

**ON A SLOW BOAT TOWARDS THE RULE OF LAW: THE NATURE OF
LAW IN THE SAUDI ARABIAN LEGAL SYSTEM**

Hossein Esmaeili

ABSTRACT

Promoting the rule of law, particularly in the Middle East, is becoming an important issue in the age of globalization. The process of establishing the rule of law in Middle Eastern countries is far more complex than originally perceived. Saudi Arabia is one of the most highly influential Muslim and Middle Eastern countries with a non-constitutional monarchy based on a traditional Islamic law system where reform and change is very slow. Understanding the nature and meaning of law and the rule of law in the Saudi Arabian legal system is an important step in promoting a rule of law system in Saudi Arabia and in other Muslim and Middle Eastern countries. This paper analyzes the concept of law within the existing legal system of Saudi Arabia which is based on a monarchy system, tribal structure, and traditional Islamic law. This paper examines whether change, even slow, is possible for a country such as Saudi Arabia where its unique legal system may be too rigidly fixed in a specific ideology and traditions to enable it to embrace the reforms necessary to establish a rule of law system.

ON A SLOW BOAT TOWARDS THE RULE OF LAW: THE NATURE OF LAW IN THE SAUDI ARABIAN LEGAL SYSTEM

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I. INTRODUCTION

The importance of the rule of law as a solution to the world's contemporary crises is well recognized by intellectuals, scholars, politicians and others in both developed and developing countries.¹ Promoting the rule of law is becoming an increasing imperative in this age of globalization.² Reforms

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1. The rule of law and democracy may not be the same thing, JOSEPH RAZ, *THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY* 211 (1979), but they are considered closely associated, and in the Middle East, and in the view of ordinary people, they are considered the same thing. According to Thomas Carothers, "although the state of global democracy is unusually challenging, a majority of citizens in most parts of the world favor democracy at least in the abstract." THOMAS CAROTHERS, *CARNEGIE ENDOWMENT FOR INT'L PEACE, U.S. DEMOCRACY PROMOTION DURING AND AFTER BUSH* 32 (2006), available at http://www.carnegieendowment.org/files/democracy_promotion_after_bush_final.pdf (last visited Jan. 20, 2009). In spite of popular anti-Western views in many Middle Eastern countries, support for democracy is high. Based on more than twenty surveys carried out in nine Arab nations from 2000 to 2006, support for democracy "is as high as or higher than" any other region in the world. Amaney Jamal & Mark Tessler, *Attitudes in the Arab World*, 19 *J. DEMOCRACY* 97, 97 (2008). See generally Mark A. Tessler & Eleanor Gao, *Gauging Arab Support for Democracy*, 16 *J. DEMOCRACY* 83 (2005); Mark A. Tessler, *Do Islamic Orientations Influence Attitudes Towards Democracy in the Arab World? Evidence from Egypt, Jordan, Morocco and Algeria (World Values Survey)*, 2 *INT'L J. COMP. SOC.* 229 (2003); Mark Tessler et al., *Getting into Arab Democracy: What do Iraqis Want?*, 17 *J. DEMOCRACY* 38 (2006).

2. Thomas Carothers, *The Rule of Law Revival*, *FOREIGN AFFAIRS*, Mar./Apr. 1998, at 95 [hereinafter *Rule of Law Revival*]; see generally *PROMOTING THE RULE OF LAW ABROAD: IN SEARCH OF KNOWLEDGE* (Thomas Carothers ed., Carnegie Endowment for Int'l Peace 2006).

necessary to establish the rule of law are becoming an important part of the political agenda in many parts of the world, including Latin America, Eastern Europe, Asia, Africa and the Middle East.

The rule of law, as a system where the ‘law’ is supreme and protects people against the arbitrary power of individuals and the State,³ is an important feature of the Western legal tradition and Western political philosophy. While Western liberal democracy and capitalism are not necessarily universally valued, few would openly oppose the importance and necessity of the rule of law. The question in regions such as the Middle East is whether the rule of law can be established outside of Western liberal democratic systems and capitalistic ideologies and conceptualized in non-Western societies.

In order to answer this question, one must first understand the nature and meaning of ‘law’ and the rule of law in non-Western societies within a historical and philosophical context. In most Middle Eastern countries, an effective system incorporating the rule of law is, as yet, unavailable. A simple solution might be to establish a system similar to that found in Western liberal democratic countries and ‘export’ it to other parts of the world, including the Middle East. Although this somewhat idealistic view is only rarely proposed in the Middle East, it has been enthusiastically espoused by many policy makers in the West. In fact some Western policy makers consider ‘their’ system for promoting the rule of law a ‘panacea’ to be ‘prescribed’ to any country, including those in the Middle East, regardless of regional, cultural, political, or historical sensitivities.⁴

However, the process of establishing the rule of law in other countries, particularly in the Middle East, is far more complex than generally perceived. The establishment of suitable rule of law systems in such countries requires greater effort and understanding than merely writing modern, progressive constitutions, and establishing functional court systems using foreign aid. The process must be gradual, from within the country which is the subject of the transition, and based on inherent principles, carefully reformulated. One important principle, perhaps neglected in countries such as Iraq, is a detailed understanding of the function of the existing legal system.⁵ Another important

3. ALBERT V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 202 (10th ed. 1965).

4. *Rule of Law Revival*, *supra* note 2, at 99.

5. As an example, the Iraq Special Tribunal [hereinafter “Iraq High Tribunal”], established by the Iraq’s Governing Council and approved by the Coalition Provisional, was meant to operate under Iraqi law. The Tribunal was established pursuant to Governing Counsel’s decree of December 9 2003. The applicable law was under the provisions of Iraq’s criminal law, including Iraqi Law Number 7 of 1958 and Iraqi Criminal Code Number 111 of 1969, and a piece of legislation enacted by the Iraq interim government (Law Number 10, October 9 2005). In fact, the Tribunal and the statute under which it was operating were prepared by the Bush Administration, the United Nations and the Non Governmental Organizations (NGO) community. The Tribunal suffered from a number of inefficiencies and flaws mainly as a result of the conflict between the Tribunal and its

matter is whether State leaders, legal scholars, intellectuals or even the general public within a country advocate a specific ideology for their government. In the Middle East, the demand for civil liberties, human rights, democracy and the rule of law system varies between countries; while the majority of people in the tribal-based societies of Oman, Saudi Arabia, or Iraq may be reluctant to embrace a Western liberal democratic system,⁶ for example, others like those in Afghanistan may be more ready to make this shift in ideological values.

It is the Saudi Arabian system that forms the focus of this paper. Saudi Arabia is a highly influential country in the Islamic world and consists of a non-constitutional monarchy, based on a tribal system and Islamic law founded by one of the largest and most powerful Arab dynasties, and divided into a number of clans. Against this traditional Islamic backdrop, the Saudi government has a strategic relationship with the West and the United States.⁷ Saudi Arabia is unique in the Middle East because its specific ideology is based on the doctrine of

creating statute and the Iraqi criminal law system. For example, cross examination and plea bargaining are not part of Iraq's criminal law system because Iraq follows an inquisitorial system. The role of judges, prosecutors, and investigation judges were also different from that of the Tribunal. The trial of Saddam Hussein could have been an important step towards Iraq's reconstruction and the establishment of the rule of law had it been conducted with a more efficient and compatible system based on Iraqi law principles. For an appraisal and analysis on the Iraq High Tribunal and the trial of Saddam Hussein, see M. Cherif Bassiouni, *Post-Conflict Justice in Iraq: An Appraisal of the Iraq Special Tribunal*, 38 CORNELL INT'L L.J. 327, 334 (2005) and SADDAM ON TRIAL: UNDERSTANDING AND DEBATING THE IRAQI HIGH TRIBUNAL (Michael P. Scharf & Gregory S. McNeal eds., 2006).

6. If a free election is held this year in Saudi Arabia, Egypt, Kuwait, Qatar, Oman and Jordan, the likely outcome will be victory for the Islamic parties. However, a free election in Iran, Turkey, Malaysia, Pakistan and Bangladesh is likely to be won by moderate and democratic parties. The first group of countries is ruled mainly by authoritarian regimes which have close ties with the West to the extent that major Western powers are ready to employ military force for the defense of those governments. This was the case for the Kuwaiti rulers during the occupation by Saddam Hussein in 1991. In the second category, Malaysia, Pakistan and Bangladesh, all former British colonies, have a parliamentary system with a well established legal system based, to some extent, on the rule of law. Iran has an Islamic government, with certain limited democratic institutions, but a legal and political system which imposes religious rules on people. Turkey has a secular government and modern democratic institutions where moderate Islamic parties have significant power and do well in elections. Therefore, it is likely that a sudden free election in 2008 in many Middle Eastern countries, except Turkey, Lebanon, and Iran, will put Islamic parties in power. This does not mean that the people of certain Arab countries do not favor democracy but, probably, because of the long term support provided by the West to totalitarian regimes in these countries, and the lack of any other viable alternatives, Islamic parties are the only effective alternative groups able to attract votes.

7. On Saudi-United States relationship, see PARKER T. HART, *SAUDI ARABIA AND THE UNITED STATES: BIRTH OF A SECURITY PARTNERSHIP* (Ind. Univ. Press 1998) and RACHEL BRONSON, *THICKER THAN OIL, AMERICA'S UNEASY PARTNERSHIP WITH SAUDI ARABIA* (Oxford U. Press 2006).

Wahhabism.⁸ Wahhabism, as a doctrine, does not recognize non-textual sources of law and rejects any innovation in religion. It also strongly opposes any interpretation of law and religion not based on traditional textual sources of law. This ideology has influenced the legal system of Saudi Arabia and many Islamic institutions and groups around the world, including some in Western countries, such as Australia.⁹

Literature on Saudi Arabia's economic and political structures is generally poorly developed, and as a result, of little value.¹⁰ In particular, information on the legal system is limited.¹¹ Within the Saudi Kingdom, the legal

8. See *infra* section II(A)(2).

9. JOHN ESPOSITO, UNHOLY WAR 107 (Oxford Univ. Press 2002); WALID PHARES, THE WAR OF IDEAS: JIHAD AGAINST DEMOCRACY 159 (Palgrave Macmillan 2007); Mervyn Bendle, *Secret Saudi Funding of Radical Islamic Groups in Australia*, NAT'L OBSERVER, Autumn 2007, at 7; STEPHEN SCHWARTZ, TWO FACES OF ISLAM, SAUDI FUNDAMENTALISM AND ITS ROLE IN TERRORISM 196-243 (Anchor Books 2003).

10. There is not, to my knowledge, a single serious study based on adequate statistics of the Saudi economy, of the structures of power and influence within the state, of the social classes of Saudi Arabia, of the ethnic and social composition of the major cities (Mecca, Medina, Jeddah, Taif, Riyadh, Dammam) in which most Saudis live. Of available books in Western languages that merit study the list is small: two good histories, one by a Russian writer (Alexi Vassiliev, *The History of Saudi Arabia*), one by an anthropologist and member of a former ruling family (Madawi al Rasheed, *A History of Saudi Arabia*); two of historical sociology by a Saudi sociologist, Yamani (*Changed Identities: The Challenge of the New Generation in Saudi Arabia*, and *Cradle of Islam: The Hijaz and the Quest for an Arabian Identity (2000)*); a general study by an independent Marxist writer, Helen Lackner (*A House Built on Sand*), and that is largely it. Those who rule the country, and make a pretence of pluralism and openness, ensure that concrete issues are not discussed or investigated, while those who, from outside, make money from the country, notably oil companies, banks and contractors, have just as little interest in the truth. All is misrepresented in propaganda and by the four ideological blankets that between them smother the realities of the country – oil, religion, monarchy and desert.

Fred Halliday, *Foreword* to PASCAL MENORET, THE SAUDI ENIGMA: A HISTORY xi, xii (Patrick Camiller trans., Zed Books 2005).

11. For a list of available literature on Saudi Arabian law up to 1995, see John Makdisi & Marianne Makdisi, *Bibliography: Revised and Updated List of Secondary Sources*, 87 LAW LIBR. J. 69, 159–161 (1995). Indeed, the most comprehensive text in English on Saudi Arabian law is FRANK E. VOGEL, ISLAMIC LAW AND LEGAL SYSTEMS: STUDIES OF SAUDI ARABIA (Brill Academic Publ'rs 2000). However, there are a number of good, recent sources published in law journals such as Abdulaziz Al Fahad, *Ornamental Constitutionalism: The Saudi Basic Law of Governance*, 30 YALE J. INT'L L. 375 (2005); Abdulaziz Al Fahad, *The Prince, the Shaykh and the Lawyer*, 32 CASE W. RES. J. INT'L L. 307 (2000); Rashed Aba Namay, *The Recent Constitutional Reforms in Saudi Arabia*, 42

literature is limited principally to traditional texts on Islamic jurisprudence written centuries ago by scholars, most of them residing and working outside Arabia. Furthermore, Saudi legal scholars and other Muslim scholars, whether they are in the Arab, Muslim or Western worlds, are strictly self-censored in their analysis and evaluation of the Saudi legal system.¹²

The central theme of this paper is the nature of law and the prospect of the establishment of the rule of law in Saudi Arabia. It examines whether change, even slow, gradual change over many generations, is possible for a country such as Saudi Arabia, whose unique legal system may be too rigidly fixed in specific ideology and traditions to enable it to embrace the reforms necessary to establish a rule of law system, whether based on Western democratic principles or not.

The primary focus of this paper will be on issues specifically relating to the rule of law in Saudi Arabia. It will include an analysis of the theoretical and philosophical basis of the Saudi Arabian legal system, a discussion of the operation of tribal and *Islamic* law and the influences of modernity on it, and finally, how the government and people of Saudi Arabia view the movement towards the rule of law. A limited rule of law system may be established in Saudi Arabia, but it needs gradual historical evolution and may take many decades.

II. THE NATURE OF LAW IN THE SAUDI LEGAL SYSTEM

Saudi Arabia's legal system and the role and nature of law in Saudi society are a good example of the interaction between traditional Islam, Saudi tribal structure, and modern law. The Saudi legal and political system is based on three important components: traditional Islam (the *Hanbali* School of Law and the Wahhabi doctrine), tribal/monarchy structure, and modern institutions. In this section these important aspects of Saudi Arabia's legal system will be analyzed.

A. Traditional Islamic Law

Saudi Arabia is one of the most traditional Muslim societies in the world. In Saudi Arabia, traditional Islam is the basis for the country's national identity, society, law, political system, and international relations. The legal system of

INT'L & COMP. L.Q. 295 (1993); Ahmed Al Ghadyan, *The Judiciary in Saudi Arabia*, 13 ARAB L.Q. 235 (1998).

12. According to Khaled Abou El Fadl, the power of the Saudi government in issuing visas for Muslims all over the world to visit Islam's holy sites gives the Saudi government a power to have an impact over the life of all Muslims. Criticizing Wahhabism may result in denying visas to scholars if they intend to visit Saudi Arabia or the holy sites for the purpose of pilgrimage (*haj*). See KHALED ABOU EL FADL, *THE GREAT THEFT, WRESTLING ISLAM FROM EXTREMISTS* 87 (Harper 2005).

Saudi Arabia is the traditional Islamic law, known as *Shari'ah*.¹³ Traditional Islamic law is a legal system based on certain religious texts and works of Muslim jurists and Muslim states during the last fifteen centuries.¹⁴ Under *Shari'ah*, law and religion overlap and religion is, according to many Muslim scholars, the divine law.¹⁵ On the nature of law and the rule of law in Islam, the literature is quite extensive.¹⁶ The dominant view of Muslim jurists is that the law in Islam is divine, sacred and comprehensive. However, there are an increasing number of Muslim jurists who consider *Shari'ah* a legal system based on certain divine principles but adaptable to circumstances, evolving and subject to criticism.¹⁷ Official Islamic law in Saudi Arabia is the very traditional version and is distinct from other Muslim countries for a number of reasons. Among these reasons is the specific status of Saudi Arabia as the birthplace of Islam, whose legal system follows the most traditional school of thought and encompasses the *Hanbali* school and the Wahhabi doctrine of law and religion.

13. The term *Shari'ah*, in both Islam and Western literature, is used in different ways. In Arabic, *Shari'ah* literally means “the water way” or “the river.” IBN MANZUR, *LISAN AL ARAB* [Arabic Language] 175 (1956). But in Islamic literature it refers to religious knowledge, Islamic jurisprudence (rules and rituals), and Islamic law. For an analysis of the meaning of *Shari'ah* and *fiqh* (understanding of Islamic Law or Islamic Jurisprudence) in Islam, see ABDULLAH SAEED, *ISLAMIC THOUGHT: AN INTRODUCTION* 43–45, ch. 6 (Routledge 2006); CHIBLI MALLAT, *INTRODUCTION TO MIDDLE EASTERN LAW* 40–61 (Oxford Univ. Press 2007); Khaled Abou El Fadl, *Islam and the Challenge of Democracy Commitment*, 27 *FORDHAM INT'L L.J.* 4, 64 (2003). See also WAEL HALLAQ, *THE ORIGIN AND EVOLUTION OF ISLAMIC LAW* (Cambridge Univ. Press 2005) [sources collectively referred to hereinafter as Fiqh sources].

