This book examines various issues in arbitration law and practice in relation to Islamic Shari′a law and the law of Saudi Arabia in general, and to arbitration in conventional banking disputes in particular. The book also compares available remedies for the settlement of banking disputes in Saudi Arabia in order to identify those most appropriate. The work further provides a simplified reference to the principles of Shari′a law and its theories, as well as Saudi law and practice in general.

The book is divided into six chapters. Chapter 1 provides a very general background to Saudi law and its sources, in addition to examining some other related general legal issues such as Wahhabism, the role of the official Mufti and his influence on the legal system, the role of women in the legal system, foreign influence on Saudi law, and some of the recent economic developments. The chapter shows how Muslim scholars introduced the methodologies of *usul alfiqh* to allow Muslims to keep their laws updated, by regulating the reasoning process and putting restrictions on law transplantation within the Muslim state, and by using the concept of urf, or local custom, as one of the sources of legislation to protect the special identity of the society. The evolution of usul alfiqh, or the legal theories, as an independent science led to the creation of four main schools of thought, each of which adopted a different set of rules for reasoning and application, and different subordinate sources of law. The chapter also distinguishes between the three confusing concepts of Islamic law, Shari′a and Islamic jurisprudence on the one hand, and Saudi law on the other. Moreover, the chapter gives an overview of the related Saudi acts and regulations, as well as the role of Saudi Arabia as one of the major capital-exporting countries.

Chapter 2 provides historical background to arbitration in this very specific geographical area. The rules of arbitration discussed in this chapter, both Islamic and pre-Islamic, are the raw materials forming arbitration rules in the four schools of jurisprudence, which are themselves the basis of modern arbitration law in Saudi Arabia. The chapter begins with the law and practice of arbitration in the pre-Islamic period, which ended around the time of Prophet Muhammad (AD 570–632), and goes up to the time of the establishment of the four schools of jurisprudence. The chapter also shows how Islam upheld some pre-Islamic practices with regard to arbitration.

Chapter 3 discusses the next stage of the development of arbitration law in Saudi Arabia, examining the law of arbitration under fully developed Islamic jurisprudence, known as *fiqh*. The arbitration laws discussed in this chapter form the basis of the Arbitration Act of 1983 in Saudi Arabia. The chapter starts by outlining the difference between arbitration and litigation under Shari′a. This is followed by discussion of the definitions of arbitration. The chapter covers the arbitration rules of Shari′a, from the arbitration agreement to enforcement of the final arbitral award, making comparisons among the four Islamic schools and paying particular attention to the *Hanbali* school as the official school in Saudi Arabia.

Chapter 4 examines the regulatory attitude toward international arbitration in Saudi Arabia. It is in chronological order and is divided into two main parts. The first part looks at the period from the creation of the Saudi state in the 1920s up to the first oil boom in the 1970s. This section discusses the arbitration cases the Saudi Government was party to, such as the *Wahat Alburaimi* case of 1955 and the well-known case of *Arabian American Oil Company v. Saudi Arabia* 'Aramco award' of 1958, and their impacts on the Saudi legal system. The second part covers the time between the 1970s and the present. This period experienced a shift in attitude in order to attract foreign investment. Many important steps were also taken toward the reactivation of arbitration as an effective dispute settlement mechanism, such as the enactment of the Arbitration Act of 1983 and its Implementing Rules in 1985, and the ratification of the New York Convention of 1958.

Chapter 5 is an evaluation of Saudi arbitration law and judicial practice. The chapter links the Arbitration Act with common practice, as well as other relevant regulations and Shari′a sources. The Arbitration Act was too brief to cover all the related issues, so the Implementing Rules became crucial in explaining the ambiguous aspects of the Act in more detail. The chapter also discusses the issues of enforcement of arbitral awards, both domestic and international, and the public policy of Saudi Arabia, its sources and applications.

