaba al-Qaḍā'iyyah* (the Board of Judicial Supervision) before it was changed to *Hay'at al-Tadqiqat al-Shariyya* (the Board of Legal Inspection) in 1938, which consisted of one chief judge and four members and was tasked with disciplining judges and inspecting judicial rulings. In 1970, the Board was superseded by the Ministry of Justice. See NASIR AL-GHAMDI, AL-IKHTISAS AL-QADA'I FI AL-FIQH AL-ISLAMI [THE JUDICIAL AUTHORITIES IN ISLAMIC FIQH], 380-381 (2000).

<sup>163</sup> See al-Hay'a al-Qaḍā'iyyah [Judicial Board] Decision No.3 (17/1/1347: June 25, 1928), approved by the Royal Decree in 24/3/1347: September 8, 1928; see also al-Jarbou, *supra* note 14, at 194.

<sup>164</sup> For a complete list of the Saudi written laws, please refer to the appendix section.

<sup>165</sup> See the web site of the Saudi Arabian Bureau of Experts at the Council of Ministers at: <http://www.boe.gov.sa/MainDefault.aspx?lang=en> as accessed lastly on July 11, 2012.

<b>Legal Field</b>	<b>Number of Written Laws</b>
Basic Laws	5
Media, Culture, and Publication Laws	11
National Security, Civil Status and Criminal Laws	19
Laws in the Fields of Commerce, Economy and Investment	39
Laws in the Fields Protocol and Ceremonies	3
Education and Science Laws	7
Hajj and Islamic Affairs Laws	7
Municipal Services and Urban Planning	15
Military Service Laws	7
Civil Service Laws	8
Agriculture, Water and Biota	19
Judiciary and Human Rights Laws	11
Tourism and Antiquities Laws	4
Youth and Sports Laws	3
Health Laws	11
Energy, Industry and Mining Laws	14
Labor and Social Care Laws	10
Public Finance Laws	16
Transportation and Communication Laws	16
<b>TOTAL</b>	<b>225</b>

**Table : Saudi Written Laws and Regulations**

It is noteworthy that the legal fields in this list of laws are mostly administrative or civil

in nature written under the legitimacy of the *siyāsa shar‘iyya*.<sup>166</sup> This is different from any laws that are stated *directly* in the sacred Islamic scriptures, which possesses a higher status in the Islamic epistemological hierarchy. This leaves us with the areas that are still based on uncodified Sharī‘a and are mainly controlled by traditional Islamic fiqh. Mainly, these include criminal law, family law, heritage or inheritance, and many aspects of the Islamic law of contracts.<sup>167</sup> These areas are the focus of the codification argument in Saudi Arabia. However, although a wide range of laws is written down, this situation does not completely prevent the qāḍī at any Saudi court from referring to Islamic books seeking laws for some details that he could not find in these written laws, or when he thinks that the law in hand might be not fully in compliance with what he thinks is a preponderant Sharī‘a law.<sup>168</sup>

Though, in 1972, the Saudi King asked the members of the Board of Senior ‘Ulamā’ (BSU) to discuss the issue of codification of Sharī‘a law in Saudi and to issue their opinion on the permissibility and compatibility of codification with Islamic teachings. In its final decision, the majority of the BSU objected to the codification of Sharī‘a law on the basis of its incompatibility with Islamic principles.<sup>169</sup>

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<sup>166</sup> This is accepted and justified under the theory of the *Siyāsa Shar‘iyya* that authorizes the Muslim ruler to enact and apply any law, act, or regulation if it meets two conditions: (1) serves a public interest; and (2) does not contradict with a clear meaning that is derived from the Qur’ān or Sunna. Meeting these two conditions makes any piece of law ‘Islamic’ even if it is not based directly on the Qur’ān or the Sunna. This is the basis upon which Saudi asserts that all of its laws are ‘Islamic.’

<sup>167</sup> These areas are left out mainly because their laws are derived from the direct meaning of the Qur’ān and the Sunna. See Abdullah Ansary, *A Brief Overview of the Saudi Arabian Legal System*, available online at: [http://www.nyulawglobal.org/globalex/saudi\\_arabia.htm](http://www.nyulawglobal.org/globalex/saudi_arabia.htm) as accessed on March 26, 2012.

<sup>168</sup> The Basic Law states “The courts shall apply to cases before them the provisions of Islamic Sharī‘a as indicated by Qur’ān and Sunna and whatever laws not in conflict with Qur’ān and Sunna which the authority may promulgate.” See the Basic Law, Article 48.

<sup>169</sup> This majority was represented by the following Shaykhs: Abdullah bin Humaid, Mohammed al-Amin al-Shinqiti, Abdulrazzaq Afifi, Abdulaziz bin Baz, Abdulaziz bin Salih, Mohammed al-Harkan, Abdulaziz bin Ghudiyān, Salih bin Luhaidan, Ibrahim bin Mohammed Al al-Shaykh, and Sulaiman al-Ubaid. A small number of the BSU dissented. These were: Abdullah Khayyat, Rashid bin Khunin, Abdullah bin Mani, Mohammed ibn Jubair, Salih bin Ghusun, and Abdulhamid Hassan. See 31 MAJALAT AL-BUHUTH AL-ISLAMIYYA [MAGAZINE OF THE ISLAMIC RESEARCH], 58 (1990); see also ABDULRAHMAN SA’AD AL-SHITHRI, HUKM TAQIN AL-SHAR’A AL-ISLAMIYYA [THE RULE IN THE CODIFICATION OF ISLAMIC SHARĪ’A], 50-51 (2007).

In 1975, a new law for the judiciary was issued. Article 89 of that new law included the formation of a committee of the Ministry of Justice, the task of which was to select and publish some judicial rulings. However, the first issue was not published until 2007. Among others, one of the goals of this publication is to “help specialists and professionals in the legal field in familiarizing themselves with judicial rulings through delivering these rulings to them.”<sup>170</sup> Another goal is to “increase the legal and judicial awareness among the public.”<sup>171</sup> The plan is to publish a new issue every six months, although only three issues have been published so far and every one contains only approximately forty selected cases.

The controversy about codification in Saudi Arabia has never stopped. Calls for codification by Saudi Progressives persist. Indeed, such calls are becoming louder, because these Progressives consider codification one of their ultimate goals for the modernization of the legal system.<sup>172</sup> They also strongly recommend codification as a solution for all of what they perceive as flaws in the current judicial system.<sup>173</sup> Their guidance in this is based on some Western models and international experiences.

## **II. Meaning of Codification within the Saudi Context**

Considering the Islamic situation of Saudi Arabia, the codification of its laws could take the form of one of three models, based on an approach that was developed by Frank Vogel, as follows:

1. Civil-law model,
2. Fatwa model, or

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<sup>170</sup> 1 THE COMPILATION OF JUDICIAL RULINGS, THE SAUDI MINISTRY OF JUSTICE, 9 (2007).

<sup>171</sup> *Id.*

<sup>172</sup> See al-Jarbou, *supra* note 14, at 198.

<sup>173</sup> *Id.*

3. Literary model.<sup>174</sup>

Following is a brief discussion of each one of these models.

**Civil-Law Model:** The civil-law model is the closest to the debated codification model in the Saudi context,<sup>175</sup> because it is the popular model that is adopted and followed by the Arab legal systems.<sup>176</sup> When stripping civil law codification from its secular, liberal, and democratic characters, four elements from this model can be expected to be discussed in the debate over codification within the Saudi context:

1. New inclusive codes (family, criminal, etc.) that consist of subjects controlled traditionally by fiqh;
2. Drafts derived mainly from traditional, classical fiqh literature, supervised by the Council of Ministers, and supplemented by the advice from the ‘ulamā’;
3. Promulgated by a royal decree; and
4. Having binding consequences over everyone, including the qāḍīs.

This is the description of codification that caused all of the controversy and argument in Saudi Arabia in the past and that continues today.<sup>177</sup>

**Fatwa Model:** Another possible model of codification in the Saudi context is the fatwa-model.<sup>178</sup> In this case, a basic restatement or compilation of the laws is made by either a single ‘alim (religious scholar) or a group of ‘ulamā’ with no legislative power.<sup>179</sup> Generally, this can be compared to the Restatement of Laws in the U.S. in two ways: their informality and their non-

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<sup>174</sup> See Frank E. Vogel, *Islamic Law and Legal System: Studies of Saudi Arabia*, 686-688 (1993) (unpublished Ph.D. dissertation, Harvard University) (on file with the author).

<sup>175</sup> See Vogel, *supra* note 174, at 686; see also al-Jarbou, *supra* note 14, at 195-196. Authoritative books discussing the Saudi legal system are in general scarce. Frank Vogel’s writings are one of the best in this regard considering the logistic support professor Vogel enjoyed from Saudi officials and the relatively long time he spent in Saudi.

<sup>176</sup> See Vogel, *supra* note 174, at 686.

<sup>177</sup> See Vogel, *supra* note 174, at 686-687.

<sup>178</sup> See Vogel, *supra* note 174, at 687.

<sup>179</sup> *Id.*

binding effect. The variables that can be expected in this model are:

1. The BSU or a similar body restates;
2. Some fiqh laws;
3. And publishes the restatement;
4. The restatement will possess no more power than fatwa.

Codification within this meaning is not controversial, as it has no binding power.<sup>180</sup>

**Literary Model:** The third conceivable model of codification in Saudi is the literary model. In this case, a single ‘alim chooses to produce a jurisprudential work in the form of code. No ‘alim opposes this direction, because, although it can be called a code or a qānūn, it has no binding power.<sup>181</sup>

### **III. Presentation of the Codification Argument in Saudi Arabia**

As a general overview, there is a strong argument about the ‘codification of Islamic Sharī‘a’ in Saudi Arabia today between Conservatives and Progressives. Among other arguments and claims, Conservatives, in general, strongly argue against the codification of the Islamic Sharī‘a claiming that it confines the power of ijtihād of qāḍīs, causing stagnation to the codified rules, and prevents qāḍīs from resorting to Sharī‘a’s main resources – the Qur’ān and the Sunna.<sup>182</sup>

On the other hand, Progressives, in general, strongly argue in favor of the codification of Sharī‘a laws. They claim that codification must cover all parts of the legal construction relating

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<sup>180</sup> *Id.*

<sup>181</sup> See Vogel, *supra* note 174, at 688. The difference between this model and the fatwa model is that in the “fatwa model” the author organizes the fiqh rules in a classical way with no numbers of articles or provisions, while in the “literary model” the author organizes the rules in articles and provisions similar to those found in modern codes, with a hope of adopting his work as code by the authorities.

<sup>182</sup> See al-Jarbou, *supra* note 14, at 194-195.

to all parts of life.<sup>183</sup> They contend that the law must be identified so that everyone can comply with its provisions. In addition, the inevitability of codification is derived from the intricacy of contemporary life.<sup>184</sup> Moreover, codification will overcome the problem of conflicting legal rulings in cases of ta‘zīr, for example, where punishments are neither stated in the Qur’ān nor in the Sunna but are instead left for the individual evaluation and consideration of each qāḍī.<sup>185</sup> Among these Progressives are classical ‘ulamā’ in Saudi, such as some members of the BSU.<sup>186</sup>

**Within the Saudi context, the debated codification of Sharī‘a in Saudi means that the King chooses from among the different Islamic interpretations one opinion that will bind the people and the courts.**<sup>187</sup> Commentary published in Arabic in Saudi Arabia on the question of whether Sharī‘a should be codified tends to be polarized. It seems that advocates of codification from the modern side and their opponents from the traditional side do not generally engage in thoughtful debates but tend to reject the other side’s opinions out of hand.

However, the possible arguments concerning codification in Saudi Arabia can be found at different levels. Also and as mentioned earlier, the arguments mostly concern the codification of Islamic Sharī‘a as a civil-law model.

***Pro-Codification Argument Among Progressives:*** On one hand, non-religious individuals, who tend to adopt a more progressive, non-religious and modern perspective in general, advance an argument (a few examples follow). There is no single book that collects their arguments; rather, their arguments can be found scattered in the form of interviews and newspaper articles. While arguments raised by classical ‘ulamā’ are more organized, systematic and derived from authoritative Islamic scriptures, such as the Qur’ān and the Sunna, the

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<sup>183</sup> See al-Jarbou, *supra* note 14, at 198.

<sup>184</sup> See al-Jarbou, *supra* note 14, at 199.

<sup>185</sup> *Id.*

<sup>186</sup> *Id.*

<sup>187</sup> See al-Jarbou, *supra* note 14, at 195-196.

arguments raised by the Progressives, non-religious figures are mostly based on logic and reason, not authoritative Islamic texts. Because of the nature of the Progressives' argument and due to the authoritative power possessed by the religious traditional figures, the Progressives' argument is for the most part ignored by these religious figures, who avoid engaging in this argument directly. This might be a way for the religious figures to express both their resentment towards and disagreement with the generally modern approach adopted by those who raise merely logical arguments, not grounded in religious authority.<sup>188</sup> Many newspaper writers and columnists have excessively discussed the issue of codification of the Islamic Sharī'a in their essays, locally as well as internationally.<sup>189</sup> It seems that it is unusual for any international writer to write about Saudi Arabia without mentioning the legal system and the issue of 'un-codified Sharī'a laws.'<sup>190</sup>

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<sup>188</sup> See AL-SHITHRI, *supra* note 169, at 22.

<sup>189</sup> The following are some examples of articles by local writers:

1. Shaykh Abdulmuhsin al-Obaikan, *Codification of Sharī'a: Praised and Original Efforts*, AL-SHARQ AL-AWSAT NEWSPAPER, issue 10026, May 2006, available at: <http://www.aawsat.com/leader.asp?section=3&article=362634&issueno=10026>.
2. Ahmed Dhaif, *Majallatu-l-Ahkam The first Try to Codify Sharī'a in the History of the Kingdom*, OKAZ NEWSPAPER, issue 1817, June 2006, available at: <http://www.okaz.com.sa/okaz/osf/20060608/Con2006060823750.htm>.
3. Mahmoud Sabbagh, *The Reform of the Judiciary and the Codification of Legal Rules*, AL-WATAN NEWSPAPER, issue 2937, October 2008, available at: <http://www.alwatan.com.sa/news/writerdetail.asp?issueno=2937&id=7782&Rname=62>.

The following are some examples of articles by international writers:

1. Nathan Brown, *Why Won't Saudi Arabia Write Down its Laws?*, FOREIGN POLICY, March 2012, available at: [http://mideast.foreignpolicy.com/posts/2012/01/23/why\\_wont\\_saudi\\_arabia\\_write\\_down\\_its\\_laws](http://mideast.foreignpolicy.com/posts/2012/01/23/why_wont_saudi_arabia_write_down_its_laws).
2. Christopher Wilcke, *Saudi Arabia Needs a More Transparent Justice System*, THE GUARDIAN, October 2011, available at: <http://www.guardian.co.uk/commentisfree/libertycentral/2011/oct/26/saudi-arabia-justice-system-reform>.
3. Caryle Murphy, *Saudi to Codify Sharī'a for Clarity*, THE NATIONAL, July 2010, available at: <http://www.thenational.ae/news/world/middle-east/saudi-to-codify-sharia-for-clarity>.

<sup>190</sup> See as examples:

1. Esther van Eijk, *Sharī'a and National Law in Saudi Arabia*, in SHARIA INCORPORATED, 139-230 (2011).
2. Frank Vogel, *Saudi Arabia: Public, Civil, and Individual Sharī'a in Law and Politics*, in SHARĪ'A POLITICS, at 55-93 (2011).
3. NOAH FELDMAN, THE FALL AND RISE OF ISLAMIC STATE, 92-102 (2008).
4. ROBERT LACEY, INSIDE THE KINGDOM, KINGS, CLERICS, MODERNISTS, TERRORISTS, AND THE STRUGGLE FOR SAUDI ARABIA (2009).

The following are some examples of the type of argument written by some local Progressives, who belong to different intellectual schools, and some of whom are modern, non-religious figures, while others are classical, religious figures. The issue that gathers them is their support for codification of Sharī‘a law in Saudi.

**1. *Deserting Sharī‘a or Codifying It?*** The first example of the type of argument raised by a modern, non-religious figures is considered in an article written by Usama al-Qahtani, titled “*Deserting Sharī‘a or Codifying It?*”<sup>191</sup> Al-Qahtani starts his article by complaining that he has written many times about the codification of Islamic Sharī‘a and that it has not been resolved or settled, but he has to write again because of the importance of the topic.<sup>192</sup>

Al-Qahtani then says that:

[T]he discussion of this topic has become a luxury as people [in other countries] have passed us by thousands phases.<sup>193</sup>

He adds:

What the qāḍīs [in Sharī‘a Courts] are ruling on here is the system of the country, [Saudi], and because their rulings are based on their unknown ijtihāds to choose from many interpretations in fiqh, then I find myself embarrassed to say that our laws are in fact unknown.<sup>194</sup>

He continues:

Some ‘ulamā’ see codification as a way to resort to positive [non-religious/man-made] laws, which is against Sharī‘a. I do not know if resorting to positive law is going to result from deserting Sharī‘a or from applying un-codified Sharī‘a, which allows for chaos, because people will not know their system [laws], which in return is going to distort the image of Sharī‘a.

Also, let’s look to the results [of refusing the codification of Sharī‘a], a number of executive agencies, especially the sensitive ones, have already established independent, in-house legal committees. The number of these committees is above hundred. The reason of this action by these agencies without doubt is the worry by these committees from the vagueness that resulted from refusing the codification of Sharī‘a law, although I know these committees care to comply with Sharī‘a. The existence of these committees weakens the legal infrastructure and creates difficulties to supervise them in their administrative and procedural conduct as well as in their compliance with Sharī‘a.<sup>195</sup>

He adds:

I often hear some opponents to codification invoke the English (Anglo-Saxon)

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<sup>191</sup> Usama al-Qahtani, *Tanhiat al-Sharī‘a Aw Taqniha? [Deserting Sharī‘a or Codifying It?]*, AL-WATAN NEWSPAPER, issue 10720, May 2012, available at: <http://www.alwatan.com.sa/Articles/Detail.aspx?ArticleId=10720>.

<sup>192</sup> *Id.*

<sup>193</sup> *Id.*

<sup>194</sup> *Id.*

<sup>195</sup> *Id.*

system as it is built on precedents and not codes. This inference is built on seeking what one likes and ignoring what he doesn't like. The truth is that the Anglo-Saxon system is not any more built on precedents. What has been codified until today exceeds what has left un-codified. However, in case there is no code then the system approves the precedents. Therefore, it combines both the precedents and the codes. But in our case, we neither approve that nor the other! We do not have codification in most of personal, commercial, and criminal matters, nor do we bind ourselves to the precedents. The difference between the two systems [ours and the Common System] is huge and the reference to it in refusing codification is invalid argument.<sup>196</sup>

Al-Qahtani continues:

Even if the codification [committee] chooses the strictest interpretation among the other interpretations, it is still far better than a situation with no codification. People involved in businesses and finance, for instance, can then form their structures and establish their works based on a clear system that is based on a clear idea no matter what restrict it is, however, they cannot do this in a no-code situation. With no-codification, a qāḍī can at any moment destroy, for example, huge investments based on incompatibility with Sharī'a in his personal ijtihād although these same exact investments are compatible with Sharī'a in someone else's ijtihād. This can cause destruction of the whole monetary system of the country.

What is the problem if some 'ulamā' sit with some lawyers and law experts to produce a codified law that is built on these 'ulamā's ijtihād that is compatible with both Sharī'a and the public benefit? Instead of leaving one sole qāḍī to rule and determine peoples' matters that might be mistaken or err as human beings are. It is better that a group of 'ulamā', lawyers and experts rule for us as God ordered them and produces laws for us.

All what codification opponents refer to is illusions and has no one sound [Islamic] evidence. Not only this, but it also contradicts the public benefit that is considered by Sharī'a.<sup>197</sup>

## ***2. Writing and Codifying Jurisprudential Rules Is an Advanced Reference for Judicial***

***Application in the Kingdom:*** The second example of the proponents' arguments is discussed in an article written by a modern, non-religious figures, titled "*Writing and Codifying Jurisprudential Rules Is an Advanced Reference for Judicial Application in the Kingdom,*" was written by Dr. Abdulmajid bin Mohammed al-Jallal.<sup>198</sup> Al-Jallal's article is devoted to attacking a religious figure who published a book opposing codification. The book was published in 2005, titled "*The Codification of Sharī'a between Permissibility and Forbidding,*" and written by

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<sup>196</sup> *Id.*

<sup>197</sup> *Id.*

<sup>198</sup> Abdulmajid bin Mohammed al-Jallal, *Tadwin wa Taqin al-Ahkam al-Shari'yya Marji'ya Mutaqaddima lil-Tatbiqat al-Qadhai'yya fi-lmamlaka [Writing and Codifying Jurisprudential Rules is an Advanced Reference for Judicial Application in the Kingdom]*, AL-RIYADH NEWSPAPER, issue 16107, July 2012, available at: <http://www.alriyadh.com/2012/07/30/article756112.html>.

Shaykh Abdulrahman al-Shithri. Al-Jallal's article was published seven years after the book. He strongly criticizes al-Shithri in his support of considering codification non-Islamic.

Al-Jallal says:

The author in his study strongly adopts the direction of forbidding the codification of Sharī'a. He presents several logical and Islamic arguments... Through reading and analyzing these arguments, anyone can see that they are out of the issue we are focusing on here, and it is a try by the author to twist the texts to make them bear more than they can bear so he [the author] can claim that he only possesses the truth; his opinion is the only truth that is never possible to be mistaken and his opponent's opinion is the mistake that is never possible to be right. And, because his arguments are of this nature, he resorted to scold and chide his opponents and to call them heretics and misled. This is not the right way to discuss controversial and unclear issues.<sup>199</sup>

He adds:

At any case, these radical opinions in dealing with issues related to the development and modernization of the Kingdom's regulations with their unjustified fear of codification to be a tool to bring into the country positive laws and rules, is not going to stop the wave and train of development and modernization that is not going to touch on the principles of Islam or its universal goals that are valid for every time and place.<sup>200</sup>

Al-Jallal continues:

One of the great benefits of codification is that its provisions are written under the supervision of a specialized, elite 'ulamā' versus cases ruled based on individual ijtihāds by individual qāḍīs... Also, codification allows parties and lawyers to know what the law is without the need to go back to read the classic fiqh books.<sup>201</sup>

He adds:

Codification is not going to stop ijtihād. All the fears and illusions in this regard are unjustified. Ijtiḥād is going to continue to re-consider some provisions in the future as situations, benefits, and needs change.<sup>202</sup>

He ends by saying:

Codification is nothing more than a regulating procedure for development and modernization. It has no relationship with secularization or westernization. Therefore, it is improper to carry on codification more than it can carry.<sup>203</sup>

**3. *The Codification of Sharī'a: Praised and Original Efforts:*** A third example is an argument supporting codification and written by classical, religious figure, titled "*The Codification of Sharī'a: Praised and Original Efforts.*" This article was written by Shaykh Abdulmuhsin al-Obaikan, a Former Qāḍī, a Saudi religious scholar, and a current Judicial

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<sup>199</sup>*Id.*

<sup>200</sup>*Id.*

<sup>201</sup>*Id.*

<sup>202</sup>*Id.*

<sup>203</sup>*Id.*

Consular in the Saudi Ministry of Justice. Unlike al-Qahtani, the argument raised by al-Obaikan carries a more Islamic tune and invokes more Islamic justifications derived from the Islamic background of its writer. In his article, al-Obaikan reminds of the “benefits of approving codification of Sharī‘a to the judiciary.”<sup>204</sup>

Al-Obaikan continues:

In this article, we will end our continuous discussion with an argument that has always been repeated by some opponents of codification; that is allowing codification is against what [Saudi] ‘ulamā’ have approved. We say that, first of all, even [great] imams, such as Ahmed ibn Hanbal, al-Shafi‘i, Malik, and Abu Ḥanifa, were all opposed. The right argument here is what is compatible with the sound religious argument and what is compatible with the goals of Sharī‘a, which is codification [in our case] as it contains great benefits for Muslims and great consideration of Sharī‘a goals and easiness of its application.<sup>205</sup>

He adds:

[Second,] it is not true that no scholar has agreed to codification for our Saudi land... There is a group from the Board of Senior ‘ulamā’, who requested this *tadwin*<sup>206</sup> of the rules, such as Shaykh Abdulmajid bin Hassan, Shaykh Mohammed bin Jubair, Shaykh Abdullah bin Mani’, Shaykh Abdullah Khayyat, Shaykh Rashid bin Khunain, and Shaykh Salih bin Gusun.<sup>207</sup>

***Codification Argument Among Classical ‘Ulamā’:*** On the other hand, another type of argument regarding codification in Saudi Arabia exists inside the camp of the members of the classical ‘ulamā’ themselves. However, the argument here seems better organized, deeper, more technical, and supported by authoritative texts from original Islamic sources. It also includes answers and replies between the two opposing sides. This argument can be found in the literature written by ‘ulamā’ belonging to academia, the judiciary, and the BSU.

The two types of previous arguments can be illustrated in the following chart:

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<sup>204</sup> Abdulmuhsin al-Obaikan, *Taqnīn al-Sharī‘a: Ijtihād Mahmūd wa-Assīl [The Codification of Sharī‘a: Praised and Original Efforts]*, AL-SHARQ AL-AWSAT NEWSPAPER, issue 10026, May 2006, available at: <http://www.aawsat.com/leader.asp?section=3&article=362634&issueno=10026>.

<sup>205</sup> *Id.*

<sup>206</sup> Al-Obaikan uses the word “*tadwin*” here, which literally means “notation” or “record” and which is the word for compiling and collecting in one book. This is different from the “binding codification” that is being discussed here; however, the rest of the article confirms that he means the “binding codification” and not just “noting” or “recording” with no binding consequence, although he uses the different term.

<sup>207</sup> *Id.*

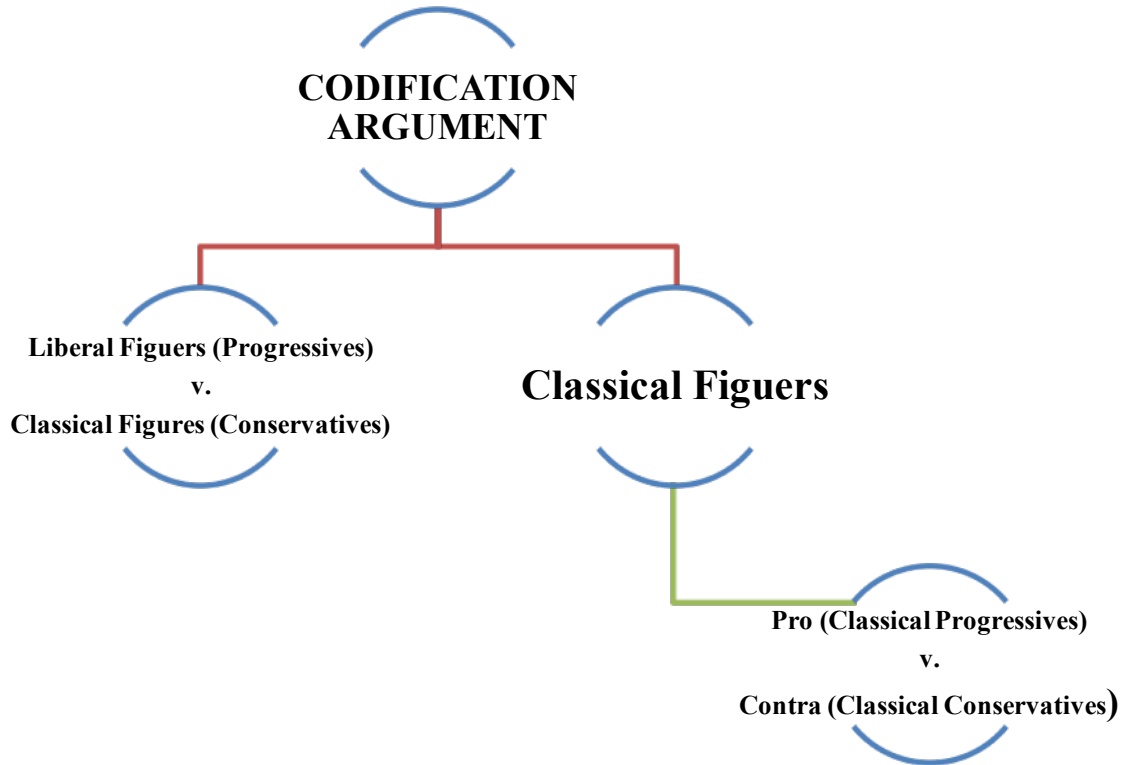


Figure 2: Codification Argument in Saudi Arabia

#### IV. Argument of Codification among Saudi ‘Ulamā’

In general, all Muslim scholars agree that the issue of codification of Islamic Sharī‘a is one of the contemporary issues that has been rarely raised and debated during the long history of Islam.<sup>208</sup>

There is a huge Islamic written literature that warns of heresies and novelty in religion. This is based on several Islamic texts from Qur’ān and Sunna, such as the famous saying by the Prophet: “He who innovates something in this matter of ours [religion] that is not of it, will have it rejected.” (Narrated by Imam Bukhari and Imam Muslim)<sup>209</sup> Another version by Imam Muslim reads: “He who does an act which our matter is not [in agreement] with, will have it rejected.”<sup>210</sup>

These statements, and other many similar ones, create a huge barrier and require special attention and sensitivity in establishing any new thing related to the conduct of religion. It must

<sup>208</sup> See AL-FAYEZ, *supra* note 160, at 57.