14. The literature on Islamic law, or *Shari'ah*, is extensive in both Middle Eastern sources (Arabic, Persian and Turkish) and in English sources. John Makdisi and Marianne Makdisi have collected a list of extensive literature on Islamic law in English up to 1995. See John Makdisi, *Islamic Law Bibliography: Revised and Updated List of Secondary Sources*, 87 *LAW LIB. J.* 69 (1995).

15. SEYYED HOSSEIN NASR, *IDEALS AND REALITIES OF ISLAM* 95 (Praeger 1966).

16. See, e.g., NOEL COULSON, *A HISTORY OF ISLAMIC LAW* (Edinburgh Univ. Press 1964); JOSEPH SCHACHT, *AN INTRODUCTION TO ISLAMIC LAW* (Clarendon Press 1964); LEGACY OF ISLAM (Joseph Schacht et al. eds., Oxford Univ. Press 2d ed. 1974); HALLAQ, *supra* note 13; MALLAT, *supra* note 13; NASR, *supra* note 15.

17. See, e.g., ABDULLAHI AHMAD AN NA'IM, *TOWARD AN ISLAMIC REFORMATION, CIVIL LIBERTIES, HUMAN RIGHTS, AND INTERNATIONAL LAW* (Syracuse Univ. Press 1990); ABOU EL FADL, *supra* note 12; MUHAMMAD AL GHAZALI, *THE SOCIO-POLITICAL THOUGHTS OF SHAH WALI ALLAH* (Islamic Research Inst. 2001); ALLAMA MUHAMMAD IQBAL, *THE RECONSTRUCTION OF RELIGIOUS THOUGHTS IN ISLAM* (M. Saeed Sheikh ed., Inst. of Islamic Culture 1996). See generally John Cooper, *The Limits of the Sacred: The Epistemology of Abdolkarim Soroush*, in *ISLAM AND MODERNITY, MUSLIM INTELLECTUALS RESPOND* 38 (John Cooper et al. eds., I. B. Tauris 2000); ABDOLKARIM SOROUSH, *THE EXPANSION OF PROPHETIC EXPERIENCE: ESSAYS ON HISTORICITY, CONTINGENCY AND PLURALITY IN RELIGION* (2006) (book is in the process of being translated into English); Abdolkarim Soroush, <http://www.dr.soroush.com> (last visited Nov. 29, 2008).

1. Birthplace of Islam (Mecca and Medina)

Arabia, or Saudi Arabia, is known as the birthplace of Islam.¹⁸ The Prophet of Islam¹⁹ was born there (in Mecca) and died there (in Medina), and Islamic *Shari'ah* also originated there.²⁰ Many of the principles of Islam, including its legal principles, are based on those practiced in ancient Arabia, now known as Saudi Arabia.²¹ This means that even if Islam had not been established, Saudi society would, to a great extent, still have had a social structure similar to what it has now. In Islam, laws are divided into endorsed (*imzaei*) and established (*tasisi*) rules. The first are rules that existed in Arab society before the advent of Islam and which were endorsed by Islam: pilgrimage, the institution of blood money (both as punishment and monetary compensation), polygamy, and many other legal principles.²² In addition, Islam established innovative new legal principles such as the prohibition of drinking alcohol and the criminalization of adultery. Indeed the legal content of the Quran (about 300 verses) was mainly revealed in response to problems raised during the twenty-three years of Muhammad's prophethood.²³ According to some Muslim jurists, the Quran primarily endorsed and upheld the existing Arab customs and institutions while introducing changes necessary to repeal objectionable customs such as infanticide, gambling, and usury.²⁴ As a result, in Saudi Arabia, Arab tradition and religion

18. See Irfan Shahid, *Pre-Islamic Arabia*, in 1A THE CAMBRIDGE HISTORY OF ISLAM 3 (P.M. Holt et al. eds., Cambridge Univ. Press 1970) (regarding pre-Islamic Arabia).

19. On the life of the prophet of Islam, see IBN ISHAQ, *THE LIFE OF MUHAMMAD: A TRANSLATION OF IBN ISHAQ'S SIRAT RASUL ALLAH* (Alfred Guillame trans., Oxford Univ. Press 1955); IRA LAPIDUS, *A HISTORY OF ISLAMIC SOCIETIES* ch. 2 (2d ed., Cambridge Univ. Press 2002); MUHAMMAD HASANEIN HAYKAL, *THE LIFE OF MUHAMMAD* (Ismail Ragi al Faruqi trans, N. Am. Trust Publ'ns, 1983).

20. See COULSON, *supra* note 16 (regarding the history of Islamic law).

21. See *infra* Part II(B)(3).

22. According to Imam Malik, one of the four founders of Sunni jurisprudential schools of law, the practice of the people of Medina is equal to *Ijma* (consensus of Muslim scholars on a legal issue) and hence a source of Islamic law. See MOHAMMAD H. KAMALI, *PRINCIPLES OF ISLAMIC JURISPRUDENCE* 372 (3d ed. Islamic Tex. Soc'y 2003).

23. See ABDULLAH SAEED, *INTERPRETING THE QURAN: TOWARDS A CONTEMPORARY APPROACH* ch. 3 (Routledge 2005) (discussing different contemporary views on the revelation of the Quran and 'revelation' in Islam). See generally Abdulla Saeed, *Fazlur Rahman: A Framework for Interpreting the Ethico-Legal Content of the Quran*, in *MODERN MUSLIM INTELLECTUALS AND THE QURAN* 37 (Suha Taji Farouki ed., Oxford Univ. Press 2004).

24. KAMALI, *supra* note 22, at 26.

overlap to a great extent, whereas in other parts of the Islamic world, such as Iran, Turkey and the Indian sub-continent, principles of Islam may not be consistent with their own ancient traditions. This suggests that the culture and legal system of Saudi Arabia is less amenable to reform and change than other Muslim countries. Saudi Arabia is comparatively unfamiliar with incorporating foreign elements into its traditional legal and political systems and so fosters reactionary and puritanical movements. Saudi Arabia's position as the birthplace of Islam places limitations on the possibility that any substantial reforms can develop there. In addition, both pre-Islamic Arab culture and traditional Islam have a particular emphasis on unelected, powerful individuals (Caliphs, *Imams*, Kings, leaders and other religious authorities) as well as on the community and the state. Establishing a system of law in such a society requires substantial changes and extended time.

The Quran, the most important source of law in Islam, was revealed in Mecca and Medina. Quranic chapters are divided into two categories of *Makki* (revealed in Mecca) and *Madani* (revealed in Medina).²⁵ *Kaba*,²⁶ or the House of God, is in Mecca, Saudi Arabia, where millions of Muslims travel each year to perform the *hajj*²⁷ ritual, a compulsory religious duty for all Muslims who are able to afford the travel costs. The Saudis are guardians of the two holy mosques of these two cities and administer the annual pilgrimage to Mecca. The guardianship of the most important Islamic holy places gives the Saudi state a special status and makes the state very influential in the Muslim world. It also gives the Wahhabi religious leaders (wahhabi '*ulama*') great power and a special status that makes it

25. The large part of the Quran was revealed during the thirteen years of the Prophet's mission in Mecca. The Meccan part of the Quran mainly relates to the fundamental principles of Islamic beliefs, such as monotheism (*tawhid*), prophethood and the existence of the hereafter, while the chapters revealed in Medina include rules relating to state, Jihad, and legal matters. It was in Medina that the Prophet Muhammad established a State with an Islamic political, legal and social structure. Some Islamic jurists consider the distinction between the nature of the Quranic chapter as revealed in Mecca and Medina as significant in the development and interpretation of *Shari'ah*. They divide the Islamic rules as temporal and permanent, arguing that principles revealed in Medina relating to Islamic beliefs are permanent and the legal principles in Mecca are temporal. A leading contemporary Muslim jurist advocating a similar view was Ustad Muhammad Taha, a professor of law at Khartoum University. He was put on trial and executed for apostasy in the Nomiry region in Sudan. See MAHMOUD MOHAMAD TAHA, THE SECOND MESSAGE OF ISLAM (Abdullahi Ahmed An Na'im trans., Syracuse Univ. Press 1987). See also ABDULLAHI AHMAD AN NA'IM, TOWARD AN ISLAMIC REFORMATION, CIVIL LIBERTIES, HUMAN RIGHTS, AND INTERNATIONAL LAW (Syracuse Univ. Press 1990).

26. *Kaba* is considered by Muslims as the house of God. Daily prayers by Muslims must be performed in the direction of *kaba* from anywhere in the world. See SEYYED HOSSEIN NASR, ISLAM: RELIGION, HISTORY AND CIVILIZATION 91-96 (Harper 2003).

27. The supreme pilgrimage of Islam is the visit of *kaba* by Muslims. It includes certain movements, prayers and sacrificing of an animal in Mecca. Every year over two million annual pilgrims visit Mecca during the lunar month of *Dhalhajah*.

hard for ordinary Saudi citizens to push for substantial reform. This creates an added difficulty for any move towards the rule of law system brought on by foreign pressure or intervention.

2. Schools of Law: Hanbali and Wahhabi

The official school of law in Saudi Arabia (and Qatar) is the *Hanbali* School which has the smallest following and was the last formed²⁸ of the four Sunni schools of thought.²⁹ Unlike the other three schools of law, and in particular the *Shafi'i* and *Hanafi* schools which developed progressive juristic methods in the interpretation of legal sources, the *Hanbali* School tended towards a literal interpretation of Islamic texts, namely the Quran and the Sunna.³⁰ Ahmad ibn Hanbal, the founder of the school, was a theologian who wrote a great book on *Hadith*.³¹ He was neither an innovative jurist nor a legal scholar; rather, he

28. Ahmad ibn Hanbal died in 855 AD. All of the other three founders of Islamic Schools of thought died before him (Abu Hanifa died in 767, Malik ibn Anas died in 795 and Shafi died in 820). Christopher Melchert, *The Formation of the Sunni Schools of Law*, in THE FORMATION OF ISLAMIC LAW 351, 351 (Ashgate/Variorum 2004) [hereinafter FORMATION OF ISLAMIC LAW].

29. In Islam there are four Sunni schools of law and the Shia school which has its own branches. See generally CHRISTOPHER MELCHERT, THE FORMATION OF THE SUNNI SCHOOLS OF LAW, 9TH-10TH CENTURIES C.E. (1997); Daura Bello, *A Brief Account of the Development of the Four Sunni Schools of Law, and Some Recent Developments*, 2 J. ISLAMIC & COMP. L. 1 (1968) (unverified); George Makdisi, *The Significance of the Sunni Schools of Law in Islamic Religious History*, 10 INT'L J. MIDDLE E. STUD. 1 (1979); A. M. Haj Nour, *The Schools of Law: Their Emergence and Validity Today*, 7 J. ISLAMIC & COMP. L. 54 (1977) (unverified); Abdurrahman A. Doi, *The Muwatta of Imam Malik on the Genesis of the Shari'ah Law: A Western Scholar's Confusion*, 4 HAMDARD ISLAMICUS 27 (1981) (unverified); THE ISLAMIC SCHOOL OF LAW: EVOLUTION, DEVOLUTION, AND PROGRESS (Peri Bearman et al. eds., 2005).

30. In various texts on Islamic law in both Middle Eastern languages (Arabic, Persian and Turkish) and English, the main sources of law in Islam are listed as the Quran, the Sunna, *Ijma* (consensus), and *Qiyas* (logical analogy). In practice this means that the traditional law derives from two written sources which are the Quran and the Sunna. However, up to fifteen secondary sources of law have been cited in Islamic law texts including *urf* (custom), *Masala* (expediency), *Isteshab* (the presumption of continuity of existing rules), and *Istihsam* (equity). On sources of Islamic law, see generally KAMIL MUSA, AL MADKAL ILA AL TASHRI AL ISLAM [THE BEGINNING OF ISLAMIC LEGISLATION] 196-222 (1989) (unverified); Muhammad Hamidullah, *Sources of Islamic Law – A New Approach*, 1 ISLAMIC L.Q. 205 (1954) (unverified); MOHAMMAD HASIHM KAMALI, PRINCIPLES OF ISLAMIC JURISPRUDENCE (3d ed., Islamic Texts Soc'y 2003); WAEL HALLAQ, THE ORIGINS AND EVOLUTION OF ISLAMIC LAW (2005); BURTON WATSON, THE SOURCES OF ISLAMIC LAW: ISLAMIC THEORIES OF ABROGATION (1990).

31. See CHRISTOPHER MELCHERT, AHMAD IBN HANBAL (2006) (discussing Ahmad ibn Hanbal).

was a collector of *Hadith* (sayings of the Prophet),³² accumulating approximately thirty thousand traditions from the narrated words and actions of the Prophet Muhammad in a book called *Al Musnad*.³³ The teachings of Ahmad ibn Hanbal were later developed through the juristic activities of his followers and his two sons.³⁴ The *Hanbali* School is also associated with two other famous Muslim scholars, Ibn Taymiyya (d. 1328) and Muhammad ibn Abd al Wahhab (d. 1787).³⁵ In the view of Ibn Taymiyya, in matters of religion and *Shari'ah*, only the Quran and the Prophet must be followed, and he particularly emphasized *Hadith* (sayings of the prophet).³⁶

Over centuries, the *Hanbali* School waned until it was revived in the eighteenth century by the Wahhabi movement.³⁷ Despite its having the least members, both the *Hanbali* School's position as the official school of law in Saudi Arabia and its founding status for Wahhabism have contributed to making it the most reactionary school of law. Arguably, it is therefore the most influential in shaping Islamic thinking in many parts of the world.

The movement of Ibn Adb al Wahhab, known as Wahhabi, was begun by Muhammad Ibn Abd al Wahhab (1703–1792) who studied religion and jurisprudence in Mecca and Medina.³⁸ He was a follower of the *Hanbali* School,

32. Wael B. Hallaq, *Early Ijtihad and the Later Constructions of Authority*, in *FORMATION OF ISLAMIC LAW*, *supra* note 28, at 317, 334.

33. This book has been edited and published (in several volumes) by various publishers in many Muslim countries including Egypt, Saudi Arabia, and Lebanon. See Melchert *supra* note 31, at 39-48; WILLIAM A. GRAHAM, *DIVINE WORD AND PROPHETIC WORD IN EARLY ISLAM* 83-84 (1977).

34. HALLAQ, *supra* note 32.

35. SEYED AHMAD MOVASSAGHI, *CONTEMPORARY ISLAMIC MOVEMENTS* 157–61 (1998).

36. MELCHERT, *supra* note 31, at 59.

37. MALLAT, *supra* note 13, at 112-13.

38. In recent years, extensive literature on Wahhabism has been published in English. Some of these works are very critical of Wahhabism, while a few are apologetic and have been written on defending the Wahhabi ideology. For critical literature on Wahhabism, see, for example, HAMID ALGAR, *WAHHABISM: A CRITICAL ESSAY* (Islamic Publ'ns Int'l 2002); HENRY BAYMAN, *THE SECRET OF ISLAM: LOVE AND LAW IN THE RELIGIOUS ETHICS* (2003); KHALED ABU EL FADL, *THE GREAT THEFT, WRESTLING ISLAM FROM THE EXTREMISTS* (2005). For a sympathetic analysis of Wahhabism, see NATANA J. DELONG-BAS, *WAHHABI ISLAM: FROM REVIVAL AND REFORM TO GLOBAL JIHAD* (2004).

later adopting the theories of famous *Hanbali* jurist Ibn Taymiyya³⁹ on law, theology, and other aspects of the religion of Islam.⁴⁰

Wahhabi, or Wahhabism, a term used in English literature as well as in other languages and Muslim literature, is a rather strange term. It has been used by different people for different purposes. Saudi Arabians do not like to be called Wahhabis and frequently take it as an insult to be called Wahhabists.⁴¹ Similarly, in countries such as Pakistan or Indonesia, and amongst Muslims living in the West, such as those in London and Sydney, the followers of Wahhabi ideology hate to be called Wahhabi. Indeed, theologically, in Islam there is no sect as Wahhabism. This means that while there is recognition of different Islamic sects such as Sunni, Shia, *Zaydi*, *Ismaili*, *Ibadi* and so on, there is no recognition of a separate sect of Wahhabi. In practice, the puritanic and simplistic ideas of a *Hanbali* jurist, Ibn Taymiyya, revived by Muhammad Ibn Abd al Wahhab in the eighteenth Century in the Arabian Peninsula, which found ethical recognition by the State of Saudi Arabia, can be labeled as 'Wahhabism.' As a result of the influence of the Saudi government, the importance of its two holy cities, and its huge oil revenue, the ideology has spread around the world.⁴² Many violent Islamic groups worldwide and extremist Islamic centers in the Western world are fed by the superficial Wahhabi doctrine. However, not all extremist movements are Wahhabi nor are all followers of Wahhabism extremists or violent. Since the message of Wahhabism is simplistic and superficial, it gives great comfort to some traditional Muslims who see the religion as a salvation for their personal problems. However, the superficial nature of Wahhabism means its involvement in the political and broader social sphere may be coupled with violence and division. Wahhabists would probably deny all aspects of fifteen centuries of Islamic civilization while also rejecting other people and other Muslims. They reject many other aspect of the religion of Islam such as its philosophy, theology, poetry, Sufism, etc. Wahhabists usually call themselves *muwahideen* (monotheists), or true Muslims.⁴³ The terms *Ahlul al Sunna* and *Jamah*, which

39. On Ibn Taymiyya's views and thinking, see James Pavlin, *Sunni Kalam and Theological Controversies*, in HISTORY OF ISLAMIC PHILOSOPHY: PART I, at 105 (Seyed Hussein Nasr & Oliver Leaman eds., Routledge, 1996); TOSHIHIKO IZUTSU, THE CONCEPT OF BELIEF IN ISLAMIC THEOLOGY: A SEMANTIC ANALYSIS OF IMAN AND ISLAM (Keio Inst. of Cultural & Linguistic Studies 1965). In this Izutsu refers extensively to Ibn Taymiyya's views.

