JusOnline n. 1/2018
ISSN 1827-7942

Gianluca De Donno

Dottorando di ricerca in Scienze giuridiche, Università degli Studi di Sassari

Elena Giunta, Mostafa El-far, John Shehata

Avvocati

The role of Shari'a as a source of law: looking for a pragmatic approach*

Introduction

Shari'a[1] is central to Islam in the hearts of many Muslims. The Islamic Revolution in Iran in 1979, together with the Islamization of Sudan and Pakistan since the 80s', represents a new phase in the project of conforming certain legal systems to the rules of Shari'a. Increasingly, Islamic Law has become a central element in the legal system of many Muslim-majority states. Indeed, a considerable number of such states affirm Shari'a as "the source" or "a source" of law[2]. At the same time, Shari'a also has the power to provoke controversy in the public debate regarding the compatibility between Islamic law and internationally accepted legal

* Gianluca De Donno is author of Chapter I, Chapter I.2, Chapter II, Chapter II.1, Chapter II.2, Chapter II.3, Chapter II.4, Chapter II.5 and Chapter III; Elena Giunta is author of Chapter II.6, Chapter II.6.1, Chapter II.6.2, Chapter II.6.3, Chapter II.7 and Chapter II.7.1; Mostafa El-far is author of Chapter I.1, Chapter I.1.1, Chapter I.1.2, Chapter I.1.3 and Chapter I.1.4. The essay has been double peer reviewed.

[1] For the purposes of the present article we will use the terms Shari'a and Islamic law interchangeably. However, the reader should be aware that the two concepts are not completely synonymous.

[2] See, for example, Egyptian Constitution art. 2, Iraqi Constitution art. 2, Iranian Constitution art. 2.6 and art.4, Pakistani Shari'a Act (1991) in force, whose Article 3 (1) provides that "*The Shari'ah ... shall be the supreme law of Pakistan*".

standards, particularly in the field of human rights[3]. Further, adherence to Shari'a standards causes issues for Islamic states attempting to stay competitive in the international economic framework.

Islamic law can be seen as one of the many consummate *Other* through which the West has built its own identity. Indeed, we know that the Hegelian Spirit, in the *Vorlesungen über die Philosophie der Geschichte*, arisen in the East, moves towards the West whereby it finds itself. In this linear process, that which is overcome lays relegated as a monolithical concept. The *Introduction to Comparative Law* by Zweigert and Kotz, in relation to Islamic law, seems to reflect such a spiritual attitude:

> "*Islamic law is in principle immutable, for it is the law revealed by God. Western legal systems generally recognize that the content of law alters as it is adapted to changing needs by the legislator, the judges, and all other social forces which have a part in the creation of law, but Islam starts from the proposition that all existing law comes from Allah who at a certain moment in history revealed it to man through his prophet Muhammad. Thus Islamic legal theory cannot accept the historical approach of studying law as a function of the changing conditions of life in a particular society. On the contrary, the law of Allah was given to man once and for all: society must adapt itself to the law rather than generate laws of its own as a response to the constantly changing stimulus of the problems of life*"[4].

In an attempt to go beyond the monolithical conceptualization of Islamic law by taking a particular perspective on the interpretation of the meaning of Islamic law, this article, after a short review of the main sources of Islamic law, will discuss the concept of law in Islamic legal thought and will then present different interpretations of Islamic law as elaborated within divergent cultural contexts, with an overview of the role of Shari'a in the Arab Republic of Egypt, UAE and Saudi Arabian legal systems.

I. Sources of Shari'a *

This section intends to provide an overview of the sources of Islamic Shari'a. The aim of such overview is to briefly familiarize the reader with the sources and

[3] For an overview on the issue, refer to, *inter alios,* M. Baderin, *International Human Rights and Islamic Law,* Oxford 2005.

* Paragraph I.1. has been drafted by Mostafa El-far; Paragraph I.2. has been drafted by Gianluca De Donno.

[4] K. Zweigert, H. Kotz, *An Introduction to Comparative Law*, Oxford 1998, p. 378.

objectives of Islamic Shari'a. The concept of legal evidence is defined under Islamic Shari'a as the proof that is used to derive Shari'a law rules on a certain or probable basis. Based on this conceptual definition, legal evidence in Islamic Shari'a can be split into two categories, depending on their approval by Islamic scholars. The first category contains the sources or evidence approved by all scholars, while the second category includes debatable evidence i.e. evidence that is not accepted by all Islamic scholars. We will first address all the approved evidences and sources of Islamic Shari'a[5].

I.1 Main Sources

Islamic Shari'a has four fundamental sources: Qur'an, Sunnah, *Ijma* ("unanimity" or "consensus") and *al-qiyas* ("analogy"). These are the original sources, which are complemented by others that are not approved by all Islamic scholars.

I.1.1. *Qur'an*

The first and cornerstone source of Islamic Shari'a is Qur'an. Qur'an is the word of God revealed to Prophet Muhammed in Arabic, then written in books transmitted between generations. The Qur'an's prevalence as a legal source is based on its direct communication from God, hence its miraculous nature. The Qur'an has unique features identified by scholars as differentiating it from other holy books. These characteristics include:

a. Rituality[6]:

Qur'an is directly connected to God, since it is his own word in all senses and features no involvement from human beings in either words or meaning:

> "*Then I swear by the setting of the stars, And indeed, it is an oath - if you could know - [most] great. Indeed, it is a noble Qur'an. In a Register well-protected; None touch it except the purified. [It is] a revelation from the Lord of the worlds*" (75-80 AL-WAQI'AH (*The Inevitable*)).

The Qur'an's proper and accurate poetic wording is deemed to be one of its miracles[7]:

[5] E. A. Gomaa, *Osool al-fiqh al-moyasar*, Amman 2008, p. 18.
[6] A. Elwan, *Mohadra fi al-shari'a al-islameya w feqhaha w masaderha,* Dar Es-salam 2001, p. 7.

"*If mankind and the jinn gathered in order to produce the like of this Qur'an, they could not produce the like of it, even if they were to each other assistants*". (88 Al-ISRA (*The night Journey*))

b. Perfection:

The second characteristic of Qur'an is its lack of incompleteness and errors since it is the word of God. The Qur'an states that:

"*Indeed, those who disbelieve in the message after it has come to them... And indeed, it is a mighty Book. Falsehood cannot approach it from before it or from behind it; [it is] a revelation from a [Lord who is] Wise and Praiseworthy*". (41-42 FUSSILAT (*Explained in Detail*))

c. Completeness:

Qur'an covers everything needed by humans, both in their lives and thereafter:

"*We have not neglected in the Register a thing*". (38 Al-AN'AM (*The Cattle*)).

d. Practicality:

Qur'an is practical and applicable for enforcement everywhere and at any time. As per the Lord's words:

"*If the sea were ink for [writing] the words of my Lord, the sea would be exhausted before the words of my Lord were exhausted, even if We brought the like of it as a supplement*". (109 Al-KAHF (*The Cave*).

Finally, it should be underlined that Qur'an covers two kinds of rules: first, the doctrinal prescriptions of religious works and ritual laws in respect of the relationship between human and God and everything related to an individual's belief in God, Angels, Holy Books, Prophets, Doomsday and Destiny (*ibadah*). The second group of rules pertains to the social and economic transactions of everyday life, identifying the laws under which humans ought to interact (*mu'amalat*)[8]. As will be highlighted *infra,* also falling within this category are the wide ranging legal sources, which interpret a Muslim's required practice relating to, *inter alia,* trading, family actions, penalties, and rights and obligations under constitutional and international rules as per Islamic Shari'a[9].

---

[7] *Ivi*, p. 22.
[8] See M. R. Rida, *Yusr al-Islam wa usul al tashri' al-'amm,* Cairo, 1984, pp. 24-28.
[9] A. Elwan, *Mohadra…,* cit. p. 22.

I.1.2. *Prophet's Sunnah*

Sunnah is the second legal evidence and source in Islamic Shari'a. It is a combination of sayings (a famous one is *"there should be neither harming [darar] nor reciprocating harm [diraar][10]"*), actions and approval by the Prophet of the actions of some third parties (so called *hadiths* of the Prophet). Being a *hadith*, i.e. a report by someone who had some familiarity with the Prophet, its legal power depends on its chain of communication (*isnad*). High and sound chains of transmission endow a *hadith* with a higher legal power when compared to *hadiths* supported by medium and lower chains[11].

The proofs of Sunnah as a legal source of Shari'a are widely available. In Qur'an, Sunnah is referenced several times:

> "*Oh you who have believed, obey Allah and obey the Messenger and those in authority among you. And if you disagree over anything, refer it to Allah and the Messenger, if you should believe in Allah and the Last Day. That is the best [way] and best in result*" (59 *AN-NISA* (*The women*)).

All the Prophet's early followers agreed, during his life and after his death, on the necessity of following Sunnah, obeying orders and avoiding committing prohibited actions. Indeed Qur'an has provided for a set of obligations that in many cases do not explain in detail the manner of practicing it, *e.g.*:

> "*Oh you who have believed, decreed upon you is fasting*" (183 *Al-BAQARAH* (*The Cow*)).
>
> "*And [due] to Allah from the people is a pilgrimage to the House*" (97 *ALI'IMRAN* (*Family of Imran*)).

The above verses, while setting a specific duty of behaviour (*i.e.* fasting or doing pilgrimage), are silent regarding the means through which such obligatory practices are to be fulfilled. Therefore, the examples of the Prophet, transmitted orally by his Companions to the community, are necessary in order to put into practice Qur'anic injunctions. The following reference in Qur'an clearly accords to Sunnah its position as a legal source:

> "*And We revealed to you the message that you may make clear to the people what was sent down to them and that they might give thought*" (44 AN-NAHL (*The Bee*)).

---

[10] Imam Nawawi's Forty Hadith: Hadith 32, 33, and 34: *Do not harm, Burden of proof, Resisting evil.*

[11] The analysis of the evolution of the Sunnah and the science of *hadiths* is out of the scope of the present article, for an insight see, *inter alia,* W. Hallaq, *The origins and evolution of Islamic law,* Cambridge 2005.

Accordingly, the role of Sunnah as a legal source can be described as: (i) confirming what is provided in Qur'an; (ii) detailing and interpreting Qur'an where its meaning is not *ictu oculi* clear; and (iii) initiating a new rule where the Qur'an is silent, while remaining in compliance with the nature, objectives (*maqasid*) and character of Qur'anic Revelation[12].

I.1.3. *Ijma' (Unanimity)*

The concept of unanimity or *ijma'* refers to the agreement of Muslim scholars, either living in a particular age or of a generation, over a certain religious issue. Such agreement is deemed to bestow a conclusive and certain knowledge on a disputable matter[13]. The unanimity can assume three forms depending on the scholars' communication of their views regarding the relevant matter: (i) explicit, where all the scholars provide their view on the incident orally or physically; (ii) silent, where some scholars provide their view explicitly, while others remain silent as a form of agreement or disagreement; and (iii) implicit, referring to instances of disagreement between scholars on two rules or more regarding an incident. References to unanimity as a source of Islamic Shari'a are traced in Qur'an and Sunnah. Qur'an affirms: "*And thus we have made you a just community that you will be witnesses over the people*" (143 *Al-BAQARAH* (*The Cow*)).

I.1.4 *Al-Qiyas (Analogy)*

The fourth and final traditional source of Shari'a is *qiyas*. From a linguistic standpoint, *qiyas* means "measurement" or "equality" in the sense of ascertaining the shared qualities of two different objects or concepts[14]. However, in its use in the hermeneutics of Islamic law, it is described as "*the extension of the same rule applicable on the origin to its branch in the presence of a link between them*". *Qiyas* is a method that comes to the rescue of the jurist when the sacred texts do not expressly cover a specific

[12] Sunnah has to fall within the scope of revelation: Qur'an highlights it as "*Nor does he speak from [his own] inclination. It is not but a revelation revealed*" (3-4 AN-NAJM (*The star*)).