<sup>209</sup> Bukhari 2697 and Muslim 1718.

<sup>210</sup> Muslim 1718.

always be borne in mind that conducting adjudication and judicial related matters is considered after all religion within the Islamic philosophy. Law itself is religion within Islamic philosophy. This caveat towards new things goes to the heart of the religious creed and is a pivotal point in particular for Salfism/Wahhabism – the Islamic philosophical traditions of Saudi, whose followers represent the dominant authoritative and official ‘ulamā’ in Saudi Arabia.

Bearing this in mind, the question that Saudi ‘ulamā’ are facing and debating in engaging the issue of codification of Islamic Sharī‘a is religious before anything else. It is whether this novel action of codification, that has no precedence in Islam, is acceptable under some Islamic justifications or is refused under the general refusal of heresies in Islam. In simple words: is codification considered an “evil” heresy “*bid‘a madhmūma*” and, therefore, unacceptable and rejected, or is it a “good” heresy “*bid‘a ḥasana*” and, therefore, should be acceptable and adopted?

The other big question that faces these ‘ulamā’ in arguing the matter of codification concerns its binding effect. Ijtihād occupies a special position in Islam, especially in the Salafī literature. The notion of ijtiḥād is very much encouraged and supported versus taqlīd (following someone’s else’s ijtiḥād), which is discouraged, condemned and disfavored. The question here is directed towards the right of the ruler within the Islamic state to force qāḍīs to adopt and therefore apply a code that is considered someone else’s ijtiḥād. If the codification of Islamic laws is to be allowed, then in fact the code is going to be nothing more than another ijtiḥād. It is an interpretation of the Islamic text that had the advantage of getting selected by the codifying committee among other interpretations. This matter carries a high sensitivity in Islam, because law at the end of the day and within the realm of Islamic Sharī‘a is considered religion, different from how law is perceived in Western world. Therefore, Muslims, especially ‘ulamā’ and qāḍīs,

are required to apply the method of ijtihād to obtain the right answer for any question before them. Under this notion, they are not bound by anyone else’s ijtihād. No ijtihād weighs more than any other. All ijtihāds are equal according to the ‘principle of mutual acceptance’ among ‘ulamā’. All ijtihāds are supposed to seek the unknown exact truth.<sup>211</sup>

Within these concepts, the questions faced in relation to the codification inquiry revolve for the most part around whether qādīs are able to apply ijtihād, and if they are or are not, whether the ruler has the right –from the point of view of the religion– to force them to accept and, therefore, apply each other’s ijtihād? To bring this even closer to one’s imagination, it can be understood in a way similar to forcing someone to pray in a manner that is contradictory to what he or she thinks is right.

### 1. Seeking Historical Support

***Contra-Codification Argument:*** The most embarrassing fact for the codification supporters is their inability to trace back any incident during the Golden Ages of Islam (the first three centuries) that can show anything similar to codification of Islamic Sharī‘a, as understood today, that was done under a sovereign Islamic state in these Golden Ages.<sup>212</sup> As stated earlier, the Anglo-Muhammadan Law was made under the reign of colonialism and not under a sovereign Islamic state and the Ottoman Majalla was a work that resulted under foreign, external pressures that were made on the Ottoman government, and overall, these two works were produced way after the Golden Ages.<sup>213</sup> In contrast, history carries that Muslims during their

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<sup>211</sup> This is called “the mutual acceptance” in Islamic law. See ABDULLA AL-BASSAM, TAQNIN AL-SHARĪ‘A: ADRARUHU WA MAFASIDUHU [THE CODIFICATION OF SHARĪ‘A: ITS HARMS AND EVILS], 8 (1959).

<sup>212</sup> See Vogel, *supra* note 174, at 691.

<sup>213</sup> See BERNARD S. COHN, COLONIALISM AND ITS FORMS OF KNOWLEDGE: THE BRITISH IN INDIA, 69 (1996); see also JOSEPH SCHACHT, AN INTRODUCTION TO ISLAMIC LAW, 95 (1982); see also KNUT S. VIKØR, BETWEEN GOD AND THE SULTAN, 230 (2005); see also Wael Hallaq, *Islamic*

Golden Ages refused and were against the binding concept of the codification idea.<sup>214</sup>

The earliest record that can be invoked traces back to Ibn al-Muqaffa‘ in his famous report, *Risālat al-Sahāba*, in 761 (144 H). Ibn al-Muqaffa‘ (d.144/760), a Persian advisor to the Abbasi Caliph Abu Ja‘far al-Mansour and a prominent scholar in the second century of Islam, criticized the state of confusion in the law that resulted from the extreme multiplicity of legal opinions in Islamic case law and advised the Caliph to draft one single code to be applied throughout the Islamic land. He wrote:

If the Commander of the Faithful were to decide to order that these cases and practices be submitted to him in a writing and with them submitted the sunnas or qiyāses which each group asserts as an argument, and then the Commander of the Faithful were to inquire into this, and impose as to each case his opinion with which God were to inspire him, and he determine upon, and to forbid judgment not in agreement with, and were to write this in an inclusive, authoritative book, then we would hope that God would make these disparate judgments, which are affected by error, a single and correct rule, and we would hope that the unification of practice would lead to an unanimity of action in accordance with the opinion of the Commander of the Faithful and his word.<sup>215</sup>

In response to this, al-Mansour asked Imam Mālik, a leading jurist and the founder of the Mālikī School of Islamic law, to draft a code to be promulgated as the official law of the state. However, Imam Malik rejected this proposal. He did not want to bear responsibility for imposing people to adopt his opinion and to damage the diversity of legal opinions in the Islamic law or perhaps to maintain the independence of the law from the state. Mālik Said:

Do not do this, because people have previous opinions and have heard hadith and narrations. Each group of them has embraced what they have previously practiced and believed in from the differences of people and others. Changing what they believe is severe.<sup>216</sup>

Later, Mālik was asked the same thing by the Caliphs al-Mahdi and Harun al-Rashid. To

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*Law: History and Transformation*, in 4 THE NEW CAMBRIDGE HISTORY OF ISLAM 142, 175-180 (Robert Irwin ed., 2011).

<sup>214</sup> See AL-SHITHRI, *supra* note 169, at 34.

<sup>215</sup> See BAKR ABDULLAH ABU ZAID, AL-TAQNIN WA-LILZAM [CODIFICATION AND BINDING], 14 (1982); see also AL-SHITHRI, *supra* note 169, at 16-17.

<sup>216</sup> See ABU ZAID, *supra* note 215, at 15-17 (1982); see also AL-SHITHRI, *supra* note 169, at 18-19.

show his excitement about the idea, al-Rashid even planned to hang Mālik's code in the Ka'ba<sup>217</sup> in case it was approved and implemented.<sup>218</sup> Imam Mālik finally agreed and wrote his classic treatise *al-Muwatta'*, though on the condition that it would not be enforced on people as the official law of the state. In a sign of consensus among them, no one of Muslim 'ulamā' and no qāḍīs at that time found any fault with Mālik's decision.<sup>219</sup>

The Islamic history then does not recall any attempt to codify until the time of the Ottoman Empire, eleven centuries later, when the Ottoman government decided to issue the Majalla, which was discussed earlier.

The opponents of codification say that the long history of the application of Sharī'a has shown that Sharī'a could be applied as it is without having its rules codified in the Western style. If there had been any codification in the early era of Islam, we would not have opposed the idea though.<sup>220</sup>

Furthermore, they cite several stories in which the Caliph, in several cases, expressed that, although he would have ruled differently, he respected the rulings produced by qāḍīs and refused to intervene to enforce his own ruling on them, regardless of the fact that he was the ruler and possessed the ultimate authority of the state according to the theory of the Islamic public law.<sup>221</sup>

One of these several stories, for example, states that a petitioner came to Caliph Umar with two judgments that were offered to him by two other Companions in the same exact case.

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<sup>217</sup> The Islamic sacred black building in Mecca.

<sup>218</sup> See ABU ZAID, *supra* note 215, at 18-19.

<sup>219</sup> See AL-SHITHRI, *supra* note 169, at 19; see also SUBHI AL-MAHMASANI, FALSAFAT AL-TASHRI' AL-ISLAMI [THE PHILOSOPHY OF ISLAMIC JURISPRUDENCE], 81 (1961); see also ABU ZAID, *supra* note 215, at 19. Although different from the modern idea of codification, this attempt for a code in the 8<sup>th</sup> century was apparently different. However, it is an illustrating example of the early developments in the evolution of Islamic law.

<sup>220</sup> See al-Jarbou, *supra* note 14, at 194; see also AL-SHITHRI, *supra* note 169, at 23 and 34-38; Muhammed al-Mahmud, Taqin al-Uqubat al-Ta'ziriya, al-Riyadh Newspaper, at: <http://www.alriyadh.com/2009/03/24/article417929.html>; see also al-Jar'i, *supra* note 155.

<sup>221</sup> See ABU ZAID, *supra* note 215, at 69-72.

Umar said:

If it had been me, I would have decided it differently.

The Petitioner said:

What precludes you while the ultimate authority is to you?

Umar answered:

If I can refer you to a text from Qur'ān or Sunna, I would do so, but I will refer you to an my ra'y (opinion), and opinion is held in common.<sup>222</sup>

By this, he meant that, since it is a matter of opinion/ijtihād, it is the right of everyone to exercise and therefore express his own opinion/ijtihād without being forced to adopt someone else's ijtihād, based on the principle of the mutual acceptance.<sup>223</sup>

***Pro-Codification Argument:*** On the other hand, the proponents of codification cite some incidents in which Muslims in general, and qāḍīs in particular, were forced to adopt a particular ijtihād enforced by the Caliph or ruler. However, Muslims of the time showed their acceptance and approval of that action. For instance, they cite within this context Muslims' consensus on accepting one authoritative copy among several of Qur'ān in the time of Caliph Uthmān, and no one expressed any opposition. They also cite the action of the famous Qāḍī Shurayh as he was ruling in accordance with the ijtihād of the ruler of his time, Caliph Mu'awiya, who enforced the law on him in an issue that was related to the law of inheritance. Shurayh did this while declaring: "This is the ruling of the Commander of the Faithful."<sup>224</sup>

The proponents of codification in Saudi also argue that Qur'ān and Sunna were both

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<sup>222</sup> See ABU ZAID, *supra* note 215, at 69.

<sup>223</sup> More historical incidents can be invoked here. See AL-SHITHRI, *supra* note 169, at 34-38; see also ABU ZAID, *supra* note 215, at 69-72.

<sup>224</sup> See AL-FAYEZ, *supra* note 160, at 57.

<sup>224</sup> AL-FAYEZ, *supra* note 160, at 85.

received orally in the time of the Prophet.<sup>225</sup> They were not collected in books until after the death of the Prophet, during the time of the Caliph Umar, when many of the Companions were killed in the wars.<sup>226</sup> Although the collection of these two sources was a novel action in that era and was not preceded by a similar one, all Muslims at that time showed their consensus on the acceptance and approval of that action with no rejection of the resulting benefit.<sup>227</sup> Their consensus on this matter appeared to be inventing something new in religion that was never practiced before. However, they accepted and agreed to it, because they realized that it was indeed required to save religion.<sup>228</sup> They argue that the codification of the Islamic rules is no more than this, as it is considered a way to save Sharī‘a in compatibility with modernization and development.<sup>229</sup> Hence, codification is nothing more than completing a mission that was established by our great ancestors in the Companions’ era.<sup>230</sup>

Moreover, similar to the above argument is the collecting and writing of fiqh itself. We know that there were no written books in Islamic Sharī‘a during the era of the Prophet. However, this type of books started to exist right after that era and included all different interpretations that were included in fiqh and that varied very much.<sup>231</sup> The consensus by the Muslim nation showed acceptance of this action, as it carried a huge benefit for Sharī‘a in saving its rules.<sup>232</sup> Again, the codification we are calling for here is not more than this, as it intersects with this action in

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<sup>225</sup> See SAHIH AL-BUKHARI [AL-BUKHARI’S BOOK], KITAB FADA’IL AL-QUR’AN, (Hadith #4986); see also JALAUDDIN AL-SIUTI, AL-ITQAN FI ULUM AL-QUR’AN [THE MASTERY IN QURANIC KNOWLEDGE], 163 (1987); see also MANA’ AL-QATTAN, MABAHITH FI ULUM AL-QUR’AN [STUDIES IN QURANIC KNOWLEDGE], 126 (1983).

<sup>226</sup> See AL-FAYEZ, *supra* note 160, at 59.

<sup>227</sup> *Id.*

<sup>228</sup> See AL-FAYEZ, *supra* note 160, at 60.

<sup>229</sup> See AL-FAYEZ, *supra* note 160, at 62.

<sup>230</sup> *Id.*; see also ABDULRAHMAN AL-QASIM, AL-ISLAM WA TAQIN AL-AHKAM [ISLAM AND THE CODIFICATION OF THE RULES], 119 (1977).

<sup>231</sup> See AL-FAYEZ, *supra* note 160, at 62.

<sup>232</sup> *Id.*

achieving the similar benefit of saving Islamic rules.<sup>233</sup> There is no difference between codifying the controlling opinion in a specific school and binding the judiciary with and writing down the *mukhtaṣarāt* (summaries) that were used to show only the controlling opinion within a specific fiqh school.<sup>234</sup>

Moreover, during the Abbasid era, Abu Yusuf, one of the preeminent Ḥanafī ‘ulamā’, proposed different views on some issues to the Caliph, which allowed him to choose the one to be applied. As the Chief Justice of Bagdad at that time, Abu Yusuf enforced the Ḥanafī School on the courts.<sup>235</sup> This action shows that binding qāḍīs with one chosen opinion, as codification requires, existed in the past.

However, the answer of the opponents of codification to all of these arguments is that the stories invoked here concern single incidents that neither exactly match the codification as defined, understood and argued here, which is a binding legal document approved by the highest authority in the land and enforced in the courts.

“In sum, proponents of codification find themselves lacking doctrinally persuasive historical precedents.”<sup>236</sup> Realizing this, they find themselves obliged to invoke Islamic sources other than history.<sup>237</sup>

## 2. The Ruler’s Right to Bind by Ijtihād

As mentioned earlier, the question of the authority of the ruler to enforce his selected ijtihād on the qāḍīs is considered one of the major problematic questions that face the quest for codification in Saudi Arabia. This question breeds several other subsidiary-questions, such as:

- Is ijtihād a required qualification for the qāḍī?

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<sup>233</sup> *Id.*

<sup>234</sup> See AL-QASIM, *supra* note 230, at 122; see also AL-FAYEZ, *supra* note 160, at 63.

<sup>235</sup> See Vogel, *supra* note 174, at 693-694.

<sup>236</sup> Vogel, *supra* note 174, at 696.

<sup>237</sup> See Vogel, *supra* note 174, at 697.

- If the answer to this first question is affirmative, then what level of ijtihād is required and acceptable? Is it the “absolute ijtihād” or “partial (madh’hab) ijtihād”? What if there is no ijtihād at all, and the qāḍī can apply only taqlīd?
- To what extent can the imam impose a selected ijtihād on the qāḍīs in any case?

Following is a brief discussion for each one of these points.

*Is Ijtihād A Required Qualification For The Qāḍī?* In answering the first question, Islamic schools are divided into three opinions:

- **First:**

An opinion that the qāḍī must be a mujtahid; otherwise he is not qualified to be a qāḍī. This is the doctrine of the majority of the schools in general: some of the Ḥanafītes, some of the Malikītes, some of the Shafī‘ites, and some of the Ḥanbalītes.<sup>238</sup>

- **Second:**

Ijtihād is not a required qualification, but it is preferred and prioritized when available. Therefore, it is permissible to appoint a muqalid qāḍī for the mission. This is the opinion of the majority of the ‘ulamā’, who belong to the Ḥanafī School.<sup>239</sup>

- **Third:**

Initially, the qāḍī must be mujtahid, unless no mujtahids are available, in which event it is permissible to appoint muqalid. This is the opinion of the majority of ‘ulamā’ who belong

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<sup>238</sup> See 7 ALA’ AL-DIN BIN MAS’UOD AL-KASANI, BADAI’ AL-SANI’ FI TARTIB AL-SHARI’ [THE PERFECT DONE IN ORGANIZING JURISPRUDENCE], 3 (1974); see also 6 MOHAMMED BIN ABDULRAHMAN AL-TRABULSI, MAWAHIB AL-JALIL SHARH MUKHTASAR KHALIL [THE GIFTS OF GOD IN COMMENTING ON KHALIL’S BRIEF], 89 (1911); see also 6 MOHAMMED AL-KHATIB AL-SHIRBINI, MUGHNI AL-MUHTAJ ILA MA’RIFAT ALFADH AL-MINHAJ [THE NEEDY’S FILL TO KNOW AL-MINHAJ TERMINOLOGY], 263 (1994); see also 6 AL-BAHUTI, *supra* note 324, at 492; see also AL-BASSAM, *supra* note 211, at 9.

<sup>239</sup> See AL-KASANI, *supra* note 238, at 3; see also 7 MOHAMMED BIN ABDULWAHID, FATH AL-QADIR [THE BLESSING OF GOD], 238 (1994).

to the Shafi‘i School and many of the late fuqaha’.<sup>240</sup>

It seems that the third opinion is the strongest and more accepted one now among the Muslim ‘ulamā’ as reality dictates it because there are not enough mujtahids to serve as qāḍīs. Ijtihād then is required for the qāḍī; however, if there is no qāḍī that holds it, then appointing a muqalid qāḍī is required for the public benefit.<sup>241</sup>

***What Level Of Ijtihād Is Acceptable?*** If ijtiḥād is required initially, then the next question is what level of ijtiḥād is acceptable? Again, if an “absolute mujtahid” is available, he is the most qualified person for the position with no doubt; otherwise, this qualification should be compromised. Partial/madh’hab mujtahid should be sought as the next option. Only if a partial/madh’hab mujtahid is unavailable should muqalid be accepted. Imam Ahmed ibn Hanbal said: “It is necessary for people to have a qāḍī. Should we allow their rights to be wasted?”<sup>242</sup>

***To What Extent Can The Imam Impose A Selected Ijtihād On The Qāḍīs?*** The answer to this third question can be divided into two possible logical categories:

- To what extent does the authority of the imam allow him to bind a mujtahid qāḍī?
- To what extent does the authority of the imam allow him to bind a muqalid qāḍī?

With regard to the first category, the majority of Islamic schools have chosen to disallow the imam to bind a mujtahid qāḍī. They reason that mujtahid possesses the tools to understand the text and to interpret it. Therefore, for the mujtahid to apply his own ijtiḥād is a religious duty

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<sup>240</sup> See 8 MOHAMMED BIN ABI AL-ABBAS AL-RAMLI, NIḤAYATU AL-MUHTAJ ILA SHARH AL-MINHAJ [THE ULTIMATE DISTANATION TO EXPLAIN AL-MINHAJ], 240 (1966); see also 11 ALI BIN SULAYMAN AL-MARDAWI, AL-INSAF FI MA’RIFAT AL-RAJIH MIN AL-KHILAF ALA MADH-HAB AL-IMAM AHMED [THE JUSTICE INTO KNOWING THE PREPONDERANT OPINION IN IMAM AHMED’S DOCTRINE], 178.

<sup>241</sup> See AHMED IBN ABDULHALIM IBN TAIMIYYA, AL-SIYĀSA AL-SHARI’YYA FI ISLAH AL-RA’I WA AL-RA’YYA [THE GOVERNANCE ACCORDING TO DIVINE LAW IN REFORMING THE RULER AND THE RULED], 27 (1984); see also AL-GHAMDI, *supra* note 162, at 365.

<sup>242</sup> See 14 MUAFFAQ AL-DIN IBN QUDAMA AL-MAQDISI, AL-MUGHNI [THE SUFFICIENT], 5 (1989).

(*wajib*) in this case, and taqlīd (applying someone else’s ijtihād) is forbidden (*harām*).<sup>243</sup>

In the second category, ‘ulamā’ in Saudi, and even in the rest of the Muslim World, disagree. They are divided into two opinions:

- First, the authority of the imam allows him to bind muqalid qāḍīs with a certain and specific ijtihād. This opinion has been adopted by the Ḥanafītes, Malikītes, and Shafī’ites.<sup>244</sup> The majority of the contemporary Muslim ulamā’ have also chosen this opinion, such as Mohammed abu-Zahrah, Ali al-Khafif, Hassanin Makhluḥ, Abdulwahhab al-Hafiz, Abul‘ala al-Mawdudi, and Umar bin ‘Abd al-‘Azīz al-Mutrik.<sup>245</sup>
- Second, the authority of the imam does not allow him to bind the muqalid qāḍīs with a certain ijtihād. In the view of the advocates of this opinion, the muqalid qāḍī, like the mujtahid qāḍī in this case, must disagree with his imam’s ijtihād and must follow a different ijtihād if he thinks that ijtihād is the right answer to the legal question before him. This opinion has been adopted by Ḥanbalītes, some Ḥanafītes, some Malikītes, and some Shafī’ites.<sup>246</sup> It is also the opinion of the majority of the ‘ulamā’ in Saudi Arabia and the official opinion of the Saudi Board of Senior ‘Ulamā’, the highest official

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<sup>243</sup> See AL-KASANI, *supra* note 238, at 5; see also AL-TRABULSI, *supra* note 238, at 93; see also AL-SHIRBINI, *supra* note 238, at 267; see also 11 AL-MARDAWI, *supra* note 240, at 490.

<sup>244</sup> See AL-KASANI, *supra* note 238, at 5; see also 7 MOHAMMED AL-KHURASHI AL-MALKI, SHARH AL-KHURASHI ALA MUKHTASAR KHALIL [AL-KHRASHI’S COMMENTARY ON KHALIL’S SUMMARY], 140 (1900); see also 8 AL-RAMLI, *supra* note 240, at 240; see also ALI BIN MOHAMMED AL-MAWARDI, AL-AHKAM AL-SULTANIYYA WA AL-WILAYAT AL-DINIYYA [THE SULTANIC RULES AND RELIGIOUS AUTHORITIES], 134.

<sup>245</sup> See AL-QASIM, *supra* note 230, at 30; see also AL-FAYEZ, *supra* note 160, at 57 & 92; see also Sa’ad Matir al-Otaibi, *Byna Ishkaliyat al-Taqnin Wa Mashrou’ al-Tadwin [Between the Problematic Codification and Legitimate Compilation]*, available at: <http://www.saaaid.net/Doat/otibi/99.htm>; see also al-Jar’i, *supra* note 155.

<sup>246</sup> See 4 MOHAMMED AMIN, TAYSIR AL-TAHRIR ALA KITAB AL-TAHRIR [THE EASING OF AL-TAHRIR BOOK], 253; see also 6 ZAINU AL-DIN IBN NUJAYM AL-HANAFĪ, AL-BAHR AL-RA’IQ SHARH KANZ AL-DAQA’IQ [THE CALM SEA IN COMMENTING ON KANZ AL-DAQA’IQ], 293-294 (1892); see also AL-TRABULSI, *supra* note 238, at 93; see also AL-MAWARDI, *supra* note 244, at 134-135; see also 11 AL-MARDAWI, *supra* note 240, at 178-194; see also 3 AL-BAHUTI, *supra* note 324, at 463-465.

religious authority in the country.<sup>247</sup>

The following chart summarizes the preceding discussion and briefly describes its results:

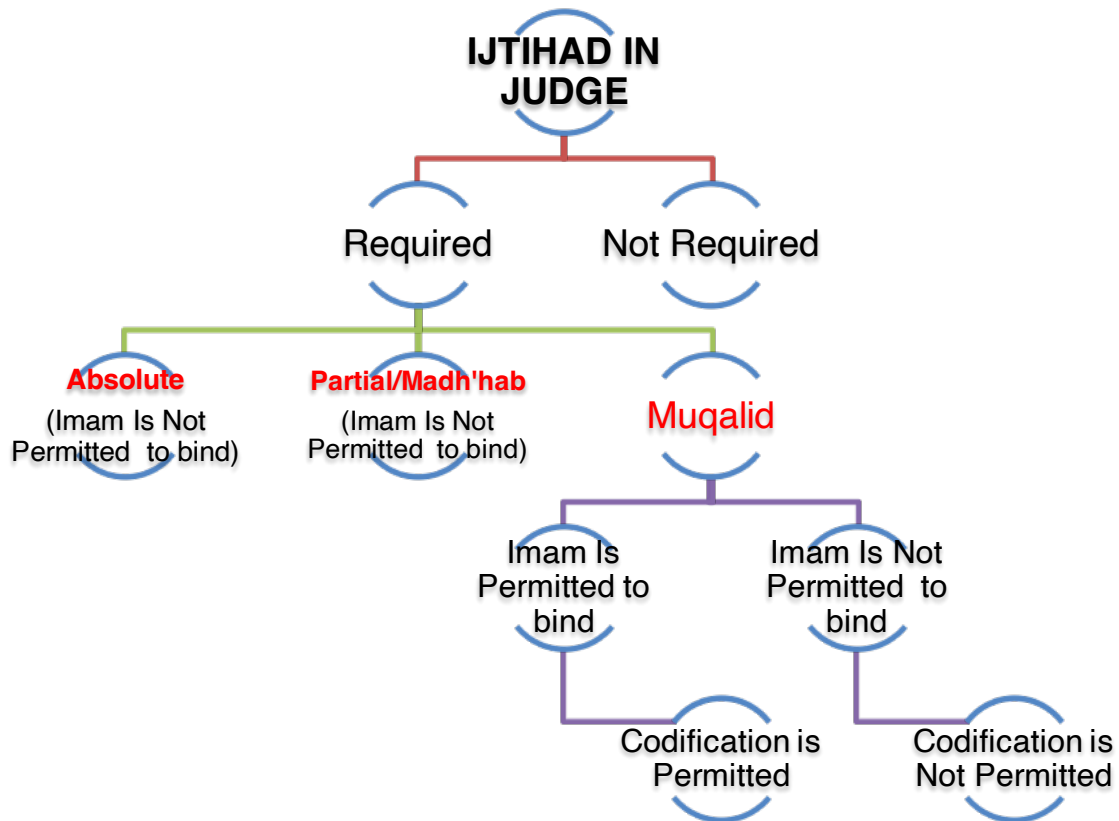


Figure 3: Ijtihad in Judge

**Contra-Codification Argument:** Argument raised by the opponents of codification in Saudi Arabia revolves around the close tie established between rule-making and ijtihād. Considering judging in the courts to be a type of ijtihād makes the answer to this question sensitive and critical in deciding whether codification with its binding effect can be accepted.<sup>248</sup> If judging is ijtihād and codification means binding with one selected ijtihād, then the questions that concern codification of Sharī‘a can be formulated as following:

<sup>247</sup>See AL-FAYEZ, *supra* note 160, at 58 & 96; *see also* al-Otaibi, *supra* note 245; *see also* al-Jar‘i, *supra* note 155.

<sup>248</sup> *See* Vogel, *supra* note 174, at 697.