40. Muhammad ibn Abd al Wahhab's ideas were articulated in his book KITAB AL TAWHID [THE BOOK OF MONOTHEISM] (1998) (unverified).

41. MENORET, *supra* note 10, at 52.

42. See ESPOSITO, *supra* note 9, at 107.

43. Abdulaziz Al Fahad, *From Exclusivism to Accommodation: Doctrinal and Legal Evolution of Wahhabism*, 79 N.Y.U. L. REV. 485, 487-89, 492 (2004).

ordinarily refer to Sunni Islam, are, sometimes, used by certain Wahhabi groups, particularly in Australia, to represent themselves.⁴⁴

What was important about the views of Ibn Taymiyya in relation to the concept of law and jurisprudence was that he rejected the doctrine of *taqlid*,⁴⁵ or mitigation.⁴⁶ Under this doctrine the rules and principles of *Shari'ah* must be inferred from sources of law such as the Quran, the Sunna, and others, and only through the teachings of the four recognized Sunni schools of thought. In other words, it could not be undertaken by Islamic jurists independently. This meant that after the establishment of the four schools (during the ninth and tenth centuries) all Sunni Muslim jurists had to have worked within the general framework of legal theory established by one of the four schools of thought. Indeed, in the mid-ninth century, Muslim scholars from all four schools established a doctrine that prohibited independent reasoning in law and required that only the basic principles already established by existing schools of thought were to be followed. This was referred to as 'closing the door of *ijtihad*'⁴⁷ and, in practice, was the beginning of the *taqlid* period. Ordinary Sunni Muslims still practice their ritual and personal law based on one of these four schools.⁴⁸ In addition, Muslim governments and Islamic States, over time, have adopted one of these schools as their official legal school. For example, the *Hanafi* School was the official School of the Ottoman Empire.⁴⁹

44. For an interesting analysis of Wahhabism and myths surrounding the doctrine, see MENORET, *supra* note 10, at 43-63. In the foreword to his book, Professor Fred Halliday admires Menoret's approach about the Saudi State and states "among other myths briskly dispensed with is that there is, in any accurate sense, such a thing as 'Wahhabism', a frequently used misnomer for the strict *Hanbali* variant of Islam that is official in the country, and that Saudi money has promoted abroad." *Id.* at xiii.

45. On *taqlid*, see SHEIKH MUHAMMAD AL KHIZRI, TARIKH AL TASHRI AL ISLAMI [HISTORY OF LAW MAKING IN ISLAM] 219-26 (Dar Al Kotob Al Elmiyah 2d ed. 1994); WAEL B. HALLAQ, A HISTORY OF ISLAMIC LEGAL THEORIES 121-24 (Cambridge Univ. Press 1997) (describing the meaning of *taqlid* and its difference with *ijtihad*). See also Rudolph Peters, *Ijtihad and Taqlid in 18th and 19th Century Islam*, 20 DIE WELT DES ISLAMIS 131-45 (1980).

46. Ibn Taymiyya also rejected the use of Greek logic which had entered Islamic philosophy and law. See WAEL B. HALLAQ, IBN TAYMIYYA AGAINST THE GREEK LOGICIANS (1993).

47. SCHACHT, *supra* note 16, at 71 (1964).

48. Today the *Hanafi* School has the largest following in the Muslim world. The majority of them are in Turkey and Turkic speaking people of central Asia and in the Indian sub-continent. The majority of Egyptians, Malays, and Indonesians follow the *Shafi'i* School. The North and West Africans are *Maliki* and the Saudis are *Hanbali*. The largest Shia School of law, *Jafari*, is followed in Iran, Iraq, Bahrain, Azerbaijan, and parts of Lebanon, Afghanistan, and Pakistan. See ASAF A. A. FYZEE, OUTLINES OF MUHAMMADAM LAW 35-36 (Oxford Univ. Press 1974).

49. On the legal system of the Ottoman empire, see MAJID KHADDURI & HERBERT LIENBESNY, LAW IN THE MIDDLE EAST VOLUME 1: ORIGIN AND DEVELOPMENT OF ISLAMIC LAW 279 (Majid Khadduri & Herbert Liebesny eds., The Middle East Institute 2007).

What Ibn Taymiyya established was that Muslim jurists no longer had to follow preceding scholars and that every Muslim jurist could infer the principles of laws directly from their source, namely the Quran and the Sunna. This doctrine of “independent inferral” of law from its original source was adopted by Muhammad ibn abd al Wahhab. Ironically, what Ibn Taymiyya said is similar to what many moderate, progressive, and reformist Muslim jurists are saying today in the modern world.⁵⁰ The difference is that Ibn Taymiyya’s approach to *ijtihad*, or the inferral of legal principles from their source, was strictly limited to only two original and textual sources of law—the Quran and the Sunna—and thus had a very superficial and narrow scope.⁵¹

Two aspects of Ibn Taymiyya’s theory can be distinguished. The doctrine works well from a traditionalist perspective in respect to Islam as a religion, particularly in relation to Islamic rituals.⁵² However, when applied to law and the political, economical and social structures of society, the doctrine poses a problem in that it provides a very narrow source of legal principles limited to a few hundred verses of the Quran and certain parts of the Sunna.

The doctrine of *takfir* is central to the Wahhabi movement.⁵³ *Takfir* is derived from the word *kofr* which literally means covering, but in religious and jurisprudential texts it refers to “covering the truth” or infidelity and unbelief. Thus, *takfir* means imposing *kofr* (infidelity) on someone or some group or movements. In the view of Muhammad Ibn Abd al Wahhab, many Muslims, including Muslim jurists who do not strictly adhere to the words of the Quran and the Sunna and those who use reason in legal interpretation or employ rationalist methods of analysis in interpretation of religion, are considered *kafirs* (infidels).⁵⁴ Except Ibn Taymiyya, many other Muslim jurists, such as Ghazali (1058–1111),⁵⁵

50. ABOU EL FADL, *supra* note 12, at 71.

51. *Id.*

52. A good introduction to Islam is SEYYED HOSSEIN NASR, THE HEART OF ISLAM: ENDURING VALUES FOR HUMANITY (Harper 2002).

Muslims themselves must draw ever more from these inner springs of wisdom and all men and women of good will in the West must seek to understand Islam in light of these central truths, which are also to be found in Judaism, Christianity, and other religions. We must all seek to rediscover the heart of religion, which is also the religion of the heart, to drink deeply of the spring of wisdom gushing forth from the heart, to live in peace and harmony on the basis of the universal truths contained in the perennial wisdom shared by all traditions, and to love all of God’s creation as the consequence of being ourselves touched by the love and compassion of the One who resides in our hearts.

Id. at 315.

53. AL FAHAD, *supra* note 43, at 491-92; ABOU EL FADL, *supra* note 12, at 137.

54. ABOU EL FADL, *supra* note 12, at 48.

55. Imam Muhammad Ghazali was a Persian theologian and Sufi who earned a place as one of the greatest Muslim scholars and had the title of the “Renewer of Islam.” *See*

Ib Sina (Avecina) (980–1037),⁵⁶ Ibn Rushd (Averroes) (d. 1198)⁵⁷ and Fakhr al Din al Razi (d. 1210)⁵⁸ may be considered as *kuffar* (plural of *kafir*) or their views are completely rejected.⁵⁹ Fakhr al Din al Razi is explicitly condemned as a *kafir*.⁶⁰ According to a contemporary scholar, labeling al Razi as a *kafir* is “akin to Jews accusing Maimonides or Catholic Christians accusing Thomas Aquinas of being infidels because they relied on nationalist criteria in thinking about God’s law.”⁶¹ A very significant aspect of Wahhabi doctrine and the Wahhabi movement, which perhaps was not intended by its founder and followers, is its Arab nationalistic approach to Islamic religion. The founder of Wahhabism strongly opposed Ottomans and other non-Arabs in the Middle East.⁶² Moreover, friendship with non-Muslims was rejected based on the principles of *tawalla* (the principle of loyalty (to Islam)) and *tabarra* (disassociation with non-Muslims).⁶³ Thus, under Wahhabi interpretation, while only 19% of Muslims are Arabs, all aspects of Islamic civilization must adhere to Arab culture, and more precisely, to the Bedouin culture of Arabia.⁶⁴ This means that the significant contributions from the majority of Muslims in the Turkish territories (Turkey and several central Asian countries), Persia, the Indian sub-continent, Indonesia, Africa, and other parts of the world are ignored. Furthermore, this approach not only alienates the majority of Muslims, it also promotes the Bedouin culture, which is only a small part of modern Saudi Arabia, and forms the literal and tribal culture of the Najd region.⁶⁵ Therefore, under Wahhabi doctrine, in spite of its opposition to any non-Islamic tradition, the tribal culture is, in practice, dominant.

Wahhabism is perhaps the most important, and unfortunately the most negative, aspect of the Saudi Arabian legal and political system. It is a significant obstacle in moving towards a rule of law system in Saudi Arabia. In moving towards a legal and political system based on a limited rule of law concept, the

generally W. MONTGOMERY WATT, *MUSLIM INTELLECTUAL: A STUDY OF AL-GHAZALI* (Edinburgh Univ. Press 1963).

56. Ibn Sina (Avicenna) was the most influential Muslim philosopher whose famous book, *Kitab al Shifa* [The Book of Healing] was an encyclopaedia of philosophy and science of the time. See NASR, *supra* note 26, at 165-66.

57. Ibn Rushd was an Arab Muslim scholar, philosopher, and physician of the twelfth century. See generally MAJID FAKHRY, *AVERROES: HIS LIFE, WORKS AND INFLUENCE* (Oneworld Publ’ns 2001).

58. Fakhr al Din al Razi was a Persian Muslim scholar and philosopher and a great commentator on the Quran. See generally YASIN CEYLAN, *THEOLOGY AND TAFSIR IN THE MAJOR WORKS OF FAKHR AL-DIN AL-RAZI* (INT’L INST. OF ISLAMIC THOUGHT & CIVILIZATION 1996).

59. ABOU EL FADL, *supra* note 12, at 48.

60. *Id.*

61. *Id.*

62. AL FAHAD, *supra* note 43, at 502.

63. ABOU EL FADL, *supra* note 12, at 48.

64. *Id.* at 52.

65. *Id.* at 53.

Saudi society needs to distance itself from Wahhabi ideology as much as possible. But, as this paper argues in later parts, establishing certain limited rule of law institutions within a Wahhabi oriented system is possible, though it will take time and effort.⁶⁶

B. Tribal Law and Tribalism in Saudi Arabia

Tribal culture and law play a significant role in the religion of Islam and *Shari'ah*, at least in the historical sense, as well as in certain modern Muslim societies.⁶⁷ Tribalism and tribal law are particularly important in understanding the legal system of Saudi Arabia and the nature of law and the rule of law in the society.

Pre-Islamic Arab custom entered the legal system of Islam in four ways. First, certain rules of *Shari'ah* were practiced in the society before the advent of Islam. A large number of Islamic rules and rituals are the confirmation of Arab practices such as *haj* and many basic principles of contract and commercial transactions and even principles of criminal law.⁶⁸ Second, certain customs which were practiced by people during the lifetime of the prophet were not confirmed expressly as law, but nor were they expressly overruled. These customs were deemed to have the approval of Islam and are known as the *Sunna al taqririyah* (or *taqrir*).⁶⁹ Third, certain pre-Islamic Arab customs remained in Muslim society even though they had not been approved by Islam and, in some cases, were even banned.⁷⁰ This category includes certain tribal customs which survived in particular areas of the Middle East, including Saudi Arabia, Iraq, Yemen and the Persian Gulf region. These tribal customs have been around for centuries and are

66. See *infra* section IV.

67. Generally the literature on tribal law and culture in the Middle East is poor. Frank Stewart is one of the few experts on tribal law in the Middle East. See, e.g., Frank H. Stewart, *Tribal Law in the Arab World: A Review of the Literature*, 19 INT'L J. MIDDLE E. STUD. 473 (1987). See also TRIBES AND STATES FORMATION IN THE MIDDLE EAST (Joseph Kostiner & Philip Shukry Khoury eds., 1992); TALAL ASAD, THE KABABISH ARABS: POWER, AUTHORITY AND CONSENT IN A NOMADIC TRIBE (Praeger Publ'rs 1970).

68. According to Reuben Levy, "Muhammad the Prophet had himself interfered little with the principles of the social system of his environment. For the tribe he substituted the Muslim community, but in essence his regulations continued to be applicable to the tribal mode of life. They were based in the main on the customs of his own tribe" REUBEN LEVY, THE SOCIAL STRUCTURE OF ISLAM 242 (1957).

69. YAHYA IBN ALI AL SHAWKANI, IRSHAD AL FUHUL MIN TAHQIQ AL HAQQ ILA ILM AL USUL [THE TRUE GUIDANCE TOWARDS THE PRINCIPLES OF JURISPRUDENCE] 61 (n.d.) (unverified); MOHAMMAD HASHIM KAMALI, PRINCIPLES OF ISLAMIC JURISPRUDENCE 66, 341 & 372 (3d ed., Islamic Texts Soc'y 2003).

70. LEVY, *supra* note 68, at 243.

very important in shaping certain Middle Eastern societies. Finally, custom (*urf*) is a source of Islamic law.⁷¹

Although Islam retained many principles of the social system of seventh century Arab society, its legal system (*Shari'ah*) developed a couple of centuries after the death of Prophet Mohammad, and was essentially independent of the Arab tribal system.⁷² Nonetheless, the developing legal system preserved certain tribal principles already confirmed by Islam. However, in societies such as those of the Arabian Peninsula, the *Shari'ah* law has, in numerous instances, been overridden by the tribal tradition.⁷³ Even in certain Arab societies, until very recently, a written code different from *Shari'ah* was practiced by tribal societies. For example, a written code of law, distinct from *Shari'ah* and known as *Shari'ah al khalil* (the laws of Abraham), was in place in Southern Palestine until the middle of the nineteenth century.⁷⁴

In a large number of today's Arab societies, particularly in Saudi Arabia, Iraq, Yemen, and the Persian Gulf countries, Bedouin tribes have their own system of dispute settlement in many matters including criminal law, sanctioned by tribal forces and judged by tribal elders.⁷⁵ Furthermore, in many of these countries, the public law system, including political, constitutional and other aspects, is shaped by the tribal system. As a result, Saudi Arabia, United Arab Emirates, Kuwait, Bahrain, Oman, Qatar, and Jordan are all ruled by families from significant tribes. Notably, many aspects of tribal customs practiced in those societies, whether in matters of private or public law, may differ widely from the principles of *Shari'ah* and the religion of Islam. For example, according to the Quran and the Sunna and other sources of Islamic law and, indeed, according to the well established principles of *Shari'ah*, people's lives, particularly those of Muslims, are sacred, and no innocent person should be killed.⁷⁶ In reality, however, practices such as the exaction of blood-revenge or the murder of innocent women who marry outside of tribal arrangements exist even in well-

71. *Urf* or custom is not technically a primary source of Islamic law. But in almost all jurisprudential texts (*fiqhhi* books), *urf* or custom is a secondary source of law. Literature on custom and *urf* in Islamic law includes Mohamed El Awa, *The Place of Custom (Urf) in Islamic Legal Theory*, 17 ISLAMIC Q. 177 (1973); HAKIM IMTIYAZ HUSSAIN, *MUSLIM LAW AND CUSTOMS: WITH A SPECIAL REFERENCE TO THE LAW AS APPLIED IN JAMMU & KASHMIR* (Srinagar Law J. Publ'n 1989); Andreas Haberbeck, *Muslims, Custom and the Courts*, 24 J. INDIAN L. INST. 132 (1982); MALLAT, *supra* note 13, at 104-08.

