



APPLICATION OF THE *SHARĪ'AH* IN THE SAUDI
COURTS: A STUDY WITH SPECIAL REFERENCE TO
COMMERCIAL COURTS

BY

ALABOUDI, ISMAIL MOHAMMED

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Ahmad Ibrahim Kulliyyah of Laws
International Islamic University Malaysia

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ABSTRACT

The aim of the thesis is to examine Saudi Commercial Court's decisions from *Shari'ah* standpoint. The method of examining opinions in its context is not well known and discussed in the pre modern Islam. Therefore, researcher use some social sciences, Talal Asad's discursive tradition method is very helpful as a starting point. Meanwhile, Islamic jurisprudence, dialectic, and education utilized sometimes in a way to reconstruct Asad's method that is to make the methodology applicable to the subject matter. The main concepts used are '*ittibā'*' (adherence) legal practice, and Islamic habitus (*Malakah*). In order to investigate the total context, whom, contribute to the decisions' reasoning, the discussion include the opinions of the '*Ulama*' toward commercial regulations into two apposite opinions disallowed then allowed. The legal education of the judges has direct impact to their reasoning, especially the shift of legal education from *madrasah* to university education. This shift made judges' *Malakah* suffered in understanding the law and their moral-orientation. In the sources of court decisions are not according to Hanbalism, that due to the clash of interests in the reality, which put pressure on the judges forum shopping from different schools of law to meet considered interest in the case. Meanwhile, the practice of sovereignty of the state particularly legislation has bad impact on the method of judges' reasoning. The solution to the sovereignty is the counter-power of people via networking to make a legal practice, and force the state follow it. The legal practice should be codified by the judges and '*Ulamā*', but not the state. The main contribution of the thesis is an analysis of Islamic law in the context from within its assumptions, which is very helpful to propose reasonable and applicable solution.

ملخص البحث

هدف البحث هو تحليل مدى تطبيق الشريعة الإسلامية في أحكام المحكمة التجارية السعودية، فرضية البحث هي أنه هناك تطبيق للشريعة وهذا لا يمنع وجود بعض الإشكالات في التطبيق. اتبع الباحث منهجية الاتباع والملكة الإسلامية مع الاستفادة من منهجية طلال أسد بالتقليد الخطابي، هذه المنهجية تراعي التطبيق وفي الوقت نفسه استدلالات القضاة في الأحكام، في مواجهات القانون التجاري السعودي. هناك قولان للعلماء الأول بالتحريم والمحاربة والثاني بالقبول والتطبيق، وكلا هذين القولين يشير إلى وضعية العلماء والمجتمع بشكل عام. التعليم القانوني عامل مؤثر بشكل مباشر على تسبب القضاة فقدمت الرسالة تاريخ الفقه في نجد والتعليم النجدي وخاصة كما هو عند ابن إبراهيم، ثم التحول الذي جرى بعد تعميم التعليم الجامعي وخفوت أثر التعليم المسجدي، والتحول من النموذج الأول إلى الثاني يحمل من التأثير على القضاة. من خلال مراجعة الأحكام محل الدراسة تبين أن مراجع الأحكام تشير إلى تعارض في المصالح المبنية على الواقع الذي جعل العلماء يلجؤون إلى التخيير بين المذاهب الفقهية للاستجابة لمصالح معينة، وأيضاً من المشكلات التي أظهرها البحث السيادة خاصة في باب حق الحاكم في التشريع، وهو ما أثر على تسبب القضاة وألجأهم إلى مراعاة القانون في التسبب فظهر شيء من الإزدواجية في مرجعية الأحكام. أما الحل فكان من المجتمع في تكوينه لقوة ضاغطة من خلال العلاقات الشبكية وإنتاج معمول به يعطي شرعية لاتباعهم الفقهي والقانوني، هذا على الصعيد السياسي أما على الصعيد القانوني/الفقهي فالحل المقترح هو تدوين المعمول به. إضافة الرسالة هو تقديم دراسة لواقع تطبيق الشريعة من خلال منهجية متوافقة مع ما تسعى له الشريعة.

