CONTRACT LAW AND JUDICIAL SYSTEM IN SAUDI ARABIA

by

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ABSTRACT

This thesis is entitled Contract Law and Judicial System in Saudi Arabia. The work is divided into seven chapters. However, as the title suggests, it deals with two interrelated subject matters and therefore can be sub-divided into two parts.

The first chapter is introductory to both topics and deals with general principles of law as derived from sacred law, the development of law and the meaning of contract (akd). The second chapter explains the present Saudi judicial system and analyses its structure and different procedures with reference to historical background. Chapter three deals with the judiciary (al-qada) and the role of the judge (qadi) in Islam, again with historical reference in order to explain their modern role. Chapter four deals with Islamic law in general and more specifically, Saudi Arabian (public) law.

Chapters five and six deal with contract. Chapter six deals with the principles of freedom of contract in relation to conditions imposed whereas

chapter five deals with the theory of contract with regard to the differing schools of thought emphasising the Hanafi and Hanbali Schools. Contract of sale and marriage are also emphasised. Chapter seven concludes with a criticism of the system and avenues of reform which the Saudi legal system is persuing in response to changing economic circumstances.

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CONTENTS

C H A P T E R O N E

INTRODUCTION

The purpose of this work is to examine the Saudi Arabian legal system with regard to its legal institutions and courts as well as to examine the theory of contract under its laws.

The general judicial policy of Saudi Arabia is different from any other in the world, in that it is a policy based solely on Islamic religious belief. The Quran does not simply set out a code for peoples' private lives but also sets out the general principles of the constitution of the country. All activities, both personal and private, are guided by the teachings of The Quran. "The Quran is a teacher, a guide and a mercy to good believers."[1] The Sharia, the all encompassing law of Islam, when translated, means "the clear path to be followed". Saudi Arabia, with the exception of North Yemen, is the only country left in the world to base its system on pure Sharia.

There are also ancilliary laws more properly called regulations, or the nizam.

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(1) The Holy Quran, Sura XLV - "Jathiya" or "Bowing the Knee", verse 20.

There are four sources of Sharia law. The first is the Quran, the recitation of God's own words by the angel Gabriel to Muhammad, the last of the Prophets. The second is the Sunna, a record of the Prophet Muhammad's deeds and utterances and of his unspoken approval or disapproval in given situations. The third is the Ijma which is the consensus of scholars on particular problems whose solutions are not found in either the Quran or the Sunna. The fourth is the Qiyas, which translated means, "measuring or comparing". It is a system of reasoning by analogy and extends the principles laid down in the Quran, Sunna and Ijma. It is used when these sources are not sufficiently specific.

The Quran and Sunna contain basic binding rules and commands, expressed in general principles often subject to varying interpretations and without theorisation. The formation of theories came in the Second Century after the "Hejira", the beginning of the Islamic calendar, and were subsequently developed.

The legal theories of each school and their interpretations of The Quran and Sunna as to the basic problems of what is good and evil, or what is legal or illegal, were affected by the different social, political and economic circumstances and pressures, and led to differing conclusions on almost all legal principles.

The Sharia on the whole has no precise rules to cover every aspect of contract. However, there are four basic principles which are as follows:

(a) Freedom of contract.

(b) Both parties are bound by the contract.

(c) The right of parties to the contract, to enforce their rights in the contract by all legitimate means.

(d) All parties to a contract have equal status before the courts.

While criticism is made of both civil and criminal proceedings in Saudi Arabia on the bases that they are not in keeping with modern needs, such criticism

is mitigated by the fact that it is not considered within the context of the social and political background of the country.

In 1927, King Abdul Aziz founded the Sharia judiciary which is the legal system. The legal system is respected as it administers what is considered God given law.

The Sharia judiciary covers almost all the judicial institutions and, as such, this work will be devoted mainly to the Sharia system. The system outside the Sharia is known as the quasi-judicial system and was founded as a result of the inability and reluctance of the Sharia judiciary to apply the law to meet the needs of modern society. This work will also deal in part with the quasi-judicial system as well as the laws, regulation and practice within these courts. However, the laws relating to their conduct and practice are often too brief and vague to extract clear principles as to their procedure.

The present judicial system will have to be strengthened to enable it to effectively deal with the increase in the number of disputes associated with the increase in prosperity and economic activity.

This work will also reflect the development of the law by Saudi legislators in response to differing modern stimuli. Response has been positive providing that development does not conflict with the spirit of the Sharia. It will be demonstrated that Saudi Arabian courts apply procedural rules which vary to a large extent from those held by classical Muslim jurists which indicates the continuing evolution of the legal system in Saudi Arabia.

Present day life involves activities which did not exist at the time of the Prophet and with which the Sharia did not specifically concern itself. These modern problems are covered by regulations (nizam). They are statutory codes promulgated by the head of state, under authority of the Sharia, to do what he deems necessary in the best interest and welfare of the people and the country. They are intended to implement the general principles of the Sharia in order to deal

effectively with specific problems of modern society. This part of the law is born of practical necessity in order to deal with modern everyday problems, but takes its authority from the general principles of the Sharia. Obvious examples are motor vehicles, airports, customs, company and labour regulations. In this way, the principles of the Sharia are implemented by the government in order to satisfy the needs of a modern, developing industrial society.

The increase in population, the increase in the number of foreign workers as well as social and economic development, led to the increase of transactions between people. Accordingly, the number of cases rose from 91,203 in 1389 (1969) to 99,632 in 1392 (1972).[2] The number of courts rose from 207 to 241, the number of judges from 321 to 464 and the number of public notary offices from 33 to 51. Two financial departments were established in the upper courts and fourteen in the medium courts. Thirteen institutes of various kinds of experts were created along with eighteen units in the upper courts, known

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(2) The Second Development Plan 1395-1400 (1975-1980) Chapter Six, Section "F" (The Judicial System) issued by The Council of Ministers Decision No. 14302/3/A of 15/5/1395.

as "observatory units" and twenty one units in the medium courts to answer inquiries regarding all cases.

Civil law defines a contract as the coming together of two or more wills and the intention of the parties to be bound by it. In a simple sale of goods transaction, it is the wish of one to sell and the other to buy - the handing over of goods in exchange for payment.

Islamic law defines contract as an offer given by one party and the acceptance of the other party which expresses itself by its legal effects on the subject matter of the contract. Considering both definitions, we find that the Islamic law definition steps from the linguistic meaning to the juristic meaning, that is (akd) the tying of a knot by binding two ends of a piece of rope and similarly so between the two parties. Al akd is the creation of an obligation made by an offer and an acceptance. According to Islamic law the tying of the knot (akd) expresses its legal effects upon the subject matter of the

contract. The contract (akd) denotes the legal act which involves a bi-lateral declaration, namely the offer (idjab) and the acceptance (kabul). The offer and acceptance should be given and accepted at the same place and time. The acceptance of the offer must be unequivocal.

Muslim jurists have been occupied with two main types of contract - the contract of sale of goods (bai) and the contract of marriage (nikah). Other types of contract are known and recognised but the contract of sale of goods and the contract of marriage have dominated the Islamic theory of contract. They were dealt with in the greatest depth, both in practice and theory, and until recent times were the majority of contracts dealt with in Saudi Arabia. With the increase in national wealth from oil revenue, foreign elements were imported into Saudi society. Novel contractual situations and problems arose with which the Saudi Arabian legal system has had to deal. The pressure to adapt and expand contract law has resulted in concepts such as sub-contract and quasi-contract.

Many Arab countries were left behind by the rest of the world in terms of technological advance as a result of Ottoman domination. They are now embracing modern technology and this advance into scientific materialism has been accompanied by some corrosion of faith. This turning away from traditional religious belief is absent in Saudi Arabia where the belief in the Islamic way of life is as strong as in the time of the Prophet. The Quran is the constitution, giving the country its laws, and as such, is an all prevailing influence throughout the structure of government and everyday life of Saudi society.

Saudi Arabia is advancing faster than any other country in the world both socially and economically. This advance is due solely to the increase in oil revenue which is the highest in the world on a per capita basis. Emphasis is placed on public spending in areas of education, health and others in this modern welfare society. Standards of living have risen. The increase in national wealth has occurred due to the increase in the price of oil within the last ten years. The change has been from paternalism

to modernity. The success of the Saudi Arabian economy has therefore created legal problems. Economic reality has been the father of legal change but this has been tempered by Islamic conservatism. Progress is welcome but only within the existing legal framework. Therefore the problem is, can the Sharia judiciary meet the problems of the increase in the number and complexity of contractual transactions accompanying the increase in national wealth?

C H A P T E R T W O

THE JUDICIAL SYSTEM IN SAUDI ARABIA WITH REFERENCE TO ITS INSTITUTIONS, STRUCTURE AND PROCEDURE

XI. COURT OF CASSATION

(i) Jurisdiction and Constitution
(ii) The Supreme Appellate Authority

1. The President of the Judiciary
2. The Judicial Commission of 1970
3. The High Judicial Committee

XII. THE HIGH JUDICIAL COUNCIL

(i) Jurisdiction and Constitution

XIII. THE QUASI-JUDICIAL TRIBUNALS

The Commerical Tribunals

1. The Commercial Council of 1345

(i) Jurisidiction and Constitution

2. The Committee for the Settlement of Commercial Dsiputes

(i) Jurisdiction and Constitution

3. The Committee for Securities

(i) Jurisdiction and Constitution

XIV. THE GRIEVANCES BOARD

(i) Jurisidiction and Constitution

(ii) Proceedings Before the Grievances Board

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(ii) Procedures in Commercial Tribunals

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XVI. THE LABOUR COMMITTEES

(i) Jurisdiction and Constitution

XVII. THE BRIBERY COMMITTEE

(i) Jurisdiction and Constitution

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(i) Jurisdiction and Constitution

XIX. THE FORGERY COMMITTEE

(i) Jurisdiction and Constitution

I. THE JUDICIAL SYSTEM

The judiciary is one of the most important powers of the state. In Saudi Arabia, its independence is guaranteed by the religion.

(i) The Setting Up of the Judicial System

When King Ibn Saud came into power in 1926, the legal system of Saudi Arabia was unified by decree.

The system in future would be based on the Hanbali School of Law, which was the most conservative of the various schools and which may be regarded as the most acceptable to the strong religious principles of the Saudi Arabian people.

The Saudi judiciary has been the subject of major legislation since 1926, particularly in the field of judicial procedure. There have been six major legislations of the Saudi judiciary.

(a) The Judicial Institutions of 1927[3] (Awda al-Mahakm al-Shariyya Watashkilatiha).

(b) The Law Concerning the Conduct of Trials in the Sharia Court of 1931[4] (Nizam Sayyr al-Muhakamat al-Shariyya).

(c) The Law of Procedure of 1936[5] (Nizam al-Murafa't al-Shariyya).

(d) The Law Concerning Centralisation of the Judicial Responsibilities of 1952[6] (Nizam Tarkiz Masou-Leyat al-Qada al-Sharee).

(e) The Organisation of Administrative Functions in the Sharia Court System of 1952[7] (Tanzim al-A'mal al-Edariyya fi al-Dawa'er al-Shariyya).

(f) The Judicial Law of 1975[8] (Nizam al-Qada).

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(3) Royal Decree of 4/2/1346 (1927).
(4) High Order No. 21 of 29/2/1350 (1931).
(5) High Order of 11/2/1355 (1936).
(6) High Order No. 109 of 24/1/1372 (1952).
(7) High Order No. 109 of 24/1/1372 (1952).
(8) Royal Decree No. M/64 of 14/7/1395 (1975).

(ii) The Concept of the King as Administrator and His Delay Action of Power

The King is the chief administrator of justice and is the final court of appeal. However, the King is subject to law and can be sued in his own courts. The concept of absolute sovereignity has no place in the Sharia, and the King is subject to the Sharia Law. In practice, the legal power vested in the King is delegated to a number of judges who apply the Sharia, as well as the ancient and established customary law, which forms part of the law of the land.

(iii) Ministry of Justice

The Ministry of Justice was formed in 1970(9) to replace the Presidency of the Judiciary which was created in 1926. The presidency of the judiciary was a high judicial authority with appellate power and in theory this same power is vested in the Minister of Justice beginning in 1970.

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(9) Royal Order No. A/105 of 21/7/1390.

The Judicial Law of 1975 created the Department of Legal Research (al-Idara al-Fanniya Li al-Buhuth) which is attached to this Ministry. This department consists of an equal number of members holding at least the certificate of a Sharia college. The jurisdiction of this department is as follows.

(a) To draw up the principles of judgements issued by the Court of Cassation and by the High Judicial Council for reference.

(b) To arrange certain chosen judgements for publication.

(c) To carry out certain research work by a request from the Ministry of Justice.

(d) To answer queries from judges.

(e) To review judgements and to state its view regarding the jurisprudential rule which such judgements are based on and to its compatibility to the rules of probity according to changing

circumstances. This view is then put to the High Judicial Council to draw up general principles according to article 8, paragraph (1) of the judicial law.

The Ministry controls the administrative and financial bodies of the courts and of any judicial department or centre.

(iv) Public and Private Rights

There are two types of cases, those which involve the private rights of the individual i.e. property rights, and those which involve the public right (the right of God) e.g. drinking wine, committing adultery. The public prosecutor may claim this type of right.

Many cases involve both rights e.g. theft or highway robbery. The public prosecutor may also claim these rights.

(v) The Bodies Which Administer Justice in Saudi Arabia

The bodies which administer justice in Saudi Arabia are of five categories.

Sharia Courts

The Islamic (Sharia) is the law of Saudi Arabia and the Sharia courts have jurisdiction in all civil, criminal and family cases.

The Commercial Court and the Committee for Settlement of Commercial Disputes

A commercial court was established in Jeddah in 1926 to hear cases between merchants, money changers, cases on bills of exchange, trade marks, companies and marine disputes. This court was abolished in 1955. In 1931 a commercial code was promulgated by Royal Decree No. 32 of 15/1/1350 A.H. (1931 A.D.) and on November 20, 1960, Decision No. 228 was passed by the Council of Ministers giving control of the commercial court to the Ministry of Commerce and Industry (at the time) and on June 27, 1962 Minis-

terial order creating two committees, a committee of first instance and an appellate committee to hear and decide commercial disputes. The final decisions of both committees had to be approved by the Minister concerned. Since the separation of the Ministry of Commerce and Industry into two Ministries, one for Commerce and the other for Industry and Electricity, all decisions made by the committees in disputes relating to Industry must be approved by the Ministry of Industry and Electricity, whilst all other decisions must be approved by the Minister of Commerce.

Other Committees

The formation of special committees is a usual practice. A special committee, also known as a tribunal, is established for a special purpose.

Certain Ministerial Departments

Certain ministerial departments enforce the laws relating to them.

The Board of Grievances

This board was established in 1955. [Royal Decree No. 2/13/9759 of 17/9/1374 A.H. (May 10, 1958)] and is headed by a person of the rank of Minister. Its main function is to investigate complaints concerning miscarriage or denial of justice or other allegedly unlawful acts of the qadis, difficulties in securing the execution of judgements, wrongs committed by government officials and similar matters. Its jurisdiction is, in essence, concerned with grievances with the system of administration of justice.

II. THE FIRST MAGISTRATE'S COURT (Al Mahkama al-Musta'jala al-ula)

(i) Jurisdiction and Constitution

The first Magistrate's court is competent to hear all crimes of tazir[10] crimes of the hadd[11] of intoxication (al-sukr) and defamation (al-qadhf). Its jurisprudence is limited to minor civil cases involving a sum not more than S.R. 300 (£30) and cases concerning the compensation for corporal injury which do not exceed one tenth of the whole blood money.[12]

These courts can hear most crimes which fall within the Sharia judiciary except the Hadd of illegal sex relations (al-zina), the hadd of theft (al-sariqa), the hadd of high way robbery (qat al-tariq), the hadd known as apostasy from Islam (al-ridda) and the hadd of retaliation (al-qisas). The first magistrate's court hears cases involving urban dwellers only. This type of court has a smaller jurisdiction than the Magistrate's court, but the largest number of cases.*

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(10) Crimes for which their punishments are left to the discretion of the appropriate authority to determine.

(11) Literally means the bounds or the limits. They are crimes for which their punishments are set by the Quran.

(12) Money paid for compensation to the injured party.

* The first magistrate's court of Riydh dealt with thirteen cases of theft, two cases of morality, forty-five cases of drunkeness, fifteen cases of injury, five cases of drugs, thirty cases of car accidents and two cases of assault between 26/1/1393 and 13/3/1393 (January-March 1973 The court's Registry Book.

These courts consist usually of a single judge (qadi) and four clerks.

III. THE SECOND MAGISTRATE'S COURT (Al-Mahkama al-Musta'jala al-Thaniya)

(i) Jurisdiction and Constitution

The second Magistrate's court has the same jurisdiction as the first Magistrate's court and hears cases only if both parties are Bedouins but it had been known to decide on minor cases, whichinvolved a non-Bedouin party. The number of cases dealt with is smaller than in other types of Magistrate's courts.

These courts consist of a single judge.

IV. THE MAGISTRATE'S COURTS (Al-Mahkama al-Musta'jala)

(i) Jurisdiction and Constitution

One or more magistrate's courts is generally formed in towns and cities where a Grand Sharia court is found.

Two magistrate's courts were established (in Jeddah and Medina) as a result of the law of 1927.

These courts were formed in towns where there were no other forms of magistrate's courts to handle cases which are usually tried by a magistrate court. A judge of a Sharia court in the cities and villages where no magistrates were found could carry out the job of magistrate. It should be mentioned here that the Magistrate's court of Medina was deprived from its power to handle criminal cases referred to the residents of Medina under a Royal will passed in 1936.(13) This deprivation of power has not been referred to in the different related laws passed since 1936. It is, therefore assumed that the related court hear all cases which fall under the jurisdiction of Magistrates.

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(13) The Royal Will of 8/1/1356 (1936), quoted in Maju'at al-Nuzam, pp. 63-64

These courts are entitled to handle cases, criminal or civil, involving both urban dwellers and Bedouins,(14) and where one party is Bedouin and the other is an urban dweller.

It can be said that the magistrate's courts have the greatest jurisdiction since they are empowered to hear and handle all kinds of cases usually decided by the First and Second Magistrate's courts. The jurisdiction of these magistrates courts has been limited because cases which used to be tried by them have been allocated to the different quasi-judicial tribunals. All judgements of the Magistrate's Courts are subject to appeal(15) except when the sentence is of no more than forty lashes or ten days imprisonment or when the judgement concerns a sum of not more than SR 500 (£50) or its equivalent.

All magistrate's courts hear cases which need a speedy procedure and which are not very serious to be heard by a Sharia or Grand Sharia court.

These courts consist of a single judge.

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(14) The Judicial Institutions of 1927, Art. 2 (a).

(15) Ta'Limat Tamyiz al-Ahka'm al-Shariyya, approved by the president of the Council of Ministers Letter to the president of the judiciary No. 24836 of 29/10/1380 (1968)

V. THE SHARIA COURTS
(Al-Muhkama al-Shariyya)

(i) Jurisdiction and Constitution

The Law of 1927 created two Sharia courts one in Jeddah and the other in Medina, they were somewhat organised, occupied a court building and kept fixed hours whereas in the villages and other towns the cases were heard in any handy place and at any suitable time.

Since 1927 the number of these courts has spread throughout the country. At present, every court, even if it is in a village, occupies a building known as the court (al-mahkama) and the cases are decided during fixed hours. A Sharia court is formed in every city or town where no Grand Sharia court exists and in the villages if the necessity arises upon the recommendation of the Minister of Justice.

Sharia courts are entitled to hear cases, in the following circumstances:

(a) All cases adjusted by a Grand Sharia Court where no Grand Sharia Court exists, but a Sharia court exists in that area.

(b) All cases normally heard by magistrate courts in an area where no magistrate's court exists.

(c) All functions falling within the jurisdiction of the public notary[16] office (katib al-'adl) where no public notary office in the jurisdiction of the Sharia court exists.

(d) The jurisdiction of bayt al-mal[17] where no such office within the jurisdiction of the Sharia court exists.

Sharia courts usually consist of a single judge. However, the number of judges of this court is determined by the decision of the minister of Justice upon the recommendation of the High Judicial Council according to the specific needs of the court.

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(16) The office of the public notary is responsible for issuing, sanctioning and registering all documents of sakk and those documents related to legal matters and transactions according to the law.

(17) Royal Decree of 4/2/1346 (1927).
The function of the office of bayt al-mal is to protect the rights of absentees and also to protect the rights of those with no parents, guardian, agent or heir and is attached to both the Sharia Court and the Ministry of Finance.

VI. THE GRAND SHARIA COURT (Al-Mahakim Al-Shariyya Al-Kubra)

(i) Jurisdiction and Constitution

A Grand Sharia court is usually formed in the main towns.[18] This type of court can be formed in other towns and cities upon the decision of the Minister of Justice. These courts hear all cases which do not fall within the jurisdiction of magistrate's courts[19] for example, cases of death, mutilation or lapidation, hudud, matrimony, property, guardianship and inheritance as well as endowment (waqf). This court can also hear cases which do not fall into any specific category. In general, these courts hear a greater number of civil than criminal cases. This court consists of a president and a sufficient number of deputies and judges, the number of which is determined according to need and may vary from town to town or city to city. For example, the number of judges of this court in Riyadh is twelve whereas in smaller cities the number of judges may be as few as three. The judicial laws did not determine the number of judges of a Grand Sharia court.

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(18) Mecca, Medina, Jeddah, Riyadh, Taif, Abha, Gizan etc.

(19) Law concerning the centralisation of the judicial responsibilities No. 109 of 24/1/1372 (1952).

This is in contrast with the Sharia court where it is normal for one judge to sit alone or is sometimes assisted by one or more judges whereas in a Grand Sharia court a single judge is always assisted by a number of other judges.

VII. PROCEDURE IN THE SHARIA JUDICIARY

Proceedings in the Sharia courts are commenced by issue of writ of summons[20] (warakat Jaleb). The summons states the parties to the action, the cause of action and that both parties must attend court on the date specified which is usually within ten days from the date of receiving the case. The case is brought to the attention of the court by a petition (istida'a) made by a plaintiff and, after specifying the trial date, the signature of the plaintiff is taken on a specific form. The writ of summons is arranged by the court's summoner and is either sent to the defendant or delivered by the summoner with the help of the police if necessary. The summoner must return a receipt of acknowledgement (kasemat esha'ar) to the court signed by the defendant. If the defendant refuses to sign, the summoner must state this fact in conjunction with evidence of two witnesses.

When the court sits to hear a case,* the first task the judge undertakes is to establish the identity of the parties. He usually reviews the case before its

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(20) Service of court summonses is achieved by personal service so to make certain that a defendant is made aware of the proceedings. Service must be affected so as to allow the defendant to prepare his defence. It is a usual practice that the first hearing is adjourned, if the defendant turns up, as there is not usually enough time to prepare a full defence.

* Cases are brought before the court by public authorisation, either the police or the ruler (Amir) of a province.

hearing.[20] The court must be composed of a sufficient number of members which varies according to the nature of the case and according to the court. For example, cases where the punishment is death, lapidation, mutilation or cases undecided by the Hanbali jurisprudence, then the case must be dealt with by the full number of judges.

As previously stated, the parties must be present during the proceedings[21] so as to state the full events of the case but if the defendant decides not to attend the court, then the case will be heard by default.[22]

After the identity of both parties has been established, the judge asks either the plaintiff or the prosecutor, which ever is the case, to state his claim. The statement given is then recorded by the record clerk and read before the court. The same procedure is followed for the defendant and if he admits to the charges, the case is then closed and judgement is passed. If the

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(21) Law of Procedure of 1936, Art. 25.

(22) Default judgements can be passed only in the case of default of appearance before the court on that specified date. Default proceedings such as judgement in default of service of a written defence are alien to the Sharia courts. It is only the judgement in default of the physical appearance of a defendant that is recognised. It is to be noted that judgement is not automatically given in default of appearance and the court must hear the evidence of the plaintiff before passing its judgement.

defendant wishes to prepare a defence or counter claim he must be given adequate time in order to do so.

A plaintiff, in a case of private right who has no evidence, or if his evidence is invalid, can request the court to authorise the court of the absentees' jurisdiction to summon him to appear and to take the oath denying the charge against him.

In a case of private right, whether criminal or civil, and in the absence of the plaintiff's evidence, the plaintiff may demand the oath of the defendant denying the claim.

In a case where both rights appear where the penalty for the public right falls with the private right, the defendant cannot be discharged from the penalty even if the plaintiff renounces his right. Unlike the prosecutor in a case of public right, the plaintiff, in a case of private right, can renounce his right at any time.

The judge usually bases his judgement upon the evidence before him so that a full examination can be carried out and the parties are then able to debate their case fully. The judge may ask a party or a witness to deliver his statement and he may question them about any point in relation to the case. The examination of a party or the cross examination of a witness by the opposing party can be made with the permission of the presiding judge. (23)

Where the courts feel that a representative of a party is trying to delay the procedures for no reason, the court can request the presence of the party in person so the trial can proceed in a speedy manner. This surely refers only to non-criminal cases as for a criminal case, the defendant must appear in person. When the court is satisfied that all the evidence of both parties has been produced, it retires to examine this evidence and to pronounce its judgement. Hearings should be attended by the necessary number of judges. If the number of judges is incomplete then others are delegated to fill their places. Judgements are pronounced by the majority.

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(23) Procedural Law of 1936. Arts. 28 & 110.

Those who oppose the judgement must state their opposition and the reasons behind such opposition and the majority must explain their view to the opposing members.(24)

Court proceedings are conducted in public unless the court decides to hold the proceedings in camera for the interests of morals and public order in all circumstances. The judgement, however, must be rendered in public.(25) The party who feels aggrieved by the judgement may resort to appeal.

The procedure followed in the trial by default and in the trial of juveniles is somewhat different.

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(24) Judicial Law of 1975, Art. 34.

(25) Ibid, Art. 33.

VIII THE COURT ASSISTANTS OR PERSONNEL IN THE SHARIA AND MAGISTRATE'S COURTS

According to classical Islamic theory the court assistants are as follows:-

(a) The court clerk (kâtib). The duties of this employee were, to write down the statements given by the parties to a court (the statement of claim of the plaintiff, the counter-claim of the defendant, the appearance of witnesses and general record of the cases). At the court, the clerk is asked to read out all documents and all relevant material put forward by the parties He was also entrusted with keeping the registers.

(b) The Muzzaki. This referred to two different employees, one who was to investigate the character of the main witness and the other to investigate the character of other witnesses.

(c) The bawwab.* (the door keeper). He was to

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* Known as Usher.

maintain order, and was positioned at the entrance of the court room.

d) The jilwaz. This employee was to maintain order inside the court room.

e) The a'w n.* He usually explains the judges orders to the litigants. The a'w n had the right to use any suitable method to secure the appearance of the parties.

f) The qasam. The qasam was entrusted with dividing the goods, in the cases of such nature, after the decision has been announced.

g) Amin al hukm. This employee was to look after and to protect the property of minors and of orphans.

h) Khazin diwan al-hukm. This employee was to arrange and to keep safe the court's files.

Since the Judicial Law, (Nizam al Qada) (1975) Chapter Six, Art. 97 the employees of the courts are as follows:-

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* Known as Tipstaff

a) Clerks

b) Summoners (Muhad'er). Each Sharia court has a few summoners who are, besides their function as summoners, in charge of keeping order outside the courtroom. They are not allowed to be present in the courtroom during the hearing in their official capacity, unless they are called upon by the judge.

c) Translators or interpreters (mutarjim). This employee was appointed by the court, and he used to be a permanent employee. His work is to help in translation, especially when one of the parties did not speak Arabic at all. According to the Commercial Law, the translator of a foreign language speaking for a party must take the oath.

d) Experts (khabeer). The testimony of experts (26) is usually accepted in the Sharia courts. The Procedural Law regulates their functions, rights and duties.

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(26) When Caliph al-Muti, appointed in 363 (973) qadi al-Quadat al-Hashimi, the Caliph, instructed him to have people attend his hearings who could enlighten him with knowledge and advice.

e) Financial department (bay't al mal).

Those chosen as clerks, summoners, translators and experts must take qualifying examinations. Their appointment is on a trial basis for a one or two year period.

The employees of the courts are governed by the laws which govern the employees of the government in the provisions which are not contrary to the judicial law and are under the observation of their administrative president. All work taken is under the supervision of the president of the court.

IX LEGAL REPRESENTATION - THE WAKILS

There is no institution such as the bar, or law society as such and there are no attorneys in the general meaning of the word in Islam. The expression "attorney" is strange to legal and even colloquial Arabic. In theory, to represent a party in a court according to Muslim legal thought is not more than a mere application of the contract of agency. The person who defends and protects the legal interests of another party is not more than an agent (wakil) and the contract binding both the agent and the party is the contract of agency (wakala).

The Saudi Arabian judiciary grants the parties to a case, a fair opportunity to argue their case and to produce any admissible evidence. This legal representation is not encouraged with the Sharia judiciary system. The quasi-judicial tribunals, however, do not object to legal representation.

According to the practice of the Saudi courts and according to the general view of the Hanbali jurists, to represent a party in a criminal case of public right

is not allowed. However, legal representation could be allowed especially in cases where one party is a foreigner and when the case involves both private and public rights if the court debates them at the same time. Permission to represent a party is left to the judge's discretion and there is no set rule. The various laws and rules throughout the years have established, in a way, the principle of representation. At present, representation, when practiced, must be by relatives and lawyers who are Saudi subjects.

X. APPEAL

(i) Review

Islam recognises the concept of appeal. The Prophet approved this concept when a complaint of a judgement was submitted to him by two parties.(27) He heard the statement of both parties and then confirmed the judgement. Umar, the Second guided Caliph, put down some basic principles of judicial proceedings(28) in his various correspondence to the governors and judges of the provinces of the Muslim state.

There did not exist any judicial institution with an appellate jurisdiction in the classical Islamic judicial theory. The power of appeal was given by Muslim jurists to the same judge who conducted the case and pronounced the judgement, sometimes the power of appeal is given to another judge of a same grade. However, Muslim countries have accepted appellate institutions in their judicial systems.

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(27) Madkur, M.S., Al-Madkhal Li Al-fiqh Al-Islami, Cairo, 1960, P.322

(28) Ali, Muhammad Kurd, Al-Idara Al-Islamiyya, Cairo, 1934, pp. 48-49

(ii) The Right of Appeal on Decision in all Instances

If a party feels misjudged by the judgement of a lower court, that party has the right to appeal against such judgement. This concept is confirmed by the Royal will issued in 1932. (29) The presidency of the judiciary in its decision of 1932 affirmed this principle.(30) The Ministry of Justice approved this principle again in 1971.(31) Originally, the prosecution did not have the right to appeal, but the Minister of Justice granted the prosecution the right of appeal in 1970.(32) The Customs Regulations states that the government's representative has the right to appeal against a judgement of a lower court.(33)

Judgements of a lower tribunal which decide the non-receivability of a claim, or decide its dismissal after it has in fact been accepted; the judgement of a Sharia court which is given on the acquittal or conviction of one accused of dealing in narcotic drugs

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(29) Royal Will No. 39 of 21/1/1351 (1932).

(30) Quoted in Majmu'at al Nazum, p. 29

(31) The Deputy Minister of Justice Circular No. 98/1/T of 1391 (1971).

(32) Letter of Minister of Justice to Deputy Minister of Interior No. 2024/1/n of 26/6/1392 (1972).

(33) Customs Regulations. Art. 252.

or of committing a traffic offence, and judgements concluded after trial, are appealable. Other judgements will only be reviewed together with the final one.

If a case is referred to an appellate authority this authority must, according to the law, consider that the aim behind the appeal is to ensure justice without any regard to the issue appealed against.

(iii) Types of Appeal

A party may appeal by filing a complaint either to the King or to the President of the Council of Ministers or to certain Ministers.

A party who feels that he was wrongly judged by the Sharia court can file a complaint to the High Judicial Authority.

A complaint filed against the decision of a commercial tribunal other than the decision of the committee for the

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* Certain cases such as death, lapidation and mutilation are automatically reviewed. The judgement must be sanctioned by the high authority (the King and in some circumstances the administrative ruler of the province).

Settlement of Commercial Disputes[34] lies under the jurisdiction of the Minister of Commerce.[35] A party who is convicted by a customs committee can appeal against the decision to the Minister of Finance.[36]

(iv) Period of Appeal

The period of appeal under the Sharia courts jurisdiction varied from time to time. The Instructions of 1967[37] give the original court the right to fix the period for appeal, as long as it is not less than ten days and not more than fifteen days. The Commercial Law,[38] fixed the period for appeal to thirty days. An appeal against a decision concerning the violation of the Law of Weights and Measures and the Law of Commercial Agencies must be made within fifteen days.[39] In the case of the customs laws and regulations the period of appeal must not exceed more than fifteen days.

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(34) Letter of the President of the Council of Ministers to Minister of Interior No. 1018 of 18/1/1390 (1970).

(35) Royal Decree No. M/5 of 11/6/1389 (1969).

(36) Letter of the Minister of Finance to the President of the General Customs Directorate No. 358 of 11/4/1390 (1970).