**If we consider the ruler one of the mujtahids, then does he have the right to enforce his own ijtihād over other the ijtihāds of other ‘ulamā’? Does he have the right to enforce his selected ijtihād to be followed in the courts regardless of the qāḍī’s ijtihād?**

This is a very tricky question. On one hand, all Islamic authentic texts, especially as interpreted by Salafies, emphasize the concept of establishing an independent relationship with the scriptures, far from any kind of mediators, similar to the concept advocated by the Christian Protestantism, for example. Salafies emphasizes the importance of independence in interpreting the texts and discourages from taqlīd –following someone else’s interpretation. On the other hand, this contradicts the notion supported by Islamic texts that requires obedience by all Muslims, including ‘ulamā’, to the Muslim ruler.

Apparently, the opponents of codification in Saudi are against binding qāḍīs’ ijtihāds, even if this binding effect is made by the ruler through code. They envision codification as handcuffing qāḍīs that will eventually decrease their role to “tools” and “typewriters.”<sup>249</sup> They also see codification as a barrier to the qāḍīs in exercising the freedom and the discretion granted to them through ijtihād.<sup>250</sup>

Moreover, they claim that the legal reform or development that is hoped for in Saudi Arabia is expected to pass through the flexibility created and supported by the ijtihād. Therefore, limiting the role of ijtihād will eventually lead to rigidity rather than desired flexibility.<sup>251</sup>

***Pro-Codification Argument:*** Codification proponents answer affirmatively the major question of whether the ruler has the right to bind the qāḍīs with a certain ijtihād/code. They justify their answer with several arguments.

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<sup>249</sup>See ABU ZAID, *supra* note 215, at 89-90; see also See AL-BASSAM, *supra* note 211, at 10; see also Vogel, *supra* note 174, at 710.

<sup>250</sup> See AL-BASSAM, *supra* note 211, at 10.

<sup>251</sup> See AL-BASSAM, *supra* note 211, at 8; see also ABU ZAID, *supra* note 215, at 86; see also Vogel, *supra* note 174, at 710.

**1. Obedience To The Ruler:** One of these arguments is that the Qur'ānic texts state that God requires Muslims to obey Him, His Messenger, and the Muslim rulers.<sup>252</sup> Accordingly, if the ruler commands something, Muslims should obey his commands as far as his commands do not involve any sin and do not conflict with obvious Sharī'a rules.<sup>253</sup> Therefore, the enforcement of codification is nothing more than obeying a ruler's command. They also assert that, even if the qāḍī qualifies for ijtihād, he should rule in conformity with the dictates of the code because of the duty of obedience.<sup>254</sup>

**2. Qāḍīs Act Through Delegation:** Another argument raised by the codification proponents relies on the Islamic public law notion that considers all the authorities of the state, including qāḍīs, to come through the imam, who delegates authorities to other state employees by the contract of *wilaya* (right to rule).<sup>255</sup> Under this notion, the Muslim imam is in fact the ultimate and the sole qāḍī of the state as far as he qualifies for the task and desires to fulfill it. Moreover, they assert "even the traditional freedom of the judge to interpret and apply Sharī'a directly is itself a delegation from the ruler, who now may prefer to delegate that authority to others, such as a legislative body."<sup>256</sup>

**3. Siyāsa Shar'īya:** The proponents of codification also invoke the doctrine of *siyāsa shar'īyya*, which means governance in accordance with the divine law.<sup>257</sup> Under this doctrine, the ruler has the right to enact any law so long as (i) it does not conflict with an obvious Islamic rule/principle, and (ii) is required to achieve a public benefit. Accordingly, binding qāḍīs with a

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<sup>252</sup> Quran 3:59.

<sup>253</sup> The rules of Sharī'a can be obvious, need no ijtihād and are known by every Muslim, such as the order of prayers, the order of hajj, and the prohibition of wine. They can also be unclear and need the effort of ijtihād by the 'ulamā'.

<sup>254</sup> See ABU ZAID, *supra* note 215, at 25; see also Vogel, *supra* note 174, at 717-718; see also al-Jar'i, *supra* note 155.

<sup>255</sup> See al-Jar'i, *supra* note 155; see also Vogel, *supra* note 174, at 714.

<sup>256</sup> Vogel, *supra* note 174, at 715.

<sup>257</sup> See Vogel, *supra* note 174, at 718.

code can be acceptable and agreed on as an application of the *siyāsa shar‘iyya*.

4. ***Maṣlaḥa***: Finally, the proponents of codification in Saudi Arabia argue that codification should be allowed and acceptable under the concept of *maṣlaḥa* (utility). According to this principle, as long as the action does not conflict with a clear meaning of Qur’ān or Sunna and either promotes a virtue or defeats a vice, then it should be acceptable. They say that, since the code and its binding effect are used to achieve a public benefit that is acceptable and required, then the code and its binding effect are acceptable and required as well.<sup>258</sup>

The proponents of codification also argue that not every qāḍī can or is qualified to practice *ijtihād*.<sup>259</sup> *Ijtihād* requires an extraordinary ability to study all of the interpretations and to choose the soundest and most accurate one among them.<sup>260</sup> It requires an extraordinary knowledge of Qur’ān, Sunna, consensus, conflict, *qiyas*, the Arabic language, and all epistemological tools that are required to know all or part of this.<sup>261</sup> This is a skill that requires a special knowledge and a long time to acquire and develop.<sup>262</sup> This skill might not exist in today’s qāḍīs. This situation leads to possible contradictions, discrepancies, and inconsistencies among the rulings of qāḍīs, even within the same exact court.<sup>263</sup> This casts doubts in peoples’ minds about Sharī‘a’s ability to rule and control today’s transactions among people.<sup>264</sup> It also leads to doubts about the integrity of qāḍīs and to accusing them of ruling arbitrarily.<sup>265</sup> It also leads

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<sup>258</sup> See ABU ZAID, *supra* note 215, at 26; see also AL-SHITHRI, *supra* note 169, at 23; see also Vogel, *supra* note 174, at 720-721; see also al-Jar’i, *supra* note 155.

<sup>259</sup> See AL-FAYEZ, *supra* note 160, at 63; see also AL-SHITHRI, *supra* note 169, at 29.

<sup>260</sup> See AL-FAYEZ, *supra* note 160, at 63.

<sup>261</sup> See 4 MOHAMMED BIN AHMED BIN ABDULAZIZ AL-FUTOHUI, SHARH AL-KAWKAB AL-MUNIR [THE COMMENTARIES ON AL-KAWKAB AL-MUNIR], 458 (1992); see also 1 MOHAMMED BIN AHMED AL-SIMNANI AL-HANAFĪ, RAWDAT AL-QUDAT WA TARIQ AL-NAJAT [THE HAVEN OF JUDGES AND THE PATH OF SALVATION], 55 (1983); see also AL-SHIRBINI, *supra* note 238, at 263; see also 8 YAHYA BIN SHARAF AL-NAWAWI, RAWDATU AL-TALIBIN [THE HAVEN OF SEEKERS], 83; see also 14 IBN QUDAMA AL-MAQDISI, *supra* note 242, at 15.

<sup>262</sup> See AL-FAYEZ, *supra* note 160, at 63.

<sup>263</sup> *Id.*

<sup>264</sup> See AL-FAYEZ, *supra* note 160, at 64.

<sup>265</sup> *Id.*; see also AL-SHITHRI, *supra* note 169, at 26-28.

some people to abandon Sharī‘a and to resort to foreign laws in their adjudication.<sup>266</sup> The codification of the Islamic Sharī‘a will stop all of these doubts and will solve all of these consequential problems.<sup>267</sup> It will also cut off the attacks on the incompatibility of Sharī‘a with modernization to rule, as it is going to show how Sharī‘a is able to meet the requirements of peoples’ lives today.<sup>268</sup> The codification of Sharī‘a, especially if made by a committee of senior ‘ulamā’, will no doubt systemize judicial rulings and make them clear and predictable in a way that is far better than rulings made by individual qāḍīs.<sup>269</sup> This, however, does not prevent an individual qāḍī from writing his opinion to the codifying committee, if he thinks that the codified article or piece of law contains any mistake that is incompatible with the methodology of ijtihād or the general spirit of Sharī‘a.<sup>270</sup> Therefore, binding qāḍīs with a code can be acceptable.

#### **V. Is It True that Codification Reduces the Role of Judges and Therefore Enhances Predictability?**

In Saudi Arabia, one of the major concerns related to codification is how it will affect the role of qāḍīs. While codifiers support codification to limit the semi-unfettered discretionary power enjoyed by qāḍīs and, therefore, enhances predictability, their opponents find it one of the most fearful consequences that justifies their objection to codification. It hits on a sensitive nerve for the opponents of the codification. For example, the opponents of codification argue that codification is a path to a full abandonment of Sharī‘a and a main reason to destroy it, because it will kill the creativity of qāḍīs (*ijtihād*) and will result in stagnating the codified rules.<sup>271</sup> As a result, the evolution and development of Islamic jurisprudence will be confined to a very limited

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<sup>266</sup> See AL-FAYEZ, *supra* note 160, at 64.

<sup>267</sup> *Id.*

<sup>268</sup> *Id.*

<sup>269</sup> See AL-FAYEZ, *supra* note 160, at 64-65.

<sup>270</sup> See AL-QASIM, *supra* note 230, at 132; see also AL-FAYEZ, *supra* note 160, at 65.

<sup>271</sup> The Ottoman experience is always invoked in this context.

area that is clearly within the codified rules.<sup>272</sup>

This argument implies a fear of a change that might reduce the role of qāḍīs. This fear carries a political dimension that can be understood when considering the historical incident that led to the foundation of the Kingdom when two men undertook the establishment of an Islamic state based on the rule of Islamic sources. The two men were Mohammed bin Sa‘ud, a representative of the political, ruling house of Āl Sa‘ud, and Mohammed bin Abdulwahhab, a representative of the religious house of Āl al-Shaykh. Since that time, the governance in Saudi Arabia is understood, although silently, to be similar to a Catholic marriage between the two wings. Āl Sa‘ud rules the country in political and administrative matters while paying respect to the family of Āl al-Shaykh, who rules in matters related to religion, such as judiciary, ifta’, endowments, mosques, and Islamic matters. Within this understanding, codification can be looked at as a limitation of a power that has been enjoyed by one of the two ruling wings –that is the power of judiciary. Although some fear that the result will create undesired tension between the government and the religious figures, it should not prevent asking the undesired question and researching the sensitive issue.

The questions can be formulated as follows:

**Has the role of judges been suspended in the countries that adopted codification and is it expected, if approved, to act the same way in Saudi? Have judges been reduced to mere “machines” in any legal system?**

One of the interesting experiences to consider in this regard is France. Not only because codification is still alive and vivid there, but also because France has the oldest codification experience in the modern time. Moreover, codification in France represents the ultimate embodiment of the spirit of a revolutionary history that preceded the process of producing the

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<sup>272</sup> See al-Jarbou, *supra* note 14, at 194-195; see also AL-SHITHRI, *supra* note 169, at 43-45.

French Code. The overwhelming revolutionary spirit at that time meant to empower the legislatures over judges, who were looked upon as partners of the former tyrannical régime.<sup>273</sup> To achieve this, the French leaders at that time worked through codification toward limiting judicial power by enforcing a strict separation of power, emphasizing the absolute supremacy of the legislature and rejecting the legality of any judicial lawmaking.<sup>274</sup> Ironically, this situation increased judicial power.<sup>275</sup> “French judicial discretion is exercised under the guise of the mere application of Code or statute. Supposedly forbidden to make law in the first place, the French judge is under no pressure to rationalize and justify decisions in any significant sense. He is left entirely to his own devices... A principle directed toward restraining judicial power thus serves to enlarge it.” Even worse, although the French academicians and judges recognize the real role played by judges, their adherence to the ideal, romantic portrait restrains them from admitting it and, therefore, prevents them from benefiting and studying the French case law.<sup>276</sup>

Hence, looking at the French experience within this scope, we can answer the question asked earlier negatively; codification did not limit the power of judges as one might think. On the contrary, it has enhanced it, increased it and created a new justification for judicial tyranny.

Also, the role of judges is never reduced to mere “machines” in any legal system. Even when judges are bound to apply either codification or legislation, the judge still possesses a considerable freedom to make new law by interpreting the code or legislation, applying merits to law details, differentiating specific cases, and developing judge-made laws through the power of precedent and the multi-level court system.<sup>277</sup>

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<sup>273</sup> Mitchel de S.-O.-I'E. Lasser, *Judicial (Self-)Portraits: Judicial Discourse in the French Legal System*, 4 *the Yale Law Journal* (No. 6) 1325 (Apr., 1995).

<sup>274</sup> Lasser, *supra* note 273, at 1332.

<sup>275</sup> *Id.*; see also AL-SHITHRI, *supra* note 169, at 42.

<sup>276</sup> Lasser, *supra* note 273, at 1333.

<sup>277</sup> See Nassir al-Dawood, *Hukm al-Ilzam Bil-Taqnin*, *al-Watan Newspaper*, at: <http://www.alwatan.com.sa/Articles/Detail.aspx?ArticleId=6813>; see also Vogel, *supra* note 174, at 743.

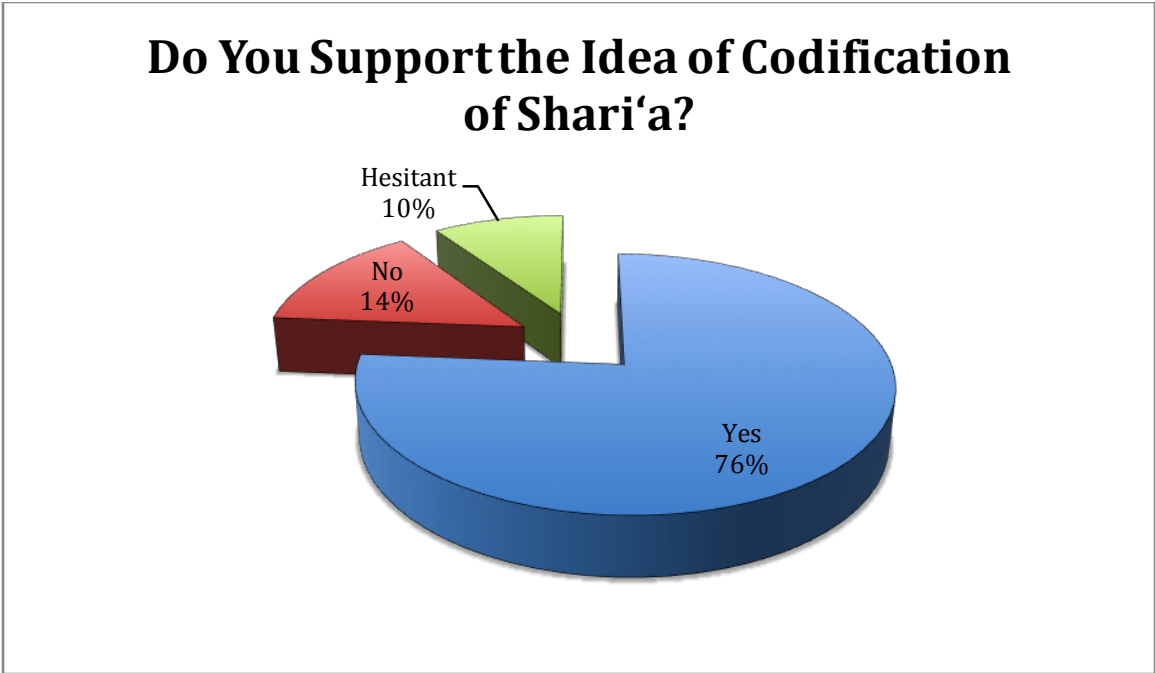
Ironically, codification has disappointed both sides. The codifiers did not reach their goal of limiting judicial power through codification, because judges still enjoy a legislative role in the adjudication process, contrary to what the opponents of codification thought, feared, and claimed.

## **VI. Codification in Field**

Within this context of the discussion regarding the codification of Sharī‘a in Saudi Arabia, it is helpful to add to the theoretical part of the discussion some of the empirical results collected during the fieldwork for this research. During the interviews conducted with the research sample, the interviewed Saudi lawyers were asked a question regarding their opinions and perspectives regarding codification of Islamic Sharī‘a. The question was:

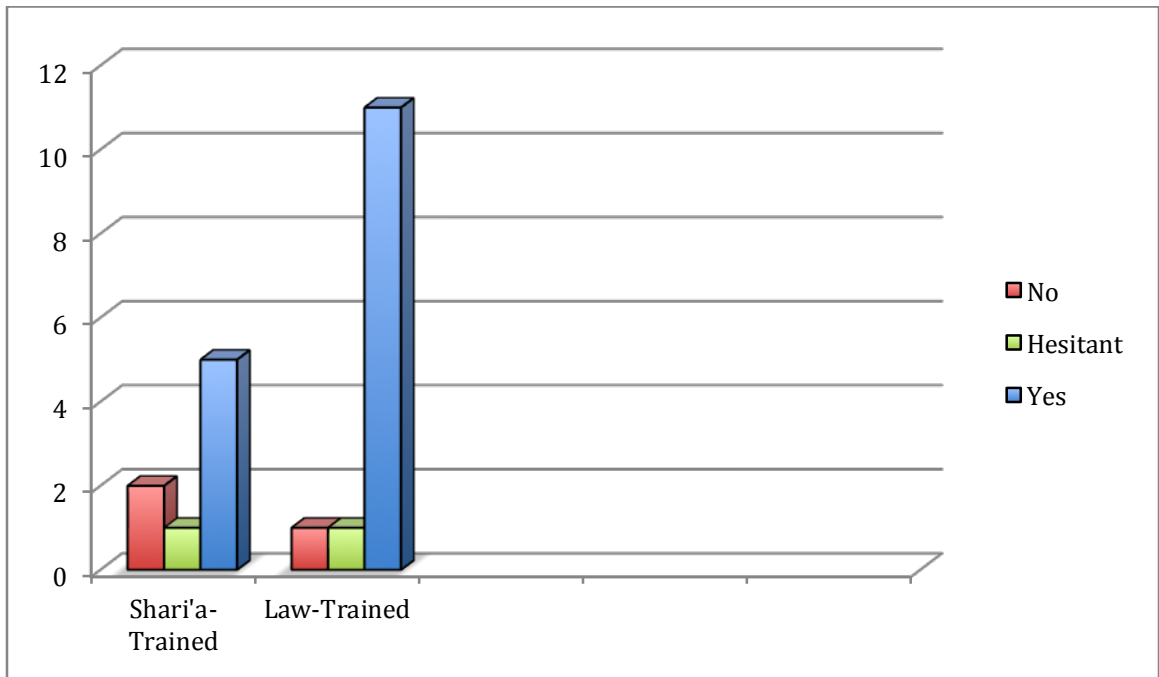
Do you support the idea of codification of Sharī‘a?

***The Answers in Numbers:*** Most of the interviewed practicing Saudi lawyers (76.2%) with different backgrounds answered “yes” to this question. Some of these lawyers, of course, are law-trained (52.3%), while the rest are Sharī‘a-trained (23.8%). On the other hand, some of these interviewees (14.2%) answered “no”, while some others (9.5%) hesitated and offered no answer. These numbers are illustrated in the following figure:



**Figure 4: Supporting Codification of Shari'a**

These numbers can be analyzed further by considering the educational background as follows:



**Figure 5: Supporting Codification of Shari'a Combined with Legal Education**

This last diagram reveals something important and interesting; it shows the limitation of

the effect of the educational background on the perception of the legal system within the Sharī‘a Courts. The majority of those lawyers who graduated from the law schools support the codification of the Sharī‘a law (in numbers) more than their counterparts who graduated from Sharī‘a schools. Despite the fact that the answers of lawyers with Sharī‘a education showed that they feel more comfortable in dealing with the current system as it is, half of the interviewed Sharī‘a lawyers expressed their support for the codification of Sharī‘a, although in smaller numbers than law-educated lawyers. This means that although the nature of the legal education affects the comfort and the understanding of the Sharī‘a legal system to a far extent (as answers to other questions show), therefore, is expected to affect the position towards codification any lawyer takes, it does not protect that lawyer, even if they are Sharī‘a-graduates, from supporting codification. This means that the legal education does not determine in an absolute way the position on codification. In other words, graduating from Sharī‘a schools does not mean absolute opposition to codification, and graduating from law schools does not mean absolute support for codification. There are still, as the chart shows, some lawyers from both segments who advocate an opposite position to the one that is advocated by the majority of lawyers from their segment.

***Codification between Two Camps:*** As the numbers above show, Saudi lawyers are very different when it comes to the issue of codification of Sharī‘a law. Even within the small number of interviewed sample, no exact generalization can be made to capture the real diversity in opinions among Saudi lawyers in relation to codification. It might be more accurate then to say that most of the interviewed lawyers who support codification are those with law-training, with the existence of some law-trained lawyers who do not support codification. On the other hand, Sharī‘a-lawyers seem to be equally divided between the two positions. This means that neither of the two positions can be assigned to one certain group in an exclusive way. There will be always

some members from each group who share the same position that is shared by the members of the other one.

It might be understandable why the majority of the law-trained lawyers support codification, as they lack the deep understanding of Sharī‘a that is supposedly enjoyed by their Sharī‘a-trained counterparts. More difficult to understand though is the opposition to codification that some law-trained lawyers have expressed, and the support of codification some Sharī‘a-trained lawyers show. Elaborated answers provided through the interviews revealed some of these lawyers’ specific reasons, as follows.

***Spirit of Flexibility:*** For example, one of the law-trained lawyers who expressed his opposition to codification said:

I do not support codification, as it will bring to us the same problems that are facing the Western countries. If I see an unsuccessful experience in front of me, why should I follow it?! Codification means depriving the Sharī‘a texts from their spirit of flexibility ... No matter how ijtihadi are the rulings, they are still limited and within a narrow circle of guesses.<sup>278</sup>

It is interesting that this law-trained lawyer does not oppose codification for religious reasons, as some of the opponents to codification do in Saudi Arabia. The key phrase in his statement is “spirit of flexibility.” This phrase was clearly stated and explained by another law-trained lawyer when asked whether he supports codification or not.

He said:

I can say that generally I support it, but personally I do not. The current, somehow malleable form of Sharī‘a allows me to use Sharī‘a law the way I like to better serve the interest of my client, but codification is going to make the rules fixed and determined.<sup>279</sup>

It seems from these two excerpts that some law-trained Saudi lawyers chose a pragmatic approach in casting their opinions regarding codification. They look to the un-codified Sharī‘a

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<sup>278</sup> Interview No. 5 on January 15, 2014.

<sup>279</sup> Interview No. 3 on January 13, 2014.

law as a tool to reach their own interests and the interests of their clients without regard to anything else. Their opposition to codification is not based on any moral or religious reasons. Frank and honest enough, this group is simply saying: I support whatever serves my interest. If un-codified serves it better, then I am against codification.

However, a third law-trained lawyer was hesitant and unable to give a firm opinion about the codification issue.<sup>280</sup>

***Necessarily as Time Changes:*** Another unexpected answer regarding codification was received from some Saudi lawyers who graduated from Sharī‘a schools. Half of the interviewed Sharī‘a-trained lawyers support codification, contrary to the other half, which is divided between either opposition or hesitation. In their answers, these Sharī‘a-trained lawyers stated that they support codification for several reasons. For example, one of these lawyers said:

I strongly support codification. My reason for this is the big difference between today’s judges and the judges in the past. Judges in the past were wiser and more knowledgeable. Today’s judges can barely reach the level of ‘excellent students of Sharī‘a.’ This is due to the weakness in the outcomes of the Sharī‘a education today. Codification is going to be the perfect solution for all the problems that exist in Sharī‘a Courts today. The codification opponents want things to be “floating”, so they can find loopholes for some people they want to favor.<sup>281</sup>

Another Sharī‘a-trained lawyer among those who support codification stated that:

I strongly support codification to stop the disparity in the rulings among the different judges in different courts. The problem is not in Sharī‘a itself but in the way of interpreting it.<sup>282</sup>

Another Sharī‘a-trained lawyer said:

Yes, we strongly need codification to clarify the Sharī‘a accommodation for the cases. For example, the Sharī‘a judge accommodates some transactions as part of Islamic fiqh while the law-trained individual will treat each one of these transactions as a contract. There is a big difference between the two accommodating analysis.<sup>283</sup>

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<sup>280</sup> Interview No. 19 on February 16, 2014.

<sup>281</sup> Interview No. 21 on February 24, 2014.

<sup>282</sup> Interview No. 17 on February 12, 2014.

<sup>283</sup> Interview No. 12 on January 30, 2014.

It seems from the previous answers that the supporters of codification among the Sharī‘a-trained lawyers justify their position by giving more consideration to the public benefit and better way of serving justice. Moreover, the word “floating” used by one of them reflects an awareness of the corruption that might result from the utilization of unfixd rules.

However, other Sharī‘a-trained lawyers were reluctant to state their position clearly with regard to codification as understood and applied in the West. Their answers clearly reflected the religious sensitivity expressed earlier<sup>284</sup> in the codification argument that concerns the right of the ruler to bind the judges. For example, when asked about his opinion regarding codification and whether he supports it or not, one of this group of lawyers said:

Yes and no! We should stick to our traditions but modernize, because the nature of social life, education, and reception by people all has changed. People are faster today and impatient.<sup>285</sup>

In the same vein, another Sharī‘a-law lawyer said:  
I support codification but not in a binding way!<sup>286</sup>

Another lawyer said:

I am hesitant! I am unable to give a definite answer. I believe in the intellectual freedom for the judge to search, but the problem today is that the judges do not have time to do this in every case before them... I wish that Islamic fiqh were well indexed, then we would not need codification.<sup>287</sup>

It seems from these answers that some Sharī‘a-trained lawyers are living with internal conflict in their consciousness. On one hand, they want codification, as they realize the changes that are taking place in society at all levels. On the other hand, their devotion to Islamic values is holding them back. They want codification to overcome problems that accompanied social and political changes; however, they do not want the binding effect to meet what they think is closer

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<sup>284</sup> In the previous chapter.

<sup>285</sup> Interview No. 14 on February 2, 2014.

<sup>286</sup> Interview No. 20 on February 17, 2014.

<sup>287</sup> Interview No. 18 on February 13, 2014.

to the orthodox Islam, as they perceive it.

Some of these lawyers said for example:

I am an advocate of the notion of codification but without binding. Codification must be advisory and not a binding document.<sup>288</sup>

Of course, the short answer to this is that codification as called for by the Saudi Progressives, who follow the codification as understood and received in the West, especially on the European Continent, requires that it be binding. If it is not binding, then it is not a “code” as the term means, but something else.

***Let People Know!:*** Contrary to the interviewed Sharī‘a-trained lawyers, most of the interviewed law-trained lawyers strongly support codification in general. This was expected, as these lawyers are more comfortable in dealing with clear, written laws in modern forms than they are with classical Sharī‘a heritage. However, the reasons and the justifications that these lawyers expressed in their statements differ.

For example, one said:

I support codification very strongly. The existence of stone-minded people, who control the judiciary and Sharī‘a in general, is the reason to oppose every change, development and modernization. Codification is going to provide a clear idea and is going to confine the judge’s authority. Codification with its vices is better than no-codification status.<sup>289</sup>

Another law-trained lawyer said:

I support codification. Let people know! To date, we do not have a clear law that controls an issue like child custody. The opposition to codification is due to the judges who do not want to let anyone to control their free hands in applying ijthad, so they can rule the way they like. The bottom line, it is all a fight for authorities!<sup>290</sup>

In the same vein, another lawyer said:

I support codification very much. Codification faces two challenges: the opposition of the classical, conservative, old school, and the belief carried by some that codification is non-Islamic and is a heresy. I support codification even if it contains some problems, as codification with problems is better than no-

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<sup>288</sup> Interview No. 20 on February 17, 2014.

<sup>289</sup> Interview No. 4 on January 14, 2014.