APPROVAL PAGE

The thesis of Alaboudi, Ismail Mohammed has been approved by the following:

Umar A. Oseni
Supervisor

Muhammad Laeba
Co-supervisor

Abdul Haseeb Ansari
Internal Examiner

Altaf Hussain Alhanger
External Examiner

Abdul Samat Musa
External Examiner

Muhd. Akram Bin Shair
Chairperson

DECLARATION

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To my son and his generation, I hope you have a better future

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TABLE OF TRANSLITERATION

Before using this Table, you must first install the AHT Times New Arabic fonts.

Table of the system of transliteration of Arabic words and names
used by the International Islamic University Malaysia.

b	=	ب	z	=	ز	f	=	ف
t	=	ت	s	=	س	q	=	ق
th	=	ث	sh	=	ش	k	=	ك
j	=	ج	ṣ	=	ص	l	=	ل
ḥ	=	ح	ḍ	=	ض	m	=	م
kh	=	خ	ṭ	=	ط	n	=	ن
d	=	د	ẓ	=	ظ	h	=	ه
dh	=	ذ	‘	=	ع	w	=	و
r	=	ر	gh	=	غ	y	=	ي

Short: a = ا ; i = اِ ; u = اُ

Long: ā = آ ; ī = اِي ; ū = اُو

Diphthong: ay = اِيْ ; aw = اُوْ

CHAPTER ONE

GENERAL INTRODUCTION

1.1 INTRODUCTION

The yearning for the application of *Shari'ah* (Islamic law) has dramatically increased throughout the Muslim world – an issue that has attracted the attention of many Western scholars. Literature by some of these scholars raises questions as to which interpretations of *Shari'ah* should be applied. Who has the right to interpret it? What is the relationship between *Shari'ah* and the modern nation-state? Within the context of sovereignty in the modern nation-state arrangement, how should Islamic law consider the effects of legal transplant in the interpretation of commercial laws in Saudi Arabia? These issues, including the study of *Shari'ah* in the context of Commercial Courts in Saudi Arabia, are the main concern of this study.

Any court ensures the application of law to maintain justice in a society. The main feature of an Islamic court is that the judge derives rules from the revelation (Qur'ān and Sunna) without the interference from the state.¹ There is no legislative body in Islamic law. The jurists (*fuqahā'*) and the judges have the right to derive the rules from revelation. The study of Islamic court presents a window of opportunity to understand the jurisprudential basis of Islamic law's *modus operandi*.

In recent years, there has been an uptick in English literature examining Islamic courts. Most of these studies utilise the socio-legal method, which reflects a paradigm shift from the hitherto traditional method of studies by the early scholars.

¹ Muhammad Al-Mawardi, *Al-Ahkam Al-Sultaniyyah* (Cairo: Al Halabi Press, 1960), 91–92. Abu Ya'la Muhammad Farra, *Al-Ahkam Al-Sultaniyyah*, ed. Mohammed Alfiqi (Berut: Dar Alkutub Al'ilmiyah, 2000), 61–62. See for a new book in the issue from in a modern context Wael B Hallaq, *The Impossible State: Islam, Politics, and Modernity's Moral Predicament* (New York: Columbia University Press, 2014), 58–59.

Western researchers proceed not from the text (essentialist school) as old Orientalists do, but rather focus on the practices of the court and society in the modern day.² These studies examine the modern and classical Islamic courts. Western researchers have adopted various methodologies in studying Islamic courts, but they have not examined Islamic courts from an *Islamic* viewpoint. That is to say, they studied Islamic law after the parameters of Western law had been established, so they presuppose the distinction between moral and legal norms. However, these norms are interrelated and often inextricably integrated into Islamic law. Western scholars' understanding of *Shari'ah* is influenced by this distinction.³

Shari'ah in Saudi Arabia is applied in a traditional manner.⁴ The Saudi legal system has two primary judicial branches in addition to the numerous other commissions for specialised dispute resolutions. The two primary judicial branches are regular courts of the Ministry of Justice and the Board of Grievances (*dīwān al-mazālim*). The Ministry of Justice constitutes the main judiciary, hearing all cases unless there is a jurisdictional exception.⁵ These courts apply *Shari'ah* even though the state gradually imposes regulations on them. The Board of Grievances is supervised directly by the King, and serves as a primarily administrative Court. However, on the refusal of regular courts to apply the Commercial Law, the state

² Iris Agmon and Ido Shahr, "Theme Issue: Shifting Perspectives In the Study of Sharia Courts: Methodologies and Paradigms," *Islamic Law and Society* 15 (2008): 10; Ido Shahr, *Legal Pluralism in the Holy City: Competing Courts, Forum Shopping, and Institutional Dynamics in Jerusalem* (Ashgate Publishing, Ltd., 2015); Ido Shahr, "Legal Pluralism and the Study of Shariah Court," *Islamic Law and Society* 15 (2008): 112–41.