72. On development of Islamic law see IGNAZ GOLDZIEHER, *INTRODUCTION TO ISLAMIC THEOLOGY AND LAW* (Andras & Ruth Hamori trans., Princeton Univ. Press 1981); JOSEPH SCHACHT, *THE ORIGINS OF MUHAMMADAN JURISPRUDENCE* (1950); HALLAQ, *supra* note 13.

73. LEVY, *supra* note 68, at 243.

74. *Id.*

75. Stewart, *supra* note 67, at 480-81.

76. "We ordained the children of Israel that if anyone killed a person, who has not killed anybody or has not made mischief in the land, it would be regarded as if that person has killed human kind as a whole." The Quran 5:32.

organized modern cities in certain Arab countries.⁷⁷ In certain tribes of the *qara* in South-Eastern Saudi Arabia, for example, a peculiar system of inheritance existed which was completely different to the Islamic law of inheritance.⁷⁸

Tribal law and tribalism are still very strong in modern Saudi Arabia. In the available literature in English, the perception is that the legal system of Saudi Arabia is based on *Shari'ah* or Islamic law.⁷⁹ There is no doubt that Islamic law is the principal system of law in Saudi Arabia, particularly in private law areas such as contract, family law, inheritance, and also with respect to criminal law matters. However, tribal law or custom is significant in Saudi Arabia in relation to the country's political and governmental structure as well as private and personal law areas. In particular, the tribal system's influence on tribal practices in regional and country areas and as part of the legal system of Islam is significant. Therefore, it can be said that Saudi Arabia has a legal system based on *Shari'ah*, tribal customs, and modern legal principles. Tribal law is evident in Saudi Arabia as part of its political and government structure, the custom of the society, and as part of Islamic law.

1. Political and Government Structure

The territories now known as Saudi Arabia, except in the early history of Islam, have never been a center of Islamic Caliphate,⁸⁰ nor a commercial or scholarship center for the Islamic world. However, a part of Saudi Arabia, known

77. In Southern Iraq, the Arab dominated province of Khouzestan of Iran and certain Arab countries of the Persian Gulf women marrying outside of their tribal arrangements may be killed by their male relatives. Male cousins have first priority to marry a woman and must waive their right before she can be wed to anyone else. A lawyer from Khouzestan province told this author that he witnessed a case where a woman, married outside of tribal arrangements and mother of a number of children, was located and killed by her cousins after seven years.

78. LEVY, *supra* note 68, at 245.

79. For example, according to Frank Vogel, "[t]he Law of Saudi Arabia is the Islamic *Shari'ah* Divine Law." VOGEL *supra* note 11, at 1. Another commentator says, "[t]he kingdom of Saudi Arabia is typically described as ancient, conservative, or traditional in its Islam, with a political and legal system based entirely and exclusively on *shari'a*, or Islamic law." Stephen Schwartz, *Shari'a in Saudi Arabia, Today and Tomorrow*, in RADICAL ISLAM'S RULES: THE WORLDWIDE SPREAD OF EXTREME SHARI'A LAW, 19 (Paul Marshall ed., Rowman & Littlefield Publ'rs, Inc. 2005).

80. The word Caliphate refers to the traditional political and governmental system of the unified Islamic world after the death of the Prophet Muhammed and a Caliph refers to the head of this unified Islamic state. See Muhammad Qasim Zaman, *The Caliphs, The 'Ulama' and the Law: Defining the Role and Function of the Caliph in the Early 'Abbasid Period*, in FORMATION OF ISLAMIC LAW, *supra* note 28, at 367 (discussing generally Caliphate and the development of Islamic law).

as Hijaz, was always the most holy place in the Islamic world, and remains so.⁸¹ The last Islamic Caliphate, the Ottoman Empire, after its major expansion early in the 19th century, maintained only nominal authority and jurisdiction over the territory.⁸² As a result, the major Arabian territories, particularly the Najd area (the basis of Saudi family) were never officially under Ottoman rule.⁸³ Hence, Najd and other areas of Arabia, with a few exceptions such as the holy cities, were ruled independently within a tribal confederation.⁸⁴ The establishment of the current Saudi State was a result of tribal confederation, the collapse of the Ottoman Empire and the rise of a merchant and commercial bourgeoisie, with support from both the British and the Wahhabi religious leaders themselves.⁸⁵ The huge oil revenue and modern economic development did not significantly change the old tribal structure of the society. Indeed, the oil revenue from the growing economy did little to discourage the central government from using tribal influence as a means of rewarding allegiance and buying loyalty.⁸⁶

The political structure of Saudi Arabia is very tribal. The Kings, the Crown Princes and most political authorities are from the Al Saud tribe.⁸⁷ The King, who is, and has, since the establishment of the modern Saudi state, been one of the sons of the founding King Abd al Aziz, appoints a successor from one of his brothers (also sons of King Abd al Aziz).⁸⁸ Indeed, it can be said that tribes in modern Saudi Arabia, now and in the foreseeable future, will play an important role in the political structure of the country—a role similar, to some extent, to political parties and other political institutions in the modern world. The tribal structure of Saudi territory has changed little since the sixth-century and there is no indication that it is likely to change in the near future. Thus, any reform in the political and legal system must consider the long tribal tradition and customs of this desert state.

2. Tribal Custom

81. MOHAMMED ALMANA, *ARABIA UNIFIED: A PORTRAIT OF IBN SAUD* 22-23 (Hutchinson Benham 1980); YAMANI, *supra* note 10, at 12.

82. MADAWI AL RASHEED, *A HISTORY OF SAUDI ARABIA* 14 (Cambridge Univ. Press 2002).

83. *Id.* at 15.

84. *Id.*

85. TIM NIBLOCK, *SAUDI ARABIA, POWER, LEGITIMACY AND SURVIVAL* 31-37 (2006).

86. AL RASHEED, *supra* note 82, at 125.

87. *See id.* Ch. 3.

88. According to Article 5(b) of the Basic Law of Governance, “[r]ule passes to the sons of the Founder King Abd al-Aziz ibn Abd ar-Rahman al-Faysal Al Sa’ud, and to their children’s children. The most upright among them is to receive allegiance in accordance with the principles of the Holy Koran and the Tradition of the Venerable Prophet.” BASIC LAW OF GOVERNANCE 1412 [1992] (Saudi Arabia) (as translated from Arabic to Persian by the Saudi Embassy) [hereinafter BASIC LAW]. *See also* JOSEPH A. KECHICHIAN, *SUCCESSION IN SAUDI ARABIA* (Palgrave Macmillan 2001).

Aside from the role of tribal structure in shaping and re-shaping the Saudi Arabian legal and political system, the customary practice of people in Saudi Arabian society is equally important in understanding their unique legal system. Tribal customs are a set of practical rules observed by the people and, in many cases, sanctioned by unofficial forces, including tribal *Sheikhs* and members of their extended family. These customary practices have been rooted in the Bedouin culture of Arab tribes since, and even before, the advent of Islam. They include specific areas such as marriage, property ownership, inheritance and even criminal law, as well as the process of dispute settlement.⁸⁹ Many aspects of the customs practiced may be inconsistent with *Shari'ah* law and the King's law, or with modern legal regulations enforceable by the government. The importance of tribal customs in Saudi Arabia has been overlooked by many commentators on the Saudi Arabian legal system.⁹⁰

The nature of tribal custom in Saudi Arabia differs slightly from that in other Arab societies such as Iraq, North Africa and the Persian Gulf States. The unwritten tribal customs of Saudi Arabia and other Arab countries lacks comprehensive studies and scholarship.⁹¹ However, the customary system in Saudi Arabia is more indigenous than in other parts of the Arab world.⁹² This is

89. The operation of customary law in tribal and Bedouin Arab societies is not limited to Saudi Arabian society only. It is practiced in many other parts of the Arab world in the Middle East including in Iraq, Yemen, Jordan, Palestine and Egypt. See, for example, on Palestine: Aharon Layish & Avshalom Shmuely, *Custom and Shari'a in the Bedouin Family According to Legal Documents from the Judean Desert*, 42 BULL. SCH. ORIENTAL & AFR. STUD. 29 (1979); Aharon Layish, *Islamization of the Bedouin Family in the Judean Desert, as Reflected in the Sijill of the Shari'a Court*, in THE CHANGING BEDOUIN 39, 41 (Emanuel Marx & Avshalom Shmuely eds., 1984). On Jordan: Tawfiq Canaan, *Unwritten Laws Affecting the Arab Women of Palestine*, 9 J. PALESTINE ORIENTAL SOC'Y 194 (1931); Ahmad Oweidi, *Bedouin Justice in Jordan: The Customary Legal System of the Tribes and its Integration into the Framework of State Policy from 1921 Onwards*, Ph.D. Dissertation, University of Cambridge (1982); FARUQ ALKILANI, AL MAHAKIM AL KHASSA FI AL URDUN [SPECIAL COURTS IN JORDAN] (1966) (unverified). On Iraq: AL MUNZHIR AL FIRWAN FARIQ, AL QADA AL ASHAIR [TRIBAL JUDICIARY] (1941) (unverified). On Sudan: John Bruce, *A Bibliographical Guide to the Customary Law of the Sudan*, Customary Law Memorandum, 3, Khartoum: Customary Law Project, Faculty of Law, University of Khartoum (1979) (unverified). On Egypt: AUSTIN KENNET, *BEDOUIN JUSTICE: LAWS AND CUSTOMS AMONG THE EGYPTIAN BEDOUIN* (Cass 1968) (1925).

90. For example, one of the best recent scholarly books on the legal system of Saudi Arabia has little on the role of tribal law in Saudi Arabia. See VOGEL, *supra* note 11.

91. Stewart, *supra* note 67, at 480.

92. According to Almana:

[t]o the people of Central Arabia, empires, nations and fixed boundaries were concepts of little meaning. Their vast land was mostly parched desert or scrub; while some of the population lived in small towns clustered around the few oases, the majority were nomadic bedouin wandering with their families and herds from pasture to

partly based on the fact that different regions of Arabia (modern Saudi Arabia) have never been attractive to migrants from other parts of the Middle East due to the harsh environment, lack of water resources, and the existence of tribal systems hostile to new arrivals. But there are certain elements of non-indigenous culture in the Hijaz area,⁹³ including Mecca and Medina and the Eastern area of Al-Hasa. Due to the location of religious sites in Hijaz, Muslim pilgrims from other areas have brought certain non-indigenous elements with them. In the Al-Hasa region, non-indigenous elements can be found due to its geographical proximity to the Persian Gulf.

It can be asserted that the tribal custom in tribal areas significantly impacts three key areas of Saudi Arabian law, namely property law (land ownership), family law, and criminal law.

In relation to real property ownership, each tribe occupies a specific territory where water resources and land ownership are controlled, and no one but those in the dominant tribe may purchase or buy land.⁹⁴ This system of land ownership is not based on either *Shari'ah* law⁹⁵ or the modern King's law of Saudi Arabia. Obviously, if cases are taken to courts, judges make judgment according to *Shari'ah* principles. However, disputes in tribal territories are rarely resolved through the courts.⁹⁶

pasture. The desert bred proud, fierce, intolerant men, whose loyalty was not to any distant monarch or emperor but first and foremost to their own tribe. The Arabian tribal system was, and indeed still is, one of infinite complexity

ALMANA, *supra* note 81, at 23.

93. MAI YAMANI, CRADLE OF ISLAM: THE HIJAZ AND THE QUEST FOR AN ARABIAN IDENTITY 1-2 (I. B. Tauris & Co. 2004).

94. ALMANA, *supra* note 81, at 23.

95. For a study of real property law in Islam, *see generally* SIRAJ SAIT & HILARY LIM, LAND, LAW & ISLAM: PROPERTY AND HUMAN RIGHTS IN THE MUSLIM WORLD (2006); FARHAT ZIADEH, PROPERTY LAW IN THE ARAB WORLD: REAL RIGHTS IN EGYPT, IRAQ, JORDAN, LEBANON, LIBYA, SYRIA, SAUDI ARABIA, AND THE GULF STATES (1979); JOHN MAKDISI, ISLAMIC PROPERTY LAW: CASES AND MATERIALS FOR COMPARATIVE ANALYSIS WITH THE COMMON LAW (Carolina Academic Press 2005); HIROYUKI YANAGIHASHI, A HISTORY OF THE EARLY ISLAMIC LAW OF PROPERTY: RECONSTRUCTING THE LEGAL DEVELOPMENT, 7TH – 9TH CENTURIES (2004).

96. When visiting the Middle East in 2005 this author spoke with a number of judges and lawyers working in Arab tribal areas of the Persian Gulf. They confirmed that a significant number of disputes never reach the civil court systems but, rather, are solved by tribal Sheiks and elders based on tribal customs, including disputes involving murder. For example, a murder case can be solved through tribal practices such as revenge killing, payment of blood money by the tribe of the accused, submission of the accused to the victim's tribe or an inter-tribal marriage between a male member of the tribe of the accused and a female member of the tribe of the victim. *See also* Mai Yamani, *Some Observations in Women in Saudi Arabia*, in FEMINISM AND ISLAM: LEGAL AND LITERARY PERSPECTIVES 263, 274 (Mai Yamani & Andrew Allen eds., N.Y.U. Press 1996); Stewart, *supra* note 67, at 480-481.

The second area where customary tribal law is practiced relates to family law. Tribal and family allegiances are important decisive mechanisms in rural and tribal territories.⁹⁷ Akin to property law, if family matters are referred to official courts, then the Islamic law of marriage will be applied. However, in a tribally structured society people will not refer their family-related issues to the courts because they fear severe consequences from their tribal fellows and family members.⁹⁸

A third area of tribal customary practice is the field of criminal law. Homicide is often the subject of blood-revenge or tribal mediation. In many cases, the tribal factions and families may settle their case through certain arrangements to erase the animosity between families and tribal factions. In some instances, amongst certain tribes, theft, particularly theft of horses, from those tribes with whom there are no treaty arrangements, may be regarded as a mark of prowess, but in some other tribal systems, it may be considered as the worst crime.⁹⁹

It is notable that the application of tribal customs in Saudi Arabia has been weakened by two important elements in recent times. First, Wahhabism is, in principle, opposed to any practice of tribal custom inconsistent with traditional *Shari'ah* principles, though the ideology itself follows a narrow path resulting in domination of Bedouin Arab culture.¹⁰⁰ Secondly, as the country is modernizing and large cities are developing, the effect of customary tribal law is weakening, although not diminishing.¹⁰¹ However, counteracting these two trends is a rise in Arab nationalism, which is pressuring both government and society to return to certain traditional Arab practices. For example, in the 1970s, it was common for Saudi men studying abroad to marry non-Saudi women (mainly from countries

97. [In the 1970s] the social prohibition on female exogamous marriages illustrated the social divisions within the country and the barriers that were still erected. *Najdi* women could not marry *Hijazi*, *Hasawi* or *Asiri* men. Within *Najd* itself, the tribal groups would not give their daughters to *khadiris*, the non-tribal population of the towns and oases. In *Hijaz*, daughters of *Sharifian* descent would not marry ordinary *Hijazis* nor would they marry into *Najdi* noble tribal groups.

AL RASHEED, *supra* note 82, at 128.

98. Women in Saudi Arabia rarely appear in court, not even in cases of divorce. A woman, if she chooses to litigate, is represented by one of her male [guardians] Saudi women explain that standing in court is considered shameful, 'ayb to the family In Saudi Arabia the family (*a'ila*) is held to be the basic unit of friendship, obligation, loyalty, moral support, socialisation and economic help The identity based on the patronymic group is used to define a person's worth, as well as to define legal and social status.

YAMANI, *supra* note 96, at 274.