<sup>290</sup> Interview No. 6 on January 16, 2014.

codification status. There are some cases that do not have a clear solution, because no law controls them, i.e. child custody and the assessment of alimony. Codification today is more insisting than any other time.<sup>291</sup>

Another lawyer had a different opinion about the reasons to oppose codification, although he supports codification. He thinks that there is no opposition, as he said:

I support codification 100%. So, I can understand the principle the judge followed in the case. However, codification is part of the solution and not the whole solution. The issue today is relative and depends on the judge's understanding and his personal assessment. There is no opposition to codification today. The whole society is ready for it. I support a codification that is based on a social mobilization that is compatible with the newly codified laws. For example, judges and lawyers should have some short courses to raise the awareness among them on how to deal with codified laws. Also, a project like codification should be supervised by Sharī'a experts, for sure.<sup>292</sup>

Another lawyer said:

I support codification. There is of course a lot of dereliction. There are no obstacles in the way to codification except for the ability to convince Sharī'a judges. Time has changed, and they also should change, develop, and accept modernization and development.<sup>293</sup>

Another lawyer answered:

I support codification based on the principle that requires clear legislation so every citizen knows his rights and duties. In fact, the society is very much calling for codification. It is just the opposition of the Sharī'a scholars that turned codification to a political matter, as it is going to strip them from their unquestioned authority and pull the rug from under them.<sup>294</sup>

Finally, one of the old experienced lawyers in the field summarized his view by saying:

I 100% support codification for two reasons: (1) everyone today has lost the ability to apply required ijihad, and (2) the caseload is very huge.<sup>295</sup>

***Sharī'a Is Distinctive:*** On the other hand, some of the interviewed Sharī'a-trained lawyers opposed the idea of codification invoking the distinctive form of Sharī'a that will be sacrificed if codification is applied. One of these lawyers, for example, said:

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<sup>291</sup> Interview No. 8 on January 19, 2014.

<sup>292</sup> Interview No. 7 on January 19, 2014.

<sup>293</sup> Interview No. 10 on January 27, 2014.

<sup>294</sup> Interview No. 11 on January 28, 2014.

<sup>295</sup> Interview No. 7 on January 19, 2014.

I do not support codification. I totally oppose codification. The current form of Sharī'a is very distinctive and it is just that we are lazy, so we do not deal with Sharī'a as it is supposed to be. Instead of codifying Sharī'a, we should train all law-educated lawyers on Sharī'a and should teach them the fiqh and usūl al-fiqh. At the end, it all depends on the consciousness of the judge. We are treating law-trained lawyers in an unjust way. We do not provide them with adequate Sharī'a law knowledge. Then they find themselves forced to say: 'the rules are ambiguous, unclear and inconsistent.' Dear law-trained colleague, the problem is not in the rulings, rather, the problem is in your lack of understanding of the nature of Sharī'a law and the mechanisms by which Sharī'a adjudication works. All this is due to your inability to understand Sharī'a law that you never studied adequately. For example, I have met many lawyers who complain about the unclear issue of custody in Sharī'a. They do not know that, according to Sharī'a law, the judge is supposed to care about what is more beneficial for the child before anything else. If the parents are equal in this, then the judge moves on to consider the age of the child. This is the law of Sharī'a, and this is how it works. People who studied Sharī'a know this and never find a problem at Sharī'a Court.<sup>296</sup>

## VII. Concluding Analysis

As mentioned earlier, the aim in this chapter is not to support any of the two sides against the other as much as to give a general overview of the issue and to present the key arguments raised inside the religious camp, mostly using its own language. Looking at the controversy objectively, several conclusions can be drawn.

**First**, from the previous presentation of the arguments raised by all sides in Saudi regarding codification, it can be seen that the debate between the Progressives from the non-religious side and the Conservatives lacks a shared ground between the two camps. While non-religious Progressives utilize arguments from logic and reason,<sup>297</sup> the 'ulamā' from the

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<sup>296</sup> Interview No. 15 on February 2, 2014.

<sup>297</sup> Such arguments include the need for codification. They think that necessity springs from the complexity of modern life contrary to the case in the early days of Islam, when judges were asked to judge a few simple cases. Nowadays, judges have a huge number of cases that involve complicated problems, especially in the areas of transfer of technology and international trade and relations. They also claim that codification will lead to a consistency in the legal system that will result in more predictability for the outcome of the cases. When the merits in cases are similar, legal decisions will be the same or at least will not vary radically. One of the very striking examples of radical outcomes can be seen in the cases of ta'zir crimes, for example. The ta'zir crimes are neither specified nor do they have preset punishments in Islamic sources. Therefore, judges apply a significant amount of their discretion in imposing a suitable punishment for this type of crime. It is usual to find cases of two people who have committed the same ta'zir crime in similar circumstances, where the sentences are dramatically different. One of them might be sentenced for imprisonment for six months, whereas another might be sentenced to imprisonment for five years. See al-Qahtani, *supra* note 191; see also AL-SHITHRI, *supra* note 169, at 26; Mohammed al-

Conservatives invoke texts from the Islamic scriptures, in their view avoiding involvement in superficial, non-Islamic-texts-based-debate. Therefore, the active and vivid debate is taking place inside the religious camp and among its own members. This camp possesses the political and the controlling power over the judiciary and all agencies of a religious nature in the country. If codification is to be passed and approved through debate, then codifiers must convince the religious opponents first to achieve their goal.

**Second**, the concept of codification is totally new to Islamic thought. There is no doubt that codification as understood and conceived either in the US or in Europe is totally alien to the Islamic legal realm. Bearing in mind the preceded argument among the ‘ulamā’, one can conclude that the classical, Islamic dichotomy that contrasts between *usūl al-fiqh* and *siyāsa*, *ijtihād* and *maṣlaḥa*, and truth and power might still be unable to capture the whole picture for such an innovative, Western concept of law like codification. The religious argument both sides try to invoke might be nothing more than a cosmetic disguise for a position that has been decided in advance. At the end, either the ‘ulamā’ strongly adopt the path of *usūl al-fiqh* and, therefore, reject codification, or they strongly adopt the path of *siyāsa* and, therefore, accept it. It is not about codification itself as much as it is about the general approach to the Islamic texts in which one believes.

However, although both sides inside the religious camp invoke and involve original Islamic scriptures in the argument in a very traditional way with which they both are very familiar and accustomed, the debate is all focused on these Islamic texts and never passes to issues or problems connected to codification itself. The difference between the two opposing

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Mushawah, *Taqnin al-Uqubat al-Ta’ziriyah*, al-Riyadh Newspaper at: <http://www.alriyadh.com/2009/03/24/article417929.html> ; see also Abdulmumin Shujaldin, *Mawqif al-Fuqaha’ Min Taqnin Ahkam al-Sharī’a al-Islamiya [The Opinion of Fuqaha’ in the Codification of Islamic Sharī’a]*, can be found at: <http://ohlyemen.org/modules.php?name=News&file=article&sid=110>.

parties is only in the angle through which each side looks at the Islamic texts. Evidence of this is that each side is supported by traditional ‘ulamā’. They all take off from Islamic ground, which they have never dared and will never dare to change. Imprisoned in the classical rhetoric, discussions on codification become less likely to produce any fruit and become more impotent to express what both sides think is at stake.

Moreover, framing the argument between the two sides in a traditional Islamic way – which is the only way conceivable and possible within the Saudi context– gives an advantage to the opponents to codification over their counterparts, because the opponents use *usūl al-fiqh*, which is the highest tool in the Islamic epistemological hierarchy. In contrast, the proponents of codification use the *siyāsa*. Therefore, if codification is approved under this situation, it will be approved through the utilization of *siyāsa* and will always lack full legitimacy in the eyes of practitioners and individuals.

Within this structure, a deeper analysis of the codification issue can be simply framed in a more analytical way considering that codification will be looked at as a less legitimate product that resulted from the application of *siyāsa* or *maṣlaḥa*, which are less than an element that is a result of the application of *ijtihād* backed by texts, which always occupies the highest status. This is a point of agreement among all ‘ulamā’ from both sides that no one desires to change. This hierarchy in Islamic sources has been always used by ‘ulamā’ as an instrument to adapt legal systems through history. This leads to the realization that the debate between the two sides of ‘ulamā’ can be understood differently, as it is more about whether this instrument will be able to satisfy the new obstacles expected to result from adopting codification while saving for the ‘ulamā’ their upper hand in controlling the matters (through applying a higher status of *Sharī‘a* law that is based on *ijtihād* and not a code that is based on *siyāsa*) as happened with the school of

taqlīd and the chief-qādi system that saved for the ‘ulamā’ their high status. The question concerns the fear of how codification will differ from these classical compromises with siyāsa and maslaḥa and their procedures.

The proponents of codification think that, although codification involves some losses for the functions of both the highest level of Sharī‘a law in the court and the qāḍī’s role, it is still able to keep the control of the ‘ulamā’ over the judiciary, especially if the code is supervised and drafted by a group of the senior ‘ulamā’.

On the other hand, the opponents of codification raise three concerns:

1. Repeatedly, history has proven that the opposite always happens. The role of the religious ‘ulamā’ has never been increased or at least saved as it was before codification. Once the Western impact is accepted in such a matter, the sacrifices follow until the role of the ‘ulamā’ diminishes.

2. Historically, it has always been risky to pay sacrifices for siyāsa from the side of the ‘ulamā’ and the classical school of fiqh. It might be an unsafe adventure today for the ‘ulamā’ considering the shifting in the balance of technological power and the modern life style on the non-religious side.

3. Even if we ignore what preceded and think that the codification is going to develop the fiqh and the role of the ‘ulamā’, other invisible losses might still occur considering the role of fiqh under the Ottoman experience, for example, which started strong and was undermined thereafter until it was entirely diminished.<sup>298</sup>

**Third**, neither of the two sides thinks “out of the box”, beyond the codification to offer a different solution to end the existing faction. For example, the opponents of codification never

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<sup>298</sup> Some of the analysis and the points laid out in this second conclusion are inspired by ideas developed by Frank Vogel. See Vogel, *supra* note 174, at 746-750.

thought of explaining their judicial methodology in reaching their verdicts to their partners in the legal field, i.e. the lawyers.<sup>299</sup> On the other hand, the codifiers never thought of examining or closely studying the current legal analysis within Sharī‘a Courts to support their claim with studies, which this research aims to achieve. They also never offered a different solution that is built on a close examination of the current status. Any model to reconcile the debate will require some sacrifices from the side of the ‘ulamā’ to change their mindset to work together with their non-religious legal partners in developing a new modern legal system tailored to save the Arabic and Islamic identity of Saudi Arabia.

The argument between the two opposing camps continues. Both sides seem to have a valid argument. There is no right or wrong answer to the issue at hand. As was mentioned at the beginning of this chapter, the aim here is not to determine who is right or wrong in this debate as much as to give a general overview of the issue and to present the key arguments raised inside the religious camp. However, some researchers and ‘ulamā’<sup>300</sup> have suggested an effective model that considers all features of the Saudi Arabian and Islamic identity. These researchers suggest the following alterations to the system for this model to succeed:

**1. *The Qāḍīs:***

This suggested model is supposed to consider the development of well-educated and independent qāḍīs, who will have a strong knowledge of classic fiqh and will be able to apply modern laws. The qāḍīs are also supposed to maintain some kind of discretion to apply on case-by-case bases while focusing on the source of the law morally as well as originally.

**2. *The Body of Law:***

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<sup>299</sup> This is what this research is about. The legal analysis is going to be explained in the coming chapter.

<sup>300</sup> Such as Mutlab al-Nafisa. See Vogel, *supra* note 174, at 750-751.

In this model, the body of law is supposed to combine classical fiqh derived from the Ḥanbalī School with modern laws that are derived from contemporary legislation:

- (a) The fiqh is supposed to result from fatwas that are the result of an active group ijtihād. Accordingly, these fatwas are supposed to compose an essential, non-binding guidance for the qāḍīs in their future rulings.
- (b) Modern laws are supposed to be issued periodically by the King, the Council of Ministries, and the Shura Council, utilizing siyāsa and maslaḥa.

**3. *The Legislative Power:***

- (a) In terms of issues governed by siyāsa, the current mechanism is fine, as it requires a Sharī'a review for every issued law.
- (b) In terms of fiqh, an innovative method of a group ijtihād might be encouraged either by the fatwa authorities, the courts, and a single 'ulamā' considering the new enacted modern laws with a continuing cooperation with siyāsa authorities.

The following chart illustrates the preceding dimensions:<sup>301</sup>

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<sup>301</sup> See Vogel, *supra* note 174, at 750-751.

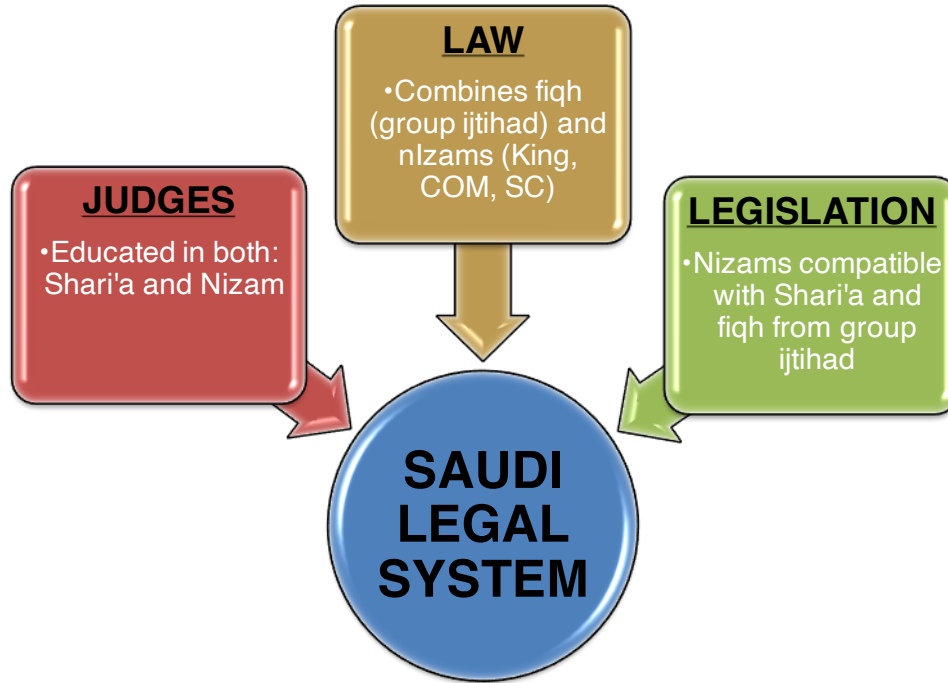


Figure 6: Dr. al-Nafisa's Proposal to Reform Legal System in Saudi

Some other proposals to reconcile the conflict between the two sides suggest seeking some other sources for legitimacy through re-thinking out of the box. The box here is the classical fiqh/siyāsa dichotomy. While these suggestions emphasize focusing on employing some other Islamic mechanisms, they admit the need for the ‘ulamā’ to develop a different mindset to complement the suggested mechanisms. Some of these other Islamic mechanisms other than the fiqh and siyāsa include:

1. Utilizing values of justice and equality to support a codification that, accordingly, is able to protect due process and equal protection of the laws.
2. Utilizing a framework that is constructed of elements derived from a combination of some Islamic concepts such as nasiḥa,<sup>302</sup> bay‘a,<sup>303</sup> ijma‘,<sup>304</sup> and shūra.<sup>305</sup>

<sup>302</sup> The advice to the ruler.

<sup>303</sup> The allegiance of loyalty to the ruler.

<sup>304</sup> Consensus.

<sup>305</sup> Consultation.

A little consideration of these concepts may result in shifting the conceptual framework that comprises the debate about codification in Saudi Arabia.

**Fourth**, in June 1928, the Saudi Judicial Board (predecessor of the Ministry of Justice) issued a resolution that was confirmed by the King requiring that judicial rulings be in agreement with the established interpretations found in the school of Imām Ahmed ibn Hanbal. The resolution approved certain Ḥanbalī books to be used by the courts in a certain order. The judicial analysis applied within the Sharī‘a Courts had never been studied closely. This judicial analysis introduces a different case of adjudication that reflects the social and religious practices existing in Saudi Arabia.<sup>306</sup> The process of judicial rulings in these courts neither resembles the process followed in civil law systems nor the one followed in common law systems, because, on the one hand, there is no code for Saudi qāḍīs to follow as in the civil law systems. On the other hand, these qāḍīs are not required to respect or consider any precedents in their rulings like their counterparts in the common law systems.<sup>307</sup> Judicial analysis within Saudi Sharī‘a Courts follows the methods laid down in the Resolution of 1928 that was explained earlier. Like judicial methodologies in all legal systems, this does not protect the legal system in the Saudi Sharī‘a Courts from some contradictions or disparities in the outcomes of cases. What may be surprising about the administration of Sharī‘a in Saudi courts is the degree to which it may be stable and predictable in theory (and maybe in practice as well, as the empirical test will show). This point is often not appreciated by outside observers of the Saudi legal system, because exceptional cases that appear unjust to outsiders are widely publicized, while the routine administration of justice in Saudi Arabia is not well understood by outsiders.

**Fifth**, the empirical results demonstrating support for codification seem at once to

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<sup>306</sup> See Vogel, *supra* note 18, at 56.

<sup>307</sup> See Vogel, *supra* note 18, at 58.

confirm and to invalidate the hypothesis of the research. The hypothesis of the research claims that interviewed lawyers with Sharī'a background are more likely to understand and feel comfortable in dealing with Sharī'a Courts compared to their counterparts trained in law schools and, therefore, the majority (if not even all of them) will oppose codification or at least be content with the current Sharī'a system. Less than half of the interviewed Sharī'a-trained lawyers expressed opposition to codification. More than half of the interviewed Sharī'a-trained lawyers showed their support. Although this does not relate directly to the core question of this research, which concerns the predictability of judicial analysis within Sharī'a Court, it is still challenging for the broader hypothesis of the research. According to the broad hypothesis of the research, the majority of the Sharī'a-trained lawyers were expected to show opposition to codification, assuming, since they were trained in Sharī'a, they will be more comfortable in dealing with its method of judicial analysis and, therefore, feel that it is adequate as an adjudication method. The empirical data did not exactly confirm this hypothesis, nor did it defeat it. This is because although these lawyers were divided equally, those who supported codification never justified that support with a categorical rejection of Sharī'a as an effective structure for adjudication. There are two distinct questions here: one is about the acceptability of Sharī'a judicial analysis while the other is focused on the desirability of codification. Although these lawyers are committed to the Sharī'a system, viewing it as acceptable and adequate as a tool for dispute resolution, they showed support for codification. Most of them expressed their disappointment and doubts, however, with the ability of current judges to apply ijtiḥād correctly beside other concerns and justifications, as described earlier. These respondents think Sharī'a judges must have more discipline and underpinning in Sharī'a jurisprudence. The answers provided by these Sharī'a lawyers seem to show their willing to allow for a place for codification, not because they

view the current Sharī‘a judicial analysis as inherently flawed or think less of it, but because deficiencies in its application by less qualified judges. In these lawyers’ view, the current judges do not possess the high competency required to apply such sound Sharī‘a analysis, and thus embrace codification as a discipline to satisfy a hunger for greater predictability. Their advocacy of codification seems to be an echo or reflection of their sense that the Sharī‘a system must be refined and made more disciplined. Within its own terms of reference, what these lawyers might want is not codification for sake of codification itself in fact, but the discipline of codification to produce more predictability within the Sharī‘a system. It is hope for a better Sharī‘a system.

In all cases, the number of law-trained lawyers who support codification among the interviewed lawyers is still larger than the number of Sharī‘a-trained lawyers who support it.

The interviews also showed the existence of some law-trained lawyers who oppose codification, but it turned out that these lawyers do not oppose codification itself but were motivated for reasons related to their own self-interests. Their self-interest lies in the fact that Sharī‘a law is more malleable when compared to the rigidity provided by code law. Sharī‘a law provides a variety of legal opinions that will not be provided if code is applied, as code usually is bound only to one legal opinion. In this case, they prefer Sharī‘a law, as they can utilize it to serve the interest of their clients better by taking advantage of the pluralistic opinions that exist in Sharī‘a that a one-opinion piece of code is not going to offer.

The following chapter is dedicated to explaining the methodology of the judicial analysis followed within the Sharī‘a Courts.

## **Chapter Four: The Methodology of Judicial Analysis in Sharī'a Courts in Saudi Arabia**

This chapter is dedicated to presenting and explaining the current methodology of legal analysis that has been enforced and followed in the Sharī'a Courts in Saudi Arabia since 1928. As seen in the previous chapter, the debate about codification is dividing the Saudi intellectual community. Some of the proponents blindly advocate codification, because they believe that it will provide an overall solution to every problem or vice of the current judicial performance. Some of their arguments in favor of their position touch partly on religion. Whether the opponents from the conservative side interact with this argument or not, neither of the two sides has studied or has based its critique on an analysis of the internal structure, methods and results of the current legal methodology used in the legal analysis in the Sharī'a Courts. As this research is meant to bridge the gap between the two camps, it engages in the argument surrounding the virtues of codification from a different perspective. This research explains the current Sharī'a juridical methodology theoretically and empirically. The description of the theoretical underpinnings of Sharī'a method will be followed with an empirical search and with an exploration of the effect of this methodology on the legal practice and specifically on the practicing lawyers.

The chapter begins with an introduction to the historical circumstances that led to the birth of the method of legal analysis in the Sharī'a Courts system in Saudi Arabia.

### **I. Historical Overview**

As stated earlier, the teachings of the Ḥanafī School, embodied in the Ottoman Majalla, was the official controlling teachings in the Sharī'a Courts in the lands that were under the direct

rule of the Ottoman Empire.<sup>308</sup> During the period of the fall of the Ottomans and the rise of the Hashemite Kingdom, which was followed by the Saudi state, the teachings of other jurisprudential schools became strong competitors for the Ḥanafī, such as the Shafī'ī School in Hijaz and the Ḥanbalī School in Najd.<sup>309</sup> Following the annexation of Hijaz and during a transformative period, the application of the Ottoman Majalla in the Saudi Sharī'a Courts was maintained only for a short time through a Royal Order issued by King 'Abd al-'Azīz in 1926, followed by the idea expressed by the King that the country should create its own legal code.<sup>310</sup> Challenged by great opposition, the newly founded country created its own methodology for judicial analysis in 1928, and the laws in Sharī'a Courts remain un-codified.<sup>311</sup> Thereafter, the Ḥanbalī School became the preferable, semi-official school of the judiciary, as it was selected by that methodology to be looked at first among the other schools. The historical literature suggests that the choice of 'Abd al-'Azīz for the Ḥanbalī school was not the result of prejudice or an arbitrary desire to enforce his own choice; rather, this literature suggests that the selection of the Ḥanbalī School was due to the closeness of this school to the people's lives in Arabia, as it was the applied law during the time of unification in most of the Arabian Peninsula.<sup>312</sup> Another stated reason, which might be found more convincing, is that the Ḥanbalī School was chosen for political reasons, as it was closer to the government officials, because it was the school adopted by the religious founders of the country, namely Shaykh Mohammed ibn 'Abd al-Wahhab.<sup>313</sup> Moreover, the Ḥanbalī School was historically the latest school appeared among the main four Sunni Schools; therefore, it was free, to a reasonable extent, from mistakes and was based on

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<sup>308</sup> See AL-GHAMDI, *supra* note 162, at 379.

<sup>309</sup> *Id.*

<sup>310</sup> See WAHBAH AL-ZUHILY, JOHOUD TAQNIN AL-FIQH AL-ISLAMI, [THE EFFORTS TO CODIFY THE ISLAMIC FIQH], 49 (1987).

<sup>311</sup> *Id.*

<sup>312</sup> See AL-GHAMDI, *supra* note 162, at 379-380.

<sup>313</sup> See AL-GHAMDI, *supra* note 162, at 380.

sound arguments, because its founder, Imam Ahmed ibn Hanbal, was an imam of fiqh and Sunna at the same time.<sup>314</sup>

In 1927, King ‘Abd al-‘Azīz considered the formation of a committee of the elite Sharī‘a scholars to constitute a “Sharī‘a Legal Digest” (majalla), that was derived from the fiqh books of the Four Sunni Schools, with no prejudice or adherence to a specific one of these schools in particular.<sup>315</sup> The idea was to confine this digest to the strongest, preponderant argument on a given point of law or doctrine, even if this argument was not the official one adopted by the Ḥanbalī School. However, this project introduced by the King never saw light.<sup>316</sup>

Later that same year, King ‘Abd al-‘Azīz established *al-Hay’a al-Qadā’iyya* (the Judicial Board) in Mecca, which consisted of a chief judge and three members selected by the King from among the senior ‘ulamā’. The full name of the board was *Hay’at al-Muraqaba al-Qaḍa’iyyah* (the Board of Judicial Supervisions) before it was changed to *Hay’at al-Tadqiqāt al-Shar’iyya* (the Board of Legal Inspections) in 1938, at which time, it consisted of a chief judge and four members and was tasked with judges’ discipline and inspection on the judicial rulings. Later, this Board was superseded by the establishment of the Ministry of Justice in 1970.<sup>317</sup>

One of the first resolutions issued by the newly formed Judicial Board was Resolution Number (3) in the 1<sup>st</sup> of *Rajab*, 1347H (June 25, 1928), which was later ratified by the King in

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<sup>314</sup> See AL-GHAMDI, *supra* note 162, at 380. This was affirmed through a declared vision by the King that emphasized tolerance and justified the selection of the Ḥanbalī School for reasons related to epistemology and objectivity. This can be inferred from different speeches offered by King ‘Abd al-‘Azīz, in which he explained his vision regarding the judiciary. For instance, he pledged to establish a judiciary that adheres to whatever the Sharī‘a Court finds sound. He said: “[T]he madh’hab that the Sharī‘a Court rules upon is not confined to any specific one [of the Islamic Madh’habs]. Rather, the [Sharī‘a] Court rules upon whatever it finds sound from any madh’hab. There is no difference between any madh’hab and the other.” O.G. Umm al-Qura No. 138 (7/2/1346, Aug. 5, 1927). He also said: “We do not confine ourselves to a specific madh’hab while leaving the other ones. Whenever we find the sound argument at any madh’hab, we refer to it and hold onto it. If we do not find the argument sound, then we adopt Imam Ahmed’s doctrine.” O.G. Umm al-Qura No. 484 (8/12/1352, Mar. 24, 1934).

<sup>315</sup> See AL-GHAMDI, *supra* note 162, at 380.

<sup>316</sup> *Id.*

<sup>317</sup> See AL-GHAMDI, *supra* note 162, at 380-381.

9<sup>th</sup> of *Rabi' al-Awal*, 1347H (September 9, 1928) to resolve the inconsistencies that might appear. Resolution Number (3) is still in effect today.<sup>318</sup>

## II. The Text of the Resolution Number (3) of Rajab, 1347H (June 25, 1928)

“His Royal Highness, the King, is considering establishing a majalla (legal digest) composed by a committee of the elite, selected, specialist *ulamā* to choose legal opinions from among the considerable books of the Four Madh’hab. This Majalla is going to be similar to the one founded by the Ottoman Government in 1293H (1876). However, it should be different in that it most importantly is not confined by any madh’hab; instead, it takes from any madh’hab whatever is in the benefits of Muslims as far as this madh’hab possesses the strongest argument and proof.

His Royal Highness gave His order to Hay’at al-Muraqaba al-Qaḍā’iyyah (al-Hay’a) to start working in this project as follows:

If the Four Madh’hab agree on an issue, then this issue should be converted to a binding law for all courts and judges to rule in conformity with, considering that the Four Madh’hab agree on many major laws as well as minor ones too. For the controversial issues among the Four Madh’hab, these controversial issues should be collected starting from the first day then al-Hay’a should meet with the greatest *ulamā* to look in the collected controversial issues in order to discuss the arguments raised by the Four Madh’hab regarding every one of these controversial issues; whatever the meeting parties find strong among these opinions as supported by Qur’ān and Sunna, they consider and, therefore, ignore the other ones that accordingly should be ruled weak. Following, al-Hay’a should follow this by converting the rules they collected to binding laws for courts and judges to rule upon them. This way al-Hay’a will collect most of the controversial issues that are the origin for difficulty and conflict among the Four Madh’hab.

Then His Royal Highness considered changing this idea to the following steps:

**A.** The ruling in Sharī’a Courts shall be in compliance with the established opinion in the Madh’hab of Imam Ahmed ibn Hanbal for the ease and clarity of the books and references of this madh’hab and for the commitment by its scholars to present evidence addressing whichever problems happen to be under consideration.

**B.** If following the established opinion in the Ḥanbalī Madh’hab appears to cause difficulty or an opposition of public benefit, then judges ought to search and reach out for opinions from other madh’hab as public benefit dictates, and the Court<sup>319</sup> has to decide to follow that other madh’hab in consideration of what has been stated.

**C.** The Courts should base their rules on the books included in the following stages:

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<sup>318</sup> Al-Hay’a al-Qaḍā’iyya [Judicial Board] Decision No.3 (17/1/1347/ June 25, 1928), approved by the Royal Decree of 24/3/1347 - Sept. 8, 1928.

<sup>319</sup> The Sharī’a Court.