(37) The Instructions of Reviewing Judgements of 1967, Arts. 3,+5.

(38) Commercial Law, Art. 543.

(39) Royal Decree No. M/5 of 11/6/1389 (1969)

If the residence of the defendant is unknown, or if he refuses to receive the decision served on him outside the tribunal, the period is then thirty days after being informed of the decision. Enforcement of a decision under appeal is to be suspended while it is under examination by the Appellate authority.

The quasi-judicial tribunals do not approve of any appeal made outside the stated period. The decisions of the quasi-judicial tribunals become final, upon the expiry of the period for appeal except when the concerned party raises his complaint to the High Authority and if this Authority agrees to the re-examination of the case.

Commercial law(40) decisions which are under appeal are not liable to execution, unless the "temporary execution"* of a decision has been ordered by the original tribunal. As to the customs committees, an appeal shall, in theory, operate as a stay of execution.

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(40) Commercial Law, Art. 558.

* What is known as a temporary execution is that which is granted upon a demand by the plaintiff, whether the judgement is made in the presence of both parties or by default and before the sanction of the judgement in cases of maintenance and cases in regard to the fees paid for foster-ages. The plaintiff should file a petition for such an execution and a bail should be presented to the court and an order must be made by the judge. The execution of the judgement to deliver the boy to his guardian, the woman to the relative in succession who cannot marry her (muhram), the separation between husband and wife and to hand the minor to his custodian.

(v) Method of Appeal

The Review under the Sharia court system can be made against decisions imposing death, mutilation or lapidation, convictions concerning a trustee of endowment, decisions concerning real property and decisions requested by the party who has the right to appeal. A party who is dissatisfied with the judgement, states his dissatisfaction with the decision and the judge may then grant him leave to appeal (la'ha al-i'tiradiyya) within ten days. The party must give his grounds for appeal. He can state his appeal by himself or with the help of a legal representative.* A party who appeals against an appealable decision is given the document which is known as sakk(41) in the preparation of his appeal. The Trial Court may study the appeal and change its judgement accordingly or pass the case to the Appellate Court (Court of Cassation).

According to the Commercial Law an appellant must file a petition to the Administrative Governor together with his appeal which must give the grounds on which he

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* Exceptions are the trial of juveniles and trials by default.

(41) The word i'lam was used instead of the word sakk. It is a summary of the case, the sentence, the defence, the evidence and the reasons behind the judgement.

objects to the decision. The Administrative Governor then refers the appeal to the trial tribunal.(42) The trial tribunal must provide the respondent with a copy of the sakk in order to enable him to prepare his counter-statement, which is to be forwarded to this tribunal within a week. After receiving the counter-statement, the original tribunal must submit the related documents of the case to the appellate tribunal.(43)

The commercial tribunal, unlike the Sharia court, cannot reconsider its decision in view of the appeal but must transfer the case to the appellate tribunal.

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(42) Commercial Law, Articles 544, 546.

(43) Commercial Law, Article 546.

XI. COURT OF CASSATION

(i) Jurisdiction and Constitution

This deals with appeals from courts of first instance, namely the Sharia and the Magistrate's Courts, to ensure that judgement conforms to the rules of the Sharia. If it does not, the Court of Cassation passes the correct judgement and informs the lower court. The sentence is then left to the discretion of the court of first instance, providing that the sentence is within the spirit of the Sharia.

The presidency of the judiciary was the first body to be invested with the power of Review in 1927, but in 1931 a certain committee called the "Committee of Review", was accorded the power of review. This Committee was abolished in 1954 when original judgements were made final. The abolition of this committee as an appellate authority created difficulties and hardship to the parties and so they referred their complaints to the King and to the High Judicial Authority. As a result independent institutions were created in 1962 which were called Courts of Cassation (mahakim al-tamyiz) or (hay'at al-tamyiz) where decisions

were final. There were two Courts of Cassation, one in Riyadh and the other in Mecca. The first dealt with cases decided by the courts in the Central and Eastern provinces and the second dealt with cases decided by courts in the Western province.

The Judicial Law of 1975 (nizam al-qada) combined the two Courts of Cassation into one court, whose seat was in Riyadh.(44)

Decisions of the Court of Cassation were pronounced by three judges except in the cases of death, lapidation or mutilation when the decisions were pronounced by five judges.

According to the law of 1975 the meetings of the General Board of the Court of Cassation were not fulfilled unless attended by a quotum two-thirds of the members. If this number was not complete, the case was then returned and the meeting was to be held with half of the members.

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(44) Court of Cassation, Judicial Law of 1395 (1975) Art. 12. The Court of Cassation General Board may decide that some of the court's departments can hold all or some sessions in another city and that branches of this court could accordingly be established in other cities if a public necessity arose.

General Board decisions were given by the majority of the members attending the meeting and, if the cast was even, the group which included the President's vote was the one to be accepted. The decision of the General Board was to be final after the Minister of Justice's approval and if he did not approve of the decision, it would then be returned to the Board for reconsideration. If the Minister of Justice still did not approve the Board's decision, the case was then forwarded to the High Judicial Council and its decision was final.

The judgements which were reviewed by the Committee of Review were the civil cases. However, the criminal judgements were not to be reviewed unless they were crimes of retaliation (gisas), and those of the hudud exept the judgements of the hadd of intoxication and defamation.

The judgements pronounced by the Grand Sharia courts and those pronounced by a magistrate's court which concerns a trustee of endownment (waqf), a guardian, or an absent person, were appealable to the Courts of Cassation. The jurisdiction of these courts especially the criminal jurisdiction was enlarged in 1967.(45) A decision by a

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(45) The Instructions to Review Legal Judgements of 1967 (Ta'limat Tamyiz al-Ahkam al-Shariyya).

lower court, whether criminal or civil, was appealable except when it did not exceed the amount of SR 500 (£50) or its equivalent and when it did not impose a punishment of more than forty lashes or ten days imprisonment. Certain decisions were to be referred to the courts of cassation in all circumstances, such as the following.

(a) Decisions imposing mutilation, lapidation or death.

(b) Decisions awarded by default.

(c) Decisions specifically referred by the judicial authority.

(d) Convictions against trustees of endowment (waqf), guardians or bayt al-mal except if the convicted person is a foreign pilgrim.

Three main departments were established with the formation of the present court of cassation - they are:

(a) The Department for Punitive Cases.

(b) The Department for Marital Cases.

(c) The Department for Other Cases.

The departments can be increased in number according to need. Each department is headed by the president of this court or one of his deputies.

The General Board of the Court of Cassation looks into the following cases:

(a) The organisation of the different departments and their jurisdiction.

(b) Problems which are raised by the judicial law or any other law.

The time limit for reviewing the case in the Court of Cassation can be from ten days to a month.

The Committee of Review consisted of a president (the president of the judiciary) and four other members.

In contrast, the number of judges of the two Courts of Cassation from 1962 - 1975 was determined according to need.

The present Court of Cassation consists of a president and a sufficient number of judges, some of whom are appointed as deputies. The General Board of this court consists of all the judges assigned to this court.

(ii) The Supreme Appellate Authority

The President of the Judiciary

The first president to assume this office was after the liberation of Hijaz by King Abdul Aziz in 1926. The president retired in 1927 and the presidency was then succeeded by Sheikh Abdullah b. Hassan who was entrusted with an appellate jurisdiction in 1931 to review sentences imposing punishments of a hadd or retaliation (gisas) in Hijaz and its dependencies and any criminal judgement pronounced in Mecca. Since 1936 the president of the judiciary was empowered to review only sentences of mutilation, lapidation and death, and to revise any criminal decision passed in Mecca. The King used to refer, from time to time, this type of sentence to

the Mufti[46] but after 1950, he referred cases to the Mufti as the final appellate authority. In 1959 the Mufti took full power over the whole judiciary. In addition to reviewing the sentences of mutilation, lapidation and death, the Mufti had the power to give the casting vote when the members of the Court of Cassation were equally divided on an issue. In 1969 the Mufti died.

The Judicial Commission of 1970

The appellate authority of the Mufti was allocated by a Royal Order[47] to a commission placed in Riyadh, it was composed of five members. The decisions of this commission were final and were pronounced by the majority of the members. In 1970 the Ministry of Justice was formed to replace the Presidency of the Judiciary. Its Minister was in theory granted the same power which had been assigned to the president of the judiciary. Yet in practice, the Minister of Justice has no appellate power such as

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(46) The most important alim in the land and usually the head of the judiciary. (see fatya and fatwa).

(47) Royal Order of 28/11/1389 (1969)

that practiced by the president of the judiciary. This made the commission the final appellate authority. In 1971 the commission was replaced by a High Judicial Committee.

The High Judicial Committee
(Al Hay'a al-Qada'iyya al'Ulya)

This committee was established in Riyadh in 1971. It consisted of a president, who was a judge of the Court of Cassation in Riyadh and four other members, two of whom were members of the previous commission and two who were experts in judicial problems. The High Judicial Committee decided the cases which were awaiting review by the previous commission and those decisions which were to be reviewed since it came into being. The decisions were taken by the majority and were final. This committee was replaced by the High Judicial Council in 1975.

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* In the Sharia judicial institutions, reference should be made to the different related commissions. Such commissions deal with only single specific cases and are then automatically dissolved. The cases which they try are serious and rather complex. The members of these commissions are selected from among the judicial personnel. The commissions are formed on the order of the King or the President of the Council of Ministers or the High Judicial Authority. These commissions can act as a court of first instance, whose decisions are appealable, or as an appellate authority. Their procedure is exactly the same as that applied by the Sharia Court.

XII. THE HIGH JUDICIAL COUNCIL

(i) Jurisdiction and Constitution

The Judicial Law (nizam al-qada) established the High Judicial Council[48] (majlis al-qada al-ala).

Its jurisdiction is:[49]

(a) To look into questions referred to it by the King (wali al-amr).

(b) To look into legal problems referred to it by the Minister of Justice.

(c) To give its opinion in questions related to the judiciary, if referred to it by the Minister of Justice.

(d) Review sentences imposing death, mutilation or lapidation.

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(48) The Judiciary Bill issued by Royal Decree No. N/1 12/1/1387 (1967).

(49) The Judicial Law, Royal Decree No. M/64 dated 14/7/1395 (1975).

The council if formed of two boards. The Permanent Board (al-hay'a al-da'ima), consists of five full-time members (with the same rank of the president of the Court of Cassation) and is headed by the one with the longest judicial service. The General Board (50) (al-hay'a al-amma) consists of the members of the Permanent Board, the president of the Court of Cassation or his deputy, the Deputy Minister of Justice and three of the public courts judges with the longest service, in one of the following towns - Mecca, medina, Riyadh, Jeddah, Dammam and Gizan and is headed by the president of the council. The judicial power of the council is the same as that of the president of the judiciary and as that of the High Judicial Committee.

The Judicial Law of 1975 changed the names of the courts and classified them into two types - public courts (mahakim 'amma) to replace the Grand Sharia courts, and Summary Courts (mahakim juz'iyya) to replace the magistrates courts. The public court consists of one or more judges and judgements are passed by a single judge except in cases of death, mutilation

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(50) The Judicial Law of 1395 (1975) Article 6 paragraph (b) amended by the Royal Decree No. M/76 of 14/10/1395 (1975).

or lapidation and others specified by the certain laws, where three judges must then pass the judgement. The Summary Court consists of one or more judges and the judgements of this court are passed by a single judge. The law does not specify the jurisdiction of each type. It states that this is to be determined by a decision of the Minister of Justice upon the recommendation of the High Judicial Council. Although the Judicial Law of 1975 changed the names of both courts, their function remains unchanged.

This awaits the new procedural law to come into existence to define the jurisdiction of the newly named Courts and to be in full operation. This procedural law is expected in the near future. Article 26 of the Judicial Law states that certain specialised courts may be formed by a Royal Order upon the recommendation of the High Judicial Council.

XIII. THE QUASI-JUDICIAL TRIBUNALS

The judiciary of Saudi Arabia is known as the Sharia judiciary and it covers most of the judicial sphere. It is a well organized and established system - whereas the quasi-judicial tribunals are to the contrary. They are not well established - they lack the organization of the Sharia Courts and cover a small part of the judiciary. The Sharia Courts were designated to be the only judicial tribunals operating in the country, but the Sharia judges who were mostly the ulama were not encouraged to apply different statutes which were to meet the newly founded problems of modernization. Their disencouragement either to the application, or even the publication of the statutes, were as follows.

The publication of new laws could, not in one way or another, be in accordance with the Sharia and thus, the application of these newly created laws could infringe on the Sharia and would in the end, become substitutes for the main Islamic principles drawn from the religious texts.

The attitude of the ulama was to minimise any codification, if any codification was to be allowed. They have always feared that to allow codification could finally

give way to adopting foreign legal principles which are strange to the Sharia and an example would be the events that followed such adoption in other Muslim states.

A group of ulama state that a new law can only be introduced by ulama who are qualified to deliver individual legal opinions (ijtihad), and that such ulama with the appropriate qualification, if they do exist, are few.

The growth of the country's wealth made life more complex. Legal problems grew side by side with the growth of national wealth. As a result, the body of Royal edicts creating new statutes had to be increased. The view and the response of the ulama in general, and the Sharia judges in particular, towards the application of the new statutes, did not change at all. So the establishment of more quasi-judicial tribunals was felt and became more essential and necessary; this approach was encouraged by the increase in the number of statutes and the negative attitude of the ulama towards the needs brought about by modernization. These quasi-judicial tribunals were known as Boards, committees, commissions or councils and were somehow attached to the administrative authorities.

However, the Sharia courts still have absolute jurisdiction over all matters and are still empowered to handle all cases in the country.

The Commercial Tribunals

1. The Commercial Council (Al-Majlis Al-Tijari)

(i) Jurisdiction and Constitution

The Council was formed in Jeddah in 1345 (1926)[51] to settle disputes between merchants and money dealers, disputes over bills of exchange, trade marks, business partnerships or companies, contracts and marine disputes.[52] This Council was also entitled to hear offences against the commercial law and to decide on the cases referred to it by the King.[53] Finally, the Council was authorised to review the decision of the Administrative Council of Yanbi'u when acting in the capacity of a commercial tribunal.

The Commercial Council of Jeddah consisted of a chairman and seven other members,[54] some of whom were selected from among the merchants and some of whom were appointed by the Government. The experiences and the religious belief were the main factors in choosing the members of this Council. The decisions of this Council must be passed by the majority of the members. The decisions

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(52) Hamza, F. Al Bilad Al-Arabiyya Al-Saudiyya, p. 203, Riyadh, 1968

(52) Higher Order No. 32 of 15/1/1350 (1931), Commercial Law, Art. 443

(53) Commercial Law, Art. 444.

(54) Ibid, Art. 432

were first of all appealable to the Administrative Council of Jeddah and the chief judge, but, after 1933, appeal against the decisions passed by this Council and were invested with the Consultative Council.(55)

The Commercial Council was abolished in 1955 and its jurisdiction was granted to the Sharia Court.(56) However, the Sharia judges were not familiar with some commercial cases such as marine disputes over commercial business between Saudis and non-Saudis. As a remedy for problems such as these, the goverment established two commercial committees, one in Jeddah and the other in Dammam in 1957. These committees were to settle disputes between merchants and traders as well as marine disputes concerning goods on wrecked ships, or goods transferred from one ship to another and similar disputes.(57)

After 1960 the Ministry of Commerce and Industry was vested with the power to deal with commercial problems.(58) In due course two committees were established in this Ministry to hear commercial cases - the Committees for the Settlement of Commercial Disputes and the Committees for Securities.

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(55) Consultative Council Decision No. 121 of 1/8/1351 (1932).

(56) Shamma S., 'Law & Lawyers in Saudi Arabia', International and Comparative Law Quarterly, XIV July, 1965, p. 1036.

(57) Council of Ministers Decision No. 62 of 5/3/1377 (1957)

(58) Council of Ministers Decision No. 228 of 2/6/1380 (1960); Letter of Council of Ministers to the Minister of Commerce and Industry No. 21776 of 9/2/1387 (1967).

2. The Committees for the Settlement of Commercial Disputes[59] (Hay'at Hassem al. Munaza'at al. Tijariyya)

(i) Jurisdiction and Constitution

These committes were established in 1967 in Riyadh, Jeddah and Damman in place of the Committees for the Ending of Commercial Disputes (hay'at fadd al-munaza'at al tijariyya) and the Committees for the Settlement of Disputes Between Companies which were both established in 1965.

These committees were established to settle commercial disputes and to handle offences violating the Law of Trade Marks of 1939[60] and the offences violating the Law of Companies. The Committees for the Settlement of Commercial Disputes have the power to liquidate companies.[61]

When these committees came into existence, they consisted of three members qualified with legal matters; the number of the members was increased to four in 1968, two of the members were qualified in the Sharia and the other two were qualified in legal matters. At present they consist of two members qualified in the Sharia.[62] The decisions

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(59) Council of Ministers Decision No. 186 of 5/2/1387 (1967), quoted in Letter of the president of the office of the president of Council of Ministers to the Minister of Commerce and Industry No. 3429 of 9/2/1387 (1967)

(60) Minister of Commerce and Industry Decision No. 262 of 26/11/1384 (1965)

(61) Minister of Commerce and Industry Circular No. 724/M of 15/11/1387 (1968)

(62) Council of Ministers Decision No. 1394 of 25/10/1388 (1969)

passed by these committees were appealable to the Reviewing Commercial Committee (hay'at al-tamyiz al-tijariyya) - this committee consisted of a president, usually the Deputy Minister of Commerce and two other legal members as advisors. The decision taken by this Reviewing Committee was considered final.(63) This Committee ceased to exist in 1968 and since then the decisions passed by the Committees for the Settlement of Commercial Disputes were made final.(64) The procedural methods applied by the committees for the settlement of disputes are, in theory, the same as those defined by the Commercial Law which was issued in 1931(65) but, in practice, it has been noticed that the committees apply to a large extent the procedural methods applied by the Sharia Courts;(66) this could be referred to the members of these committes being qualified in Sharia matters, besides the procedural methods defined by the commercial law are the same as those applied by the Sharia courts. The commercial law does not state in details the procedural methods to be followed and applied, for example it does not specifically state what method should be taken when the parties fail to appear, when on the other hand the Sharia court deals with the problem by dropping the case.(67) It is therefore assumed that in such circumstances when the commercial law does not specify the certain

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(63) Council of Ministers Decision No. 186 of 7/9/1387 (1967)

(64) Council of Ministers Decision No. 1221 of 7/9/1387 (1968); Letter of the President of the Council of Ministers to the Minister of Interior No. 1018 of 18/1/1390 (1970); Letter of the President of the Council of Ministers No. 24753 of 16/12/1388 (1969).

(65) The Minister of Commerce & Industry Decision No 262 of 26/11/1384 (1965)

(66) Committee for the Settlement of Commercial Disputes (Riyadh) Decision No 1/90 of 1/1/1390 (1970) and Decision No. 24/90 of 7/3/1390 (1970)

(67) The Organisation of Administrative Functions in the Sharia Court System of 1952, Article 32.

rule, reference is then to be made to the application by the Sharia courts upon the understanding that the methods applied by both court systems are nearly the same.

3. The Committee For Securities (Lijan al-Awraq Tijariyya)

(i) Jurisdiction and Constitution

The jurisdiction on matters concerning fraud in securities used to lie with the Committees for the Settlement of Commercial Disputes. This jurisdiction was then given to separate committees called the Committees for Securities (lijan al-awraq al-tijariyya). In addition to hearing cases of fraud in securities, these committees were entitled to hear cases concerning the violation of the Law of Commercial Agencies (nizam al-wakalat al-tijariyya) and the Law of Weights and Measures (nizam al-muyayara wa al-magayis).(68)

The Committies for Securities are placed in Riyadh, Jeddah and Dammam, each consisting of a president and two other members. The decisions of these committees can be appealed for to the Ministry of Commerce.(69)

The Sharia courts can hear cases which fall under the jurisdiction of these committees (the Committee for the Settlement of Commercial Disputes and the Committee for Securities) if such cases are referred to them.(70)

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(68) Minister of Commerce and Industry Decision No. 1185 of 28/6/1389 (1969)

(69) Minister of Commerce and Industry Decision No. 729 of 7/11/1388 (1969)

(70) Committee for the Settlement of Commercial Disputes Decision No. 7/90 of 15/2/1390 (1970)

The aim behind the establishment of these committees was to make them the ultimate tribunals to decide the cases which fall within their jurisdiction but the Sharia courts are too powerful to be dispossessed of the general jurisdiction assigned to them. However, there is no way of comparison between the sufficiency of the Sharia courts and between that of these committees in commercial matters. In general, the committees usually handle cases which are technically complex.

XIV. THE GRIEVANCES BOARD

(i) Jurisdiction and Constitution

Grievances (mazalim) can have a very wide definition and in simple words it may be defined as when a dispute arises between two or more parties or if one party thinks that he has been treated without any justice. The person who was given the power to handle cases of grievances was known as wali al-Mazalim, who must possess both the power enjoyed by a governor and the knowledge of a judge.(71) He looked into grievances and corruption committed by officials or private individuals. This concept was not strange to the Islamic legal thought, it was practiced throughout the Islamic history. King Abdul Aziz accepted this concept after the conquest of Hijaz. He practiced the role of wali al-Mazalim and sat to hear the people's grievances. At a later stage a box for complaints was established and its key was kept with the King.(72)

As development took place in Saudi Arabia, the mazalim was, in turn, developed. The constitution of the Council of Ministers of 1954 established a

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(71) Abu Ya'La, M.B.H.., Al-Akham Al-sultaniyya. Cairo, 1938, p.58.

(72) Umm Al-Qura (the Saudi Arabian Official Gazette), June 7, 1926

public institution known as the Grievances Board (diwan al-muzalim)[73] which was assigned to the Council itself. The importance of this Board grew so that in 1955 a Royal Decree was issued re-organising the Board. Since then it has been a separate institution, with an independent identity headed by a president with the rank of Minister. Its president was directly responsible to the King, who was the highest authority for the Board.[74] However, when the constitution of the Council of Ministers of 1958 was introduced, the King's power on the Board was transferred to the president of the Council of Ministers.

The jurisdiction of the Board is as follows.[75]

(a) Registration of all complaints submitted to it.

(b) Investigation of every complaint submitted or referred to it and the preparation of a report on the complaint stating the facts, the results of the investigation, the action the Board recommends to be taken and the justifiable reasons behind the recommended action.

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(73) The Council of Ministers Law of 1954, Art. 19.

(74) Law of Grievances Board, Art. 1, Royal Decree No. 7/13/8759 of 17/9/1374 (1955)

(75) Royal Decree No. 2/13/9759 of 17/9/1374 (1954) Art. 2, The Jurisdiction of the Board.

(c) To send the said report to the concerned Minister or head of department concerned with copies to His Majesty's office and the Prime Minister's office. The concerned Minister or head of department should, within two weeks of receiving the report, notify the Board of his carrying out the recommended action or his objections to it. If he objects to the recommended actions, he should state his reasons for the objections. Accordingly, the president of the Board shall then submit a report to His Majesty the King who will issue a high order regarding the report.

In theory, the Board can look into a complaint against a judgement rendered by a Sharia court if the impartiality of the judge is challenged and if the procedure followed by him is alleged to be illegal.(76) The wide jurisdiction of the Board has begun to lessen considerably recently.(77)

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(76) Internal Regulations of the Board, Art. 6.

(77) Sadiq, M.T., Tatawwur al-Hukm wa al-Idara fi al-Mamlaka al-Arabiyya al-Saudiyya, Riyadh, 1965, pp. 145-146.

At present the Board decides the action to be taken on the enforcement of judgements of countries within the Arab league, disputes between Ministers and business companies in Saudi Arabia(78) and an appeal by a foreign business concern operating in Saudi Arabia against a decision withdrawing its licence or liquidating it.(79)

The Board is represented at tribunals and on committees which deal with certain crimes and offences i.e. bribery and forgery crimes, the contractors cases against governmental departments, military disciplinary offences involving officers of certain ranks.

The Board is located in Riyadh and has a branch in Jeddah. It consists of a president, a deputy president, a general director, an assistant general director, legal advisors on Sharia and other legal matters (the number was not determined by the law, however in practice there has been only one advisor on Sharia and on other legal matters), an unspecified number of examining

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(78) Council of Ministers Decision No. 58 of 17/1/1383 (1963)

(79) Law of Foreign Capital Investment (Art 10) Royal Decree No. M/4 of 2/2/1399 (1979)

magistrates (the number is to be determined according to need) and finally a clerical staff.(80)

The structure of the Board is now as follows.

(a) The Reviewing Committee consisting of a chairman, legal advisors, examining magistrates and a secretary.

(b) The Consultative Committee which is composed of the legal advisors.

(c) Some administrative departments.

(d) The Sharia section.

(e) The section of legal matters.

(f) The public treasury or revenue section.

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(80) Internal Regulations of the Grievances Board, Art. 2.

Each of the aforesaid sections consists of qualified examining magistrates who undertake the proper investigation in their own area of jurisdiction. The Law and the Internal Regulations of the Grievances Board do not state in a detailed process the types of cases in which it deals. The law and the regulations state that it handles complaints against governmental officials.(81) The Board has dealt with matters outside the sphere of government, for example the Board dealt with a complaint against a surgeon who operated on a patient, without the patient's full consent.(82)

(ii) Proceedings Before the Grievances Board

When a case is forwarded to the president of the Grievances Board, he refers it to one of the examining magistrates of the Board who must then undertake the necessary examination. An examining magistrate has the right to question a party or a witness about any matter related to the case in question. After the proper examination takes place the magistrate will then write his report and suggest the actions to be taken. This report must be forwarded to the Reviewing Committee for a final examination. The parties are not allowed to be present

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(81) Internal Regulations of the Board, Art. 5

(82) Harrington, C.W., 'The Saudi Arabian Council of Ministers', The Middle East Journal, vol. 12 Winter 1958, No. 1, p. 18

when the Reviewing committee sits to examine the related case. Each member of the committee will examine the case individually and form his own opinion. The members will then meet to form a collective opinion. If they do not agree on a collective opinion, then the opinion of the majority will be taken. If the case concerns a bribe then the report has to be referred to the Bribery Committee. The parties can attend the hearing conducted by the Bribery Committee and the trial is directed in a similar manner as that directed by both the Sharia courts and the commercial tribunals.

The proceedings has to be conducted in the Arabic language, and if one party is a foreigner who can not speak Arabic, he is then allowed to bring with him an interpreter whom he trusts or he may have one appointed by the court. According to the Commercial Law (83) the interpreter of a foreign language speaking for a party must take the oath.

According to the legal Hanbali texts (84) and to practice in the Saudi Arabian courts, the oath is usually administered in civil proceedings. The oath

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(83) Commercial Law, Art. 483

(84) Al-Mughni, Vol. XII, p. 126

is an important issue in the Saudi Arabian judiciary and has a religious and social background.*

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* A case was raised before the court of Abaùqiq, an oil town in Saudi Arabia between a Saudi worker and an American employee of the Arabian American Oil Company. The employee was accused of attacking the Saudi worker both verbally and physically. For the worker to prove his claim under the law, he must either present two witnesses, and if he could not do so, then the other alternative would be to demand the oath from the American employee (being the defendant). The Saudi worker (being the plaintiff) demanded the oath. The defendant did not know the meaning of the oath and it was explained to him as follows: "For a Muslim to lie under oath is considered a sin of a very serious nature, so the plaintiff is asking you to take the oath to swear that you are innocent, but if you do not take the oath you will then be found guilty, and, if you take the oath, it must be the truth". The defendant decided to take the oath and subsequently was found not guilty.

(An article by G.M. Baroody, quoted in Aramco World Magazine, Vol. 17 No. 6, 1966)

XV. COMMERCIAL DISPUTES

Settlement of Commercial Disputes by A Commercial Tribunal

(i) Jurisdiction and Constitution

The jurisdiction of the commercial tribunal covers the whole area of commercial disputes.

A commercial tribunal is empowered by a Royal Decree to hear commercial disputes and consists of a president and six other members; three of whom are honorary members, three of whom are permanent members, chosen for their experience in commercial problems and for their religious belief, and a seventh member specialised in the Sharia. All of the members mentioned above are appointed by the King. The Regulations state that arbitrators could be appointed to solve commercial disputes with the full consent of the concerned parties who must state if they will be bound or not by the arbitration.

If the tribunal accepts the arbitration agreement, and if arbitrators are appointed, arbitration cannot then be withdrawn, and the conditions of the agreement are binding upon the parties concerned.

It is to be mentioned here that the Kingdom has not, in the past, acknowledged international arbitration clauses in government contracts.

(ii) Procedures in Commercial Tribunals

Trial proceedings in the commercial tribunals are quite similar to those applied by the Sharia courts, whereas the proceedings in the other quasi-judicial tribunals are considered purely administrative; an exception to this would be the examining magistrates of the Grievances Board.

When the clerk of the tribunal starts the proceedings by recording the names of the parties, the president of the tribunal will request the identity of the parties. He then starts by asking the plaintiff to state his claim, and if he denies, the plaintiff is then asked to produce his evidence, and if he does so, the defendant will then be asked about the evidence. A considerable time will be given to him to plead against it and to produce his own evidence. This is done exactly in the same way as in the Sharia courts.

When a witness for a party lives outside the jurisdiction of the trial tribunal, that party is then given adequate time to bring his witness. If it is

rather difficult for the party to produce the testimony before the trial tribunal, he can demand that the testimony be taken by a court in whose jurisdiction the witness lives, even if this court is placed in a foreign country.(85)

The Commercial tribunals and the Sharia courts observe the same rules in regard to testimony and accept testimonies given by witnesses.

The Commercial tribunals do not state any limits on the admission of testimony delivered before any tribunal even if the tribunal is a foreign one, whereas the Sharia courts admit the testimony delivered by other than the original witnesses only when it is delivered before a Saudi court on the authorisation of the trial court. The usual practice is that the commercial tribunals, other than the Committee for the Settlement of Commercial Disputes, hear the criminal aspect of the case together with the civil aspect, if such a case stems from one act by the same defendant, since the evidence produced by the plaintiff to prove the civil aspect of the case will also prove the criminal aspect.

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(85) Commercial Law, Article 505.

Testimony rendered under the commercial law must comply with the principles of the Sharia. According to the Hanbali jurisprudence, the number of witnesses must be at least two for commercial offences under taz'ir*. The testimony regarding taz'ir is considered to be adequate if it is delivered by two adult male witnesses. The majority of the judges follow the Hanbali justification in this regard. The Court of Cassation in Riyadh has upheld this principle.(86) It has, for example, changed a judgement of a first Magistrate's Court on the grounds that it pronounced a sentence of taz'ir according to the evidence of only one witness.(87)

In principle, the testimony of experts is usually accepted in Sharia courts. According to the Sharia, testimony cannot be accepted unless the judge is satisfied that it is relevant to the facts in question. As well, testimony must be free from any motive. Its aim must be to secure the fair dealing of the case in issue. The testimony of witnesses, according to the Commercial Law(88) is submitted and delivered in a way similar to that followed by the Sharia courts. The testimony of experts must be forwarded to the commercial tribunal in a written report.(89)

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* Please refer to footnote No. 10

(86) Court of Cassation (Riyadh) No. 61 of 1384 (1964) quoted in memorandum of First Magistrates Court (Riyadh) to the President of the Judiciary No. 2000 of 13/9/1388.

(87) Court of Cassation (Riyadh) No. 174/2 of 1389 (1969)

(88) Commercial Law, Article 505

(89) Ibid., Article 501.

The recognition of "documents", official or otherwise, as a proof of evidence, is taken into consideration in civil proceedings.

The commercial law states that a commercial judicial authority has the right to request the production of documents from either private or public custody. Public departments and institutions usually respond to the request of the tribunals for discovery of relevant documents. The commercial law states that whenever the alleged executor of a document denies his connection with it, or if allegaiton of falsification or alteration of a document arises, the tribunal must set up a commission of at least three experts of good moral standard to investigate the signature, the authenticity of the handwriting of the alleged executor and compare them with those appearing in the document.(90)

Some argue that the proceedings in the Saudi Arabian courts are managed exactly in the same way set in the works of the ancient classical Muslim jurists and according to fixed methods. That cannot be so because even

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(90) Commercial Law, Article 501

the classical Muslim Jurists themselves decided most methods of court procedure according to the needs of the time. It is an admission by the classical Jurists to the needs of their time. A follow-up study of the Islamic court procedure throughout the years can show that quite clearly. At present, even the very strict Muslim Jurists state that most, if not all, procedural methods are not fixed by the Sharia and that they can be adapted to changing circumstances. A look at the Saudi Arabian courts will tell us that these courts do not apply procedural methods which are set by the classical jurists and this evidences a continuing evolutionary process of the legal system.

(iii) The Chambers of Commerce and Industry

The Chambers of Commerce[91] and Industry are set to protect and to develop the commercial and industrial interests of the nation. The chamber is formed by a joint decision between the Minister of Commerce and the Minister of Industry and Electricity.* The decision states the location of the chamber, its jurisdiction and the number of subscribers. Chapter two of the Law and in particular article (5), states the different jurisdiction of the chamber, sub-article (G) and (H) state that the chamber can settle the commercial and industrial disputes by way of arbitration if the parties to the dispute agree to refer it to the chamber.