[13] It appears that the doctrine of *ijma*' was formally defined in the last decades of the fourth century of the Hijrah.

[14] See A. Mansour, *Al-madkhal fi al-shari'a al-islameya,* Banha, p. 83.

case. Technically, as defined by Mohammed Hashim Kamali in his *Principles of Islamic Jurisprudence, qiyas* is "*the extension of a Shari'ah value from an original case, or asl* [underlying rationale]*, to a new case, because the latter has the same effective cause as the former*"[15]. Practically, by virtue of the commonality of the *ratio legis*, or '*illah*, between an original case regulated by a given text and a new case, the same textual ruling is extended to the new case. Obviously, given that *qiyas* is the fourth source in the hierarchy of Islamic law sources, a recourse to analogy is only warranted if the solution of a new case cannot be found in Qur'an, Sunnah or a definite *ijma*'.

I.2. Controversial sources

Apart from the above described four sources, Islamic legal theory has elaborated throughout its history many secondary sources of law and of legal interpretation. Such sources cannot be taken as fully recognized sources since they are not unanimously approved by Muslim scholars. Nonetheless, even if their detailed examination is beyond the purposes of the article, they are testament to the richness and depth of the development and articulation of Islamic theories of law. The emphasis on one or more of these sources varies depending on the single school of law (*madhab*) or the regional background of the single jurists. The broad realm of controversial sources includes, among others, *al-istihsan*, *al-maslaeh al-morsala*, *sad al-zara'a*, a*l-'urf* and *al-isteshab*. Literally, *al-istihsan* means considering something good, preferable and beautiful (from the root of *hasuna*)[16] and, with respect to the other controversial sources, its importance relies on its extensive use as the preferred tool by modern reformers for reforming Islamic law. The principle of *istishan* enables the jurist to abandon a strong precedent for a weaker precedent in the interests of justice, especially when the interpretation of a certain rule would lead to hardship for the believer and a departure from the ruling is in line with the *maqasid al-shari'a* (objectives of the Shari'a). As for *istihsan, al-masaleh al-morsala* is a concept that can serve as a vehicle for legal change, granting legitimacy to new

[15] M.H. Kamali, *Principles of Islamic Jurisprudence,* Kuala Lumpur 2002, p. 180.

* Paragraphs from II.1. to II.5. have been drafted by Gianluca De Donno; Paragraphs II.6. and II.7. have been drafted by Elena Giunta.

[16] M. H. Kamali, *Istiḥsān and the Renewal of Islamic Law*, in *Islamic Studies*, 43:4, 2004, p.561.

rulings and allowing jurists to address situations that are not mentioned in the scriptural sources of the law[17]. In particular, the aim of *maslaha*, partially similar to *istihsan,* consists of prohibiting or permitting something on the basis of whether or not it can serve the public's benefit or welfare.

II. Four interpretations of Islamic law *

II.1. The concept of law

We have analysed in the previous paragraphs the sources of Shari'a, their articulation and their interconnection. This could be considered a descriptive approach to defining Shari'a. However, referring sources to a concept is in many ways tautological and therefore does not necessarily provide assistance in understanding what Shari'a is. In this sense, understanding Shari'a has to be taken as a purely comparative effort by a western writer to convey an idea of Shari'a to western readers that is undoubtedly shaped by the cultural background of the western jurist. As such, the definition of Shari'a as set out in the following pages is necessarily based on a variety of concepts (our idea of law, our idea of religion, *et cetera*), which will influence, even involuntarily, our perception of Shari'a. A Muslim jurist, therefore, may reasonably not agree with our conclusions.

For the Christian, God has not proclaimed a law the obedience to which will ensure his salvation. This is because a Christian is saved only by Grace through his faith in Jesus Christ. The human tendency towards committing sins requires a law, but the latter has no function in curing the sinner: the punishment a coercive government provides is a consequence of the original sin of Adam and of the fall from heaven, *i.e.* a kind chastisement[18].

If we compare this approach to law with the relevance placed on Islamic Shari'a, the difference seems quite evident. As Norman Anderson correctly points out, for the Muslim, any code of conduct or scale of values is based on the divine

[17] See F. Opwis, *Maṣlaḥa in Contemporary Islamic Legal Theory*, in *Islamic Law and Society*, 12:2 (2005), p. 183.

[18] See M. Cacciari, *Il potere che frena*, Milano 2013, pp.10-15. See also Augustine*, De Civitate Dei*, XIX, 17 "*non curans quidquid in moribus, legibus, institutis diversum est, quibus pax terrena vel conquiritur vel tenetur, nihil eorum rescindens vel destruens, immo etiam servans ac sequens".*

revelation. An act is good when commanded by God and bad if forbidden by Him. The Qur'an is the uncontested word of God and it is the primary source of orientation for the behaviour of the believer[19]. The Qur'an itself confirms: "*Now We have set you (Muhammad) on a clear religious path, so follow it. Do not follow the desires of those who lack (true) knowledge*"[20]. Thus, in the Islamic cultural horizon, *Physis* and *Nomos*, Nature and Law, depend on the Revelation: it is the Revelation that helps to discover and to explain what appears irrational or inexplicable in social, ethical or legal prescriptions. God has a legislative function; He is the Lawgiver [21] who has provided Muslims with guidance and the divine determinism, both of the Universe with its laws, and of society with the revealed law that regulates relations between human beings, has interesting consequences in the realm of political theory[22]. The crucial point is that a utopic dimension does not exist in Islamic thinking, since the society established by God is perfect at its origins. The divine subjectivity, in establishing the ethical-political norms, imposes an already - perfect order[23]. That is to say, these ethical-political norms, products of His will, ratified by Him since the beginning of time, are the best guide possible for believers. Being God, i.e. sovereign and ruler in the literary meaning of the word, the divine government will necessarily have to manifest itself in the human government on Earth. For this reason, contrary to the Augustinian paradigm, the government is not a consequence of the uncontrollable aptitude for disorder of a state's citizens, but is rather a way of creating a perfect society[24], and a benefit given by God[25]. However, one of the main misunderstandings of the nature of Islamic societies originates here. The common idea is that, due to the above expressed premises, Islamic societies are inherently theocratic; if the fundamental law is God's law, eternal, unchangeable and perfect in its content, there is no place for a human legislation, or rather such legislation could

[19] N. J. D. Anderson, *The Sharia Today*, in Journal of Comparative Legislation and International Law, 31:3/4, 1949, pp. 20-22.

[20] Q 45:18, see also Q 5:44 and Q 28:85.

[21] See for example, Q 5:50.

[22] M. Campanini, *Islam e Politica: Il Problema dello Stato Islamico*, in *Il pensiero politico,* XXXVII, 2003, p.456.

[23] P. Crone, *Medieval Islamic Political Thought*, Edinburgh 2005, especially pp. 3-6.

[24] *Ivi.*

[25] K. A. El-Fadl , *The Human Rights Commitment in Modern Islam*, in J. Runzo and N. Martin (ed.), *Human Rights and Responsibilities*, Oxford 2003, p.133.

only exist to the extent that it does not contradict the Revelation. This perspective misses the point insofar as it overlooks some decisive passages. What is present in Sunni Islam is not a consortium of religious figures who rule the people under the pretence of knowing better than others (for example, thanks to a direct inspiration) the continuously changing will of God. On the contrary, in a precise historic moment God has manifested His rules for man's benefit: the fundamental issue is interpreting this complete and precious divine gift. As noted by Majid Khadduri, the term that better describes the link created by Islam between man and law, and which correctly depicts the ideal form of an Islamic society, is a "nomocracy": it is not God, but God's law, which really governs[26]. The only decisive element for one true community becomes the application of God's sacred law, wherein lies the core of the question[27].

II.2. The role of *fiqh*

A well-known anecdote regarding 'Ali, the cousin of the Prophet, enables us to understand the central importance that the activity of human interpretation acquires in giving consistency to the divine law. Reports tell that when 'Ali resorted to solve his political dispute with Mu'awiya through arbitration, thus leaving aside military force, the zealot group of Khawarijs rebelled, accusing him of betraying God's word. They maintained indeed that 'Ali was legitimated by the Qur'an as chief of the community and his concession to refer the question of legitimacy to a negotiated settlement was a human usurpation of God's sovereignty. To reply to his accusers, 'Ali gathered the people to discuss the issue and, touching the Qur'an, asked the sacred Book to speak and inform the bystanders of God's will. The people obviously exclaimed that this would have been impossible, the Qur'an not being a human endowed with the possibility of speaking. Having heard that, 'Ali claimed this was what he wished to demonstrate: the Qur'an is mute in itself and

[26] M. Khadduri , *War and Peace in the Law of Islam*, New Jersey 1955, p.16.

[27] A text worth reading on the peculiar value of the law in Islamic culture is M. H. Benkheira, *L'amour de la Loi. Essai sur la normativitè en Islam,* Paris 1997.

human beings give effect to it according to their limited personal judgements[28]. The anecdote, historically provable or not, leads us to the first paradoxical point in our discussion, often overlooked by the wide-spread stereotypes regarding Islamic law. Despite a God Legislator, whose legislation is immutable *sua ipsa natura*, the efficacy of His normative rule remains latent without a process of human mediation. In this sense, a *hadith* collected by Abu Dawood adds another element that is fundamental in understanding the nature of Islamic law. Sayyidina Mu'az ibn Jabal reported that when Allah's Messenger sent him to Yemen, he asked him how he would decide cases when they were brought to him. He said, "*According to Allah's Book*." The Prophet asked, "*If you do not find them there?*" "*Then according to your sunnah*."*"But, if they are not there, then*?" Mu'az said, "*I will make ijtihad and extract judgement with my opinion (and try to arrive at a true conclusion), not being negligent in that*." The Prophet was pleased and patted him lightly on the chest, saying, "*All praise belongs to Allah Who caused the envoy of Allah's Messenger to conform to what pleases Allah's Messenger*"[29]. Thus, the intellectual activity of the interpreter joins up reality and law, making use of his efforts to connect the multiplicity of events with the divine guidance, in what becomes a speculative discovery of God's secret will. This intellectual activity is what is properly called *itjihad* and represents the technique by which jurists have developed legal rules from the sacred sources[30].

Obviously, the interpretation of the sources of *Shari'a* by different jurists may produce divergent rulings from the same sacred text. This issue soon became clear in the doctrinal foundation of Islamic law, to the extent that Muslim jurists focused on the tradition attributed to the Prophet stating: "*every mujtahid [31] is correct"*, or "*every mujtahid will be [justly] rewarded*"[32]. The consequence of this understanding of the law as a product of human agency and efforts in finding the meaning of God's revealed

[28]K. A. El Fadl, *The Human Rights...*, cit., p. 133.

[29] Abu Dawood, *Kitab Al-Aqdiya*, 11.

[30] The science devoted to the study of jurists' hermeneutics is *usul-al-fiqh,* which literally means the study of the source of *fiqh*. *Fiqh* can be translated as "the knowledge of the *shar'i ahkam* (legal rules) pertaining to the conduct, that have been derived from their specific evidences". See I. A. K. Nyazee, *Theories of Islamic Law. The Methodology of Ijtihad,* Islamabad, p. 22.

[31] A *mujtahid* is a jurist who strives to find the correct answer.