**[First Stage:]**

The judges must, first, consult the two late Ḥanbalī authoritative books, which were both composed by Maṣṣūr ibn Yūnus al-Bahūti al-Ḥanbalī (d.1642); that are:

- (1) Sharḥ Muntahā al-Irādāt; and,
- (2) Kashāf al-Qinā‘ ‘an Matn al-Iqnā‘.

Judges should do the following:

Follow the answer that both books agreed upon or that was provided by one of them and not the other.

In case of a contradiction, Sharḥ al-Muntaha triumphs.

**[Second Stage:]**

When neither of the two books is available, or they do not provide an answer to a given problem, judges revert to abridgment or summarization as follows:

- (1) Al-Rawḍ al-Murbi‘ Sharḥ Zād al-Mustaḥni‘ fī Ikhtiṣār al-Muḥni‘ by Sharf al-Din Abu al-Najā al-Hajjawī (d.1560); and,
- (2) Dalīl al-ṭālib li Nayl al-Maṭālib, by Mar‘ī ibn Yusuf al-Karmī (d.1554).

**[Third Stage:]**

If a solution still cannot be achieved, then other Ḥanbalī law books may be consulted. Two of the most authoritative Ḥanbalī books after these are:

- (1) Al-Mughnī by Muwafaquldin ibn Qudama (d.1223); and,
- (2) Al-Sharḥ al-Kabir by Abdurahman ibn Qudama (d. 1283).

The decisions are issued according to the prevailing opinion that these two books provide.

**[Fourth Stage:]**

If an answer still cannot be found, then the judges are instructed to consider the interpretations of other Islamic schools, if, depending on the circumstances, the judges find it better to apply such interpretations in achieving a more suitable judgment that would best serve the public good.”<sup>320</sup>

The previous stages for achieving the judicial rulings within the Sharī‘a Courts can be illustrated in the following chart:

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<sup>320</sup> Al-Hay’a al-Qaḍā’iyya [Judicial Board] Decision No.3 (17/1/1347/ June 25, 1928), approved by the Royal Decree of 24/3/1347 - Sept. 8, 1928 and O.G. Umm al-Qura No. 138 (7/2/1346, Aug. 5, 1927).

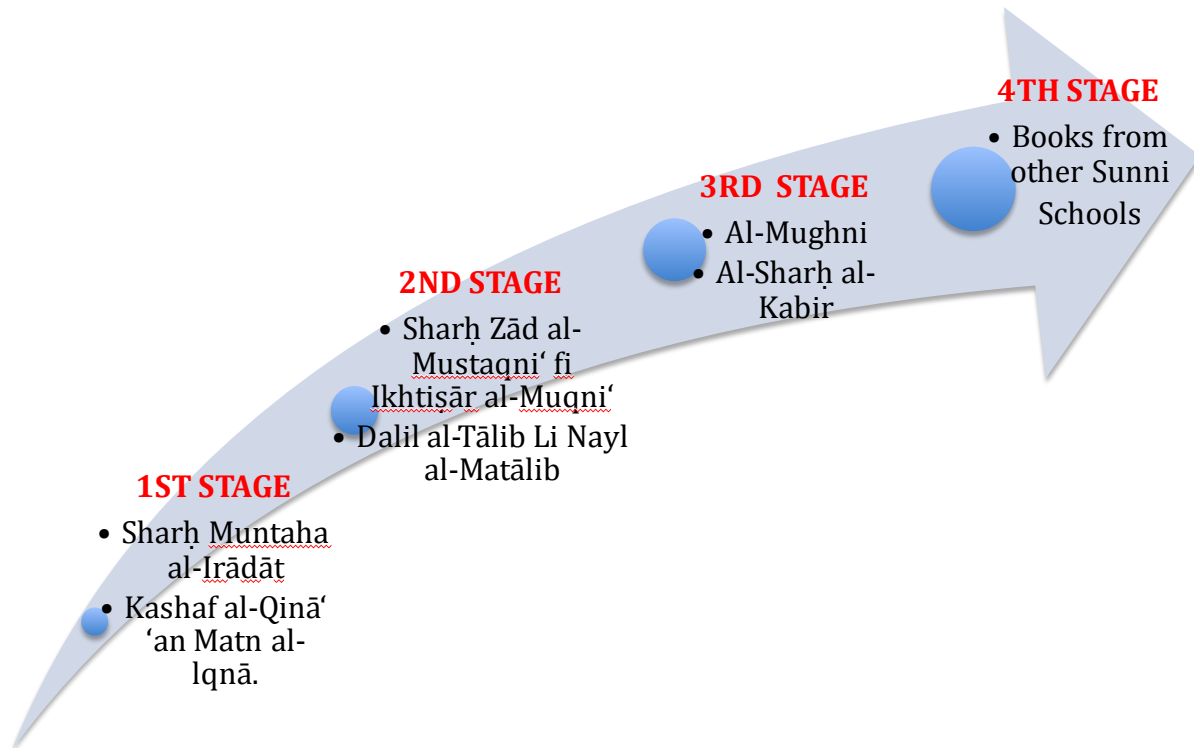


Figure 7: Stages of Judicial Analysis in Shari'a Court

Following the issuance of this resolution, a Royal Decree, issued in 1349H (1930), stated the following:

It will be sufficient to rule by what is found in the authentic law books of the school of Imam Ahmed ibn Hanbal, which can be applied without the meeting of court members, while a judgment with no basis in these texts will require an obligatory meeting.<sup>321</sup>

### III. Examples of Solving Cases Following the Judicial Analysis Methodology

**Example 1: Revoking a Marriage because of a Breach of Contract:** A couple got married 16 years ago with a dowry of 20,000 Saudi Riyal (SR). They have three children. The husband recently married another woman.<sup>322</sup> The contract for the second marriage includes a marriage continuity condition that specifies that the husband has not had and will not have any other wives either before or after entering the marriage contract. The second wife submitted a

<sup>321</sup> See FU'AAD HAMZA, AL -BILAD AL-ARABIYYA AL-SAUDIYYA [THE COUNTRY OF SAUDI ARABIA] 175 - 176 (1988).

<sup>322</sup> Islamic Shari'a allows for polygamy with up to four women at the same time.

petition to revoke her marriage on basis of breaching the marriage contract.<sup>323</sup>

**Answer:** Following the previously explained methodology, Sharḥ Muntahā al-Irādāt should be consulted first. This book states:

[C]onditions in a marriage contract are two types: first, valid, binding for husband, he cannot get out of it unless he divorced the wife... examples of this type of conditions include:... as if she requires him not to marry while she is his wife.<sup>324</sup>

He then said:

If this is stated well, then if the husband did not meet the condition, then the wife has the right to revoke the marriage. Umar ruled for a wife against her husband, because he was default in her condition. The man protested saying: ‘then they divorce us’ [meaning men]. Umar then said: ‘conditions are the sharp cut where rights end’ and he ignored what the man said. This is because [a condition in marriage contract] is binding in the contract, so the right to revoke is guaranteed once the other party is unable to meet, similar to guarantees in a sales contract.<sup>325</sup>

**Example 2: Revoking Marriage for Wife Abuse:** A couple has been married for 15 years. The husband abuses his wife by repeatedly beating her. The wife finally decides to submit a petition to the court to revoke her marriage on the basis of committing continuous domestic violence physically and emotionally.<sup>326</sup>

**Answer:** Sharḥ Muntahā al-Irādāt states:

Khul‘ is permissible when life between a couple becomes unbearable and ill, so everyone hates the other.<sup>327</sup>

However, this is not enough to answer the question in this case. So, the answer should be obtained in the following book, Kashāf al-Qinā‘ ‘an Matn al-Iqnā‘, which states the issue in the case clearer as it says:

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<sup>323</sup> This question was based on a real case that was decided on June 4, 2008 in the General Court of Jeddah, Saudi Arabia.

<sup>324</sup> 9 MANSUR IBN YUNUS AL-BAHUTI, SHARH MUNTAHA AL-IRADAT, 111-112 (2008).

<sup>325</sup> 9 AL-BAHUTI, *supra* note 324, at 114.

<sup>326</sup> This question was based on a real case ruled on by the General Court of Jeddah, Saudi Arabia on August 16, 2010.

<sup>327</sup> 9 AL-BAHUTI, *supra* note 324, at 307.

If the woman hates her husband for his behavior or his look, his internal or external image,... then she is entitled for khul' on a compensation for what Allmight says: 'If you are worried they [the couple] will not perform their duties towards each other, then no guilt in what she pays to get out of the marriage.'... Also for the hadith narrated by ibn 'Abbas: a woman came to the Prophet of Allah (PBUH) and said: Oh Messenger of Allah, Thabit ibn Qais, I do not shame him in anything in religion or behavior, but I hate to be an infidel after being a Muslim. The Prophet said: 'Will you return to him his garden?' the woman said: 'Yes' the Prophet then asked her to return the husband's garden and ruled her marriage revoked.<sup>328</sup>

**Example 3: Evacuation of a Rental Property after Being Sold:** A woman rented two stores from a company owned by a man who owns the property that contains these two stores and other assets. Suddenly, the owner decided to sell the whole company, including this property, to another man. The new owner knew about the rental lease between the former owner and the tenant when he decided to enter in the selling contract and to buy the property. However, the new owner did not want to continue the leasing contract and, therefore, decided to bring a case against the tenant to force her to evacuate the stores, claiming that the lease was between the woman and another person, the old owner, and not himself.<sup>329</sup>

**Answer:** Al-Bahuti said in Kashaf al-Qina':

Selling the rented property is valid...because renting is a contract of benefits, therefore, it does not invalidate the selling contract... either [the previous owner] sells in within the rental period or before it starts... however, the new owner has the right to continue in the leasing contract or revoke it for free if he did not know that this property is rented.<sup>330</sup>

This implies that the new owner in the question does not have the right to revoke the leasing contract, as he entered in the selling contract while knowing about the leasing contract in advance.

**Example 4: A Claim over Money not Delivered:** A man bought a car for 60,000 SR, and he agreed with his friend to write a check in this amount to the name of the friend, who would

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<sup>328</sup> 5 MANSUR IBN YUNUS AL-BAHUTI, KASHAF AL-QINA AN MATN AL-IQNA, 241-242 (1997).

<sup>329</sup> This question was included in a real case decided by the Shari'a Court in Jeddah, Saudi Arabia on February 28, 2010.

<sup>330</sup> 4 AL-BAHUTI, *supra* note 328, at 37.

then pay the money to the car company. When the friend received the check, however, he cleared the check, took the money, and never paid the car company.<sup>331</sup> When the man asks the friend to return the money immediately, the friend does not deny the story but claims that he has spent the money and cannot pay it back immediately. He asks to be given some time, although he is thought to have properties worth more than the money he owes to the man.<sup>332</sup>

**Answer:** In *Kashaf al-Qina'*:

Loans should be paid immediately if asked to do by the lenders for the Prophet's saying: 'Procrastination from rich lenders is unjust'.<sup>333</sup>

This means that the loans should be paid immediately when the borrowers are rich. Rich in this context means having enough money to pay the debt.

### Analysis

In the previous theoretical examples, these questions, taken from real cases decided by the court, were answered theoretically by following the methodology laid out in Resolution (3) and applied in *Sharī'a Courts in Saudi Arabia*.

This leads to the conclusion that following this methodology as was done in the previous examples, combined with knowledge of *Sharī'a*, can lead to clear and predictable answers contrary to the claim of some Saudi lawyers. This staged procedure described here reflects a real intention by the officials to lay out a methodology that shares some of the characteristics that are

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<sup>331</sup> Under Islamic law, this is not considered a complete theft crime, because it lacks the conditions required for such a crime to be considered theft in Islam, which are: (1) the thief must be an adult and aware; (2) the thief must be able to choose with no coercion; (3) the thief must know the forbidding law; (4) the stolen property must be something of worth; (5) the value of the stolen property must be above a certain limit; (6) the stolen property must have been stolen from a usual saving place for such items; (7) the theft must be proven either through testimony or confession; (8) the theft must be in a hidden way; (9) there should be no doubt about ownership; and (10) because it is a private right, the person who owns the stolen property must ask for it back. All of these conditions must exist for the crime to be considered theft under Islamic law and, therefore, punishable. See MANSUR BIN YOUNUS AL-BAHUTI, *AL-RAWD AL-MURBI SHARH ZAD AL-MUSTAQNI*, 439-441 (1990).

<sup>332</sup> The question in the example is based on an actual case that was decided in the *Sharī'a Court of Jeddah*, Saudi Arabia on May 14, 2008.

<sup>333</sup> 3 AL-BAHUTI, *supra* note 328, at 362.

attributed to codification, such as predictability and consistency. It suggests some practical convergence in predictability and consistency between the outcomes in codified system and those obtained within Sharī'a Courts disciplined through following a pre-set methodology. If rationality in law is defined as following some criteria of decision applicable to all like cases, then the methodology included in the previous royal decree may be viewed as rational.<sup>334</sup> Regardless how great the desire for predictability and consistency in law among members of the legal community is, it must be borne in mind that these values of consistency and predictability are not the highest priority for the Judges in the Sharī'a Courts. These values might not even occur to some of these religious judges. The most important and foremost value in the opinion of these judges is the conformity with what God asks for in a given law or case. It is what the *ijtihād* of each judge leads him to believe is the right interpretation of the text, with no consideration for any thing else.

#### **IV. Judicial Analysis in the Field**

Before delving into the core questions regarding judicial analysis, interviewed participants were first asked for their thoughts about the predictability of outcomes in the Sharī'a Court in general and their own ability to predict for their clients in cases adjudicated before the Sharī'a Court. These introductory two questions were asked to pave the road gradually to ask about the judicial analysis itself. If the interviewed lawyer answered positively that the outcome is predictable, then it was useful to follow this with questions about his knowledge of the judicial analysis to see if what he thought was based and related to the clarity and the adherence of the judges to this analysis. If the lawyer answered that he thought that the outcome was not predictable, arbitrary, or nonsense, then the following questions regarding the workability of the

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<sup>334</sup> See Trubek, *supra* note 26, at 730.

judicial analysis were asked to shake the lawyer by testing his knowledge of how much he knew about the judicial analysis and how far this might be helpful for him. The nature of the provided answers also helps in determining what predictability means to lawyers and how they interpret it.

The questions asked were:

1. In terms of predictability, what do you think about the outcome of Sharī‘a Courts: is it predictable or not?
2. How would you assess your own ability to predict how/what a judge in a Sharī‘a Court is going to rule in a given case?

***The Predictability of the Outcome of Sharī‘a Courts in General:*** In response to the first question, the answers varied from “predictable,” “sometimes,” “not predictable,” “weak,” to “depends.” Out of the 21 interviews:

- 6 lawyers (28.5%) answered “predictable.”
- 8 lawyers (38%) answered “not predictable.”
- 1 lawyer (5%) answered “sometimes.”
- 2 lawyers (9%) answered “weak.”
- 4 lawyers (19%) answered “depends.”

These numbers can be illustrated in the following graph:

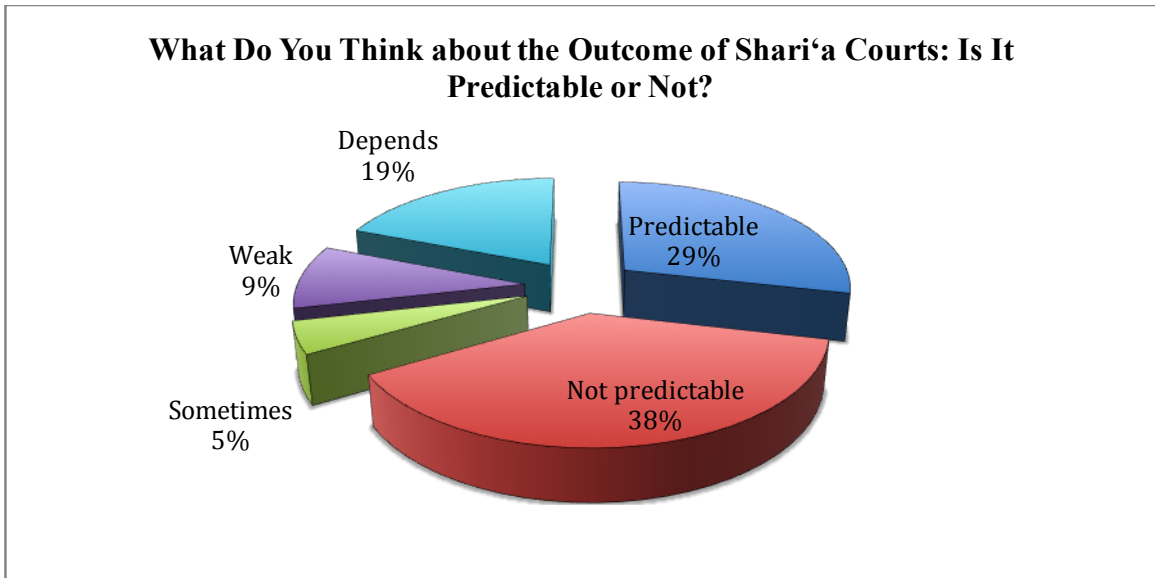


Figure 8: Predictability of the Outcome of Shari'a Court for Lawyers

They can be also analyzed with consideration of the educational background of the interviewees as follows:

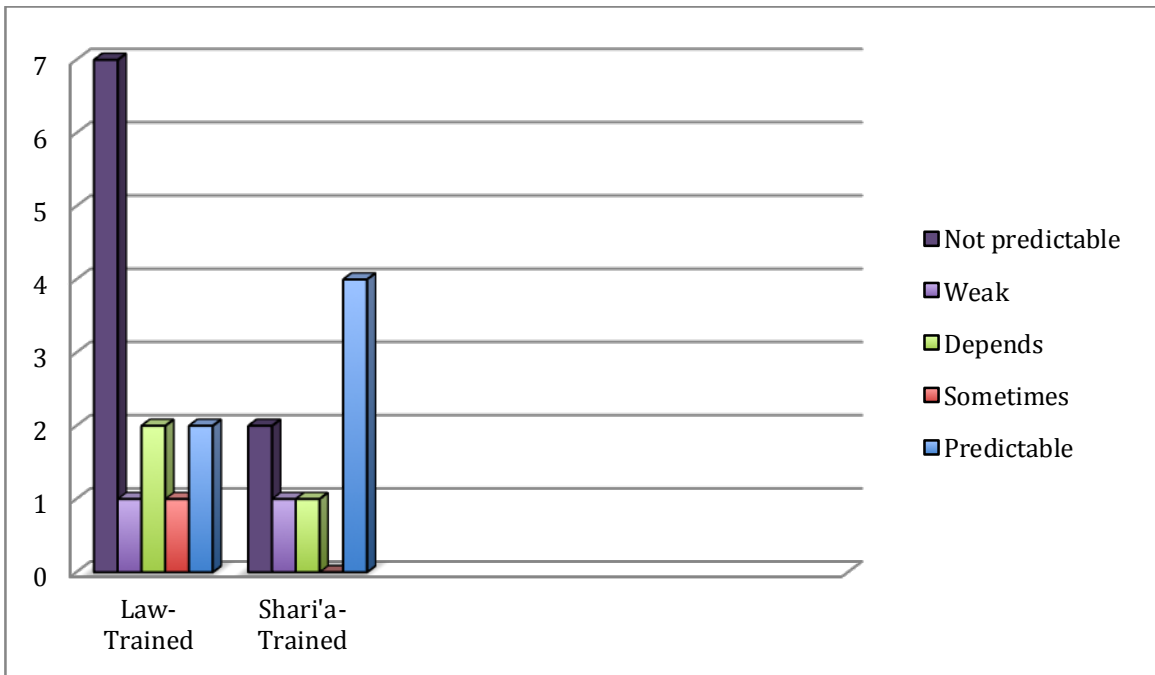


Figure 9: Predictability of the Outcome Combined with Legal Education

**“Predictable v. Not predictable”!:** A quick glance at the chart above reveals how law-trained lawyers differ from Shari'a-trained lawyers on this point.

On the one hand, most of the interviewed law-trained lawyers used a stronger phrase to express their thoughts by saying that the outcome of Sharī‘a Court is “*not ~~at all~~ predictable.*” Nearly the number of the interviewed law-trained lawyers who thought that the outcome of the Sharī‘a Court is not predictable is as triple the number of the interviewed Sharī‘a-trained lawyers who thought the same.

In their own words, some of the law-trained lawyers expressed their frustration by stating that:

A lawyer cannot predict the outcome of the Sharī‘a Court at all! He might be able to predict the procedural side but not the final outcome. A lawyer who respects himself will not dare to fool his client by claiming that he can predict any of the outcomes of the cases.<sup>335</sup>

Another lawyer stated:

No, it is not at all. It is impossible. Even if you think you can predict, the case will go in a different direction from what you thought you knew, and unexpected circumstances will occur in a way you never knew. This of course forms a problem with clients, as they want their lawyer to tell them how the case might end, which no lawyer can claim.<sup>336</sup>

A third lawyer said:

A lawyer can never know how the case is going to end. This happens sometimes because of the ambiguity of the law or the nonexistence of law in other times. The inability of the lawyer to predict creates of course a huge problem when dealing with clients, as these clients gradually start to lose their faith in that lawyer.<sup>337</sup>

Along the same line, another lawyer said:

Lawyers are at all unable to predict the outcome of the Sharī‘a Courts. This presents a huge problem, as it determines accepting the cases or rejecting them. Accepting cases in case of inability to predict the outcomes forms a risk.<sup>338</sup>

Also, a lawyer said:

A lawyer cannot at all predict. In case he claims that he can, this will be based on his own experience and not because of the clarity of the judicial analysis and laws themselves. This of course causes two problems: (1) it creates a problem of mistrust with clients, and (2) it might cause a financial loss for the client, as he/she might avoid settlement hoping to gain more through adjudication while it might not be the case here.<sup>339</sup>

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<sup>335</sup> Interview No. 2 on January 12, 2014.

<sup>336</sup> Interview No. 4 on January 14, 2014.

<sup>337</sup> Interview No. 6 on January 16, 2014.

<sup>338</sup> Interview No. 9 on January 25, 2014.

<sup>339</sup> Interview No. 13 on January 30, 2014.

*Playing without a Note:* However, one of the law-trained lawyers shared his own interpretation of this odd situation of practicing law within a system you do not fully understand. He was frank enough to state the reason, from his point of view, why law-trained lawyers think the outcome of the Sharī‘a Court is unpredictable contrary to Sharī‘a-trained lawyers. He said:

When the lawyer claims the inability to predict, it is because of his inability to read the books and the references used by the Sharī‘a judges.<sup>340</sup>

Since this lawyer attended some voluntary sessions in Sharī‘a school to educate himself about Sharī‘a, it is not odd to hear him saying this.

Another lawyer out loudly said to me, when he was commenting on one of the references used in the judicial analysis, that:

Sharh Muntaha al-Iradat is *talismanic!*<sup>341</sup>

In a deeply disappointed voice, another law-trained lawyer summed up what he thinks is the situation of Saudi lawyers with a law background in dealing with the Sharī‘a Court. He simply said: “The Saudi lawyer,” by which he meant the law-trained one, “plays without a note!”<sup>342</sup> He was trying to say that the law-trained Saudi lawyers lack the guidance to understand Sharī‘a Court and, therefore, their practice of law before the Sharī‘a Court is very much similar to a musician who plays an instrument without guiding notes –just guessing, supposing and speculating, nothing more. Confirming this idea, another law-trained lawyer said:

The bottom line to me is that there is no clear system! You have to navigate in the dark!<sup>343</sup>

All these previous statements by the interviewed law-trained lawyers support that most of

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<sup>340</sup> Interview No. 5 on January 15, 2014.

<sup>341</sup> Interview No. 19 on February 16, 2014.

<sup>342</sup> Interview No. 8 on January 19, 2014.

<sup>343</sup> Interview No. 3 on January 13, 2014.

the law-trained lawyers agree on that the judicial analysis within the Shari'a Courts is very unpredictable to them. Moreover, several lawyers connect the ability to predict the outcome of the court with the respect and self esteem. For these lawyers, ability to predict means more than a job skill. It means respect and trust for themselves and for their clients. However, from their answers, they seem confused about the reason for this ambiguity. No one seems willing to address the difference between the legal education they received and the one that the judges received in the Shari'a schools.

On the other hand, the interviewed Shari'a-trained lawyers were divided in their opinions regarding the predictability of the outcome of the Shari'a Courts. Only half of the interviewed Shari'a-trained lawyers think the outcome of the Shari'a Courts is predictable, while the other half is divided in their opinions between viewing the outcome "weakly predictable," "sometimes predictable," "depends-on" and "non-predictable." On the surface, this might present a surprising finding that challenges the hypothesis of this thesis. However, looking only at the numbers would not satisfy the inquiry of the research, as it is not expected to offer an accurate answer. This is because the nature of this study is qualitative, meaning that numbers are not supposed to be the main focus of it and they should not distract from analyzing the answers in-depth through looking through the lines into the quality of the data provided through the information-rich experiences provided by the subjects of the research.

One of these lawyers said:

Yes, the experienced lawyer can predict the outcome of the Shari'a Court based on his knowledge of Shari'a, rulings, and laws. The reason for some lawyers' complaints is their ignorance in Shari'a and their weak qualifying level, which makes them unaware of the rulings.<sup>344</sup>

Another lawyer said:

Lawyers can predict the outcome of Shari'a Court once they are equipped with the required knowledge, they study the case well and the arguments are clear.<sup>345</sup>

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<sup>344</sup> Interview No. 14 on February 2, 2014.

<sup>345</sup> Interview No. 15 on February 2, 2014.

In the same vein, another lawyer said:

Ability to predict is based on a combination of studying the case well, knowing its details, and knowing how to direct the Sharī‘a judge through tackling certain points in Sharī‘a. Our expectations in this office are mostly true about 90% of the time. My Sharī‘a background is always with no doubt the key for my predictability and winning the cases.<sup>346</sup>

Another lawyer, who is a former Sharī‘a judge for many years, said:

Yes, but absolutely not all the time. This is because of the different opinions that exist in Sharī‘a in general and because of the existence of different affecting circumstances that surround each case differently. However, the rulings are still limited to a few options that every Sharī‘a educated person knows.<sup>347</sup>

The previous statements provided by the Sharī‘a-trained lawyers all support their comfort and positive attitude towards the outcome of the Sharī‘a Court. They seem very much in the same line with the court, having no trouble in performing their job and gaining the trust of their clients.

This being said, some of the Sharī‘a-trained lawyers expressed their frustration in a way similar to the majority of the law-trained lawyers. One of these lawyers said:

All lawyers cannot at all predict the outcome of the Sharī‘a Court. This is because there is no specific methodology for judges to follow. For me, this does not form a problem, as I do not promise my clients anything. I study every case well before I accept it, and determine all of the positives and negatives.<sup>348</sup>

In the same vein, another Sharī‘a-trained lawyer said:

Not at all! The judge is free to rule the way he wants. It is something no one can predict at all. The reasoning and considerations are very weak. Predictability is not at all possible.<sup>349</sup>

The last two answers provided by the Sharī‘a lawyers shed some light on what might be part of the reason of why some Sharī‘a lawyers think that the outcome of the Sharī‘a Courts is not predictable. These lawyers said that they know ‘*nothing*’ about the judicial analysis in

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<sup>346</sup> Interview No. 18 on February 13, 2014.

<sup>347</sup> Interview No. 20 on February 17, 2014.

<sup>348</sup> Interview No. 21 on February 24, 2014.

<sup>349</sup> Interview No. 16 on February 12, 2014.

Sharī‘a Court when they were asked about it. The answers provided by these two lawyers were contrary and incompatible with all the data collected from both the written literature and from the empirical work done in this research. Interestingly, these two answers were provided by exactly the same Sharī‘a lawyers who also said that they find the outcome of Sharī‘a Courts not predictable. Logically, this finding leads to think of the possibility that the Sharī‘a education might not be enough for lawyers to predict the outcome of the Sharī‘a Courts. It also leads to think about the level of transparency exists between the court/judge and the lawyers. It may also reflect some shortage in the work done by the Ministry of Justice in terms of informing lawyers who do not know and refresh the knowledge of the lawyers who already know. It may also be a combination of all these possible reasons.