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(91) The new chamber of Commerce and Industry law issued by the Royal decree No. M/6 fo 30/4/1400 (1980).

* The Ministry of commerce and Industry was re-organized into two Ministries, one for Commerce and the other for Industry and Electricity in 1975.

(iv) The Court's Practice Regarding Contractual Provisions and Problems in Saudi Arabia

The conditions stated in the contract are applicable and are binding on the contracting parties as long as they do not breach the principles of the Sharia. The Saudi Arabian courts acknowledge these conditions and enforce them.

The parties to a contract between a Saudi party and a foreign party, let us say between a Saudi company and a foreign company, can, according to their own free will, decide on the law* which govern their obligations and on the method of settlement when a dispute arises. Attention should be given to the principle of arbitration as arbitration clauses can be found in 90% of the contracts in the country. If the parties cannot agree on the method to solve their dispute, the dispute then lies with the Board for the settlement of Commercial Disputes.(92) This Board consists of two judges qualified in Islamic law and a third judge who is qualified in commercial law and practice.

The Board acts as a court and is not bound by its own precedents. Proceedings before the Board is carried out in the Arabic language and its procedure causes lengthy hearings. In cases of contracts regarding

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* But because Saudi law has no conflicts of law provisions, Saudi courts and tribunals will always apply domestic law.

(92) This Board is formed by special law and it has its own procedure.

private concerns, an arbitration clause should be inserted to avoid any difficulties which may otherwise arise.

If the parties, for example, stipulate that a foreign law is the law which governs their obligation and even the law clauses stipulated are most probably acknowledged and applied by the courts of Saudi Arabia. If a government office or institution submits to the normal procedural form of arbitration or if it submits to a foreign law as the governing law then such submission is neither acknowledged nor applied by the Saudi Arabian system. When a dispute arises between a governmental institution and other parties, the case should then be referred to the Grivances Board. The decisions taken by the Board must be approved by either the King or the Prime Minister.

Labour contractings are not allowed in Saudi Arabia unless the labour contractor works as a government licensed private employment agent. It is stated by the Labour Law that if a company which is functioning in Saudi Arabia sub-contracts part of its job, the contracting company is legally responsible for the sub-contractor's execution of the terms of the contract of employment. The contractor's responsibility ceases when the contract terminates. If the contractor does not

apply the rules of the law, the Ministry of Labour, after special inquiry, has the right to annul the contract.(93)

(v) The Practice in International Contracts

It is well known that in international contracts the usual practice is to apply a sort of institutional arrangement such as arbitration by the International Chamber of Commerce for the settlement of disputes.

Arbitration can be used as a substitute to judicial proceedings which are often time consuming, but including an arbitration clause does not always preclude judicial(94) intervention.

If a contract is concluded between a foreign company and a private Saudi company, or a commercial company owned by a Saudi governmental institution, and a dispute arises, the attitude of the Saudi court is as follows. The private parties can state whatever method they chose for the settlement of their disputes; they can, for example, refer their dispute to international arbitration. The Saudi courts acknowledge and apply arbitration clauses

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(93) Labour Law of 1969, Article 141.

(94) Some countries do not enforce arbitration awards.

but foreign judgements are not. Let us say that a party got an award in International arbitration and let us suppose that the award was made a judgement in a court of foreign jurisdiction and if the party wanted to apply and execute the award against a property in Saudi Arabia, the conduct of the Saudi court would be to arrange a new hearing on the essence of the case before allowing execution on property in the Kingdom.

When the parties do not agree on the method of solving their disputes, the case is then referred to the Board for the Settlement of Commercial Disputes (see Courts Practice to Contractual Provisions in Saudi Arabia).

It appears that companies established by the Saudi Goverment to engage in commercial activities are allowed to accept international arbitration. If a contract is concluded between a foreign company and a non-commercial agency or institution of the Saudi government and where a dispute arises, then the attitude of the Saudi court is as follows:

In 1963 governmental agencies and institutions were prohibited from accepting international arbitration as a method for the settlement of disputes.*

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* Council of Ministers Decision of 1963.

A dispute was to be referred to the Grievances Board (see the section on Grievances Board).

The laws which apply to Saudi government department contract disputes are the management Regulations as well as the terms of the contract itself. The regulations concerning this matter state that the contractor's application for relief is limited to the cases where the contractor depended upon the government whose act or omission caused damages or injuries to the contractor e.g. where a government agency changes the specifications of the contract or issues a suspension order not based on the contractor's fault. The Grievances Board is the one empowered to look into these cases and its decisions are final.

XVI. THE LABOUR COMMITTES

(i) Jurisdiction and Constitution

The first labour and workmen law to be established in the Kingdom was in 1366 (1946). The law stated that in cases of dispute between workers and employers, either party had the right to put their case into arbitration. The arbitration suit consisted usually of two members (appointed by the worker and the government). The law also stated that if arbitration fails to solve the case then the local courts or the judicial committees which are established for such purpose would be the concerned authority to solve these problems. This method kept labour disputes outside the Sharia jurisdiction (which was the past informal settlement acknowledged by the people of the land). A system of arbitration or the reference to certain judicial committees, was established to solve labour disputes.

In 1389 (1969) the new labour and workmen law came into being, chapter eleven of the law dealt with labour committees and the settlement of labour disputes.(95) Article 172 referred to two institutions which are considered as courts of first instance and known as primary and high

(95) Labour law, Royal Decree No. M/21 dated 6/9/1389 (1969) Articles 173-188

committees.[96] A case must be filed with the primary committee in the region of employment. Decisions are final unless a party wants to appeal, then he must do so within thirty days of it being served. A date will be set for the hearing within fifteen days from the date of filing the appeal. A decision will then be rendered by the appellate committee within thirty days from the date of the first hearing. Disputes can be referred by mutual consent to arbitration and unless otherwise agreed upon, an arbitration award can be appealed before the higher committee. For example, if a labourer is not satisfied with the management's decision he can then take his case to the '_Amir_'[97] and the _Amir_ might ask him to take his case to the local labour office. If agreement is not reached, then the case must be sent to the Grievances Board,[98] and from there it may be taken to the Court of Appeals. Other resources are the Sharia court or an appeal directly to the King.

A record of court cases covering the period 1950 to 1959 shows that management actions were maintained in 63% of all cases, reversed in 17% of cases and modified in 20% of cases.

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(96) Courts of first instance;(primary commission)consists of 3 members who handle all disputes initially and have final jurisdiction over those involving not more than SR 3,000 in industrial injuries cases, termination of services cases and disputes over fines, (High Commission) consists of 5 members who handle all cases of appeal.

(97) '_Amir_' - Ruler or Governor of the area.

(98) Grievance Board - serves as the highest administrative tribunal.

XVII. THE BRIBERY COMMITTEE (Lijan Mukafhat al-Rishwa)

(i) Jurisdiction and Constitution

The Bribery Committee was formed in accordance with the Law of Combatting Bribery(99) of 1962, to investigate the bribes committed by the public employees in their line of duty. The investigation is usually carried out by a member of the Grievances Board and a member of the police force. The crime is then referred to a committee of three members, the president of the Grievances Board or his deputy as a president, a legal advisor from the Grievances Board and another legal advisor appointed by the council of Ministers. The decisions of the Bribery Committee must be ratified by the president of the council of Ministers and are considered final.

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(99) Nizam Mukafhat al-Rishwa, Royal Decrees Nos. 15 and 16 of 7/3/1382 (1962)

XVIII. THE CUSTOMS COMMITTEE (Al-Lijan al-Jumrukiyya)

The Customs Law of 1952[100] established several committees of first instance jurisdiction.

(i) Jurisdiction and Constitution

The committees are empowered to investigate and decide on crimes of smuggling and attempted smuggling within their territorial jurisdiction.[101] Its decisions are appealable to the Appellate Customs Committee.[102] According to the Regulations,[103] an appellate tribunal, called the Appellate Customs Committee (al-Lijan al Jumrikiyya al-Isti'nafiyya), was established to review the decisions of the customs Committes of first instance. In 1971 the Committee was replaced by two appellate committees in Riyadh and Jeddah. The decisions of the Appellate Customs committees must be approved by the Minister of Finance.[104]

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(100) Nizam al-Jamarik wa al-La'iha al-Tanfidhiyaa (1952) The Customs Law and the Customs Regulation.

(101) Commercial Law, Article 52

(102) Customs Regulations, Articles 257, 264

(103) Ibid., Article 257

(104) Minister of Finance, Decision No. 4/1907 or 30/7/1391 (1971) amended by Ministerial decision No. 3/193 of 16/1/1398 (1978)

The number of members of the Customs Committees varies and the Appellate Customs Committee consists of a president and two other members who are appointed by the Minister of Finance.

XIX. THE FORGERY COMMITTEE (Lijan Mukafahat al-tazwir)

(i) Jurisdiction and Constitution

Penalties for crimes of forgery of money were set out in 1960[105] and in 1961 a law was introduced[106] to combat forgery (nizam mukafahat al-tazwir). This was amended by a Royal Decree in 1963.[107] There was no separate department, committee or authority, before 1960, to deal with cases involving forgery. Cases of such nature were left to the President of the Council of Minsiters, the Minister of Finance and National Economy, and the Minister of Interior, each within his jurisdiction. In 1966 the council of Ministers decided that a special committee for trying crimes of forgery was to be established. The decisions of the committee has to be approved by the President of the Council of Ministers.

The committee consisted of a president (usually the Minister of Interior or a deputy), two members of the Grievances Board, a member from the Ministry of Interior and a legal advisor from the Council of Ministers.[108] The Council of Ministers' decision No. 735 of 9/9/1391 (1971) transferred the investigation in forgery cases in to the investigation committee referred to in the bribery committee which is formed of a member of the Grievances Board and a member of the police force. The council's decision No. 1230 of 23/10/1391 (1971) emphasized that after the investigation, the crimes are then referred to the three members committee the one stated in the Bribery Committee and the decisions must be ratified by the President of the Council of Ministers and are considered final.

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(105) Royal Decree No. 12 of 20/7/1379 (1960)
(106) Royal Decree No. 114 of 26/11/1380 (1961)
(107) Royal Decree No. 53 of 5/11/1382 (1963)
(108) Council of Ministers Decision No. 214 of 10/3/1386 (1966)

Finally it is submitted that the separation and the very independence of the judicial power together with the highest authority of the principles of the Sharia affirms the process of justice.

The cases are handled in a speedy manner and with competancy especially in the Sharia courts, which form the main part of the judiciary. All if not most decisions can be appealed against. The quasi-judicial tribunals recognize any judgement passed by a Sharia court, without any questioning to procedure, admission or to any relevant aspect.

CHAPTER THREE

AL-QADA AND THE ROLE OF THE QADI IN ISLAM WITH REFERENCE TO THEIR HISTORICAL BACKGROUND

I. JUDICIARY (AL-QADA) - DEFINITION

(i) Literally
(ii) In the Sharia
(iii) Its Legality

II. HISTORICAL BACKGROUND

(i) Al-Qada in Islam
(ii) Al-Qada During the Prophet's Time
(iii) Al-Qada During the Caliphs' Time
(iv) Al-Qada During the Ummayyads Period
(v) Al-Qada During the Abbasids Period

III. THE PRINCIPLES OF AL-QADA

IV. THE ELEMENTS OF AL-QADA

V. THE CONCEPT OF THE JUDGE (QADI)

(i) The Characteristic Behaviour of the Judge
(ii) The Qadi in Present Day Saudi Arabia
(iii) Conditions of Appointment
(iv) Dismissal of Judges

VI. GUIDANCE TO JUDGES BY A PRACTICE OF THE PROPHET

I. DEFINITION

(i) Al-Qada Literally

The word qada has several different meanings such as 'to finish' as in God's words:

> "Then when Zayd had finished (his marriage) with her, with the necessary (formality), we joined her in marriage to thee".

It means to settle, so as to say that Mohammad has settled his debt.

It also means 'the rule' as in God's words:

> "Thy Lord hath ruled that ye worship none but Him". (109)

In this instance al-qada in principle is the rule of something and its accomplishment.

Al-qada can also mean 'the sanction of a judgement' as in God's words:

> "And we gave (clear) warning to the children of Israel.."

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(109) The Holy Quran, Sura xxxiii - "Ahzab" or "The Confederates", verse 37.

Therefore the ruler is called a judge because he sanctions and renders judgement, qada as well means to compel and so the judge is called a qadi for compelling a judgement.

It is the latter meaning of al-qada, that is, judging and judgement,(110) which concerns us here.

(ii) Al-Qada in the Sharia

Most Muslim jurists define al-qada as an obligatory rule.(111) Ibn Rushid said "it is an obligatory legal rule". Ibn Abideen said according to Ali'm Qassem that it is an obligation in certain ijtihad cases where there is a dispute. Al-Tahanawee said "it is an obligatory saying issued by the authority".

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(110) Its origin in Arabic is " قضاى " (qadee) from the word " قضيت " (qadeeta) but when the letter " ى " " e" comes after the letter " ا " " ā" (long vowel) will turn into a letter called hamza " ء " " a" (consonental sound) and the plural of the word will then be judgements (aqdiyya),exactly like the case (al-qadiyya), and its plural, the cases (al-qadayya) It could be said 'he destroyed him' (qada ala'ihee) 'to judge' (yaqdee), 'judiciary' (qada), 'case' (qadiyya) and 'judge' (qadi) - Madkur, M.S. - Al-Qada Fi'l Islam - A Study of the Judiciary System in Islam. Cairo (1964). p.11

(111) Majallat Rabitat al-A'lam al Islami, Vol. 7, p. 45 (1977) and Hashyyat ibn Abedeen, Vol. 2

Some say that al-qada means the mutual understanding between the Creator and His creation, to obey His orders and abide by His rules. It is quite clear from the previous definitions that in al-qada there is an obligatory element where as in al-fatwa* such element does not exist.

(iii) Its Legality

The main basis of al-qada and its legality is in The Quran, the Sunna and the Ijam (consensus of scholars).

In the Quran, as stated in the following verses:

> And this (He commands): Judge thou between them by what God hath revealed. (112)

> We have sent down to thee the Book in truth That thou mightest judge between men, as guided by God: So be not (used) as an advocate by those who betray their trust. (113)

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* Fatwa (legal opinion). The words futya, fatwa or ifta, represent the principle of mashura (consultancy) in answering legal or religious questions in connection to the Islamic judicial system.

(112) The Holy Quran, Sura v. - "Maida" or "The Table Spread", verse 52.

(113) The Holy Quran, Sura IV - "Al-Nisa" or "The Women", verse 105.

O ye who believe! Stand out firmly for
justice as witnesses to God, even as
against yourselves. (114)

They ask thy instruction
concerning the women
Say: God doth (115)

In the Sunna,[116] Amro bin al-A's states the following saying of the Prophet, "if the governor gave a judgement according to his own legal opinion (ijtihad) and was correct then he will be rewarded twice, but if his judgement was wrong, then he will be rewarded once and only once".

Ijam (consensus of scholars on certain problems, where no solution for these problems are stated in either The Quran or The Sunna).

Most Muslim jurists agreed on the legality of the judiciary and on the settlement of disputes. Ahmad said "There should be a governor to settle litigations. Should the rights of the litigants be wasted?"

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(114) The Holy Quran, Sura IV - "Al-Nisa" or "The Women" verse 135.

(115) Ibid, v. 127

(116) Ibn Quadama - Al-Mughni wa al Sharh al Kabeer - Volume II, Kitab al-Qada, p. 373

II. HISTORICAL BACKGROUND

There did not exist an organised state among the Arabs before the revelation of Islam which made it difficult to maintain any positive legislation. All legislation was based on the customs, morals, beliefs and practice of the community.

The Bedouin's customary law consisted mainly of the Bedouin's social customs and habits and was based on the concept of personal revenge. All cases were to be referred to the tribal law. The absence of an organised authority among the Bedouins and the non-Bedouins, could be related to the absence of a well established judicial system. A sort of tribal judiciary operated in a manner which corresponded with the people's life and beliefs.

The Arabs acknowledged the concept of arbitration and they used to refer their disputes to an arbitrator (hakam). If the parties in dispute failed to solve their case in negotiations, then the case was put to arbitration, under the consent and approval of the parties concerned. The parties could choose any person as arbitrator. Besides

his personal qualities and reputation, the arbitrator should possess knowledge and wisdom. Certain people among the Arabs were skilful in deciding law cases such as those known to foretell the future. Some families and clans got the reputation of dealing with legal questions. The parties who usually refer their dispute to arbitration, agree on the points which they want to raise before the arbitration suit. The person who was chosen to act as arbitrator could either accept or refuse the appointment. The arbitrator's decision was not a judgement, but rather a statement of rights in a disputed case which was usually accepted by the parties. This decision is a pure legal statement of law, thus the functions of an arbitrator became that of a legislator. This legal justification of the customs and beliefs of the tribe constituted the method of arbitration.

Although Islam changed many of these conditions and methods, traces of some of them remained in Islamic law.

Hearing both parties to a case, and the principles of Natural Justice, were the main aspects of the method

of arbitration. "The onus of proof is on the claimant and the taking of an oath is incumbent upon who denies."(117) This fundamental hadith is a clear indication to the plaintiff to prove his claim, and if he cannot prove it then he can demand the oath from the defendant. Islam adopted this principle from the pre-Islamic legal thought of the Arabs.

Islam brought equal status among the people in the eyes of God. The Quran and the Sunna introduced a new religion to the world, laying down certain laws to govern the new relationship between people. Thus a new social system was introduced.

(i) Al-Qada in Islam

To a Muslim, there is no difference between his everyday life and his religious obligations. Each is part of the other. A Muslim does not have the choice to believe in something and yet deny it. He has no choice but to follow in his day to day life the path set by God.

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(117) An-Nawawi - Forty Hadith, translated by Ezzedin Ibrahim - Denys J. Davies (1976), Hadith 33, p. 108.

> It is not fitting for a Believer, man or woman. When a matter has been decided by God and his Apostle, to have any option about their decision. If anyone disobeys God and His Apostle, he is indeed on a clearly wrong path. (118)

In this respect Islam brought together the religious obligations and the daily obligations to other fellowmen, and so besides the Prophet's functions to educate, guide and preach, he also settled litigation between parties.

Justice is one of the main principles of The Quran. God asked the messengers and prophets that came before Mohammad to be his representatives on earth and to establish his teachings.

> Behold, thy Lord said to the angels: "I will create a vice regent on earth". (119)
>
> O David! We did indeed make thee a vice regent on earth: so judge thou between men in truth (and justice): Nor follow thou the lusts (of the heart), for they will mislead thee from the path of God. (120)

David settled litigation and rendered judgements. Some of David's judgements are mentioned in the following verse of the Quran.

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(118) The Holy Quran, Sura xxxiii - "Ahzab" or "The Confederates", verse 36.

(119) The Holy Quran, Sura II - "Al Baqara" or "The Cow", verse 30

(120) The Holy Quran, Sura xxxviii - "Sa'd" being one of the abbreviated letters) verse 26.

> And remember David and Solomon, when they gave judgement in the matter of the field into which the sheep of certain people had strayed by night: we did witness their judgement. To Solomon we inspired the (right) understanding of the matter: to each (of them) we gave judgement and knowledge. (121)

Al-Nabahee said "al-qada is one of the respectable jobs God had given. Judges have a certain position and rank in life. God asked them to render judgements in the lawful and unlawful things and this was the Prophet's method and the Caliphs' after him. It is a sincere job and it comes in importances after the Caliphate power".(122)

The judicial methods referred to during and after the Prophet's time were of two categories. Firstly, arbitration, and secondly, to bring the dispute before a judge.

In the case of arbitration, when the two disputing parties refer their problem to an arbitrator to settle between them, they normally accept his decision. Arbitration was known before Islam.(123) For example when Alqama ibn O-lath and Amer bin Al-Tafeel referred their

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(121) The Holy Quran, Sura XXI - "Anbiyaa" or "The Prophet's" - verses 78-79

(122) Tarikh Quadat al-Andalus, p.2

(123) Majallat Rabitat al-A'alm al-Islami, Volume 7, p. 47 (1977).

dispute over the chiefdom of their tribe to a chief of another tribe, they entered into a competition in horsemanship, courage and poetry for a period of two years. Both were equally competent, courageous and poetic. The arbitrator could not prefer one to the other, and so ruled that both were equally competent for the chiefdom of their tribe. They accepted the judgement and both joined in it.

Islam affirms the method of arbitration. God says:

> If ye fear a breach between them twain appoint (two) arbiters one from his family and the other from hers; if they wish for peace, God will cause their reconciliation: for God hath full knowledge and is acquainted with all things. (124)

The second method is to bring the dispute before a judge who is appointed by a high authority. The Prophet himself was the highest judge in the land and the first and the last reference in all matters that concerned Muslims. It was an appointment by God, as in his words:

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(124) The Holy Quran, Sura IV - "Al-Nisa" or "The Women", verse 35.

> But no, by the Lord, They can have no (real) faith, until they make thee judge in all disputes between them, and find in their souls no resistance against Thy decisions, but accept Them with the fullest conviction. (125)

Al-qadi in Islam is not merely the mouthpiece for a religious rule nor the executor of that rule. His task is to find the correct judgement from the particular facts of a case, using both his legal skill and his gift of understanding, especially where there are no direct legal rules or pronouncements upon which to base his judgement. This understanding is a gift from the Creator to His creation. Quite apart from the necessary legal knowledge which he must possess, God referred to Solomon for understanding and to Solomon and David for their legal knowledge, as is stated in the following verse of The Quran:

> And remember David and Solomon, When they gave judgement in the matter of the field into which the sheep of certain people had strayed by night; we did witness their judgement. To Solomon We inspired the (right) understanding of the matter: to each (of them) we gave judgement and knowledge. (126)

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(125) The Holy Quran, Sura IV - "Al-Nisa" or "The Women", verse 65.

(126) The Holy Quran, Sura XXI - "Anbiya" or "The Prophet's", verses 78-79.

(ii) Al-Qada During the Prophet's Time

Mohammad (the Prophet) came as a religious leader to re-construct the Muslim community. He settled disputes. The Prophet was asked to act as an arbitrator in tribal disputes and thus became the leader of the Muslim community and its legal professor.(127) He took the job of a judge in the community and carried out working as an arbitrator (hakam). In the verses of the Quran which refer to the Prophet's judicial authity, the word to rule (hakama) and its derivatives are expressed, when on the other hand the word qada from which the term qadi is originated is referred to in the Quran not as a judgement of a judge, but to a supreme religious rite, either of Allah or of the Prophet. In a single verse both words occur:

> But no, by they Lord
> They can have
> No (real) Faith,
> Until they make thee judge (hakam)
> In all disputes between them,
> And find in their souls
> No resistance against
> Thy decisions (gada) but accept
> Them with the fullest conviction.

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(127) Khadduri, M. and Liebensy, H., The introductory section is taken from the Law in the Middle East, Volume 1, 'Origin and Development of Islamic Law". London (1955), p. 30.

The first word, judge (hakam), refers to the Prophet as an arbitrator, when the word decisions (qada) indicated the prophet's decision and the full authority behind the decision. This creates a new Islamic principle, the principle to administer justice. The prophet acting as a judge (hakam) gave great significance to this concept.

The Prophet used to judge at first view in cases with sufficient evidence, and by oath when there was no evidence. His judgement was by ijtihad.(128)

Al-Bukhari and Muslim wrote that two parties who referred their dispute to the Prophet were told:

> I am no more than a human being, like you and you refer your dispute to me and probably one of you is more clever and skilful in his proof than the other, and so I might judge accordingly. (129)

The Prophet used to say:

> The onus of proof is on the claimant and the taking of an oath is incumbent upon him who denies.

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(128) Madkur, M.S., Al-Qada fi'l Islam, Cairo (1964), p. 22

(129) Ibid. p. 22

The Prophet sent Ali, the last of the four guided Caliphs, as a judge to Yemen and he instructed him in the following words:-

> If the two parties refer their dispute to you, do not judge unless you hear from both of them, it is much safer and more just.

He sent Mua'z bin Jabal as a judge to Yemen after its conquest and he raised with him the following questions:

Question:	How would you judge?
Answer:	According to the Book of God.
Question:	If you cannot find a solution in the Book of God, how would you then Judge?
Answer:	According to the Sunna of His Prophet.
Question:	And, if you cannot find a solution in the Sunna of his Prophet?
Answer:	I will judge according to my ijtihad.

The Prophet then showed signs of satisfaction.

Malik in Al-Muwata'[130] states that Abee Huraira said that two men referred their dispute to the Prophet

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(130) Al-Muwata' - (A collection of traditions) Imam Malik Ibn Anas, kitab al - Hudud, p. 513. (no date is given).

and one of them said, "Oh, Prophet of God settle and judge between us according to God's Book", and the other repeated, "Yes Prophet of God, Judge between us according to God's Book, and may I speak? "My son committed adultery with the other's wife and I was told that my son should be stoned. I offered a hundred sheep and a slave, I asked the people of knowledge and they told me that my son should be flogged one hundred times and be kept away for a year and that the other's wife should be stoned". The Propet answered "What can I do but to judge according to God's Book? Your son should be flogged one hundred times and kept away for one year. Your sheep and slave will be returned back to you." The Prophet ordered Anis Al-Aslami to go to the woman and ask her and if she confesses, then she should be stoned, and the execution was carried out.

In a case where one party (a plaintiff) from al-Medina put his case against another party (a defendant) to the prophet. The subject of the case was that the defendant's date trees have extended to the plaintiff's land and so caused the plaintiff a substantial damage.

The prophet ordered that the trees should be removed.

(iii) Al-Qada During the Caliphs' Time (632-661 A.D.)

The four guided caliphs acknowledged the principle of arbitration and so the principle survived during this period. An example is when Omar bin al-khatab and Abee bin Kae'b referred their dispute to Zaid bin Thabet. Ali bin Abbee Taleb and Mou'aweyya bin Abee Suffyyan after ages of fierce fighting, referred their quarrel to Abu Mossa al-Ashari and Amro bin al-A's.

Al-qada remained the same without any main change during the time of the first Caliph, Abu Bakr. The Caliphs used to instruct and direct the judges and the governors of the Muslim state. In his letter to the governors and to the judges of the state, umar, the second guided caliph, put down some of the most fundamental rules of judicial procedure. In his letter to Abu Mossa al-Ashari,(131) he directed him in the following words:

> Let not a judgement in a case which you have ruled, but which you reviewed again in your conscience, and were guided in it to a more sound judgement, be an obstacle to you from returning to the decision which you know is right, because what is right can never be cancelled by anything.

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(131) Mudkur, M.S. - Al-Qada fi'l Islam, Cairo (1964), p. 27

In another case brought before Umar bin Al-Katab, (the second guided caliph) a plaintiff wanted water to reach his land; and the only way was by digging a canal through the defendant's land but the defendant did not allow the plaintiff to do so. Umar instructed the defendant in the following words: "Why prevent your brother in Islam from something beneficial to both of you?" Umar did not accept the refusal of the defendant and ruled in favour of the plaintiff.(132)

The first house for the judiciary (dar al-qada) to be established was at the time of ottoman bin Afan (the third guided caliph).

Ali bin Abee Taleb (the fourth guided caliph) was the most skilful qadi in the land. The Prophet used to say: "the most knowledgeable judge among you is Ali" (aqdakum Ali). Umar bin Al-Khatab used to say: "I will be in trouble without Ali" (Lawla Ali lahalik Umar).

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(132) Quoted in: "Yamani, A.Z., Islamic Law and Contemporary Issues, (1968) p. 22 "case of al-Dahak M. bin M."

In general the Caliph used to refer the cases to the Book and then the Sunna, they used to refer cases to those ula'ma who are more knowledgeable in the Sunna.

The Caliphs used to refer to the principle of ijtihad as well, and it is usually a collective ijtihad when the case concerns the nation and a single ijtijad when it concerns the individual.

(iv) Al-Qada During the Ummayyad Period (661-750 A.D.)

A special office known as "The office of the Judge" was introduced (133) during this period of the Arab history. The governors of the Ummyyads, appointed Islamic judges (qudat) for the new community, this could clearly be noticed especially after their conquest of the urban areas of the newly expanding state. The governors used to have full power in every field over their provinces, in accordance with the rules set by the Caliph. In the judicial field the governor was allowed to delegate this judicial power to a judge, in matters related to Muslims only. Other minorities and groups retained their own legal methods.

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(133) Khadduri, M. and Liebesny H., Law in the Middle East, (1955), p. 37.

At the early stages of this period, the Islamic judges were considered the employees of the administration. The main principles of the Islamic law were introduced, these principles were drawn up by the decisions passed by the judges of the state. Their judgement was usually based on their own opinion, according to their customary practice, provided this was not in conflict with the theme of the Quran. The judge's job took a sort of specialization and appointments for the job were made to those with more legal experience.

(v) Al-Qada During the Abbasids Period (750-847 A.D.)

There was a considerable change to the principle of al-qada during this period of the nation's history. The close relationship between the Sharia and "The office of the judge" was apparent during this period, for a judge to be appointed he must possess the proper Sharia knowledge and was usually chosen from those judges in the centre or the state. This procedure gave way to a new office to be established known as "The office of the chief judge" (qadi al-qudat)*. The abbasids caliphs used to refer the various problems of the state to the chief judge and they used to consider his opinion especially on the appointment of judges.

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* The first to preside over this office was the qadi Abu Yusuf.

III. THE PRINCIPLES OF AL-QADA

There are four principles of Al-Qada:[134]

(a) Testimony. (shahada)

(b) Oath. (yameen)

(c) To decline to answer questions or to take the oath. (nukol)

(d) Confession. (iqrar)

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(134) Bedayat Al-Mujtahid wa Nehayyat al-Muktasid, Vol. 2, Kitab al-Aqdiyya, p.462.

IV. THE ELEMENTS OF AL-QADA

There are five elements of Al-Qada:[135]

(a) A judge: appointed by the governor to settle litigation. (hakim)

(b) The judgement: what the judge pronounces to settle a case. (hukum)

(c) A right: a right is either a right of God or a right of an individual or both. (haq)

(d) A party who has infringed a right (defendant): the one against whom judgement is given i.e. the one against whom a right is enforced. (al mahkum ala'i hee)

(e) A party whose right has been infringed upon (plaintiff): the one in whose favour the judgement is given i.e. the one who has had the right enforced. (al-mahkum laho'o)

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(135) Madkur, M.S., Al-Qada Fi'l Islam, Cairo, 1964. pp. 16 - 18

V. THE CONCEPT OF THE JUDGE (QADI)

The Muslim state had not established itself at the time of the four guided Caliphs (al-kuhlafa'al rashideen) 632 - 661 A.D. A judge (qadi) was, and still is, the deputy of the governor or ruler of a province. The governors possessed all powers (Legislative, Executive & Judicial) over their areas of jurisdiction because of their job. After development took place in the Muslim state, the judges were the deputies of the authority which appointed them and they in turn could appoint deputies to help them. This procedure would give the appointing authority the right to end their appointment and this would then result in the lack of separation between the different powers.

The judge in Islam represented what is known as ordinary justice whereas other magistrates represented what is known as "extraordinary justice". This terminology observed from Roman practice, evidence of which can be found in Islamic practise.

The usual practice of the courts was the operation of the court and its procedure in accordance with set rules laid down by the legislator, this what was known as "Extraordinary Justice". When what was known as ordinary justice operated in a way without any set rules, judgements were based upon the judge's opinion taking into consideration the principles of justice.

The first of these practices was to be known as the qada and the second as the mazalim.

The judge's work within the judiciary could be defined by the works of the jurists known as the "collection of fiqh" - the jurisprudential work on public law.

When exercising ordinary justice, the judge had power to compel. The jurisdiction of the judge thus became more comprehensive. Similarly, the Maliki School gave the judge an extraordinary judicial power in order to provide a more just solution to any case.

Through the gradual development of the following concept, the judge became more knowledgeable of his office. This system consisted of the concept of arbitration between individuals and the protection of the individuals interests. The judges exercised certain functions which did not correspond to their jobs. It was normal for a judge to teach law, issue legal opinion (fatwas), act as the guardian of the interests of orphans, practise the job of public notary and be the administrator of (waqf), the ownerless, the dead and those who put their property for a religious cause.

The judges possessed religious character and for this reason their influence was felt in all fields and institutions of public law in the Islamic state.

The judges were called upon to inscribe at the time of the investiture of caliphs and also to depose a Caliph or ruler. The judges also had certain administrative powers.

The judicial functions of a judge as described by al-Mawardi are as follows:

(a) To settle the disputes between the people.

(b) To enforce the rights (Al-Huqoq).

(c) The appointment of judge's deputies.

(d) To look after the (waqf) property.

(e) The arrangement of testamentary dispositions (al-wassayyah).

(f) To protect the interests of the unmarried women and the orphans who have no guardian and in general to protect those members of the society who are in need of protection.

(g) To apply the (hudud).

(h) To supervise the courts' assistants.

(i) The supervision of witnesses (shuhud).