The sixth and final chapter discusses whether a dispute related to conventional banking business can be settled through arbitration or not. Following on from the discussion in the previous chapter, this one looks at the issue of the arbitrability of banking disputes requiring a reference first to the Shari′a law on conciliation. The chapter also explores the Shari′a law on banking interest as both the main motive in the banking sector and the main contradiction in the public policy of Saudi Arabia. This chapter further compares the judicial treatment of banking interest in Saudi Arabia with the neighbouring countries of Egypt and the UAE. Suggestions are made regarding the most suitable alternative remedy in the case of disputes involving elements contradicting Shari′a.

Chapter 1
An Introduction to the Law and Economics of Saudi Arabia

Al-Saud has been in existence since the eighteenth century, although Saudi Arabia itself is relatively newly-formed, united only in 1932. At first, it was formed as an alliance between the religious figure Muhammad ben Abdulwahhab, who was more of a social reformer, and Muhammad ben Saud, who was a political leader in the town of Aldiri′yah. Since its establishment, Saudi Arabia adopted the Islamic Shari′a as its main source of legislation; therefore any law contradicting the main principles of Shari′a is considered null and void. This chapter is an introduction to Saudi law in general, including the sources and applications of Shari′a law in contemporary legal systems. The chapter also gives an overview of the development of Saudi commercial regulation and the importance of Saudi Arabia, both as the largest economy in the region and as a major oil and capital-exporting state.

The Distinction between Islamic Law, Shari′a and Islamic Jurisprudence (Fiqh) and Saudi Law

Many outsiders and even Saudi lawyers commit the mistake of confusing Shari′a and Saudi law on one hand, and Shari′a and fiqh, or Islamic jurisprudence, on the other. It is important to distinguish amongst these three important concepts, because of the different degrees of flexibility in their application. It should be noted that these concepts – Islamic law, Shari′a, and Islamic jurisprudence (fiqh) – are used interchangeably, especially by Western scholars and practitioners. The term 'Saudi law' can also be used to describe Islamic law, for the reason that it does not contradict the principles of Islam; however, the distinction should be emphasized, as Saudi Arabia applies Shari′a law specifically, in addition to some transplanted acts and codes. These borrowed acts and codes are Islamic in concept, as they do not contradict Islamic law, but a few of them do contradict some of the Shari′a principles, meaning that the distinction becomes important.

Many Muslim scholars distinguish between Shari′a and Islamic jurisprudence, or fiqh in Arabic, as follows: the concept of Shari′a is broader than jurisprudence – the jurisprudence, as well as other theories of Islam such as the Islamic creed, comes under the umbrella of Shari′a.[1]

1 I. Abd-Alhaqq, 'Islamic Law: An Overview of its Origin and Elements', *The Journal of Islamic Law*, 1/1 (1996), pp. 26–31.

Generally speaking, Shari′a, or *Ash-Shari'a*, means 'the pathway' – a way to be followed and the way that a Muslim has to tread. In its original usage, the term Shari′a referred to the road to a watering place or the path leading to water, i.e., the way to the source of life.[2] From this last point, Arab lexicographers developed Shari′a to mean 'the law of water', which, over time, was extended to cover all issues of life.[3]

In the Quranic context, the word Shari′a describes any religion or principle that is followed by someone: 'Then we put you on a Shari′a (a way of Religion); so follow that (way), and follow not the desires of those who know not.'[4] And again: 'To each among you have we prescribed a law and an open way.'[5] When the Quran mentions Shari′a, it is in its broader context as applied to any human being; whereas, when describing Shari′a in relation to Muslims, scholars tend to use its narrower definition as the religion of Islam.