[32] The Arabic is "*kull mujtahid musib*" and "*li kulli mujtahid nasib*". See A. H. al-Basri, *Al-Mu'tamad fi Usul al-Fiqh*, 2:370-2;' Al. al-Din, *Kashf al-Asrar 'an Usul Fakhr al-Islam al-Bazdawi*, 4:30-55; A. Al-Ghazali, *al-Mustasfa min 'Ilm al-Usul*, 2:363-7

word implied the acceptance that there could be more than a single correct answer to the same question. For Muslim jurists, this raised the issue of the purpose or the motivation behind the search for divine will. What is the divine purpose behind setting out indicators of the divine law and then requiring that human beings engage in a search? If the Divine wants human beings to reach the correct understanding, then how could every interpreter or jurist be correct? The jurists were divided into two main camps. The first school, known as the *mukhatti'ah*, argued that ultimately there is a correct answer to every legal problem. However, only God knows what the correct response is, and the truth will not be revealed until the Final Day. The *musawwibah* (and among them, al Ghazali) argued that there is no specific and correct answer (*hukm mu'ayyan*) that God wants human beings to discover, in part because if there were a correct answer, God would have made the evidence indicating a divine rule conclusive and clear.

Such acknowledgement that the sacred texts, as a source of positive rules, cannot be directly applied but require the mediation of human beings to be endowed with a precise normative meaning - and that such meaning can be disputed and amended by other *mujtahids*[33] - enables us to easily understand the reasons of the development, since the early Islamic history, of an articulated jurisprudential science. The science of *fiqh* is surely one of the jewels of Islamic civilization, a master example of intellectual elegance whose incomparable architects have been '*ulama* (scholars). A recent scholarship has the merit of having cast light on the dynamism and richness of a system generally depicted primitive or unchanged throughout centuries[34], a system which, based on *ijtihad* and *ikhtilaf*, legal reasoning on the text and acceptance of the divergence of opinions, but also on controversial sources like *istihsan* and *maslaha,* has provided a remarkable flexibility and spirit of adaptation to changing circumstances. Indeed, on the basis of data collected in a pivotal study on

[33] In order to understand to what extent Islamic law is open to disputes, it is worth noting that it controversial even the exact number of verses in the Qur'an with an identifiable legal meaning (80-200-300?). In this respect refer to H. Gerber, *Islamic Law and Culture*, 1*600-1840*, Leiden 1999, p.137 and A. Layish, *The Transformation of the Shari'a from Jurists' Law to Statutory Law in the Contemporary Muslim World*, in *Die Welt des Islams, New Series*, 44, 2004, pp. 85-113.

[34] Cfr. J. Schacht, *An Introduction to Islamic Law*, Reprinted edition, Oxford, 1983, pp.70-71, where he argues that Islamic law ceased to develop at the end of ninth century. See also N. Coulson, *A History of Islamic Law,* Edinburgh 1984, p.81.

women in Ottoman Shari'a courts in Palestine and Egypt, Amira Sonbol points out how *qadis* (the Shari'a court judges) deployed all the articulated practices of Islamic law legal theory in deciding cases. Principles of *istihsan* and *istihbab* provided the *qadi* with the flexibility needed to guide him in the direction of what was the preferable rule depending on the sociocultural and economic context of the people he served, and in the service of two key principles: the sanctity of contracts and the protection of the weak, particularly children and women[35].

II.3. *Qadijustiz*

A pivotal moment in the modern legal history of the Middle East was undoubtedly the period of reforms undertaken in the 19th century in Egypt and the Ottoman Empire (in the latter beginning with the so-called *Tanzimat*) which eventually led to the establishment of the Mixed Courts in Egypt and to a vast programme of codification (the 1875 and 1883 codes in Egypt, the *Majalla* in the Ottoman Empire). This pervasive reformist movement deeply affected the Islamic legal system and resulted in a significant backlash to its evolution. Indeed, it did not simply entail the sudden introduction of the principle of codification in a cultural environment which conversely had ca long and elaborate tradition of jurists-based law[36], but it also fundamentally changed the nature of law as practiced and understood. As Nathan Brown correctly argues, Islamic Shari'a was more than a legal system, broadly consisting as it did of a set of institutions and practices dedicated to Islamic knowledge, including mosques, *qadi* courts, and theological and cultural centres like Al-Azhar[37]. Nonetheless, the institutions dedicated to Islamic knowledge underwent a process of transformation towards a modern-like educational system, with lectures, specified sequences of courses, and examinations

[35] A. Sonbol, *Women in Shariah Courts: A Historical and Methodological Discussion*, in *Fordham International Law Journal*, 27:1, 2003, pp. 225-253. Sonbol also analyses the juridical evolution of the system and its surprisingly progressive outcomes, "*where women had clear rights to sue in court*" and the flexibility of the system "*allowed women to determine their marriage contracts and the conditions under which they lived*". Highlighting that women also had complete rights to divorce a husband they did not want to be with, Sonbol decries modern, self-proclaimed "Islamic" legislation which seek to place women under the full control of their husbands.

[36] For a comprehensive discussion about codification and Islamic law refer to, *inter alios,* W. Hallaq, *The impossibile State: Islam, Politics, and Modernity's Moral Predicament,* New York 2012.

[37] Cfr. N. J. Brown, *Sharia and State in the Modern Muslim Middle East*, in *International Journal of Middle East Studies*, 29:3, 1997, p. 365.

to the extent that the "*educational techniques and practices earlier deemed to constitute an essential part of the shar'ia [were] largely abandoned*[38]". The great teaching organizations had a long tradition in training those learned in Shari'a and in creating proper jurists able to understand Islamic law as a living legal system in all its complexity. Once they disappeared, a whole system of knowledge, disconnected from specific institutions and practices, was dispersed. Even if there was an attempt to include some study of Islamic law in the new law schools created by the Middle Eastern states and based on western universities, it was treated as another academic subject and taught in a specific course disjointed from legal practice and conversely identified a set of fixed and identifiable rules.

This dramatic change played a significant role in the way a certain western common idea has been built on Islamic law. Specifically, it resulted in being perceived as a backward bulk of static rules, written in medieval commentaries that no longer had a place in modern times. With the eclipse of the class of *fuqaha*[39]*,* the jurists expert in the science of *fiqh,* Islamic law was detached from its endowment of flexibility and set apart from the cultural context in which it operated, thus mistakenly described as an immutable gathering of principles on books. Islamic law became, therefore, the primitive law of a pre-modern society. In Terminiello v. Chicago (1949), Mr. Justice Frankfurter, commenting on his own court, said: "*This is a court of review, not a tribunal unbounded by rules. We do not sit like a kadi under a tree dispensing justice according to considerations of individual expediency*." For Justice Frankfurter the image of the Islamic law judge, the *qadi,* was that of a man sitting barefoot and with a turban on his head, under a tree - maybe drinking a *shay* - or in the corner of a mosque dispensing solomonic justice based on a very basic personal conception of equity[40].

Eventually, the way of adapting law to the social evolution, that, as we have seen, was the main feature of *fuqaha,* got confused with a presumed arbitrariness

[38] *Ibidem.*

[39] *Fuqaha* (sing. *faqih*) is a term derived from *fiqh.*

[40] L. Rosen, *Equity and Discretion in a Modern Islamic Legal System*, in *Law & Society Review*, 15:2, 1980 - 1981, p. 217.

typical of *qadijustiz*, as Max Weber called Islamic law[41]: the image of the legal system managed by the turbaned man started to shape western ideas on Islamic law.

II.4. Islamic law in western experience

No one interested in the study of Islamic law and its interpretation in the West can easily avoid the impact of the Abu Dhabi, ARAMCO and International Marin Oil cases. These arbitration awards deeply reflected the distorted image of *qadijustiz* described above, in demonstrating the obstinacy of western interpreters who denied that Islamic law could be sophisticated enough to be used in complex commercial disputes. On the other hand, these cases established themselves firmly in the minds of Arab lawyers and businessmen, resulting in the negative attitude of many Arab countries towards arbitration[42]. As Ibrahim Fadlallah remarks, these three awards led many Arab jurists to believe that the West had outrightly rejected their law. Further, while many decades have passed since the above mentioned awards, other recent decisions show that such historical misunderstandings have not been entirely left behind[43]. The three awards were delivered in the middle of last century and all shared the same perspective concerning Islamic law.

Sheikh Abu Dhabi v. *Petroleum Development Ltd*, was delivered in 1951 by Lord Asquith of Bishopstone. It involved an oil concession granted in 1939 by the Sheikh of Abu Dhabi (at that time, a British protectorate) to Petroleum Development Ltd, transferring to the latter the exclusive right to drill for mineral oil for seventy five years[44]. A dispute arose between the parties with respect to certain subsoil areas and an arbitration proceeding was started. The agreement did not provided for a specific governing law and Lord Asquith, the sole arbitrator, firstly referred to national law as primarily applicable, *i.e.* the law of Abu Dhabi, which was basically Islamic law[45]. However, Lord Asquith denied any useful role to such legal system. He stated: "*but*

[41] A. Vrolijk, J. Hogendijk, *O ye Gentlemen: Arabic Studies on Science and Literary Culture,* Leiden 2007, p. 467

[42] See K. Balz, *Islamic Law as Governing Law under the Rome Convention. Universalist Lex Mercatoria v. Regional Unification of Law,* in *Unif. L. Rev*., 37, 2001.

[43] I. Fadlallah, *Arbitration Facing Conflicts of Culture*, in *Arbitration International,* 25:3, 2009, p. 305.

[44] *Petroleum Development,* 18 I.L.R. 144, 1951, at 144-5, 147.

[45] At those times the U.A.E. had not a civil code, which was eventually adopted in 1985, and they basically had a Shari'a law system.

no such law can reasonably be said to exist. The Sheikh administers a purely discretionary justice with the assistance of the Koran; and it would be fanciful to suggest that in this very primitive region there is any settled body of legal principles applicable to the construction of modern commercial instruments"[46]. Lord Asquith's words precisely reflect the orientalist fantasy of the primitive middle-eastern region as perceived by"civilised" jurists, in which the Qur'an appears as merely a bizarre legal reference textbook. Indeed, Lord Asquith did not reject Abu Dhabi law on procedural grounds, by denying its applicability to the specific case, but rather he deprived Islamic law, on a deeper, theoretical level, of the possibility to be considered a law in itself.

The arbitrator in *Ruler of Qatar v. International Marine Oil Co. Ltd.* arrived at the same conclusion as Lord Asquith in *Petroleum Development Ltd*. In *Ruler of Qatar* it was clearly stated that Islamic law was believed to be inadequate[47]. While acknowledging that Islamic law was the proper *lex contractus*, nonetheless the arbitrator stated that it does not "*contain any principles which would be sufficient to interpret this particular contract*"[48]. In neither case did the arbitrators make any attempt to demonstrate the juridical reasons requiring a non-application of Islamic law: instead, their analysis was limited to a very general disdain for it. It is hardly surprising therefore that, to Islamic eyes, such experience was little more than an extension of the old capitulations system of extraterritorial courts administered by European powers[49]. The arbitrators did not have any knowledge of Islamic law: had they not been obfuscated by cultural prejudices, they would have however found in Islamic legal treaties comprehensive answers to the juridical questions posed by the arbitration cases[50].

In more recent times, a decision by a British court has shown that the tradition of hostility towards Shari'a is not yet overcome. The Court of Appeal was questioned about the legitimacy of a contractual clause, which provided that: "*subject to the principles of the Glorious Shari'a, this Agreement shall be governed and construed in*

[46] Petroleum Development, 18 I.L.R. 144, 1951, at 144-5, 147.

[47] C. J. Colon, *Choice of Law and Islamic Finance*, in *Texas International Law Journal*, 46:411, 2011, p.413.

[48] Ruler of Qatar v. International Marine Oil Co. Ltd., 20 I.L.R. 534, 1953.

[49] C. N. Brower and J. K. Sharpe, *International Arbitration and the Islamic World: The Third Phase*, in *The American Journal of International Law*, 97:3, 2003, p. 643.