Muslim jurists have related both the judge's acts as judge in judicial proceedings and his judicial acts outside that sphere to the classification of the word

"judgement". They distinguish between the spoken judgement (al-hukum al-qawli), and the action of the judge (al-hukum al-fi'li), and the implied judgement (alhukum al Dimnee). The judgement, according to Islamic jurisprudence, consists of a decision given by the judge after the process of the judicial proceedings before him. When the judge acts as an administrator of property of which he is the guardian, it is considered fi'l. When the judgement includes certain characters such as when stating the party's triple name, it is considered Di'mn. It is stated by the jurist Ibn Farhun that the judge's functions according to a demand made by the interested party. This rule used to apply to cases of private interests but was later extended to cases of public interest. In a case of private interests, the victim usually brought the case before the judge, whereas in a case of public interest, the judge was empowered to act on his own initiative. Muslim jurists differed in their interpretation of the concept.

(i) The Characteristics of a Judge

These are stated in a work on jurisprudence and are as follows:(136)

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(136) Majallat Rabitat al a'lam al Islami, Vol. II, 1977, p. 42

(a) A judge should not judge when he is in an emotional or nervous state.

(b) A judge should not pass judgement until he has heard from both parties.

(c) Equality between both parties in seating before the judge.

(d) Equality between both parties in treatment.

(e) A judge should not raise his voice against either of the parties.

(f) A judge should not hear the case unless both parties are seated, so that both of them will deliver their case in comfort and peace.

(g) Equality between all ranks be they noble or non-noble, a slave or a free man.

(h) A judge should sit only during certain hours of the day.

(ii) The Qadi in Present Day Saudi Arabia

The role of the qadi has its origins in early Islam but its present day form and administration was

established by King Abdul Aziz after the unification of Saudi Arabia in the first quarter of this century.

Sharia theory and practice states that the head of state can act as a judge or can delegate this authority. King Abdul Aziz could have acted as a judge but he did not do so. Judges are appointed by a Royal Edict but their independence is unquestionable. Present day judges are chosen for their experience, seniority and religious belief.

A qadi is addressed as Your Reverence. His role is more than a judge. He is a religious leader and leads the prayers in the mosque, delivers sermons and advises the ruler on matters of religion. He hands down fatwas(137) when legal matters are referred to him. The connection between the legal and religious functions are logical in that law is based on religious teachings.

A putative qadi attends one of the Kingdom's preparatory religious schools for five years instead

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(137) Fatwa (legal opinion). The words futya, fatwa or ifta, represent the principle of mashura (consultancy) in answering legal or religious questions in connection to the Islamic judicial system.

of secondary school. He then attends one of the Sharia colleges for four years where he reads for the Sharia. The qadi is closely supervised during this period and due regard is paid to his conduct, piety, and in particular to his religious beliefs. His period at the Sharia college is the period during which he obtains the necessary legal knowledge. He then attends a higher judicial institute (138) for three years where he studies the religious problems facing the country due to progress and recommends solutions.

After this period, a Sharia graduate will either be appointed to the Sharia judiciary as a junior judge on recommendation of the judicial council or pass into a government institution, or take a position as a teacher in a religious institute.

The qadi is the central figure in a Sharia court and may carry out his function with the assistance of a junior qadi. The qadi maintains absolute control over the proceedings before him. His role is not merely to hear the facts before him but is also inquisitorial. His judgement is not only based on the

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(138) Royal Decree No. 4 of 12/3/1385 (1965) established a Higher Judicial Institute.

facts presented by the parties but he is to actively seek the truth by questioning the parties and witnesses at will and thereby to seek the truth. He will conclude a case by attempting to convince the parties to settle their differences by the honourable method of compromise (sulh) and will often recommend a basis for settlement.

In theory a judge is removable but in practice this is not so. In general, the judge can only be transferred by a judicial authority to another job, by decision of the majority of the judicial council under a Royal approval for misbehaviour, criminal offence or lack of competence. The judge can appeal the decision regarding his competence to the judicial council. Judges are only transferred to judicial jobs by a decision of the judicial council. The position is pensionable at the age of seventy.

The general proposition that a judge who is appointed to administer the law should do so under its protection, both independently and freely, without any fear of the consequences of their decisions, is well

established. Certain measures are taken by the law to guarantee their integrity. Judges should have respect from both individuals and officials because of the nature of their jobs.

Restrictions are imposed upon a judge in both his private and judicial freedoms which attempt to guarantee his impartiality and independence.* A judge should not proceed in a case in which he is a party or any case in which one party is a relative or descendent or wife. A judge cannot proceed in a case where there is a benefit for him, or where one of its parties is an enemy. A judge should not take any paper related to the case in question outside the court. The judge should not make any personal contact with any of the parties to the case in question outside the court. A judge should not take any other job outside his realm or indulge in any sort of business.

Members of the Sharia judiciary enjoy certain immunity which is not extended to members of a quasi-judicial tribunal.

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* The judge has complete independence and freedom in his realm in accordance with the rules of the Sharia. No one can infringe on his independence. This is emphasised by the Judiciary Bill issued by the Royal Decree No. N/1 dated 12/1/87 (67) and by the first chapter of The Judicial Law (Nizam al-Qada) issued by the Royal Decree No. M/64 of 14/7/1395 (1975).

(iii) Conditions of Appointment

During and after the Prophet's time judges were appointed by the Prophet or the Caliph or the Caliph might ask the governors of the provinces to appoint judges in their areas. Muslim jurists differ on the conditions but agree on the main principle[139] of appointment. A judge must be:

(a) A mature free man. A boy cannot be given the authority to render judgements and the judgement of a woman is not correct, but the Hanbalis differed on this and said that a woman could give a judgement but not in al-hudud or al-qisas cases because her testimony is not accepted. Al-Tubari allowed a woman to deliver judgements in every case without any exception and he compared that with her legality to give a legal opinion (fatwa).

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(139) Fath al-Qadeer, Vol. 5, p. 485.

(b) Wise. To be able to recognise and consider things and to solve problems according to his ability and skill.

(c) Muslim. Islam is a condition for the legality of a testimony of one Muslim to another Muslim. The Hanafi School states that a non-Muslim (zimi) could deliver a judgement in favour of a non-Muslim providing both parties are non-Muslim. Hanbalis, and Zahirriys as well as other schools accepted the testimony of a non-Muslim for probate of a Muslim's will. Where the testator died abroad the rule was based on the following verse from the Quran:

> O Ye who believe! When death approaches
> Any of you, (take) witnesses among yourselves
> When making Bequests, two just men of your
> Own (brotherhood) or others from outside if
> ye are journeying through the earth, and the
> chance of death befalls you (thus) (140)

Ibn Abas said, "Min Ghayrekum" "Or others from outside", in reference to those who can swear upon their own Book (e.g. Bible).

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(140) The Holy Quran, Sura V "Maida" or "The Table Spread", v. 109.

Abdullah A. bin Hanbal said that the testimony of a non-Muslim is acceptable on behalf of a Muslim in cases of inheritance exactly as in the case of death abroad. The Maliki School accepted the testimony of two non-Muslim doctors on behalf of a Muslim where there are no Muslim doctors. Ibn Taimiyya and Ahmad of the Hanbali School accepted the testimony of a non-Muslim in general. Some verses in the Quran do not specify that it is mandatory to be Muslim in order to be a witness.

> When you release their property to them,
> take witnesses in their presence: (141)

In another verse it is conditional that testimony should be given by a "just" Muslim.

> Thus when they fulfil Their term appointed,
> Either take them back on equitable terms or
> part with them on equitable terms; And take
> for witness Two persons from among you,
> Endued with justice (142)

Interpretation of this verse is that in cases of divorce, witnesses must be from among you i.e. Muslim.

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(141) The Holy Quran, Sura IV, "Nisa" or "The Women" v. 6.

(142) The Holy Quran, Sura LXV, "Talaq" or "Divorce", v. 2.

The testimony of a non-Muslim on behalf of a Muslim is not acceptable in divorce cases and in family law cases in general but is acceptable in other civil matters.

'Article 1794' of Majallat al-Ahkam al-Adliyya does not consider Islam as a condition and 'Article (1705)' does not state that a correct testimony can be given only by a Muslim. Al-Majalla deals with civil matters more so than family law matters. What if a non-Muslim is appointed to reside over the judiciary? It is stated as a legal opinion (fatwa) that if a non-Muslim is appointed by the head of state and then becomes a Msulim, any judgement passed by him is correct without the need for re-appointment. The same is true if he became an apostate and then returned to Islam. His judgement will also be correct.

(d) Just. The judge should be just, honest and decent. Hanafites say an immoral judge could be appointed to render judgements as long as he does not violate the Sharia. Shaffii does not accept this.

(e) Qualified in Shaira (and his judgements should be in accordance with the Sharia). The Hanafi state, and all other schools agree that he should also be a scholar. In Al-Hidayya wa Al-Enayya wa Al-Fatih, the concept of ijtihad is not a condition. Al-Ghazali said that it is difficult in modern time to combine conditions of justice and ijtihad. Jurists agreed that the judge could render a judgement in any of the rights; the Right of God or the right of the individual. They agreed also that a judgement should not justify a taboo, nor should it forbid a lawful act. They also agreed that a judgement could be passed on a present Muslim and differed on the absent one and on the People of the Book.

The judge is to settle between the parties at the same session and to hear from both parties by starting with the plaintiff.

(f) Physically fit. The rule is that a judge must be able to hear, see and speak. Muslim jurists differed on this point some saying that short-sighted persons could be appointed as a judge. They referred to the short-sighted Ibn Om-Maktoum who was appointed by the Prophet as a judge in Al-Madina.

They differed on the question of illiteracy, but it is quite clear that an illiterate person can be appointed as a judge because the Prophet himself was illiterate.

(iv) Dismissal of Judges

Judges are appointed by the head of state or by the judical authority. They can be dismissed by the head of the state or they can resign.(143) Some schools consider immorality as a reason for dismissal of a judge.

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(143) Madkur, M.S., Al-Qada Fi'l Islam, Cairo, 1964, p. 46.

VI. GUIDANCE TO JUDGES BY A PRACTISE OF THE PROPHET(144)

In 1955 American doctors at the Aramco Hospital were posed with a difficult legal problem. Under Islamic law a dead body of a Muslim cannot be violated. In the hospital there was a Muslim woman who was pregnant, but the foetus was lifeless. In order to save the mother an operation had to be performed. The doctors feared legal liability and sought the opinion of the qadi of the Sharia court of Dhahran. The qadi, having heard the facts and having given due consideration, gave the following opinion.

In the time of the Prophet a man was wandering in the desert. He was cold and ill. He was lightly clad and realised that if he could not find warm clothing he would die. He came upon the body of a dead Muslim, probably the victim of robbers, clad in warm clothing. He removed the dead man's clothes leaving the naked corpse exposed. He stripped the body and put the clothes on himself leaving the body unburied, and in doing so saved himself from death. The man came to a village where the Prophet was staying. Believing he had not shown respect for the dead, and thus offended

(144) Aramco World Magazine, Vol. 17, No. 6, 1966, p.27 An article by G.M. Baroody.

the Quran, he went and confessed his acts to the Prophet. The Prophet told him that as long as his deed was necessary to save his life, and as long as the person from whom he had taken the clothes was already dead, then in the eyes of God he had committed no wrong. The qadi thus instructed the American doctors that they could perform the necessary surgery on the unborn foetus providing it was necessary to save the mother's life. If they proceeded with this operation on the already lifeless foetus there would be no violation of the Sharia.

C H A P T E R F O U R

ISLAMIC LAW IN SAUDI ARABIA - ITS GENERAL PRINCIPLES WITH REFERENCE TO ITS HISTORICAL BACKGROUND

I. INTRODUCTION

II. POPULATION, HISTORICAL DEVELOPMENT - POLITICAL AND RELIGIOUS BACKGROUND OF SAUDI ARABIA

III. INSTITUTIONS OF GOVERNMENT, THE CONSTITUTION AND THE POWERS OF THE STATE IN SAUDI ARABIA

IV. PRINCIPLES OF ISLAMIC LAW

I. INTRODUCTION

The source of the legal system in Saudi Arabia is the Sharia.* The Hanbali School is the recognised school of law. The two scholars of this school most followed in Saudi Arabia are Ibn Taymiyya (661-728 H) and Ibn Qayyim al-Jawziyya** (691-751 H).

The legal provision are not codified and are to be found in certain Hanbali legal texts such as Al Mughni (by Ibn Quadama).

The basic theory is that law is the Divine Law of God, based on the Quran and the tradition of the Prophet and his companions. The King is the chief administrator of justice. He usually delegates his power to judges, and both are subject to the Sharia. Customary law, is accepted as long as it does not contradict the Sharia.

The King can only legislate within the limits of the Sharia and upon matters which are not the subject of The Quran or Sunna. If a draft law which he wants to apply, contradicts with the principle of the Sharia, then it cannot become law. Thus the legislative power of the King is limited by the Sharia. For example, a proposal to use cadavers of Saudi national in medical school, providing

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* The basic law of Saudi Arabia in civil and criminal matters is the Islamic law as witnessed in The Quran and The Sunnah. The rules of this law are administed by the Sharia courts.

** Referred to sometimes as the Ibn al-Jawziyaa.

the families of the deceased consented, could not necessarily become law, because the Sharia, for religious and moral reasons, does not accept this proposal and thus may rule against it.

Thus, legislation is confined solely to those matters upon which The Quran or Sunna do not touch. This administrative legislation is known as Regulation. The council of Ministers has the power to interprete these regulations. The interpretation of law in Saudi Arabia is not confined to the Hanbali School, but is also drawn from the general principles of the Sharia as interpreted by the other Sunni schools supplemented by Royal edicts and decisions of the Council of Ministers.

II. POPULATION, HISTORICAL, POLITICAL AND RELIGIOUS BACKGROUND

The present population of Saudi Arabia is approximately eight million. The Bedouin form about 25%, settled cultivators about 65% and urban dwellers about 10%. The largest towns are Riyadh (the political capital), Jeddah (the commercial capital), Mecca (the religious capital), Dharan, where the oil fields are found and Medina where the tomb and the mosque of the Prophet are located.

Most Muslims of Saudi Arabia belong to the Sunni* sect of Islam.

Saudi Arabian society has always been divided into two distinct classes. One class lived in permanent settlements and made their living by cultivating the land. The other class, the Bedouins, were nomadic(145) and lived by pasturing their flocks. All Arabs, whether Bedouin or non-Bedouin, were divided into large tribes and the tribes into smaller clans, each with its own traditions.

The land now known as Saudi Arabia was not conquered or subject to a foreign power in the general meaning of the word and therefore the influence of foreign legislation or administration was not great. Thus the Saudi legal

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* There are two sects within Islam, the Sunni and the Shiites as there are two sects of Christianity (Catholic and Protestant).

(145) Galwash, A.A. Religion of Islam, Cairo, 1958, p.17

System has not been Europeanised or subject to any external power. It is for this reason that religion and law remain linked in the coutry.

The present Kingdom of Saudi Arabia was founded by Abdul Aziz after uniting the peoples of the Arabian peninsula under his leadership in 1932, with the help of the Saudi clan, from whom King Abdul Aziz descended. On November 13th, 1953, Abdul Aziz died and Saud (Abdul Aziz'z eldest living son at the time) was proclaimed King.(146) He was deposed eleven years later. Faisal, the second living son of Abdul Aziz, assumed power in 1964. King Khalid was proclaimed King of Saudi Arabia on the 24th of March 1975 upon the assassination of King Faisal.

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* King Abdul Aziz ibn Adbul Rahman ibn Faisal al-Saud (1880-1953). He was proclaimed Sultan of Najd and its dependencies in 1912 and King of Hejaz in 1926 and King of Saudi Arabia in 1932.

(146) Assah, A. - Miracle of the Desert Kingdom, London (1969) pp. 74-75

When King Faisal ascended on the throne, he undertook a reform movement in every field within the framework of the religion.* During his administration, he strengthened the state's religious bases. Earlier, he had played an active role, under the aegis of his father, in establishing a united kingdom with all the necessary administrative and legal institutions. He shouldered the responsibility of government with his father, he served as a viceroy in Hijaz and was chosen by his father as foreign minister. When he assumed power, he declared Saudi Arabia a sovereign Arab Muslim state whose constitution was the Quran and the Sunna of the Prophet. Faisal implemented the Islamic system of popular constitution. The Citizen's basic freedoms were guaranteed, social justice and stable government were maintained. The state guaranteed free education and medical treatment, social security, and insurance against unemployment. The government sought to create modern industry in the public sector.

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* "Saudi Arabia is the country which God honoured by chosing it as the site of His house and the mosque of His Prophet, giving it pre-eminence since the dawn of Islam." (From King Faisal's speech after he was proclaimed King of Saudi Arabia in 1964).

King Khalid followed in the steps of his predecessor in affirming the general policy of the state in accordance with the principles of the Sharia. Previous development programmes were continued and progress was made in nearly every field of administration.* King Khalid remained the Prime Minister and the President of the Council of Ministers. Two Deputy Prime Ministers were appointed, Crown Prince Fahd ibn Abdul Aziz (being the First Deputy Prime Minister and the First Vice President of the Council of Ministers). Prince Abdullah ibn Abdul Aziz (the head of the National Guard) was appointed as the Second Deputy Prime Minister and Second Vice President of the Council of Ministers.

Arabian society rose and established its bases when the Prophet Mohammad came with the sincere message of Islam and presented the new Muslim faith to the Bedouin community. Unity was achieved after a long history of unrest. The new faith spread into the neighbouring lands and thus established a new era of civilisation in the history of mankind. Pre-Islamic religion was based on complete idolatry, however, some was based on astrology, each tribe worshipping either its own idol or planet and each had its own temple. The main temple that of the Kabba in Mecca, known as the temple

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* A kind of specialisation took place in this era in adminsitration.

of Ibrahim and Ishmael, was holy to all the tribes. However, there did not exist an overall religion or principle to unite the people. Other smaller sects such as Christianity and Judaism were present. The Christian and Jewish communities were strengthened by the events at the time in Constantinople and Palestine respectively.

Prior to Islam, the tribes of Arabia were in a continuous state of war. Infanticide and human sacrifice were common. Inspite of this, a certain amount of civilisation had been acquired.

The Prophet Mohammad persuaded the people to abandon idolatry and to accept Islam. He founded a nation and a religion, he put an end to the state of confusion which prevailed in Arabia. Islam established the foundation of a pure social system based on the principle of charity, friendship and mutual trust. The previous state of unrest was replaced by a more organised social structure.

> 'O men, verily, we have created you of one male and one female; and we have divided you into peoples and tribes, that ye might have knowledge of one another. Truly the most worthy of honour in the sight of God is he who feareth Him most. Verily, God is knowing and congnisant. (147)

The new social system which was introduced by the Prophet, founded new social provisions, and these required new laws to care for the weaker members of the society. This led to the establishment of urban development and education.

The new leader of this newly established and unified society was known as the successor of the Prophet and was named the Caliph.(148) Muhammed was succeeded by four "guided" Caliphs.*

The ummayyad dynasty came after Ali, the last guided Caliph and thus the ummayyad Caliphate was introduced. It recognised Damascus as its capital. The ummayyad Caliphate gave way to that of the Abbasids in Asia which recognised Baghdad as their capital. The Caliphate was referred to as the spiritual authority, while the temporal power was in the hands of the rulers.

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(147) The Holy Quran, Sura XLIX - Hujurant or "The Inner Apartments", verse 13

(148) Khadduri M. and Liebensy H. The Pre-Islamic Ages In The Middle East, London 1956

* The four guided Caliphs were Abu Bakr, Omar, Othman and Ali.

During this period of history the people of Arabia were looking for an independent, powerful nation which would home the muslim faith.

Although the influence of religion in the West is diminishing, it is important to realise the strength of the connection between the teachings of the Prophet and the teachings of Islam in Saudi Arabia. It is this factor which shapes the framework of present day society in Saudi Arabia.

III. Institution of Government

When dealing with Islamic law, due regard must be given to the pre-Islamic customary law (URF). Customary law has always been accepted when not in conflict with the Sharia. However the law at the time of the Prophet was not altogether undeveloped. The customary law of the pre-Islamic Bedouin can be found in the poetry of the period. Mecca at this time had strong commercial ties with Syria and Iraq. Medina, had been, an oasis with a large population of Jewish Arab converts. These cities had a more developed law, than that of the primitive customary law of the Bedouin, their law was influenced by the foreign contacts which both cities experienced.

What had been known as the customary commercial law was applied by the traders amongst themselves in Mecca in a manner similar to that of the law merchant in Western Europe. Agricultural contracts and land law were similarly important in Medina. The law relating to family relationships, inheritance and crimes were, among Bedouins and non-Bedouins alike, still influenced by the old tribal system which assumed the absence of any sort of legal protection, and in turn the absence of a well organised judicial system.

During this period, disputed cases were decided either by negotiation between the parties or by bringing the case before arbitration.

The principles brought by the Prophet were far-reaching and innovative. The Prophet did not attempt to change the customary law which prevailed among the Arabs. Rather, he developed a new system of life, teaching people what to do and what not to do. Islamic law is a system of duties, consisting of ceremonial, religious, moral and legal obligations all within a religious framework.

There was no precise development of law, to be mentioned at the early period of the four guided Caliphs. But the Ummayyad Caliphs, who were more concerned with the running of the state system, and with the help of the religious idealists introduced a new system of laws for the Arab Muslim state. They developed what has been known as the "schools of Islamic law". Many movements in oppositions to these schools came into being. The kufa school in Iraq opposed the traditionalists in Medina. These dissensions are still present in Islamic legal thought.

The Constitution

Historical Background

Saudi Arabia was formed by the unification of two independent states, Najd and its dependencies and the Kingdom of Hijaz. When King Abdul Aziz subjugated Hijaz he had to implement a unified constitution for the new sovereign state. He chose the constitution of Najd. King Abdul Aziz had been brought up in the conservative Wahabbi tradition and he conquered Hijaz with the help of Ikhwan (brethren), a group of devout Bedouins. It was thus inevitable that the constitution of Saudi Arabia would be of the most conservative Islamic tradition. This was encouraged by the rest of the Islamic world which wanted the Sharia applied in its purest form in the country which was the birthplace of the Prophet.

The Ulama kept constant watch on all matters concerning the Sharia. The Ikhwan, who were the military arm of King Abdul Aziz, also demanded strict adherence to the Sharia. The strength of the Ulama, and its conservative religious views can be seen in the fatwa issued February 11, 1926 demanding the abolition of any

law that was contrary to the Sharia. This fatwa was issued as a result of a conference held to resolve a dispute between King Abdul Aziz and the Ikhwan. The power of the Ulama is also illustrated by the fatwa dated November 2nd, 1964 demanding that King Saud be deposed and his brother Faisal installed as King.

During the reign of King Abdul Aziz, the Ulama was the only force which satisfied the beliefs of the Ikhwan, the force by which Abdul Aziz obtained and maintained control of the country. On August 30th, 1926, the Fundamental Instructions of the Kingdom of Hijaz were introduced. The first section of this legislation affirmed the independence and unity of the independent Islamic state of Hijaz. The second section gave administration to King Abdul Aziz who was bound by the provisions of the Sharia. Legislation in the Kingdom of Hijaz was to conform with the Book of God and the Sunnah of His Prophet and the conduct of the Prophet's followers.(149)

Other provisions dealt with the establishment of

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(149) The Fundamental Instructions of the Kingdom of Hijaz (Al-Ta'limat al-Assasiyya li al-Mamlaka al-Hijaziyya) 1926, Article (6).

the King's viceroy and defined the affairs of the Kingdom.

These Instructions have been modified, particularly in 1932 when the Najd and the Hijaz were formally unified into the Kingdom of Saudi Arabia.

The Consultative Council (Majlis al-Shura) 1345 H (1926 G)

The original Instructions of 1926 provided for a consultative council for the administration of the Kingdom of Hijaz. It was to advise the Viceroy. The Instructions of 1926 were to meet the demands of the Hijazis for a system of administration. Other provinces did not have such demands until discovery of oil in the Eastern province in 1938.

In 1927 the Instructions were modified and the council assumed wider responsibilities, but all decisions still had to be ratified by the Viceroy or the King.(150) The King was empowered to dissolve the whole council and dismiss or appoint members, as he retained the ultimate legislative authority and was subject only to the Sharia. The council still operates but is subject to decisions of the Council of Ministers.

The Council of Deputies (Majlis al-Wokala') 1350 H (1931 G)

In 1927 a commission on administrative reform recommended that a Council of Deputies should be

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(150) Hamza F. Al-Bilad Al-Arabiyya Al-Saudiyya Riyadh, 1968, p. 102.

formed. This Council of Deputies was to be in principle a cabinet for both Hijaz and Najd. In 1931 the Council of Deputies was established.(151) The council was formed of a president who was the Viceroy of Hijaz* and three other members who were chosen by the King. They possessed their power from the King, to whom they were responsible.

The fundamental Instructions have been criticised as being undebatable but it should be appreciated that there was a need to implement such legislation in order to stabilise the country.

In 1953 with the appointment of Saud as King, adminsitration became centralised in Riyadh, as it was the home of the Royal Family and the geographical centre of the country.

Prince Faisal formed a new government in October 1962 which announced a ten point programme, stating that a new law for the country was to be introduced based upon the Quran, the tradition of the Prophet

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(151) Um al-Qura (The Saudi Official Gazette) August 12, 1927, (14/2/1346 H.)

* The position of Viceroy was abolished in 1953.

and the acts of the Caliphs. The law was to be implemented by an independent judiciary and a supreme judicial council. Also a ministry of justice was to be created.

A draft constitution of 1960 reinforced the precedence of the Sharia as did Faisal's speech when he ascended to the throne in 1964. Affirming this precedence, his subsequent speeches reinforce the view that the Sharia is the constitution of the country without preference for any particular school. Whilst in theory the Hanbali school has had precedence since 1928 other Sunni schools have influence.

The System of Government in Islam

Saudi Arabia is the centre of the Muslim faith and houses the Kabba which all Muslims should face in performing prayers. The wish of the people of the land is to maintain and preserve the principles of the Sharia.

The system of government in Islam does not give

the King absolute power.(152) His duties are restricted by the Sharia. Any action outside the sphere of the Sharia could cause the King to be deposed and even punished.

The Saudi monarchy is not a hereditary one. The Saudi system acknowledges the investiture of a crown prince during the life time of the reigning monarch. Upon the death of the monarch the crown prince assumes power and ascendes on the throne. His ascension to the throne is subject to an examination by the religious bodies and awaits the approval of both the Council of Ministers and the Council of State. Upon this approval the crown prince then recieves the investiture of the nation. Islam acknowledges the right of the King to rule as long as his rule is in confirmity with the Sharia and the public interest. The Saudi Arabian society consists mainly of a number of nomadic communities who need a common citizenship based on common respect for religion and on the observance of the Sharia. Abdul Aziz's aim was to establish a more developed state and to change the people from a state of nomadism to a more settled community. He first held all the executive power but with the progress of the community

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(152) Yamani, A.Z. Nizam Al Hukum Fi Al Mamlake Al Arrabiyya Al-Saudiyya, Riyadh University Bulletin, Riyadh, 1960, p. 114

more sophisticated needs arose. At first a ministry of finance was formed and then at a later stage a ministry of foreign affairs was established. King Abdul Aziz chose minsiters and advisors to advise him and to decide on some matters of the state.

The proclamations of a new statute by a Royal Decree on the 17th of May, 1958,(153) could be considered as the framework of the operation of government.

The King can appoint the Prime Minister, the Prime Minister in his turn can propose to his Majesty the King the appointment of the deputy or deputies Prime Minister and the ministers. The meetings of the Council of Ministers are held and attended by at least two thirds of its members. Resolutions are passed by a majority and the Prime Minister holds the deciding vote. The Law governs, the members of the Council of Ministers acts. The Council draws the internal, foreign, financial, econominc, educational and defence policies of the state. A legislative, executive and administrative power is vested with the council.

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(153) "22 Shawal 1377 A.H. (Anno Higira)"

The King has the right to return to the council any draft, decree or order before his endorsement explaining the reasons behind such an act. If the King witholds his endorsement, and if the draft decree or order is not returned to the Council of Ministers within thirty days from the date of its receipt by the Royal cabinet, the Council of Minsiters can take any action which it thinks applicable. The Decrees must be published in the Official Gazette and put into execution from the date of publication unless stated otherwise.

Powers Invested in the Prime Minister

The statute of 1958 gives the Prime Minister the power to direct and guide the general policy of the state.(154) The King may advise, direct and guide the Prime Minister. A governor of a province by virtue of the statute, represents the government and not the King. The governor is regarded as an administrative Officer who reports to the Minsiter of Interior. He may be assisted by a deputy governor. The statute divided the country into provinces which in turn were divided into counties and these into districts. The

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(154) Philiby, J.B. Statute of the Council of Ministers', Saudi Arabia, The Middle East Journal, XII summer 1958, p. 319.

King appoints the governors of the provinces, the council of Minisiters appoints the counties administrators and the representatives of the different minsiters. The Minsiter of Interior appoints the district employees. The jurisdiction of the administrative employees of the provinces is defined by the council of Ministers statute. The governors of the provinces share the responsibility of running the provinces with their provincial councils. The provincial councils can put to the governors and through the governors to the higher authority the matter which reflect the interests of their communities. The minsiters can consult with the provincial councils on matters related to their ministeries for the communities welfare and progress. The number of members of each provincial council is around thirty consisting of the governor being the president of the council, the representatives of each ministry and some local advisors. These local advisors are appointed for a period of two years, this period can be renewed. They can submit their resignations to the governor and in his turn the governor puts their resignation before the Minister of Interior for his approval.

The meetings of the provincial council are held each month and by the attendance of two thirds

of its' members, the resolutions are passed by a majority.

The Legislative Power

The Sharia gives the right to the head of state wali al-amr or his representative to draw up new legislation for the community in a manner which is not contrary to the principles of the Sharia.* Those who carry out the function of drafting new legislation are scholars of the Sharia.**

When King Abdul Aziz assumed power he had complete legislative authority. Other institutions, for example The Consultative Council (Majlis al-Shura), and the Council of Deputies (Majlis al-Wokala), assisted and implemented some legislation. Since the reign of King Saud, legislative power is vested in the council of Ministers. A committee of six ministers and ten experts qualified in legal matters, study and recommend new legislation.

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* This method of producing new policy is called siyass'h shariyya

** The ulama who staff the high judicial authority.

Additional legislative power is vested in the King and is exercised on the advice of the council of Ministers. All legislation is promulgated by Royal Decree.

The general principle is that most branches of the law stem from Muslim law which is based on the Quran and the Sunna but there are several areas, especially that which relates to commercial activities, defined and regulated by Royal Decrees, on occasions influenced by continental jurisprudence.* All legislations are published in Arabic in the Official Gazette (um-El-Qura). Official English versions of some decrees can be found, but under all circumstances the Arabic version is the authentic one unless it is stated otherwise. Legislation becomes effective and enforceable on the day following its publication in the Official Gazette.

All ministers and some heads of government institutions are invested with the power of making regulations by ministerial or administrative circulars. These rules are circulated to the various government departments and are not usually published in the Official Gazette. They

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* Examples are the Companies Law, the Foreign Capital Investment Law, the Protection of National Industries Law, the Commercial Agencies Law, the Taxation Law, the Mining Code, the Social Insurance Law, the Residence Law etc.

became effective on the date of their issuance by the concerned authority. These regulations have the same effect as legislation by Royal Decree except where there is an apparent inconsistency between them and such decrees.

The High Judicial Authority plays a very positive role in legislation and it may oppose any new legislation drawn by the King or the Council of Ministers which conflicts with the principles of the Sharia.

The Mufit and his office known as (dar al ifta) played a major role in legislation. This office was attached to the Presidency of the Judiciary until 1969. Since then the office has been transformed into an institution called "Idarat al-Buhuth al-Ilmiyya wal al-Ifta wa al-Daw'a wa al-Irshad" - the Office of Religious Research, the Issuing of Fatwa, Preaching and Religious Guidance. Some of the jurisdiction of the office of the mufti has been transferred to a new institution called "Hay'at Kibar al-Ulama" - the Board of the Grand Ulama. These two institutions play an important role in the drafting of new legislation.

The Administrative and Executive Power

During his reign, King Abdul Aziz possessed full administrative and executive power but he delegated limited authority to some statesmen and institutions.(155)

A new period of administration in the history of Saudi Arabia started in 1953 with the formation of the council of Ministers. Crown Prince Saud, being the president of this council took complete control in running the administration of the country. It is submitted that a kind of centralization took place at the time, and since then the council has been vested with all administrative and executive powers. However, the King has the right to supervise and direct the council.

The Judicial Power

(Reference is made to Chapter Two of this thesis).

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(155) Lipsky, G.A. Saudi Arabia, New Haven 1959, p. 116

IV. PRINCIPLES OF ISLAMIC LAW

The Islamic jurisprudence (fiqh), refers to the Islamic law as a holy law, this law was revealed by God through the angel Gabriel to Mohammad the last of the prophets and then through Mohammed to mankind. This holy law can not be changed. It is an ordinance from God. This Islamic law stems from two branches, the one which regulates the relation between man and God[157] and the other which regulates the relation between man and his fellow-man. The first is holy and can not be changed at all when the second can be changed to adapt to the needs of the society as long as it does not contradict the main theme of the Sharia.