Shari′a is not simply a religious teaching or divine order; its scope can be expanded to encompass the way of life Muslims should follow, which involves more than mere formal rites and legal provisions. The broader definition of Shari′a suits the nature of its rulings, as it is not restricted to laws, regulations, beliefs or rituals; it covers all aspects of the private and public life of Muslims, both as individuals and as groups, and it includes the totality of Allah's commandment.[6]

Islamic jurisprudence, or fiqh, developed later, when reasoning became necessary to allow the Islamic legal and social system to regulate new circumstances. The word fiqh literally means 'understanding' – Islamic jurisprudence is an understanding of Shari′a texts based on applied knowledge of the Quran and the *Sunna*.[7]

The concept of Islamic law was not in use at the time of the classical Muslim scholars; it started to develop as a reaction to the Western influence on Muslim scholars and philosophers, especially after the French occupation of Egypt. The French occupation influenced Egypt in various ways, but the creation of modern statutes represented in the import of the Napoleonic Code and the formation of the Constitution of Egypt were the most notable benefits in the areas of law development and the codification of Islamic law.[8] It can be said that after the

2 Ibid.

3 C. Mallat, 'From Islamic to Middle Eastern Law: A Restatement of the Field (Part 1)', *The American Journal of Comparative Law*, 51 (2003), pp. 699–719.

4 The Quran 45: 18. It should be noted that the reference to the Quran hereinafter is made to the translation of the meaning of the Quran from Arabic to English. The translation was taken from the website of the Ministry of Islamic Affairs of Saudi Arabia and it is available at <http://www.al-islam.com> [accessed 11 March 2009].

5 The Quran 5: 48.

6 Supra n. 1, Abd-Alhaqq.

7 H. Motki, *The Origins of Islamic Jurisprudence: Meccan Fiqh before the Classical Schools* (1st edn., Brill Publications, 2002), p. 4.

8 J. Harold, *Bonaparte in Egypt* (1st edn., Hamish Hamilton Publications, 1963), p. 374.

French occupation of Egypt many Muslim scholars began to modernize Shari′a, taking the Napoleonic Code as a model for Shari′a reform.

At the present time, Islamic law is recognized as the entire system of law and jurisprudence associated with the religion of Islam, including: the primary sources of law (Shari′a), i.e., the Quran and the Sunna; and the subordinate sources of law and the methodology used to deduce and apply them (Islamic jurisprudence, or fiqh).

It has been noted that many Western scholars refer to Shari′a and Islamic jurisprudence interchangeably, which can lead to confusion, because fiqh, or jurisprudence, changes, whereas Shari′a remains constant. The distinction between Shari′a and jurisprudence should be maintained, because Shari′a is the foundation of all doctrines formulated and developed under fiqh, whereas fiqh is simply the understanding of the sources of Shari′a.

The kingdom of Saudi Arabia was united officially in 1932 but Saudi law did not start to appear until the mid 1960s, when Saudi Arabia experienced comprehensive reforms through introducing a number of basic laws. Very few codes were issued before the 1960s; the law was totally dependent on the individual reasoning of judges, along with ministerial circulars and royal decrees concerning specific issues.[9]

Outsiders might see Saudi Arabia as a place in which Shari′a is the law of the country, which is partly true. But Saudi law is more comprehensive than either Islamic law or Shari′a, in the sense that Saudi law encompasses Islamic law and the codes and regulations adapted from other laws within the sphere of the Shari′a principles. Saudi legislators bear the duties of not violating Shari′a and of keeping up with economic, social and political interests. The main dilemma faced by Saudi legislators is regulating prohibited activities under Shari′a, especially when such activities are important in promoting economic growth, e.g., some banking activities. For instance, the Banking Control Law of 1966 shows the way in which Saudi legislators deal with prohibited activities under Shari′a. The Law says nothing about banking interest, because legalizing it clearly in the Act would be a violation of the Constitution of the country; nonetheless, the law does leave room for the practical regulation of such activities, as will be seen in the final chapter.