³ Wael B Hallaq, "Groundwork of the Moral Law: A New Look at the Qur'ān and the Genesis of Shari'a," *Islamic Law and Society*, 2009, 226; Baber Johansen, *Contingency in a Sacred Law: Legal and Ethical Norms in the Muslim Fiqh*, vol. 7 (Brill, 1999), 42.

⁴ Frank E. Vogel, *Islamic Law and the Legal System of Saudi: Studies of Saudi Arabia* (BRILL, 2000), xiv.

⁵ The exception most of the time comes from the King and usually the Commission settled along with its regulation like Capital Market Dispute Resolution and Insurance Dispute Resolution. However, some other time the specialist taking from the Regular Court and settled a separate commission like Media Dispute Resolution and Banking dispute Resolution. In fact, this issue is a very controversial legal topic in Saudi. See Ayub Aljabu, "Akhtisas Diwan Almazalim", *Majallat AlAdil*, no. 51 (1432).

transfers the application of Commercial Law to the Board of Grievances. This dissertation will focus on the Commercial Courts.

Some of the structures present in the modern commercial law, such as a corporation, do not exist in the classical Islamic law. Islamic law does not distinguish between commercial and civil activities.⁶ In modern Saudi Arabia, the Saudi Government needs a code of commercial law that is distinguishable from the civil aspect to fill the gap in Islamic law for regulating commercial businesses in the country. King Abdul Aziz first issued Commercial Court Regulation Decree (35. 1930). This regulation consists of 633 provisions. The traditional judges refused the application of the commercial law due to their objections to codification. This refusal led the King to specify separate courts for commercial disputes in several commercial cities. These courts were similar to commissions - each consists of two experts in commerce as well as a qualified judge in *Shari'ah*. In 1961, these courts were merged and integrated into the Ministry of Commerce and Industry. Under the decree (M. 63. 1988) issued by King Fahad, these commissions were temporally put under the control of the Board of Grievances. Initially, Egyptian counsellors were appointed in these courts but were gradually replaced by Saudi *Shari'ah* judges.⁷

The *Shari'ah* judges in charge of Saudi Commercial Courts, base their judgements on the codified commercial law backed by *Shari'ah*, but not in a traditional manner, as the traditional manner means that the judge refers to revelation, not codified laws. However, the judges of Saudi Commercial Courts take into account *Shari'ah* and its principles when giving judgements since there is no codified civil

⁶ Torki A Alshubaiki, "Developing the Legal Environment for Business in the Kingdom of Saudi Arabia: Comments and Suggestions," *Arab Law Quarterly* 27, no. 4 (2013): 381.

⁷ Aljaber Hasan, *Alqanwan Altijari*, 3rd ed. (Aldar Alutaniyyah, 1994), 17–20; Maren Hanson, "The Influence of French Law on the Legal Development of Saudi Arabia," *Arab Law Quarterly* 2, no. 3 (1987): 286.

law. In this unique situation, *Shari'ah* judges base the rulings on regulations issued by the King (state), adopting the Western legal method, blended with Islamic law. This study will examine the extent of the application of Islamic law in the Saudi Commercial Courts, and assess the impact of such differing legal concepts from the perspective of *Shari'ah* within the same legal system.

1.2 STATEMENT OF PROBLEM

The study of Islamic law from text and context is not an easy task because it requires an interdisciplinary study. The outcomes of *Shari'ah*, judgement and fatwa, can be differentiated with the yardstick of enforceability.⁸ The focus of this study is the aspect of court decisions of the Saudi Commercial Court. The aspect of fatwa only relates to the legal opinions of jurists which might be outside the scope of this study. The judges derive their authority from the wali al 'amer (ruler), but the Mufti (giver of a fatwa) does not need permission from the state.