99. LEVY, *supra* note 68, at 244.

100. ABU EL FADL, *supra* note 12.

101. See MENORET, *supra* note 10, at ch. 6.

such as Egypt, Lebanon, and Syria), but a law has since been introduced requiring Saudi men to obtain permission from the Ministry of the Interior before entering into such marriages. Furthermore, Saudi women are banned from marrying non-Saudi men, even if they are Arab and Muslim.¹⁰²

The customary tribal practice in Saudi Arabia is clearly a significant factor in the development and reformation of its legal system. Customary regulations practiced for centuries cannot be changed and reformed at short notice or through government initiatives alone. Any plans for reforming or modernizing the legal system of the Arabian Peninsula and establishing a rule of law system should include special considerations regarding Arab customary practice.

3. Tribal Law as part of Islamic Law

There is no doubt that an objective of Islam was the dissolution of the tribal structure¹⁰³ and the establishment of a community of believers with a universal mission,¹⁰⁴ but *Shari'ah* law did not abolish the tribal system and tribal laws completely. Besides new rules and principles introduced by Islam, certain existing principles practiced by the people of Arabia were accepted by Islam, or were modified. For example, Islam banned the tribal customs of infanticide,¹⁰⁵ revenge killings,¹⁰⁶ unlimited polygamy,¹⁰⁷ and drinking alcohol.¹⁰⁸ However, certain principles of Arabian society, such as *dia* (monetary compensation for manslaughter and unintentional murder), most of the legal principles relating to *rahn* (mortgage), and certain rules of inheritance are all retained by *Shari'ah* law. One reason for retaining these Arab customary laws in Islam is the ancient Arab

102. YAMANI, CRADLE OF ISLAM, *supra* note 93, at 81.

103. "O people. We created you all from a male and a female and appointed for you tribes and nations to know each-other. Verily, in God's sight the most honourable of you is the most pious of you." Quran 49:13.

104. "Say (O messenger) O people, I am sent to you all as the messenger of God." *Id.* 7:158.

105. "And when the female infant, buried alive, shall be questioned . . . for what sin was she killed." *Id.* 81:8-9.

106. "And do not kill any life that Allah has forbidden—except with legitimate reason. Anybody who is killed unjustly we have given authority to the heir of that person to ask retaliation but they should not exceed the limit." *Id.* 17:33.

107. "[T]hen marry women at your choice, two or three or four, but did you fear that you may not be able to deal with them justly then marry only one . . . you will never be able to be just with them even if you try hard." *Id.* 4:3 & 4:129.

108. *Id.* 5:90.

idea of *sunna*, or the customary practice of past generations. This idea of safeguarding the traditions of the past was very strong amongst Arab tribes of the sixth century, and although the Prophet of Islam fought hard to change this doctrine and labeled it as *jahilia* (ignorance), it survived in part in Islam and, in particular, in Muslim societies in the Middle East. The doctrine of pre-Islamic *sunna* and its effect on Islamic law is nicely expressed by Joseph Schacht:

The idea of *sunna* presented a formidable obstacle to every innovation, and in order to discredit anything it was, and still is, enough to call it an innovation. Islam, the greatest innovation that Arabia saw, had to overcome this obstacle, and a hard fight it was. But once Islam had prevailed, even among one single group of Arabs, the old conservatism reasserted itself; what had shortly before been an innovation now became the thing to do, a thing hallowed by precedent and tradition, a *sunna*. This ancient Arab concept of *sunna* was to become one of the central concepts of Islamic law.¹⁰⁹

Generally, it can be said that the legal system of Islam or *Shari'ah* retained tribal customary practices of Arabian societies in four key areas: public law, personal law, commercial transactions, and criminal law.

Particular areas of public law in Islam such as treaties (*uhoud* or *uqoud*), *aman*¹¹⁰ (asylum and protection of strangers), ownership of *anfal*¹¹¹ (spoils of war), and *jezya*¹¹² (special tax paid by non-Muslims) are rooted in pre-Islamic Arab culture. The emphasis in Islam on the observation of treaties and agreements which have now been translated to the Islamic conduct of the State¹¹³ are rooted in the Arab tribal culture of "keeping promises."¹¹⁴ The concepts of *bay'a* (alliance) and *shoura* (consultation) in government were from existing Arab culture retained by the Quran.¹¹⁵

The area of personal law, including marriage and divorce, custody of children, and inheritance, is particularly subject to Quranic legislation. Although Islam opposed the tribal structure as *jahila* (ignorance), it does recognize the family as an important institution and provided extensive rules in relation to family matters in this context. Nonetheless, Islamic family law includes certain

109. SCHACHT, *supra* note 47, at 17.

110. "When one of the non-believers take refuge to you give them protection" Quran: 9:6.

111. "When they ask you about *anfal* tell them that they belong to Allah and the Messenger." *Id.* 8:1.

112. "Fight with those who do not believe . . . until they pay *jezya*." *Id.* 9:29.

113. "Oh, you who believe! Fulfill the promises and covenants . . ." *Id.* 5:1.

114. AB AL AZIZ SALIM, *TARIKH ARAB QABL AL ISLAM* [THE HISTORY OF ARABS BEFORE ISLAM] 348 (Baqir Sadri trans., 2003) (Author's translation).

115. Quran 42:38 & 3:159.

elements of tribal custom as it existed in seventh century Arab society. For example, the husband in a marriage contract undertakes to pay the bride the dowry (*mahr* or *sadaq*).¹¹⁶ The rule in the pre-Islamic period was that the dowry had to be paid to the legal guardian (*wali*) of the bride. Islam, however, provides that the dowry must be paid to the bride herself and further recognizes full property rights of the wife which did not exist before the advent of Islam in the Arabian society. Also, the polygamy accepted by *Shari'ah* was a pre-Islamic Arab custom which was limited by the Quran and was made subject to restrictive conditions.¹¹⁷ Nevertheless, it is notable that Islam banned a number of different marriages such as *nikah al badal* (swing marriages in which men could exchange their wives for sexual pleasure),¹¹⁸ practiced in pre-Islamic Arabian society.

Another area of personal law influenced by Arab customary law is inheritance. Islam developed a comprehensive inheritance system in which certain heirs have fixed shares and others take the residue.¹¹⁹ The essentials of inheritance law are laid down in the Quran.¹²⁰ Generally, a male inherits twice as much as a female. These provisions are part of the inheritance law in almost all Muslim countries in the modern world with the exception of a few countries, such as Turkey. In many other areas of personal and private law, including contract, torts, and other commercial transactions, certain aspects of pre-Islamic Arab culture were also incorporated.¹²¹

Criminal law is another area where components of Arab customary law have been retained. The law of *diat* (plural of *dia*-meaning monetary compensation), translated in English to "blood money" or "blood right," has a dual role in *Shari'ah* law.¹²² It serves both as compensation in certain cases such as non-capital murder or as a punishment in cases such as inflicting bodily injuries where exact *qisas* (retaliation) is not possible. *Dia* is even legislated by a Quranic command.¹²³

116. "[A]nd give the women [whom you marry] their *mahr* [dowry] with a good heart" *Id.* 4:4.

117. "[M]arry suitable women two or three or four, but if you fear that you shall not be able to deal with them justly then only one" *Id.* 4:3.

118. See 2 SEYYED AL SABIQ, *FIQH AL SUNNA [THE SUNNI JURISPRUDENCE]* 5 (Dar al Fikr 1998) (Author's translation).

119. On the Islamic inheritance system, see JAMAL J. NASIR, *THE ISLAMIC LAW OF PERSONAL STATUS* (3d ed. Kluwer Law Int'l 2002); NOEL COULSON, *SUCCESSION IN THE MUSLIM FAMILY* (Cambridge Univ. Press 1971).

120. Quran: 4:11-12.

121. SCHACHT, *supra* note 16, at 7.

122. Hossein Esmaeili & Jeremy Gans, *Islamic Law Across Cultural Borders: The Involvement of Western Nationals in Saudi Murder Trials*, 28 *DENV. J. INT'L L. & POL'Y* 145, 165-66 (2000); M. Cherif Bassiouni, *Qesas Crimes*, in *THE ISLAMIC CRIMINAL JUSTICE SYSTEM* 203, 208 (M. Cherif Bassiouni ed., Oceana Publ'ns 1982).

123. "[W]hoever kills a believer by mistake . . . a compensation [blood-money, *i.e.* *dia*] shall be given to the deceased's family, unless they remit it." Quran 4:92.

One aspect of the law relating to blood money practiced in Saudi Arabia is the *dia* for a *shabi bel khata qatl* (homicide by mistake), which imposes on *aqila* (those who inherit from the victim). Under this rule recognized under Islamic jurisprudence, if A causes the death of B unintentionally (rolling on a person causing death while asleep, for example), the blood money is imposed on A's family and not on A individually.¹²⁴

Another area of criminal procedure in Islamic law where the pre-Islamic Arab tribal law is retained is the evidence of *qasama* (oath) in proving murder. *Qasama*, literally meaning oath, is applied where the *louth* is established. *Louth* describes a situation where the evidence is not quite sufficient to sanction a verdict, but close to the standards required for proving murder. In such a situation (*louth*), the family of the victim (fifty men) would take an oath to Allah that the accused murdered the victim. The crime would then be considered proved.¹²⁵ Islamic jurisprudence books expressly state that the rules of *qasama* are of tribal origin.¹²⁶

It is evident from those discussions that in modern Saudi Arabia, elements of tribal law are available in its political structure, customary tribal practice, and within its Islamic law system. Indeed, Saudi Arabian society is very tribal in nature, particularly in respect to its political and legal systems.

Therefore, seeking a rule of law system in this society demands an understanding of its tribal nature and the utilization of the potential resource of tribal custom. For example, the tribal concept of *bay'a* and *shoura* may be used as a mechanism for creating institutions such as local councils and assemblies acting as legislatures. These institutions, alongside modern institutions such as bar associations and other professional associations, may be utilized to move the society toward a transparent and responsible legal and political system with, at least, certain rule of law institutions.

C. Modern Law in Saudi Arabia

The establishment of modern institutions and the modernization of the legal system in Saudi Arabia reflect the story of conflict between tradition and modernity, and traditionalism and rationalism.¹²⁷ This conflict is not specific to Saudi society and can be found in other Middle Eastern countries where tradition,

124. 5 ABDURRAHMAN AL JAZIRI, KITAB AL FIQ ALA AL MADHHIB AL ARBA'A [BOOK OF JURISPRUDENCE ACCORDING TO FOUR JURISTIC SCHOOLS] 205 (Dal al Fikr 1999) (Author's translation).

125. *Id.* at 242-43.

126. *Al Nidham al arabi al ladi aqarraho al-Islam [an Arabic custom retained in Islam]*, in SABIQ, *supra* note 118, at 391.

127. See YAMANI, *supra* note 93, ch. 6. On the challenge of modernity in Saudi Arabia, see generally, FOUAD AL-FARSI, MODERNITY AND TRADITION: THE SAUDI EQUATION (Kegan Paul Int'l 1991).

which includes religion and tribal custom, has been struggling with modernity for centuries.¹²⁸ In the case of Saudi Arabia, the conflict goes back to Ottoman's introduction of codified rules.¹²⁹ In legal terms, the conflict is between the *Shari'ah* and the *Syasad al Shar'ia*,¹³⁰ traditional law and the modern system of governance.¹³¹ The modern system of Saudi law, as opposed to traditional *Shari'ah*, will thus be discussed in the following sections within the context of its unique and complex history.¹³²

1. Saudi Modern Legal History

Although the modern State of Saudi Arabia was established in 1932 by King Abd al Aziz bin Abdul Rahman al Saud, its origin goes back to the mid-eighteenth century when an allegiance was established between the two founding parties of the original partnership: Ibn Ab al Wahhab, who emphasized adherence to the true edicts of Islam, and Ibn Saud, whose main concern was collecting extra taxes to run the Emirate.¹³³ Thus, even from this early period there has always

128. On modernity and Islam see generally, TARIQ RAMADAN, *ISLAM, THE WEST, AND CHALLENGE OF MODERNITY* (Islamic Found. 2003); FAZLUR RAHMAN, *ISLAM AND MODERNITY: TRANSFORMATION OF INTELLECTUAL TRADITION* (Univ. of Chicago Press 1984); BERNARD LEWIS, *WHAT WENT WRONG?: THE CLASH BETWEEN ISLAM AND MODERNITY IN THE MIDDLE EAST* (Harper Perennial 2003); ALEV ÇINAR, *MODERNITY, ISLAM, AND SECULARISM IN TURKEY: BODIES, PLACES, AND TIME* (2005); AHMAD MOVASSAGHI, *NOSAZI WA ESLAHAT DAR IRAN: AZ ANDISHA TA AMAL [MODERNIZATION AND REFORMS IN IRAN, FROM THEORY TO PRACTICE]* (2007) (Author's translation).

129. See MALLAT, *supra* note 13, at 239 (regarding codification of law in the Muslim world by the Ottomans).

130. *Syasad al Shar'ia* is defined as "necessary measures taken for the wellbeing of people and to distance them from corruption even if there is no authority for such measures in the Islamic sources." IBN QAYYIM AL JAWZY, *AL TURUQ AL HUKMIYYAH FI AL SIAHAH AL SHAREIAH [THE RULES IN RELIGIOUS POLICIES]* 16 (1961).

131. See VOGEL, *supra* note 11, ch. 8 (fully analyzing codification and *ulama's* objection).

132. The literature and scholarship on contemporary Saudi Arabian law is very poor in both English and Arabic. Except the parts of the legal system which are based on the traditional *Shari'ah*, the modern system of Saudi Arabian law is not unified and lacks comprehensive legal studies. According to Mallat, "[t]o date, the operation of the law cannot be said to be unified, as the centres of legal tender get superimposed in a motley system of administrative regulations, code-like decrees, specialized tribunals and half-institutionalized dispensation of legal judgements and arbitration, alongside firmly established unwritten customs." MALLAT, *supra* note 13, at 242.

133. Al Fahad narrates the story of alliance between the tribal leader Muhammad Ibn Saud and Muhammad Ibn Abdulwahab:

The Shaykh asked for the Prince's support to spread the reform by the might of his sword, predicting that once the campaign was launched, the prince would set up a wide realm and achieve supremacy over all of

been conflict between the state's attempt to modernize, adhere to economic principles, and respond to international pressure for change on the one hand, and the Wahhabi *ulama*'s desire to keep traditional principles of Islam immune from change, on the other. This struggle has led to a de facto arrangement between the state and the *ulama*. While both survive on the support of the other, each side constantly struggles to push forward its own agenda. However, in reality, when unsolved cases arise, it is the state, through the absolute authority of the king that prevails.¹³⁴

In some areas such as personal law matters (marriage, divorce, custody of children and inheritance), Islamic jurisprudence (*fiqh*)¹³⁵ is the dominant law. The *ulema* (Muslim jurists) are the interpreters of the law and deliver judgments in this area whilst the state sees no reason to involve itself with the *ulama*. Yet in other areas, such as criminal law, there is a kind of shared responsibility and power arrangement between the *ulama* and the King. This cooperation is based on the nature of criminal law and procedure under Islam.¹³⁶ In other areas, such as taxation, immigration, and traffic matters, the state is the primary authority.

Following the establishment of the Saudi modern state, King Abd al Aziz attempted to create a modern legal system for the Hijaz area in contrast to the more traditional and local systems in other parts of Saudi Arabia. These reforms continued from 1932 (the unification period) through to the present. Behind these

Arabia . . . upon receiving proper assurances, he [the prince] agreed to abide by the true edicts of Islam, but asked for an exemption with regard to taxation, as he had a custom of regularly collecting extra-canonical taxes, the legal [i.e. religiously] sanctioned levy being inadequate to support him.

AL FAHAD, *The Prince, the Shaykh and the Lawyer*, *supra* note 11, at 307. The Shaykh politely declined this request, declaring that if the prince would simply follow the law of God, the *Shari'ah*, he 'would make up for the loss manyfold.'" *Id.*

134. Larbi Sadiki, *Saudi Arabia: re-reading politics and religion in the wake of September 11*, in *ISLAM AND POLITICAL LEGITIMACY* 29, 32-33 (Shahram Akbarzadeh & Abdullah Saeed eds., RoutledgeCurzon 2003).