Regardless, weighing these last two negative statements with half of the interviewed Sharī‘a lawyers who showed that it is predictable for them, and with the answers of the other half that varied in degrees, makes it difficult logically as well as epistemologically to count on just two answers in defeating the hypothesis of the thesis and rule it wrong for only two Sharī‘a lawyers said it is not predictable, considering that these answers were provided by the exact two lawyers who also expressed their unfamiliarity with the Judicial Analysis. Considering this is at least enough to slow down before rushing to rule the hypothesis of this thesis invalid. Adding to this the fact that the majority of the law-trained lawyers answered “non-predictable” pushes back towards supporting a positive correlated relationship between the legal education and the predictability of the judicial analysis, as the hypothesis suggests. In fact, contrary to defeating the hypothesis, this finding strengthens the hypothesis and adds to it a normative dimension that is: if the Sharī‘a education is not thorough and comprehensive, it will affect the perception of the Sharī‘a lawyer towards the understanding of the judicial analysis negatively.

**The Lawyer's Own Ability to Predict:** When asked directly about their own ability to predict for their clients, the lawyers gave answers that varied between “good,” “fair,” weak,” and “depends.” Out of the 21 interviews:

- 10 lawyers (48%) answered “good.”
- 4 lawyers (19%) answered “fair.”
- 6 lawyers (28%) answered “weak.”
- 1 lawyer (5%) answered “depends.”

These answers can be illustrated in the following graph:

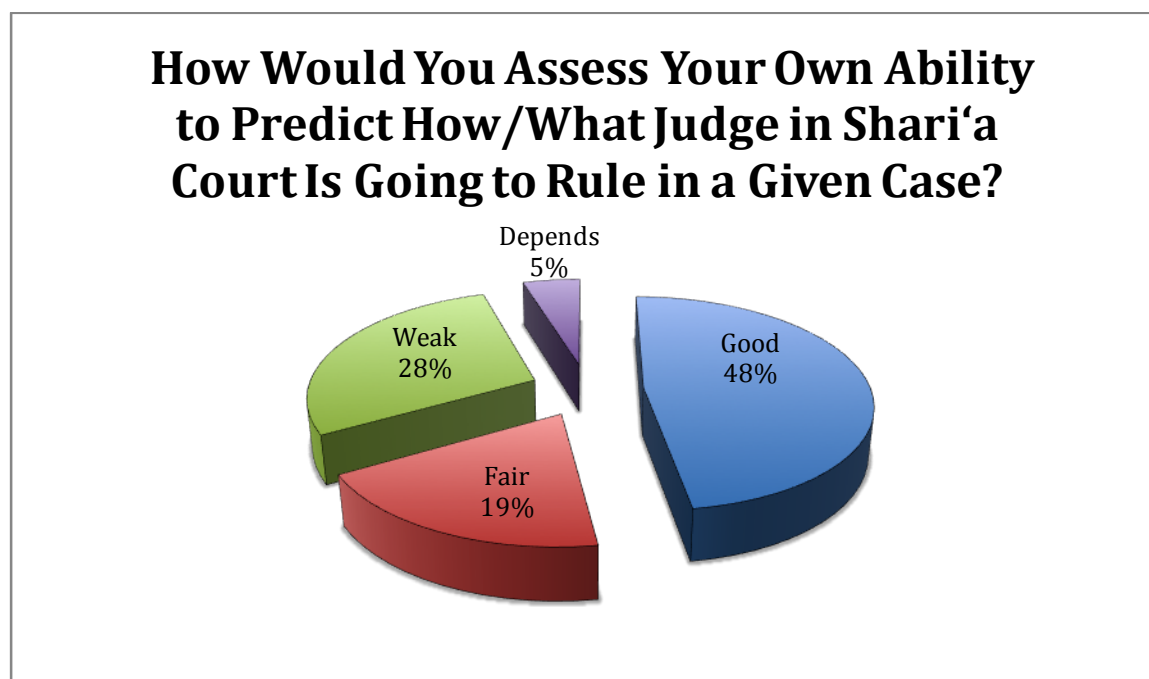
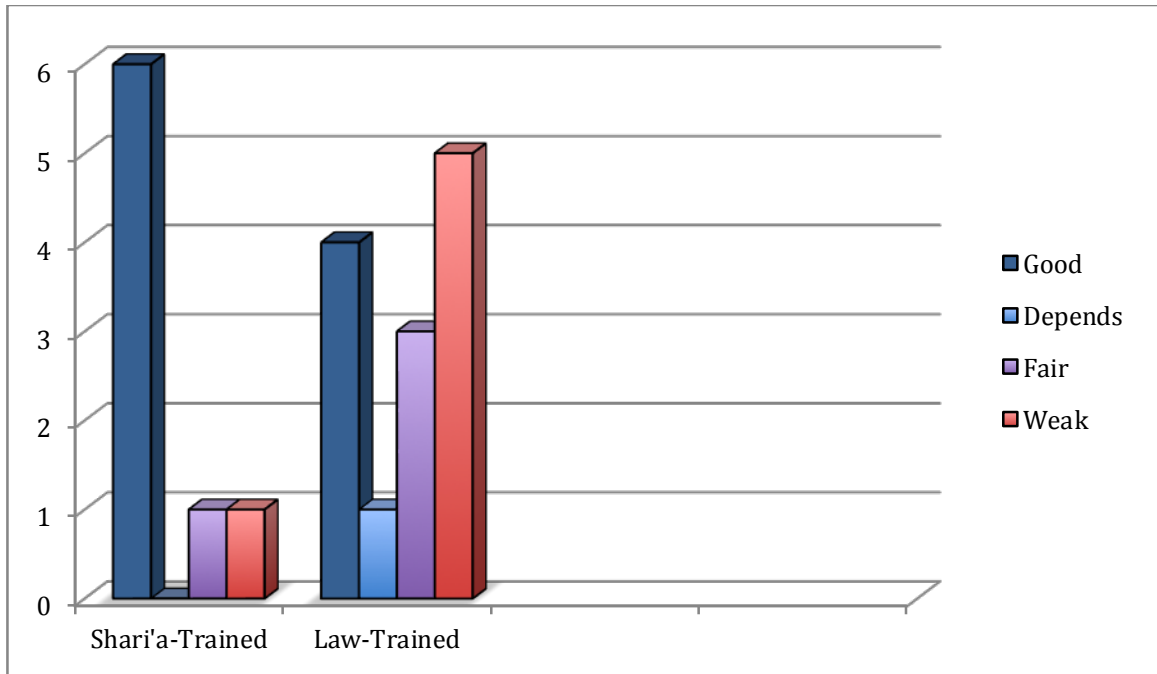


Figure 10: Assessing Lawyer's Own Ability to Predict

The previous answers can also be analyzed differently giving a consideration to the nature of the legal education. The following chart illustrates the connection between these previous answers and the educational background of the interviewees:



**Figure 11: Assessing Lawyer's Own Ability to Predict Combined with Legal Education**

As can be seen, the interviewed Sharī‘a-trained lawyers’ answers were, generally, positive and confident (6 out of 8 answered “good”) than the answers of the interviewed law-trained lawyers (only 4 out of 13 answered “good”). When asked how they would evaluate their own ability to predict, some of the answers provided by Sharī‘a lawyers were:

- “90%.”<sup>350</sup>
- “I consider myself excellent in this based on my knowledge in Sharī‘a.”<sup>351</sup>
- “85%. I know exactly the thinking map of each judge very well. I am confident in my knowledge.”<sup>352</sup>
- “Very good! Yes I cannot affirm, but I can at least draw scenarios of how it is going to be.”<sup>353</sup>

The answers provided by these lawyers to the question at hand supports the earlier

<sup>350</sup> Interview No. 18 on February 13, 2014.

<sup>351</sup> Interview No. 20 on February 17, 2014.

<sup>352</sup> Interview No. 16 on February 12, 2014.

<sup>353</sup> Interview No. 12 on January 30, 2014.

finding and strengthens its followed analysis when these lawyers answered the question related to the predictability of the judicial analysis in general. Although some Sharī‘a lawyers (2 lawyers) said that they find the judicial analysis not predictable, these lawyers happened to be the same exact lawyers who expressed no familiarity with the Judicial Analysis. In answering the current question, it was not surprising for these two lawyers to be the exact ones who described their own ability to predict the outcome of the Sharī‘a Courts “weak” and “fair.” This might indicate some personal weakness in the general knowledge and ability of these specific two lawyers, but does not stand logically to defeat the overwhelming data gathered both theoretically and empirically through this research that supports establishing a parallel relationship between the nature of the legal education and the way the lawyer perceives the legal system in general and the predictability of the judicial analysis in particular.

On the other hand, interviewed law-trained lawyers generally showed a less confident attitude. Their answers carried somehow negative emotions, such as:

- “Absolutely mysterious and not able to be known.”<sup>354</sup>
- “Generally, weak and relative.”<sup>355</sup>
- “Very weak! Not a problem in me, but a problem in the system itself.”<sup>356</sup>
- “Very weak. Does not even exist.”<sup>357</sup>
- “Weak in an area of law I never practiced, somehow acceptable in areas I practiced.”<sup>358</sup>
- “I cannot give a general answer.”<sup>359</sup>
- “30%.”<sup>360</sup>

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<sup>354</sup> Interview No. 4 on January 14, 2014.

<sup>355</sup> Interview No. 6 on January 16, 2014.

<sup>356</sup> Interview No. 7 on January 19, 2014.

<sup>357</sup> Interview No. 9 on January 25, 2014.

<sup>358</sup> Interview No. 10 on January 27 2014.

<sup>359</sup> Interview No. 11 on January 28, 2014.

Again, the answers and the percentages here repeatedly suggest a strong link between the nature of the legal education and the understanding and the comfort with the Sharī‘a Courts. They suggest that the legal educational background plays a key role in shaping the knowledge and therefore the confidence of the lawyers’ ability in assuring their clients of their ability to give reasonable answers when dealing with the Sharī‘a Court.

***Familiarity with Judicial Analysis:*** It was surprising when Saudi lawyers were asked during the interviews “are you familiar with the Resolution of 1928 that includes the judicial analysis within Sharī‘a Courts?,” that 38% of them said they never had even heard or known that such thing exists. This was surprising, because knowing this analysis is essential for any lawyer who practices law before Sharī‘a Courts, as it enables the lawyer to understand and map the process that the judge is very likely going to follow. This is similar to knowing the code in the civil law systems or knowing the precedents in common law systems. Lawyering before the court in the United States, for example, without reviewing the precedents is not acceptable behavior and does not meet the basic ethical standards.

Although it was meaningless to ask these lawyers about the impact this judicial methodology might have on their performance before the courts, it was intriguing to ask the question nevertheless. Most of the lawyers who had never heard of Resolution 1928 and its significance for judicial analysis regretted that they had not been exposed through their education or the Ministry of Justice to the methods of Sharī‘a analysis, but they added that an understanding of Sharī‘a method would be amazingly crucial and helpful for them in their job in all respects.

One of the interviewed law-trained lawyers said:

It should be essential to teach and inform lawyers about this judicial analysis

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<sup>360</sup> Interview No. 13 on January 30, 2014.

during their legal education.<sup>361</sup>

Another law-trained lawyer who said that he knew about the analysis and that he spent some time studying Sharī'a, commented on whether knowing this judicial analysis is helpful for the lawyer before the Sharī'a Court:

Familiarizing oneself with this methodology is a very important and positive thing. This methodology is like a 'roadmap' for a lawyer that enlightens his way and shows him how the case is going to be decided. Lawyers who complain about vagueness and unpredictability are ignorant. Knowing this methodology is more than enough in dealing with the Sharī'a Court.<sup>362</sup>

Although these lawyers realized the advantage of knowing such judicial methodology and somehow admitted the disadvantage of not knowing it, some of the interviewed law-trained lawyers who realized their lack of knowledge of the judicial methodology within Sharī'a Court, nevertheless, threw the entire fault on the side of the judicial methodology itself and harshly criticized the system. Instead of admitting their ignorance of the judicial methodology, they insisted that the analysis is very old, outdated, and technical in a way that forms a huge obstacle to a lawyer.<sup>363</sup>

The following graph illustrates the overall percentages of the answers that lawyers provided when asked about their knowledge of the Resolution that involves the judicial analysis:

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<sup>361</sup> Interview No. 10 on January 27, 2014.

<sup>362</sup> Interview No. 5 on January 15, 2014.

<sup>363</sup> Interview No. 2 on January 12, 2014.

## Are You Familiar with Resolution of 1928 that Includes the Judicial Analysis within Shari'a Courts?

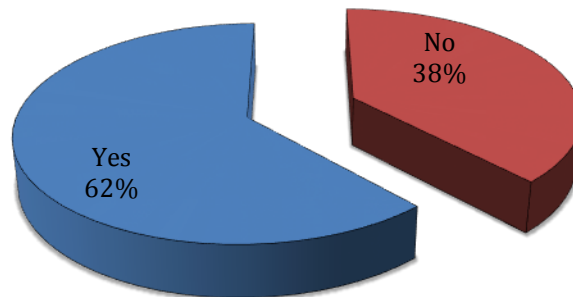


Figure 12: Lawyer's Familiarity with Judicial Analysis in Shari'a Court

The previous numbers can be also looked at differently when considering dimension of the legal education, as follows:

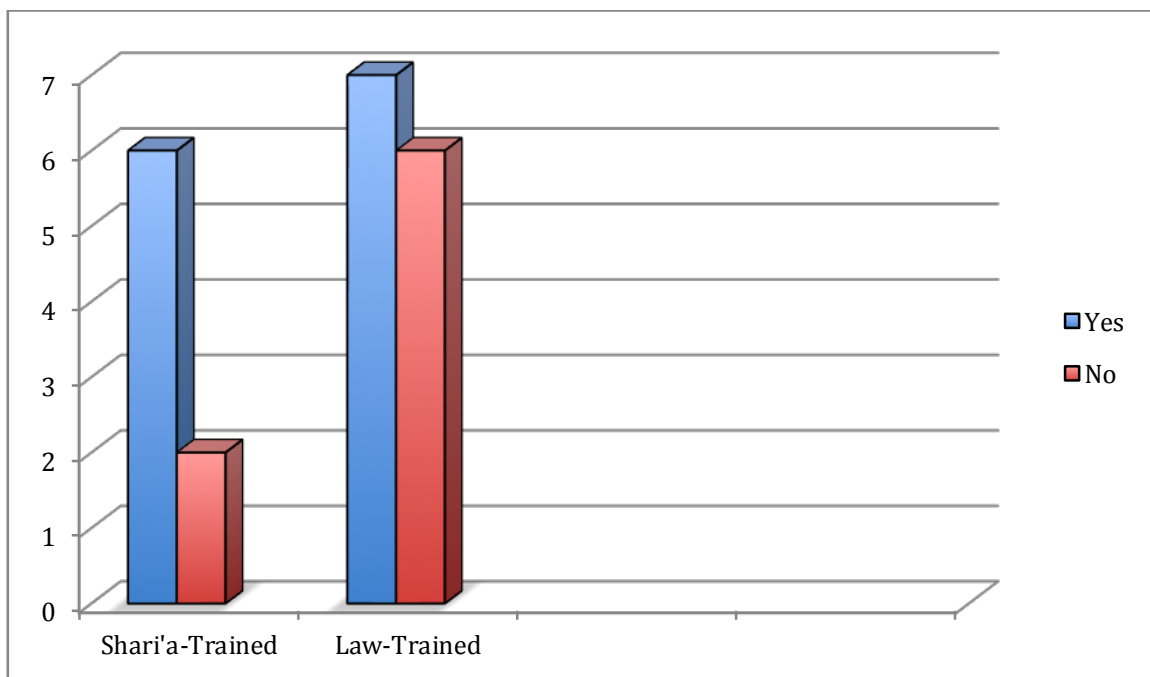


Figure 13: Lawyer's Familiarity with Judicial Analysis in Shari'a Court Combined with Legal Education

A glance at the previous charts shows that, although a significant number of the

interviewed lawyers among those who were trained in law expressed their knowledge of the Resolution of 1928, there was a comparable significant number among them that showed the opposite. On the other hand, almost the entire interviewed sample of Sharī‘a-trained lawyers expressed their knowledge and awareness of that Resolution and the included analysis methodology.

***Impact of Judicial Analysis on Lawyer’s Predictability:*** The interviewed lawyers, however, provided contradictory impressions regarding the judicial analysis. Some of these impressions were negative, while others were positive. Moreover, these positive and negative impressions could not absolutely be attributed to one exact group; rather, they were coming from within the two groups equally. Some interviewed Sharī‘a-trained lawyers praised the judicial methodology, while others within the same Sharī‘a group criticized it. The same thing happened with the interviewed law-trained lawyers. The following is a presentation of some of these lawyers’ answers followed with a brief analysis.

***It Is Talismanic!:*** Expressing their negative impressions regarding the judicial analysis in the Sharī‘a Court, some lawyers said:

Some judges do not follow this methodology accurately or clearly.<sup>364</sup>

Another one said:

It is an old, outdated methodology that should be replaced with a modern one that keeps up with current time. This methodology is the main source of all problems, as it is very technical, and this creates an obstacle for the lawyer to understand and know how the case is progressing.<sup>365</sup>

Another lawyer said:

In my whole work experience (15 years), I never saw any judge invoked or mentioned this methodology. Even if you study and follow this methodology as a lawyer, at the end, the judge has the right not to follow it and to resort to his own ijtiḥād. The bottom line is that judges are not “bound” to follow this methodology. It is there only as a helpful and advisory tool. They may apply it as well as they may not. This Resolution did not help or assist lawyers at all, as it

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<sup>364</sup> Interview No. 1 on January 12, 2014.

<sup>365</sup> Interview No. 2 on January 12, 2014.

is nothing more than an advisory.<sup>366</sup>

In the same vein, another lawyer said:

I do not think knowing this methodology is enough or helpful as minds differ in understanding and applying it.<sup>367</sup>

Another lawyer said:

Knowing this methodology is not enough at all for lawyers to be able to predict the courts' outcome, because its main source is the Hanbali fiqh, which is the biggest madh'hab in opinions.<sup>368</sup>

Another lawyer said:

Knowing this methodology is not enough at all for lawyers to predict the outcomes. One of the reasons for this is that this methodology depends on fiqh books not law books, which creates obstacles and makes it difficult for lawyers trained in law schools to read or understand. Judges need to support their rulings with law books not fiqh books.<sup>369</sup>

Another lawyer said:

The books included in the judicial analysis methodology contain so many opinions. Even if the lawyer studies it and chooses one of these many opinions, the judge might choose another opinion. Knowing this methodology for lawyers might help but it will never be able to give a final, definite answer.<sup>370</sup>

Another lawyer said:

The books included in this judicial analysis methodology were all written during ancient time, which makes it very difficult for lawyers trained in law schools to read and understand. There is a huge gap between law-trained lawyers and Sharī'a-trained judges.<sup>371</sup>

Another lawyer said:

Understanding and applying the methodology included in that Resolution needs work done by a team of knowledgeable specialists, very similar to doctorate research work.<sup>372</sup>

Another lawyer said:

Because these books are old, searching for today's problem inside these books is sometimes a wasting of time.<sup>373</sup>

Another lawyer said:

Sharh Muntaha al-Iradat is talismanic!<sup>374</sup>

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<sup>366</sup> Interview No. 4 on January 14, 2014.

<sup>367</sup> Interview No. 7 on January 19, 2014.

<sup>368</sup> Interview No. 8 on January 19, 2014.

<sup>369</sup> Interview No. 9 on January 25, 2014.

<sup>370</sup> Interview No. 11 on January 28, 2014.

<sup>371</sup> Interview No. 13 on January 30, 2014.

<sup>372</sup> Interview No. 15 on February 2, 2014.

<sup>373</sup> Interview No. 17 on February 12, 2014.

<sup>374</sup> Interview No. 19 on February 16, 2014.

On the other hand, other interviewed lawyers showed satisfaction and admiration for the methodology followed in the judicial analysis within the Sharī'a Courts. Their comments included:

Judges are required to look and use these books. They rarely use other books out of the books list included in the methodology. Knowing and studying this methodology is enough for any lawyer who has studied Sharī'a to predict the outcome of the court.<sup>375</sup>

Also:

Every lawyer [who wants to practice in Saudi] must read and study this methodology very well and must review it all the time.<sup>376</sup>

Another lawyer said:

The Resolution pronounced the methodology of judicial analysis within the Sharī'a Court is absolutely very helpful for lawyers to understand how cases develop and how the outcome is made within the courts. However, the [Saudi] lawyers are oblivious and careless about it. Amazingly, they seem not to care.<sup>377</sup>

Another lawyer said:

In contrary, this methodology is proof that the lawyers are equipped with what enables them to predict the outcome of the adjudication within the Sharī'a Court, on the condition that they study and understand Sharī'a. The question then is: who is the lawyer that is able to understand these books? Who is able to know their wording, their implications and the difference between their laws? This Resolution with no doubt is a framework for the adjudication and a proof of caring about clarity, openness, and transparency of the legal system for everyone.<sup>378</sup>

Another lawyer said:

This methodology as methodology has no problem. It is very correct and straightforward. Theoretically, it is supposed to work systematically with no trouble producing systematic, predictable rulings. I think the problem is that some of today's judges are not as qualified as the old ones to use and apply this methodology accurately as it dictates.<sup>379</sup>

Another lawyer said:

Knowing this methodology is more than enough for any lawyer who originally knows Sharī'a.<sup>380</sup>

Another lawyer said:

Although I never heard of such a Resolution or methodology, I strongly think knowing and, moreover, teaching and studying this methodology for law

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<sup>375</sup> Interview No. 19 on February 16, 2014.

<sup>376</sup> Interview No. 18 on February 13, 2014.

<sup>377</sup> Interview No. 12 on January 30, 2014.

<sup>378</sup> Interview No. 14 on February 2, 2014.

<sup>379</sup> Interview No. 15 on February 2, 2014.

<sup>380</sup> Interview No. 16 on February 12, 2014.

students must be one of the basic principles with no doubt.<sup>381</sup>

Another lawyer said:

Familiarizing oneself with this methodology is a very important and positive thing. This methodology is like a ‘roadmap’ for a lawyer that enlightens his way and shows him how the case is going to be decided. Lawyers who complain about vagueness and unpredictability are ignorant. Knowing this methodology is more than enough in dealing with the Sharī‘a Court.<sup>382</sup>

Although the statements above seem to contradict each other, it might be helpful in analyzing them to consider some extra factors, such as educational background. Eleven lawyers expressed negative impressions regarding the methodology followed in the Sharī‘a Court. 81.8% of these 11 lawyers (9 lawyers) were graduates of the law departments in which Sharī‘a is only marginally taught or not taught at all, while 18% (2 lawyers) were Sharī‘a-trained.

On the other hand, seven lawyers expressed positive impressions regarding the same methodology; 5 (71.4%) were Sharī‘a-trained lawyers, while 2 (28.5%) were law-trained.

The following graph sums up these numbers as follows:

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<sup>381</sup> Interview No. 10 on January 27, 2014.

<sup>382</sup> Interview No. 5 on January 15, 2014.

## Lawyers Expressed Negative Impressions towards Judicial Analysis

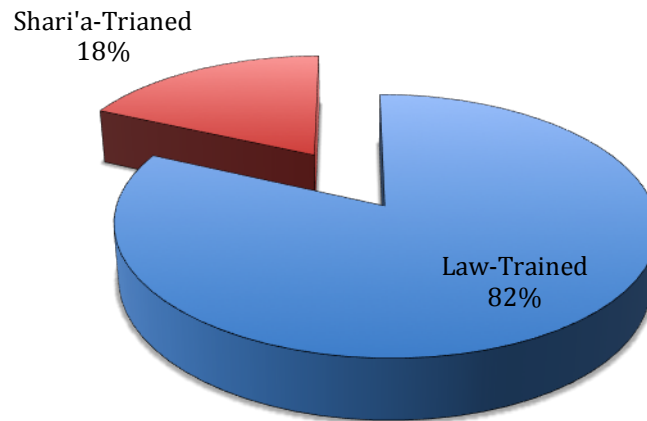


Figure 14: Lawyers' Negative Impressions toward Judicial Analysis

## Lawyers Expressed Positive Impressions towards Judicial Analysis

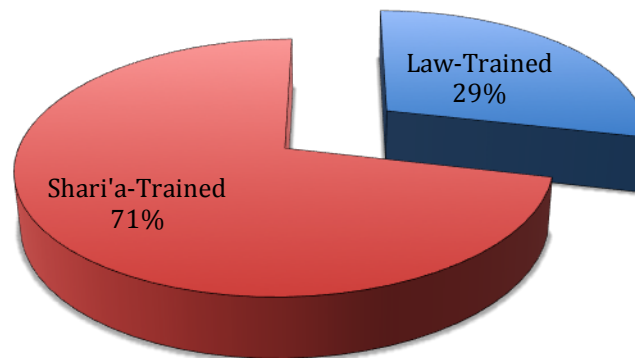


Figure 15: Lawyers' Positive Impressions toward Judicial Analysis

Additionally, the two variables can be combined in one chart as follows:

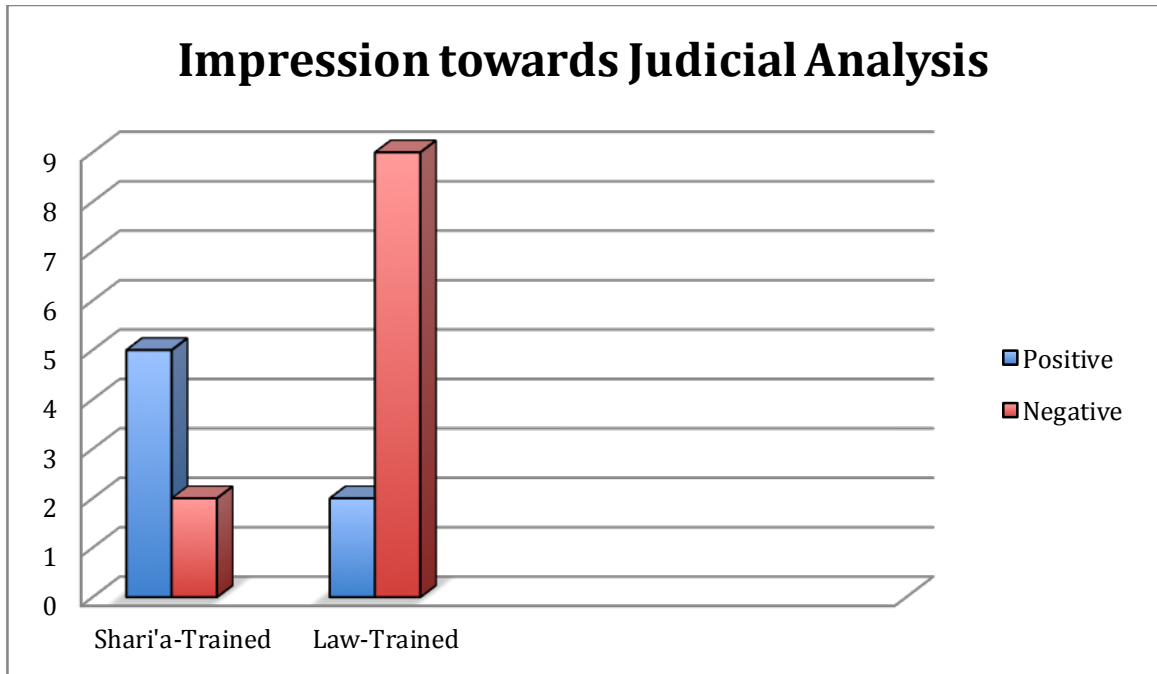


Figure 16: Lawyers' Impressions towards Judicial Analysis Combined with Legal Education

A quick glance at these previous charts clearly shows that the legal education is still occupying a key position in determining the direction where the answers lay. It reflects the degree of comfort in dealing with the Sharī'a Courting system. The answers keep showing that lawyers with Sharī'a-training are more understanding, appreciative and comfortable in dealing with the Sharī'a court system. The opposite can be said about the law-trained lawyers, as the system seems to them mysterious, vague, and uncomfortable to deal with.