[50] For an overview on Islamic contractual law, see, *inter alios,* S. E. Rayner, *The Theory of Contracts in Islamic Law,* London 1991.

accordance with the laws of England"[51]. The Court of Appeal, upholding the decision of the first instance court, qualified the clause as a nonbinding statement of purpose and rejecting the reference to Shari'a on the assumption that, *inter alia:* (i) *lex contratus* can only be a state law, according to the provisions of the Rome Convention; (ii) "*the principles of the Shari'a are not simply principles of law but principles which apply to other aspects of life and behaviour*"; and (iii) "*even treating the principles of Shari'a as principles of law, the application of such principles in relation to matters of commerce and banking were plainly matters of controversy*". The legal justification that the law of a contract can only be that of a country is purely technical and can be disputed. However, its analysis falls beyond the scope of this article[52]. Conversely, the implication of the assumptions under points (ii) and (iii) are of major concern with respect to our discussion. Indeed, these statement further illustrate that Islamic law has been prevented from being considered a "law" in the full meaning of the term, perceived as it is of have no clear division between the religious and the legal, and a system that is uselessly complex, contorted and discretionary ("*such principles in relation to matters of commerce and banking were plainly matters of controversy"*) compared to the clarity of western (common) law. However, despite some misleading ideas on the purely ethical nature of Islamic law, a significant distinction between legal and moral imperatives was clear to *fuqaha* since the beginning of Islamic legal science[53], and, in any case, as shown above the division between *ibadat* and *mu'amalat* is a founding principle in Islamic legal thought. Further, while the existence of different interpretations by scholars on single legal matters is true with respect to Islamic law, it is also a common feature in many legal systems where jurisprudential and scholarly evaluation of legal problems vary and develop constantly: nonetheless, the historical and cultural roots of the "*capitis deminutio*" of Shari'a are well settled.

[51] Beximco Pharmaceuticals Ltd v. Shamil Bank of Bahrain EC [2004] APPLR 01/28

[52] The Rome Convention has been replaced by the Rome I Regulation, adopted by the European Union in 2008. Under the Rome I Regulation, there appears to be more scope for the choice of a non-state law. See, *inter alia,* A. Zahid and H. M. Ali, *Shari'ah as a choice of law in international islamic financial contracts: Shamil Bank of Bahrain case revisited*, in *US-CHINA LAW REVIEW,* 10:27, 2013.

[53] See M. Baderin, *International Human Rights and Islamic Law*, Oxford 2003 p. 35

II.5. Islamic law in the interpretation of the Egyptian Supreme Constitutional Court: the veil case

A different approach to the modern interpretation of Shari'a is provided in the jurisprudence of the Egyptian Supreme Constitutional Court (SCC). After the period of post-war pan-Arabism and socialism, in 1980 the Egyptian government yielded to pressure from the so-called Islamist movements and amended the Constitution by codifying Shari'a as the primary source of legislation in the country. Article 2 was re-drafted to state that "*Sharia is the principal source of legislation*" and Shari'a was therefore given supremacy in the normative hierarchy of the Egyptian legal system[54]. The SCC found itself in the tricky position of harmonising a secular legal system, deeply influenced by French law[55], with the principles of Islamic Shari'a (*mabadi al-shari'a)* that had set the parameters of constitutional validity of Egyptian legislation[56].

The issue at stake was even more complex because, as highlighted above, since about a century Islamic law had not been a living legal system for approximately a century. It was, therefore, detached from its institutions and practices and the same judges of the constitutional court were not educated as traditional *qadis*. In spite of that, the SCC had to struggle in order to defend - and make acceptable to traditionalists - its prerogative in being the sole authority entrusted with the power to ascertain the "islamicity" of the legal rules. The dialectic, proper of Egyptian society, between secularists and Islamists deployed itself on the field of constitutional confrontation over Article 2 and the SCC was able to cleverly paint itself as neutral arbiter[57]. The spread of principles of theocratic governance in the public debate is by no means a phenomenon confined to Egypt,

[54] The current version of the Egyptian Constitution states "*Islam is the religion of the state and Arabic is its official language. The principles of Islamic Sharia are the principle source of legislation*".

[55] As known, the prime author of the Egyptian Civil Code was the jurist Abd El-Razzak El-Sanhuri, undisputedly the master re-builder of Arab law in the twentieth century, who received assistance from Dean Edouard Lambert of the University of Lille. Between 1921 and 1927, Sanhuri had pursued his doctoral studies at the University of Lyon under the supervision of Lambert himself. This cultural diversity was reflected in the drafting of the Egyptian Civil Code.

[56] See K. Yefet, *Lifting the Egyptian veil: a Constitutional road map to female marital emancipation in the Islamic world*, in *The Family in Law*, 5:87, 2011, p. 115.

[57] C. B. Lombardi, N. Brown, *Do Constitutions Requiring Adherence to Shari'a Threaten Human Rights? How Egypt's. Constitutional Court Reconciles Islamic Law with the Liberal Rule of Law*, in *American University International Law Review,* 21:3, 2006, p. 393.

since the resurgence of religious fundamentalism is common to different geographical areas[58]. In this context, the approach of the SCC to the constitutional interpretation of the principles of Shari'a is considerably interesting, as demonstrated by the landmark decision case No. 8 of Judicial Year 17, decided on May 18 1996, commonly known as the "veil case"[59].

On May 18 1996, the SCC, under the Presidency of Counselor Dr. 'Awad el-Murr, and with the membership of seven other chief justices, including the President of the Commissioners Body and the secretary general, issued a judgement in a case referred to it by the Administrative Court. The case had been brough by Mahmoud Sami 'Ali Wasil, in his capacity as *wakil* (guardian) of his two daughters, Mariam and Hajir, against the Education Minister, the director of Alexandria's Education Board, and the Isis's Manger Girls High School in *al-Siyuf*. The plaintiff resorted to the SCC in order to halt the implementation of the decision by the High School to bar his daughters from admission. In particular, he challenged the constitutional legitimacy of decision No. 113 1994 of the Minister of Education, which forbade schoolgirls from wearing *niqab* in public schools[60], by asserting that it was in violation, *inter alia,* of Article 2 (respect of the principles of Shari'a), Article 41 (on preservation of personal freedom) and Article 53 (prescribing equality in public rights and duties) of the Egyptian Constitution.

The ministerial decision had angered Islamists and therefore the matter was politically very sensitive[61]. The SCC, however, rejected the plaintiff's claim, and in so doing provided an interesting insight into its methodology of interpreting Article 2. First of all the SCC maintained that Article 2 entrusted it with "*the right [to perform its*

[58] An interesting point of view on such matter can be found in R. Hirschl, *Constitutional Courts Vs. Religious Fundamentalism: Three Middle Eastern Tales*, in *Texas Law Review, Forthcoming U Toronto, Public Law Research Paper* 04:08, 2004.

[59] For Arabic speakers, a report of the decision can be found at the website of the Supreme Constitutional Court http://tashreaat.com/Pages/default.aspx. A translation of the ruling is provided by N. Brown, C. Lombardi, *The Supreme Constitutional Court of Egypt on Islamic Law, Veiling and Civil Rights: An Annotated Translation of Supreme Constitutional Court of Egypt Case No. 8 of Judicial Year 17 (May 18, 1996)*, *American University International Law Review,* 21: 3, 2006.

[60] The decision defined the form of school uniform in its color, shape and composition. It allowed girls to wear the *hijab* while outlawing the *niqab*.

[61] An interesting insight on the political and cultural background is offered by G. Abdo, *No God but God: Egypt and the triumph of Islam,* Oxford 2000.

own] ijtihad to facilitate the affairs of the people and reflect what is correct from among their customs and traditions, so long as they do not contradict the universal goals of their Shari'a": a court of jurists trained in secular law affirmed, intriguingly, that the power to interpret Islamic law is vested only in the juridical authority demanded to do so by the Constitution of the state. This was a remarkable theoretical shift with respect to the traditional idea that - as seen before - the state should have no role in matters of Islamic law and that the normative production was a privilege of '*ulama'*[62]. The cultural diversity of Egypt's legislative history also exerted its influence on the way the SCC performed *ijtihad* and resorted to the principles of Shari'a.

Indeed, the SCC initially adopted the classic distinction between scriptural commands that are entirely unambiguous and certain with respect to their meaning (*qat'i*), and commands that are only presumptively correct with respect to their meaning (*zanni*)[63]. As such, only a small number of scriptural commands could be considered to be certain with respect to both their authenticity and meaning (*qat'ifi thubut wa-dalalatiha*) while most of the remaining were not able to reach such an epistemological foundation. For the commands unequivocally certain regarding their authenticity and meaning, *ijtihad* is forbidden, as they contain fixed principles is the breach or amendment of which is *haram* (forbidden). The Court began with the Qur'anic commands dealing with veiling and highlighted that there was no shared view among jurists in the past about whether a precise requirement for women was to cover their face and their hands[64]. Therefore it inferred that, while it was unambiguous that God had commanded women to "cover" some parts of their bodies, there was no clear indication about which parts of a woman must be covered and, consequently, it could be said that women under Islamic law have no definitive requirement for their dress[65].

---

[62] See, *inter alios,* W. Hallaq*, The Origins …,* Cambridge 2005, p.181.

[63] W. Hallaq, *A history of islamic legal theories*, Cambridge 1997, p. 40 and ff.

[64] N. Brown, C. Lombardi, *The Supreme Constitutional Court*…, cit., pp. 452-54.

[65] "*cloth style is not fixed by nusus maqtu' biha fi thubutiha aw dalalatiha (theological scripts that have been dogged to be definite on its authenticity/meaning). Consequently, women's attire is a debatable issue in which ijtihad never ends, as they remain open within a secure, general framework defined by the Qur'anic provisions (Qur'an 24:31 & 33:59)"* see M. Arafa, *The prohibition of wearing veil in public schools in Egypt: an analysis of the Egyptian Supreme Constitutional Court jurisprudence*, in *Revista de Investigações Constitucionais*, 4:1, 2017, pp. 69-85.

Accordingly, the ministerial decision banning face veils could not be considered contrary to Shari'a since it did not contravene any of its explicit provisions; the Ministry had ruled in a debatable matter, where the *wali al'amr* (the political leader) "*has the authority (right) to develop his/her own ijtihad to assist the individuals' affairs and redirect what is accurate from the surrounding traditions, as long as they do not contradict the Shari'a maqasid (universal spirit)*"[66]. As for the SCC, therefore, alongside the clear scriptural commands, the *maqasid al-Shari'a*[67] also fell within the scope of Article 2 as part of the "framework" in which the development of legal norms has to take place. The classic theory of *maqasid* identified five ultimate goals of Shari'a, *i.e.* religion, life, reason, property, and honor/modesty. In consideration of *maqasid*, the SCC directly investigated the specific goals underlying the recommendation to veil and found that such command "*must manifest her modesty, [must] facilitate her legitimate contribution to what the affairs of her life require and [must] protect her from debasement*"[68]. Thus, the Court analysed the Minister's ban on veiling in schools in light of the "promotion of modesty" and concluded that not having the face veiled cannot be tantamount to immodesty. Nonetheless, despite compliance with *maqasid al-shari'a* the Court affirmed that any law should be also consistent with the "general goals" (*maqasid al 'amma)* of the Shari'a, that is to say the development of human welfare. Interestingly, the SCC, arguing *a contrario*, found that imposing an entire veiling would create indirect and noticeable social harm, since a woman "*must perform tasks that will involve her mixing with others. It is therefore unimaginable that life in all its aspects would surge around her while she would be specifically required to be an apparition clad only in black or the like*"[69].

Case No.8 of 1996 is a landmark decision of the Egyptian Supreme Constitutional and represents one of the most significant judicial rulings on the interpretation of Shari'a clauses in modern constitutional states. At the same time it

[66] M. Arafa, *The prohibition of wearing veil*…, cit. p. 78.