The legislature is a branch of the modern nation-state, but the same terminology does not suit Islamic law, because Islamic law does not have a legislative body. The jurists extract law from the revelation using a well-established methodology. Although the ruler has a very limited right to issue a ruling through *Siyāsah Shar'īyyah* (*Shari'ah* oriented policy) and *Maslahah* (Public Interest), the jurists and judges are the true custodians of the rule of law.

Islamic law, like other legislation, has its jurisprudential base. This research will examine Islamic law from this point of view. Qur'an and Sunna are the main sources of Islamic law. The process of law making from Qur'an and Sunna is known

⁸ Ahmed Alqrafi, *Alahkam Fi Tameez Alftawa An AlAhkam Wa Tasrufat Alqadi Wa Alimam*, ed. Albdul Alfatah, 2nd ed. (Maktab ALmatbuat Alaslamiyyah, 1416), 43, 44, 98.

as *Ijtihād* (Juristic Deduction). The necessity of *Ijtihād* in all *fatwas* and judgements makes its scope broad. The problem of this study is formulated as follows:

The codification of the Saudi commercial law is defective due to state interference. Moreover, the transplantation of the Saudi commercial law from a foreign law has led to jurisprudential clash. This conflict will affect the moral foundations of the judiciary in Islam.

1.3 RESEARCH QUESTIONS

This study seeks to answer the following questions:

1. Does the existing Saudi commercial law comply with the fundamental principles of Islamic law?
2. How far do the Saudi Commercial Courts judges apply the principles of Islamic law in the context of the existence of the law of the King?
3. What is the nature of the legal reforms required in the Saudi Commercial Court to align the procedural and substantial laws with the *Sharī'ah*?
4. To what extent can Islamic law be applied to the modern nation-state?

1.4 RESEARCH OBJECTIVES

The present study aims:

1. To apprise the legal complexities of applying Islamic law in the modern state.
2. To explore whether the existing Saudi commercial law complies with the fundamental principles of Islamic law.
3. To examine the extent to which the Saudi Commercial Courts judges apply the principles of Islamic law with the existence of regulations; and

4. To propose legal reforms required in the Saudi Commercial Court to align the procedural and substantial laws with the *Sharī'ah*.

1.5 SCOPE AND LIMITATION

King Abdullah issued a decree (M. 87. 2007) that introduces a regulation reorganising the judiciary. The purpose of the decree was to assemble all relevant judicial bodies under the umbrella of the Ministry of Justice, except the Administrative Courts, which will be run by the Board of Grievances. The Commercial Courts were expected to be transferred to the Ministry of Justice. However, as of 2014 this law has not come into force as a result of the late issuance of the Civil Law Procedure. The Civil Law Procedure (Decree M.1. 2014), and consequently the transfer of the Saudi Commercial Courts from the Board of Grievances to Ministry of Justice, is expected to be completed in 21\9\2017

This thesis will focus on the Commercial Courts, as they exist under the Board of Grievances. The period of the examination is limited to the position of the law from 1988 to 2015.

This thesis will also focus on the judges' methods used to reach their decision to determine the jurisprudential basis of the decision in light of Islamic law. As such, it is a socio-legal and jurisprudential study more than a doctrinal study.

1.6. LITERATURE REVIEW

In the post-9/11 era, *Sharī'ah* has become a dominant topic in the West. The publication of articles, dissertations, and books on Islamic law shows the surge of its popularity in the West. Western researchers study Islamic law from a secular perspective. They utilise modern intellectual frameworks, such as sociology,

anthropology and political science, whereas Muslim researchers often lack a solid methodology of socio-legal studies.⁹ Islamic law researchers have not yet developed a strong methodology to challenge those of the West. A new methodology should be formulated based on Muslim beliefs to cope with these secular elements.

Vogel is an important figure in studying Saudi and Islamic legal systems. His research in the 1980s focused on the General Courts, which are organised under the Ministry of Justice. Vogel's project was field research based on observation of the courtroom and interviews with the concerned people. His research points out the importance of *Ijtihād* and *Siyāsah Sharʿiyyah* in the Saudi legal system.

Vogel relied on the American realist school in studying Islamic law. He views *Ijtihād* as a central concept in the Saudi legal system. *Ijtihād*, in Vogel's viewpoint, is nothing but an inner-directed justification and microcosmic law¹⁰, which “resembles Protestant Ideal of individual research for truth and of moral autonomy merged with a case-law vision of law”.¹¹ Taking a concept from a tradition out of its networking concepts without taking into consideration the whole networking may lead to confusion. *Ijtihād* is a jurisprudential concept confined by revelation, the consensus of jurists, and a well-established legal tradition. Moreover, the judges in the Saudi legal system follow the Ḥanbali school which heavily influences their decision making.