**Sharī'a Court v. Dīwān al-Madhālim:** The interviewed lawyers were asked to compare dealing with the Sharī'a Court and dealing with Dīwān al-Madhālim in terms of their clarity of laws, comfort and ease. The common conception among Saudi legal professionals is that, unlike the Sharī'a Court, Dīwān al-Madhālim tends more to follow and apply pre-written/codified laws. However, this does not mean that Dīwān al-Madhālim is infallible or protected from applying the same judicial analysis used in the Sharī'a Court when no law covers the details before it. Also, the judges in Dīwān al-Madhālim are the same as those in the Sharī'a Court, as the Dīwān al-

Madhālim pulls its judges from among the pool of Sharī‘a school graduates. The only difference is that, in addition to the Sharī‘a training that these judges receive, Dīwān al-Madhālim requires its judges to have two years of legal education at *al-Ma‘had al-‘Ali lil-Qadha* [The Higher Institute of Judiciary], which provides those Sharī‘a judges with some modern legal courses, such as Corporate Law, Commercial Law, and others, to train them to understand and accept laws in modern forms.<sup>383</sup>

The interviewed lawyers in the study sample were asked: “Do you think that the process of legal analysis is different between Sharī‘a courts and Dīwān al-Madhālim? Does this difference make it easier or harder for you to practice lawyering?” The purpose of these questions is to explore the impression that these lawyers have about dealing with such a judicial institution that, although it applies pre-written laws as compared to the Sharī‘a Court that applies a traditional form of analysis about which many lawyers complain.

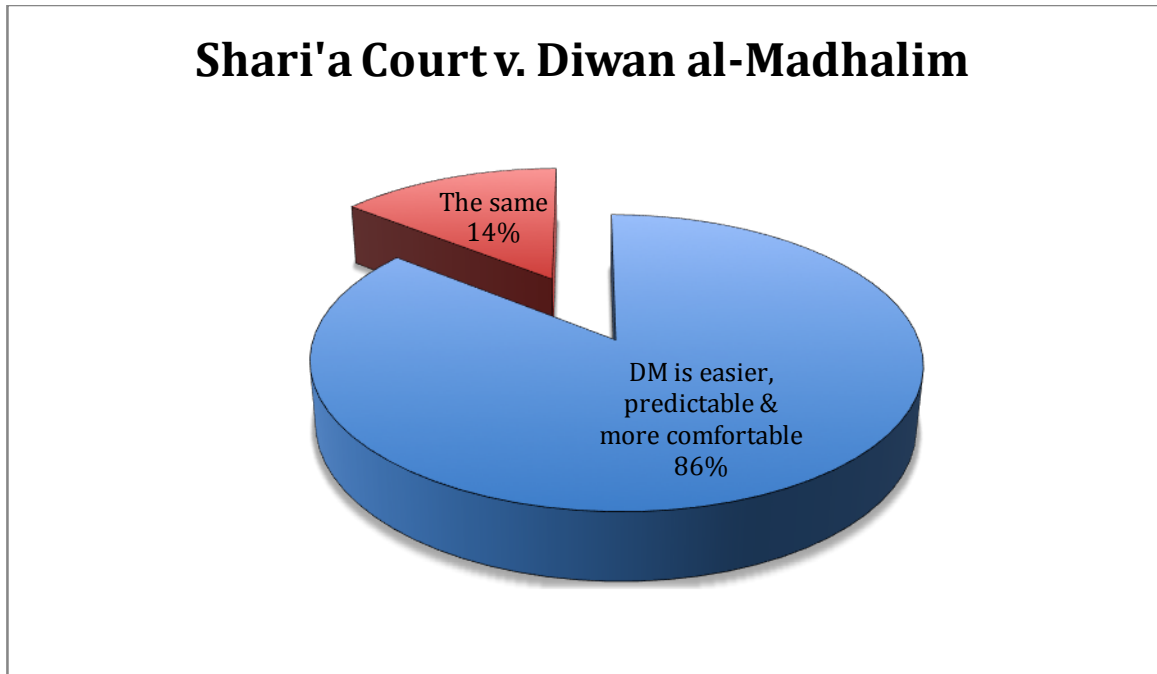
Generally, the overwhelming majority of these lawyers said that they think that dealing with Dīwān al-Madhālim is easier, predictable and more comfortable. They reasoned that the judicial analysis used there is clearer, as it is based on pre-written laws as explained above. However, some very few lawyers said that these two courts are the same to them, implying that these lawyers have the skills needed to deal with both courts alike. The answers came as follows:

- 18 lawyers (85.7%) answered: “Yes, it is easier and more predictable.”
- 3 lawyers (14.2%) answered: “They are the same.”

These answers can be illustrated in the following graph:

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<sup>383</sup> The web site of the Saudi Higher Institute of Judiciary at Imam Mohammed Ibn Saudi University: [www.imamu.edu.sa](http://www.imamu.edu.sa)



**Figure 17: Lawyers' Comparison between Sharī'a Court and Dīwān al-Madhālim**

***As Though it Were a Different Country:*** The clarity of the applied laws makes it easier for lawyers, especially those with a law background, to perform before Dīwān al-Madhālim, but it is also the clarity of the procedural aspect of the court. One of the law-trained lawyers provided the following answer when asked to compare the two institutions:

Of course al-Dīwān is better! It is difficult to deal with the Sharī'a Court because of the vague authority on which the rulings of that court are based.<sup>384</sup>

A funny, yet surprising, comment was made by one of the lawyers when he said:

To me, there is a huge difference between the two. It looks as if they exist in different countries! Even the treatment and the respect lawyers receive there is different. At al-Dīwān, three judges look at your case. They correct each other and complement each other, which helps to serve justice better.<sup>385</sup>

A more experienced law-trained lawyer also pointed out the availability of some logistics in Dīwān al-Madhālim that supports shaping a positive attitude towards Dīwān al-Madhālim, compared to the Sharī'a Court.

<sup>384</sup> Interview No. 6 on January 16, 2014.

<sup>385</sup> Interview No. 11 on January 28, 2014.

He said:

Dealing with Dīwān al-Madhālim is easier and better. Even the available logistics at al-Dīwān are better, such as the location, the parking spaces, the building, the work environment, etc. All this makes al-Dīwān a better place to deal with than the Sharī‘a Court in my view.<sup>386</sup>

On the other hand, some of the interviewed Sharī‘a-trained lawyers had a different, almost opposite, opinion about the two legal institutions.

For example, one of these lawyers said:

This is not true. They are not different from each other. The judges of al-Dīwān are Sharī‘a judges, and they depend on the Sharī‘a books exactly like their Sharī‘a Court counterparts.<sup>387</sup>

Another Sharī‘a-trained lawyer confirmed this by saying:

The mechanism of reaching the verdicts is the same in both courts. The difference is only in the formalities.<sup>388</sup>

Another Sharī‘a-trained lawyer added:

Of course, there are huge similarities between the two institutions. The judges of al-Dīwān are essentially Sharī‘a judges. What Dīwān al-Madhālim is entitled to look at is based on the assigned jurisdiction. However, al-Dīwān is better, in my opinion, in the procedures. Al-Diwan is more well-organized.<sup>389</sup>

Another Sharī‘a-trained lawyer said:

In general, there is no difference except in time and number. Three of judges look at the case at al-Dīwān, and the time they spend to produce a ruling is shorter. They are really very fast and have excellent skill to research and produce fast rulings.<sup>390</sup>

Another Sharī‘a lawyer added:

Dīwān al-Madhālim is as wonderful as it should be. The procedure there is clear and not vague like the Sharī‘a Court. The produced ruling is mostly clearly reasoned. Al-Madhalim consists of circuits that each has three judges. This gives it an extra advantage when compared to the Sharī‘a Court, where only one judge looks at your case and rules on it.<sup>391</sup>

However, some other law-trained lawyers were less admiring of the Dīwān al-Madhālim when compared to the Sharī‘a Court.

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<sup>386</sup> Interview No. 10 on January 27, 2014.

<sup>387</sup> Interview No. 18 on February 13, 2014.

<sup>388</sup> Interview No. 12 on January 30, 2014.

<sup>389</sup> Interview No. 14 on February 2, 2014.

<sup>390</sup> Interview No. 15 on February 2, 2014.

<sup>391</sup> Interview No. 17 on February 12, 2014.

One of these lawyers said:

Generally, there are no essential differences. It is just that al-Dīwān is required to follow written laws more than the Sharī‘a Court.<sup>392</sup>

Although the results of this question might seem to have no direct effect on the core subject of this research, the question was asked to explore the impression of Saudi lawyers toward dealing with a parallel legal institution, al-Dīwān, in their country, that enjoys more care and is organized in a better way. This might help when considering the potential for the Sharī‘a Court to benefit from the administrative experience of Dīwān al-Madhālim in developing itself.

The final impression that can be deduced from all of these comments and numbers is that Saudi lawyers in general showed more comfort in dealing with Dīwān al-Madhālim than they showed dealing with the Sharī‘a Court. However, most of their comments focused on procedures and logistics and not the judicial analysis mechanism. In contrast, the answers of several Sharī‘a lawyers revealed that there is almost no difference in the methodology followed in the judicial analysis in both courts, which forms the focal point of this research. As can be inferred from their answers, the differences are in some other surrounding factors and aspects more than the core of the mechanism by which the rule is derived from the law.

***Compatibility with Modernization:*** The interviewed lawyers were asked to share their thoughts regarding whether the current application of Sharī‘a within the Sharī‘a Courts is compatible, in general, with modernization. The question asked was: “Do you think Sharī‘a is compatible with the modernization of Saudi society without codification?” The answers came as follows:

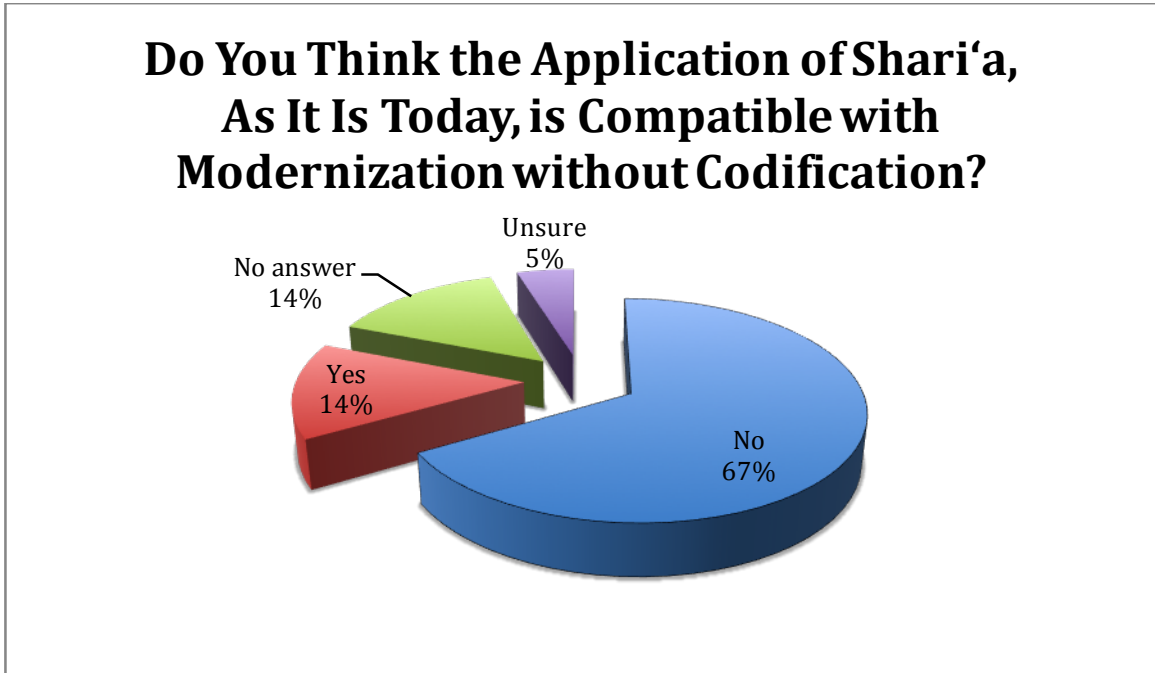
- 14 lawyers (67%) answered “no.”
- 3 lawyers (14%) answered “yes.”

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<sup>392</sup> Interview No. 7 on January 19, 2014.

- 3 lawyers (14%) did not give an answer.
- 1 (5%) lawyer was unsure.

These numbers are presented in the following graph:



**Figure 18: Compatibility of Shari'a Application with Modernization**

These answers can be presented differently when combined with the background of the lawyers as the following chart shows:

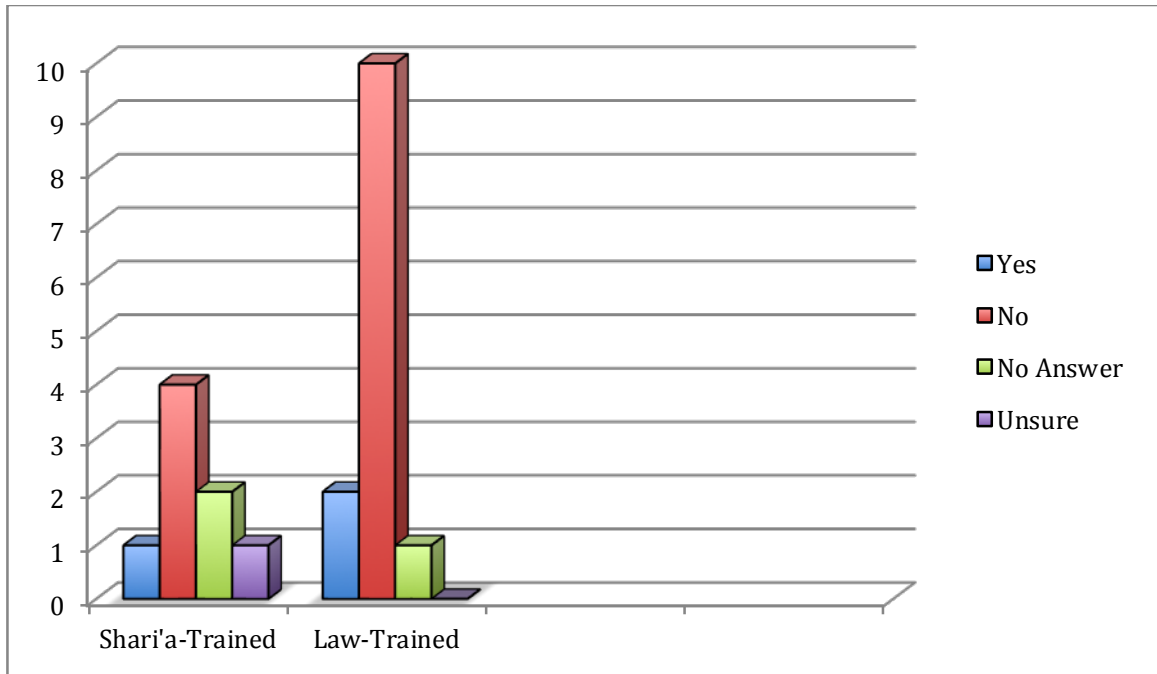


Figure 19: compatibility of Shari'a Application with Modernization Combined with Legal Education

## V. Concluding Analysis

As mentioned earlier, the main focus of this chapter is to explore theoretically and empirically the level of predictability associated with the method of judicial analysis followed in the Shari'a Court. Several conclusions can be drawn.

**First**, the judicial analysis in Shari'a Courts in Saudi Arabia introduces a different case of adjudication that reflects the different social and religious practices existing in the country.<sup>393</sup> The process of judicial analysis used to arrive at rulings in these courts resembles neither the process followed in civil law systems nor the one followed in common law systems. This is because, on the one hand, there is no code for Saudi judges to follow as in the civil law systems, and, on the other hand, these judges are not required to respect or consider any precedents in their rulings, unlike their counterparts in the common law systems.<sup>394</sup>

Judicial analysis within Saudi Shari'a Courts follows the methods laid down in

<sup>393</sup> Vogel, *supra* note 18, at 56.

<sup>394</sup> Vogel, *supra* note 18, at 58.

Resolution Number (3) of 1928 explained in this chapter. As the case with judicial methodologies in all legal systems, however, a formally consistent method does not protect the legal system in the Saudi Sharī‘a Courts from occasional contradictions or disparities in the outcomes of cases at some times. What may be surprising about the administration of Sharī‘a in Saudi courts, however, is the degree to which it may be stable and predictable.

The empirical exploration in this present study of the actual status of predictability and how practicing Saudi lawyers perceive this predictability reveals much about the impression among Saudi legal practitioners of the legal process followed in the Sharī‘a Courts.

In the first stage, several different legal examples inspired by real cases were invoked to examine how the legal analysis works in theory. These examples involved cases chosen to illustrate the methodology that judges follow in the Sharī‘a Court. These examples produced systematic and predictable answers consistent with received canons of interpretation. Whether this is clear to Saudi lawyers or not is another question. There might be other factors that affect their understanding of the soundness and predictability of the judicial methodology or display in those decisions. These factors might have no relationship to the methodology included in the judicial analysis itself. An empirical investigation was expected to answer this inquiry.

The **second** half of this chapter was devoted to the presentation and the analysis of most of the data collected through interviews conducted with twenty-one Saudi lawyers from different educational backgrounds. Those interviews provided interesting data and perspectives. The answers provided through those interviews were information-rich experiences that would never be available if the research was conducted differently: quantitatively, for example.

After all that preceded, it seems that one clearly substantiated conclusion is the key role played by the legal education received by the interviewed Saudi lawyers. The nature of legal

education seems to affect these lawyers' understanding, ability, confidence, view and level of comfort in dealing with the Sharī'a Court. Although most of the interviewed Saudi lawyers held in common many values irrespective of their formal legal training, that training definitely affects their understanding and comfort in dealing with a system based on Sharī'a.

On the one hand, a gloomy and loud voice that combines disappointment, frustration, and anger was heard from the law-trained lawyers during the interviews. These gloomy voices reflect their inability to understand why the Sharī'a Court system is so difficult and puzzling. Why are they unable to understand and grasp and, therefore, deal with it comfortably?

Similar emotions and some anger were also heard in the voices of the interviewed Sharī'a-trained lawyers but for a different reason. This group was angry about how is it possible for lawyers with no Sharī'a background to be able to practice law in a country in which laws are based on Islamic Sharī'a. Sharī'a lawyers showed no sympathy for what they perceived to be a flaw. They were also puzzled and unable to understand this point.

On the other hand, a sense of pride, confidence, and control was easily felt when speaking to any Sharī'a lawyer during the interviewing process. The Sharī'a lawyer feels that he is part of the system, a son of it. He feels that the judge is no better than him. He could have been sitting at the same bench where the judge in front of him is sitting now. He is also a Shaykh, as the judge is a Shaykh. He went to the same school the judge went to, studied the same books the judge studied, and met the same teacher (scholars) the judge met and benefited from.

One interviewed, experienced Sharī'a lawyer was proud in flaunting that he taught in a Sharī'a school in Mecca for many years and that many judges, judicial assistants, and prosecutors were originally students in his classes. He said:

I know a lot of them. They also recognize me and pay me a lot of respect. I know absolutely how to deal with them and how to invoke pieces from the

Sharī'a books that are going to trigger points that will convince them of my right position. I make them silent when I speak.<sup>395</sup>

It is perhaps needless to say that this lawyer was a huge supporter of the Sharī'a Court. He does not support codification. One can see why he is this way. He voluntarily made himself available for several interviews. Through the interviews, he depicted a very rosy picture of the Sharī'a Court system.

This interviewee is a model of a Sharī'a lawyer who is fully and completely immersed in the Sharī'a legal system and who is fully comfortable and equipped with the necessary tools to practice and represent his clients as perfect practice and representation can be understood. He benefited the system by teaching Sharī'a courses, and he is benefited from the system by adjudicating before courts that represent to him a tangible embodiment of what he thinks, teaches, and practices.

On the other side, the impression that was transferred during the interviewing process was that the law-trained lawyer feels himself less qualified in several ways. He feels like a second level lawyer. He feels that the Sharī'a judge is like an alien, who comes from a different planet. The Sharī'a judge to him is an enigma that is very difficult to be solved or deciphered. He always sees himself less than the Sharī'a judge. He never studied Sharī'a. He does not understand the classical, intricate jargon that the Sharī'a judges use. Career-wise, he is unequal to Sharī'a graduates, as they can be appointed judges in the court, while he cannot. There is a huge gap between the two men. One of those law-trained lawyers said:

Nothing within the Sharī'a Court is clear to me. Everything is mysterious. I, as a lawyer, if someone asks me about a simple issue adjudicated before the Sharī'a Court like custody, for example, I do not know the answer. There is no clear text to me as well as no stable norms that I can consult to obtain a clear answer for

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<sup>395</sup> Interview No. 18 on February 13, 2014.

my client. It all absolutely goes to the judge's discretion and his evaluation. I, as a lawyer, never know where the judge is going to go with my case!<sup>396</sup>

This is the sound of an enigma that was repeated over and over in almost all interviews conducted with law-trained lawyers. One of the interviewed Sharī'a lawyers, who used to be a professor at the Sharī'a college, offered his own explanation of the situation. He started by admitting that there is a huge gap between the Sharī'a judge and the law-trained lawyer. He said:

There is a huge gap between the judges and the lawyers due to two reasons: First, the inability of the law-trained lawyers to communicate with Sharī'a judges through utilizing the principles, the norms, and the language these judges understand and know well. If this lawyer who comes from a law background addresses the Sharī'a judge in a way and tone that this judge understands and writes to him invoking the same books and references this judge uses, then this judge will definitely accept from him and listen to what is he saying. I myself have seen Sharī'a judges who were addressed properly by smart law-trained lawyers who were knowledgeable about Sharī'a to the extent that these lawyers were able to amaze the Sharī'a judges and made them include excerpts in their rulings from the memoranda written by these smart lawyers. Second, is the novelty of the law profession in the country. The lawyer is not treated as a professional but as an agent of his client. Unfortunately, there is no effective system until now.<sup>397</sup>

It is that dynamic relationship between the Sharī'a judges and the Sharī'a-trained lawyers that brings these two groups together in a way creates a class of elites, who speak the same language, use the same terms and phrases, exchange the same thoughts, and even look and dress the same way.<sup>398</sup> This elite class is similar to a "forbidden city" for the law-trained lawyers who, although allowed to enter that city physically, are deprived from integration and assimilation as they lack the tools for this full integration. However, only very few law lawyers figured out this problem and equipped themselves with some Sharī'a knowledge through some evening classes and, therefore, joined that elite class.

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<sup>396</sup> Interview No. 4 on January 14, 2014.

<sup>397</sup> Interview No. 14 on February 2, 2014.

<sup>398</sup> Sharī'a judges wear their national white gowns in a way tells that they are religious people. The Sharī'a lawyers do the same, while the law-trained lawyers wear in a more modern and fashionable way.

It seems that unless the legal education is revised and reformed, this duality and discrimination is going to continue. In any case, the sense of the opaqueness of the Sharī‘a system may indicate a need for some reforms in current practices. More reasoning and explanation of how the judge reaches his verdict should be included and presented in the rulings documents. More transparency in the way by which the judges evaluate the merits of cases before them must be included and presented. This will definitely help narrowing the gap between the Sharī‘a elite and the non-Sharī‘a person who will be able to read and understand the procedure of the case.

The Sharī‘a Court must pay more attention of bringing itself and its judicial analysis closer to the lawyers as well as to the public. As the empirical data showed in this research, some lawyers, even among the Sharī‘a graduates, either do not know about the analysis utilized in the Sharī‘a Court or know but do not appreciate its value for conducting their job. Periodical teaching sessions for the lawyers that educate them about this methodology are expected to be very helpful in advancing shared grounds between the judiciary and the lawyers as well as enhancing transparency and openness between the two groups. This will definitely reflect on more trust, comfort and content among lawyers and, therefore, their clients.

In sum, although the theoretical inquiry for the judicial analysis showed that it is workable and predictable, there are two opposing points of views. The first one is totally unhappy with the Sharī‘a Court system, as it feels that it is problematic, complex, vague and difficult to deal with. In the view of this group, all of these adjectives can be attributed to the judicial analysis with no reservations. These are the majority of the interviewed law-trained lawyers.

In contrast, the other group has some comments and notes about Sharī'a Court, but, overall, they are content, comfortable, and happy with the system, including the application of the judicial analysis.

## **Chapter Five: Conclusion**

Saudi Arabia approved Sharīʿa law as the supreme law of the land. For the most part, this is due to an old historical agreement between its political and religious leaders. All of the Saudi policies and regulations revolve around compliance with Sharīʿa teachings as understood by Saudi religious scholars. The legal system is one of the governmental institutions that is fully controlled by the Sharīʿa scholars. Nevertheless, the Sharīʿa Court system applies a traditional methodology for its judicial analysis that resembles neither the analysis used in civil law system nor in the common law system. However, the Judicial Board in Saudi Arabia issued an order in 1928, that was later ratified by the King, to enforce a specific methodology that included a certain staged order for Sharīʿa judges to follow in their endeavor to produce rulings.

Although this worked well when Saudi Arabia was a young, emerging state, the situation changed after the discovery of oil, as Saudi Arabia entered a new era of modernization for its institutions. Saudi Arabia is undergoing a rapid transformative process in seeking an overall modernization of its agencies. Under this umbrella, calls are occasionally made by Progressives inside and outside of Saudi Arabia to reform and modernize the legal system by replacing the current traditional methodology of judicial analysis in the Sharīʿa Court with a code. In their call for codification, these Progressives are inspired by the international and regional experiences in modernization that followed the classical modernization approach, which requires the existence of a code. One of the main purposes for enforcing a code is to ensure a high level of predictability in laws and rulings.

A theoretical and empirical exploration of the current judicial analysis in the Sharīʿa Court in Saudi Arabia in this paper has shown that this judicial analysis is reasonably predictable in theory. It has also shown that this judicial analysis is perceived in a positive way in practice

for those interviewed lawyers who gained adequate amount of Shari‘a knowledge. Lack of thorough and comprehensive Shari‘a knowledge by the interviewed lawyers, even if they were Shari‘a lawyers, prevents them from forming positive perspective and, therefore, enhances confusion, vagueness and ambiguity.

Through this research, several conclusions can be drawn:

**First**, the modernization that exists in Saudi Arabia is different from that exists in other countries. Modernization in Saudi Arabia is tailored to the Saudi Arabian situation. “In Saudi Arabia, different times and different places exist at once. Saudi Arabia is both a pre-modern and a post-modern society.”<sup>399</sup> Although Saudi modernization might resemble Western modernization in some of the aspects related to economy, industry, health, urbanism, etc., it does not focus as much on transforming the social, religious, intellectual, and traditional values of the country. “Saudi society does not operate by Western logic.”<sup>400</sup> After all, the Saudi modernization is supported by its own oil and committed to ongoing and active state intervention. It reflects a governmental agenda that is backed by the support of the Saudi people and the leaders of the county. The Saudi modernization seems to espouse between modern and tradition in a way that appears challenging to the classical approach to modernization that requires a full adaptation and adoption of modern values at the expense of traditional and spiritual ones. The Saudi modernization calls for a re-examination and re-definition of modernization to account for the role of consciousness state policy.

**Second**, part of the discussion of modernization inevitably focuses on the legal system as one of state institutions that are expected to be included in the process. One of the important and persistent topics that are floated on the surface by many Progressives is the clarity and the

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<sup>399</sup> See FANDY, *supra* note 134, at 6.

<sup>400</sup> See SHAW AND LONG, *supra* note 121, at 106 and 109-110.

transparency of the performance of the Sharī‘a Court in producing its rulings. The discussion logically then turns to suggesting a solution to solve what is considered to be a problem. The solution that is usually suggested by many of these Progressives is reduced to codification of Sharī‘a law. Chapter 3 has shown that codification might not be the right answer for all conceivable problems raised by Progressives. It does not seem to provide the fast, magical solution to what codifiers think of as a flaw in the Sharī‘a Court analysis. Like most arguments in Saudi, the argument of codification in Saudi Arabia always takes a religious direction. Therefore, a religious answer must be comfortably obtained before anything else can occur. Chapter 5 showed how the issue of codification is challenging to the religious scholars’ community. If codification is to be enforced, it will not be enforced through a text or *usūl al-fiqh* bases, which is considered the ultimate authority in the Islamic epistemological pyramid. Rather, it will be enforced utilizing *siyāsa shari’yya*, which occupies a lesser authority in that pyramid. Therefore, codification will not be self-convincing to many scholars. Even if they apply it, this will be with a lot of religious embarrassment and discomfort. In addition, the codification argument might carry some political dimension as it is thought to reduce the role played by Sharī‘a scholars and to pull the rug out from under their feet in a system that was founded on the cooperation between political and religious figures in which the political wing derives its legitimacy through the blessing of the religious wing. A conflict of authority interests is at stake here, which creates high sensitivity at several levels. Considering all of this and other aspects, this chapter ended by asserting that codification might cause more problems than it can solve.