[67] The term *maqasid al shari'a* has been defined by Y. Auda as *"a system of values that could contribute to a desired and sound application of the Shari'ah"*. This concept has been employed as a hermeneutical tool in pre-modern Islamic law and it has been brought to an articulated level of analysis by imam Abu Ishaq al Shatibi (720-790 a.h./1320/1388 a.d.) and by the renowned philosopher A. al-Ghazālī. It is based on the idea that Islamic law is purposive in nature, that is, to mean that the law is endowed with specific goals to accomplish.

[68] N. Brown, C. Lombardi, *The Supreme Constitutional Court*…, cit, p. 453

[69] *Ivi*, p. 454.

has sparked an animated debated on the technique of interpretation adopted by the Court. We can argue that such approach is to a noteworthy extent distant from the kind of *ijtihad* as put into practice by classical *fuqaha.* Indeed, the SCC's contention that it was up to the SCC itself, through its analysis of Article 2 of the Constitution, to survey not simply the application but also the definition of the principles of Shari'a, would hardly have been admissible in classical times whereby the derivation of normative rules was the prerogative of jurists belonging to traditional *madhabs* and not of the public power[70]. Furthermore, the SCC established its own interpretation of the concept of *ijtihad*, regardless of the limits on the exercise of *ijtihad* discussed by classical sources[71], and irrespective of the contradictory opinions on the matter in Islamic jurisprudence. Using the words of F. Vogel, "*ijtihad may be no more than a careless use of words or conceptions, especially since they are usually bolstered by purely utilitarian arguments for assigning power to decide to the state… A key element so far is devotion to fixed but highly general principles either established by a clear text or by their pervasive influence on fiqh… coupled with an openness to a freewheeling ijtihad even when that ijtihad diverges entirely from the views, even the consensus, of past scholars."*[72]

The SCC's methodology as applied to the case also blurs the distinction between classical views on Islamic law and the modernist theory of utilitarian *neo-ijtihad* promoted by Rashid Rida. If the distinction between clear and ambiguous verses goes back to the *usul-ul-fiqh* treaties, the type of intuitive consequentialist reasoning that the SCC seems to embrace would have been fiercely rejected by Shafi'i[73]. Equally, the reference to the "the general principles" of Shari'a and the corrective utilitarian method used as a tool to modify rules recognized by classical Islamic scholars if such rules are in contrast with the vague ideal of the "general

[70] M. Q. Zaman, *The Caliphs, the Ulama, and the Law: Defining the role and function of the caliph in the early 'Abbasid period*, in *Islamic Law and Society*, 4:1, 1997, p.2.

[71] For a really acute overview on the issue refer to W. Hallaq, *Was the Gate of Ijtihad Closed?*, in *International Journal of Middle East Studies*, 16:1, 1984, pp. 3-41.

[72] F. Vogel, *Conformity with Islamic Shari'a and Constitutionality Under Article 2: Some Issues of Theory, Practice, and Comparison,* in E. Cotran and A. O. Sherif (ed.), *Democracy, the Rule of Law and Islam*, Leiden 1999, pp. 543 - 544.

[73] C. B. Lombardi, N. Brown, *Do Constitutions Requiring Adherence*…, cit., p. 430.

benefit of the people" does not seem completely in line with Islamic modernist theories[74].

Ultimately, we can identify that the SCC proposed a new approach to Islamic legal interpretation - derived from its peculiar reinterpretation of competing approaches to Islamic legal theory. Using the words of M. Arafa, it is possible to affirm that "*the Court involved in a self-sufficient functional interpretation of both the Qur'an and authentic Sunnah … established its specific interpretation of ijtihad irrespective of the opposing attitudes in Islamic jurisprudence, and its classical techniques, and thus, it situated itself as a de facto interpreter of divine ideals and legal guard on the Sharie'a values to avoid any extreme ideology or radical philosophy*" with the purpose of "*advancing a moderate (liberal), rights-protecting interpretation of Sharie'a",* and offering us one of many possible perspectives on Islamic constitutionalism[75].

II.6. The role of Shari'a in GCC Countries

II.6.1. Constitutional relevance of Shari'a as a source of law

The actual relevance of Islamic Shari'a within the legal systems of Muslim countries is closely related to the role assigned to it by the basic law of each state[76]. With specific reference to the constitutions of the GCC Countries, despite the fact that Islam is identified as the state religion in all of them[77], the exteht to which Islamic law plays a role in each varies greatly[78].

---

[74] See Johansen B., *Supra-Legislative Norms and Constitutional Courts: The Case of France and Egypt,* in E. Cotran and A. O. Sherif (ed.)*, The Role of the Judiciary in the protection of Human Rights*, , London; Boston 1997, pp. 369 - 370.

[75] M. Arafa, *The prohibition of wearing veil…*cit., p. 79.

[76]See L. al-Rimawi, *Relevance of Shariah as a legislative source in a modern Arab legal context,* in *The Company lawyer*, 32, 2011, p. 59 ff. Al Rimawi identifies the following categories: Shari'a as an overall constitutional source (Saudi Arabia); Shari'a as the principal source of legislation (Oman and Egypt); Shari'a as one of the legislative sources (Kuwait, Bahrain, Qatar); countries accepting Islam as the religion of the state and nevertheless recognizing that the temporal law shall be the expression of the will of the people (*e.g.* Jordan, Morocco, Tunisia); Shari'a plays no role as a constitutional source (*e.g.* Lebanon).

[77] "*The Kingdom of Bahrain is…Islamic Arab State…"* (art. 1a) Bahraini Constitution); "*Qatar is an independent sovereign Arab State. Its religion is Islam"* (art. 1 Qatari Const.); "*the religion of the State is Islam"* (art. 2 Kuwait Const. and art. 2 of Omani Const.); "*Islam shall be the official religion of the Union"* (art. 7 UAE Const.); The Kingdom of Saudi Arabia is a sovereign Arab Islamic state with Islam as its religion (art.1 Saudi Const). For a practical analysis of the role and influence of Shari'a within Islamic constitutional models please refer to M. Papa, L. Ascanio, *Shari'a. La legge sacra dell'Islam*, Bologna 2014.

[78] Da. I. Ahmed and M. Gouda introduced "the Islamic Constitution Index" which consists of thirty questions to be answered in order to identify the degree of Islamization of the OIC Countries' Constitutions,

A first distinction should be drawn between Saudi Arabia and other GCC states. Among GCC countries, Saudi Arabia assigns the most prominent role to Islamic Shari'a. This can be immediately inferred from the words illustrated on its flag: "*There is no God but Allah, Mohammed is the Messenger of Allah".* Art. 1 of the Saudi Constitution states that "*the Kingdom of Saudi Arabia is a sovereign Arab Islamic state with Islam as its religion; God's Book and the Sunnah of His Prophet, God's prayers and peace be upon him, are its constitution*…". The basic law of Saudi is thus a compound of Qur'an and Sunnah. As a result, Islamic Law is fully entrenched in every aspect of the state and its citizens' lives. In other GCC Countries, the application of Islamic law is diluted with codification and principles inherited by Western models. Their basic laws still attribute a certain degree of relevance to Shari'a, making it either "a" or "the" main source of legislation[79]. As such, these countries have had to balance two, often opposing, forces, from Western social and legislative systems on one side and the need for preservation of Islamic values on the other side[80]. The prime reason for this dichotomy can be traced back to the extraterritorial jurisdiction exercised by the British Crown within the Gulf region.

Indeed, the British presence has been of particular interference in Kuwait, Bahrain, Qatar, in the area today corresponding to the UAE[81] and, to a lesser extent, in Oman. Contrarily, Saudi Arabia has never been under the dominance of any western country[82]. The above-mentioned conflict between modernisation (i.e. "Westernisation") and Islamisation is particularly clear in the United Arab Emirates. Therefore the following paragraphs will take the UAE and Saudi Arabia as examples

see D. I. Ahmed, M. Gouda, *Measuring Constitutional Islamization: the Islamic Constitutions Index*, in *Hastings Int'l & Comp. L. Rev.* 1, 2015, pp. 43-46.

[79] See C. B. Lombardi, *Constitutional provisions making Sharia "A" or "The" chief source of legislation*, in *American University Law Review*, 28:3, 2013, pp. 737 ff.

[80] Preservation of Islamic values requires the Islamic Ummah to promote human well-being following a pattern which is compliant with Islamic ethics. The difficulty lies in balancing the application of Shari'a with the opportunity to benefit from the progress achieved. Consequently, Arab countries are called on to gradually replace social and economic elements that are not religiously acceptable in favour of Islamic systems. In this respect, also for an overview on the Islamic banking systems, please see G. M. Piccinelli, *I principi e gli istituti finanziari islamici: alcuni aspetti giuridici relativi alle banche islamiche*, in *Oriente Moderno Nuova Serie,* 68:1 (1988), pp. 6-7. For a wide understanding about the development of modern Islamic jurisdictions see F. Castro, *Il modello Islamico*, Torino 2007.

[81] Then the Trucial States.

[82] W. M. Ballantyne, *The New Civil Code of the United Arab Emirates: A Further Reassertion of the Shari'a*, in *Arab Law Quarterly*, 1:3, 1986, pp. 245 ff.

of the differing extent to which Islamic Shari'a has relevance within Muslim countries and with specific reference to the GCC states.

II.6.2. *The courts'system in the United Arab Emirates*

In 1892 the rulers of the Emirates and the British political residents signed a Treaty that would change the fate of jurisdiction, procedure and substantive law of the Emirates of Abu Dhabi, Dubai, Sharjah, Ajman, Fujairah, Ras Al-Khaiman and Umm al-Quwain. The Treaty had the purpose of committing Britain to protect the Emirates from military attacks in exchange for the Emirates' commitment not to initiate any diplomatic relationship with other governments other than the British. Furthermore, Britain was given jurisdiction on the external affairs of the Emirates, whilst local rulers kept jurisdiction on local and domestic affairs. To paraphrase, Britain had established a protectorate on Emirates that would last until 1971. In 1945, the British government through its Political Resident, entered into an agreement with the Trucial sheikhs according to which the latter ceded their jurisdiction on British subjects, foreign non-Muslim subjects and British protected persons. Obviously these extraterritorial British courts did not apply the Islamic law. They rather applied the Indian Codes and the King's Regulation enacted by the Political Residents in the Gulf[83]. Local rulers maintained jurisdiction on cases involving native-citizens. These disputes were originally referred to sheikhs and local rulers who applied rules derived from customs, Islamic Shari'a and the common sense of justice.

Throughout the first decades of the XX century, Shari'a courts started to spread in each Emirate. These courts had been created as a response to the massive migrations towards the coastal Cities of the Emirates. The migratory phenomenon resulted in an increase of disputes related to family, property and criminal law, and involving people who did not have any local tribal links. These disputes were not,therefore, referable to Sheikhs or rulers of local tribes. The Shari'a courts applied the Islamic law, but they did not follow any specific procedural rule. They

[83] B. S. Butti, *The development of the UAE legal system and unification with the judicial system*, in *Arab Law Quarterly*, 11:4, 1996, pp. 116 ff.

had competencies on matters of personal status and criminal law. Their decisions could be rejected by the parties and referred to the local ruler who had the power to assign the case to a second judge. This ruling could also be refused since the parties, where convinced of the unfairness of it, had the right to address the matter to the Islamic authority of other countries[84]. Other than that, merchants and pearling communities had their own court system which was largely based on customary and non-written laws[85]. This brief consideration of its historical background provides some indication of the multi-layered legal system within the UAE.