The Evolution of Islamic Jurisprudence (Fiqh)

Islamic jurisprudence (hereinafter fiqh) has been described by Schacht (1959) as the Canon Law of Islam and the ‘common law’ of the whole Islamic world. Under Shari′a, the monarch is bound by the same duties of respect and obedience as are his subjects. The interpretation of the rules of fiqh, their extension or limitation

9 Examples of laws issued in that period and still in effect: the Banking Control Law of 1966, the Companies Law of 1965 and the Law of Commercial Agency of 1962.

when confronted by new cases and judgment as to how they can be adapted to new social needs are matters to be decided by *ulama*.[10]

Fiqh literally means 'deep understanding'; terminologically, fiqh is the process of deducing and applying Shari′a principles and injunctions in real or hypothetical cases or situations. The same term is used to refer to the collective body of laws deduced from Shari′a through the use of usul alfiqh methodologies. The only fundamental difference between fiqh-based injunctions and Shari′a-based injunctions is that Shari′a injunctions are not amendable or even negotiable, whereas injunctions established under fiqh should be flexible and amendable in accordance with the different circumstances and customs that play an important role in the application of such injunctions, provided that such customs do not contradict Shari′a. This difference can be observed by tracing the history of issues in contemporary life, such as some banking transactions, that are controversial now, but that formerly had a different legal status in the past. For instance, hire purchase contracts are technically prohibited because they contain two agreements in one, referred to as '*bai'an fi bai'ah*' in fiqh treatises. However, the social need for such contracts and the desire to reduce dependence on bank loans have led some scholars to accommodate hire purchase within Shari′a legality requirements.

Owing to economic necessity, the legal status of banking interest has been modified and the prohibition relaxed in some Muslim countries, regardless of its validity under Shari′a. Even in Saudi Arabia, which is known for a degree of strict adherence to Shari′a rulings, banking interest has become more acceptable, at least in the business community. Islamic jurisprudence has an element of what can be called cautious or restricted flexibility, as shown in the above hire purchase example, whereby economic necessity can lead to the integration of commercial practice and religious standards but not to the modification of divine law. Social attitudes, or urf, may affect the legal status and legality of some controversial subject matters; nevertheless, the change in social attitudes toward banking interest, or *riba*,[11] will never lead to reconsideration of its legal status, because the injunction prohibiting riba came from the Quran, which is the main non-negotiable source of Islamic law.

The objective of fiqh is to demonstrate the practical application of Shari′a. The scope of the application of fiqh is very wide: it applies to all areas of law and life, including religious, political, civil, criminal, constitutional and procedural law; the administration of justice; and the conduct of war.[12] One of the main conditions that should be provided in a fatwa is conformity with the real life of the recipient of

10 J. Schacht, 'Islamic Law in Contemporary States', *American Journal of Comparative Law*, 8 (1959), pp. 133–36. Ulama are scholars in theology and law.

11 Riba is an Arabic term that describes a set of strictly prohibited commercial transactions. It can refer to banking interest or usury; it can also refer to the credit sale of identical objects. For more details please see Chapter 6.

12 S. Ramadan, *Islamic Law, its Scope and Equity* (1st edn., Macmillan, 1960), p. 64.

that specific ruling, meaning that the spirit of the law should prevail over the strict wording of the text.[13]

Classical scholars during the eighth and ninth centuries divided fiqh as a science into two broad categories. The first is called usul alfiqh (the roots of fiqh) and refers to the systemized methodology and principles of interpretation used in ascertaining the law. The second is *foru' alfiqh* (the branches of fiqh) and is similar to the actual practice of law, dealing with rendering decisions that derive from the application of usul alfiqh.

Usul alfiqh

There is an independent field of study of Islamic law called usul alfiqh, or the science of source methodology in Islamic jurisprudence. Although Alshafi′e, the founder of the *Shafi'e* school, was the first scholar to introduce usul alfiqh as an independent science, Usul alfiqh needed a few decades to develop.[14] There are many definitions for this term. Alghazali, a classical scholar, defined it as the fundamental sources or roots from which Islamic jurisprudence (fiqh) can be derived.[15] Another scholar, Alrazi, defined it as the aggregate, considered per se, of legal proofs and evidence that, when studied properly, will lead either to certain knowledge of a Shari′a ruling or to at least a reasonable assumption concerning the same; the manner by which such proofs are adduced; and the status of the adducer.[16]