**Third**, although codification has been discussed in Saudi Arabia for decades, no scholar or researcher has ever thought of exploring the current judicial analysis offered by this research. A theoretical exploration of the judicial analysis showed that, contrary to the common stereotype

in many Saudi minds, the judicial analysis is a workable, reasonably predictable analysis. Through several theoretical examples inspired by actual cases, chapter 4 showed that the judicial analysis is not mysterious, vague, or complex. Consequently, this led to thinking about other extra factor(s) that might be contributing to presenting this analysis in such a negative light. The hypothesis of this research suggests that legal education might have an effect on the understanding and perception of Saudi lawyers of the workability of the judicial analysis in the Sharī'a Court. Interviews with Saudi lawyers focused on this side of the equation.

While conducting the fieldwork for this research, the interviewed Saudi lawyers showed that they are as divided in their legal education as they are in their perspectives. All comments, numbers and overall percentages have repeatedly shown that lawyers who were trained in law schools are more likely to be suspicious of the judicial analysis used in the Sharī'a Court and, therefore, carry a very negative impression about everything related to the Sharī'a Court. The great enthusiasm that these lawyers showed for codification is not a surprise.

On the other hand, interviewed Saudi lawyers, who graduated from Sharī'a schools and carry Sharī'a legal education, showed a high level of content and comfort in dealing with the Sharī'a Court at all levels. Most of these Sharī'a lawyers expressed their understanding of its judicial analysis and complete familiarity with books that judges in the Sharī'a Court use.

This leads to conclude that: although all Saudi lawyers share many of the same thoughts, the duality in the legal education reflects an obvious divergence in the understanding and comfort in dealing with a system of which Sharī'a forms the essence. This situation produces unequal legal individuals in the eye of the governmental policies and regulations. To help eliminate this unjust situation and for Saudi Arabia to overcome this deep divergence, several recommendations may be considered.

## 1. Unifying the Legal Education:

This recommendation suggests ending the existing duality in the legal education by uniting the Sharī‘a and law educations. This unification of the two majors means merging the curricula that the students study in both law schools and Sharī‘a schools in one school that offers the same majors for all students and that equally qualifies these students later for all different legal jobs. “The legal knowledge of the standing judiciary (lawyers) should be identical with the sitting one (judges).”<sup>401</sup> Most of surrounding Arab and Muslim countries have done this and established schools for combined “Sharī‘a and law” education. Several Saudi legal figures have realized the importance of a step like this in Saudi Arabia and have been calling for this ever since.<sup>402</sup>

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<sup>401</sup> Interview No. 8 on January 19, 2014.

<sup>402</sup> For example, one of these figures is Shaykh ‘Issa al-Ghaith, a Saudi Judge and Member of the Shūra Council. He wrote: “In the last decades, the legal education has been debated by some individuals and organizations –in good faith– as they think they are protecting Sharī‘a through rejecting this legal education. Because of this, an absolute negative impression has always accompanied the use of the word “law” in the past. It did not stop here, but went far to reject every human innovation although the issue is merely earthly and is not related to any religious matters... Provision 146 of the Education Bill issued in 1970 by the High Committee for Education Policy recommended that “schools of Sharī‘a must insert legal studies in its curricula to produce graduates who are experts in both fields, Sharī‘a and law in order to meet the need of the country. Moreover, the Council of Ministers confirmed this recommendation in its Decision Number 167 in 1980 through Provision Number 4, as it states ‘Andhima must be taught in Sharī‘a schools.’” However, all these years have passed and we did not see any application for these recommendations and decisions in reality. This is absolutely against the public benefit. This is how we always are in many of our life’s matters; we reject every new thing forgetting that a human being is always an enemy for what he does not know. Instead of asking for these developments, we are standing as a hindrance in their way. This is proof that the political system in our country is more modern and developed than the society... for all this, I welcome an establishment of new schools within the universities under the name ‘kulayat al-Sharī‘a wa al-qanun’ (school of Sharī‘a and law) as is the practice in all Islamic universities, such as al-Azhar in Egypt. Furthermore, law departments must be converted into law schools as is the case in many Arabic and international universities. This is going to be a positive development even if it is late... Some individuals’ oppositions should not be taken in consideration at the expense of millions of citizens who are harmed and bored of these oppositions through past decades... As there are departments that teach only Sharī‘a and others that teach only law, graduates are divided between those who know Sharī‘a while lacking the legal depth, and those who know law while lacking the Sharī‘a depth. What must be done is an insertion of law curricula inside the Sharī‘a schools, and Sharī‘a curricula inside the law schools. This gap between the two majors must be closed. This is going to happen only by a high will. Within the Sharī‘a Courts, the judge needs laws in procedural, formal and technical matters, while he needs Sharī‘a for reasoning and ruling. We must not blame the weak outcomes of the legal system, if we are going to maintain this segregation between Sharī‘a and law, although we [Sharī‘a judges] practice both of them every day through our cases, courts and all life matters. Ending this segregation is compatible with our constitutional and legal structures.” Issa al-Ghaith, *Assessment of the Legal Education in the*

One of the promising steps taken by the Saudi government in this regard is its recent conversion of some of the law departments in the universities into independent law schools. In addition, the Islamic university of Umm al-Qura in Mecca has established the first hybrid school that offers curricula including subjects from the two disciplines at the same time.<sup>403</sup> Yet, all twenty other universities continue to separate the two educations from each other and thereby perpetuate the problem.

Merging the two majors is expected to produce several benefits. One of these benefits is the creation of a job market that offers equal opportunities to all graduates. Currently, the law graduates are not allowed to join the judiciary and work as judges. This profession is reserved exclusively for Sharī‘a graduates. Through the foundation of other schools like the one founded by Umm al-Qura University, unjust policies, like this one, will hopefully be abolished. Among the main goals of the newly founded school in Mecca is that it will qualify “its graduates to work in juridical sectors, education sectors, security sectors, human rights organizations, embassies, lawyering, and governmental and private legal consultation.”<sup>404</sup> The newly founded school in Mecca sets an epitome for what the desired legal education in Saudi Arabia should aim at to contribute to solving problems that resulted from the segregation in the legal profession; an education that qualifies its graduates to work in the offered jobs in the legal arena equally with no discrimination based on education, since they are all equipped with the necessary knowledge,

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*Kingdom of Saudi Arabia*, al-Riyadh Newspaper on June 28, 2011, can be found at: <http://www.alriyadh.com/645650>. A brief version of the article was published in the al-Madina Newspaper on November 29, 2013, and can be found at: <http://www.al-madina.com/node/494404>.

<sup>403</sup> The school was founded in 2010 under the name of Kuliyyat al-Dirasat al-Qadha’iyya wa al-Andhima (College for Judiciary Studies and Systems). The new school offers a four-year-bachelor degree with a curriculum that covers both Sharī‘a and regulation subjects. The first class is expected to graduate from this college this year.

<sup>404</sup> The web site of the School of Judiciary Studies and Systems as accessed on June 26, 2012: <http://uqu.edu.sa/page/ar/203752>.

and since they all belong to the same country. In fact, Article 8 of the Basic Law states: “Governance in the Kingdom of Saudi Arabia is based on justice, shūra (consultation) and equality according to Islamic Sharī‘a.”<sup>405</sup> It also states: “Consolidation of the national unity is a duty. The State shall forbid all activities that may lead to division, disorder and partition.”<sup>406</sup> Also: “The State shall facilitate job opportunities for every able person and enact laws to protect the worker and the employer.”<sup>407</sup> All of these articles assert the importance of the key role that should be played by the government to ensure equality for its citizens at all levels, including education and jobs opportunities. It is, therefore, not only unjust, but also incompatible with the Basic Law for the governmental policies to differentiate between two Saudi graduates who belong to the same legal field by opening the door for one of them to work in the judiciary, for example, while depriving the other of this right. Lack of teaching Sharī‘a law for Saudi law students in a country, when Sharī‘a forms the essence of its laws and actions, is not right and should come to an end if we aim to create a stable legal profession. If the legal system is meant to serve justice, then this legal system should be just for its members in the first place and before anything else.

It is that dynamic relationship between the Sharī‘a judges and the Sharī‘a-trained lawyers that brings these two groups together in a way creates a class of elites, who speak the same language, use the same terms and phrases, exchange the same thoughts, and even look and dress the same way.<sup>408</sup> This elite class is similar to a “forbidden city” for the law-trained lawyers who, although allowed to enter that city physically, are deprived from integration and assimilation as they lack the tools for this full integration. However, only very few law lawyers figured out this

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<sup>405</sup> Saudi Basic Law, Article 8.

<sup>406</sup> Saudi Basic Law, Article 12.

<sup>407</sup> Saudi Basic Law, Article 28.

<sup>408</sup> Sharī‘a judges wear their national white gowns in a way tells that they are religious people. The Sharī‘a lawyers do the same, while the law-trained lawyers wear in a more modern and fashionable way.

problem and equipped themselves with some Sharī'a knowledge through some evening classes and, therefore, joined that elite class.

### **2. Judges to Provide Reasoning and Analysis in the Rulings Documents:**

Many lawyers complain from lack of reasoning in most of the documents presented by the Shari'a judges in the courts. This leaves the lawyers and their clients with a status of confusion. It also opens the door to undesirable guesses. More reasoning and explanation of how such judge reaches his verdict should be included and presented in the rulings documents. More transparency in the way by which the judges apply the merits in front of them to each case must be included and presented. This will definitely help narrowing the gap between the Sharī'a elite and the non-Sharī'a person who will be able to read and understand the procedure of the case.

### **3. Sharī'a Court to Make More Efforts to Connect with People:**

The Sharī'a Court must pay more attention of bringing itself and its judicial analysis closer to the lawyers as well as to the public. As the empirical data showed in this research, some lawyers, even among the Sharī'a graduates, either do not know about the analysis utilized in the Sharī'a Court or know but do not appreciate its value for conducting their job. Periodical teaching sessions for the lawyers that educate them about this methodology are expected to be very helpful in advancing shared grounds between the judiciary and the lawyers as well as enhancing transparency and openness between the two groups. This will definitely reflect on more trust, comfort and content among lawyers and, therefore, their clients.

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**APPENDIX I**  
**LIST OF THE EXISTING SAUDI WRITTEN LAWS**

Legal Field	Number of Written Laws
<b>Basic Laws</b>	<b>5</b>
Basic Law of Governance	
Law of Shūra Council	
Law of the Council of Ministers	
Law of Provinces	
Succession Commission Law	
<b>Media, Culture, and Publication Laws</b>	<b>11</b>
Basic Law of Broadcasting	
Law of King ‘Abd al-‘Azīz Foundation	
Law of Documents and Archives	
Law of National Center of Documents and Archives	
Law of King Fahad National Library	
Legal Deposit Law	
Regulatory Rules of Advertisement and Publicity Boards	
Law of King ‘Abd al-’Azīz Public Library	
Law of Printed Materials and Publication	
Law of Press Establishments	
Copyright Law	
<b>National Security, Civil Status and Criminal Laws</b>	<b>19</b>
Law of Saudi Arabian Nationality	
Penal Law of Money Counterfeit	
Law of Substituting Fine for Imprisonment	
Anti-Forgery Law	
Law of Diplomatic and Special Passports	
Border Security Law	

<b>Legal Field</b>	<b>Number of Written Laws</b>
Law of Imprisonment and Detention	
Civil Defense Law	
Civil Status Law	
Penal Law of Impersonating Public Officers	
Anti-Bribery Law	
Travel Document Law	
Anti-Money Laundering Law	
Law of Private Security Services	
Law of Combating Narcotics and Psychotropic Substances	
Law of Weapons and Ammunition	
Law of Explosives and Fireworks	
Law of Transport of Money, Precious Metals, and Negotiable Instruments	
Traffic Law	
<b>Commerce, Economy and Investment Laws</b>	<b>39</b>
Commercial Law (Law of the Commercial Court)	
Law of Commercial Agencies	
Law of Calibration and Measurements	
Law of Commercial Papers	
Companies Law	
Law of Public Investment Fund	
Law of Saudi Arabian Standards Organization	
Law of Saudi Development Fund	
Law of Chambers of Commerce and Industry	
Law of Commercial Books	
Law of Professional Companies	
Law of Certified Accountants	
Law of Commercial Register	
Law of Settlement Against Bankruptcy	
Statute of the Supreme Economic Council	

<b>Legal Field</b>	<b>Number of Written Laws</b>
Law of Trade Names	
Foreign Investment Law	
Statute of the General Investment Authority	
Basic Law of the GCC Accounting and Auditing Organization	
Law of Stores for the Sale of Vehicles with Revoked Registration	
GCC Patent Law	
Law of Commercial Data	
Law of Trade Marks	
Law of the Saudi Council of Engineers	
Capital Market Law	
Cooperative Insurance Companies Control Law	
Law of Commercial Lien	
Anti-Concealment Law	
Competition Law	
Law of Patents, Layout Designs of Integrated Circuits, Plant Varieties, and Industrial Designs	
Installment Sale Law	
Bylaws of the GCC Standardization Organization	
Contractor Classification Law	
GCC Uniform Law on Anti-Dumping and Countervailing Measures and Safeguards	
Law of Chemicals Import and Management	
Law of Time-Share Properties	
Statutes of Saudi Export Development Commission	
Statute of Consumer Protection Association	
Anti-Commercial Fraud Law	
<b>Protocol and Ceremonies Laws</b>	<b>3</b>
Law of Saudi Decorations	
Law of Military and Civilian Medals	
Law of the Flag of the Kingdom of Saudi Arabia	

<b>Legal Field</b>	<b>Number of Written Laws</b>
<b>Education and Science Laws</b>	<b>7</b>
Law of Literacy and Adult Education in the Kingdom of Saudi Arabia	
Law of the Institute of Diplomatic Studies	
Law of King ‘Abd al-‘Azīz City for Science and Technology	
Law of the Council of Higher Education and Universities	
Law of Production and Marketing of Education and Universities	
Law of the Institute of Public Administration	
Statute of Technical and Vocational Training Corporation	
<b>Hajj and Islamic Affairs Laws</b>	<b>7</b>
Law of the Supreme Council of Endowments	
Law of Imams, Muezzins, and Mosque Servants	
Law of Commission for Promotion of Virtue and Prevention of Vice	
Statute for the Treatment of Persons Arriving in the Kingdom on Hajj, Umrah, or other Visas	
Statute for the Services for Umrah Performers and Visitors of the Prophet’s Mosque from Abroad	
Law of Transporting Pilgrims to the Kingdom and Returning them to their Countries	
Law of Domestic Pilgrim Services	
<b>Municipal Services and Urban Planning Laws</b>	<b>15</b>
Law of Roads and Buildings	
Law of National Statistics	
Census Law	
Law of the Disposition of Municipal Real Estates	
Law of Real Estate Development Fund	
Law of Municipal and Rural Areas	
Law of the Protection of Public Facilities	
Law of Real Estate Ownership and Investment by Non-Saudis	

<b>Legal Field</b>	<b>Number of Written Laws</b>
Statute of Real Estate Ownership by GCC Citizens within Member States	
Law of Ownership of Real Property Units and Plotting thereof	
Law of Real Property Registration	
Nuisance Law	
Law of Eminent Domain and Temporary Taking of Property	
Law of State Leasing and Vacating of Property	
Statute of the General Housing Authority	
<b>Military Service Laws</b>	<b>7</b>
Law of Commissioned Offices Service	
Military Pension Law	
Law of Noncommissioned Officer Service	
Law of Military Academies	
Law of Military Service Council	
Law of Military Insignias	
Law of Individual Military Uniforms and Equipment	
<b>Civil Service Laws</b>	<b>8</b>
Law of Employee Discipline	
Law of Ministers, Vice Ministers, and Grade "Excellent" Employees	
Civil Pension Law	
Civil Service Law	
Civil Service Council Law	
Law of Benefit Exchange between the Civil and Military Pension Laws and the Social Insurance Law	
Statute of the Public Pension Agency	
Uniform Law for Extension of Insurance Coverage to GCC Citizens Working in a Member State Other Than Their Own	
<b>Agriculture, Water and Biota Laws</b>	<b>19</b>
Laws of Allotment of Uncultivated Land	

<b>Legal Field</b>	<b>Number of Written Laws</b>
Law of the Grain Silos and Flour Mills Organization	
Law of Saline Water Conversion Corporation	
Law of Preservation of Water Resources	
Law of the National Commission for Wildlife Conservation and Development	
Law of Fishing, Investment and Preservation of Live Aquatic Resources within Territorial Waters of the Kingdom of Saudi Arabia	
Law of Marine Science Research in Maritime Zones of the Kingdom of Saudi Arabia	
Law of Wildlife Reserves	
Game Law	
Law of Treated Sewage Water and Reuse Thereof	
Law of Trading in Endangered Species of Wild Fauna and Flora and Products thereof	
Environmental Law	
Livestock Law	
GCC Veterinary Quarantine Law	
Forest and Pasture Law	
GCC Agricultural Quarantine Law	
GCC Fertilizers and Soil Conditioners Law	
GCC Pesticides Law	
Agricultural Development Fund Law	
<b>Judiciary and Human Rights Laws</b>	<b>11</b>
Law of Sharī'a Judiciary Jurisdiction	
Law of Trial of Ministers	
Arbitration Law	
Law of the Bureau of Investigation and Public Prosecution	
Law of Procedure before Sharī'a Courts	
Code of Law Practice	

<b>Legal Field</b>	<b>Number of Written Laws</b>
Law of Criminal Procedure	
Statute of Human Rights Commission	
Law of the General Commission for Guardianship over Property of Minors and Persons of Similar Status	
Law of the Judiciary	
Law of the Board of Grievances	
<b>Tourism and Antiquities Laws</b>	<b>4</b>
Law of Antiquities	
Hotel Law	
Law of Protection of Heritage Manuscripts in the Kingdom of Saudi Arabia	
Statute of the General Commission for Tourism and Antiquities	
<b>Youth and Sports Laws</b>	<b>3</b>
Saudi Arabian Scout Association Law	
Basic Law of Sports Federations and the Saudi Arabian Olympic Committee	
Statute of the High Commission for Equestrian Clubs	
<b>Health Laws</b>	<b>11</b>
Basic Law of the Saudi Red Crescent Authority	
Law of the Saudi Commission for Health Specialties	
The Law of Private Laboratories	
Health Law	
Law of Private Health Institutions	
Law of Fertilization, Utero-Fetal and Infertility Treatment Units	
Law of Pharmaceutical Preparations and Installations	
Law of Trading in Breastfeeding Substitutes	
GCC Uniform Law for Medical Waste Management	
Law of Practicing Healthcare Professions	
Law of the General Food and Drug Authority	
<b>Energy, Industry and Mining Laws</b>	<b>14</b>

<b>Legal Field</b>	<b>Number of Written Laws</b>
Law of Protection and Promotion of National Industries	
Law of the Saudi Industrial Development Fund	
Statute of Royal Commission for Jubail and Yanbu	
Law of Precious Metals and Gemstones	
Statute of the Saudi Geological Survey Commission	
Statute of the Supreme Council for Petroleum and Minerals Affairs	
Statute of the Saudi Organization for industrial Estates and Technology Zones	
Law of Gas Supply and pricing	
Mining Investment Law	
Electricity Law	
Uniform GCC Law of Industrial Regulation	
Statute of the General Survey Commission	
Statute of Electricity and Co-Generation Regulatory Authority	
Statute of the Petroleum Studies and Research Center	
<b>Labor and Social Care Laws</b>	<b>10</b>
Regulation of Charitable Societies and Foundations	
Cooperative Health Insurance Law	
Statute of Human Resources Development Fund	
Social Insurance Law	
Disability Law	
Rules for Nominating, Selecting, and Honoring Voluntary Leaders	
Labor Law	
Social Security Law	
Regulations of Social Development Centers	
Law of Cooperative Associations	
<b>Public Finance Laws</b>	<b>16</b>
Law of Stat Funds Collection	
Law of Zakat Collection	
Law of Saudi Arabian Monetary Agency	

<b>Legal Field</b>	<b>Number of Written Laws</b>
Saudi Arabian Monetary Law	
Banking Control Law	
Law of the General Audit Bureau	
Law of Managing Public Funds	
Law of Port Service Fees and Charges	
Law of Registration Fee for Ships and Floating Units	
Uniform GCC Customs Law	
Income Tax Law	
Law of Civil Aviation Tariff	
Law of Public Warehousing	
Law of the Saudi Credit and Saving Bank	
Government Tenders and Procurement Law	
Credit Information Law	
<b>Transportation and Communication Laws</b>	<b>16</b>
Automobile Union Law	
Railway Security Law	
Law of Saudi Arabian Airlines Public Corporation	
Law of Railways Public Corporation of the Government of the Kingdom of Saudi Arabia	
Law of Seaports, Harbors, and Lighthouses	
Law of Saudi Ports Authority	
Law of Public Transport on Roads of the Kingdom of Saudi Arabia	
Postal Law	
Communications Law	
Statute of the Saudi Communications Commission	
Statute of Saudi Post Corporation	
Statute of the General Authority of Civil Aviation	
Civil Aviation Law	
Anti-Cyber Crime Law	
Electronic Transactions Law	

<b>Legal Field</b>	<b>Number of Written Laws</b>
Statute of the Railway Authority	
<b>TOTAL</b>	<b>225</b>

## APPENDIX II

### Brief Description of the Books Included in Resolution of 1928

**1. *Sharḥ Muntahā al-Irādāt by Maṣṣūr ibn Yūnus al-Bahūti (d.1642):*** The full name of this book is “Daqā’iq Uli al-Nuha fi Sharḥ al-Muntahā” (7 big volumes) which is a commentary book on another book called “Muntahā al-Irādāt fi al-Jam‘ Bina al-Muqni’ wa Zyadāt.” The original book, “Muntaha al-Iradāt,” was composed by Mohammed ibn Ahmed al-Futuhī al-Misrī, known by Ibn al-Najjār (d.1564). He composed it in the region of Sham<sup>409</sup> after his trip to Egypt to represent the soundest opinion in the Ḥanbalī School. Al-Muntaha became very popular among the prominent Ḥanbalī scholars at that time, including the father of the author himself, who approved it to his students as the main reference in the Ḥanbalī fiqh. Many Ḥanbalī scholars, therefore, commented on this book, including al-Bahuti, who composed Daqā’iq Uli al-Nuha fi Sharḥ al-Muntahā. In the introduction to his commentary work, al-Bahūti explains that he wrote this commentary, because “...the author [of Muntahā al-Irādāt] although has commented on his book, he [the author] has not satisfied the hunger for treatment for the ill as he over-commented in some places as well as left some places without sufficient reasoning or explanation.”<sup>410</sup> Many scholars have followed up on al-Bahūti’s commentary with other commentaries, as is the tradition with classical Muslim scholarship.

**2. *Kashāf al-Qinā’ ‘an Matn al-Iqnā’ by Maṣṣūr ibn Yūnus al-Bahūti (d.1642):*** This book was authored by Maṣṣūr ibn Yūnus al-Bahūti al-Ḥanbalī (d.1642) (10 large volumes), who was considered the “biggest supporter of the Ḥanbalī School, the editor, the founder of its principles, and the devout to explain its unclear issues.”<sup>411</sup> Kashāf al-Qinā’ is a commentary book for the script of al-Iqnā’, which was also composed by the same author, al-Bahūti. al-Bahūti states that he “...mixed the two texts [the original script and the commentary] until they became like one text.” He also states that he “...traced the sources of his script as al-Muqni, al-Muharrar, al-Furū’, and al-Mustaw‘ib.”<sup>412</sup>

**3. *Al-Rawḍ al-Murbi’ Sharḥ Zād al-Mustaqni’ fi Ikhtisār al-Muqni’ by Maṣṣūr ibn Yūnus al-Bahūti (d.1642):*** Al-Rawḍ al-Murbi’ (1 volume) is a commentary work for Zād al-Mustaqni’ fi Ikhtisār al-Muqni’. While al-Rawḍ al-Murbi’ is authored by al-Bahuti, the original script of it “Zad al- Mustaqni’” was composed by Sharf al-Din Abu al-Najā al-Hajjāwī (d.1560). Although al-Zad was commented on by many Ḥanbalī scholars, al-Bahuti’s commentary is considered

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<sup>409</sup> This is the old name of the area that is known now as the Fertile Crescent, which encompasses Syria, Jordan, Lebanon, and Palestine.

<sup>410</sup> MANSUR IBN YUNUS AL-BAHUTI AL-HANBALI, DAQA’IQ ULI AL-NUHA FI SHARH AL-MUNTAHA, 3 (1999).

<sup>411</sup> MOHAMMED IBN ABDULLA IBN HUMAID AL-NAJDI, AL-SUHUB AL-WABILA ALA DARAI’H AL-HANABILA [THE RAINY CLOUDS ON THE HANBALIS TOMBS], 470-472 (1989).

<sup>412</sup> AL-BAHUTI, *supra* note 328, at 11.

the best among his peers.<sup>413</sup>

**4. *Dalīl al-ṭālib li-Nayl al-Maṭālib*, by Marʿī ibn Yusuf al-Karmī (d.1554):** Dalīl al-ṭālib li-Nayl al-Maṭālib (1 volume) was authored by Marʿī ibn Yusuf al-Karmī (d.1554). In his introduction to his book, al-Karmi pledged to state only the soundest opinion in the Ḥanbalī School. The organization of his book is better than his peers, as he mentions all of the related details of one issue in one place. Many late Ḥanbalī scholars took great care of this book. Some of them, like al-Taghlibi, considered it the best Ḥanbalī composition. Many of these scholars also commented on Dalīl al-ṭālib. When compared to al-Zad, Dalīl al-ṭālib has simpler and clearer wording and better organization. In contrast, al-Zad has stronger and more complex wording, which provides students with a fiqh sense that equips them to read and understand all classical and modern Ḥanbalī books.

**5. *Al-Mughnī by Muwafaq al-Dīn ibn Qudama al-Maqdisī (d.1223):*** This book was written by Muaffaq al-Dīn Abdullah ibn Ahmed ibn Muhammad al-Jumaʿilī al-Maqdisī (known as Ibn Qudama) as a commentary on another famous Ḥanbalī book called *Mukhtasar al-Khiraqī*. Ibn Qudama’s book (12 large volumes) and is considered by Ḥanbalī scholars to be the richest and most famous book among other commentaries on *Mukhtasar al-Khiraqī*. Several Muslim scholars praised Ibn Qudama’s book, such as al-Izz ibn ‘Abd al-Salām, who said: “I never saw among Islamic books like al-Muhalla by Ibn Hazm and al-Mughni by Shaykh Ibn Qudama in their quality and editing.”<sup>414</sup> He also said: “I could not start *ifjā*’ until I received my copy of al-Mughni.”<sup>415</sup>

**6. *Al-Sharḥ al-Kabīr by ‘Abd al-Raḥmān ibn Qudama (d. 1283):*** This book (12 large volumes) is another commentary book composed by ‘Abd al-Raḥmān ibn Muhammad ibn Ahmed ibn Qudama al-Maqdisi. The original name of this commentary book was “al-Shafī fī Sharḥ al-Muqṇī’.” As the name implies, al-Sharḥ al-Kabīr is a commentary on al-Muqṇī’ by Ibn Qudama al-Maqdisī. The differences between al-Mughnī and al-Sharḥ al-Kabīr is that al-Mughnī covers more cases, rules and issues than those stated in al-Sharḥ. However, al-Sharḥ al-Kabīr included more legal opinions of Ḥanbalī scholars than exist in al-Mughni. Finally, it included more attribution of hadith than al-Mughni.

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<sup>413</sup> ABD AL-AZIZ IBN IBRAHIM IBN QASIM, AL-DALIL ILA AL-MUTUN AL-ILMIYYA [THE GUIDE TO THE SCIENTIFIC TEXTS], 442 (2000).

<sup>414</sup> ABD AL-QADIR IBN BADRAN AL-DIMASHQI, AL-MADKHAL ILA MADH’HAB AL-IMAM AHMAD [THE ENTERANCE TO IMAM AHMAD’S DOCTRINE], 426 (1981).

<sup>415</sup> ABD AL-QADIR IBN BADRAN AL-DIMASHQI, AL-MADKHAL ILA MADH’HAB AL-IMAM AHMAD [THE ENTERANCE TO IMAM AHMAD’S DOCTRINE], 426 (1981).

## VITA

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