135. See *Fiqh* sources, *supra* note 13 (discussing the meaning of *Fiqh*).

136. Under Islamic criminal law there are three categories of crimes and three categories of punishments. Certain crimes attach fixed punishments which are prescribed by the Quran or the Sunna and neither the *ulama* nor the state may change or alter them. They are called *hudud* punishments and include lashing, life imprisonment, and hand amputations. *Hudud* punishments are limited to a handful of crimes (certain kinds of theft, armed robbery, illicit sexual relations, slanderous accusation of unchastity, drinking alcohol, and apostasy). The second category is *qisas* which applies to intentional murder. The third category of punishment is called *tazirat* and applies to the balance of crimes. Also if the high standard for proving *hudud* and *qisas* are not met then *tazirat* may be applied. This means that over 90% of crimes in a society are covered by *tazirat* or discretionary punishments. *Tazirat* may be prescribed by the state or by fatwa of *ulama*. See JAZIRI, *supra* note 124, at 261-63; Esmacili & Gans, *supra* note 122, at 152. See VOGEL, *supra* note 11, ch. 6 (discussing the cooperation of the state and the *ulama* on criminal law).

changes were many reasons, including the Arab nationalism of the 1950s in Egypt, the Islamic revivalisms in the 1980s in Iran and elsewhere, as well as a need to ensure legal continuity with the outside world.¹³⁷ In 1992, the Basic Law of Governance¹³⁸ and a Consultative Council were established. However, neither the Basic Law principles nor the Consultative Council itself fulfills modern concepts of constitutional democracy or of a parliamentary system of governance. The Basic Law was drafted secretly without any public debate or consultation and there was no referendum to ratify the document.¹³⁹ The Basic Law consists of nine parts and 83 Articles. Article 1 states that the constitution of the Saudi Kingdom is “the book of God and the Sunna (Traditions) of his Messenger.” Article 5 provides that the system of governance in Saudi Arabia is monarchical and it shall be limited to the sons of the Founder, King Abd al Aziz, and the sons of his sons.¹⁴⁰ The remainder of the document provides certain principles in relation to economic rights and duties, state authorities, financial affairs and auditing agencies. In relation to most principles provided in the Basic Law, there are references to *Shari’ah* or its two major sources, the Quran and the Sunna.¹⁴¹

The Basic Law, in Article 44, provides for some kind of separation of power stating that authorities in the State shall consist of judicial authority, executive authority and, regulatory authority.¹⁴² However, the same article provides that the King shall be the final authority for the three branches of government.¹⁴³ Obviously a true separation of power and accountability of the government is unlikely to be established in a system where authorities are not elected by the people. However, in the history of Islamic nations and in Saudi Arabia, a limited version of the separation of power or independence of the judiciary has always existed. Since the establishment of the Abbasid Caliphate in the early history of Islam (eighth century), the *ulama*, or Islamic Scholars, have always had a role in the form of stating the legal principles (*fatwa*) or acting as judges (*qadi*) and they have been, to some extent, independent of the government.

The Basic Law has no significance in changing the system of Saudi Arabia or making the system more accountable. However, it represents, at least symbolically, the push for limited reform from within Saudi society. Although the timing of the conclusion of the document coincided with the end of the 1991 Gulf War, its roots and background go back well before the war began. Saudi society is generally very slow in demanding and embracing change. However,

137. See AL-RASHEED, *supra* note 82, ch. 5.

138. BASIC LAW, *supra* note 88.

139. For an analysis of the process of establishing the Basic Law, see Rasheed Aba Namay, *Constitutional Reform: A Systemization of Saudi Politics* 16 (3) J. S. ASIAN & MIDDLE E. STUD. 43 (1993) and Abdulaziz al Fahad, *Ornamental Constitutionalism: The Saudi Basic Law of Governance*, 30 YALE J. INT’L L. 375 (2005).

140. Basic Law, *supra* note 88, art. 5.

141. See, e.g., *id.*, arts. 5–8, 17, 21, 23, 26, 38, 45, 48, 57, 67.

142. *Id.*, art. 44.

143. *Id.*

within a dynasty of more than five thousand ruling Princes of the Saud family, there have been times when the push for change has been driven internally by the monarchy and their own frustrations with this monopolizing of power.¹⁴⁴

2. Modern System of Law

In Saudi Arabia, as in other Muslim countries,¹⁴⁵ there have always been discussions among *ulama* and other authorities as to whether the *Shari'ah* can be codified and, in any case, whether a codified system of law can be introduced. In certain countries, for example Iran, the *Shari'ah* is codified.¹⁴⁶ This means that the view of the majority of Islamic scholars (*fuqaha*) on legal issues, such as crime and punishment, is codified and published in government gazettes. However, the interpretation of the codes is left to the *fuqaha*, as well as decisions in cases where the codes are silent on legal matters.¹⁴⁷ So if a code, for example the Civil Code, is unclear, then judges, who are *Mujtahids* (those who studied Islamic jurisprudence to a very high level), may make a decision based on their interpretation of the *Shari'ah*.

The case of Saudi Arabia is an ongoing issue. The country has already moved from having Islamic jurisprudence (*fiqh*) as its system of law to a more defined *Hanbali* School of Law as its primary system and other Islamic schools of law (*Shafi'i*, *Hanafi* and *Maliki*) as its secondary system of law. However, the country is divided in relation to whether *fiqh* can be codified.¹⁴⁸ In 2000, the Saudi Board of Senior *Ulama* issued a *fatwa* (Fatwa No. 8) rejecting codification

144. Prince Talal Bin Abd al Aziz, one of the forty sons of King Abd al Aziz, as recently as September 2007 declared that he was intending to establish a political party to enhance reforms in Saudi Arabia. If he does, it will be the first political party established in Saudi Arabia ever. Joseph A. Kechichian, *Saudi Arabia embarks on key reforms*, GULF NEWS, Oct. 11, 2007, available at <http://archive.gulfnews.com/articles/07/10/11/10159419.html> (last accessed Feb. 19, 2009).

145. For example, Sheikh Fazlollah Noori (died 1909), a prominent Muslim cleric in Iran during the Iranian constitutional revolution of the early 20th century, declared that the making of new legislation (which are not consistent with *Shari'ah*) by members of the parliament is against Islam and those making such new laws are apostates. See ERVNAD ABRAHAMIAN, TORTURED CONFESSIONS: PRISONS AND PUBLIC RECANTATIONS IN MODERN IRAN 24 (1999); ABDULKARIM SOROUSH, RĀZDĀNI VA ROSHANFEKRI VA DINDĀRI (Wisdom, Intellectualism and Religious Conviction) 284-88 (Author's Translation).

146. Qanuni Assassi Jumhuri'I Isla'mai Iran [The Constitution of the Islamic Republic of Iran], 71-72 [1980], available at http://www.parstimes.com/law/Iran_law.html (last visited Nov. 29, 2008) (English translation).

147. *Id.* art. 167.

148. The background to the idea of codification of law in Saudi Arabia and its proponents and opponents is analyzed very well in VOGEL, *supra* note 11, at 337-62.

of *Shari'ah* as un-Islamic.¹⁴⁹ However, there are voices among Saudi scholars advocating codification of the law.¹⁵⁰

It seems that codification, in view of the majority of Saudi *ulama*, is considered legislative in nature and hence un-Islamic, whereas the Iranian experience has demonstrated the contrary. It shows that codification may facilitate and modernize the application of *Shari'ah* without changing the established principles of *Shari'ah*. In other words, there may not be any problem with codifying *Hanbali* jurisprudence in a series of well organized and well indexed volumes of codes based on the view of the majority of *Hanbali fuqaha* represented by an assembly of senior Saudi *ulama*. However, there still remains strong resistance in Saudi Arabia against the notion of codifying *Shari'ah* law.

Nonetheless, some areas within *fiqh*, such as the *tazirat* (unspecified penalties and clemency in criminal law) as well as matters not covered by the specific provisions addressed under *fiqh*, including international finance and broadcasting, may be regulated by Royal decrees and thus codified.¹⁵¹ Similarly, the civil and criminal procedures based on resolutions, regulations and Royal decrees are published in the official gazette. Further, the *Majlis al Shura* may propose legislation which then needs to be approved by the Council of Ministers and be adopted by the King.¹⁵² Thus, the power of the King is substantial.

It is notable that modern legal institutions and legal provisions are expanding.¹⁵³ This indicates that the legal system of Saudi Arabia is moving from a traditional *Shari'ah*-based and closed system to a system with more modern

149. *Id.* at 338.

150. *Id.* at 339.

151. Article 48 of the Basic Law of Governance states that “[t]he courts shall apply to cases before them the provisions of Islamic *Shari'ah*, as indicated by the Qur’an and the *Sunnah*, and whatever laws not in conflict with the Qur’an and the Sunna which the authorities may promulgate.” BASIC LAW, *supra* note 88.

152. Examples of legislation enacted in Saudi Arabia are: Royal Decree M/64 of 14 Rajab 1395AH (July 23, 1975) (Law of the Judiciary); Council of Ministers Resolution 190 of 16 Dhu al Qadah 1409 (June 19, 1989) (Procedural Rules Before the Board of Grievances); Ministerial Decision 307 of 21 Safar 1424AH (Apr. 21, 2003) (Implementing Regulations of the Private Laboratories Law); Royal Decree, 27 Shaban 1412AH (The Law of Provinces); Royal Decree M/21, 20 Jumadi al awal 1421 (Aug. 19, 2000) (The Law of Procedure Before *Shari'ah* Courts); Ministerial Decision, 15 Muharram 1425 (Mar. 6, 2004) (Income Tax Law). The original versions of the above legislation are published in UMM AL QURA (Saudi official gazette). However, English translations can be found on the website of the Saudi Arabian Embassy in Washington, D.C., <http://www.saudiembassy.net> (last visited July 15, 2008).

153. Recently, Saudi Arabian law has become partially available at websites such as Lexadin at <http://www.lexadin.nl/wlg/legis/nofr/oeur/lxwesau.htm> (last accessed Dec. 14, 2008); the Royal Embassy of Saudi Arabia, Washington D.C. at <http://www.saudiembassy.net/Country/Laws/LawsDetail.asp> (last accessed Dec. 14, 2008); and Legal Information Institute, Cornell University Law School at <http://www.law.cornell.edu/world/mideast.html#saudi> (last accessed Dec. 14, 2008).

legal institutions and significant modern legal principles. These modern institutions and legal principles will, inevitably, require more accountability and equality before the law. The nature of modern legal institutions, including the court system, is substantially different from the traditional tribal structures and *Shari'ah* principles. Indeed, the establishment of such institutions and the introduction of modern legal principles alongside *Shari'ah* could positively affect both the tribal structure and the traditional *Shari'ah* system in moving towards the establishment of the rule of law.

3. Court Structure

The court system in Saudi Arabia is regulated by the Law of Judiciary (1975), which is a royal decree.¹⁵⁴ Under the provisions of the decree, the *Shari'ah* courts consist of the summary courts, general courts, the appellate court and the Supreme Judicial Council.¹⁵⁵ The highest court in law, the Supreme Judicial Council, amongst other things, reviews death, amputation or stoning sentences.¹⁵⁶ The procedural law (both civil and criminal) is regulated by three pieces of legislation including the Law of Procedure before *Shari'ah* Courts (2000),¹⁵⁷ Law of Criminal Procedure (2001),¹⁵⁸ and Code of Law Practice (2001).¹⁵⁹ In addition to these traditional courts, there are a number of administrative courts and tribunals which have jurisdiction over specialized areas of law relating mainly to commercial disputes, agency, labor and banking. These courts and tribunals are given the power to act under specific legislation in the form of royal decrees published in the Umm al Qura. An example is the Board of Grievances, which has been operating since 1982.¹⁶⁰ It is an independent administrative judicial commission, but is not independent of the King. The Board is directly responsible to the King.¹⁶¹ It has jurisdiction in relation to certain issues such as pension laws, workers' compensation, implementation of

154. THE LAW OF JUDICIARY, *supra* note 152.

155. *Id.* art. 5.

156. *Id.* art. 7.

157. Royal Decree M/21, *supra* note 152. This legislation deals with jurisdiction of courts, filing and recording law suits, appearance and absence of litigation, hearings procedure and order, as well as certain other jurisdictional issues.

158. Royal Decree M/39, 28 Rajab 1422 (Oct. 16, 2001). This legislation provides certain protection for individual rights in criminal law matters and outlines criminal procedure in relation to investigations, arrest warrants, and certain other criminal procedure matters.

159. Royal Decree M/38, 28 Rajab 1422 (Oct. 15, 2001) (The Code of Law Practice). This legislation is concerned with legal representation and the duties and rights of lawyers.

160. Royal Decree M/51, 17 Rajab 1402 (May 10, 1982) (Law of the Board of Grievances).

161. *Id.* art. 1.

foreign judgments (if not contrary to *Shari'ah*), and the precautionary seizure of properties or funds based on the requests of overseas courts.¹⁶²

The courts in Saudi Arabia follow the *Hanbali* School version of *Shari'ah* law in core issues such as contract, family, and criminal law.¹⁶³ The system corresponds more closely to a civil law system, rather than to the common law. Theoretically, *Shari'ah* and Islamic jurisprudence have more similarities with common law than civil law.¹⁶⁴ However, implementation of Islamic law in the courts seems to be more inquisitorial in process than adversarial, and, in practice, jurists (*fuqaha*) play the roles that senior judges have under a common law system. In fact, in most Muslim countries, particularly in the Middle East, and, in the Arab world, *Shari'ah* is applied in a form more adaptable to civil law systems. *Shari'ah* law, through the works of Islamic jurists over many centuries, has developed from its original sources, particularly the Quran and the Sunna because of a number of influences. The influence of the Ottoman Empire, which adopted codification of law similar to continental European systems, is one important factor. Also, in recent years, many lawyers and legal academics in the Middle East have completed their studies in France, Switzerland and other civil law countries in Europe, as a result bringing into the court system civil procedures and rules. The role of judges and the method of appointing judicial officers now appear to be more akin to the civil law system. It is also notable that many Saudi legal academics and jurists have studied in Al Azhar in Cairo where the Egyptian legal system follows a civil law pattern.

The court system and its provisions are based on relatively simple procedures. For example, the relevant legislation referred to in this section is very brief and simplistic and usually consists of about fifty articles of about ten to fifteen pages in length, at most. Obviously, in Saudi Arabia and in other countries where the law is not the main governing factor and other factors such as individuals or ideologies affect the governing rules, legislation and legal provisions are limited in favor of these other factors. For Saudi Arabia to move towards a legal and political system based on the rule of law, it must gradually expand its modern court system while establishing a more comprehensive system

162. *Id.* art. 8.

163. In 1928, six *Hanbali* jurisprudential texts were made mandatory for courts by a 1928 resolution of Saudi Arabian Supreme Judicial Council. See SAYED HASAN AMIN, MIDDLE EAST LEGAL SYSTEMS 312-13 (Royston 1985).

164. Civil law systems are mainly based on codified laws, whereas common law is mainly developed over centuries based on decisions of higher courts in the United Kingdom and other common law countries. Islamic law is not a codified system of law and was developed over centuries by works of prominent Muslim jurists and their *fatwas*. In many instances, *fatwas* and the opinion of prominent Muslim jurists were issued when new and innovative cases arose. According to Joseph Schacht, Islamic law is neither common law nor civil law but it is a "jurists' law" system which "was created and further developed by private specialists, a phenomenon well known to the sociology of law." SCHACHT, *supra* note 16, at 209.

to include more areas of law, including those currently under the jurisdiction of traditional *Shari'ah* courts. It is important for Saudi Arabia and its legal system to cover disputes in every corner of the country including the tribal area. A well-developed modern court system to apply the law and dispense justice is an important component of a modern legal system based on the rule of law. Saudi Arabia lacks such a system.

4. The Legal Profession

A separate professional class of people known as lawyers was gradually established in European legal systems by the early fifteenth century. Today legal representation is an important feature of modern legal systems and, in a number of cases, the right to representation is a principle of human rights.¹⁶⁵

Legal representation in Saudi Arabia is a very recent concept. Indeed, the first case in which parties to a case were represented by a lawyer was the case of two British nurses, Deborah Parry and Lucille McLaughlin, accused and convicted for the murder of an Australian nurse, Yvonne Gilford, in 1997.¹⁶⁶ Both the victim and the defendants were foreign, Western nationals. The case was the subject of international media attention and both the British and Australian governments intervened to protect their nationals.¹⁶⁷

Legal representation in the courts is neither regulated by *Shari'ah* nor is it prohibited. Under *Shari'ah*, representation of one person by another person (*al*

165. For example, Australian common law recognizes the right of a person to legal representation in certain cases. *See Dietrich v. The Queen* (1992) 177 C.L.R. 292 (Austl.)