The law according to the European thought is rather different from that of Islam. The law in Europe is introduced by man and can also be changed by man, it can be enforced by the authority such as courts, when to a muslim, the law is that of God and it is holy, therefore muslims must sincerely observe and abide by.

The Islamic law introduced an organised system of life without references to any authority for its application. Islamic law regulates human conduct in the moral,

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(157) Khadduri, M. 'Nature and Source of Islamic Law', 22 GEO. WASH. L. REV. 3, 6-8 (1953)

ethical, social religious and legal fields. It regulates the legal problems and the religious duties of the Islamic nation.

The main sources of Islamic law are the Quran (the true word of God), the Sunnah (the acts and practice of the Prophet), the Consensus (the opinion agreed upon by Muslim jurists) and the Analogy (to restore to logic and reason).

The Quran - The Quran is the Holy Book which was revealed by God through the angel Gabriel to Mohammad the last of the prophets, to introduce the new religion and to meet the requirements of the new established society. In general, the Quran deals with few pure legal problems. "This is the Book; in it is guidance sure, without doubt, to those who fear God."* "ALR. A Book which we have revealed unto thee, in order that thou mightest lead mankind out of the depth of darkness, into light, by the leave of their lord to the way of (Him) the exalted in power worthy of all praise."**

The Sunnah - Literally "The Habitual Practice" is referred to as the tradition of the Prophet. The Sunnah explains the principles revealed in the Quran. It is the Prophet's speech, deed, approval or disapproval in certain circumstances. The authority behind the Sunnah is mentioned

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* The Holy Quran, Sura II, Baqara or "The Heifer", verse 1

** The Holy Quran, Sura XIV, Ibrahim or Abraham, verse 1

in may verses of the Quran:

> "And we have sent down unto thee (also) the message: that thou mayest explain clearly to men what is sent for them, and that they may give thought".(158)
>
> "Obey God and obey the Apostle"(159) and "So take what the Apostle assigns to you, and deny yourselves that which he witholds from you". (160)

The Prophet's aim was not to introduce a system of Law; for this reason, it is incorrect to call Islamic law, Mohammadan Law. Islam is a system of duties possessing religious, legal and moral characteristics.

Muslims differ over the accuracy and the correctness of the Sunnah.* The task of collecting what the prophet did or said, as a reference to muslim jurists and researches, did not start until after his death. Most Muslims accepted the main traditions but jurists of the different Islamic schools of thought differed on the point of accuracy of other traditions.

Consensus (ijma). The agreement on a statement of law in a certain case reached by jurists. Consensus could be

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(158) The Holy Quran, Sura XVI Nahl or the Bee, verse 44

(159) The Holy Quran, Sura V, Maida, or the Table spread, verse 95

(160) The Holy Quran, Sura LIX Hashir, or the Gathering, verse 7

* Two authentic books of the Sunnah are SAHIH AL Bukhari and SAHIH Muslim

an agreement on legal principles not found in the Quran or the Sunnah but accepted by Muslim jurists as a final rule. Consensus could be known by the clear statement of opinion of jurists or even by their silence on a certain issue. This principle helped the various needs of the Muslim community.

> "Thus, have we made of you an unmat justly balanced, that ye might be witness over the nations ......*

Analogy (giyas). This principle is accepted as being derived from a judicial proposition and from which a conclusion is to be drawn. The rules are an answer to certain causes and effect. The acceptance of this principle and its application caused a difference of opinion among the various Islamic schools. Other sources of Islamic law are known such as preference (istihsan), public interest (maslaha murselah), deduction (istidlal), and customs,(161) but these are not important as the main four sources.

> "Whoever recommends and helps a good cause because a partner therein; and whoever recommends and helps an evil cause, shares in its burden.....**

The Different Shools of Law

The science of jurisprudence rose with the development of the Abbasid State in 750 A.D. and at the time of the formation of the four sunni schools of law.(162) This

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(161) Custom is the most accepted source of law among the other less important sources of Islamic law.

(162) Two groups rose after the Prophet's death as to the question of succession. One, the Sunnies who accepted the Caliphate of Abu Bakr, Omar, Othman and Ali, the second, the Shiites who state that Ali's succession is the substantial one and rejected the succession of the other three Caliphs. S. Mahmassani, Muslims, Decandence and Renaissance. 44 Muslim Worlds, 186, 194 (1954)

* The Holy Quran, Sura Baqare, or the Heifer, verse 143

** Ibid, Sura IV, Nisa or the Women, Verse 85

period witnessed the writings of the prophet's traditions and the commentaries of the Quran.

Muslim jurists were, to begin with divided into two major groups or schools. The one in Hijaz was led by Malik ibn Anas (known as the Maliki school 179/795). The followers of this school referred to the prophet's tradition. They confided the followers themselves to the legal texts stated in the Quran and to the prophet's practice.

The other school was founded in Kufa (Iraq) and was led by Abu Hanifa al-Numan and so known as the Hanafi school 150/767. This school referred to the concept of "opinion". The followers of this school accepted some of the Prophet's tradition but confided themselves to reason and opinion.

Muhammad ibn Idris al-Shafi'i a student of Malik ibn Anas founded the Shafi'i school in Egypt after his immigration from the Arabian peninsula in the 8th century A.D. 205/870. The followers of this school wanted to draw a compromise between the previous schools.

The last school was formed by Abu Abdullah Ahmad ibn Hanbal and so referred to as the Hanbali school. The

followers of this school devoted themselves to the strict text of the Quran and the Sunnah. The principle of analogy as a source of law was referred to at the time of the Hanbali jurist Ibn Taimiyya.

Other schools such as that founded by Abo Sulaiman Al-Zahiri (called the Zahiri school) which referred to the literal meaning of the Quran and the Sunnah, disappeared. The main features of this school was the acceptance of the principle of consensus (ijma), if it was agreed upon by the majority of jurists, and the rejection of the principle of analogy (giyas).

C H A P T E R F I V E

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1. PREFACE

According to Muslim scholars, the law (ash-shar) is divided into five categories:

1.	Beliefs	I'tiqadat
2.	Moralities	Adab
3.	Devotions	Ibadat
4.	Transactions	Mu'amalat
5.	Punishments	Uqubat

Transactions (mu'amalat) is the source of contractural obligations. Mu'amalat, the terminology used for duties between man and man, is divided into:-

(a) Altercations (mukhasamat).

(b) Nuptials (munakahat).

(c) Securities (amanat).

Within these three divisions lie the various sections of contractual obligations such as sale, agency, marriage and partnership.

II. THE DEFINITION OF CONTRACT IN THE ISLAMIC SYSTEM VS OTHER SYSTEMS

(i) Contract is defined in Islamic jurisprudence by the majority of Muslim jurists as "the obligation of an offer given by one party to the acceptance given by the other party, in a way where its legal effect is expressed on the thing contracted upon".(163)

Other Muslim jurists referred to contract (al akd) in every covenant drawn by a man, and they called what is formed under one will testamentary disposition (al wasseyyah), endowment (al wakf) and oath (al-yameen),(164) as well as what is formed under two wills, al akd.

Al akd literally means to fasten, to strengthen, to gather something by connection (a linking together). It is said for example, "I tied the rope" (to bind two ends of something, and thereby form a strong connection(165) (akadt al habel).

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(163) Al Baberti fi al-Enay'ah ala Hameish Fatih al-Qadir, Vol. 5, p. 74, wa Hashiate ibn Abedeen 2/26; wa Hashiat al Dasoukii 3/5/6. Article 103 of Al Majalla and Article 262 min Kitab Murshid al-Hairan. Le Qadri Basha.

(164) Ahkam al-Quran, Al Jasas Vol. 2, p. 294,295. Al Akd is what the contractor commits himself to do, or commits others to do on binding bases, sale (al-bai) and marriage (nikah) are then contracts (okod) as well as covenant (al-ah'd) and securities (al-aman) because its giver has committed himself to fulfill it.

(165) Mukhtar al- Sihah - p. 444-445, Al Musbah al Munir, 2/32.

The expression is also used as the link between two words. So the akd, in fact, must have two parts and a close binding link.

As the idea behind al akd is to fasten closely, some Muslim jurists maintain that it can be applied for a mere promise, a unilateral covenant given by one party.(166) Muslim jurists favoured the definition of akd as a binding or a connection between the offer and the acceptance(167) which fulfills certain criteria so that it has a legal effect.

(ii) Civil jurisprudence*defines the contract as the wish of two or more persons to be legally bound, for example, in the contract of sale where the seller and the buyer are legally bound by an agreement to hand over the goods in exchange for payment. So according to civil jurisprudence the contract is formed by the binding of two wills. A unilateral desire to be bound is not sufficient to form a contract.

(iii) If we compare the definition of contract in Islamic jurisprudence to the definition of contract in civil jurisprudence, we find that the Islamic definition moves

(166) Sharh Altwdeih ala al Takoyoh, Vol. 2, p. 123, Tafseer al-alossi 22/239.

(167) Abu Zahra, M. Al Milkiyya wa Nazariyyat al-Akd, "Band", p. 101-102.

* The codified law of Middle Eastern countries such as Egypt, Iraq and Syria.

directly from the linguistic meaning of akd (a "fastening" or "tying") to the juristic meaning, whereas in civil jurisprudence al akd is an obligation stemming from the objective criteria of offer and acceptance. The obligation itself however, does not have an objective existence prior to and apart from the acceptance of the offer. The Islamic concept of al akd bases the concept of contract on the obligation itself, rather than on these criteria. Thus, according to Mulsim jurists the legal effect on the subject matter of the contract (i.e. transfer in the sale of goods) is essential to the definition of contract. But in civil jurisprudence, this is not the case.

(iv) The definition of akd mong the majority of Muslim jurists differs from the English definition of contract. For example, according to some Muslim jurists, terms such as "I will buy" or "I will sell", have no legal effect as this constitutes no more than a mere promise(168) whereas in English law such promises may, in certain circumstances, be enforced.

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(168) Article 171 of the Majalla (Ottoman Civil Code).

The definitions of contract in Islamic jurisprudence also differs from the French legal definitions of contract.(169) The French define a contract as an agreement. Muslim jurists distinguish between an agreement and an akd and say that the agreement is much more general than the akd. The akd is an agreement to form an obligation or transfer an obligation. Thus, every akd is an agreement but an agreement is not an akd unless it forms or transfers an obligation. Most Islamic jurists do not see any importance in this distinction and it is not referred to or defined in modern civil codes of Middle Eastern countries.

Among the majority of Mulim jurists the akd is a bilateral transaction and must consist of an offer (ijab) and an acceptance (kabul), both made regularly in the same meeting (majlis) of the parties to a contract. The party who makes the offer can withdraw his offer before the acceptance of the other party is given. This could also be applied to the party who has the right or the condition of option (shart al Khayar).

The akd must have a form (siqha) in which the wishes of the parties are clearly expressed and in which a relation-

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(169) "An agreement by which one or more persons bind themselves in favour of one or more persons to give or to do or not to do something". Article 1101 of the French Civil Law.

ship is formed in the eyes of the law. Any method of expression such as the words "I sell you herewith" in a contract of sale for example, is valid, as long as it gives a sufficiently clear meaning.

The concept of akd in Islam is a very fundamental one. It is based on certain elements such as morals and religion as shown and explained in the different Quranic texts and hadiths.* The akd is based on moral and religious principles rather than on purely commercial ones as is the case in most other legal systems.

Islamic law did not lay down specific contractural rules. It was more specific about sale (al-bai), however, which was the type of contract on which other contracts, such as that of marriage, were patterned.

An akd in Muslim law could be a legal transaction, whether it relates to contract or to mere unliteral declaration,(170) such as a testamentary disposition (al wasseyyah). However, the term akd in general refers

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* The Prophet's acts and sayings which were remembered by his followers and which were kept in a form called "The Hadith" or story and were handed down from person to person. Eventually these acts or sayings were written down by those known as traditionists who recorded these hadiths in authentic collections and that is how the Sunnah has been kept.

(170) See the section on bilateral and unilateral contracts and unilateral legal acts.

to a legal transaction which involves a bilateral declaration namely the offer (idjab) and the acceptance (kabul).

The akd according to Islamic law is a legal transaction which creates a new legal situation. Reference is made to certain contracts such as sale of goods* where the actual delivery of the object of sale is regarded as a condition for the conclusion of the akd. "The akd must comply with a condition of unity in time and space".(171)

The Quran ordered that obligations and contracts be fulfilled, and that debts due on a term be put in writing unless they concerned present goods. It laid down this general principle by which dealings in all matters should be made.

The words of the Quranic texts in general apply to all contracts and covenants concluded between man and man, besides the spiritual covenants between man and God, as can be seen from the following verses:

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* except in the contract of salam which involves future delivery. This subject will be dealt with later in this work.

(171) Kramers, J.H. Encyclopedia of Islam, Netherlands, 1960, p. 318.

To fulfil the contracts, which ye have made ...(172)

Oh believers, when you contract a debt one upon another for a stated term, write it down ... unless it be merchandise present that you give and take between you ... (173)

If ye are on a journey, and cannot find a scribe, a pledge with possession (may serve the purpose) and if one of you deposit a thing on trust with another, let the trustee (faithfully) discharge his trust ..... conceal not evidence; for whoever conceals it his heart is tainted with sin ... (174)

..... and fulfil the covenant of God; thus doth He command you, that ye may remember. (175)

And call in remembrance the favour of God unto you and his covenant, which He ratified ... (176)

Those who break God's covenant, after it is ratified, and who sunder what God has to be joined, and do mischief on earth: these cause loss (only) to themselves. (177)

Those faithfully observe their trusts and their covenant. (178)

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(172) The Holy Quran, Sura II, "Baqara" or "The Heifer" v. 177.

(173) Ibid, v. 282.

(174) Ibid, v. 283.

(175) Ibid, Sura VI, "An'am" or "Cattle", v. 152.

(176) Ibid, Sura V, "Maida" or "The Table Spread", v.8.

(177) Ibid, Sura II, "Baqara" or "The Heifer", v. 27.

(178) Ibid, Surã XXIII, "Mu-minun" or "The Believer" v.8.

> And those who respect their trusts and covenants. (179)

Where written agreement cannot be made because of mistrust or because of unjust witnesses, then the pledge* is the most suitable form for the parties. The trustee's duties are to guard the interest of others and to hand back the entrusted property when he is so ordered.

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(179) The Holy Quran, Sura LXX "Ma'arj" or the Ways of Ascent", verse 32

N.B. For full illustration and reference, please see section IV - The contract in Islamic Law in the Quran, p. 176

* A trustee's duties are to guard the interests of the beneficiary and to hand back the entrusted property when he is ordered to do so.

III. BILATERAL AND UNILATERAL CONTRACTS - THE DIFFERENCE BETWEEN A UNILATERAL CONTRACT AND A UNILATERAL LEGAL ACT

The unilateral contract forms a contractual obligation on the part of only one party. e.g. contract of bailment without consideration (akd al-wadeyyah) and a contract of surety (akd al-kaffala). It is necessary to distinguish between a unilateral contract and a unilateral "legal act". A unilateral contract is a contract like any other in that it is not complete unless there are two parties and there is an offer by one party and an acceptance given by the other party. A unilateral "legal act", however, is complete by a unilateral will, e.g. testamentary disposition (al-wasseyyah) and the promise of reward (al-ja'ala). Thus, in a unilateral contract only one party is bound, but two parties are required in order to create the obligation. The unilateral aspect of the contract is seen in the effect of the contract rather than in its formation. A unilateral "legal act", however, is unilateral in both the formation of the obligation and its effect.

Muslim jurists differed on this point and there developed two lines of thought. The first was that testamentary disposition (al-wasseyyah) is an akd. It is stated(180) that the donnee cannot own or possess the object disposed of unless he accepts it. So al-wassayyah as an akd cannot exist without the agreement of the two parties.(181) This is supported in Share'al-Islam(182) where it is stated that al wasseyyah is to give somebody the ownership of something and there must be an offer (ijab) and acceptance (kabul).(183)

Abu Hanifa* and two of his followers considered offer and acceptance to be essential elements in testamentary disposition (al wasseyyah), If they are not present the disposition has no legal effect. The Maliki School also accepts this view. And Ibn Quadama (of the Hanbali School) refers to the acceptance as part of the reason behind transferring the ownership,(184) thus rendering it essential to the validity of the disposition.

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(180) Tazkirat al-fugaha' vol. II Kitab al wassayyah Tehran (n.d.) (n.n.)

(181) Ibid, al-wassyyah, altabae'al Hajariah.

(182) Share' al-Islam, vol. 2, al-Najaf al-Ashraf, 1969 p. 243

(183) Ibid

* The founder of the Hanafi School

(184) Al-Mughni - vol. Vi, Egypt 1929, p. 98

The second line of thought was that testamentary disposition (al-wasseyyah) is a unilateral "legal act" (iqa)[185] rather than a contract, from the donor to the donee, and that acceptance does not play a role in its validity. Those who support this view offer three arguments.

(i) Some Imameyys and Zayyediah* say that acceptance[186] is not relevant to the execution of al-wasseyyah. But the conduct of the donee (the "expressed iqa") if he returns the subject matter of the disposition, is equivalent to a rejection of an offer.

(ii) The Maliki School and some members of the Shafi'i School consider [187] acceptance to be a condition of the execution of al-wasseyyah.

(iii) Most Shaffeiyys, some Hanafiis and Imamayys[188] do not regard a partial or a complete acceptance as a condition. They say that the party to whom the ownership is transferred fulfills the offer by operation of law.

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(185) Akd is of two parties like sale, marriage etc. Iqa is from one party (i.e. a unilateral "legal act") such as divorce.

(186) Al Muntazae' al-Mukhtar 4/492.

(187) Hashiate al-Dasouki 4/424.

(188) Al-Mazhab F. Abadee 1/452.

The second approach is accepted by most Muslim jurists. Thus al-wasseyyah is generally seen to be a unilateral "legal act" (iqa) and not a contract. If we refer to the al-wasseyyah principles and the Quranic verses such as the following,

> It is prescribed when death approaches any of you, if he leave any goods, that he makes a bequest to parents and next of kin, according to reasonable wage; This is due from God-fearing. (189)

we find that the condition of acceptance is implied. The validity of the act relates to the act of the donor (al mussei) without any reference to acts of the donee because the above verse implies acceptance on his part.

The donor of a gift (al wahib) and the donor in testamentary disposition (al mussi) commit themselves to transfer the property in question. They both act unilaterally and there is no need for an acceptance by the other party.

Since the transfer of property by gift or testamentary disposition is a "legal act" (iqa) it cannot

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(189) The Holy Quran, Sura II, "Baqara" or "The Heifer", verse 180.

be said that the gift (hiba) and al wasseyyah are contracts in the sense that marriage and sale are. We defined the contract earlier, and we stated that marriage is a contract (an offer from the man and an acceptance from the woman) and sale is a contract (an offer from the seller and an acceptance of the buyer). Marriage and sale, for example, are contracts because there are two main elements present, these being - two competent parties and offer and acceptance.

In al - wasseyyah and al hiba, these two elements do not exist. Al wasseyyah does not take place until after the donor's death and the acceptance of the donee has no effect.

The acceptance in a contract must be in the same session (majlis). Implied acceptance is not considered to be an acceptance. The acceptance should be unequivocal, as for example, the woman's acceptance of an offer of marriage.

It should be noted that from a formal point of view, if the contract is bilateral and is in writing

each party must have a copy of it. When there is a unilateral contract the party who is the creditor must keep the copy of the agreement because the obligation lies on the other party, whereas in a bilateral contract, the obligation flows in both directions. In a bilateral contract, if one party does not carry out his obligation, then the other party may dissolve the agreement (fask). It is called the "implied condition of dissolution" (al shart al fasek al-dimnee). In unilateral contracts such as al-wasseyyah this implied condition does not exist.

In bilateral contracts, if one of the parties does not carry out his obligation and asks the other party to carry out his part of the contract, then the latter is entitled to require the plaintiff to carry out his part of the obligation first. This situation is not found in unilateral contracts.

In bilateral contracts, if one party cannot carry out his obligation, due to impossibility, then his obligation, and that of the other party, is dissolved. Liability to pay damages lies on the party which could not carry out its obligation because of the impossibility. In a unilateral contract liability to pay damages always lies on the donor because he is the only one who benefits from the contract.

IV. THE CONTRACT IN ISLAMIC LAW

I. Sources

According to Islamic law, the contract defines the rights and obligations between the contracting parties. The basic rules which bind Muslims to their obligations are drawn from the primary sources of Islamic law, namely the Quran and the Sunnah.

(a) The Quran

(i) "O ye who believe! Fulfill (all) obligations".(190) This verse admonishes the believers to fulfill their obligations. It establishes the basic tenet of Islamic theories of obligations between man and man and between man and God.

It is stated that obligations are of three categories or kinds:(191)

(a) The Holy obligations - those which occur from a religious character in our relationship with God.

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(190) The Holy Quran, Sura V, "Maida" or "The Table Spread" verse 1

(191) The Holy Quran, Text, Translations and Commentary by Ali, A.Y. (1968) p. 238, footnote 682

(b) The common obligations - those which occur in our material life. Making a promise, entering into a commercial contract such as sale, or a social contract such as marriage.

(c) The implied obligations.

(ii) Come not near to the orphan's property except to improve it, until he attains the age of full strength; and fulfill (every) engagement. For (every) engagement will be enquired into (on the Day of Reckoning). (192)

This verse is related to contracts for the benefit or orphans, but the words of the verse are general and could be applied to any contract.

(iii) Fulfill the Covenant of God when ye have entered into it, and break not your oath after ye have confirmed them; indeed ye have made God your surety; for God knoweth all that ye do. (193)

To every contract which is made, or oath which is taken, God is a witness and therefore, they must be fully observed.

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(192) The Holy Quran, Sura XVII, "Beni Isra-iL", or "The Children of Israel", verse 34

(193) The Holy Quran, Sura XVI, "Nahl" or "The Bee" verse 91

(iv) And be not like a woman who breaks into untwisted strands, the yarn which she has spun after it has become strong. Nor take your oaths to practise deception between yourselves, lest one party should be more numerous than another, for God will test you by this; and on the Day of Judgement He will certainly make clear to you (the truth of) that wherein ye disagree. (194)

Thus, a contract is a solemn act entered into and binding between parties, and must be carried out with all sincerity and honesty.

(v) And take not your oaths, to practise deception between yourselves, with the result that someone's foot may slip after it was firmly planted, and ye may have to taste the evil (consequences) of having hindered (men) from the Path of God, and a mighty wrath descend on you. (195)

It is indicated in this verse that the consequences of making false contracts are severe.

(vi) Nor sell the covenant of God for a miserable price: for with God is (a prize) far better for you if ye only knew. (196)

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(194) The Holy Quran, Sura XVI, "Nahl" or "The Bee" verse 92.

(195) The Holy Quran, Sura XVI, "Nahl" or "The Bee" verse 94.

(196) Ibid, verse 95.

This verse states that one gains nothing by breaking one's contract for in so doing one breaks the principles of the Sacred Law and gains nothing because God's will has been disobeyed.

(vii) (But the treaties are) not dissolved with those pagans with whom ye have entered into alliance and who have not subsequently failed you in aught, nor aided anyone against you. So fulfill your engagement with them to the end of their term, for God loveth the righteous. (197)

(viii) How can there be a league, before God and His apostle, with the pagans except those with whom ye made a treaty near the sacred mosque? As long as these stand true to you, stand true to them, for God doth love the righteous. (198)

These verses show the Muslim's duty to fulfill obligations with Muslims and non-Muslims alike. This applies equally to private and public obligations.

(ix) .....give measure and weight with (full) justice. No burden do we place on any soul, but that which it can bear; whenever ye speak, speak justly, even if a near relative is concerned, and fulfill the Covenant of God. Thus doth He command you, that ye may remember. (199)

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(197) The Holy Quran, Sura IX, "Tauba" (Repentance) or "Baraat (Immunity), verse 4

(198) Ibid, verse 7

(199) The Holy Quran, Sura VI, "An'am" or "Cattle", verse 152.

This verse states the general principle of justice and places the obligation to speak and act honestly in relationships with others.

(x) O ye who believe! When ye deal with each other, in transactions involving future obligations* in a fixed period of time, reduce them to writing. Let a scribe write down faithfully as between the parties; let not the scribe refuse to write as God has taught him, so let him write. Let him who incurs the liability dictate but let him fear his Lord God, and not diminish aught of what he owes. If the party liable is mentally deficient, or weak, or unable himself to dictate, let his guardian dictate faithfully. And if there are not two men, then a man and two women, such as ye choose, for witnesses, so that if one of them errs, the other can remind him. The witnesses should not refuse when the are called on (for evidence). Disdain not to reduce to writing (your contract) for a future period whether it be small or large; it is juster in the Sight of God, more suitable as evidence and more convenient to prevent doubts amongst yourselves. But if it be a transaction which ye carry out if ye reduce it not to writing but take witnesses whenever ye make a commercial contract; and let neither scribe nor witness suffer harm. If ye do (such harm), it would be wickedness in you. So fear God; for it is God that teaches you. And God is well acquainted with all things. (200)

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* Future obligations were disfavoured by some jurists, The Hanafi School for example but were recognised amongst other jurists.

(200) The Holy Quran, Sura II,"Baqara" or "The Heifer" verse 282.

Five general rules of contract are enunciated in this passage. The first is that all contracts entailing future obligations should be committed to writing and witnessed by two independent parties. The second is the onus of putting the contract into writing is on the one who incurs the future liability. The third is that where a party is not competant to commit the contract to writing, it should be done by his guardian. All these three provision relate to contracts entailing obligations to be fulfilled in the future. The fourth point, in contrast, deals with contracts that can be fulfilled by the Parties immediately, and in these there is no need to commit them to writing. The final points deals with commercial contracts where it is advised that two witnesses be used.

(b) The Sunnah

The Sunnah expresses in similarly unquestionable terms the binding nature of a Muslim's obligations. "Muslims are bound by their conditiosn".(201) This statement

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(201) Bukari, Sahih XIII (Kitab al shurut), al-Matba'a al-Masriya, 1934, p. 289.

conforms to the principles of the Quran. A limitation of this general principle (stated in another hadith) is that Muslims are not bound by conditions which make lawful what is unlawful, or make unlawful what is lawful. This hadith is the basis of the divergence of opinion among the four Sunni schools of law.

2. Elements of the Contract

(i) Offer and Acceptance

a) The offer and acceptance must be between two people who intend to form a legally binding contract.

b) The offer and acceptance should unite in the subject matter i.e. if a seller says to the buyer "I sell you my house for £1,000" and the buyer says "I buy your house for £500" this requirement would not be fulfilled. The acceptance does not correspond to the offer.

c) The offer and acceptance should come together at the meeting place (majlis al-akd) that is both parties must be present. If one of them is present and the other is absent, the conclusion of the contract will wait until the party who is absent is present to state his acceptance after receiving the offer, to correspond with it.

Offer and acceptance are considered to be the main features of the principle of consent. As stated above if the offer corresponds to the acceptance, then the

consent of the contracting parties is demonstrated quite clearly. The acceptance of the offer means that the parties have consented, and agreed to form a legal obligation. Consensual defects such as duress and mistake will be discussed later in this work.

(ii) Conditions of the Contract

Conditions which relate to the subject matter are as follows:

a) The subject matter must be in existence at the time of the formation of contract. If the subject matter ceased to exist at the time of the formation of the contract, then a contract cannot be created. Such a contract is void ab initio. The Hanafi jurists, as well as most others, consider contracts of salam,* hire and manufacture, legal by way of exception to this rule. Jurists validated these contracts by way of "preference (istihsan).** Some Muslim

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* The payment of the price for the object of the sale now and to delay the delivery for a future date.

** Salam is considered as another source of Islamic law and jurists can either apply the thing or not by way of "preference" to ease things and make them more flexibile.

jurists by way of analogy to this condition considered contracts for future goods to be invalid. Others differed in that future goods could form the subject matter of the contract.

b) The subject matter should be capable of being sold. For example, a dead object cannot be sold because the subject matter is not capable of ownership and value.

c) The subject matter should be known and clearly described. Seeing the object makes the subject matter known.

d) The subject matter should be capable of delivery at the time of the conclusion of the contract.

e) The subject matter of contracts between Muslims should be something legal (moral, recognised by public order, "clean") i.e. a contract to sell a dog or wine is void ab initio.

(iii) The Parties

The legal capacity of the parties (al-ahliyya al-Qanonyya) is divided into:-

a) The capacity to enter into a contract, the disposal and the fulfillment of one's obligations, the capacity of execution (ahliyyat al-ada)

b) The capacity of obligation (ahliyyat al-wujub) - the capacity to get rights and duties.

(iv) Valid and Invalid Contracts

To be valid a contract must:

a) Have its elements and conditions present.

b) Possess a legal subject matter or object.

c) Be in terms which are certain.

d) Be formed between competent parties.

e) Possess an acceptance which corresponds to the offer.

f) Have legal "characteristics" (awsaf).*

g) The intention of the parties must be moral.

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* When the contract is attached to an unlawful description e.g. if the consideration in a contract of sale is not legal property.

The division of valid contracts into those which were enforeceable (nazif) and those which were unenforceable (ghayr nafiz) is recognised by the jurists of the Hanafi school. They considered a valid contract to be conditional (mawquf) when it is issued from a party who has the ability to issue a contract but does not have the capacity to form it such as the contract of sale or marriage by a minor or prodigal person. The contract is considered to be valid but without any legal effect unless it is approved by a guardian. If the guardian approves it, the contract is enforceable (nafiz) but becomes void (batil) if he disaffirms it. The Hanafis divide the enforeceable contract into irrevocable (lazim) and revocable (ghayr lazim). According to the Hanafis, the contract of sale is irrevocable i.e. one party cannot revoke it without theconsent of the other. Contracts of surety, however, are considered to be revocable. Thus, the contract could be unilaterally revoked.

Invalid contracts - invalid contracts may be contracts which have a defect in their substance (asl) such as some of the elements of a valid contract being absent. For example, the subject matter may not be in existence at the time of contracting, one of the parties being a lunatic, or an attempted sale of a thing which is of public benefit. Such contracts are void ab initio (batil). The contract may, however, suffer from a defect in that its characteristics (awsaf) are prohibited by law, for example, where the price in a contract of sale is not legally recognised as property or if the price is unknown. Such contracts are considered by the Hanafis to be irregular (fasid). The substantial elements of contract are present, but an illegal (wasf) character such as the price not being legally recognised as property in a contract of sale is present.

The Hanafis had two views regarding irregular contracts.*

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* The other schools did not recognise the concept of irregularity.

The first view was that they were valid because of the validity of the substance (its elements and subject matter). The second view was that they were void because the consideration had a prohibited character (wasf). Thus the definition of an irregular contract is that it has a valid substance but an illegal character. An invalid contract, however, is one which has a defect in its substance (asl). And in the definition of a valid contract, what is legal is its substance (asl) as well as in its character (wasf).

It can be seen that the criteria must be present in order for a contract to be concluded and binding.

a) The acceptance should correspond to the offer.

b) The unity of the contract session (majlis), is another important element among Muslim jurists in their discussion of the theory of contract, and there developed three opinions. Firstly, the majority maintained that the offer and acceptance must be made at the meeting place and in this way the offer unites

with the acceptance immediately. The second was that the requirement of majlis was fulfilled when the acceptance by the other party was given. The third view was that the requirement of majlis was met when the offeror actually heard the acceptance of the offeree.

The siqha form of contract, there is not specific form for contracts among Muslim jurists. They refer to the intention of the parties and so they consider any form which gives the clear intention of the parties behind the purpose of their contract acceptable. In this regard Islamic law did not restrict the parties to a certain form, and this could be considered a major issue behind the Muslims' principle of freedom to contract.

c) The subject-matter should be known and in correspondence to public order ,in accordance with the law and free from usury (riba) and risk (gharrar). An example could be the prohibition of future goods as being unpredictable and unknown, but Muslim jurists

accepted the contract of salam as an exception.

Most Muslim jurists gave to the buyer the right to view the subject matter of the contract. But the right to place conditions on the transaction, they gave to both parties. Some jurists, mostly among the Hanafi and Maliki Schools referred to other options, e.g. the option of acceptance.*

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* This will be dealt with in Chapter VI.

V. THE THEORY OF CONTRACT IN THE HANAFI SCHOOL

(i) Preface

The Hanafi School is dealt with in this work as being the main foundation of the Majalla[202] which was followed and adapted by many civil law countries of the Middle East. Some states such as Jordan, (until recently) adopted it completely and some, such as Iraq, adopted some of its principles to their civil codes. The Hanafi doctrine is widely spread among various Arab states, especially those bordering Turkey (the centre of the Ottoman Empire).

Reference will be made in this work to the Egyptian and Libyan civil codes, where principles of the Shafii and Maliki schools are present. The Hanbali school will be primarily dealt with in this study, as it is the school of law followed in Saudi Arabia.

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(202) Majallat I Ahkami Adlie - (The Book of Rules of Justice)

Concentration is given in this work to both the Hanafi and the Hanbali schools as they are the most highly regarded and influential.