In fact, the UAE Constitution sets out a courts system with a twofold structure: the Federal courts and the local courts. Each Emirate has its own local judicial system, but not all of them adhere to the Federal one since Dubai and Ras Al-Khaimah keep their autonomous jurisdiction in matters that are not constitutionally assigned to the Federal Supreme Court. Each Emirate has local courts of first instance and courts of appeal. In Sharjah, Al Fujaira, Umm al Quwain, Abu Dhabi and Ajman, which are part of the Federal judiciary, these local courts are complemented with Federal courts of first instance and appeal. As third instance courts, the local courts refer to the Federal Supreme Court, while the others have established their local Courts of Cassation. However, the Federal Supreme Court holds exclusive jurisdiction in the whole country as for the matters listed under art. 99 of the UAE Constitution[86]. Each level of court is divided into circuits on the grounds of its specialty. Such divisions can be broadly classified as distinguishing amongst civil, commercial, criminal and Shari'a courts[87]. Furthermore, free trade zones have been established in every Emirate of the state to conduct financial activities[88]. Amongst them, and particularly relevant in terms of legal and economic development, is the DIFC which established its autonomous courts system. The DIFC is entirely ruled by international standards and common law principles.

[84] Usually Egypt, Mecca or Qatar.

[85] *Ibidem.*

[86] *E.g.* disputes between member Emirates, examination of the constitutional legality of laws, legislation and regulation, interpretations of Constitutional provisions.

[87] See art. 102 UAE Const.

[88] Art.1, Federal Law No.8/2004 concerning Financial Free Zones.

II.6.3. Relevance of Islamic Shari'a as applied before the UAE courts

Islamic law comes into consideration before courts at two levels: as a basic principle of the UAE legal system and as a relevant law in personal status cases involving UAE Muslim citizens.

(A) Islamic Shari'a as a general principle

Art. 7 of the UAE Constitution states that "*Islam is the official religion of the Federation and the Muslim Shari'a is a main source of its legislation*[89]".

This provision primarily refers to legislation: no laws or regulations shall be enacted which are not consistent with the principles of Islamic law. Further, courts shall refer to Islamic Shari'a in the process of interpretation of laws and in circumstances where a particular matter is not specifically addressed by any Federal or local law. In this regard, arts. 1-3 of the UAE Federal Law No.5/1985 on civil transactions[90] lay down the principles of application of the law. According to these provisions, Islamic doctrine and rules shall be followed to understand, construct and interpret legislative texts. Islamic Shari'a shall be taken into consideration by courts in ruling on matters that do not fall under any legal provision. More precisely, in the first instance, the judge shall look at the most appropriate solution within the Maliki or the Hanbali doctrines. If a solution cannot be found there, then the Shafi or the Hanafi doctrines shall be referred to. However, special rules have been introduced in the area concerning commercial transactions[91]. Undoubtedly, this is the field where the above mentioned conflict between modernisation and the safeguarding of Islamic doctrine arises the most.

It would be unrealistic to expect Islamic Countries, and Muslims more generally, to be completely excluded from the economic order. Nonetheless, the constant demand in the last decades for an economic order which is in line with the teaching of Islam has posed a considerable theoretical and practical challenge,

[89] http://www.elaws.gov.ae/EnLegislations.aspx

[90] *i.e.* the UAE Civil Code.

[91] "*The civil Transactions in the United Arab Emirates State shall be subject to the law, whereas the commercial transactions remain subject to the laws and regulations applicable in their regard, pending the issuance of the Federal Commercial Law*" (Art. 1 of the Civil Code's Preamble).

questioning the ability of modern Islamic countries to align their legal systems with Shari'a principles while preserving a competitive economic environment[92]. Evidence of this conflict can be found in the charging of interest for delayed payment[93], regarding which the Junatta Bank case is of particular relevance.

(B) Charging of interest in commercial transactions versus civil transactions: the Junatta Bank Case

The Junatta Bank was one of the several banks filing claims before the Abu Dhabi First Instance Court between 1979 and 1980[94]. The financial institutions sought payment of certain debts together with the related interest. The claim was based on Articles 61 and 62[95] of the Abu Dhabi Law of Civil Procedures, which allowed the courts to charge interest by the rate stated in art. 62 in respect of the awarded sum and until the final payment. Despite these provisions, the First Instance Court held that no interest was due to the plaintiff. Indeed, payment of interest would have been contrary to the Islamic prohibition of *riba*. As a consequence, the First Instance Court was prevented from applying Articles 61 and 62 of the Abu Dhabi Law on the grounds of Art. 7 of the UAE Constitution and Art. 75 of the Federal Law No.10/1973[96]. The Junatta Bank filed an appeal against

[92] From this point of view, Islamic Countries have established economic orders, and particularly banking systems, in compliance with Islamic doctrine. Some Islamic contemporary authors maintain that the state is supposed to intervene within banking system to remove *riba* and unlawful gains. The majority of Islamic doctrine finds the solution in a profit-sharing system to replace interest. However, there is also Islamic thinking which refuses existing solutions and asks Muslim economists to persist in their endeavors to find a path towards economic development that is fully Shari'a-compliant. See A. N. Saleh, *Unlawful Gain and Legitimate Profit in Islamic Law: Riba, Gharar and Islamic Banking,* Cambridge 1986.

[93] It is appropriate to underline that the distinction between *riba al-nasia* and *riba al-fadl* seems to have lost most of its relevance. Any unjustified earning, either for the creditor or the debtor, for the buyer or the seller, has to be considered as in contradiction with the principles of Islamic Shari'a, G.M. Piccinelli, *I principi e gli istituti*…, cit., p. 7 and ff..

[94] A. Al-Muhairi, *The Position of Shari'a within the UAE Constitution and the Federal Supreme Court's Application of the Constitutional Clause concerning Shari'a*, in *Arab Law Quarterly*, 11:3, 1996, pp. 234 ff.

[95] Art. 61: "*The Court may in determining the interest on an adjudged amount order the calculation of the interest from the date such amount fell due or any later date until the date of payment or any prior date. It may further charge interest on the costs of the claim or any part thereof."*

Art. 62: *1 "Interest rate determined by the court shall not exceed the price accepted between the parties or dealt with such in any stage before instituting the proceeding.*

2 If the parties did not agree on the interest rate, the court may determine the rate, provided that it shall not exceed 12 percent in commercial formalities and 9 percent in the non- commercial formalities.

3 In all cases, the benefit shall not exceed the amount of debt origin."

[96] "*The Supreme Court shall apply the provisions of the Islamic Shariah, Federal laws and other laws in force in the Member Emirates of the federation conforming to the Islamic Shariah. Likewise, it shall apply those rules of Custom on those*

the First Instance decision, maintaining that payment of interest is legitimate where it is predetermined by agreement. Further, the appellant argued that it is not for the First Instance Court to decide whether law provisions violate the Constitution, which is instead a matter for the Supreme Court[97].

The Court of Appeal maintained that legislation, regulations, orders and other measures belong to the lower rank and as such they are subject to constitutional control. Quite the contrary, Islamic law belongs to a higher type of law which even the Constitution itself should follow, hence it is not subject to the constitutionality control. Therefore, the appeal was rejected on the grounds of Islamic Shari'a, according to which *riba* is a grave sin. The issue eventually reached the Constitutional Chamber of the Supreme Court under request of the Civil Cassation Chamber in order to evaluate the constitutional legitimacy of the aforementioned Articles 61 and 62. In upholding the validity of the examined provisions, the Supreme Court passed the buck and did not address the question of conflict between Islamic law and secular law. The ruling was based on the following formal considerations:

- Art. 148 of the Constitution states that all matters stated by laws in force at the time when the Constitution became effective[98] shall continue until they are amended or cancelled;

- both Arts. 7 and 150 of the Constitution address the legislator to replace laws which are not consistent with the Constitution or with Shari'a. The issuing of laws is not a judiciary competence;

- the purpose of the maximum interest rate introduced by Art. 62 of the Abu Dhabi Law of Civil Procedures is to protect the debtor. Therefore where payment of interest is originally laid down by the parties' agreement, its validity may not be questioned. The Court only has the power to reduce a rate which exceeds the legal limits.

---

principles of natural and comparative law which do not conflict with the principles of Shariah" (art. 75, Federal Law No. 10/1973.

[97] The Supreme Court is competent to examine the constitutional legality of laws, legislation and regulation under request of any state court during a case. The ruling is only binding on the case under which the constitutional challenge arose (art. 99.3 UAE Const.)

[98] As it was the case of the Abu Dhabi Law No. 3/1973.

It was only a matter of time before the Federal Supreme Court was asked to render a final judgment on Articles 61 and 62. Unavoidably, not only juridical but also economic considerations were part and parcel of the ruling. With decision No. 14/9 rendered on 28 June 1981, the Court declared the constitutional consistency of Arts. 61 and 62 of the Abu Dhabi Law. The ruling is final and binding *ex* Art. 101 of the Constitution. The decision was based on the concept of necessity or *maslaha*. Based on the analysis of the general *modus operandi* of financial institutions, the Court held that it was vital for banks to charge simple interest on banking operations. Since the UAE economy and social development largely rely on these institutions, securing their competitiveness was crucial for the economic existence of the UAE as well as for the wellbeing and benefit of the people of the UAE[99]. Possibly analogous economic considerations were taken into account by the Federal legislator[100]. Indeed, art. 714 of the UAE civil code (Federal Law No. 5/1985) renders void any provision which aims to introduce the payment of a benefit that exceeds the requirements of a loan contract, with the sole exception of a guarantee on the borrower's right[101]. However, as far as traders and commercial activities are concerned, provisions from the Commercial Code (Federal Law No.18/1993) will apply. Therefore, payment of interest can be validly stipulated within the contract.

In this regard, Art. 76 of the Commercial code states that "*A creditor is entitled to receive interest on a commercial loan as per the rate of interest stipulated in the contract…".* In addition, Art. 77 states that "*where the contract stipulates the rate of interest and the debtor delays payment, the delay interest shall be calculated on basis of the agreed rate until full settlement".* Art. 88 clarifies that where the debtor delays payment of the sum of money which is the subject-matter of the obligation, then he shall pay the interest fixed under the above-named Arts. 76 and 77 as a compensation for delay. Under these circumstances, damage is presumed without the need for the creditor to prove

[99] H. Tamimi, *Interest under the UAE law and as applied by the Courts of Abu Dhabi,* in *Arab Law Quarterly*, 50, 2002, pp. 50-51.

[100] In 1992, when the civil procedure code entered into force, it repealed all previous laws, decrees, orders, measures and decrees concerning civil procedures. Yet the provisions pertaining to interest remained in force as specifically stated under Art. 1 of the code itself.

[101] See also Art. 204: *"If the object to be disposed of or its consideration is an amount of money, its quantity and kind must be determined. The currency fluctuation at the time of payment is immaterial*".

it[102]. On the grounds of the above-mentioned provisions, the Dubai Court of Cassation[103] allows for the application of any interest rate agreed by the parties in commercial transactions. The Court also denies having any power to minimize the amount clearly resulting from the agreement, as long as the contract is not contrary to public policy. In the specific case, the legitimacy of a 15 per cent rate was declared since it was clearly provided for by the agreement in case of delay in the debt payment, and the terms of delay were clearly stated. The *riba r*egulation in the UAE is a clear example of the practical consequences resulting from the constant endeavour of jurists to find a balance between the need for modernization and the need for safeguarding Islamic identity.

(C) Relevance of Shari'a in *status personae* cases: divorce of Muslim citizens

Personal status cases are handled by Shari'a courts where they involve UAE Muslim citizens. These courts apply Islamic Shari'a, giving a prominent role to the Maliki jurisprudence, and as codified by the law of the state. Personal status law is codified under Federal Law No. 28/2005, which was enacted to implement the general principle stated under Art. 15 of the Constitution: "*the family shall be the basis of society. Its support shall be religion, ethics and patriotism. The law shall guarantee its existence and shall safeguard it and protect it from corruption*". The above-mentioned law applies to UAE Muslim citizens, while non-Muslim citizens are subject to special provisions applicable to their community or confession. Foreigners are subject to the personal status law as long as they do not choose a different law which is applicable according to the provisions of private international law.