There is an ongoing debate among Muslim scholars regarding the actual number of fiqh sources. However, they do agree on these five sources: the Quran; the Sunna; al ijtihad; al ijma′; and al qiyas.[17]

Al ijtihad Ijtihad can be translated from Arabic as a 'human activity', and refers in legal usage to the endeavour of a scholar to derive law on the basis of evidence found in Shari′a texts. The result of ijtihad, or the discovery or formulation of a new legal rule, is to be reached through interpreting Shari′a texts and applying the *qiyas*. By interpreting Shari′a texts, a Muslim scholar can discover the reason behind an expressed legal rule; and from there, through analogical deduction, he

13 Fatwa is an Arabic term to describe a legal opinion of a Muslim Scholar concerning issues of religion, law or legal interpretation.

14 See generally M. Alshafi′e, *Alrisalah* (1st edn., Dar Alkotoub Al Ilmiyah, 2001).

15 F. Mitha, *Algazali and the Ismailis: A Debate on Reasoning and Authority in Medieval Islam* (1st edn., Institute of Ismaili Studies, 2001), p. 10.

16 F. Al Razi, *Al Mahsul Fi 'Ilm Usul al* Fiqh, ed. Dr. Taha Jabir al ′Alwani (1st edn., Imam Muhammad ibn Saud Islamic University, 1979), Vol. 1, p. 94. Cited from T. Alwani, *Source Methodology in Islamic Jurisprudence* (3rd edn., The International Institute of Islamic Thought, 2003), p. 1.

17 H. Khan, 'Nothing is Written: Fundamentalism, Revivalism, Reformism and the Fate of Islamic Law', *Michigan Journal of International Law*, 24 (2002/2003), p. 273.

can extend a given rule to cases of a similar nature.[18] There is a general impression that the use of ijtihad was blocked around the eleventh century when some scholars declared the gate of ijtihad closed, but actually Muslim scholars have continued to use it in various legal and religious issues.[19] Nowadays, there is a preference for so-called 'ijtihad jama′e' or 'group ijtihad', which is a form of limited ijma′. In group ijtihad, a group of scholars meet to decide on new matters, instead of resorting to the individual ijtihad of the time of the great scholars who created the four schools. Some may argue that group ijtihad is similar to the concept of ijma′; however, they differ in that group ijtihad needs the agreement of only a group of scholars, whereas ijma′ needs the agreement of most of the scholars of the time. The decisions issued by committees such as the Council of Senior Ulama of Saudi Arabia, the Islamic Fiqh Academy of Makkah and the Fiqh Council of Alazhar can be considered a sort of group ijtihad.[20]

Al ijma′ Al ijma′ refers to the consensus of qualified Islamic scholars of a given generation on particular points of Islamic law. On points where the Quran and the Sunna do not give particular guidance, the scholars as a community reach an agreement.[21] This methodology has its reference in the Quran in the following verse:

> O ye who believe! Obey God, and obey the Prophet, and those charged with authority among you. If you differ in anything among yourselves, refer it to God and His Prophet, if you do believe in God and the Last Day: That is best and most suitable for final determination.[22]

The qualifications necessary to participate in ijma′ are set out in the fiqh textbooks; however, each one of the participants should also practise individual reasoning in his own right. Some groups of scholars require judges to be able to participate in such a process, as will be seen when talking about arbitrators qualifications. Theoretically, some scholars describe ijma′ as the most important legal notion in Islam; through it, they believe, Islamic societies should be able to establish

18 B. Al-Muhairi, 'Islamisation and Modernisation within the UAE Penal Law: Shari′a in the Pre-modern Period', *Arab Law Quarterly*, 10 (1995), pp. 287–309.

19 W. Hallaq, 'On the Origins of the Controversy about the Existence of Mujtahids and the Gate of Ijtihad', *Studia Islamica*, 63 (1986), pp. 129–44.