166. In the Yvonne Gilford case, the two British nurses were represented by a Saudi Arabian citizen, Salah al Hejailan, educated in law in Cairo, who had an office in London and who would give consultancy and legal advice to British citizens doing business with Saudi Arabia. In that case on December 11, 1996, Yvonne Gilford, an Australian nurse working in Saudi Arabia was killed in her room in a military medical complex in Dharam. Later, two British nurses, Deborah Parry and Lucille McLaughlin, were tried and convicted and given *qisas* (death penalty for murder). The ordeal ended only when the brother of the murdered nurse, Frank Guilford, living in Australia, agreed to waive the death penalty, and the King of Saudi Arabia pardoned the pair for the jail term imposed under *tazira* (discretionary punishment). Under Islamic law, the punishment for first degree murder is *qisas* (retaliation), but it can only be carried out upon the demand of the victim's heir (close family who inherit from the victim). However, both in Saudi Arabia and Iran, legislation imposes a jail term (if the family of the victim forgive the offender) in certain cases, and in Saudi Arabia the King has the power to give clemency to an offender who is already pardoned by the family of the victim. For a commentary on the case, see Esmaeili & Gans, *supra* note 122, at 145, and Belinda Wells & Michael Burnett, *When Cultures Collide: An Australian Citizen's Power to Demand the Death Penalty Under Islamic Law*, 22 SYDNEY L. REV. 5 (2000).

167. Esmaeili & Gans, *supra* note 122; Wells & Burnett, *supra* note 166.

wikala) is permitted.¹⁶⁸ The word *al wikala* is used in various verses of the Quran.¹⁶⁹ In the Sunna there are many sayings of the prophet (*ahadith*) in which representation is allowed.¹⁷⁰ It is claimed, according to the consensus of Muslim jurists, that *wikala* (or representation) is allowed, and further, it is highly recommended.¹⁷¹ In Islamic jurisprudence texts, there are chapters on the meaning and conditions of *wikala*.¹⁷²

After the 1997 international coverage of the Yvonne Gilford case, and with increasing foreign investment in Saudi Arabia, the idea of regulating legal representation developed, leading to the creation of the Code of Law Practice in 2001 by a royal decree.¹⁷³ The Code authorizes and regulates legal representation. It defines “law practice” as “representation” of third parties before courts of law, the Board of Grievances and other Committees as may be set up pursuant to law decrees, and also to mean rendering consultancy services based on the principles of *Shari’ah* and the rule of law.¹⁷⁴ Practicing lawyers must be qualified and have an appropriate legal degree from either a *Shari’ah* college or from one of the Saudi Kingdom’s universities or its equivalent, if obtained from an overseas university.¹⁷⁵ A practicing lawyer must practice according to the principles of *Shari’ah* and the laws in force in the Saudi Kingdom.¹⁷⁶

The introduction of a Code of Law to authorize and regulate the legal profession in Saudi Arabia is a step forward towards the rule of law. The Saudi Kingdom was one of the last countries in the Islamic world, and in the Middle East, to allow legal representation. However, it may take years and decades for Saudi society, particularly litigants and legal institutions, to fully embrace the concept of legal representation. It is not yet standard for people to employ a lawyer, nor is it readily acceptable for courts and judges to ensure that litigants have appropriate third party representation. Only when the practice eventually becomes part of a legal system may one even dare to contemplate the independence of the legal profession and its institutions such as bars and associations.

168. 3 SEYYED AL SABIQ, *FIQH AL SUNNA* [THE SUNNI JURISPRUDENCE] 162 (Dar al Fikr 1998) (Author’s translation).

169. *E.g.*, Quran: 3: 173; 18: 9; 12: 55.

170. SABIQ, *supra* note 168, at 162 (Author’s translation).

171. *Id.* (Author’s translation).

172. *Id.* at 162–66 (Author’s translation).

173. Royal Decree M/38, *supra* note 159.

174. *Id.* art. 1.

175. *Id.* art. 3.

176. *Id.* art. 11.

5. Human Rights and Rights of Women

The issue of human rights in Islam and, in particular, Muslim countries is an ongoing issue which has been the subject of extensive discussion in recent years. In both the Western and Muslim worlds there are different approaches to the issue of human rights in Islam and in Muslim countries. Human rights has become one of the most contentious issues with respect to the relationship between Islam and the West, or traditional Islam and the modern world. According to Mohsen Kadivar, an Iranian Muslim jurist and philosopher, historical Islam and modern human rights principles conflict in six key areas: (1) the inequality between Muslims and non-Muslims; (2) the rights of women; (3) recognition of slavery in traditional texts; (4) abuse of privileges by the *ulama*; (5) lack of religious freedom to abandon Islam; and (6) harsh punishments and arbitrary torture as acceptable practices.¹⁷⁷

Within Islam, there are different approaches to the issue of human rights and *Shari'ah* principles which can generally be divided into three categories. The first approach is that *Shari'ah* principles are based on divine law and, under any circumstances, are superior to any human-ascribed law, including how *Shari'ah* law applies to principles of human rights.¹⁷⁸ This view sees no problem with any traditional principles of *Shari'ah* in relation to any matter, including the rights of women and Islamic criminal law principles. This approach has strong advocates among certain Muslim jurists, particularly in Saudi Arabia and Iran, and within certain Islamic movements because it shifts the blame to the West's obsession with democracy, civil liberties and human rights.¹⁷⁹

The second approach argues that traditional Islam is substantially unable to reconcile with a free and modern society and should play no part in the public life of individual Muslims. Muslim writers such as Ayaan Hirsi Ali and Irshad Manji are among the strongest supporters of this approach.¹⁸⁰ The approach does not have much theoretical foundation among Muslim jurists, but is practiced in many Muslim societies, such as Turkey.

177. "Under historical Islam (traditional Islam), human beings are not central in the religion and hence human rights are irrelevant. God is the center and responsibility (*taklif*) imposed by God, is the theme of *Shari'ah*." Mohsen Kadivar, *Reconstruction of Wisdom: A Condition for Reconciling Religion and Human Rights* (May 16, 2007) (unpublished conference paper, prepared for Human Rights Conference, Mofid University, Qom, Iran, on file with the author) (the presenter was barred from presenting the paper in the Conference).

178. See, e.g., SEYYED HOSSEIN NASR, *THE HEART OF ISLAM, ENDURING VALUES FOR HUMANITY* 117 (2000).

179. *Id.* at 153-54.

180. See, e.g., IRSHAD MANJI, *THE TROUBLE WITH ISLAM TODAY: A MUSLIM'S CALL FOR REFORM IN HER FAITH* (St. Martin's Griffin 2004); AYAAN HIRSI ALI, *THE CAGED VIRGIN: AN EMANCIPATION PROCLAMATION FOR WOMEN AND ISLAM* (Free Press 2006).

The third approach views Islam as a great religion and civilization with long and robust traditions which through tolerance and adaptation can accommodate itself within modern societies.¹⁸¹

Within the three approaches there are further sub-approaches. In Saudi Arabia, the dominant Wahhabi ideology and the majority of jurists in the Islamic centers of Mecca and Medina support the first approach, and the government has no ability to move in directions substantially contradictory to it.¹⁸²

In contemporary Saudi Arabia, women have less rights than many other Muslim countries in the world by comparison.¹⁸³ Islamic criminal law, including public flogging and beheading, is practiced regularly.¹⁸⁴ Rights of minorities and non-Muslims are very limited except for foreign nationals.¹⁸⁵ Although there have been improvements in recent years in relation to human rights, freedom of the press, and education for women, in certain areas there have been further rigid directions issued by the government as a result of pressure from Wahhabi *ulama*. For example, in December 2007, for the first time, single women under forty were barred from taking *haj* pilgrimage unless accompanied by a male relative.¹⁸⁶

The issue of human rights in Saudi Arabia is a wider issue than Islam and human rights. It has historical origins in terms of the relationships between religion and the state, and religion and the law. This paper does not intend to canvass the various issues relating to human rights in Islam or Saudi Arabia. However, the issue does relate to the theme of this paper—the rule of law. If, in Saudi Arabia and other parts of the Muslim world, society evolved to a stage where the law, not individuals, ruled the affairs of society; where the law was not sacred, but could be criticized and changed; and where the majority of people, rather than the State, decided how the nation should be managed; then the rights of individuals and society would, of course, be given priority in the legal system. However, this process is still many generations away from being achieved.

181. See, e.g., ABOU EL FADL, *supra* note 12; ABDULLAHI AHMED AN-NA'IM, TOWARD AN ISLAMIC REFORMATION: CIVIL LIBERTIES, HUMAN RIGHTS, AND INTERNATIONAL LAW (Syracuse Univ. Press 1990).

182. MAI YAMANI, CHANGED IDENTITIES: THE CHALLENGE OF THE NEW GENERATION IN SAUDI ARABIA 115-31 (Royal Instit. of Int'l Affairs 2000) (regarding different Islamic movements in Saudi Arabia).

183. See Human Rights Watch, Perpetual Minors: Human Rights Abuses Stemming from Male Guardianship and Sex Segregation in Saudi Arabia (2008), available at http://www.hrw.org/sites/default/files/reports/saudiarabia0408_1.pdf (last visited Dec. 13, 2008).

184. Esmacili & Gans, *supra* note 122, at 149-54.

185. Schwartz, *supra* note 79, at 32.

186. Syed Faisal Ali, "Mahram not Reachable" Keeps them Worried, ARAB NEWS, Dec. 19, 2007.

III. THE ROLE OF *ULAMA* AND CERTAIN OTHER OBSERVATIONS IN RELATION TO THE RULE OF LAW IN SAUDI ARABIA

It has been said that “failure of democracy and the rule of law” in the Middle East is a political reality and “bringing about democracy and the rule of law in the region is a political, not a legal, task.”¹⁸⁷ This proposition has merit. There is no doubt that Middle Eastern countries need the establishment of modern institutions, such as political parties, and substantial changes in their political system. However, many other cultural, economic, and legal realities are as important as political issues. The concept and philosophy of law, and the nature of legal institutions, are as important as political considerations.

This section discusses the future development of the rule of law in the Saudi nation with respect to a number of factors, which may be more political than legal in nature, including four significant factors affecting its establishment: (1) the role of the West; (2) the influences of *ulama*; (3) economic development; and (4) future perspectives.

A. Western Support

One complication in relation to change and reform in Saudi Arabia is the relationship between the Saudi Kingdom and the West, particularly the United States. Initially, necessity promoted a strategic alliance between the West and Saudi Arabia. The United States had significant interest in Saudi political development because of the discovery of huge oil reserves in the desert state and the vital importance of the most traditional Muslim and Arab state in preventing the spread of Soviet power into the Middle East and North Africa. The latter is no longer a major concern, but as the world’s top oil producer and the most influential Muslim country, Saudi Arabia today is still important to the West and, indeed, to the world. Furthermore, the stability of the Muslim state is vital to confronting radical Islamists who employ terror and violence. The irony is that, at the same time, both financial support and the ideology of the so-called Islamic terrorists originates mostly from Saudi Arabia. It is surprising that the support is not only through individuals and non-governmental institutions in the Saudi Kingdom—money spent by the Saudi government and its embassies¹⁸⁸ around the world also plays a vital role in mobilizing radical Islamic movements.¹⁸⁹ Many Islamist parties in Afghanistan, Pakistan, Chechnya, Iraq, Indonesia, and Somalia are financially supported by, at least, certain elements in the Saudi establishment,

187. MALLAT, *supra* note 13, at 6.

188. The Australian newspaper reported that the Saudi Embassy in Canberra had provided funding towards the wages of 20 Imams nationwide: Cameron Stewart, ‘Block Saudi Cash’ for Imams, THE AUSTRALIAN, May 17, 2007, at 7.

189. There are claims that the Saudi government is no longer willing to actively promote radical religious groups. BRONSON, *supra* note 7, at 261.

many of these armed with the Wahhabi ideology.¹⁹⁰ Islamic movements, centers and schools in many major Western cities including Washington, New York, London, and Sydney are both financially and ideologically supported by Saudi Arabia.¹⁹¹

A further complication added to this equation is that Arab nations see their unelected and dictatorial regimes supported by the West. Although not the only or even the primary reason, the support of the West, and in particular the United States, is an important factor for the survival of the Arab regimes, including the Saudi dynasty. For example, when Saddam Hussein occupied Kuwait in 1990 and threatened to push farther south into Saudi Arabia,¹⁹² it was President George H. W. Bush who declared to the world that the security and stability of Saudi Arabia were vital to the security of the United States, and that the United States would use force to protect the Saudi Kingdom.¹⁹³ Had the United States not sent hundreds of thousands of troops to the Saudi Kingdom, Saddam Hussein may have toppled the Saudi family from power and driven the Middle East into further chaos.¹⁹⁴ During this turbulent period, there was the prospect of change and reform in Saudi Arabia. The rest of the Saudi population (other than the house of Saud) and other Arab and Muslim states could have been involved in restructuring the heart of the Islamic world and the Middle East. Certainly, this is not to say that it would have been right to leave Mecca, Medina, and the huge oil reserves of Kuwait and Arabia in the hands of a brutal dictator with the ambition of ruling the Arab world and the Middle East. Neither the astute intellectual nor the majority of Arabs and Muslims would have tolerated Saddam Hussein. However, the strategic support provided by the West and the United States for the house of Saud and the unelected rulers of Kuwait does raise some serious questions in relation to America's motives in its involvement in the Middle East.¹⁹⁵

190. DORE GOLD, *HATRED'S KINGDOM: HOW SAUDI ARABIA SUPPORTS THE NEW GLOBAL TERRORISM* 119-55 (2003).

191. According to the website of King Fahd Bin Abdul Aziz (reigned 1982–2005), the King has invested substantially in supporting Muslim minorities around the world resulting in “some 210 Islamic centers, wholly or partly financed by Saudi Arabia, more than 1500 Mosques and 202 colleges and almost 2,000” Muslim schools worldwide. Introduction – King Fahd Bin Abdul Aziz, <http://www.kingfahdbinabdulaziz.com/main/m000.htm> (last visited Nov. 30, 2008).

192. Madawi Al-Rasheed, *God, the King and the Nation: Political Rhetoric in Saudi Arabia in the 1990s*, 50 *MIDDLE E. J.* 359, 361 (1996).

193. ROBERT PAULY JR, *US FOREIGN POLICY AND THE PERSIAN GULF* 124 (2005).

194. Following the occupation of Kuwait, King Fahd applied for US protection because of inability of Saudi forces to face the powerful Iraqi army. AL-RASHEED, *supra* note 82, at 163. The United States sent massive air and naval forces to the Persian Gulf followed by over 500,000 American troops arriving on Saudi soil. *Id.* at 164.

195. According to Samuel Huntington, the United States rewards those countries which follow its leadership by several means and in the case of Saudi Arabia, for example,

The relationship between Saudi Arabia and the West is both negative and positive. The relationship is negative in the sense that, of the people of Saudi Arabia those who have the primary responsibility and means to change the society through reforms are reacting against the West. They seek other alternatives to democracy and the rule of law, such as an Islamic Caliphate or a radical Islamic state.¹⁹⁶ The positive aspect comes from the economic development of the state with the development of major semi-industrial cities, which require modern civil institutions. This development allows for further cultural and educational interaction with the West, which could create an influential intellectual group of Saudi people to facilitate future changes and create an environment conducive to reasonable international and Western pressures.

B. The Role of the Ulama (Religious Authorities)

Another important issue in relation to change and reform and the rule of law is the role of the *ulama* and their strength in Saudi Arabia, both in their connections with the state and in their popularity and support among ordinary people in the Saudi Kingdom. In practice, the *ulama* control the judiciary. Unlike other Muslim *ulama* in, for example, Egypt, Iraq, Iran, and the Indian sub-continent, Saudi *ulama* have the least interaction with the outside world, with the exception of limited contacts with Al Azhar University in Egypt. Furthermore, the Wahhabi tradition significantly bars Saudi *ulama* from any reform initiations. The complication here arises because in the Arabian tradition of Saudi Arabia, the *ulama* must either initiate or approve any movement for reform. Change and reform by the government or intellectuals is useful but certainly not as influential as if it is initiated by *ulama* who, traditionally, are the main source of knowledge and legitimacy of law and policy in the Arabian society.¹⁹⁷

Since Wahhabis seized Mecca and Medina in 1924, scholarship in these two centers of Islam has been limited to the teaching of rigid Wahhabi ideology.¹⁹⁸ All Sunni Muslim schools (*Hanafi*, *Maliki*, *Shafi'i* and *Hanbali*) as well as the *Shia* School and many other Islamic sects and schools, such as *sufists*, were once located in Mecca and Medina. Today, Mecca and Medina are the

by being silent about Saudi's deviations from U.S. norms in relation to abuse of human rights. Samuel Huntington, *The Lonely Superpower*, 78 FOREIGN AFF. 35, 45 (1999).

196. "Although the radical Islamists are in a small minority, their language, identifying corruption and demonizing the West, finds an echo among many of the new generation. As the state's ability to underwrite social stability with oil wealth declines, the voice of Islamic opposition could well find more supporters." YAMANI, *supra* note 93, at 131. See also BASSAM TIBI, *THE CHALLENGE OF FUNDAMENTALISM: POLITICAL ISLAM AND THE NEW WORLD DISORDER* (2002).