In the last two decades, much research has been conducted on the Islamic courts using various methodologies. A collection of 21 articles was written by experts in the field and edited by Masud¹² and others. Each expert examined the Islamic courts from a patchwork of sociology, anthropology, and political science

⁹ For more discussion on socio-legal method see Yaqin Anwarul, “Legal Research and Writing” (Malaysia: LexixNexis, 2007), 10.

¹⁰ Vogel, *Islamic Law and the Legal System of Saudi: Studies of Saudi Arabia*.

¹¹ Ibid.

¹² Karen Kern et al., *Dispensing Justice in Islam: Qadis and Their Judgments* (Leiden: Brill, 2010).

perspectives. Most of the experts in this collection followed the descriptive method, which is governed by the Western presumption about law and religion.

In modern history, the Ottoman Empire is considered the best example of the application of Islamic law, leading some researchers to compare the Saudi application of Islamic law with the practices of the Ottomans.¹³ Gerber¹⁴ studied the Ottoman legal system from the perspectives of anthropology and legal history. He used court documents to show the relationship between the state and the *Qāḍī* (Judge). However, the current study will rely heavily on the legal method rather than on anthropology, and presupposes a normativity of Islamic law.

In this context, the book written by Hallaq¹⁵ entitled “The Impossible State” is suggestive. He supposes that the “modern Islamic state is inherently self-contradictory” because it is “primarily grounded in modernity’s moral predicament”.¹⁶ The researcher will take this argument into account and adopt it in this dissertation. Although Hallaq elaborates his thoughts from a theoretical standpoint, this dissertation will deal with these ideas concerning the Saudi Commercial Courts from an *applied* standpoint.

Regarding methodology, Asad¹⁷ argued that “if one wants to write an anthropology of Islam, one should begin, as Muslims do, from the concept of a discursive method that includes and relate itself to the founding text of the *Qūrʾan* and

¹³ See for example Rudolph Peters, “What Does It Means to an Official Mudhhab,” in *The Islamic School of Law: Evolution, Devolution, and Progress*, ed. Peri Bearman, Rudolph Peters, and Frank E. Vogel (Cambridge, Massachusetts: Harvard Law School, Islamic Legal Studies Program, 2006), 148.

¹⁴ Haim Gerber, *State, Society, and Law in Islam: Ottoman Law in Comparative Perspective* (SUNY Press, 1994).

¹⁵ Hallaq, *The Impossible State: Islam, Politics, and Modernity’s Moral Predicament*.

¹⁶ Ibid.

¹⁷ Talal Asad, “The Idea of an Anthropology of Islam. Washington, DC: Georgetown University,” *Center for Contemporary Arab Studies*, 1986.

Ḥadīth”.¹⁸ Likewise, this study will employ the discursive method from anthropology and apply it to examine the Saudi Commercial Courts from a legal perspective.

The following is a review of literature in the discursive tradition method relevant to this study. Two articles by Asad are pertinent in this regard. The first article¹⁹ which examined *Nasīḥah* (advice) in Saudi revivalism showed the changes in their practices of *Nasīḥah*, comparing it to the traditional approach. It concluded that the changes are within the traditional sphere of Islam. In the second article,²⁰ Asad talked about the transformation of law and ethics in modern Egypt. He claimed that the introduction of modernity led to the distinction between ethics and legality in Egypt, showing the differentiation between ethics and legality in modern state. However, he argued ethics and legal norms are interrelated in Islamic law, utilising a certain context in Islamic society to show changes and conformity of the practices. This dissertation will be in line with the discursive tradition, but the focus of this research is different as it examines the Saudi legal context.

Messick²¹ as an anthropologist describes Muslim society as the “*Sharī‘ah* society”, and considers the Muslim society within the boundaries of its normativity. For example, to discuss the judiciary, he begins from Qur’ān and Sunna and the authoritative books in this society. He examines the judiciary based on the social norms of Ibb, Yemen.

¹⁸ Ibid.