The Majalla was the creation of the reform movement which swept the Ottoman Empire in the ninteenth century. It came to protect and to keep the Islamic heritage in the newly found legal system. The rules were preserved from the writings of the most various and most famous jurists of the Hanafi School. The Majalla did not bring any new principles; it codified the old Islamic rules of the civil law of the Ottoman Empire.(203)

The rules, before the introduction of the Majalla were to be found throughout the former works of many jurists. The Majalla is divided into parts in relation to subject matter, but its classifications in general are not well stated. The sources of the Majalla were so limited that it caused many problems in every field, especially in the field of contracts, as new circumstances evolved which could not be dealt with because the Majalla did not have a general theme or theory to govern contracts.

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(203) Liebensy, Religious Law and Westernisation in the Moslem Near East, 2 AM. J. COMP. L., 496-497 (1953)

Initially the Majalla operated in a manner restricting the freedom of the parties to contract,* but the Ottoman Code of Civil Procedure was changed in 1914, and the principle of freedom to contract was altered to include all contracts and agreements which did not contradict the regulations, the morals and the public order of the society.(204)

The Islamic law gives great emphasis and regard to the individual and to his transactions with others. The Majalla, following in this pattern, stated basic principles which defined the rights of individuals and provided appropriate remedies.

(ii) A contract is defined in the Majalla as occurring when the parties bind themselves and agree to do something in regard to a certain matter.(205) The binding and the agreement to do something is the unity of offer and acceptance. Therefore, the formation of a contract is the connection between offer and acceptance in a

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(204) S. Mahmassani, Fal Safat al-Tashri fi al - Islam, 1966, p. 45

(205) The Majalla, Article 103-104

* For example, contracts for sale of future goods were not recognised.

in a legal manner. Therefore, the conclusion of a contract is the legal connection between offer and acceptance in a way which the result can be achieved quite clearly.

Certain factors must be present in order for there to be a contract which binds its parties legally, such as the consent of the contracting parties, the legal capacity of the parties, there must be valid objectives behind the intentions of the parties to a contract, and in some cases a certain form is required.

Contracts do not have to be in any precise form. The form could be agreed upon by the contracting parties, but is subject to their intentions as stated by the law.

(iii) The Principle of Consent of the Contracting Parties

> O ye who believe, eat not up your property among yourselves in vanities; but let there be amongst you traffic and trade by mutual goodwill .....(206)

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(206) The Holy Quran, Sura IV, "Nisa" or "The Women", verse 29.

Consent is necessary for the conclusion of a contract. It is the main feature of a valid contract. Consent is chown by means of offer and acceptance. Offer is a statement made with a view to becoming legally bound. Acceptance is the statement made in response to the offer with a view to becoming legally bound. The contract is then complete.(207) If either offer or acceptance is not present, the contract is deemed to be void. As previously discussed, some contracts are deemed by some jurists to be exceptions to this rule.

Offer and acceptance may be given by word of mouth, by writing or by any other recognised sign or even conduct (in some circumstances) which indicates offer and acceptance.(208) In some instances the acceptance is considered to be sufficient if it coincides with the offer by way of implication.(209) Acceptance must conform to the offer(210) and can be given as long as the offer stands.

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(207) Majalla, Article 101-102

(208) The main object of offer and acceptance is the mutual agreement of the parties, Majalla, Arts. 173, 174, 175

(209) Majalla, Article 178.

(210) Acceptance must coincide with the offer of the other party, Majalla, Article 177.

Neither offer nor acceptance can be implied from silence alone, but silence is equivalent to a statement where there is a positive necessity for speech.

The Majalla, for instance, refers to silence as an indication of acceptance in the contract of hire (Ijara)[211] but not so in the contract of loan (A'reya).[212] Islamic law had presumed that every contract would be made in the actual presence of the parties,[213] known as the meeting of the parties (majlis al-aqd.) With the expansion of commercial transactions and modern means of communication, acceptance was held to occur at the place and at the time that the message of acceptance reached its destination.[214]

(iv) Consensual Defects in the Majalla

The parties to a contract must be free to consent. Any defect inhibiting the freedom of consent can render the contract void. Thus, any agreement must be free from

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(211) Majalla, Article 438.

(212) Ibid, Article 805.

(213) The Holy Quran, Sura II, "Baqara" or "The Heifer", verse 282. This principle is referred to in Article 181 of the Majalla.

(214) Rahim A. The Principles of Muhammadan Jurisprudence, Lahore, 1958, p. 282.

duress (Ikrah),[215] mistake (Galat), fraud (Tadlis) or deceit (Taghreer) and lesion (ghabn).*

The contract entered into because of duress is void. This principle does not apply to all contracts, as cases of personal status are exceptions. "Anyone who after accepting faith in God, utters disbelief, except under compulsion."[216] The person who inflicts the duress must be able to carry out his threat and the person whi is the subject of the duress must have complete belief that the threatened incident will happen. Finally, the person who is the subject of the duress msut carry out the act he has been compelled to do in the presence of the person inflicting the duress.

The Hanafis divide the duress into:-

a) Restraining, (mulj'i) sometimes referred to as complete (Tam) or major. This kind of duress occurs when there is a threat of a major injury such as the loss of life or limb, the loss of property and similar acts.

b) Not restraining (ghayr Mulj'i) or sometimes referred to as incomplete (ghyra tam') or minor. This kind of duress occurs when there is a threat of imprisonment or simple injury.

This division of duress is due to the difference between what the jurists of this school consider as a consent (rida) and what they consider as a choice (Ikhtiyar).

What concerns us here is that both kinds nullify the

(215) Majalla, Articles 948-949. duress consists of "wrongfully forcing a person through fear to do something without his own conent". Major duress is defined as the death of a person or the loss of a limb. Minor duress occurs when grief or pain alone is caused, such as imprisonment.

(216) The Holy Quran, Sura XVI, "Nahl" or "The Bee", v. 106

* Fraud, deceit and lesion could be referred to under the term "misrepresentation" in English law.

principle of consent.

Contracts made under mistake[217] as to subject matter or one of the fundamental aspects of the contract are void ab initio.[218]

Gross lesion if accompanies with complete deceit or fraud renders a contract voidable at the instance of the innocent party, who is entitled to cancel the contract and to receive damages.[219]

(v) The Legal Capacity of the Parties.

The parties to a contract must be able to debate, prove, and understand the character of their acts. It is a condition for the fulfillemnt of a sale contract that the parties must be aware of their act and that they should have complete capacity.[220]

A person who can not exercise legal rights is known as an "interdicted person".[221] Minority, lunacy, imbecility, prodigality, debt, mortal sickness, mental deficiency, drunkenness and inadvertance and sometimes womanhood are reasons* for a person to be called an "interdicted person".

a) Minority

A minor who can not realize the consequences of his acts cannot enter into any kind of contractural relationship (he does not possess any kind of legal capacity) but a minor who understands the

(217) Mahmassani S. al-Nazariyya al-A'ma Lial-Mujibat wa al-Okoud fi al-Sharia al-Islamiyya, Beirut 1972, vol. 2, p. 420

(218) Majalla, Article 72

(219) Majalla, Article 357

(220) Majalla, Article 361

(221) Ibid, Article 941

* Sometimes referred to as impediments to legal capacity.

consequences of his acts can enter into some contractual relations which are for his own benefit, such as accepting a gift [222] without the need for the guardian's approval. But such a person can not enter into a contract which is to his disadvantage, such as bestowing a gift upon someone else. Such persons possess only the capacity of obligations. In certain circumstances where there is doubt as to whether it is to the minor's advantage or not, the contract can not be, concluded unless the guardian approves the act. [223] The majority of Muslim jurists consider a minor becoming of age when the minor reaches the age of puberty which is fifteen. "Make trial of orphans until they reach the age of marriage; if then ye find sound judgement in them; but consume it not wastefully, nor in haste against their growing up". [224] The court usually protects the welfare of a young person who reaches the age of puberty but whose mind is not yet developed.

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(222) Muslim jurists and scholars differed on considering the gift a contract (see the classification - Bilateral and Unilateral Contracts).

(223) Al-Majalla, Articles 943, 966-967

(224) The Holy Quran, Sura IV "Nisa" or "The Women", verse 6.

b) Lunacy and Imbecility

A lunatic is a person who is either continuously or occasionally of unsound mind, whereas an imbecile is a person whose mind is upset and whose understanding is limited and in general mentally unstable. The Majalla treated the lunatic as though he were a minor who cannot understand and therefore cannot enter into any kind of contractural relations. An imbecile was treated as a minor who realizes the consequences of his acts and was given the capacity to enter into contractural relations which are only to his own benefit. (225)

c) Prodigality

A prodigal person is known as that who wastes his money and who causes damages to his property by his reckless acts(226) for no reason. The Quran also refers to prodigal persons.(227) The Majalla permitted the court to publicly declare a person to be prodigal.

d) Debt

The court may upon the request of a debtor's creditors,(228) declare a person who is in debt as an interdicted person.

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(225) Al Majalla, Articles 994-945, 957, 978-979. Article 980 gives lunatics who are not continuously mad but sane during a period of time, acts of desposition over property like normal persons.

(226) Al Majalla, Article 946

(227) The Holy Quran, Sura IV, "Nisa" or "The Women", v. 5

(228) Majalla, Articles 998 - 1001

e) Mortal Sickness(229)

This is defined as an illness where death is definite and where the ill person may in accordance with his acts do something which is against the interests of his heirs and creditors. Many Muslim jurists however consider terminal illness to constitute merely a partial interdiction, whereas others consider it to constitute a total interdiction.

f) Mental Deficiency

A mentally deficient person is defined in Islamic jurisprudence as a person who is of slow understanding. If the acts of a mentally deficient person are to the standard of an adult man who is capable of entering into contractual obligations, then such a person is considered to have full legal capacity but if his acts are not to the level of an adult person he is then treated as though he were a minor with no legal capacity whatsoever.

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(229) Majalla, Arts. 393-395, 1595-1605

g) Drunkenness

Drunkenness could cause mental disability. This disability could be either for a short or a long period of time. The Hanafis and some other jurists consider such a person to have no legal capacity.

h) Inadvertence

An inadvertent person is one who is easily deceived (because of his simplicity) in transactions. This could be considered similar to prodigality.

i) Womanhood

Some jurists consider women to have no legal capacity, some consider them to have limited capacity, and some consider them to have full capacity.*

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* The reasons given by jurists is that the woman is considered simple minded, inexperienced, tends to forget and more emotional than the man.

(vi) The Binding Force of the Contract

Some articles of the Majalla are considered in contrast with the main Islamic theme of fulfilling all obligations. The first hundred articles of the Majalla however conform to the general rules of Islamic jurisprudence.(230)

Some of these rules allow some exceptions. These exceptions should not affect the general application of the rule The idea behind these rules is to give a more clear explanation of the principles and the problems of Islamic law.(231) Some of the rules on their own are not clear enough to authorise a Muslim judge to conclude his judgement upon them when he can not find a more clear rule in a more clear text.* The rules were laid down to give an over all approach to the law rather than to give solutions to certain problems. As the Majalla states, "matters are stated according to the intention of the parties".(232) Effect is to be given to the intentions and to the meaning of the contract and not to its wording, and when there is a difference between the intention of the contracting parties and the wording of the contract

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(230) Mahassani S. Fal Safat Al-Tashri fi Al-Islam, 1966, pp 149 - 167

(231) Majalla, Article 1

(232) Ibid, Articles 2 & 3

* Such as the other fundamental texts of Islamic law.

or between the meaning of a certain expression and its wording, consideration must be given to the certainty of the intention and the meaning and not to the wording.(233)

Where the application of the rule in an exceptional situation could lead to an extravagant difficulty and hardship, then the rules provide for flexibility. The Majalla considers difficulty as giving rise to facility, and that where strict application of a rule would cause hardship, consideration should be given. The Majalla allows certain things which are often forbidden to be applicable by way of necessity: "Necessity makes prohibited things permissible".(234) But the application of the principle of necessity is discretionary. It must be estimated by the extent(235) and the circumstances of each case. The application of the principle of necessity does not mean that the rights of others are wasted, for example, if a hungry person takes food belonging to another person and eats it, such person must pay the value of the thing taken.(236)

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(233) Mahmassani S. Fal Safat Al Tashri Fi Al-Islam 1966, p. 160

(234) Majalla, Article 21

(235) Majalla, Article 22

(236) Ibid, Article 33

The theory of license by necessity could be considered to be the back-bone of this principle in the binding force of contracts.(237) For example when the reason for necessity or for the difficulty and hardship disappears and does not continue any more or if the reason of hardship is over, then the full application of the contract would be reinstated. The Majalla states that the authorisation of something to be applicable or to come into being because of some reasons or excuses stops from being applicable when the reason for its application is over.(238) An example would be if a witness can not attend the court to deliver his statement for a reason such as illness, his statement will then be taken at home and if the reason (in such a case as illness) is over, then the application of the rule becomes enforceable. When an interidction is lifted, then the thing to which such interdiction is bound returns to its legal status.(239) Another exception to the general rule of the binding force of contracts is when the reason for the fulfillment of the contract discontinues. Even if the contract has been legally made, Muslim jurists say that the continuance of the purpose of the contract was necessary for it to be considered valid. In an event whereby the reason for the fulfillment of the contract discontinues, so that the contract cannot be carried out, such contract is cancelled. An example is where a person

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(237) Mahmassani S. Fal Saft Al-Tashri Fi Islam, 1977, p. 156

(238) Majalla, Article 23

(239) Majalla, Article 24

who is suffering from a toothache makes a contract with a dentist to extract his tooth for a certain fee, and if the pain disappears, the contract of hire is then cancelled.(240) (The contract of service is alien to Muslim jurists. Where there is difficulty, the Majalla provides that the principle of necessity may be applied). In the contract of hire, a person has the right not to pay any rent if there was no benefit gained from the contract upon which such contract is concluded.(241)

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(240) Majalla, Article 443

(241) Majalla, Article 478

VI THE THEORY OF CONTRACT IN OTHER ARAB STATES WHERE CODES ARE INFLUENCED BY THE MALIKI AND SHAFI'I SCHOOLS

i) Preface

The jurists in Egypt acknowledged the importance of Islamic jurisprudence and its adaptaion to modern circumstances and needs, but they denoted that civil law systems of other nations could assist the social conditions which existed in the area and so in 1949, the new Egyptian Civil Code was introduced.(242) The code was mainly drawn from all the Schools of Islamic jurisprudence,of other nations' civil codes, and from earlier decisions of the Egyptian courts. Other countries of the Middle East watched with anxiety the gradual development of the Egyptian Civil Code.(243) For example, in Iraq and Syria, the Majalla did not fulfil the requirements of the society and in Libya whose legislation until that time had been unsophisticated.

There was a need for reform in these states, the people were looking for new civil codes, the Egyptian action brought this desire closer and as a result the Syrian Civil Code of 1949, the Iraq Civil Code of 1951(244)

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(242) The Egyptian civil Code was introduced in October 1949.

(243) Anderson, 'The Significance of Islamic Law in the World Today' - J. Comp. L (1960) p. 196

(244) The drafting committee of the Iraqi Civil Code referred to the Majalla as soucre of law for this proposed code. Principles from other Islamic Schools of Law are also referred to as well as foreign codes which are not contrary to public order.

and the Libyan Civil Code of 1953[245] were introduced. As referred to, the new Iraqi Civil Code preserved many theories and principles of the Majalla.[246]

The provisions of the Iraqi Civil Code were based primarily on Islamic Law.[247] The reasons behind its devotion to Islamic law were the deep-rooted influence of Ottoman laws in Iraqi society and the desire of the people to remain close to the Islamic legal system. In the absence of certain provisions, Islamic law was the source from which rules and principles were drawn. This view was confirmed by the Egyptian Civil Code.[248]

The explanatory memorandum to the Egyptian Civil Code affirms the importance of Islamic law on which it relies when the court is faced with a case where no relevant provision is to be found in the code. The Libyan Civil Code of 1953 and the Syrian Civil Code of 1949 affirmed also the significance of Islamic law.

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(245) The Iraqi Civil Code was introduced in June 1953 - the Libyan Civil Cade was introduced in February 1954, and the Syrian Civil Code in June 1949.

(246) Certain rules of the Majalla are preserved by the new Iraqi Civil Code. For example, Articles 2 & 3 of the Majalla became Article 155 of the Iraqi Civil Code, Article 13 became Article 157, Article 14 became Article 2 and so on.

(247) The Iraqi Civil code of 1951, Art. 1

(248) Egyptian Civil Code introduced in 1949, Art. 1

In Article 1 of each of these codes, customary law was expressly replaced by Islamic law as the primary source of law, where there is no applicable provision in the code.

(ii) The Principle of Consent of the Contracting Parties

The contract is formed under the Egyptian, Iraqi, Libyan and Syrian Civil Codes in a similar way to that of the Majalla but is directed towards the commercial needs of the society. Under these codes, a contract is formed when the intentions of the parties (who must be eligible to enter into contractual obligations) are expressed quite clearly. The intention could be expressed either orally, by writing, or by any common usage of a sign. The intention could be made by way of implication.(249) It becomes effective at the place and from the time the acceptance is acknowledged by the party concerned, unless there was an expressed implied or even an explicit legal text to the contrary.(250) These civil codes acknowledge

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(249) Egyptian Code Arts. 89-90, IRA. Code Arts. 77,79-LIB. Code Arts. 89-90, SYR. Code Arts. 92-93 in.

(250) Egyptian Code Article 91; IRA Code Article 87; LIB Code Article 91; no correspondence in Syrian Code.

the principle of majlis al-akd, in a way which corresponds to the needs of present day societies.

If there was no time limit for the acceptance to be made at the meeting of the parties and if the acceptance was not made immediately then the offeror is not bound. This applies to telephone conversations and to similar circumstances. Acceptance could be given at any time after the offer and before the end of the meeting of the contracting parties where the contract is being formed, as long as the offeror has not shown any sign of withdrawing his offer.(251)

The acceptance must always correspond to the conditions of the offer. If the acceptance is made beyond the conditions of the offer or if it brings a restirction or a modification to the main offer, it is then considered to be a rejection and constitutes a counter-offer.(252) Contracts can be completed and fulfiled when the two parties agree on the main issues leaving the minor details to be agreed upon at a later stage, that is if there was not any condition or reason which indicates that if the agreement on these minor details has not been reached, would vitiate the contract. When any dispute occurs, especially on the minor details, the court will then give its decision after studying the transaction. The decison must be based on the provisions of the Law and on the principle of justice.(253)

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(251) Egyptian Code, Arts. 93-94 - IRA Code Arts. 82,84 LIB Code Arts. 94-95, SYR Code Arts. 94-95

(252) Egyptian Code Art. 96 - no exact correspondence in the IRA Code - LIB Code Art. 96 SYR Code Art 97

(253) Egyptian Code Art. 95 - IRA Code, Art. 86, LIB Code Art. 95 - SYR code Art. 96

According to the nature of some contracts and to the commercial usage if the party who makes the offer does not request a formal acceptance to his offer, the contract is then considered formed unless there is a clear refusal, in due time. If the other party keeps silence or if he fails to reply, this silence and failure to reply may constitute an acceptance in the following circumstances:-

a) If the offer is made for the interest of the offeree.

b) If the offer is referred to dealings which has already existed between the contracting parties.(254)

iii) Consensual Defects

All four civil codes divide consensual defects into three kinds: duress, mistake and fraud or deceitful lesion.

Duress is defined as a reasonable fear which is promoted by the other party. Its presence renders the contract coid.

Mistake has to be fundamental in order to render the contract void. Any advantage of the mistake, taken by the party who induced it, contrary to the idea of good will

(254) Egyptian Code Article 97; IRA Code Article 81; LIB Code Article 98 SYR Code Article 99.

can not be accepted.(255)

Fraudulent or Deceitful lesion will render a contract void where the fraudulent or the deceitful lesion induced the innocent party into entering into the contract.

(iv) Legal Capacity

The legal capacity of the parties under the four civil codes is the same as that of the Majalla and is therefore identical to the Islamic legal requirements concerning capacity.

The young person who can not discriminate has no legal capacity while on the other hand, a young person with discretion* has limited capacity, and can only enter into those contracts which are to his own benefit. A person obtains his legal majority according to the codes of Iraq, Egypt and Libya at eighteen. The Majalla and Islamic jurisprudence set the age at fifteen. Syria, however, followed the Majalla on this pcint.

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(255) Egyptian Code, Aeticles 120-124; IRA Code, Articles 117-120; LIB. Code Articles 120-124; SYR. Code Articles 121-125

* the age of discretion occurs when a person reaches puberty according to the Civil codes of Egypt, Syria and Libya.

(v) The Binding Force of the Contract

According to the four codes, the contract defines the obligations between the contracting parties. The contract is the law of the parties, and they must abide by its terms. The new Egyptian Civil Code, stated two exceptions to this rule.

1. The contract defines the law between the parties and so it can be said that it is the set of rules which governs both parties. It can be amended, changed or cancelled by the agreement of both parties, or even by reasons of the law. If, as a result of an exceptional and unforeseen circumstances, not reaching the degree of impossibility, the performance of the contract becomes quite oppressive on the debtor, as to threaten him with extravagant loss, the court may after assessing the interest of both parties, reduce the obligation to reasonable limits. Any contractual condition to the contrary is void.(256)

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(256) Egyptian Code Article 147; IRA.Code Article 146; LIB.Code Article 147; SYR.Code Article 148.

2. The acceptance in the contracts of adhesion* is absolute. This contract is set up for a certain purpose and in accordance with certain rules, this contract is made by the offeror and is unquestionable. If the contract is made according to the concept of adhesion and if it includes arbitrary conditions, the court may modify these conditions or may relieve the weaker party of the obligaiton in accordance with the principles of justice. Any agreement contrary to this is deemed to be void.

The explanation made of any vague rule in the contract of adhesion must not be the cause of any harm inflicted on the weaker party even if he was a creditor.

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* The development of societies created two classes of people; those who are strong economically and those who are weak. Thus, a certain kind of contract appeared between these two classes. The class which is weak cannot argue the conditions of such contracts and has to accept what the other class has to offer. The class who is weak economically needs this kind of contract in his daily life. Examples are a contract with the airlines or transport companies.

VII THE THEORY OF CONTRACT IN THE HANBALI SCHOOL

(iv) Preface

The branch of Law known as the civil law is alien to the beliefs of the Saudi Arabian people and so no civil code in the general meaning of the word does exist. The Hanbali rules of Law and jurisprudence, is the official and most accepted doctrine in the kingdom. After several unsuccessful attempts, King Abdul Aziz tried in 1927 to introduce a civil code similar to that of the Majalla but not based on the Hanafi doctrine. His efforts, for such implementation were faced with strong opposition from the immenent Hanbali jurists who were in favour of reliance on the religious texts as acknowledged by the Instructions of 1926.(257)

> The legal norms, applied in the Kingdom of Hijaz shall always be in accordance with the Quran, the sunna of his prophet, the conduct of the prophet's companions and with the conduct of the first pious followers.(258)

(ii) The Principle of Consent

Similar to the other Schools, the Hanbali School does not have specific formal requirements for offer and acceptance. Any expressed verbal indication , behaviour

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(257) Schacht, J., 'Islamic Law in Contemporary States' J.COMP. L. (1959) pp. 133, 146-147

(258) Instructions of the Kingdom of Hijaz, August 29, 1927, Article 6

and act which shows quite clearly without any question, the desire of the parties concerned, suffices for the formation of the contract, according to the jurist Ibn Taimiyya. The reason given for this approach was that a strict verbal phrase could cause misunderstanding and sometimes hardship, since many contracts from the time of the Prophet were concluded without words e.g. by a shake of the hand or other unequivocal behaviour indicating the existence of a contract.(259)

Acceptance, according to the Hanbalis must be given before the contracting parties end their meeting known as (majlis al aqd). If, for example, a seller makes an offer, and the parties break up the meeting before an acceptance is given, there is no contract created.(260)

(iii) Consensual Defects

The rules concerning consensual defects are the same as those found in the Majalla. Mistake, fraudlent or deceitful lesion and duress can affect the formation of any contract, and renders the contract void. Under the Hanbali doctrine the announced and unannounced intentions of the contracting parties must be clear from any sort of duress. However, when a ruler compels a person to sell his

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(259) Ibn Taimiyya, III Mujmat Fatawa (in Arabic) 1326 H. He stated that the intention should be regarded rather than the wording of the contract. pp. 267-272

(260) Al-Jiziri, Abdul Rahman, II Kitab al-fiqh ala-al -Madahib al-Arba, p. 168 (n.d.)

house for the payment of his debts, the sale in such a case is valid and is accepted because there is a justification to the act. But when there is no justification to the act, the duress is deemed to be unjustifiable and renders the sale void.(261)

A major difference between the Hanafi and Hanbali schools is on the principle which relates to the object of the contract. The Hanafi school on the one hand vitiated most contracts where there was an element of risk and the sale of things which are not in existence.(262) The Hanbali school on the other hand permitted the sale of such goods. The reasoning behind the vitiation of contracts with the element of risk was based on the Quranic principle which vitiated gambling.

The contracts which involved an element of risk and where this element was obviously one of irregular risk (gharrar), (were considered by the Hanafis - as well as the majority of Muslim jurists), or where the degree of the obligations on the part of one party and where the benefits set out to the other party were not quite clear at the time the contract was formed. In their attempt to bring a kind of equality between the parties in their contractural relationships through the denial of gambling contracts, these jurists did not in turn validate certain commercial contracts

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(261) Al Jiziri, A.R. Kitab Al-Fiqh Ala Al Mahadib al-Arba, in Arabic, Vol. II, p. 161 (n.d.)

(262) Majalla, Art. 205

which confer certain benefits such as the contracts of insurance.(263)

Some Hanbali jurists rejected this idea. They said that the need for the social and economic development of the society, certain measures of expectation were essential in contracts, and if that was not considered then the basis of all commercial contracts would be weakened. They also add that (on the issue of irregular risk raised by the Hanafis and supported by the majority of muslim jurists) to reject all elements of irregularity and uncertainty was not practical because in nearly all cases, the justice and fairness in values, is usually based on the nearest estimation rather than on a price calculation. They state that to alter the usual commercial practice which is the general behaviour of the people according to what they are accustomed to could cause hardship and uncertainty in dealings.(264)

However, it is submitted that the approach of the Hanbali jurists could be the cause of facility in dealings especially in a more modern progressive economic society.

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(263) Habachy, 'The System of Nullities in Muslim Law, J. COMP. L. (1964) pp. 61,66

(264) Ibn Taimiyya, III Mujmuat Fatawa (in Arabic) 1326 H., p. 278

(iv) Capacity

The legal capacity of an individual to enter into a contract, according to the Hanbalis, is the same as that applied by the Hanafi School as expressed by the Majalla. In general, a minor who can not understand the nature of his acts* can not enter into any kind of contractual obligations even if the guardian approves it. But some jurists of the Hanbali School say that a minor who can not understand the nature of his acts can enter into a contract, only if his act is of little value although what that value is has not been clearly defined. A minor who understands the nature of his acts** can enter into a sale contract which is to his own benefit on the approval of his guardian.

(v) The Binding Force of the Contract

The Hanbalis in general and Ibn Taimiyya in particular made reference to the various verses of the Quran which state quite clearly God's commands for the fulfillment of contracts, as being the general rule of contract law. In our covenant with God, we undertake certain obligations upon ourselves, these obligations should be fulfilled even if they were not referred to

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* Known as imperfect understanding

** Known as perfect understanding

quite clearly. A man who makes a promise and then renounces it has not yet established his true faith. The Quran and the Sunna state that the renouncement of covenants, conditions, treaties and contracts is prohibited and that who does so must be penalised.(265)

The Muslim ruler in his public actions as the Imam of the nation, must fulfil and observe his covenants and contracts quite honestly, he is bound to do so by the religious texts, it is exactly the same as that of the muslim person in his private actions as an individual. The Muslim ruler must observe and apply the religious principles, he must confine his action to the religious surroundings setting an example to the rest of the nation.(266) Therefore, a breach of faith by the ruler will lead to serious infringement of law and order and a set back for the nations's anticipation of a just, honest, trustworthy leader. As Ibn Qudama of the Hanbali school stated:

> The ulama have referred to the breach of faith committed by Imam al-Muslimeen (who is usually the leader of the muslim nation) as being more serious and grievous than that committed by the individual, for its unpredictable bad results. If the Imam gets a bad reputation for breaking the faith.., the people, friends and enemies will not have faith or trust in him and in his covenants or treaties, this will harm the leader's reputation and in general will lead to a state of disbelief in the Muslim Leader.(267)

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(265) Ibn Taimiyya, III Mujmuat Fatawa (in Arabic) 1326 H. p.330

(266) Coulson, N.J., "The State and the Individual in Islamic Law' vol. 6 INT'L.& COMP. L.Q. (1957), p. 49

(267) Anderson and Coulson. 'The Moslem Ruler and Contractual Obligations' vol. 33 N.Y.U.L. REV. 1958, pp.229-230

This kind of relation between the religious principles of the Islamic law and the political regime in the Muslim's history was regarded as perfect and ideal. Unfortunately this ideal practice was not followed by the Muslim leaders, all the time especially in recent years.(268) A person can do nothing to prevent the abuse of an unjust leader. However, the principles of the Muslim's holy law request the Muslim leader to observe and to abide by his obligations.(269)

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(268) Notle, The Rule of Law in the Arab Middle East, Muslim World, (1958), vol. 48, p. 295.

(269) Anderson J.D. and Coulson, N.J., 'The Moslem Ruler and contractual obligations" 33 N.Y.U.L. REV. (1958) pp. 918-933

VIII THE CONTRACT OF SALE AND SOME CONCEPTS WHICH ARE RELATED TO THIS KIND OF CONTRACT

The main contract in Islam is the contract of sale. Most other contracts are based on this. Understanding the contract of sale is essential to understanding the general theory of contract in Islamic law. The contract of sale and the certain concepts which are dealt with under the theory of sale are discussed herein. Reference is also made to the difference of opinion of the Hanbali School from the other schools in regard to the contracts of sale and marriage.

(i) The Principle of Sale

Sale of goods (bai) - The Quran validated contracts to the extent that no element of usury is involved ".....But God hath permitted trade and forbidden usury"(270)

A contract of sale is concluded as is any other contract i.e. offer and acceptance between two parties, however the two parties must according to the Law possess the required legal capacity. For a valid contract of sale, certain elements must be present. The object or subject matter must be a legal property of value, in

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(270) The Holy Quran, Sura II, "Baqara" or "The Heifer" verse 275.

existence at the time of sale and can be delivered. The price, at the time of contracting, must be stated quite clearly.

In a contract of sale the object or subject matter must be stated quite clearly; this being an essential condition of a valid contract. The subject matter can be acknowledged by vision. Some jurists state that acknowledgement can be by description alone. There developed two views of contracts concluded on the basis of description. They are as follows:

a) A contract is invalid unless the buyer has seen the object of the sale.

b) Ibn Qudama did not agree with this and stated that acknowledgement may be the result of certain knowledge on distinguishing qualities where the price varies from one object to another and that can be enough for the contract to be considered valid, as in the contract of salam which is formed on the description of the object. It is not essential to consider what is known as hidden properties. This can be said about any object which can

be sold according to the contract of Salam if it can be acknowledged by certain qualities or if it is of which can be sold by weight and measure.

When goods do not correspond to description there are a number of legal consequences, the purchaser of goods that do not correspond to description has the option of acceptance or rejection of part or of the whole. In cases of conflict between the parties, the onus is on the purchaser to prove his allegation which in the absence of evidence should be supported by oath (yamin).

(ii) The Concept of Sale with Regard to the Previous View of the Sale Object

If a contract of sale is formed after a previous viewing of the sale object,(271) the contract is then considered void unless the object is in existenct at the majlis of the contract.(272) Ibn Quadama disagrees with this stating that previous viewing of the object is equal to viewing the object during the conclusion

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(271) After a period of time has passed between the viewing of the object and the formation of the contract.

(272) Al Mirdawi, Al-Insaf, Vol IV. p. 297

of the contract. He maintained that seeing the object is not the only way to have sufficient knowledge of it, as there are other means, such as description. He maintains that it is a matter of consensus when, for example, two parties to a sale contract of a house which is the object of the sale conclude the contract by viewing part of the house, the contract is considered valid even though the parties did not view the whole object. But if the viewing of the object at the time of the conclusion of the contract is a condition for the validity of the contract then the object must be viewed as a whole.(273) Thus, two different views evolved among the jurists which led to a disagreement between the Hanbali School and Ibn Qudama as to whether a contract of sale concluded after the previous viewing of the object is valid where there is a possibility of change. The Hanbali School say that such a contract is invalid as long as there is a suspicion of change and that the buyer is not certain about the condition of the object. Thus the contract lacks the condition of acquaintance.(274) Ibn Qudama states "such a

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(273) Ibn Qudama, Vol. III, Egypt, 1929, p. 583

(274) Al-Mirdawi, Vol. IV, First Edition (n.p.) 1957 p. 297

contract is valid if there is as much reason to suppose that the sale object has remained unchanged as that it has changed."(275) He supports his view by the principle that whenever doubt arises in a situation, the essential relation between the parties, as defined by the contract ('asl) should be taken into account, especially when there is no exact proof of the new situation.