Law No. 28/2005 is largely based on Islamic Shari'a and its purpose is to regulate matters concerning family law[104] . As an example, Art. 98 (3) states that "*Prior to deciding disunion between spouses, the court has to endeavour reconciliation*". In furtherance of this purpose, spouses will be received by the "Moral and Family guidance", which will try to reconcile the parties as prescribed under Surah An-Nisa

[102] Art. 89 Comm. Code.

[103] Case No. 261/96, reported in R. Price, E. al-Timimi, *United Arab Emirates Court of Cassation Judgments,1989-1997*, Alphen aan den Rijn 1998.

[104] Such as conditions of a valid marriage, spousal rights and obligations, and divorce.

(4:35)[105]. Another clear example can be found under the Second Book of the mentioned law concerning dissolution of contracts of marriage. Divorce can be obtained through repudiation, agreement between the parties or judicially. As far as the repudiation is concerned, Art. 100 states that "*Repudiation takes place by the husband or his proxy, designated in a special power of Attorney or the wife if her husband gave her complete autonomy of herself".* Under Art. 104, repudiation can be either retractable or non-retractable. The first one does not put an end to the marriage contract until the elapse of the *Idda*[106]. Repudiation is retractable, unless it has "*occurred for the third time or before sexual penetration*"[107]. The non-retractable repudiation may occur with or without the right to remarry. In the first case, the divorcee can only return to the man who divorced her after a new marriage and a new dowry. In the second case, the divorcee can only return to the man who divorced her after expiry of the *Idda* from another husband who had carnal knowledge of her pursuant to a valid marriage[108]. After divorce, the judge issues an order fixing the woman's alimony during the *Idda'*[109].

In application of Islamic law, and particularly the doctrine of Imam Malik, the Federal Supreme Court denied a divorcee the custody of her children[110]. The woman had been convicted by the Ajman criminal court[111] for her marital infidelity

---

[105] "*And if you fear dissension between the two, send an arbitrator from his people and an arbitrator from her people. If they both desire reconciliation, Allah will cause it between them. Indeed, Allah is ever Knowing and Acquainted [with all things*]".

[106] It is a waiting period that needs to expire before a widow or a divorced woman can get married to a man (who is not her previous husband in case of divorced woman).

[107] Art. 105.

[108] Surat Al-Baqarah (2:229, 230, 232):

"*Divorce is twice. Then, either keep [her] in an acceptable manner or release [her] with good treatment…";*

"And if he has divorced her [for the third time], then she is not lawful to him afterward until [after] she marries a husband other than him. And if the latter husband divorces her [or dies], there is no blame upon the woman and her former husband for returning to each other if they think that they can keep [within] the limits of Allah . These are the limits of Allah , which He makes clear to a people who know";

"And when you divorce women and they have fulfilled their term, do not prevent them from remarrying their [former] husbands if they agree among themselves on an acceptable basis. That is instructed to whoever of you believes in Allah and the Last Day. That is better for you and purer, and Allah knows and you know not".

[109] Surat 2:240-241: "*And those who are taken in death among you and leave wives behind - for their wives is a bequest: maintenance for one year without turning [them] out. But if they leave [of their own accord], then there is no blame upon you for what they do with themselves in an acceptable way. And Allah is Exalted in Might and Wise"; "And for divorced women is a provision according to what is acceptable - a duty upon the righteous*".

[110] Ruling on Appeal before Federal Appeal Court, No. 623/2013.

[111] Case No. 2515/2012.

(*zina*)[112]. Indeed, she had established an illegal relationship with a man, allowing him into her house while her husband was away. The husband divorced her on the grounds of the prejudice and harm derived from her unfaithfulness[113]. He asked for the Judge to refuse her custody of the children because she did not satisfy the conditions prescribed under Art. 143. The Federal Supreme Court held that the woman was not suitable for custody. The Court held that amongst the various conditions necessary for the custody of children, the custodian must have honesty, integrity and good character since such will have an impact on the ethics and education of the children. The claimant[114] did not possess such features since she committed a crime against her husband by letting a strang man enter their home without her husband's permission. It caused a prejudice of the moral principles of the family, which is a violation of the principles of the UAE society and its Islamic customs. Furthermore, based on the Maliki doctrine and on the grounds of the harm she caused to her husband, the wife was deprived of the right to receive the amount of the dowry that was still unpaid.

II.7. The Saudi Arabian legal system

The primary role of the Saudi Arabian state is to enact God's will. Indeed, Art. 23 of the Saudi Basic Law states that "*The state protects Islam; it implements its Shari'ah; it orders people to do right and shun evil; it fulfills the duty regarding God's call*". It is a duty of the state to regulate the daily lives of its citizens, their social conduct and their religious activity to ensure that they refrain from moral wrongdoing[115]. The

[112] *Zina* is one of the *hudud* offences against sexual morality. Islamic jurists agree on the definition of zina as "a sexual intercourse between a man and women outside a valid marriage (*nikha*), the semblance (*shubha*) of marriage, or lawful ownership of a slave woman (*milk yamin*)". Evidence of zina can be given either by confession or through four eye-witnesses who must have witnessed the intercourse. However, with the exception of this core of rules, Islamic schools require for different standards of proof on zina. As an example, only Maliki and Shafi'I jurists accept one confession as a satisfying proof of the offence, whilst other schools require for confession to be pronounced four times. (Z. Mir Hosseini, *Criminalizing sexuality, zina laws as violence against women in Muslim context*, in Ziba Mir Hosseini, Vanja Hamzic, *Control and Sexuality: The Revival of Zina Laws in Muslim Contexts*, London 2010, pp.11-12).

[113] Art. 117.

[114] Claim was filed by the woman.

[115] An interesting analysis on this aspect may be found in J. L. Brand, *Aspects of Saudi Arabian Law and practice*, in *Boston College International and comparative law review*, 9:1 (1986), p. 7: "*A Saudi lawyer might be asked by his client for an opinion on a question of contract liability; he could as well be asked for guidance as to what action might please God*".

state fulfills its Islamic duty through its executive and regulatory authorities which hold the power of *siyasa*[116]. This power is exercised in accordance with the Islamic law and it is addressed to the community as a whole. The role of *siyasa* is of vital importance in the modernization of the Saudi legal system. From this point of view, it has to be considered that the Hanbali school, which is the one prevailing in Saudi Arabia, does not recognize as a source of law any consensus achieved after the time of the Prophet[117].

It has already been said that God's Book and the Sunnah are the exclusive sources of law and of deliverance of *fatwa* in Saudi Arabia[118]. Nevertheless, the Saudi Constitution[119] identifies a regulatory authority that lays down regulations and motions to enact Islamic Shari'a. The regulatory power is jointly exercised by the King, the Council of Ministers and the Consultative Council. Given that the completeness and perfection of the Holy Book is a dogma for Believers[120], the regulatory authority is stated as being competent only for the activities which are permissible or to which Shari'a is indifferent.

What may result, and which is an alien concept to a Western jurist, is that both the regulatory and executive functions are carried out by the Council of Ministers and the King, who is also the Prime Minister. In order to improve administrative efficiency, the country has been divided into regions which are administered through local governments acting as branches of the executive central power. Administrative agencies have been spread along the country with the purpose of identifying and addressing social, economic and administrative needs. Each agency is under the direct supervision of the Minister in charge of the matter dealt with by the agency[121]. The third authority is the judiciary, which applies Islamic law to the individual and specific cases brought before the Court.

---

[116] The power that Shari'a itself delegates to rulers in matters not governed under Islamic law and aiming at the safeguard of the general interest and wellbeing of the community.

[117] F. E. Vogel, *The Public and Private in Saudi Arabia*: *Restrictions on the Powers of Committees for Ordering the Good and Forbidding Evil*, in *Islam: the public and private spheres*, 70:3, 2003, pp. 750 ff.

[118] Arts. 1 and 45 Const., as mentioned under paragraph III.A.

[119] Art. 44.

[120] See par. I.B.1.

[121] A. F. Ansary, *A brief overview of the Saudi Arabian legal system*, published online at the Hauser Global Law School Program, http//:www.nyulawglobal.org/globalex/Saudi_arabia.htm., 2008.

The judiciary system runs on two tracks: the system of courts and the administrative judiciary body (Board of Grievances). The system of courts is composed of courts of first instance, courts of appeal and the Supreme Judicial Council. Each court is divided into circuits or panels: general, criminal, family, commercial and labor. They are bound to decide according to Islamic Shari'a[122]. The Board of Grievances is composed of courts of first instance, courts of appeal and a High Administrative Court. It has jurisdiction to decide on administrative cases as listed under Art. 13 of the Law of the Board of Grievances[123]. Amongst others, the Board has jurisdiction over requests for execution of foreign judgments and arbitral awards. The High Administrative Court holds jurisdiction on judgments of lower administrative courts rendered in violation of provisions of Sharia or laws not inconsistent therewith[124]. Before the Board was established in 1954, jurisdiction over Administrative complaints belonged to the King.

II.7.1. Traditionalism and modernization in Saudi Arabia

As in other GCC countries, in Saudi Arabia the most conservative tendencies have to coexist with liberal ones. The difference comes from the fact that, in Saudi Arabia, the traditional movement is represented by the judges in Shari'a courts, the *Ulama* in Universities and the Board of the Senior *Ulama* which gives *fatwas*[125]. The Council of Ministers and the *Shura* Council appear to be the most prominent representatives of the movement towards modernisation. Their most substantial proposals concern the need for a codification that would guarantee a higher level of homogeneity of courts' decisions and the need for the Saudi state to pay more attention to commercial demands, also in the view of attracting foreign investors[126].

---

[122] See Saudi Arabia Law of the judiciary Arts. 5-25.

[123] *E.g.* rights provided for in civil service, military service and retirement laws for employees of the Government and entities with independent corporate personality; revocation of final administrative decisions issued by persons concerned when the appeal is based on grounds of lack of jurisdiction, defect in form or cause, violation of laws and regulations, error in application or interpretation, tort cases initiated by the persons concerned against the administrative authority's decision, contracts to which the administrative authority is a party etc.

[124] See art. 11

[125] A. M. Al-Jarbou, *The role of traditionalists and modernists on the development of the Saudi Legal System*, in *Arab Law Quarterly*, 21:3, 2007, p. 193.

[126] *Ivi*, p. 197.

Similar to other Islamic countries[127], in Saudi Arabia the conflict between traditionalist and liberal movements is particularly clear in the regulation of interest payments in commercial transactions.

The starting point is that in Saudi Arabia, any form of interest is prohibited because it is in contradiction with the Islamic dictates forbidding any form of *riba*. Nevertheless, where a contract includes clauses providing for the charging of interest, it is not entirely void: only the specific clauses are void and unenforceable before the courts. Unlike the UAE courts, which acknowledged the necessity of allowing interest in commercial transactions, the Saudi Shari'a courts and the Board of Grievances maintain a strict position regarding interest. It is beyond doubt that *riba* is forbidden under Islamic law, therefore courts refuse to enforce interest provisions and in some cases they reject the demand on the grounds of the illegality of the contracts involving *riba*.

As an example, the Board of Grievances[128], with a decision that became a precedent for the Board, refused to give judgment on the appeal filed by a bank's shareholder. The plaintiff alleged that the bank failed to perform its contractual obligations and asked the court to enforce the contractual provisions. The Board based its decision on a *fatwa*[129] stating that it is illegal to become a shareholder of a company dealing in illegal activities. As such, the plaintiff had no right to be protected. Still, several conventional banks operate on Saudi territory and they carry out conventional transactions[130] with interestingly low levels of NPL[131]. Saudi financial regulations do not provide for any specific regulation on interest. Furthermore it has already been said that interest is unenforceable but not illegal[132].