¹⁹ Talal Asad, “The Limits of Religious Criticism in the Middle East,” in *Genealogies of Religion: Discipline and Reasons of Power in Christianity and Islam* (Baltimore, London: Johns Hopkins University Press, 1993), 170–200.

²⁰ Talal Asad, “Reconfigurations of Law and Ethics in Colonial Egypt,” in *Formations of the Secular* (Stanford, CA: Stanford University Press, 2003), vol. 205 (Stanford: Stanford University Press, 2003), 205–56.

²¹ Brinkley Messick, *The Calligraphic State: Textual Domination and History in a Muslim Society* (Univ of California Press, 1992).

Agrama²² compared Egyptian Family Courts and the *Fatwa* Council regarding the concept of Islamic law in their decisions. He demonstrated the changes of *Hisbah* (commanding the right and forbidding wrong) in the Egyptian Family Courts because of secularism. Throughout his discussion, he elaborates on the transformation of the Egyptian legal system from an Islamic to Western system.

In studying Islamic law, orientalist presuppositions still have a significant influence on some Muslim researchers. Moreover, the concept of law is difficult to grasp outside the sphere of Western assumptions. This research is an attempt to challenge these assumptions in Islamic law. It will rely on critical Western scholarship to formulate a method of studying Islamic law in practice.

Santos²³ and Twining²⁴ are useful to build an understanding of the concept of law in different cultures without Western presuppositions. Santos examines law from a social perspective, and Twining from a jurisprudential standpoint. Glenn²⁵ and Menski²⁶ are known for their comparative studies of law. These writers have a similar attitude toward understanding any legal traditions in their original context. Keeping this idea in mind, these researchers will help the researcher to avoid wrongful judgements toward Islamic law.

This research will formulate a more accurate and effective method of examining judgements of the Saudi Commercial Courts. Since the Saudi legal system adopts Islamic law, this study will examine these courts from a normative Islamic perspective. Asad proposes a discursive tradition as an effective method of exploring

²² Hussein Ali Agrama, *Questioning Secularism: Islam, Sovereignty, and the Rule of Law in Modern Egypt* (Chicago: University of Chicago Press, 2012).

²³ Boaventura de Sousa Santos, *Toward a New Legal Common Sense: Law, Globalization, and Emancipation* (Cambridge University Press, 2002).

²⁴ William Twining, *General Jurisprudence: Understanding Law from a Global Perspective* (Cambridge University Press, 2009).

²⁵ H Patrick Glenn, "Legal Tradition of the World" (Oxford: Oxford University Press, 2000).

²⁶ Werner F Menski, *Comparative Law in a Global Context: The Legal Systems of Asia and Africa* (Cambridge University Press, 2006).

Muslims societies. It is worth mentioning that this method was named by Abdurrahman²⁷ “The Sphere of Islamic Deliberation”. Asad writes that “an Islamic discursive tradition is simply a tradition of Muslim discourse that addresses itself to conceptions of the Islamic past and future, with reference to a particular Islamic practice in the present... and it will be the practitioners’ conceptions of what is *apt performance*, and how the past is related to present practices”.

1.7 METHODOLOGY

This study adopts the qualitative legal research method, and will be relying on both primary and secondary data. This research will use primary sources including the decisions of the Commercial Courts.

In 2012, the Board of Grievances published the decisions of the Saudi Commercial Courts, entitled “Collections of Commercial Rulings and Principles”.²⁸ This research will rely strongly on their collections in addition to unpublished decisions. The researcher will conduct interviews, both structured and unstructured with concerned judges and lawyers. Unstructured interviews seek to envision the *modus operandi* of the Saudi Commercial Court. Structured interviews aim to secure relevant information or interpretations of certain issues not found in published court decisions. The researcher will utilise related regulations, such as the Commercial Laws and the Law of the Board Grievances.

The Saudi judicial system follows the Ḥanbali School of Law and Ḥanbali classical and contemporary law books. Accordingly, this study will rely on such sources. Islamic jurisprudence is critical in the study of the Islamic legal system, and related sources will be included, such as Qur’ān, Hadith and Arabic language.

²⁷ Taha Abderrahman, *Tajdid Almanhj Fi Taqwuim Alturath* (Berut: Almarkz Althqafi Al‘arabi, n.d.).

²⁸ “Almudawanat Alqadha’iyyah,” n.d.