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(275) Ibn Qudama, Vol. III, Egypt, 1929, p. 584

(iii) The Concept Regarding the Conditions as to the Quality of the Subject Matter

The seller must observe the degree of quality which is stated by the buyer sepecially if that is the reason why he contracted to purchase it. If the seller offers an object of a better quality the buyer is free to revoke the contract or accept it. Ibn Qudama stated that the particular quality stated by the buyer should be observed as the buyer concluded the contract for a special reason.

The Hanbalis maintained that the buyer has no right to revoke a contract of sale if he received something better than he bargained for.(276) Ibn Qudama's view, however, is based on a consideration of individual interest, which is basic to all business transactions. It is unfair to sell an object which does not conform to the buyer's purpose even though from some point of view the object may appear to be superior to the one contracted for.

From this we can see that the general rule regarding the measure of quality is the suitability for the buyer's purpose.

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(276) Al-Mirdawi,Vol IV., first edition (n.p.), 1957 p. 342

(iv) Compensation for Defects found in the Sale Object

Ibn Qudama maintains that if a person buys goods and they are defective, if he does not or cannot return them, he can still claim compensation from the person who sold them to him even though he knew of the defect beforehand, and as long as the seller does not dismiss what is considered as his obligation under the terms of the contract. The majority of Hanbali jurists, however, do not give the buyer the right to claim compensation when he does not or cannot return the goods as this indicates that he is satisfied with them.(277) The defect in the goods must exist at the time that the contract is concluded. This principle is illustrated in the following case:

Ibn Turki Sudayrii, a plaintiff in an action against the defendant K.S. Al-Deen brought an action for the return of the price paid for a slave for the price of SR 4500 paid for the sale. He claimed that the slave was a "run away" and that this was a defect. He stated that the defendant had sold the slave on the condition that he was free from any defect. Upon this basis he demanded revocation and return of the money.

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(277) Al-Mirdawi, Vol IV., first Edition (n.p.), 1957, p. 420.

The plaintiff was questioned as to the date of purchase of the slave and when the slave started to run away. The plaintiff replied that he bought the slave in November and that the slave started to run away in early December. The defendant agreed that he had sold the slave to the plaintiff for SR 4500 with a condition that the slave was free from defect and he had bought the slave from a third party on that condition. The plaintiff brought two witnesses who confirmed the slave was known as a runaway. It was found on the evidence that the slave was defective prior to the defendant's purchase. The plaintiff was entitled to demand the return of the money and the revocation of the sale as the defect, though hidden, was present at the time of the sale. The judge referred to a case at the time of Ibn Hanbal and ordered the return of the money and assured Al Deen (the defendant) that he had a right to claim against the person who sold him the slave.(278)

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(278) Grand Sharia Court of Mecca, Sakk No. 61, Registry Book 3 p. 49 (1374) 1954.

(v) The Concept of the apportionment of the Price

If the object of a contract of sale consits of forbidden and permitted things and if the price of each thing was not divided among them in proportion, therefore sold separately, then such contract is considered void.* Ibn Qudama, among others, stated that as long as the price has not been divided in proportion to each part, the contract must be regarded as a whole and considered completely valid or completely invalid. It is impossible to regard the contract valid in part where the price of each part is not fixed at the conclusion of the contract since the contract lacks the condition of stating the price of each part of its object clearly and separately. Jurists give a comparison to such a case of a man who marries two sisters. Such contract of marriage is invalid because it consists of permitted and forbidden things. The majority of Hanbalis consider such a contract to be valid in the permitted part and invalid in the forbidden part in proportion to the price which has to be estimated separately for each part

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* Selling wine together with orange juice.

of such a sale.(279) In such a case, in order to estimate the value of each part, it is assumed that wine, invalid part, is the same as valid part, juice. This assumption does not render the contract void as a whole since it is possible to separate the two parts of the sale object by defining the value and deducting one of the amounts from the whole sale price.* Ibn Qudama maintains that a contract of salam whose related condition is that the object is to be delivered later at a certain time must be invalid when, for instance, a buyer puts a condition that he should receive immediately half of the goods and the other half later. This is because the price of each part is not fixed, since goods delivered immediately usually cost more than those whose delivery is not urgent. The Hanbalis, to the contrary, maintain that the contract is valid in the delayed part and void in the part where delivery is immediate. The difference between Ibn Qudama and the Hanbalis on this extends also to other matters.

This view, adopted by Ibn Qudama, is not limited to contracts of sale of goods. He asserts it in relation to contract where the consideration is a preparatory condition of the validity of the contract.

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(279) Ibn Qudama, vol. IV, p. 238.

* Al Bahuti, Sharh al Muntaha, Vol. II, p. 154.

(vi) The Contract of Salam

> "O ye who believe when ye deal with each other, in transactions involving future obligations, in a fixed period of time... (280)

This verse is the basis of the principle of the contract of salam. It is a sale where the price must be paid at once and the goods to be delivered at a later date. The following conditions are essential for the validity of this contract.

a) The price should be paid in the "meeting place" and if the parties separate before payment is made, according to the majority of jurists, no contract is formed.

Some jurists of the Maliki School accept delay in the payment of up to three days.

B) The goods should be delivered at a fixed future date. Jurists differed on the length of the period in which delivery could occur.

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(280) The Holy Quran, Sura II, "Baqara" or "The Heifer", verse 282

c) The goods should be property which exist at the time of delivery. (This is agreed upon by all schools except the Hanafi School). According to this school, the goods should be in existence from the time the contract is formed to the time of delivery.(281) If it is not in existence at either the date of formation or the date of delivery, the contract is invalid.

Most Muslim jurists approved this kind of sale but Ibn al-Musayyab did not. His reason was the hadith of the Prophet prohibiting the sale of something not in existence. "The man cannot sell something which does not exist".

Al-salam should be free from any risk (gharrar). The only distinction between al-salam and any other sale is that in other sales the subject matter must be in existence at the time of the formation of the contract whereas in the contract of salam, the subject need only be in existence at the date of delivery.

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(281) Al-Hidaya - See Fath al-Qadir, Vol. 6, Boolaq 1894-98, p. 213.

Those jurists who consider contracts of sale where the subject matter is not in existence at the time of contracting to be valid acknowledge that such contracts are contrary to the principle of analogy but maintain their validity by way of exception. This exception was justified on the basis of necessity and because this type of contract was validated by certain legal texts. Some jurists considered salam to be a contract of risk, and validated by the principle of necessity. Most jurists, however, do not consider the contract of salam to be a contract of risk, even though it is a contract on something unknown at the time of formation. Thus, the subject matter being unknown at the time of formation does not necessarily make it a contract of risk.

(a) The Consideration for Goods in the Contract of Salam

In the contracts of Salam where the subject matter is of various kinds of objects without defining the apportionment of the consideration among them, are, considered by the majority of Muslim jurists as valid.

If a buyer buys two substances, for example, butter and cheese, for a fixed price of one dinar under a contract of salam and the parties do not define the relative prices of the objects, the contract is to be considered valid. This view is supported by the Hanbali jurist Ibn Qudama.

However, the Hanbalis in general consider such a contract as invalid, they maintain that the contract of salam is not allowed in the first place, but is permitted on the condition that it is safe from the element of risk (al-gharrar). The Hanbalis add that the conclusion of such contracts includes an element of risk, if the parties agree to annul the contract in one part of the object only, which the seller may not be able to hand over. The consideration for the annuled part is not exactly known for the need of definition of the price of each in the contract. Ibn Qudama also considered

a contract to be valid where the subject matter consists of one kind of object and the consideration (payment of price) of different kinds of currency, for instance gold and silver without the need for the definition of their relative qualities. For example, when the buyer concludes a contract of salam for a quantity of wheat for five dinar and fifty dirham. Ibn Qudama maintained[282] that, where it may be impossible for the seller to hand over part of the subject matter, the buyer will get a proportion of the full quantity, e.g. if the full quantity is one hundred kilograms and the seller is not able to hand over more than, say, fifty kilograms then half of the amount of the consideration paid in advance by the buyer must be returned to him. The Hanbali's, however, considered such contracts void because the proportion of the two different currencies is not specific.[283]

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(282) Ibn Qudama, Vol IV, Egypt, 1929, p. 305.
(283) Al-Mirdawi, Vol V, (n.p.), 1957, p. 106.

(b) The Properties of a Visible Consideration in the Contract of Salam

The prices of the subject matter must be exchanged during the majlis for the validity of the contract of Salam. It is debatable whether there is a necessity for an exact properties description of a visible consideration. Some say that the parties should have full knowledge of the properties of the consideration whether it is presented by the parties or not and even if it had been seen by the parties. It is stated that Ibn Hanbal referred to the description of the consideration, when a buyer pays the price he must state quite clearly the kind of payment and the kind of currency.(284) This conforms to the approach by Malik and Abu Hanifa, who maintained that a contract of salam could not be fulfilled, because the qualities of the object could not be known and as a result the contract is invalid (batil) or void. So, the absolute knowledge of the properties of the consideration is essential, as when disputes arise and in similar situations, a suitable known object would be much easier to substitute to the one which is not clear. The problem could also arise if part of the consideration belongs to a third party and this could make the contract

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(284) Al-Mirdawi, Volume V, first edition (n.p.), 1957 , p.106

invalid in this part. If the consideration were not stated quite clearly and defined, they could cause a lot of uncertainty to the parts of the contract which are valid and to the parts which are considered void. Ibn Qudama takes a different approach to the problem than those of his school, he refers to the failure of the jurist al-Khiraqi to mention the case in his book when describing the salam. Al-Khiraqi does not regard it as essential, the full knowledge of the properties of a visible consideration. To defend his approach, Ibn Qudama adds that, in as long as the consideration is seen by the parties concerned, there is no question as to its properties and quantity, and the description of an object which is considered certain by viewing, serves no purpose. This is quite similar to a case of sale of a visible object where is is considered adequate to view the object. He opposes the Hanbalis view stating that subsequent refund of the consideration of the contract cannot affect the contract, since this issue has no effect on the conclusion of the contract. If the contract fulfills the conditions of the contract of salam, it must be respected without any regard to any hypothetical objectives.(285)

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(285) Ibn Qudama, Vol. IV, Egypt, 1929, p. 298.

(c) The Contract of Salam for Exchange of Goods

In the contracts of Salam where the price is paid in kind i.e. goods for goods not of the same weight or measure, the contract is considered valid.(286) Ibn Qudama mentions that in such cases and in similar ones, if there is a difference in the amount of the object and if the payment must be delayed that does not create any problem. He adds that the question of the consideration in kind being valid has a precedent, he gives the example of the dower in the contract of marriage being of goods. Therefore, there can be no problem to the payment in kind in any other contract. He refers to Ibn Hanbal's explanation in which he accepts the validity of such contracts and in which he acknowledges that the consideration may be of currency as it also may be of goods.(287) Ibn Qudamada also refers to the opinion of sharif Abu Ga'far in which he allowed the conclusion of the contract of Salam where the object of the sale is of dirhams and dinars and where the consideration is of goods. Ibn Qudama finalises his analysis to the topic in question by concluding that the aforesaid approach is the one adopted by Malik of the Maliki school and al-shafii

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(286) This is for the reason that the exchange of goods which are the subject of weight and measure must be made outright and to delay the payment of goods for goods of such a category is prohibited (riba al-nasi'a). The contract of salam is based on deferred payment of the consideration, the contractors are not allowed to conclude such a form of contract where the objects and the consideration are of weight and measure..

(287) Ibn Qudama, Vol. IV, Egypt, 1929, p.299

of the Shafii school. (The Hanbalis in general do not consider that goods are valid consideration in the contract of salam, except for Ibn Qudama.)

For instance, Ibn Ali Musa assumes that the consideration in the contract of salam must be either gold or silver. Al-Khiraqi maintains that it is not allowed to conclude a contract of salam if the object is goods payable for deferred goods. Al-Qadi Abuya'lu states that gold or silver being the consideration confirms to Ibn Hanbal's view concerning the contract of salam.(288)

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(288) Al-Mirdawi, Vol. V, first edition (n.p.), 1957, p. 89.

(vii) "Earnest Money" (Bai al-Arbun or al-Arbun)

"Sale of Arbun" occurs when a man agrees to buy an object and pays to the seller an amount of money which is deducted from the purchase price if he takes the object but is forfeited to the seller if he refuses to take the object. This definition of arbun is agreed upon my most jurists.

Malik, bowever, says "A man to buy the slave says to the seller I will give you one dinar or dirham or more if I take the object. What I give you of money is part of the price of the object and if I do not buy the object what I gave you is mine."(289)

Ibn Qudama says "The arbun in the sale is to buy the object and pay a dirham or its equivalent, and if he takes the object then it is part of the price and if he does not take the object then the dirham is for the seller".(290) Al-Murtada and Al-Ramh maintained that the seller takes the dirham by way of gift (hiba)

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(289) Al-Muwat'a, Vol IV - Hamish al-Muntafa, Egypt, 1951, p. 157.

(290) Al-Mughni, Vol. IV, Egypt, 1929, p. 232.

and that this gift is a condition which lies at the heart of the transaction.

(a) The Legality of Arbun

Muslim jurists differed on the legality of this kind of transaction. The Hanafis, Malikis, Shafis and Abu Al-Khattab of the Hanbali School prohibited it. The Hanbali School generally permitted it. The reasons behind its prohibitions are:

i) The Prophet's hadith which forbids the arbun.(291)

ii) The Prophet's prohibition of contracts which contian two conditions. It is held by some jurists that the contract possesses the conditions of gift and unilateral revocation.

Ibn Rushid said the following with regard to the risk, that is a prohibited risk (gharrar) and that the prohibition of arbun by the Prophet was based on this.

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(291) Al-Muwat'a Hamish Al-Muntafa, Volume IV, Egypt, 1951, p. 157.

He added that the major risk could be in the nature of the transaction itself, or that the price is to be paid in the future or that the subject is not to be delivered until the future. He based the invalidity of the transaction itself on the Prophet's prohibition of two sales in one transaction, as well as the Prophet's specific prohibition of arbun.

Most jurists prohibit this sale because of the risk and because of the taking of money without giving anything in return.(292) It is not considered compensation for the time lost in waiting, for if it were, the arbun would not be deducted from the price when the buyer desires to conclude the contract.

Ibn Hanbal, the Caliph Omar and others explained their acceptance of arbun on the following basis:

i) It is stated that when Nafe B. Abdul (293) Harith was asked by Umar b. Al-Khattab to purchase a house to the caliphate from Safwan B. Umayya to be used as a prison. Reference was made to Ibn al-Harith's

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(292) Bidayyat Al-Mujtahid, Vol. 2, Third Edition, Egypt, 1960, p. 163.

(293) Al-Mughni, Vol. IV, Egypt, 1929, p.233

statement "If he (Umar) doesn't recognise the transaction, (Safwan) will get a certain sum of money". Ibn Hanbal's view and opinion as recorded in the following statement: "....nothing can be done, it is Umar's view". Muslim jurists interpreted the statement to mean that Umar did not act in contrast to the hadith, besides the hadith which prohibits the arbun is considered as a weak hadith and so no legal rule could be drawn on such bases. If such a condition was prohibited then Umar would not have acted and approved the arbun. Ibn Qudama, having in mind the views of Ibn Hanbal and the other schools stated that where a sum of money is paid by the seller of the goods and where there is a condition that the seller can keep the sum of the money paid as part of the payment, before the conclusion of the contract and if the intention of both parties was directed towards that, when the buyer returns to buy the goods, that sum of money will be considered part of the price. The condition in this case is considered valid.

ii) It is stated that when Zayyd bin Aslam asked the Prophet about the sale of arbun and that the Prophet merely postponed it and did not expressly prohibit it.

iii) That if an object of sale is rejected by the buyer, he must return both the object and something extra with it. Thus, the retention of the arbun by the seller is analogous to that which must be returned in such a case. Ibn Hanbal concurred with this argument.

The Courts of Saudi Arabia appear to approve of the principle of arbun as is illustrated in the case of Rahabi v. al-Alraefi.(294)

It is submitted, however, that the arguments of those who oppose arbun are stronger because the risk (al-gharrar) in arbun is clear.

If the buyer pays an amount of money to the seller he concludes the sale that amount of money is considered part of the price, and if he does not conclude the sale he then regains the money. This kind of sale is valid for the risk is small; the money is proferred by way of part payment.

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(294) Grand Sharia Court in Mecca, case No. 46 - Registry Book (2) on 17/2/1380 (1960).

The buyer may pay the seller an amount of money for the sale object and ask the seller not to sell the object to anyone else and that if the buyer does not buy the object from the seller, the seller retains the amount. This constitutes a separate contract and the amount paid is deducted from the price. This sale is valid. The difference between this sale and the arbun is that this sale is free from the irregular (fasid) quality of having two conditions in one contract. It is two agreements; the first agreement contains the condition of rejection and that the seller may retain the money paid. The second agreement is formed without the condition of rejection.

An object may be bought and then the buyer decides that he does not want it and agrees with the seller to return it to him, with an amount of money. This is how Ibn Hanbal justified the transaction of arbun.

To buy an object and then the parties say that the seller pays some of the money. This is what is known as a relief (a'fa) i.e. a man buys a slave for

100 dinars to be paid at a future date, then the seller tells the buyer he will relieve him by lowering the price to 10 dinars to be paid immediately or in the future. It does not matter that the seller originally paid a different price from that which he is asking from the buyer.

In all of the above cases if the contract of sale is not performed because the seller refused to sell the object to the buyer, the buyer can claim the deposit back and cancel the sale. But if the contract of sale is not performed because of the buyer's failure to perform, then he forfeits the deposit to the seller.

(viii) Other Forms of Sale

There are other contracts of sale which do not come under this definition, for example:

a) Tawliya - The sale of goods at the same price which was paid in the first place for its purchase. It is stated that at the time when the Prophet went to Medina from Mecca, Abu Bakr offered him one of his two camels but the Prophet refused to accept it without payment, so he paid him the same price Abu Bakr first paid for their purchase.*

b) Murabaha - The sale of goods at the same price paid in the first place for its purchase with a surcharge; this surcharge is considered as a profit.

c) Wadia - The sale of goods at a price less than that paid in the first place.

d) Ishrak - The sale of goods, where the buyer in this kind of transaction is considered a partner in the ownership, as to the proportion of what he pays and the actual price (the price paid in the first place) (Partnership).

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* Akham al uqu'd fi al-Shariyya al-Islamiyya by Al-DAHMI M.A. Cairo, 1974, pp. 72-82

e) Istisna - A transaction of sale where the object of the contract is something to be made (manufactured). The object is not in existence at the time of the contract. Jurists would have invalidated this kind of transaction by way of anology to future goods, but it was considered valid as being the cause of facility.

f) Sarf (exchange) - A transaction between the contracting parties, where they exchange money or valuable metals. (295)

g) Muqayada (barter) - A transaction which is the same as that of sarf but the exchange here is for commodities.(296) This type of contract has faded in importance.

h) Bai al-Wafa - A transaction of sale between the contracting parties, but the seller has the right to take back the object contracted upon on the condition that he pays back the price. Muslim jurists varied in their recognition to this kind of transaction, the variation was between acceptance and non-acceptance.

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(295) Gold for gold.

(296) Wheat for Wheat

IX. THE CONTRACT OF NIKAH (MARRIAGE)

"Marry those among you who are single
or the virtuous ones among your slaves."(297)

(i) Validity

A marriage contract is concluded in the same way as any other contract, by the offer and acceptance by the man and woman, or by their particular guardians (walis).*

The presence of free witnesses (two men or one man and two women) is a formal necessity for such a contract to be considered valid.

The contract of marriage is regarded as void if the husband intends at the time of the marriage to divorce his wife after a certain time. The Hanbalis adhere to this idea. They state that such a marriage is in fact for enjoyment (al-muta), which is forbidden.

Ibn Qudama, however, stated that such an intention does not render the contract of marriage void, the reasoning given by him is that a husband is not obliged to keep a wife forever. The husband's intention to

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(297) The Holy Quran, Sura XXIV "Nur" or "Light", v. 32.

* The Wali is the nearest male relative in order of succession.

divorce the wife if they are not compatible is considered sufficient. It seems that Ibn Qudama does not refer to the end result of such an intention in this case. The husband in such a case is usually the beneficial party, he fulfills his objective on the cost of his wife, who has not any knowledge of the hidden intention of the husband and at the end there is only one party to suffer; that party is the wife and this is unfair.

Ibn Taimiyya refers(298) to the explanation of the related case given by Ibn Qudama, the intention by the husband to keep the wife as long as he wishes, this not being the issue because such an intention is considered to be acceptable, even if the intention is put into words. According to Ibn Qudama the issue is, when the husband clearly expresses his intention to divorce his wife after the elapse of a certain period of time, such intention renders the contract of marriage void because such an intention puts the contract of marriage under the category of al-muta marriage which is prohibited.

(ii) Dower (Muhr)

Dower is payment to the wife from the husband. The wife can still claim the dower even if she can not

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(298) Ibn Taimiyya, Nazaryyat al-Akd, p. 206.

exercise her matrimonial duties.(299) The Hanbalis state that the dower must be paid after the formation of the contract which gives the husband the right to enjoy matrimonial life.(300) Ibn Qudama opposes this clarification. He states that the wife has the right to dower if she accepts her matrimonial duties. However, she can not claim the dower if she can not exercise her matrimonial duties. The right to enjoy matrimonial life with the wife can be considered as the consideration for the dower which is paid to the wife by the husband.(301) Most Muslim jurists disagree with a condition in the contract of marriage that the dower is subject to the following:

(i) that the bride should be a virgin.

(ii) that the busband must not take another wife.

They do not consider such a condition as binding. In such a case, the agreed amount of dower is void and the amount generally prevailing in the society replaces it.

(iii) The Role of the Guardian (Wali) in Marriage

The legal position granted to those who are fit and able to look after the welfare of those who can not look

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(299) Dower is a woman's marriage portion.

(300) Al-Mirdawi, Vol. VIII, first edition, (n.p.), 1957, p. 310.

(301) Ibn Qudama, Vol. VI, Egypt, 1929 pp. 454-455

after their own welfare is known as marriage guardianship.

It is agreed among Muslim jurists that those considered as minors, insane or without any experience in life of both sexes should have marriage guardians. However, in practical life, it is assumed that the woman's need for guardianship is more essential than that of the man because the women usually marry at a younger age and in certain given situations is less experienced. So a guardian is necessary to look after the woman's welfare.

Muslim jurists differed regarding the theory that women are less experienced than men. Some agreed with it and some didn't. The difference in views created different conditions which were specified by the various schools where a woman would need a marriage guardian. The factors of womanhood, immaturity and minority, virginity and wealth were considered in determining whether a guardian was needed. However, the woman can, with the guardian's approval give herself in marriage.

The concept of guardianship in the contract of marriage is stated by law. Neither party to the marriage contract can remove the guardian since the conditions for the guardian's requisition do prevail.

Muslim jurists differed on the clarification of the concept of guardianship. Some state that this concept is a right which the law confers on the guardians, when others state that it is being a duty confered on the guardians by the law. Most jurists combine both clarifications and state that it is a duty confered on the guardians to look after the interest of their wards and to do so they must have the right by law to enforce their authority. If the guardian misuses this authority he is subject to legal sanctions.

(a) The Conditions of a Guardian

The guardian must be a free Muslim male with the required legal capacity and of a good character. This wardship is usually practised by the father as the next relative in succession (asaba) or the highest qualified person in succession to the father. Failing the presence of either of these, the qadi* assumes the role of guardian.

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* The local judge.

(iv) Prohibited Marriages

The Quran forbids marriage with "non-marriageable persons" (maharim)* i.e. one's female ascendants and decendants. Also, those with whom the man establishes a certain relationship by nursing, 'fosterage' (radà). Marriage at the same time, with two women who are sisters is also forbidden.

Contracts of marriage may be valid, irregular or void.

In an irregular (fasid) contract of marriage, if the marriage is consummated, the wife has the right to the dower (muhr) besides, the wife, must observe what is known as the waiting period** (ida') if the marriage is to be annulled. If there are children of such marriages then they are considered legitimate. This is in contrast with the contract of marriage made void (batil) by religious texts.

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* The Holy Quran, Sura IV "Nisa or "The Women", verse 23.

** Three months.

(v) Divorce (Talaq)

Divorce is the repudiation of the wife by the husband.* It may be revocable (raji) or irrevocable (bai'n).

(a) A revocable repudiation can be recalled during what is known as the waiting period (ida') of the wife. The husband declares that his wife is divorced; during this period the woman is provided for. The waiting period (ida') is usually three months except when the woman is pregnant in which case it lasts until she delivers the child. The parties could reconcile during the waiting period. Having made the first formal declaration of divorce, the husband must wait for the wife to recover from her next menstruation period and enter a state of purity. He may then make a second formal declaration of divorce.

When the waiting period passes and the parties have not reconciled their differences the divorce is considered compelte and the woman is then free and can re-marry. If the woman wants to reconcile with her former husband after the separation then a new marriage contract should be drawn.

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* The Holy Quran, Sura II "Baqara" or "The Heifer", verses 226-232

The third formal declaration of divorce after the last waiting period elapses gives the woman the freedom to marry any person she wants. If the first husband wants to re-marry the divorced wife during this period, the wife had to be married to another man and had to be divorced meanwhile.

(b) Irrevocable Divorce. An irrovocable divorce makes the marriage annul and if the parties want to re-marry, a new contract of marriage should then be drawn. What is recognised as a conditional repudiation of the marriage puts the repudiation automatically under certain events.

The vow of continence (ila) is when the husband under oath states that he will not come near nor touch his wife for four months and if the oath is carried out, the marriage is then considered annulled and the repudiation is then irrevocable. The self-redemption (kul) is the annulment of marriage by a payment to the husband. The recrimination (li'an) is when the husband under oath blames his wife of adultery and if the wife under oath denies that, if the oaths taken by both parties are

carried out, the marriage is then considered annulled and the repudiation is then irrevocable.

Some jurists refer to the injurious dissimulation (zihar). This is when the husband swears not to touch his wife and says, "you are to me as the back of my mother". This feeling between man and wife is not acknowledged by Islam. The husband should repent (kaffara) usually within four months, if he does not, the divorce is then considered irrevocable.

(c) Other forms of Irrevocable Repudiation:
The husband may divorce his wife after the formation of the contract of marriage but before consummation takes place without the need for a waiting period. When the announcement of repudiation is made in a revocable repudiation and the waiting period has expired without the annulment of the contract. The third repudiation in a revocable divorce renders the repudiation irrevocable.

The majority of jurists state that the announcement of repudiation must be made clearly, directly and unequivocally.

Repudiation could be made, either before consummation takes place and before the stating of the dower, or before consummation takes place but after stating the dower, or after consummation.

In the first case, the man should pay to the woman what is known according to the usage and custom as a compensation. When, half of the dower should be paid in the second case and the full dower in the third case.

(vi) Maintenance

The husband should maintain his wife during the marriage and after the termination of marriage in the revocable repudiation and if she is pregnant in the irrevocable repudiation, and he must maintain the children of the marriage until they become of age i.e. the usual practice is, the boys until they work and the girls until they marry. But jurists differed on the quantum.

Jurists in general differ on the concept of marriage. Some consider it to be a sacrament, others consider it a contract while a third group discusses it under the separate category of family law. The majority, however,

consider it to be a simple contract for the following reasons:

a) The elements of any contract are applicable to this kind of contract.

b) That the acceptance should correspond with the offer, usually at the meeting place.

c) Any form of expression which gives the clear meaning behind the parties intention could be considered sufficient.

d) That there is compensation for any damages in any contract, the principle of consideration could also be found in this kind of contract such as the dower and the maintenance which are mainly stated to protect the interests of the injured party.

C H A P T E R S I X

THE PRINCIPLE OF THE FREEDOM TO CONTRACT IN ISLAMIC LAW

I. INTRODUCTION

The Islamic religion supports the concept of individual freedom while balancing this freedom against a person's obligations to his community and individual members of that community. Freedom of faith, freedom of speech and all other freedoms are protected by Islam.

The Sharia states the principle of the individual's freedom quite clearly, in accordance with all individuals' behaviour, the necessity of the society's recognition of the individual's existence and his right to act according to his needs. Accordingly, each individual can live, travel, enter any profession or enter into any contract provided that it does not infringe upon public order. However, the Sharia forbids injustice, so that no one can abuse these freedoms in order to harm others and infringe upon their freedom. The Prophet said,

> The wealth of a Muslim may not be legally split, without his own free will.

God created all human beings with full responsibility. Religious duties and punishments are based on the prin-

ciples of the individual's free will.

The main principle is the legality of things. However, looking at the illegal acts which are forbidden to deal with according to the human sociological principles, we find that all illegal acts are limited to those which protect others and not as a restriction per-se. To Muslim jurists, the rationale behind legality is that a legal act causes no harm to others.

The Sharia advocates the enjoyment of lawful acts and the abandonment of illegal ones. This fundamental principle overrides all codified laws.

The Sharia does not provide detailed rules governing all aspects of legal relationships. The most important principles are as follows:

a) The freedom to contract.

b) The contract is the law which governs the contracting parties.

The freedom of the parties to agree to the terms of the contract is a fundamental principle. Muslim

jurists referred to this principle in their discussion to the doctrine, they based their argument on the various Quranic verses (Reference is made to the Quaranic verses in chapter five) and on the different Hadiths.

"Muslims are bound by their conditions."* (Shurut)

In this extract of the hadith, there is an implied expression of freedom to make conditions and an expressed command to fulfill them.

> For everyone who commits a breach of faith there will be set up, on the day of Judgement, a flag proportionate in height to his breach of faith; but there is no one who breaks faith more guilty than he who commands the common people.**

In addition there is the famous authoritative statement made by The Second Caliph:***

> A man's rights are regulated and defined by his conditions. You are entitled therefore to what you conditioned.

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* A well established hadith (a saying of the Prophet).

** Ahkam, al-Qurtubi, vol. VIII, p. 33.

*** The four guided Caliphs after the Prophet were Abo Bakr, Umar, Ottman and Ali. Sharh al-Aynee Al'a Al-Bukhari, vol. 13 p. 298.

This fundamental principle is stated and repeated in the jurisprudential work of such great jurists as Ibn Qudama, Ibn Taymiya and Ibn al-Qayyim. * Ibn Taymiya referred to the fact that the Sharia orders the exact performance of contracts and to observe our obligations, quite generally and it emphasizes the principle that contracts and conditions stated in them, can be determined by the parties and are valid and permitted. Ibn al-Qayyim, following the same approach, maintained that contracts and conditions stated should be considered valid except when they are unequivocally forbidden by God.(302)

It is submitted that, what is known as the right of option comes under the definition of this principle. The option (al-Khyar) means to acquire the best of two matters, in other words, the contractor has the choice to either revoke or accept the contract. The rule is that the contract becomes complete and binding upon the parties when its terms are fulfilled, but for the particular interests of the parties, and the general welfare of the Society, the rule was broadened by allowing the right of option.

The right of option is granted on two conditions:

1) That both parties must agree to the option

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(302) Professor Coulson N.J. The Moslem Ruler and Contractual Obligations, 1958, p.922 N.Y.U.L. REV.

* Hanbali Scholars.

2) That there is a defect in the object of the contract which renders the object returnable.

There is ample authority in the Quran, the Traditions, and in the works of the jurists for the principle that Muslims are firmly bound by every lawful contract into which they enter and by every condition or option they make.

II THE CLASSIFICATION OF CONDITIONS

Muslim jurists and scholars divided contractual conditions into valid and invalid ones. There are three types of valid contracts: irrevocable and enforceable (lazim and nafiz) such as contract of sale or revocable and enforceable (ghayr lazim and nafiz), such as the contract of agency or unenforceable or conditional (ghayrnafiz or mawquf), such as when a minor enters into a contract which is subject to his guardain's approval.

According to most Islamic jurisprudential schools, contracts which are invalid have no effect at all and so are cosidered void (batil). The Hanafi school divide the invalid contracts into irregular (fasid) contracts and void (batil) contracts. When the elements and the subject matter of the contract becomes disordered then the contract is considered void. The elements of the contract are offer and acceptance, such as when either offer or acceptance are made by an insane person. The subject matter of the contract is the thing contracted upon, such as the subject matter being something dead. When, other than the contract's elements or subject matter become disordered, then the contract is considered irregular, as when the price becomes disordered such as when the price is paid in wine.

The void contract is that which is not lawful according to its substance (essence) and characteristics (attributes).

The substance of the contract is its elements and its subject matter, the elements must be lawful and the subject matter must be legal property. The characteristics are those, other than the elements and the subject matter of the contract - an example is, the condition which is contrary to the requirements of the contract. This classification by the Hanafis arise from the difference between the substance and peculiar nature of a contract and its characteristics.* This corresponds, as stated, to the difference between the (aswaf) and the (asl).** The conditions for the conclusion of contracts are; that there should be an offer from one party and an acceptance from the other party, that the acceptance must be made at the meeting place, that the parties should acquire the legal capacity and that the subject matter of the contract must be legal property, in existence and capable of delivery. The conditions for the validity of contracts are; the freedom of the contract from usury, uncertainty and conditions other than those for the legally set requirements of the contract.