---

[127] See par. III.C.2 above.

[128] Decision 56/d/t g/1/1416, reported in A. M. Al-Jarbou, *The role of traditionalists…,* cit., p. 198.

[129] Islamic Jurisprudence Assembly, Jeddah AH 7-12/11/1412.

[130] By way of example, see http://www.alfransi.com.sa/en/section/about-us/annual-reports.

[131]See Central Banks' financial reports: http://www.sama.gov.sa/en-US/EconomicReports/Pages/FinancialStability.aspx

[132] On this point, an interesting conversation amongst King Faisal ben Abdul Aziz and a businessman has been reported: a Customer refused to pay interest claimed by the bank. He complained before the King since paying interest would have contradicted Islamic dictates. Nonetheless, the King responded that the Bank had granted a certain facility for a certain period. Hence the client was supposed to return the favor, giving the bank an equal amount for the same period after that time the bank is to repay it to him without interest. (A. Y. Baamir, *Shari'a Law in Commercial and Banking Arbitration: Law and Practice in Saudi Arabia*, Abingdon 2010 p.169.

The issue concerning the enforcement of banking contracts has been solved through the establishment of the Banking Disputes Committee by the Saudi Arabian Monetary Agency. The Committee has been created by Royal Decree[133] to settle all banking disputes and it is composed of a first instance committee and an appeal committee to review first instance rulings. Despite the fact that the Committee is not part of the Saudi judiciary system, it holds powers which are similar to those belonging to courts such as freezing debtors' bank and investment accounts, restricting debtors from dealing with governmental bodies and banks, issuing travel bans and so forth. The Committee's judgments are final and binding hence they are not subject to judicial review. Therefore, traditional courts are strictly bound to Islamic law and they do not enforce contract provisions which are not Shari'a compliant. However, banking transactions are subject to a separate regime that derogates from the interest prohibition. Ultimately, this creates a legal regime for banking transactions which is not dissimilar to that of the United Arab Emirates.

III. Islamic law: an essentially contested concept? *

W.B. Gallie introduced the idea of "essentially contested concepts" in an essay of that title published in 1956[134]. These are defined as "*concepts the proper use of which inevitably involves endless disputes about their proper uses on the part of their users*" [135] or, to be clearer, concepts in relation to which disputes cannot be resolved by argument alone, either because people mean different things when using the same word or because, while there could be a general agreement as to the concept, there is a disagreement as to the best implementation of it. Gallie offers different and, to some extent, overlapping conditions that can be deemed descriptive of the nature of these concepts[136]. More specifically, (a) the concept must be "*appraisive in the sense*

[133]No. 8/729, 10/07/1407H.

* The present Chapter has been drafted by Gianluca De Donno.

[134] W. B. Gallie, *Essentially Contested Concepts*, in *Proc. Aristotelian Soc'y*, 167, 1956.

[135] *Ivi,* p. 169.

[136] The theory of essentially contested concepts has received wide attention from theorists in many fields of research. Without the pretention of being complete, reference can be made to J. Waldron, *Is the Rule of Law an Essentially Contested Concept (in Florida)*? in *Law and Philosophy,* 21, 2002; J. Gray, *Political Power, Social Theory and Essential Contestability* in David Miller and Larry Siedenkopf (ed.), *The Nature of Political Theory*, Oxford 1983, pp. 75–101; C. Swanton, *On the 'Essential Contestedness of Political Concepts*, in *Ethics,* 95*,* 1985; B.

that it signifies or accredits some kind of valued achievement"; (b) it must have "*an internally complex character, for all that its worth is attributed to it as a whole*"; (c) the accredited achievement should be, initially, variously describable; and (d) the concept must be recognised as contested among contending parties and the disputes regarding the concept must appear to be perfectly genuine, unresolvable by argument of any kind, [and] nevertheless sustained by perfectly respectable arguments and evidence [137].

One of the interesting examples raised by Gallie concerns the definition of "democracy". As he notes, all the uses of the term presuppose a more elementary one in which is expressed a variety of political aspirations that have been historically embodied in countless slave, peasant, national and middle-class revolts and revolutions, as well as in scores of national constitutions and party records and programmes [138]. Consequently, the concept of democracy shows at a first sight its "internal complexity" to the extent that any democratic achievement (or programme) admits of a variety of descriptions in which its different aspects are graded in different orders of importance and which might convey: (i) the idea of the power of the majority of citizens to choose (and remove) governments; (ii) the equality of all citizens, irrespective of race or creed, to attain positions of political leadership and responsibility; and (iii) the continuous active participation of citizens in political life [139]. However, no matter how cogent the analysis, people could reasonably disagree over defining the above characteristics of "democracy". They, for example, may disagree on the extent that forms of direct democracy should be implemented, particularly whentaking particular political decisions. They may have different views on the idea that a democratic society should provide a state-funded

---

Clarke*, Eccentrically Contested Concepts*, in *British Journal of Political Science,* 9, 1979. Essential contestation also plays a pivotal role in the work of R. Dworkin on the concept of law: in his article "Constitutional Cases" he affirmed that certain theories of legal interpretation "*ignore a distinction that philosophers have made but lawyers have not yet appreciated",* where such distinction is the distinction between abstract concepts and the various, more specific conceptions of which that concept admits, thus failing to understand that some such abstract concepts— like the concepts of fairness, equality, and cruelty—are contested concepts, which therefore admit competing conceptions. See R. Dworkin, *Taking rights seriously. Cambridge,* Harvard 1977, p. 134. See also M. E. Criley, Contested Concept and Competing Conceptions, available at http://d-scholarship.pitt.edu/9832/1/Criley%2C_Mark_E_Dissertation_2007-1-30.pdf.

[137] *Ivi,* p. 172.
[138] *Ivi,* p. 184.
[139] *Ivi,* p. 185.

national health system or on the incidence of the progressive rate of taxation on wealthier classes. Politics being the art of the possible, democratic targets will be raised or lowered as circumstances alter, and democratic achievements are always judged in the light of such alterations.

Following our description of Islamic law "in action", a similar theoretical essence is revealed by the concept of "Islamic law". As we have seen, competing legal and scholarly understandings of Islamic law - achieved in a particular era or in a specific cultural and geographical environment - may present remarkable degrees of differentiation with regard to such concept. Indeed, the hermeneutical value of the *ijtihad* exerted by classical *mujtahids* is not the value that *ijtihad* has acquired in the praxis of the Egyptian Supreme Constitutional Court. We should not be surprised, since the actors do not share a common background: on one side jurists educated in institutions that had as their core a precise learning of Islamic law while, on the other, secular jurists that interpret Islamic law within the boundaries of a modern constitutional framework. Similarly, the controversial conceptualization of Islamic law that has often been advanced in Western courts has identifiable historical roots and has not been developed in a vacuum. Arguably, moreover, the exegetical method opted for by UAE courts has few points of contact with those experienced by the Egyptian SCC, the former tending to be more literal and closer to the word of the sources while the latter is more devoted to abstracting from the sources very broad principles, thus moving towards positions characteristically identified as secular and liberal, but at the same time distant from the classical jurists interpretation of *zina,* showing a stricter reading of the requirements for *zina* to be proved. Conversely, both the UAE Supreme Court and Saudi legislation on the matter, despite the quite clear prohibition of *riba* in Islamic legal source,s tend to accept that commercial transactions provide for charging interest, on the grounds of necessity or *maslaha.* Nonetheless, it is hard to affirm that one of the multiple interpretations provided has the priority over the remaining and embodies the "true" meaning of Islamic law. All being contestable and disputable, they have

competing but at same time defensible conceptions that reject any possible sound definition of what Islamic law "is" and which are its necessary contents.

A valuable paper by Nimer Sultany shows the logical flaws inherent to debates that prefer conceptualism over pragmatism, as such debates are inclined to ignore the contestability of the basic concepts[140]. Sultany reflects on the long discussed issue of the compatibility of Islam with democracy, observing that it cannot be resolved on a highly abstract level of debate. Indeed, as he acutely observes in mapping the standpoints of Salafis and moderate Islamists on the subject, they both call for *Shari'a* law, but have different conceptions of it, while, both moderate Islamists and secularists call for individual rights, but have different conceptions of rights. On the other hand, the Salafi surely have as strong a commitment to social justice as leftist secularists: nonetheless, they promote a different conception of justice[141]. In the thought of Sayyed Qutb, Sultany underlines, Islam advocates freedom, social justice, and equality, but in his idea of equality differentiated treatments of women are totally justifiable. Arguably, there is a certain overindulgence of formalism when we pretend that words have a determinate, clear, fixed, or stable meaning and that they can dictate only certain outcomes through a single deductive method[142] ; formalism "*suggests an apolitical—or objective—and conclusive resolution of conflicts through logical reasoning that is not susceptible to the open-ended character of political and ideological contestation*" [143]. Applied to the competing determinations of Islamic law, formalism prevents a comprehensive approach and upholds a one-sided scenario where, following a syllogistic method, from the authoritative sources of Islamic law only a single answer is derived through predetermined standard operations of logic. Obviously, as explained *supra,* this view is wrong insofar as it ignores the decisive human agency (and value choices) that is behind any interpretation and arrangement practice and thus distorts or misunderstands the practice of Islamic law. This point is shared both from liberal

[140] N. Sultany, *Against Conceptualism: Islamic Law, Democracy, and Constitutionalism in the Aftermath of the Arab Spring,* in *Boston University International Law Journal*, 2013.
[141] *Ivi,* p. 449.
[142] *Ivi,* p. 456.
[143] *Ibidem.*

(or secularist) and from literalist Islamic law hermeneutical methodologies. In each case, devotion to formalism hides the recognition of the necessary contestable, variable and evolving Islamic law traditions, where no one tradition deserves more than another the banner of embodying the values of "true Islamic law".

There are many Islamic laws and many structures Islamic law could assume: the mere fact that in specific historic circumstances Islamic law has developed along certain forms does not mean those forms should be valid for all times and places. We can judge if those forms were functional in the context they operated and if they can be useful in changed contexts, but we cannot pretend they have an eternal validity. Muslims are in charge of deciding the organization of their communities and the application of Islamic law according to Qur'anic moral standards. They have the possibility of determining which among the Qur'anic precepts have a legal dimension and how to structure an Islamic legal system. Obviously, it is a consequence that different communities can reach different results, thus preserving the value of diversity. In any case, what Islamic law is, which are its legitimate forms, which way is more suitable for its application, are all questions to which only Muslims can answer. What Muslims maintain is the proper way of devising Islamic law becomes Islamic law [144].

Abstract
Starting from the second half of the last century, a great emphasis has been put on Shari'a as a central element in the legal system of many Muslim-majority states. The common approach toconsidering Islamic legal systems, however, is still dominated by a monolithical conceptualization of Islamic law, where the description of Shari'a is derived from abstract reasoning on what Shari'a is or ought to be. The aim of this article, after a discussion of the concept of law in Islamic legal thought and an overview of the different interpretations of Islamic law as elaborated within divergent cultures (Arab Republic of Egypt, UAE and Saudi Arabia), is to advance the idea of Islamic Law as an essentially contested concept, and to detach its analysis from any formalism in favour of an acknowledgment of its antagonistic, unfixed and ever-evolving nature.

Key words
Shari'a - Fiqh - Ijtihad - Modernisation - Veil - Riba - Gallie - Contestedness - Formalism.

[144] R. Peters, *From Jurists' Law to Statute Law or What Happens When the Shari'a is Codified,* in *Mediterranean Politics*, 7:3, 2002, p. 91.