20 The Islamic Fiqh Academy, resolution No. 8 dated 18/01/1985. Makkah, Saudi Arabia. See also B. Schabler, L. Stenberg and R. Mottahereh, *Globalization and the Muslim World,* (1st edn., Syracuse University Press, 2004), pp. 99–100.

21 Butti, 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', *Arab Law Quarterly*, 11 (1996), pp. 219–44.

22 The Quran 4: 59.

permanent legislative institutions.[23] In practice, there has not been any successful ijma′ since the time of the companions of Prophet Muhammad, owing to political divisions and cultural differences.[24] Despite the fact that absolute ijma′ cannot be reached, scholars can usually attain ijma′ in a certain geographic area or within a certain *mathhab*.

Al qiyas Al qiyas can be considered as the source of continuity of the fiqh. Al qiyas, or qiyas, is defined as the process of analogical reasoning from a known injunction to a new injunction. Qiyas involves analogical reasoning based on the primary sources of Shari′a, the Quran and the Sunna. According to this method, the ruling of the Quran and the Sunna may be extended to new problems provided that the precedent (*asl*) and the new problems (*far′*) share the same operative or effective cause (*illah*).[25] An example of this would be when the established prohibition of alcohol (from the Quran) is used to prohibit the use of drugs that produce similar effects to the intoxication of alcohol, even though there is no mention of drugs in the Shari′a texts.[26] As mentioned above, the Quran is not a collection of laws and codes; the first impression reading the Quran gives is that everything is lawful unless prohibitive injunctions exist, either in the Quran or in the Sunna.

Ijma′ is ranked higher than qiyas in the order of fiqh methodology. To participate in ijma′ over a disputed matter, the scholars, or *fuqaha′*, must have a deep knowledge of the Quran and the Sunna and their related sciences, most notably the Arabic language. The Arabic language requirement is very important in order to enable scholars to grasp the intentions of the Shari′a texts.[27] Qiyas was originally a fluid concept of reasoning from prior sources, through argument by analogy, argument *a fortiori*, argument *a majore ad minus*, argument *a minore ad majus* or argument *a contrario*. Reasoning through qiyas was broad enough to provide for flexible development in the law; its techniques permitted limitations and extensions of pre-existing rules. Over time, qiyas has become restricted, owing to a misunderstanding of its real sense, to a strict or literal interpretation of the law. This, in turn, has led to the development of the *istihsan*, which seeks to remedy this restriction by promoting the spirit and essentially social purpose of the law, i.e., to assure the satisfaction of human interests.

The above five sources of fiqh are agreed on by all the schools of fiqh; the disputed sources will be discussed below.

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23 I. Abd-Alhaqq, ‘Islamic Law: An Overview of its Origin and Elements’, *Journal of Islamic Law and Culture*, 7/1 (2002), pp. 27–54.

24 Ibid.

25 J. Makdisi, ‘Legal Logic and Equity in Islamic Law’, *American Journal of Comparative Law*, 33 (1985), pp. 63–78.

26 Ibid.

27 N. Aghndies, *Islamic Theories of Finance: With an Introduction to Islamic Law and Bibliography* (1st edn., Gorgias Press, 2005), p. 71.

Istihsan The term istihsan can be translated as 'juristic preference' or as 'public interest'.[28] It is the process of selecting one particular acceptable solution over another because the former appears to be more suitable for the situation in hand, even though the selected solution may be technically weaker than the rejected one. Istihsan has also been defined as a process of selecting the best solution for the general public interest in the form of *ijtihad*. Istihsan does allow judges and scholars some flexibility in interpreting the law if it will be useful. In other words, istihsan is permission to allow the spirit of the law to prevail over the precise wording of the law.[29] Scholars of different schools give this concept different names; the Hanbali scholars call it istislah, which translates as 'equity' or 'public interest'; meanwhile, the *Maliki* scholars call it almasaleh almursalah, which is more like a departure from strict adherence to the texts in favour of public welfare.[30] Istihsan is sometimes called 'the hidden qiyas', as opposed to 'the apparent qiyas', which requires a strict application of the law.