197. See *infra* Part IV.

198. THE LAW OF JUDICIARY, *supra* note 152, art. 5.

centers only for Wahhabi *ulama*, a doctrine previously discussed in section II(A)(2),¹⁹⁹ officially practiced only in Saudi Arabia and Qatar.

Unfortunately, the Wahhabi *ulama* are not prepared to embrace change, and the prospect of any reform initiative within the circle of *ulama* in Saudi Arabia is therefore unlikely.²⁰⁰

C. Oil and the Economy

An obstacle to promoting the rule of law and the development of democratic institutions in Saudi Arabia and many such countries is the restrictions placed by the physical environment on economic development. The Arabian Peninsula is mainly desert and not suitable for agriculture. Thus, land ownership has never been a significant factor in the economy of the desert. Without water and fertile land for agriculture, individuals and single families are unable to survive, and the tribe, through trade, became the center of all social and economic relations.²⁰¹ Consequently, social relations, land ownership, and rights and responsibilities were all regulated by the tribal structure. As previously discussed, Islam did not dismantle the tribal culture of Arabia completely.²⁰² Further, Islamic civilization developed outside the Arabian Peninsula in Baghdad, Istanbul, Egypt, Persia, and India. Most of Arabia was a tribal society largely left to its own devices by the Islamic Caliphate. During the periods where certain reformist development and intellectual scholarship flourished in the Islamic world, including in the Ottoman Empire, Persia, and other parts of the Muslim world, there were no comparable events in Arabia, other than the advent of the Wahhabi movement. Even after the establishment of the Saudi-Wahhabi State in 1930, no major social or political changes happened in Arabia, except for the further cleansing out from Saudi Arabia any aspect of moderately plural Islamic civilization. However, the main sources of income for the Saudi-Wahhabi Kingdom were still taxes and customs paid by Muslim pilgrimages every year, along with the exportation of dates. So the state was, to a limited degree, answerable to a broader, diverse, and pluralistic Islamic world. However, when oil, in huge amounts, was commercially discovered in the 1930s, things

199. See *supra* Part II(A)(2).

200. One of the great Wahhabi jurists, and the Mufti of Saudi Arabia, was Imam Abdul Aziz Baz (died in 1999) who issued a fatwa in 1969 titled: *Adilla al naqliyya wa al hissiyya ala jarayan al shamsi wa sukouni al ardh* [rational and narrative proofs of rotation of the sun and centrality of the earth]. Baz also issued various other fatwas including prohibition of women from driving which is still the law in Saudi Arabia. See Gabriel Fouad Haddad, *A Concise Guide to Another Primary Innovator in Islam* (2008), available at http://www.sunnah.org/history/Innovators/ibn_baz.htm (last visited July 15, 2008).

201. ALMANA, *supra* note 81, at 23.

202. See *supra* Part II(B).

changed.²⁰³ The government's budget is now wholly dependent on oil revenue which is almost entirely operated by large foreign companies, foreign workers, foreign managers, and foreign lawyers. These foreigners, plus millions of other foreigners in the Saudi Kingdom, make up a significant portion of the country's population, and yet they have no say in relation to the country's affairs, and indeed, have no protection as citizens.²⁰⁴

The indigenous population of the Saudi Kingdom is comprised of three classes: the Saudi family and associated tribes; people in the governing class (*ulama* and Wahhabi Sunni leaders); and the rest, most of whom are still dependent on traditional methods of living, and a sizeable portion of them are nomadic tribes.²⁰⁵ This third category, forming the majority of the Saudi Kingdom's population, is economically dependent on oil revenue for basic modern needs such as health and education. Saudi Arabia is unique in the world in terms of its economy, population, and legitimacy. The economy is oil-based, with about 20% of the world's proven petroleum reserves.²⁰⁶ There are approximately 6.5 million people in the Saudi work force, with about one-third of the population in the 15–64 age group being non-national.²⁰⁷ The unemployment rate is high (estimated at about 13%) among Saudi males, and women are completely excluded from the workplace or any service industry except for home duties.²⁰⁸ In such an economic situation, Saudi people are in no position to tell their government what to do. Indeed, they must follow the State to be able to benefit from the huge oil revenue produced by foreign workers and owned and controlled by the state.

The Saudi State is, in practice, only answerable to Wahhabi *ulama* for its legitimacy, and to a limited degree, to the West for external support. Therefore, pressure for reform can only come from either the *ulama* or the West, or both.

203. AL-RASHEED, *supra* note 82, at 93-95.

204. Kamel Mellahi & Geoffrey Wood, *Human Resource Management in Saudi Arabia*, in HUMAN RESOURCE MANAGEMENT IN DEVELOPING COUNTRIES 135 (Pawan Budhwar & Yaw Debrah eds., 2001).

205. On Saudi family, tribal system and Wahhabism as three components of the modern Saudi Arabia, *see generally* MADAWI AL-RASHEED, A HISTORY OF SAUDI ARABIA (2002); DAVID COMMINS, THE WAHHABI MISSION AND SAUDI ARABIA (2006); READER BULLARD, TWO KINGS IN ARABIA: LETTERS FROM JEDDAH, 1923-25 AND 1936-39 (E.C.Hodgkin ed. 1993); JOHN BRADLEY, SAUDI ARABIA EXPOSED: INSIDE A KINGDOM IN CRISIS (2005); CHRISTINE MOSS HELMS, THE COHESION OF SAUDI ARABIA (1981); ALMANA, *supra* note 81; Abdulaziz Al-Fahad, *From Exclusivism to Accommodation: Doctrinal and Legal Evolution of Wahhabism*, 79 N.Y.U. L. REV. 485 (2004).

206. Energy Information Administration, *Saudi Arabia: Background* (2005), http://www.eia.doe.gov/emeu/cabs/Saudi_Arabia/Background.html (last visited July 15, 2008).

207. Intute, *World Guide-Saudi Arabia: Economic Data*, http://www.intute.ac.uk/sciences/worldguide/html/1012_economic.html (last visited July 15, 2008).

208. *Id.*

There is no prospect of any pressure from the *ulama*, at least in the foreseeable future, and indeed it is more likely that the *ulama* will push for a return to traditional values.²⁰⁹ The West may not have incentive to change the current situation as stability of Saudi Arabia and strategic relations with this country are crucial for the Western interests in the Middle East. Therefore, in its current state, the Saudi economy presents significant barriers against reform and the prospect of the state moving toward the rule of law.

D. Looking Ahead

When analyzing the state and legal system of Saudi Arabia in terms of its compatibility with a rule of law system, most conclusions are negative. There are no elections, women are severely oppressed, and there is absolutely no freedom of religion. Further, the state applies the most severe corporeal punishment in the world. More pessimistically, it is unfortunate that there is no effective alternative or credible opposition within or outside of the country such that the fall of the Saud family almost certainly would move the state, with its strategic importance and significant financial resources, into the hands of radical Islamists. However, there are positive aspects to consider, which may lead to a more optimistic view of future outcomes.

First, *Shari'ah*, or Islamic law, is a system fundamentally close to both the Judaeo-Christian tradition and Roman law. Islamic philosophy and science were also influenced by Greek philosophy during the Abassied dynasty (750–1258).²¹⁰ Indeed, the original Western concept of law was “developed from a combination of Roman, Greek, and Judaeo-Christian thoughts.”²¹¹ Although *Shari'ah* and the Islamic concept of the law did not follow the same path of change and reform as Western law, there are many fundamental similarities between the two systems. For example, concepts of eternal law and natural law, developed in the West, share similarities with the *Shari'ah* view of divine law and the use of *qias* (analogy) and *aql* (wisdom) as secondary sources of law.²¹² Therefore, *Shari'ah* is a legal system arguably closer to Western legal systems of

209. In 2007, under pressure from *ulama*, the government for the first time banned Muslim women under the age of 40 from attending Haj without a male relative. Ali, *supra* note 186.

210. NASR, *supra* note 26, at 164.

211. PATRICK PARKINSON, TRADITION AND CHANGE IN AUSTRALIAN LAW 28 (3d ed. Lawbook Co. 2005).

212. According to Mulla Sadra (d. 1640), an Iranian and famous Muslim philosopher *shar* (religion) and *aql* (reason) are the same things. I Sadr al Din Shirazi (Mulla Sadra), AL HIKMA AL MUTAALIYA FI AL ASFAR AL AQLIYYA AL ARBAA [THE FOUR PHILOSOPHICAL VOYAGES OF REASON], Qum 12 (n.d.) (unverified).

thought than Hindu or Buddhist-based legal systems.²¹³ Also, *Shari'ah* is an adaptable legal system, in that certain of its principles, mainly in relation to personal law and contracts, form part of the legal systems of more than fifty Muslim countries. Therefore, there is a prospect of a better understanding and development of *Shari'ah* by the Islamic world and its positive effects on the Saudi legal system.

Second, because Saudi Arabia is a rich oil-based economy, and despite State ownership of its resources, huge developments, foreign investments, and economic growth in this small desert state are creating a push to modernize the economy. A modern economy cannot be managed purely based on Bedouin culture, a simplistic legal system, and a family-monopolized government.²¹⁴ Therefore, Saudi Arabia needs to develop the necessary institutions to adapt to the challenges of a modern society, some of which may pressure the state to develop good governance and encompass democratic principles conducive to promoting the rule of law. Indeed, there is a prospect of rapid transformation in almost all aspects of life in the contemporary Saudi Kingdom.²¹⁵

Third, a huge breakthrough for reform in Saudi society is more likely to come through its women. Currently Saudi women are denied many basic rights.²¹⁶ There is little sign of the *ulama* relaxing their strong opposition against reform in favor of women in Saudi Arabia, but as the society becomes more urbanized and more people move to the cities, pressure will mount from women in

213. According to Abdolkarim Soroush, Islamic civilization and Western civilization went through the same developing paths, except in Islam, jurisprudence, or *Shari'ah*, became the dominant force (while in the West religion gave way to wisdom and science). See ABDOLKARIM SOROUSH, AEIN SHAHRIARI WA DEANDARY [GOVERNANCE AND RELIGION] 165-66 (2000) (unverified).

214. Apart from extensive foreign investment in the Saudi Kingdom, there have been significant efforts in recent years to lift the standard of the education system and expand tertiary education. Also, a large number of students from the Saudi Kingdom have been sent abroad to study in modern universities including thousands to Australia. See Richard Kerbaj & Milanda Rout, *Saudis Move to Stem Uni Radicals*, THE AUSTRALIAN, Feb. 27, 2008, available at <http://www.theaustralian.news.com.au/story/0,,23282588-12332,00.html>.

215. MAI YAMANI, CHANGED IDENTITIES, THE CHALLENGE OF THE NEW GENERATION IN SAUDI ARABIA 132 (2000).

216. According to the 2008 Human Rights Watch report:

The Saudi system of male legal guardianship denies women their fundamental rights. Women must obtain permission from their father, husband, even sons, acting as male guardians to work, travel, study, marry, receive health care, and access government agencies, including when they seek protection or redress as victims of domestic violence. Strictly enforced gender segregation denies women full participation in public life.

HUMAN RIGHTS WATCH, SAUDI ARABIA: COUNTRY SUMMARY 4 (Jan. 2008), available at <http://www.hrw.org/legacy/wr2k8/pdfs/saudiarabia.pdf>.

Saudi society for their basic human rights. Already, the increase in communication with the outside world through the media, particularly through satellite technology and the internet, plus the attendance of a significant number of women at universities and other educational institutions, is stimulating half of the population to pressure the state and *ulama* for reform and change.²¹⁷ Sadly, women in Saudi Arabia have not benefited from the huge oil income of the Saudi Kingdom in recent decades. Rather, they have been more disadvantaged as men have been encouraged by increased oil resources income to become polygamous.

Fourth, the fact that Saudi Arabia has a pro-Western government gives the international community itself (including international and human rights organizations) the opportunity to put pressure on the Saudi Kingdom for reform and change. Unlike foreign occupation and economic sanctions, international pressure should have positive outcomes in positive directions. Furthermore, the increasing interaction between Saudi Arabians and the rest of the world, in terms of political, economic, cultural, and educational relations, is arguably very positive. Apart from expanded economical and political relations with the rest of the world, Saudi Arabia's position as the center of Muslim pilgrimage (*hajj*) will contribute to the openness of the society now and well into the future.

IV. CONCLUSIONS

This article has reviewed and analyzed specific issues in relation to Saudi Arabian law, and, in particular, analyzed in detail the Wahhabi doctrine in order to understand the concept of law and the status of the rule of law in Saudi Arabia and the possibility that rule of law will gain traction in the future.

The nature and concept of law in the Middle East and in Saudi Arabia is based primarily on Islamic law, or is influenced by the law of Islam. In Islam, at least in the view of ordinary Muslims and the majority of Muslim scholars, law constitutes commands from God, and, hence, is blended with religion and is a sacred system. The important point is that as long as the law is considered divine and sacred, it cannot be criticized and fundamentally changed, though it may still be subject to different interpretations.

Saudi Arabia, as the most influential Muslim country in the world, has a legal system based on the most traditional version of Islam but with a mixture of tribal and modern law, operating through a monarchical system in which the Royal family (consisting of at least 5,000 princes) and the *ulama* have absolute authority. This means that Saudi society, in spite of the superficial reforms of

217. One example of a progressive and reformist Saudi woman is Mai Yamani, who was born into a Saudi ruling family, studied and taught in Saudi Arabian universities, and is now a voice of Saudi and Muslim women. She has published scholarly books and articles on Saudi Arabia including FEMINISM AND ISLAM, *supra* note 96, and *Muslim Women and Human Rights: The New Generation in Saudi Arabia*, in DEMOCRACY, THE RULE OF LAW AND ISLAM (Eugene Cortan & Adel Sheriff eds., Springer 1999).

recent years, is still one of the most authoritarian societies in the world. On the other hand, major changes in other Muslim nations would not be very effective in changing the legal and political systems of the Islamic world unless Saudi Arabia also undertook significant reforms and change. Apart from traditional Islamic law as its base, the legal system of Saudi Arabia is also uniquely based on the *Hanbali* school of thought and the Wahhabi doctrine of law and religion. The doctrine of Wahhabism employs one of the most literal methods of interpretation of law and religion and was developed from the least popular, and the most superficial, school of Islamic thought. Although this is denied by Saudi Arabians, in practice the superficial school of Wahhabism is followed both by *ulama* who run the judiciary and the ruling authorities. However, economic developments and modern world institutions necessary to run the country's affairs have caused the creation of a parallel modern system of law in matters not subject to specific *Shari'ah* rules, such as corporation law, media and broadcasting law, and international trade and business. The modern system of law requires institutions such as the legal profession and appellate structures in the court system. These institutions are emerging in Saudi Arabia and have positive influences on the legal system of the country.

One very important aspect of the Saudi Arabian legal system is its tribal nature and the very important and unofficial system of tribal law and tribalism. Certain elements of tribal law and culture are available and influential in the political and legal system of Saudi Arabia as well as in the culture of the society. Any further changes and reform in the legal and political system of the state need to take into account the long tradition of tribalism in Saudi Arabia. Although it may be ideal to imagine a rule-of-law system based on the rights of individuals, the tribal nature of the society requires careful consideration of the tribal system in any future establishment of a rule-of-law system.

The process for reform and change in the Middle East, particularly in Saudi Arabia, is very slow and indeed it must be gradual. The culture of democracy and the rule-of-law institutions can only function effectively in societies where the necessary institutions are established. The era of colonialism has passed, and there is no other alternative but to allow different societies to feel the need, understand the nature, and be prepared to accept for themselves a rule of law system. However, foreign assistance and pressure would be welcomed. Saudi Arabian society, for various reasons discussed in this article, is one of the most complicated societies in the world. It is traditional, tribal, and hostile to Western concepts of democracy and good governance. But the nation is slowly moving forward. The Saudi Arabia of 2009 is more open than it was a decade ago. More people are better educated, legal representation is becoming more popular, and there have been some improvements in the rights of minorities. A bigger economy with more industrial major cities and huge foreign investment in the Saudi Kingdom will require a more effective legal system and legal institutions. Sudden and revolutionary change may not inevitably bring positive results. Even with revolutionary change, the society needs to be ready to adopt

modern and effective reforms. Therefore, whether substantial changes happen in the current political structure or not, and whether the Saudi family will survive another century or not, Saudi Arabia will probably be one of the last countries in the Middle East and Islamic world to transfer from an authoritarian and tribal monarchy to a more democratic system with a rule of law. Thus a modern semi-democratic Saudi Arabia with a limited rule-of-law system, where State power is controlled by an effective system of law and an independent judiciary exists, may be feasible. However, barring unforeseeable events, this may take many decades or another century to achieve.