The various options, the difference between valid and invalid contracts and therefore conditions, are the most widely discussed issues among the four Sunni Schools. This is dealt with at length in this chapter with the differing jurisprudential approaches of the four Sunni Schools.

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* The substance of a contract (asl) and the characteristics of a contract (awsaf). Writers usually refer to this as the difference between the essence and the attributes of a contract.

** The sale of something unknown, as when a seller says to the buyer I sell you all what I own and the buyer accepts without knowing what he has accepted to buy, the sale is then considered irregular (fasid).

III. THE VIEW OF MUSLIM JURISTS AS TO THE FREEDOM TO CONTRACT

Muslim jurists referred to the various options discussed among the four jurisprudential schools of Islamic thought. They vary in their explanation and in their acceptance of the different options.

The options give the contracting parties a lot of flexibility according to the party's own free will and choice to expand, to include and finally to conclude the desired contract in respect to their interests and to the general interests of the community. It is therefore considered an important aspect to the principle of the freedom to contract.

The jurists differed as to how much freedom of contract was permitted by the law. These differences were manifested in how these jurists interpreted the proposition that the consequences of each contract are set by law i.e. it is the law which regulates the consequence of every contract and not the parties to the contract. The Hanafi and the Shafii jurists maintained that the consequence of this proposition was to prevent the parties from drawing conditions which do not agree with the legally set requirements of the contract and any condition which alters or adds to the legally set requirements of the contract. On the other hand, the Hanbali and the Maliki jurists regarded a condition as being contrary to the legal consequence of the contract only when it altered

or did not agree with the legally set requirements of the contract.

Another major difference among Muslim jurists was their interpretation of the proposition that the parties to a contract can not have absolute freedom to put conditions which are contrary to the rules of law.*

The four Sunni Schools or jurisprudence recognise in principle the freedom of the parties notions of will (Irada) to contract, but vary as to the degree of such freedom. According to the theoretical approach the Hanafi and the Shafi'i schools are quite restrictive in their application to the rule. When on the other hand the Maliki and the Hanbali schools apply more freedom and the Hanbali school in particular is considered the one which permits a lot of freedom and which takes a positive step towards the application of the rule. The four jurisprudential schools backed the principle of the freedom of the parties notions of will directed and bound by the ethical and moral limitations enforced by the religious texts.

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* The Prophet prohibited a sale braced with a condition (bay'washart). The Shafi'i jurists explained the tradition to mean that all conditions other than those which conform to the legal consequences of contract or those which strengthen these legally set requirements, are prohibited and invalid. This explanation did not play an important role in regard to the matter among the jurists of the Hanafi Schools although it was accepted by them. The Maliki jurists applied the tradition in reference to the conditions which do not agree with the legally set requirements of the contract or those conditions which affect the price. The Hanbali jurists did not accept the tradition as it stands, instead they stated that the Prophet prohibited a sale braced with two conditions (bay'wa shartan). Reference is made to the authoritative books of al-Muhadab, Mawahib al-Jalil and al-Mughni.

IV. FREEDOM TO CONTRACT ACCORDING TO THE HANAFI SCHOOL

As was mentioned earlier the Majalla enunciates the principles of the Hanafi School. The principle of freedom of contract was limited by the Majalla, primarily through the operation of rules regarding the subject matter of the contract. As an example, the contract of sale is recognised as the exchange of property for property, when on the other hand the contract of sale of a thing which is not recognised as property ....is considered void.(303)

The Civil Code procedure of the Ottoman State was at a later stage ratified to lift any limitation to the principle of freedom of contract. For instance, the Majalla required that the subject matter of the contract be capable of delivery,(304) that the parties to the contract get full knowledge of it(305) and that it must be of value, for the contract to be considered legally binding.(306) It was not quite clear at first whether contracts for future delivery were valid or not. After ratification, the Ottoman Code of Civil Procedure broadened the scope of contractual freedom by recognising more types of contracts.

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(303) Majalla, Art. 105
(304) Ibid, Art. 198
(305) Ibid, Arts. 200-201
(306) Ibid, Arts. 199,709

There were certain exceptions to the rule against contracts of sale for future delivery, for example where advances or down payments were made on such contracts (even though the Majalla regarded them void in principle).

The Majalla recognises the following conditions or options in general and in the contracts of sale in particular:

a) The option of condition (Khyar al-shart). This option is when the two contracting parties put a condition that either of them or only one of them or even a third party (mostly in other schools) has the option to either revoke or accept the contract in a stated period of time, after it has been concluded.(307) According to the Hanafis, this option is considered valid in certain contracts such as the contracts of sale and hire and is considered invalid in other contracts such as the contracts of marriage and Salam. In regard to the period of the option the jurists of this school divide it into three categories:

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(307) Majalla art. 300

1) Irregular, such as to state an unknown period or if the parties do not state any period at all, Agreed upon by the majority of jurists.

2) Acceptable, such as to state three days or less. Agreed upon by the majority.

3) In variance, such as to state that you are in option for a month or two. Differed upon by the jurists of this school.

b) An option for acceptance (Khyar al-Kabul). This option gives the freedom to any of the parties to a contract of sale to keep his acceptance, after the offer has been made, and until the end of the meeting.(308)

c) An option for misdescription (Khyar al-Wasef). This is when a party sells a certain property to another party, the property being of certain required qualities, but the property proves to be the opposite. In such cases the buyer has the option, either to revoke the sale or to accept the object.(309)

d) An option as to payment (Khyar al-Naked), whereby the payment of the price is to be made at a certain stated time.

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(308) Majalla, Art. 182

(309) Ibid, Art. 310

It could be drawn between the contracting parties and it could be considered valid among them but it the payment is not made at the stated time then the contract may be revoked.(310)

e) An option as to selection (khyar al-Ta'yyin). If a person buys one of a number of objects, he can then fix a time to enable him to decide and to choose.(311)

f) An option of inspection (khyar al-Ro'yya). In principle the buyer of an unseen object has the option either to reject or accept the object after seeing it.(312) The Hanafi school considers the sale of something absent which the parties have not seen as invalid whether it was in the meeting of the parties or not.

The sale of something absent in considered valid in two conditions:

1) If the sale object is owned by the seller.

2) If a full description of the sale object is given.

The option of inspection could be affirmed in certain circumstances and in certain contracts such as the ccntract of hire. The option of inspection is annuled in the following circumstances:

(a) If the sale object changes when in the hands of the buyer.

(b) If the sale object was received and accepted after the viewing.

(c) If the price was paid after the viewing.

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(310) Majella, Arts. 313-315

(311) Ibid, Arts. 316 -319

(312) Ibid, Arts. 320-335

g) an option of defects (khyar al-A'yyb). In principle this option gives the buyer the right to revoke the contract when he discovers a defect in the object.(313) The Hanafis state that the buyer has the option to revoke the contract of sale if he finds a defect in the object, even if the parties did not put that as a condition.

This option can be considered in the following circumstances

(1) The defect is caused by the seller, as when he adds water to the milk.

(2) Natural defect. The natural defect can be either,

a) visible, eg. if the animal sold has a limp.

b) hidden, eg. if the melon sold was spoiled from inside.

The jurists differed as to the degree of defect which makes the goods returnable. Some do not consider the simple defect as a reason to return the object to the seller.

The Hanafis say that the defect can either happen when the object is still with the seller or after the buyer had received it.

The first kind can happen in the following circumstances:

(1) If the defect was caused by the seller after the conclusion of the contract, the buyer has the option to take it with some reduction or leave it.

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(313) Ibid, Arts. 336-355; Fath al-Qadeer Vol. 6, p. 2

(2) If the defect was caused by the buyer, then he must pay the full price.

(3) If the defect was caused by a foreign party, the buyer has the option to accept it and to demand compensation from the foreign party or to revoke the contract.

(4) If the defect was caused by a natural cause, the buyer can return the object and get his money back or can take it with a reduction.

(5) If the defect was caused by the object itself, as to buy a slave and the slave did something in himself to make himself defected, the buyer can return the slave and get his money back or can accept it with a reduction in the price.

The second kind is when the defect happens in the hands of the buyer.

(1) If the defect is caused by the buyer.
(2) If the defect is caused by a natural cause.
(3) If the defect is caused by the object itselt.

In these three circumstances, if there was an old defect other than the newly found defect which happened in the hands of the buyer, then the object can not be

returned.

(4) If the defect is caused by the seller.

(5) if the defect is caused by a foreign party.

In these circumstances if there was an old defect other than the newly found defect, the object can not be returned, and each of the parties must compensate for the defect he has caused.

h) An option of Lesion (khayyar al-Ghabn). the general approach by this school is that the gross lesion (al-ghabn alfahesh) which is accompanied by fraud or deceit renders the contract void.* However, some jurists state that gross lesion alone gives the right to the injured party to revoke the contract.

The Hanafi School restricted the freedom of the parties to make conditions. This limitation was because of the school's support to the theory which states, that the consequences of any contract are set only by law. According to the Hanafi School only the following conditions may be present in a contract. Conditions which conform to the legally set requirements of the contract: The prerequisites

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* fath al-Qadir, vol. 6, p. 106; Majalla Art. 357

of any contract are set by law.(314) (Such as in the contract of sale, the property shall be transferred to the buyer, the buyer shall pay the price and the seller shall hand over the property). Conditions which support the legally set requirements of the contract: (e.g. If a seller puts a condition requesting the buyer of the goods to either bring a surety or give a pledge. This condition and similar ones support one of the legally set requirements of the contract that the buyer shall pay the price). These conditions were acknowledged by way of exception. Conditions ratified by custom: Conditions ratified by custom were also ackowledged and considered valid by way of exception. (For example, if a buyer of a piece of cloth puts a condition to the seller that he must make it into a suit.) The conditions put down by the parties to a contract, other than those acknowledged by way of exception were considered to be invalid and that the invalidity of conditions, being in this context the general application and rule.

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(314) In a normal contract of sale, the property will be transferred by the one party (the seller), to the other party (the buyer)(1), and for the completion of sale, the buyer must pay the price (2).

We must differentiate between two categories of invalid conditions. Some invalid conditions were divisible. Others could not be separated or divided thus resulting in the contract becoming irregular (fasid).(315) Invalid conditions which are not divisible are:

a) Conditions which bestow an extra benefit on one of the parties to the contract (i.e. if a seller of a car puts a condition that he must use the car for a certain period of time.)

b) Conditions in a contract which includes the exchange of property for property* (mubadalat mal bi mal), such as the contracts of sale and hire.

The invalid conditions which are considered divisible are as follows:

a) Conditions which do not bestow a benefit on either of the parties to the contract regardless of the nature of the contract in relation to which these conditions

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(315) For the differences between an irregular (fasid) and void (batil) contract see: The Encyclopaedia of Islam by H. Gribb, J. Kramer, J. Schacht (London 1960, Vol. 1, p. 319.

* Value for value

were stated.

b) Conditions which bestow an extra benefit on either of the parties to the contract when made in relation to a contract that does not include the exchange of property for property. (e.g. the contract of marriage or contracts of gift.)

V. FREEDOM OF CONTRACT ACCORDING TO THE SHAFI'I SCHOOL

The freedom to make conditions and to refer to option in the Shafi'i School is similar to that of the Hanafi School. This School recognises most options* referred to by the previous School. As to the option of condition, it can be to either party such as to say "I sell you this with the condition that the option is for me within three days" and if the other party says "I accept to buy with the condition of option to you within three days", or it can be to one party only, the party who starts the saying says that he has the right of option e.g. "I sell you this camel for £100 with the condition of option to me within three days and if the other party says "I buy accordingly without professing the exact words which confer the condition of option, but he must agree to it even by silence and finally the option being to a foreign party as to say "I sell these goods for this amount with the condition that the option is to my father". The party who has the option can either accept or revoke the contract. The jurists of this school limit the period of this option to three days only.

In regard to the option of inspection the majority of Shafii jurists consider the sale of something absent as void, whether it is absent from the meeting or present but unseen. Some jurists consider the sale valid if the quality

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* Nihayat al-Muhtaj, Vols. 3 & 4, pp. 65, 370

and the kind of the object is known by way of description. The previous viewing of the objects which are not changeable is valid and viewing part of the object is acceptable as long as this part is the same as the rest.

The view of the jurists of this school as to the option of defect is as follows. If a buyer buys something and finds a defect in the object he can return it, if the defect happened before receiving the object whether it happened before or after the conclusion of the contract. If the defect happened after receiving the object and if the cause of defect was old the buyer can also return the object.

If the defect happened while the object is in the hands of the buyer and he finds an old defect most probably caused when in the hands of the seller and if the cause of the new defect was not old and it was nothing to do with the old defect, then the buyer can not return the object without the seller's consent even if it was caused by the seller, otherwise the case can be one of the followings:

1) When the seller accepts to revoke the contract without any compensation from the buyer and when the buyer accepts to keep the object without any compensation for the old defect.

2) When the parties agree to either revoke or accept the contract with compensation..

3) When the parties do not agree to the previous conditions, if one of the parties wants to revoke the contract and the other wants to accept the contract, then the opinion of the party who wants to accept will be recognised and approved whether the party was the seller or the buyer.

They add what is known as the option of the meeting (Khyar al-majlis) that is the right given to either party to review the contract before the end of the meeting. This option is affirmed after the conclusion of the contract without the need for it to be conditioned. It is recognised in the contracts where the consideration is exchanged. The option of the meeting is considered annulled (i) when the parties to a contract state that they are bound by the contract which they have drawn as to state that the contract is indispensable, e.g. to say that we accept the contract or we annul the option, (ii) when the parties separate from the meeting.

Some Hanafi jurists refer to this type of option when speaking about the option of acceptance, while others of the same school reject it. However, the majority of jurists of the Hanafi School state that this option is affirmed, only when it is conditioned for.

As to the option of lesion, this school maintains that if the lesion is either simple or gross and is accompanied

by fraud or deceit, then the party who is the subject of lesion can revoke the contract. However, the Shafi'i School does not recognise by way of exception the conditions which support the legally set requirements of the contract, nor does it recognise the conditions which are ratified by custom. All those other than for the legally set requirements of the contract are considered invalid. If the invalid conditions confer an extra benefit on either of the parties to the contract these conditions are then considered indivisible and the contract is then considered void (batil).(316) An invalid condition which bestows no benefit on either of the contracting parties is considerer to be divisible.(317)

The Shafi'i School does not recognise the rule of the Hanafi School that invalid conditions in a contract of marriage are divisible.

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(316) It is not clear according to this school if such conditions make void all contracts regardless of their nature.

(317) Nihayyat al-Muhtaj, Vol. 3, p. 442

VI. FREEDOM OF CONTRACT ACCORDING TO THE MALIKI SCHOOL

The Maliki School recognises the various options* stated by the previous schools. They recognise the option of condition and they divide the period of this option according to the thing sold into the following categories:

1) The period of option in the selling of a land and what is connected with the land like trees, must be within thirty eight days.

2) The period of option in the commercial offers such as clothes, is between three to five days.

3) The period of option in the sale of animals, the jurists differed between two kinds of animals, those which can not be used or ridden such as the sheep and those which can be used and ridden such as the horse, in the first category the period is from three to five days when as in the second category the jurists differed, their differences were related to the value of the animal and to the degree of its suitability for use.

As to the option of inspection , to sell an absent thing which the buyer has not seen can take two forms:

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* Mawahib al-Jahil, Vol. 4, pp. 240,428,472.

a) Absent from the view of the buyer but present in the meeting such as the sugar in the box. The sale is void unless the buyer sees the object.

b) Absent from the meeting, such as being in another country, the sale is then considered valid.

However, in any of the above circumstances the sale of a thing which has not been seen is considered valid unless one of the following is established:

i) If the sale object is fully described by stating for example its kind and quality.

ii) If the parties put a conditon of option to see the sale object.

According to the option of defect, if the buyer buys something and he finds a defect in the object, then he can return the object, if he knew of the defect but he can not return the object in the following circumstances:

(1) If the object was destroyed after the conclusion of the contract.

(2) If the buyer shows signs of acceptance after viewing the object.

(3) If the defect disappears before the return of the object.

As some jurists of the Hanafi School, the majority of the Maliki School jurists do not recognise the option of the meeting, the condition of such option renders the contract void. The jurists of this school refer to the option of withdrawal (khyar al-ruju) and state that the offerer must keep to his offer till the end of the meeting. The Hanafis refer to this option sometimes under the option of acceptance and in other circumstances under a separate heading.

As to the option of lesion, this school considers the simple lesion which is not accompanied by deceipt a reason for revocation in certain sale contracts and the gross lesion a reason for revocation in other sale contracts.

The Maliki School classifies conditions in general into three categories:

a) The conditions which are considered for the legally set requirements of the contract.

b) The conditions which are considered contrary to the legally set requirements of the contract.

c) The conditions which are considered neither for nor contrary to the legally set requirements of the contract[318] and confer a benefit relating to the subject matter which is not excessive.

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(318) This category does not exist in the Hanafi and Shafi'i Schools.

The conditions which support the legally set requirements of the contract (known as 'beneficial to the contract') come under the first category and are considered valid. Conditions of the second type are invalid. Conditions of the third category are valid. These rules apply to all contracts other than that of marriage. A condition in a contract of marriage is invalid only if it is contrary to or does not agree with the substance of the contract.

An invalid condition is divisible if the party making it agrees to waive it but if he insists on it, then it becomes indivisible and the contract will be considered void.(319)

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(319) Al-Sharh al-Kabeer, Vol. 3, p. 66.

VII. FREEDOM OF CONTRACT IN THE HANBALI SCHOOL

The Hanbali School adheres more strictly to the Quran than the other schools. Thus, the Hanbalis are more flexible and permissive concerning the options in particular and the conditions of contract in general. Ibn Tamiyya stated, for example, that the parties to a contract are allowed to enter into any kind of contract and to state any condition unless forbidden by the religious texts.

The jurists of this School recognise most of the options stated by the different Schools. The option of condition is affirmed in the contract, in principle before the contract becomes irrevocable. According to the period of this option the jurists of this School state that the period must be known but they do not put any limit. The unknown period renders the contract invalid.

As to the option of inspection, the sale of something absent is valid on two conditions:

1) The object must be that of weight and measure.

2) The full description of the object.

This is similar to the contract of Salam but is not a real Salam, there are two rules which govern the validity of the contract of something absent under the previous two conditions:

a) The buyer can return the object if it is not to

the description and the seller must then replace the exact one.

b) The parties must not separate before they had exchanged the subject matter.

The previous viewing of the object renders the contract valid.

As to the option of defect, this School states that the simple defect does not affect the object and so it can not be returned. The Hanbali jurists state that if a party buys something and finds a defect in the object then there are two circumstances:

1) If the defect happened before the buyer received the object, he can then return it for the defect.

2) If the defect happened while in the hands of the buyer after receiving the object, the buyer can not then return the object.

If there was an old defect in the object while in the hands of the seller and a new defect happens while the object is in the hands of the buyer, the buyer can either accept the object as it is or the case will then be put to the court, where the judge usually revokes the contract and requests both the seller to pay back the price to the buyer and the buyer to return the value of the object according to the old defect.

The option of the meeting is affirmed in certain contracts such as the contracts of hire and salam. This option is annuled if the parties separate from the meeting, or if they put as a condition that none of them has the right to this option and finally by the death of either party.

As the Hanafis, the jurists of this School give the right to the offerer to withdraw his offer (the option of withdrawal) before acceptance is made and as the Shafiis, they give the right to either party to review the contract before the end of the meeting.(the option of the meeting*).

As to the option of Lesion this school adheres to the same approach followed by the Maliki School.**

The parties to a contract are free to put any condition they want as long as such conditions are not contrary to the legally set requirements of the contract nor forbidden by law. (320) And so conditions were divided into those which are valid and those which are invalid. It is submitted that the Hanbali School differs from the other

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* al-Mughni, Vol. 3, p. 562

** al-Mughni, Vol. 4, p. 218

(320) For example, a condition by the seller or even the buyer for another contract. Such a condition is unlawful because the Prophet himself prohibited two transactions in one.

schools on the principle of freedom to contract is in the question of permissibility. The range of conditions allowed by the Hanbali School is much broader than that allowed by the other schools, except in the contract of marriage.

The Hanbali School considered conditions for the legally set requirements of the contract to be conditions known as beneficial to the contract and therefore considered valid. The Hanbalis expand the field of valid conditions by allowing exceptional conditions which institute rights or obligations which are not set by law but on the other hand are not contrary to those set by law. This is limited to conditions concerning benefits related to the subject matter of the contract(321) and such conditions could be of a nature which would be considered excessive by other schools.

The jurists of the Hanbali School considered the principles of freedom of contract to be fundamental. This can be seen quite clearly in their application of conditions in the contract of marriage. Their analysis to the question is related to a Tradition of the Prophet. the Tradition expresses that, "the conditions most deserving of fulfillment are those whereby you make a woman lawful to you". Therefore any condition in the contract of marriage is considered valid unless it is contrary to the legally set requirements of the

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(321) An example, as to the condition by the seller of a car that he should use it for a certain time.

contract or is forbidden by law*.

The Hanbali jurists do not accept the Tradition of the Prophet in which he prohibited a sale braced with a condition. They also refer to the prohibition by the Prophet of a sale braced with two conditions. Thus, the Hanbalis maintained that two conditions will invalidate a contract, unless the conditions were in accordance with the legally set requirements of the contract.(322)

The Hanbalis held that conditions which are invalid due to a legal prohibition are indivisible and therefore render the contract void. But conditions which are invalid because they are contrary to the legally set requirements of the contract are divisible and the validity of the contract is therefore not affected.

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* Contrary to all the Sunni Schools, a condition by the wife that her husband must not take a second wife will be valid (al-Mughni, Vol. 7, p. 93)

(322) Al-Mughni, Vol. 4, p. 95.

C H A P T E R S E V E N

CONCLUSION

CONCLUSION

The independence of the judiciary together with the supremacy of the principles of the Sharia constitute the two main pillars of the Saudi Arabian legal system. As stated in this study, both parties to a case enjoy full equality before the law and are given the right to prove their claims. Most cases are liable to appeal and in general cases are handled speedily and efficiently.

Criticism is made of the Saudi Arabian legal system on the basis that it is inconsistent with modern needs and that therefore judical reform is required. It is admitted that modernisation within the terms of Shariatic law is required. But these critics often do not consider the historical backgound of the Saudi Arabian legal system. It is also stated that the Saudi Arabian courts conduct their proceedings in the manner laid down in the works of the classical Muslim jurists and in accordance with rigid and inflexible rules. Muslim jurists however, maintain that procedural rules can be adapted to changing circumstances. This can be seen in the practice of the Saudi Arabian courts today. For example, the Judicial Law of 1975 introduced considerable

changes and clarified many points. The most important change was the creation of the High Judicial Council (Majlis al-Qada Al-Ali) and the "Department of Legal Research" (al-Idara al-Fanniya li al-Buhuth). The latter was formed for the purpose of selecting, classifying and publishing legal principles derived from decisions of the Court of Cassation and the High Judicial Council, as well as undertaking legal research and answering questions raised by the judges. The publication of cases expands the predictability and effect of Hanbali jurisprudence and opens the door for the adoption of a broader approach to legal problems which had not been known in Saudi Arabia previously. The principle of ijtihad,or the giving of independent legal opinion,provides a means of implementing this justification for this new approach because it is an accepted form of judicial interpretation of law.

The Judicial Law of 1975 also established the public courts (Mahakim Amma) and the Summary Courts (Mahakam Ju'ziyya). The statute does not specify the jurisdiction nor any functions of either court. The statute did not mention the present courts (Sharia and Magistrate's Courts) which are in force and are to be replaced. It is

submitted that the courts should be separated and classified especially in small towns where there is no distinction between them. The jurisdiction of each court should be revised and made more specific. The Higher Court should have a wider appellate jurisdiction, more comprehensive power and all embracing jurisdiction. It is further submitted that any new law or regulation issued should abolish the previous law, but in Saudi Arabia this is not so. In any promulgation of a new law or regulation the new legislation does not specifically repeat the previous law; it does not refer to the previous law and it does not define the relation between the previous law and subsequent one. Therefore, it is not clear to the public which law is applicable.

It is submitted that the quasi-judicial tribunals do not fulfill the role for which they were created. They are, in general, unstable and lack the efficiency and experience of the Sharia courts. Their members do not have the judicial immunity enjoyed by the Sharia judges to guarantee their impartiality. The existence of these tribunals has resulted in the distraction of certain executive officials and authorities, such as the Council of Ministers and the Minister of Finance, from

their original duties, as they are required to act also as appellate authorities for certain quasi-judicial tribunals.

The Sharia court has the ultimate jurisdiction over all matters. The Judicial Law of 1975, however, recognised that the tribunals were competent in other areas. But the jurisdiction of some of these tribunals for example, the Grievances Board, should be more specifically defined. Reformers however, suggest that the Board should have a comprehensive and all-embracing jurisdiction. It could be so in practice but it would be preferable if its jurisdiction were more clearly defined so that everyone would know the extent of the Board's jurisdiction.

Certain rules of evidence such as those relating to the credibility of witnesses in regard to the circumstances of the time, and evidence given by women should be reviewed in keeping with modern Saudi society. There is a need for reform in this regard.

The present system of appeal is complex. If the appeal court (the Court of Cassation) disagrees with the decision of the trial court, it then requests the alteration of the decision, but the trial judge can insist on his own decision, and since the Court of Cassation does not have the power to make a decision of its own and substitute it for trial judge's decision, it can only demand that the case be reheard by a new judge or court. It would however, be preferable if the Court of Cassation were requested to give the power of appeal to a different judge. The new decision is also subject to review by the Court of Cassation in exactly the same manner so the case may go back and forth between the trial court and the Court of Cassation unless the Supreme Judicial Authority interferes. It is submitted that the Court of Cassation should be required to make a final decision on the merits of the case when such a delay occurs.

In practice the principle that trials be conducted in public is often not given effect to. Therefore it is difficult to ascertain when a trial will be in public and when it will be in camera.

The Sharia judiciary, in principle, does not allow legal representation, and this has resulted in the lack of a well organised legal profession in the country. It could be said that the judiciary has succeeded in performing fair trials by avoiding the usual dramatic speeches and arguments offered by lawyers. This is evident to those who have come into contact with the Saudi Arabian legal system. On the other hand, professional representation could speed up the court process. For example, a lawyer could be of help to the court in excluding irrelevant material and taking some of the burden off other authorities, and could help his client by giving him appropriate legal advice. The time has come,due to the changes in Saudi society, for Saudi Arabian law to adopt a comprehensive system of legal representation.

Modern development has created new problems which make it difficult for the judiciary,whose training is often only a primary knowledge of the Sharia, to cope with. The judges ought to pass through a more detailed and lengthy education in the Sharia in order to deal with these problems.

Saudi legislative authorities have acknowledged this deficiency, and so a High Judicial Institute al-Ma'ahad al-ali li-al-Qada was created to help future judges gain the necessary knowledge of the Sharia. The achievement of this goal was aided by the Judge's Law Kadir al-Qudat which differentiates among the different degrees of judges.

Thus problems could be reduced and the judicial system will be united and organised and thus more competent to deal with commercial, criminal, civil or other problems; rather than having different institutes or tribunals to deal with specific problems. For example, the quasi-judicial tribunals help the executive authority and give it more freedom to exercise its function by relieving it of some of the judicial burden which it was previously required to exercise.

Conditions have changed since the Prophet's era and the judges must keep pace with these changing circumstances. The legal systems of other countries should be included in the education of judges in order that they may compare them to the Sharia. This would enable them to form a unique legal principle to govern a specific

issue. The judges would then have a greater ability to solve the problems which will face the country as it develops. This would help the different branches of power to function more efficiently. The Kingdom is developing rapidly but the Saudi desire to hold onto the nation's background of religious integrity is well established. The Saudis have accepted progress and have pushed forward for modernisation while maintaining the prestige of the country which is the homeland of the Muslim faith. Islamic law is well established and preserved here. Modernisation should not affect the preservation and application of Islamic law. To the contrary, it should help and assist the enforcement of Islamic principles in Saudi Arabia.

The different powers of the state used to emanate soley from the King. He used to have executive, administrative and judicial power. Separation of power was unknown. After the discovery of oil, progress took place. Development was seen in every field and services were expanded. At this time the Council of Ministers was formed. The different powers of state were separated.

The definition of the theory of contract in Islamic jurisprudence came as a comprehensive statement to include the main principles of contract under Islamic thought. The classification into bilateral and unilateral contracts and unilateral legal acts is not well defined. The jurists differed on the frustration of contracts and also on what to consider to be a contract or a mere legal act.

The Quran and the Sunnah state quite clearly the basic principle of contract and obligation. The Majalla explained and laid down a lot of Islamic principles and rules, but lacked continuity and organisation. Certain new situations arose in the field of contracts which the Majalla did not cover. Alot of its provisions need to be modified to meet modern time. The Sharia is adaptable to changing circumstances and so the Jordanian action in putting aside the Majalla and drawing a new civil code based primarily on Shariatic principles is very appropriate.

A more defined approach to the theory of contract under the Hanbali School should be drawn up, as the jurists of this school vary in their inter-

pretations of the different principles. As seen, for example, the Hanbali School does not clearly define the legal capacity of the minor especially when it differentiates between perfect and imperfect understanding.

The contract of sale and marriage were discussed in this work as they are the most common contracts in a Muslim's life. References were made to the contract of salam and to the sale of arbun, and the views of the Muslim jurists as to the concept of risk (gharrar) and usury (riba). Acceptance of the contract of salam would appear to be the most reasonable approach. Furthermore, it is submitted that, the hadith which prohibits the arbun (because of the definite risk involved) appears to provide a conclusive argument against the validity of such contracts. It could be said that risk is present in the contract of salam, but that contract was made valid as an exception to facilitate commercial transactions. As stated among the Hanafi jurists the object of the sale in the contract of salam should be in existence at the time of contract till the future delivery date and this seems to prevent any risk.

Islam gives the parties the free will to enter into any contract and into any condition which is not contrary to Islamic law and public order and so conditions were divided into valid and invalid ones as were contracts. Muslims are bound by their conditions (shurut) but at the same time, every type of contract is considered on its merits and pronounced legal or otherwise on the basis of the Quranic texts, the hadiths or the Consensus (Ijma). Muslim social order, in matters concerning contracts, is based on two main principles these being, to oppose any suspicion of usury (riba) and to exclude all risk from transactions.

Muslim jurists differed in opinion on the principle of allowing minors to contract and to the age of puberty but most of them accept that if a contract is in the minor's advantage then it is valid. But it would be preferable that all contracts by minors be concluded through only his guardian even if the contract is to the minor's advantage. It is difficult to formulate an objective test as to what is to the minor's advantage, thus confusion is created. What is to a minor's advantage may often be

clear but in some marginal cases the opinion can only be subjective. A long term review, careful planning with full consultation of all concerned would be required.

A commercial code covering the various fields of commercial law could be drawn up, embodying the universal principles of the Sharia. A series of provisions could be made for contracts by which Islamic principles and rules are made more clearly known.

Codification could retain the principles of Islamic law and create a truly indigenous and efficient system of commercial law. Codification would also make the law more accessible to the people, thus reducing the number of disputes and making the outcome of disputes more predictable. Furthermore, the fact that the operation of the law would be more predictable would facilitate commercial transactions whose frequency and complexity is especially expanding in the dynamic Saudi economy.

Due to the fact, however, that Saudi law is essentially a religious one whose force is derived from divine revelation, replacing any of those

principles with codified provisions whose validity emanates from the state rather than from God could have a profound effect on the structure of the society. Thus, codification is opposed by many who see it as a step towards secularisation and westernisation. This is a particularly sensitive issue in Saudi Arabia, for this country has a history of conservatism in all areas of life; and the need to retain cultural roots and traditions is rendered essential because of the fact that Saudi Arabia is the guardian of Mecca and Median, the centres of Muslim faith.

There is merit to this argument. It is, however, unnecessary and undesirable for the issue to be seen in terms of having an either - or solution. The strength of those who oppose the idea of codification can be seen in the fact that an entire body of regulations has had to evolve by Royal edict in order to deal with matters which have arisen due to rapid modernisation and economic expansion. If the power of the Sharia courts is considered by the judges and the conservative elements to be diminishing due to the encroachment of codification and special courts, conflict will develop in the society. Thus,

in this country, a more moderate solution should be looked for.

It is submitted that Saudi Arabia possesses a well developed body of common law. Unfortunately, this body of law has not been able to provide the predictability and accessibility which are considered to be the advantages of codification. This could be rectified, however, if cases were reported and if the principle of stare decises were adopted. This would ensure that judicial authority remains in the judiciary. It would also ensure that the Sharia would be the only foundation of law in the country. This notion is not entirely foreign to Islamic jurisprudence. For example, the concepts of analogy (qiyas) and preference (istihsan) has always provided the jurists with the means of broadening the application of Shariatic principles and thereby causing the law to adapt to changing circumstances. The effectiveness of a common law system however, is premised on case reporting and the principles of stare decises. And, these two principles should be adopted whether or not codification is chosen as being the appropriate route to follow.

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