Istihab, or istis'hab Istihab, or istis′hab, is best defined as 'the presumption of continuity'. This concept is well-known in Western laws, which provide that things or situations continue to exist until the contrary is proven. This principle was introduced by Alshafi′e, founder of the Shafi′e mathhab, and it is considered to be a limited principle. It applies only to cases where there is no evidence available and, at best, establishes the continuance of a fact in existence that has already been proven to exist.[31] Examples of when istis′hab might be used are: presuming that a missing person is still alive until his or her death is confirmed; continuing a marriage unless dissolution is proved; and adhering to the fundamental Islamic law principle stating that a person is innocent until proven guilty.

Urf – 'Local Custom'

Islamic jurisprudence recognizes local custom as an important source of law only when such practice does not breach Islamic principles. This applies even if the custom relates to a non-Muslim society. Custom can be defined as that which is practised more often by people in a particular geographic area than by others. Islam considers custom to be unwritten law formed by the practice of people throughout generations. Custom is incorporated into the law through the procedure of judges, court judgments and ijma′. When a judge is unable to find an applicable text from the Quran or the Sunna, or cannot find an ijma′ or an accurate qiyas, he will turn

28 H. Fadel, 'The Islamic Viewpoint on New Assisted Reproductive Technology', *Fordham Urban Law Journal*, 30 (2002), pp. 148–50.

29 Ibid., p. 150.

30 Supra n. 25; Makdisi, p. 73.

31 Supra n. 27; Aghndies, p. 104.

to the custom of the community to determine the issue.[32] As a simple example, if an agreement does not determine the commission in a sale contract, the judge will turn to the usual practice of the place of the conclusion of the contract and issue his judgment on that basis. Custom can serve as persuasive evidence or as the basis for legal presumption; however, even when the case requires reference to local custom, judges still rely on experts and notaries to indicate the acceptable form of the local customary practice.[33]

As a final remark about usul alfiqh, it is appropriate to add this quote from Professor Hallaq, who concluded that:

> [U]sul alfiqh as a mixed product of human reasoning was articulated in a double-edged manner as it was both descriptive and prescriptive. It expounded not only the method of modus operandi of juristic construction of the law as the later scholars carried them out, but also the proper and sound ways of dealing with the law. Moreover, usul alfiqh provided the jurists with a methodology that allowed them not only to find solutions for a new case, but also to articulate and maintain the existing law. Even old solutions to old problems were constantly rehabilitated and reasoned anew.[34]

Codification of Shari′a Law

The call to codify the rules of Shari′a in a similar way to modern Western codes and acts has met with some success in different Muslim countries. Issued in 1882, *Majallat Alahkam Al Adliyah*, the so-called 'Majalla', was the first-known attempt to codify the Shari′a. The Majalla did not work in practice, because it was drafted for a non-Muslim authority and because it forced the society to follow the *Hanafi* school to the exclusion of the others. The popular belief that the Majalla was drafted as a civil code for the Ottoman Empire is partly incorrect. The Majalla was initially drafted under a reciprocal agreement between the Ottoman Empire and the Russian Orthodox Church; it was only later that the Majalla was adopted as the Ottoman civil code. In the aftermath of the Crimean War (1853–1856), a Muslim population was living within the Russian Empire; there was also a number of Orthodox Christians living within the Ottoman Empire. The original agreement resulted in the Majalla being adopted as a Muslim code in exchange for a Christian code.

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32 S. Heynman, *Islam and Social Policy* (1st edn., Vanderbilt University Press, 2004), p. 102.

33 L. Rosen, *The Justice of Islam: Comparative Perspectives on Islamic Law and Society* (1st edn., Oxford University Press, 2000), p. 16.

34 W. Hallaq, *The Origins and Evolution of Islamic Law* (4th edn., Cambridge University Press, 2007), p. 148.